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## SPECIAL ISSUE

# GUEST EDITOR'S NOTE: THE RIGHT TO DEVELOPMENT IN AFRICA AND NATURAL RESOURCES OWNERSHIP



### 1. INTRODUCTION

This special edition of the *Journal for Juridical Science* is the outcome of the Third International Conference on the Right to Development that took place at the University of the Free State in September 2019, hosted by the Free State Centre for Human Rights, in collaboration with the Centre for Human Rights, University of Pretoria, and the Thabo Mbeki African Leadership Institute, University of South Africa. The selected articles present some exciting viewpoints for reflection on the very important, but often overlooked subject of the right to development and the



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requirement of natural resources ownership for its realisation. The right to development envisages that the use of natural resources for development must be equitable to ensure that it contributes to making living conditions progressively better for the human person. However, while the competition for Africa's natural resources multiplied over the past decades and continues to soar even in present times, prospects that gains from the exploitation of those resources would translate into improved living standards for the peoples of Africa have, disappointingly, remained unfulfilled.

According to Sengupta, the right to development refers to a particular process of development that is rights-based or consistent with human rights standards.<sup>1</sup> By inference, every aspect of the development process ought to be geared towards enhancing human rights in general and most importantly, contribute to the realisation of the right to development. This, in essence, implies that the entire development process must be people-centred and revolve around equalising opportunities for development, getting rid of development injustices, including in the distribution of natural resources, and eradicating poverty and inequalities that impact negatively on human well-being. The rights-based definition gives the impression that it only grants entitlement to some abstract thing (the development process), which can be relinquished without any feeling of dispossession, thus making it difficult to situate the natural resources ownership component of the right to development.

The natural resources ownership element becomes more comprehensible when the right to development is conceived differently. Stephen Marks's conception of the right to development as entitling peoples to assert development itself as a human right<sup>2</sup> highlights the people-centred dimension, which is much more profound and creates a sense of possession, thus providing a more lucid reading of the natural resources ownership requirement for its realisation. The Declaration on the Right to Development guarantees that the right to development also implies the full realisation of the right of peoples to self-determination, which entails asserting sovereignty over all their natural wealth and resources.<sup>3</sup> The African Charter enshrines a more explicit provision on natural resources ownership, which guarantees the right to freely dispose of and that in exercising that right, the exclusive interest of the peoples of Africa must be given priority.<sup>4</sup>

The interest and focus on the natural resources requirement for the realisation of the right to development draws from the supposition that the recognition of actual ownership has the potential to alter perceptions and, hence, the discourse on implementation and, it is hoped, shape the direction of socio-economic and cultural development on the continent. Before

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1 Sengupta 2004:180-181; Sengupta 2002:448; Sengupta 2001:2528; Sengupta 2000:562-563.

2 Marks 2003:12.

3 United Nations Declaration on the Right to Development Resolution A/RES/41/128, adopted by the UN General Assembly on 4 December 1986:arts. 1(2) and (3).

4 African Union, African Charter on Human and Peoples' Rights, adopted by the Organisation of African Unity in Nairobi Kenya on 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217:art. 21(1).

proceeding to give an overview of the various contributions, it is important to provide some analysis of the relevance of natural resources for development and the constraints related thereto, which entails looking at the conflicting principles of availability or ownership with respect to the realisation of socio-economic and cultural development.

## 2. NATURAL RESOURCES FOR DEVELOPMENT – AVAILABILITY OR OWNERSHIP?

Natural resources are crucial for leveraging socio-economic and cultural well-being and sustainable livelihood for an estimated 1.2 billion people living in Africa,<sup>5</sup> which, unfortunately, remains the least developed of all regions in the world. By virtue of provisions of United Nations declarations and resolutions as well as the African Charter, natural resources are designated principally as a collective entitlement, over which the peoples of Africa are granted the right to self-determination to freely dispose of, as it may become necessary for the fulfilment of their exclusive interest.<sup>6</sup> While the guarantee to freely dispose of natural resources suggests that the resources are available and can indeed be disposed of, the International Covenant on Economic, Social and Cultural Rights enshrines a caveat in art. 2(1), indicating that state parties to the Covenant may only be able to give effect to the range of rights contained therein, to the maximum of their available resources.

On the basis of the natural resources availability caveat, African state governments have often found justification for failing in their obligations on socio-economic and cultural development on the basis of lack of resources. In addition, although natural resources are known to play a central role in boosting economic growth for many countries,<sup>7</sup> for Africa, besides generating conflicts in countries with huge deposits such as Sierra Leone, Angola and the Democratic Republic of Congo (DRC) among others,<sup>8</sup> total average export is estimated at 70 per cent, while only contributing roughly 28 per cent to gross domestic product.<sup>9</sup> At this rate, it is unimaginable that Africa could

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5 The World Bank 'Extractive Industries Overview'. <https://www.worldbank.org/en/topic/extractiveindustries/overview> (accessed on 15 December 2019).

6 United Nations General Assembly Resolution 626(VII) on the Right to Exploit Freely Natural Wealth and Resources, adopted on 21 December 1952; common art. 1(2) of the International Covenant on Economic, Social and Cultural Rights, adopted by General Assembly Resolution 2200A(XXI) 1966 and the International Covenant on Civil and Political Rights, adopted by General Assembly Resolution 2200A(XXI) 1966; United Nations Declaration on the Right to Development Resolution:art. 1(1); African Union, African Charter:art. 21(1).

7 Free Network 'Are natural resources good or bad for development?' Policy Brief, 21 November 2011. <https://www.freepolicybriefs.org> (accessed on 15 December 2019).

8 Paltseva & Roine 'Are natural resources good or bad for development?' Free Network Policy Brief, 21 November 2011. <https://www.freepolicybriefs.org> (accessed on 15 December 2019).

9 The World Bank 'Extractive Industries Overview'. <https://www.worldbank.org/en/topic/extractiveindustries/overview> (accessed on 15 December 2019).

realistically rely on its wealth of natural resources for socio-economic and cultural development that remains a major challenge.

The quest for natural resources is, for the most part, the reason why some European countries invaded and colonised the African continent for a period that officially lasted over approximately seven decades. Despite recognised independence for African countries, with assurances of the right to permanent sovereignty over their natural resources for purposes of socio-economic development and the well-being of their peoples,<sup>10</sup> there continues to be an unfettered encroachment into the natural resources space across the continent. Even as industrialised countries have productively utilised the natural resources from Africa to drive development to the standards that they have attained, the setback to development on the continent is, unfortunately, mitigated by two theoretical explanations; the natural resources curse and resource constraint theories.

The natural resources curse theory posits that natural resource endowments do not necessarily guarantee economic benefits, but rather generate negative developmental outcomes: collapse in economic growth prospects, high levels of corruption, ineffective governance and political instability, which tend to weaken overall economic performance and cause failures in developing countries.<sup>11</sup> Evidently, many African countries, including Angola, the DRC, Liberia, Nigeria, Sierra Leone and Sudan have, in spite of their extensive natural resources reserves, remained extremely poor and least developed and, more so, ravaged by lethal conflicts.<sup>12</sup> Meanwhile, natural resources-deficient countries such as Hong Kong, Japan, Korea, Singapore and Taiwan provide evidence that a high development index standard of living and quality of life are attainable without dependence on natural resources.<sup>13</sup> While these examples convincingly illustrate that natural resources are not inevitable to drive development in any part of the world, the persistent demand for, and exploitation of the resources in Africa, including through illicit means, does not support the thesis that natural resources are a “curse” to development.

In addition to the natural resources curse theory, Africa’s development woes have often also been explained by the resource constraint theory. This theory holds that natural resources are generally limited in supply<sup>14</sup> and, hence, should be preserved or, better still, exploited with restraint. The resource constraint theory, which creates the belief in natural resources availability uncertainties, is conceived within the context of increasing globalisation propagated by developed countries, on the one hand, and the subjugated quest for global balance anchored in the idea of a new international economic order and the right to development, on the other, for which developing countries have consistently asserted a claim. Africa is portrayed or perhaps viewed within

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10 United Nations General Assembly Resolution 1803(XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources:par. 1.

11 Di John 2010:1; Frankel 2010:3; Ross 2003:17; Kalh 2002:268; Richard 1993, cited in Frankel 2010:3.

12 Frankel 2010:3.

13 Frankel 2010:3.

14 Sengupta 2000:560.

this context as not having sufficient natural resources to accelerate its own development, thus being required to look up to developed countries for their benevolence in providing development assistance.

Meanwhile, Africa's natural resources are known to be a source of attraction to major industrialised countries worldwide and the principal contributor to economic growth, infrastructural development and technological advancement in those countries. If adequately managed to the exclusive interest of the peoples of Africa as stipulated in article 21 of the African Charter, there is no justification that natural resources cannot equally take Africa to comparable standards. This means that the natural resources curse and constraint theories are inherently biased in explaining why Africa's natural resources are not translating into better living standards for its peoples. It is apparent that some parts of Africa have remained least developed as a result of acute deficiency in natural resources. However, the vast majority of resource-rich countries have not demonstrated the potential to rise above or at least to the level of established thresholds for development in terms of either economic growth or human development rankings.

Development naturally entails the mobilisation of extensive resources, especially with regard to the realisation of the socio-economic and cultural rights aspects related thereto, which is preconditioned on the resources availability principle. This principle, which wrongly makes resources availability a central focus, suggests that socio-economic and cultural development cannot be achieved in the instance where the requisite resources are not available. It erroneously also implies that the right to socio-economic and cultural development cannot be claimed, unless the requisite resources are available to give effect to its realisation. The emphasis ought rather to be placed on the human rights aspect, necessitating as a matter of obligation for states to protect and utilise available resources in the most appropriate manner possible – amounting to an obligation for natural resources governance – to achieve socio-economic and cultural development for their peoples.

International human rights law makes provision to the effect that natural resources actually belong to peoples, while the state is only required to play a custodianship role in the governance of those resources to ensure equitable distribution to the benefit of all peoples. This notwithstanding, African state governments generally arrogate sovereign control over natural resources. In some instances, they fail to regulate the abusive exploitation by non-state actors and, by so doing, deprive the peoples of Africa of their inherent entitlements and consequently, deny them the right to development. In other instances, the state governments justify their inability to create the conditions for better living standards for their peoples by hanging on the natural resources availability principle to advance the argument of lack of resources for development.

Unlike other human rights, the right to development exceptionally commands the shared responsibility of peoples, the state and the international community. However, as guarantor of all human rights, the state is obligated and thus bears greater responsibility to create the conditions and the enabling

environment for the right to development to be achieved without constraint. With the obligation that the right to development imposes for its realisation in Africa and the processes and mechanisms required to do so, the context necessitates a shift in development thinking from the viewpoint of natural resources availability, which is reductionist in conception, to envisaging development from the point of view of natural resources ownership. The argument anchors on the fact that, even though the right to development in Africa principally aims at improving socio-economic and cultural conditions on the continent, its realisation is conceptually not subject to the resource availability requirement.

Rather, at the core of the right to development is the recognition of the centrality of the human person and the guarantee of natural resources ownership, over which they are entitled to assert full sovereignty as a means to achieve socio-economic and cultural self-determination.<sup>15</sup> The emphasis on ownership is, of essence, for the reason that the natural resources ownership principle has the potential to shape the extent to which comprehensive sustainable development can be achieved in Africa and, more so, because the race for natural resources continues to generate livelihood dilemmas for the dispossessed peoples on the continent.

Development, in this instance, is understood to derive not necessarily or exclusively from the monetary potential of natural resources in boosting economic growth, infrastructural modernity and technological advancement, but essentially also from the human well-being benefits associated with culture and lifestyle practices that depend on natural resources for sustaining livelihood. For example, the vast majority of African cultures perceive land not exclusively as a means of production or something to possess, but as of communal value, an intrinsic part of collective spiritual being and a vital component of cultural identity.<sup>16</sup>

It is stated that under no instance may a people be deprived of their natural resources, which are recognised as a means of subsistence.<sup>17</sup> With the continuous setbacks to development in Africa, it became necessary, as part of the objective of the conference that led to the authoring of the articles in this special edition of the *Journal for Juridical Science*, to explore the following questions: First, who owns the natural resources needed to achieve the right to development in Africa? Secondly, to what extent is full sovereignty over the natural resources in Africa achievable for the peoples to whom the right to development is guaranteed?

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15 United Nations Declaration on the Right to Development:art. 1(2).

16 Home 2013:405-408; Lephakga 2015:145-163; Mosoma 1991:26.

17 Common art. 1(2) of the International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly, Resolution 2200A (XXI) of 16 December 1966, 999 UNTS 171 UN Doc A/6316 (1966) and International Covenant on Civil and Political Rights, adopted by the UN General Assembly, Resolution 2200A (XXI) of 16 December 1966, 993 UNTS 3 UN Doc A/6316 (1966); African Union, African Charter:art. 21(1).

### 3. OVERVIEW OF THE CONTRIBUTIONS

Although diverse in perspective in terms of specific thematic focus, the contributions articulate – implicitly or explicitly – the primary argument that the right to development remains relevant as a model for socio-economic and cultural development and the betterment of living standards for the peoples of Africa. To achieve this purpose entails, as explained earlier, a closer scrutiny of the natural resources ownership factor, which, as illustrated, remains a serious concern that impacts on the extent to which implementation of the right to development is envisaged. The focus on natural resources ownership is thus intended to highlight one of the often-overlooked constraints to the realisation of the right to development.

*Anzanilufuno Munyai* delves into Africa's colonial past to demonstrate that the primary motive of European colonisation was nothing other than the accumulation of wealth, which resulted in the abusive exploitation of Africa's natural resources and the resultant dispossession of the peoples of Africa, and underdevelopment of the continent. She explores the contradictions between Africa's affluence in natural resources and its poor and underdeveloped status. Putting the impact of colonialism on the livelihood of the peoples of Africa side by side with the vision of African renaissance, pan-Africanism and present prospects for development, she argues that, in order to achieve the aspirations contained in Agenda 2063, requires prioritising the right to permanent sovereignty over natural resources. She further makes the case for resource nationalism as a means to achieve the right to development in Africa.

Focusing on the underpinnings of the law, *Carol Ngang* sheds light on the crucial question of ownership of the natural resources that make up the common African heritage. He examines the common heritage entitlement enshrined in the African Charter, with respect to the distressing concern why Africa remains poor and underdeveloped in spite of its enormous natural resource endowments. He situates the enquiry within the context of the law and development discourse, particularly from the angle of the right to development, which necessitates the conscious use of the law to achieve people-centred development. He points out that prevailing realities compel the peoples of Africa to exercise their right to self-determination and be consistent in asserting ownership over the natural resources to which they are legitimately entitled.

*Solomon Abegaz* explores land conflicts in Ethiopia, especially involving the Amhara and Oromo peoples, resulting in internal displacements and suffering for hundreds of thousands of the local communities and ethnic groups. He explains that land is central to the livelihood of the Ethiopian rural population consisting of approximately 85 per cent of the entire population. He argues that meaningful socio-economic and cultural development or self-determination of the people depends on how the question of land ownership is dealt with by the state, which is obligated to prevent dispossession and violation, including by third parties. While rapid and complex new developments are taking place in Ethiopia, Abegaz raises concerns with respect to the extent to which attention is paid to the right to development enshrined in the country's federal

*Constitution*. He concludes that, without effective protection of the land rights of local communities, the agenda for development in Ethiopia would fail to achieve its purpose.

*Robert Home* explores the legacy of past colonial interventions in sub-Saharan Africa under the British dual mandate policy associated with Lugard, in creating tensions between private, public and customary land tenure in Africa, resulting in conflicts and disputes over land. He highlights some important legal and policy developments in the present century, including the Sustainable Development Goals (SDGs), the New Urban Agenda, and the UN-Habitat's Global Land Tool Network in promoting innovative practices such as land readjustment and participatory mapping, as well as reform of urban planning laws. He further illustrates how some African states have applied alternative dispute resolution mechanisms as a potentially quicker and cheaper approach in dealing with complex and excessively lengthy legal proceedings through the courts. He applies the concepts of historic institutionalism, path dependency and isomorphism in proposing improvements to land and property tribunals.

*Olayinka Adeniyi and Amos Adeniyi* focus on the right to water as an indispensable natural resource that is of very high value to rural women in Africa. They point out that, while industrialisation has made quality potable water accessible to women in cities and urban areas, the water situation in rural areas continues to pose a major challenge, particularly in Nigeria. They argue that, considering the geographic location of South Africa, its peculiar water problem could be expected to be worse than in Nigeria, but the contrary is the reality, due to the South African government's involvement in water-renewable strategies. They draw attention to the fact that the right to water is a component of the right to development and, to ensure its realisation, they draw inspiration from South Africa's water-renewable techniques to suggest ways for Nigeria to improve on its water strategy.

*Gerard Kamga* focuses on the mechanics of subjugation that compels some fifteen African countries of the Franc Zone, after 60 years of 'independence', to remain under domination and the patronage of France through the use of the CFA and the Comoros Francs, which he describes as "empty currency". It appears that the latter enjoys an exceptional stability, but, in principle, robs the member states of monetary and economic sovereignty. He analyses the rationale and (real) politics behind France's commitment in guaranteeing unlimited convertibility of the CFA and the Comoros Francs to the Euro and questions whether such a commitment is driven by a genuine concern for development in the fifteen countries in question. He further explores the extent to which the CFA and Comoros Francs impact negatively on the right to development for member states of the Franc Zone.

Focusing on Cameroon – one of the member states of the Franc Zone and a state party to the African Charter on Human and Peoples' Rights – *Serges Kamga* interrogates its commitment in ensuring the realisation of the right to development enshrined in the Charter as well as its domestic *Constitution*. Aware that the achievement of the right to development necessitates an effective mobilisation of resources by the state, he examines the institutional



mechanisms, including especially the Special Criminal Court, established by the government in the fight against endemic corruption in the country. He draws attention to the extent of illicit flows in Cameroon and questions the extent to which the Court could provide an effective remedy in protecting the country's wealth and resources, considering its dependence on, and control by the executive arm of the state that pulls the strings of its operation.

#### 4. CONCLUDING OBSERVATIONS

From the foregoing, it can be observed that the expectation of the peoples of Africa to enjoy exclusive benefits from the free disposal or exploitation of their natural resources is seriously constrained by a range of different factors, probably explaining why, in spite of its extensive richness, the continent remains extremely poor. Revolutions spearheaded by communities of the impoverished that often spontaneously sprout across Africa (though triggered by several remote causes and articulating different specific demands) are generally not unconnected to the inequalities resulting from the injustices in the allocation of natural resources.<sup>18</sup> While the experience in Africa shows that the availability of natural resources does not necessarily guarantee socio-economic and cultural development, it also cannot be denied that subverting the ownership rights of the peoples to whom those resources are legitimately entitled accounts for the current state of development setbacks in some parts of the continent.

Bannon and Collier illustrate that, while substantial reserves of diamonds caused the collapse of Sierra Leone into the lowest rungs on the human development index, diamonds have been the critical driver to successful development in Botswana, which is presently one of the fastest growing economies in the world.<sup>19</sup> The fact cannot be ignored that Botswana's success story is in function of a firm policy that obligates its precious gemstones to be processed in-country to the exclusive benefit of its people, unlike in many other African countries.

The concept of the right to development, which originated in Africa in the late 1960s and early 1970s,<sup>20</sup> is born from the contradiction that the peoples of Africa may only assert autonomy to the extent that they can make political choices, while ownership of, and control over their natural resources and, hence, the extent to which they may enjoy socio-economic and cultural development is determined by the subjugating class. The right to development is underpinned by the conceptual understanding that ensuring the fair and equitable distribution of natural resources is guaranteed to significantly narrow the inequality gap and create equilibrium in aspirations for improved well-being and better standards of living in developing countries.

Opinions in this regard are diverse but converge around the common understanding that natural resources are inevitable for the realisation of the

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18 See Kalh 2002:257-282.

19 Bannon & Collier 2003:11; Ross 2003:17.

20 Ngang 2018:111-112; Ouguerouz 2003:298.

right to socio-economic and cultural development in Africa. The contributors make tentative suggestions on how natural resources could effectively be harnessed, managed and productively utilised to accelerate development and secure well-being and better living standards for the peoples of Africa. With varied conceptions and sometimes conflicting approaches to development, especially with Africa's increasing drift towards foreign direct investment (in spite of its direct bearing on the continent's natural resources), the arguments advanced in this issue of the *Journal for Juridical Science* and the solutions proffered are not in any way conclusive. The contributions are nevertheless intended to broaden the conversation on the requirement of natural resources ownership for the realisation of the right to development in Africa.

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