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# African Regional Forum news

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# INTERNATIONAL BAR ASSOCIATION ANNUAL CONFERENCE

DUBLIN 30 SEPTEMBER – 5 OCTOBER 2012



**S**teeped in history, yet buzzing with youthful energy, Dublin's medieval, Georgian and modern architecture provide a backdrop to a bustling port where the cosmopolitan and charming meet in delightful diversity. Serving as Ireland's historical and cultural centre, as well as the nexus of Irish education, administration, economy and industry, Dublin is perfectly suited to host the IBA's 2012 Annual Conference.



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## CSR in Africa

**T**he year 2012 pregnant with promise for the Forum! There is the all-important African Regional Forum Conference in Kampala, Uganda on 9-10 August, which will be followed by the IBA Annual Conference in Dublin. The Kampala conference follows recent successful conferences in Cape Town, South Africa and Nairobi Kenya. We are very pleased with the attendance and support for the regional conferences which has been shown by our African sisters and brothers.

The continent is poised to become a leading and influential component within the IBA. Africa offers the opportunity for all of us to expand the influence of law in society. The powerful influence of corporate social responsibility (CSR) continues to be a central debating topic. Is CSR playing

the role that we all want it to have? Or is it merely an avenue for the large corporates to satisfy a requirement without any serious commitment? This interesting but controversial topic will again be debated at the Annual Conference in Dublin and will surely create excitement and stimulating debate.

The Forum has many challenges ahead – the continuing violations of the rule of law in many countries, the perceived lack of a human rights culture in some countries and the habit of many leaders in Africa of wanting to stay on as leaders forever! This phenomenon is an on-going challenge for all African lawyers. I have every reason to be confident that we will not let down our colleagues in the rest of the IBA. We will uphold democratic principles.

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## Human rights and development in Africa

**I**would first like to take this opportunity to wish our highly esteemed readers and members of the African Region Forum a fruitful and prosperous 2012, and hope that this year will be full of excitement and achievement for the Forum and its members.

Secondly, Dubai is a beautiful city to behold; holding the International Bar Association Annual Conference 2011 in Dubai was a wonderful opportunity for delegates like me to visit the city for the first time. For many delegates, especially those of us from the African continent, Dubai was a home-from-home, for here we enjoyed, amongst many other things, beautifully bright and sunny skies. Dubai is no doubt a premier tourist destination because everything functions well to ensure the security of people and property. There is no questioning the fact that, in Dubai, many delegates have found another holiday refuge.

The content of the IBA Annual Conference 2011 was broad and illuminating, the featured papers comprising of stimulating research for the intellectual enrichment of all delegates in attendance.

The theme of this first African Region Forum Newsletter of 2012 is human rights and development in Africa.

The *Black's Law Dictionary* (7th edition), defines 'human rights' as:

'the freedom, immunities and benefits that, according to modern values (especially at an international level), all human being *including children* [emphasis added] should be able to claim as a matter of right in the society in which they live [...].'

'While development is a human-created change to improve [...] an activity, action or alteration that changes undeveloped [...] to developed [...].'

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Africa must therefore make the human rights of its citizens, especially women and children, a top priority in order to develop its full potential.

Globally, the issue of rights for children has been down-played over the years. In African regions, their rights have often been abused because many African cultures and customs permit it. This newsletter will, through submissions by various contributors, expose the ways in which the rights of children, especially Nigerian children, have been abused because of their status. We will also touch upon the issues around the rights of women to disclose their 'worth' or assets.

Human rights issues are not the only news we will be bringing from the African Continent; economic growth in South Africa has shown the country's resilience in the face of economic turmoil in the majority of developed markets. In this newsletter we will consider Nigeria's potential for developing an economy desirable to any investor as guaranteed by the promulgation of the Public Procurement Act which has been adopted by many states including Osun State.

This edition of the newsletter will take you on a voyage through the various stages of development on-going in Africa and we hope that you enjoy the ride!

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# South African economy and investment: an introduction

In a year blighted by further economic turmoil in the majority of developed markets, South Africa has once again showcased its resilience. The growth of the South African economy was forecast by the Monetary Policy Committee of the South African Reserve Bank at a rate of three per cent during 2011 although during the fourth quarter the growth rate was revised down from 3.2 per cent, principally as a result of poor economic growth prospects around the globe.

Furthermore, data published by Statistics SA in September 2011 indicate that, year-on-year, retail sales have increased by 8.3 per cent, with manufacturing production up by 7.7 per cent. These statistics are further bolstered by the significant inflows of foreign capital into the country.

A further driver of direct foreign investment into South Africa has been the ever-growing scramble for investment opportunities on the African continent. South Africa's highly developed infrastructure, sophisticated financial and banking sectors, coupled with a stable legal system, are all factors contributing to the rationale behind investors' continued view of South Africa as the springboard into greater Africa.

Similarly, investors have earmarked South African corporates as the ideal vehicles for expansion into the broader continent, and their appeal continues to feed healthy M&A activity on the South African business landscape.

For example, 2011 has seen US retail giant Walmart acquire a controlling stake in Massmart, one of South Africa's largest retailers with operations in 14 African countries, in a deal valued at US\$25bn. Visa, the US-based payments group, also completed the acquisition of Fundamo, a South African-based company, with operations in 37 countries across Africa, the Middle East and Asia, for a US\$110m acquisition.

South Africa continues to experience interest from Chinese and Indian investors, especially in the mineral and resources sector. Most notably during July 2011 the Chinese group, Jinchuan, launched a bid to acquire the JSE-listed mining giant, Meteorex Ltd, in a deal valued at US\$1.35bn.

## Legislative change to company law

The first of May 2011 saw the much anticipated new Companies Act (2008) finally come into force. Practitioners are now busying themselves with becoming acquainted with the new corporate regime, as well as assisting clients through the transitional period. But with only 18 months of the 'moratorium period' remaining, companies are running out of time within which to amend their constitutional documents so as to ensure compliance with the provisions of the new Act.

Despite encountering a few teething problems amid the launch of a new administrative Commission (CIPC) and challenges being faced in terms of compliance, generally the modernisation of South African corporate law has been met with positivity, evidenced by the improvement of South Africa's 'ease of doing business' rating. There remains the establishment of the Tribunal still to look forward to as well and, with the appointees to possess corporate expertise across the board, corporate South Africa anticipates the development of a specialised company law jurisprudence to emerge from the establishment of this judicial forum.

On other frontiers, changes to the M&A landscape abound as an overhaul of the old, combined with the introduction of the new, work together to afford a more modern feel. Examples see the streamlining of the familiar scheme of arrangement, as court sanctioning of the scheme is now a thing of the past. The effect is that (board and regulatory consent aside) these transactions will essentially only require the approval of 75 per cent of the 'independent' shareholders in order to succeed. This, coupled with the introduction of appraisal rights for dissenting shareholders, is an attempt to strike the right balance between efficiency and the need to offer minority shareholders protection. The result is a more cost effective mechanism which is easier to implement and thus ideal for facilitating friendly takeovers and the reorganisation of companies with a wide spread of shareholders.

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Evidence of modernisation sees the introduction of amalgamations and mergers to the M&A landscape, a first in South African law. Although no doubt familiar to the US and Canadian readership, local practitioners now have the opportunity to take advantage of the versatility on offer; the more creative being provided with the ability to fashion innovative new structures through which to service the demands of the complex world of corporate restructuring.

However, challenges do remain. The current Income Tax Act is not yet fully aligned with the new corporate M&A framework and, in this regard, a key concern is how the rollover relief is to work. However, amendments to the tax laws are on the

horizon and it is hoped that these will iron out many of the issues currently encountered.

The Takeover Regulations also see an important change with the introduction of the requirement that any guarantee for the payment of the cash consideration in respect of a takeover must be provided by a South African registered bank. This has seen some foreign investors and banks caught off-guard with the foreign bank intending to provide the guarantee not meeting the required standard due to the lack of a locally registered branch.

So, while there are many changes with which to contend, the principle focus going forward will be on modernising and simplifying South Africa's company law, with the key objective to make it a more friendly place in which to do business.

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## The relationship between economic development and law: How can law reduce poverty in developing countries?

**C**an the instrument of law reduce poverty? If so, which laws, and how can this be achieved?

### The relationship between law and poverty

The role that law can play in reducing poverty has an important place in the international community.<sup>1</sup> Foundation documents such as the International Covenant on Economic, Social and Cultural Rights at Article 2(1), for instance, prescribe an obligation on all states party (and preferably all states) to take 'all appropriate means, including particularly the adoption of legislative measures'<sup>2</sup> to alleviate poverty. Other covenants of fundamental importance place a similar focus on the issue of poverty, as a burden that stretches throughout all peoples through history.

Its importance notwithstanding, the connection needs explanation as poverty has a direct relationship to economics

rather than law. Poverty by nature is a (severe) economic situation whereby a population lacks the ability to fulfill basic needs; not a legal construct though law, as we shall see, may help lessen poverty and eradicate its causes. Income poverty, hunger, disease, the lack of adequate shelter, gender inequality, poor educations, and environmental degradation are identified as dimensions of poverty under the UN Millennium Development Goals.<sup>3</sup> Whether or not intrinsic to poverty, certainly most of these attributes accompany it and go a long way to describing what living in poverty is often like.

Law on the other hand is a set of binding rules regulating the behaviour of individuals and backed by sanction. Law regulates societal relations and systematises the roles and relations of a government with its public. Among the types of behaviour and relations that are governed are those that may be causal to poverty, including crimes

against private property, other economic crimes, corruption, and inequality or other harmful practices.

In regulating a people through government, the law may play both positive and negative roles. Law may impose obligations on the state to promote economic development by playing an active role in ensuring that economic needs are met. This may include a state's obligation to protect the liberties and human rights of individuals and groups so that each is able to pursue happiness and the realisation of their wants (including economic wants and needs). The state may also be required by law to refrain from activity that impairs legitimate economic activity within its boundaries.<sup>4</sup> If such obligations need enforcement it is effective to incorporate them into law. As pointed out by Hart, the most prominent general feature of law at all times and in all places is that its existence means that certain kinds of human conduct are no longer optional but in some senses obligatory.<sup>5</sup>

The role that law plays is basically after the fact. The reason here is that we are concerned with the role that law can play in developing nations where poverty has already taken root. There are countless intricacies causal to this difficult economic situation, not all of which are amenable to legal solution. Law as we know is not an end in and of itself but a means to an end or an instrument of change, but that change may be positive.

### Meritorious legislation ('good law')

For it to be effective in answering the question at hand, law (here meaning legislation) must be 'good' in that it must be able to tackle the root causes of poverty. In my view such legislation must have the aim of reducing poverty and of promoting economic development for all, namely through the equitable distribution of resources, through fair labour relations, through equality before the law, and through greater empowerment of the poor and marginalised in society.<sup>6</sup> 'Good' legislation should also address factors that contribute to under-development by proscribing against harmful state and non-state acts including economic crimes, abuses of power and other practices that make some groups economically unproductive.<sup>7</sup>

Law can prescribe a fair utilisation and protection of natural resources – most importantly of land. Guaranteeing the autonomy of people over natural resources

and the benefits of the fruits of such resources is important in maximising economic productivity.<sup>8</sup> The effective management of land and resources is another factor to be considered in the fair distribution of resources and the empowerment of the poor over such resources. The goals here are to help all people produce at a level that meets their consumption needs, combating the scourge of hunger and starvation that has caused such devastation in some places. Backing such values in law enables the beneficiaries to pursue a legal remedy where there is violation.

The marginalisation of certain groups or parts of society is a waste of labour and the productivity of such groups. In economic terms, this is a disadvantage for both the marginalised and the society at large. Gender-based exclusion, for instance, leads to a society that uses only about half of its available resources, which may be presumed to be about half as productive. Discrimination against other groups such as the disabled and against certain ethnic groups can also have a degrading effect on both the groups discriminated against and against society at large that could have availed itself of these groups' productivity.<sup>9</sup>

Some discrimination against groups is pernicious against the groups but not against their economic productivity. Some societal prejudices against artisans and handicraftsmen for instance have led to such groups being unable to go to the market to sell their products; the community utilises the person's products in these cases but stigmatises the producers. The poverty of these groups derives from societal practices that violate their rights to equality and to support themselves from their work. In economic terms productivity is discouraged and the public will suffer its consequences.

Education may be effective here by making the public aware of the harm discrimination brings to the community at large. Such activities can be backed by law so that society is forced to take lessons against the sanction of law. The 'carrot and stick' nature of the law may here be visible as at first an opportunity is given to change behavior naturally, then the law implements such values by force.

Having a strong criminal justice system encourages people to work and accumulate assets with protection against crime robbing them of their labours; the contrary demonstrates the importance of such a system: a loose criminal justice that does



not deter criminals against violating rights to private property is ultimately destructive. Corruption – the abuse of resources in public hands to private ends – undermines developmental pillars, individual human rights, and the legal frameworks intended to protect them. In countries where governments can pass policies and budgets without consultation or accountability for their actions, undue influence, distortions of development and widespread poverty is often the result.<sup>10</sup> Thus, anti-corruption laws that punish the *ultra vires* acts of officials can also contribute to poverty reduction. It is also considered a regressive tax that robs resources from already hard-pressed households; bribes and embezzled assets could have been used in the development of public endeavors.<sup>11</sup>

Corruption and other crimes therefore have the effect of discouraging investment that could have improved the economic situation of many through job creation and by increasing governmental income. Good laws contribute to good governance to bolster the confidence of investors who can rely on the legal framework in place for the protection of their investments and assets. Investment creates job opportunities and strengthens government; these will further result in the economic self-reliance of families and the wider economic development of a country.

There may be two methods to reach a certain goal, especially for a multi-dimensional problem that needs resolution. One is systematically tackling the symptoms of a problem in order to eradicate the main challenge. The second is curing the problem at its root so as to stop its effects from occurring in the first place. Both at international and domestic levels attempts are made to reduce crime, to stop terrorism, to broker peace between armed groups, to prevent communicable diseases, ensure gender equality and child protection, etc; but I would argue that these are often the symptoms and not the cause, the common predecessor of which is typically poverty.

To be effective law should therefore aim first at solving the problem of poverty. This would obviate the futility of layering regulation upon regulation proscribing these acts without first solving the underlying problem. Yet this underlying problem is vicious; with growing populations around the world taxing a limited resource base and competing interests as a constant factor in all populations at all times, deriving an overarching universal solution to eradicate

poverty is difficult, either through law or through any other means. By contrast, poverty is not a concrete problem that is tangible: it is revealed through a *lack* of food to live on, *lack* of health care to combat illness and disease, poverty of education to function in society, etc. Tackling even one of these aspects – symptomatic though they may be – will solve a part of the poverty manifested in that situation.

### Execution of the law

It is not difficult as such to list factors that contribute to poverty with a statement that these may be remedied through law. Law would be paramount if all that was required was legislative enactment. As we know, however, law depends on implementation – enforcement – to achieve its purposes. It is also of paramount importance to have a government committed to solving the country's problems – in poverty reduction – through enacting appropriate legislation and the implementation of such laws. This takes us to the principle of democracy, and to popular sovereignty manifested through the appointment of government by the general public.

In reducing poverty across a broad spectrum, popular consent to devolve power on a government through open elections may be the best political methodology thus far discovered. The construct of a popular voice able to achieve popular elections is both cause and effect of a power shift that typically translates into a more widespread involvement in popular economic development as well as this political process. Competition provides preference of policies and enables the public to gauge the competencies and determination of the candidates in the sphere of poverty alleviation.

### The Rule of Law

Having meritorious laws and the capacity to implement them are both necessary but not sufficient conditions. A precept of the Rule of Law is that the law should apply to all in an equal manner without discrimination.<sup>12</sup> Impoverishing factors do not survive on thin air; they are attributed in some way to the acts and behaviour of people. If there is discrimination among individuals or in groups applying laws, the factors attributed to these groups or individuals in the favour of whom the law is not applied will remain unaddressed and resume their impoverishing



role thereby rendering the attempt of poverty reduction through the instrumentality of the law of no effect.

To exemplify this we can take the consequence of a violation of the rule of law in the fight against corruption. The law is a good tool – even axiomatic – in the prevention and control of crime, and there may also be a financial capacity to enforce such laws. However, if the law is applied discriminately among public officials of different ranks and positions, the problem is not solved as it will be perpetuated by those whom the law failed to govern.

### International law and poverty reduction

Without international law poverty may well have worsened to a greater degree than its present situation. That poverty reduction at the global level has become a pressing concern of states across the world – without distinction as to their economic status – is inspirational; as is the fact that the world is working to halve poverty by the year 2015.

Inter-state relationships affect the benefits that accrue to contracting parties as much as individual relationships. Such state relationships are manifested through the conclusion of treaties, the establishment of international and regional organisations, and trade relations need to be based on a fair determination of the benefits and burdens on both sides. Developing countries with much greater needs expect to be assisted through their international relationships. These objectives are very desperate as it is the welfare of citizens of these states that hinge on success at this international stage. This makes such states dire expectants of direct aid, technical support, and other kinds of help from their more developed counterparts.

Bargaining power in international relationships between developed and developing states has never been equal. This inequality pre-determines the outcome of international efforts to reduce poverty. With the rich dictating terms to its poor relations, the outcomes promote the interests of the former at the expense of the latter. Gratuitous economic relations are said to entail the forfeiture of an essential portion of the sovereignty of poor states because of the interference the developed world is able to exercise over the domestic affairs of its developing counterparts. This kind of undertaking can mitigate poverty in poor countries in the short term; but exacerbates

it in the long run, as, in the long run it produces what colonisation caused in former colonies of the major powers. These products include inter alia economic and political dependence and the subservience of poor states that are not only dumping grounds but also serve as fields for the experimentation of ideologies that are not contextualised to the local situation. Developing countries are often the producers of raw materials on subsistence scales; there is a rent-seeking tendency by both state and private entities which makes the economy depend on short-term benefits, affecting its overall survival, and the country as a polity as rent-seeking tendencies trigger continual conflict that gives rise to peril and undermines the survival of the state.

Inequitable interstate relationships have led to economic and political dependencies and inefficiencies with regard to the problem at hand: poverty reduction. Internal armed conflicts caused by attempts to scramble the limited resources of a country also increase under-development as the work forces of the country engage in disputes and devote their time and energies in such destructive (unproductive) activities. Governments also engage in war instead of in development activities. War and conflict lead to the displacement of people from their home lands if not also from their home state. What extent may poverty reach other than this? The root cause of these inequitable relationships perpetuates asymmetrical international relations.

What remedy can law provide to redress this situation? The answer to this gives rise to the role of international law in reducing poverty. The force of international law lies in the will of states to respect and to ensure the implementation of international rules. The Millennium Declaration, for instance, adopted by leaders the world over, promises to 'free all men, women, and children from the abject and dehumanising conditions of extreme poverty.'<sup>13</sup> States aim to work together for the accomplishment of these goals through international cooperation. The source of this obligation is the law or the international declaration enacted by the umbrella organisation ie, the United Nations, which itself is a law and an indicator of the existence and efficiency of international law. The Declaration creates competition between poor states in their efforts to achieve the goals in an achievable time and to free their people from poverty. It also makes great powers compete among

themselves for the support they can muster toward the defeat of poverty.<sup>14</sup> These show the need not necessarily for a world police, for prosecutors and courts, to prosecute states for failing to fulfill or for breaching their obligations; rather it demonstrates international law as a covenant between states and the compilation of rules prescribes existing values and practices of the states that is self-executable. At this stage an attempt is not being made to stress that international law is always and absolutely effective even without the usual enforcement institutions and mechanisms; rather it should be noted that no law has ever been guaranteed as to its absolute governance, this is so even where there is fierce state machinery dedicated to enforce it.

The sovereign equality of states needs practical implementation. Moreover states need to consider their domestic situations and the needs of their populations in their international undertaking, and give heed to each other's concerns. This turns the wheel of discussion to the force of law through the gratuity of states to aid their counterparts. But this is how international law works; its force emanates from the work of states to respect it and ensure its respect by others. Still, it has force and there is reason to respect it or not to breach it. International credibility and image have more consequences than are at first apparent, which is why states do not want to appear as violators and many governments agree to the proposals and treaties of common organisations like the UN.

International law may play a significant role in poverty reduction by addressing global issues which in turn imposes challenges on poor states in their attempts to feed their population. As the world still depends on the earth for its sustenance, issues of environment are critical. This global phenomenon does not differentiate between the industrialised and the non-industrialised. It is also transcendent; no one may control the effects of other countries faults within its boundaries. However the primary victims of environmental damage are those who still depend on agricultural produce for their livelihoods. These countries constitute the poorest countries and their populations comprise the extremely indigent in world society.

Environmental degradation undermines the economic basis of states, leading to widespread displacement and migration to urban areas or to more developed countries.

The learned few who were supposed to shed light on their peoples flee to these countries that pay well for their job. This can be seen from two perspectives pertinent to the theme of this article:

- the poor country that pays for the expenses of education and training of such would-be immigrants is disadvantaged in incurring the costs without return and without its needs being addressed.
- the destination countries benefit from their wrong, through the improper utilisation of the environment that leads to the economic degradation of poor states and the disproportionate payment of professionals (in their home states) that flee to the latter to provide the services employers did not pay for. Therefore the situation can be explained as a friend causing disability of the other and gaining from the outcomes of such disability.

It will however be short of reality to limit the influence of environmental change only on poor countries. The same cause is destroying developed civilisations too through natural catastrophes. Hence the continuing degradation is increasing the world's poor population and deepening the intensity of poverty requiring more effort and greater mechanisms to alleviate it. It is also unwise to assume that the responsibility is solely that of industrialised countries: poor states must also adopt domestic environment protection laws and protect their environments from possible pollution through industrial activities concentrated in the country which entail the destruction of forests and other natural resources.

International law may, in this regard, play a positive role in combating continual degradation by requiring states to reduce emissions that pollute the surroundings. This will create a better chance of rehabilitating natural resources and resurrecting the economic activities attached thereto. On the other hand, law may oblige states to redress the damages already caused by over-utilisation of the environment which is a *res communes*, although such remedy depends on the willingness of states to compromise their interests. Such 'forfeiture' (not the case if seen from a wider perspective) can be achieved through diplomacy and through relaying to the great powers the importance of such measures. Such efforts should reach the extent of exposing governments to the world including to their own population and influencing them by putting their political credibility at stake because of



their failures to take measures that support the environment. Gas-releasing countries that fail to improve the environment with a corollary of resulting poverty will be out cast and lose the trust of the world population. This will force it to show commitment and discharge its responsibility which will be one step towards alleviation of poverty in developing countries.

### Conclusion

Both international and domestic laws can and do contribute to the reduction of poverty in developing countries. The laws that address the causes of poverty through rules and sanctions can achieve their objectives. However, for different laws to work effective state machinery needs also to exist. This presumes, in my view, a democratic and liberty-respecting government prepared for and bound by law to develop and enforce policies for poverty eradication. In poor states where their every basic item of life is lacking or in short supply, the first thing that comes to everyone's mind is to give food to the crying infant, clothes to the shivering elderly, to loosen the binds of discrimination and the disabled that are the poorest of the poor so that they can be self-sufficient. We hold that the law can foment all these societal challenges.

Problems are solved by governments in using laws to communicate with their population. Laws are backed by sanction hence obedience results from such force of the law, and the power of the government is borne from the force of law in regulating human behaviour. So long as it is agreed that laws are capable of molding behaviors, resort can be made to the question 'how can law reduce poverty', to the author enactment of laws that address the social, political and economic interaction is a key factor. Following this is to ensure the proper implementation of good laws, which can be put in place if there is government of the people, for the people, and by the people. Such a government will be accountable for its acts and responsible for its failures including the failure to reduce poverty and to cause poverty through its own conduct. When such obligations are embraced by law, the citizenry will have an enforceable action against any contrary conduct constituting breach of the legal rule.

With respect to the role of international law, essentially diplomacy and state negotiations, we can conclude similarly. No major power will remain the same eternally, but a poor state will likely remain indigent for generations. How can international law fail to notice these states and fail to try to free such sections of the world population from poverty? The reason is international law as the law of states and the reflection of the basic norms in society have accomplished the orders of its day. It was colonisation that was the order of the day, it was slavery that was once the legitimate mode of labour relation, and it was subjugation of the mass for the pleasure of the few that regulates the world hence there was none other than these to be enshrined under the laws.

International law is constantly changing; it is the manifestation of the will of the states, now even more than at the outset 100 years ago. It is a positive sign that international law evidences concern for the misery of poor states. We are not however at the zenith that can be reached; diplomacy and international law remain insufficient, and counterbalancing forces include those of might and competing questions of strategic importance. International law needs also to introduce a mechanism to discipline relations between states and to develop an independent way of providing support for strategically unimportant states. Such developments will have some force if inscribed in binding legal instruments. Law may establish that all states have an obligation to reduce poverty that must be adhered to thus contributing to the reduction of poverty in developing countries.

Law may do the following to reduce poverty in developing nations:

- It may promote economic development through the fair distribution of property and resources and through the empowerment of the poor and the marginalised.
- It may address factors that contribute to under-development, proscribing against conditions such as crimes against property, against the economy, and against corruption.
- Law requires active implementation if it is to be more than words on paper. Above all, effective law depends on its being respected and adhered to on every subject without discrimination. The Rule of Law therefore is a determining factor with regard to achieving the purpose of the law, both at the international and local or national level.

## Notes

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## Child brides: the African perspective

**The concept of the 'child bride'**

A 'child' is any human being below the age of 18 years (as defined by the Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child and the Nigerian Child Rights Act).

'Bride' denotes a woman who has just been married or is about to be married (where 'woman' refers to an adult female person above the age of 18 years). A 'bride', therefore, is an adult female who, upon both legal and physical maturity and after having understood and accepted the responsibilities associated with marriage, has consented to and contracted the same.

A 'child bride' is a young girl, betrothed to be married, who is underage and not yet mature enough, physically or intellectually, to comprehend and appreciate the responsibilities of marriage.

'Child marriage' usually refers to two separate social phenomena which are practiced in some societies:

- The first and more widespread practice is that of marrying a young child (generally defined as below the age of 18 years) to an adult. It is usually a young girl married to a man sometimes old enough to be her grandfather.
  - The second practice is a form of arranged marriage in which parents or guardians from different families arrange a future marriage between two children. In this practice, the individuals betrothed often do not meet one another until the wedding ceremony which occurs when they are both considered to be of a marriageable age. In child betrothals, a child's parents arrange a match with the parents of a child from another family (social standing, wealth and expected education all play a part in this match-making process), thus unilaterally determining the child's future at a young age.
- In many tribal systems, a man pays a 'bride price', a payment of cash, cattle or other valuable, to the



girl's family in order to marry her. In many parts of Africa, this payment decreases in value as a girl gets older. Even before puberty it is common for a married girl to leave her parents to be with her husband. Many marriages are poverty related, with parents needing the bride price to feed, cloth, educate and house the rest of the family.

It is important to note that families are able to solidify political and/or financial ties by having their children intermarry. The betrothal is considered a binding contract upon the children and their families. The breaking of a betrothal can have serious consequences both for the families and for the betrothed individuals themselves.

In Africa it is common to see many communities engaged in the practice of offering up their female children to marriage without the prospective brides' consent. In this case it is the parents who give consent and arrange the marriage rites and ceremonies. The important aspect of these marriages is that 'consent of both parties' is absent; this makes the marriage a 'forced marriage'. The parents or other third parties give consent on behalf of the child bride.

Child marriage in itself is a form of forced marriage. By definition forced marriage is a union that is performed under duress and without the full and informed consent or freewill of both parties. Being under duress includes feeling both physical and emotional pressure. Victims may fall prey to forced marriage through deception, abduction, coercion, fear and inducements. In most cases, because of the absence of a minimum legal age for marriage, there is no legal consent.

### Cases of child brides from across Africa

*Ukuthwalwa* is a cultural practice among people from the Xhosa ethnic group in South Africa's Eastern Cape Province whereby girls are abducted for marriage.

- (NS) Nolizwi Sinama, aged 14, was a victim of this culture in **South Africa**. One day she set off from her aunt's home to a neighbouring village, thinking she had been sent on a routine chore, but in fact she was on her way to be married to a 42-year-old man. She had this to say: 'They stole my innocence and my childhood; I begged them not to take me. I told them I wanted to continue with my studies that I wasn't ready to be a wife but they wouldn't let me go... They told me that I didn't have a say in the matter – one of them said all the arrangements were made with my

family's consent.' Her aunt and brother had arranged the marriage, taking three cows as a bride price, or *ilobolo* as it is known in South Africa.

Three years later Ms Sinama says the experience left her feeling worthless. Her husband forced her to sleep with him and she became pregnant a month after she was abducted. Sinama says she told her aunt that her husband forced her into having intercourse but was told that a failed marriage would disgrace the family. She finally filed for divorce after discovering her husband was HIV positive.

Prince Xhanti Sigcawu, a member of the Xhosa royal family, said in defence of the custom: 'Ukuthwalwa, like all our other customs was and remains an important part of who we are as a people.'

- In villages throughout northern **Malawi**, girls are often married at or before puberty to whoever their fathers choose, sometimes to husbands as much as 50 years their senior. Many of these girls choose lifelong misery over divorce because custom decrees that children in patriarchal tribes belong to the father.

(MS) Mapendo Simbeye sent his 11-year-old daughter, Mwaka, a shy first-grader, to Kalabo's hut, to serve as a servant to his first wife and become Kalabo's new bed partner in order to pay back MWK 2,000 (US\$16) he borrowed to feed his wife and five children. Mwaka says her parents never told her she was meant to be the second wife of a man almost three decades older than her. 'They said I had to chase birds from the rice garden. I didn't know anything about marriage.'

Mwaka ran away and her parents took her back after six months. But her escape is an exception to the norm; in remote lands like this, where boys are valued far more than girls, where older men prize young wives, where fathers covet dowries, and where mothers are powerless to intervene, many African girls like Mwaka must leap straight from childhood to marriage at a word from their fathers. Sometimes that word comes years before they reach puberty.

- Hadiza is from Northern part of **Nigeria**. She said: 'I was married when I was 15 years old. I was forced into it.' Whenever her husband attempted to consummate the marriage, Hadiza would flee to her parents' home, but they kept returning her to him. Finally her husband raped her. The attack was so violent that Hadiza was sent to hospital.

### Child marriage in Africa

Various UN-commissioned reports indicate that in many sub-Saharan countries there is a high incidence of marriage among girls younger than 15 years of age. Many governments have tended to overlook the particular problems that child marriage has resulted in, including obstetric fistulae, prematurity, stillbirth, sexually transmitted diseases (including cervical cancer as caused by the HPV virus) and malaria.

- In parts of Ethiopia and Nigeria a considerable number of girls are married before they are 15 and some girls are married as young as the age of seven.
- In parts of Mali 39 per cent of girls are married before the age of 15.
- In Niger and Chad over 70 per cent of girls are married before the age of 18.
- In South Africa there are legal provisions made for respecting the marriage laws of traditional marriages, whereby, a person might be married as young as 12 for females and 14 for males.

Early marriage is cited as 'a barrier to continuing education for girls (and boys)'. This includes *absuma* (arranged marriages set up between cousins at birth), bride-kidnapping and elopement undertaken by the children themselves.

Meanwhile, a male child in these countries is more likely to have a full education, obtain employment and pursue a working life, thus tending to marry later. In Mali, the female to male ratio of marriage before the age 18 is 72:1; in Kenya this figure is 21:1.

Statistically, the percentage of girls marrying before the age of 18 in some African countries are

- Niger 76.6 per cent;
- Chad 71.5 per cent;
- Mali 65.4 per cent;
- Guinea 64.5 per cent;
- Central African Republic 57 per cent;
- Mozambique 55.9 per cent;
- Uganda 54.1 per cent;
- Burkina Faso 51.9 per cent;
- Ethiopia 49.1 per cent;
- Liberia 48.4 per cent;
- Cameroon 47.2 per cent;
- Eritrea 47 per cent;
- Malawi; 46.9 per cent;
- Nigeria 43.3 per cent; and
- Zambia 42.1 per cent.

### Motives for child marriage

There are various motives for child marriage. These include:

- **Poverty** Some poor families use child marriage as a means to gain financial ties with wealthier people.
- **Political** The aristocracy of some cultures tends to use child marriage between different factions or states as a method of securing political ties between them. For example, the son or daughter of the royal family of a weaker power would sometimes be arranged to marry into the royal family of a stronger neighbouring power, thus preventing itself from being assimilated.
- **Religion** Some religions do not specify marriageable age and many people use this as a way to marry children. For example, a legislator of an African country recently married a 13 year old girl from another African country. During a media interview condemning the act he claimed he had not offended any religious law.
- **Tradition** It is a cultural tradition in many African settings to arrange marriage for children. For example, in the Nupe-speaking community of Kwara State, Nigeria, as soon as a girl is born, the parents of a young boy will immediately seek the girl's hand in marriage and both families will monitor the nurturing of that girl until puberty (11-15 years) when they will marry her off to the young man. In some other communities a girl may be married to an old man who is old enough to be her grandfather.

### Consequences of child marriage: the impact on child brides

- **Premature pregnancy** Child brides almost always bear children before they are physically or emotionally ready.
- **Maternal mortality** Girls younger than 15 years of age are five times more likely to die during childbirth or pregnancy than older women. Pregnancy-related deaths are the leading cause of mortality for girls aged 15 to 19 worldwide.
- **Infant mortality** Mortality rates for babies born to mothers who are under the age of 20 years are almost 75 per cent higher than for children born to older mothers. The children that survive are more likely to be born prematurely, have a low birth weight and are more at risk of contracting HIV/AIDS.



- **Health problems** Premature childbirth can result in a variety of health problems for mothers such as fistula, a debilitating condition that causes chronic incontinence. Girls with fistula are often abandoned by their husbands and ostracised by the society. There are approximately two million girls living with fistula and 100,000 new cases are reported every year.
- **HIV/AIDS** Married girls are more likely to contract sexually transmitted diseases, including HIV/AIDS, than unmarried girls. Young girls are more physically susceptible to STDs, have less access to reproductive education and health services, and are often powerless to demand the use of contraception.
- **Illiteracy** Child brides are often taken out of school and denied further education when married. Their children are also more likely to be illiterate.
- **Poverty** Child brides, already poor, are isolated and denied education and employment opportunities, making it difficult for them to break out of the cycle of poverty.
- **Abuse and violence** Child brides are more likely to experience domestic abuse and violence than their peers who marry later.
- **Mental health** Violence and abuse can lead to post-traumatic stress and depression.
- **Isolation and abandonment** Child brides are often isolated from their peers and abandoned when they develop health problems like fistula.

### **Vesicovaginal fistula (VVF): a major health implication of child marriage**

Vesicovaginal fistula (VVF) is an abnormal communication between the bladder and the vagina as a result of prolonged obstructed labour while rectovaginal fistula (RVF) is an abnormal opening between the rectum and the vagina as a result of prolonged obstructed labour. A person can have both VVF and RVF when both bladder and rectum are affected.

Northern Nigeria has one of the highest rates of child marriage in the world: nearly half of all girls here are married by the age of 15. The consequences have been devastating; Nigeria has the highest maternal mortality rate in Africa and one of the world's highest rates of fistula. Many women are left incontinent for life. Up to 800,000 women suffer from fistula in Nigeria.

'They marry young, they get pregnant young, they deliver young and they pick up the fistula,' says Kees Waaldijk, the chief consultant surgeon at Nigeria's Babbar Ruga hospital, the world's largest fistula clinic, in the northern state of Katsina.

Most cases occur during the girl's first pregnancy and nearly half the patients at Babbar Ruga are under 16 years old.

Dr Waaldijk operates on approximately 600 women a year with no electricity or running water. He sterilizes his equipment in a steel casserole pot that sits on a gas camping stove. Rows of women and girls, some as young as 13, lie listlessly on rusty hospital beds or on the floor, each connected to a catheter.

Mariam lay helplessly with a catheter connected to her bladder dripping urine into a local bedpan, looking fragile and weak on her hospital bed among several others. Her dreadful appearance and obvious youth caught my attention during my visit to Babar Ruga. I asked her how old she was and she answered she was seven years old.

Curious, I asked the hospital matron, Hajia Nefisat, what brought a seven year old girl to a VVF hospital. She explained that Mariam's parents gave her up to be married. When she was unable to consummate marriage because her reproductive organ was too small they invited a 'local barber' to cut the entrance to her vagina to widen it, enabling her husband to enter her. In the process her bladder was cut and a VVF operation had to be performed on her.

Semsia, 15, was another patient at the hospital. She was married at the age of 13. During prolonged labour during childbirth at the age of 14, her bladder was damaged. She had also undergone an operation and looked tired and fragile on her bed.

The smell of urine associated with the disease is overpowering and many of the women have been cast out from their communities because of it. Some have been divorced by their husbands; it is estimated that up to half of adolescent girls in northern Nigeria are divorced. 'If nothing is done the woman ends up crippled for life: medically, socially, mentally and emotionally,' Dr Waaldijk said.



## What can be done to prevent child marriage?

### Education

- Girls with a secondary education are around six times less likely to marry young compared with girls who have little or no education. Vocational training for those who do not have the opportunities or cannot cope with formal education serves the same purpose.
- Education delays the age at which a woman marries. For example, Amina Mohammed, an orphan from the Nupe-speaking community of Kwara State in Nigeria, has been traditionally betrothed to a husband since infancy but her actual marriage to the young man has been delayed because she is learning sewing in the city where she has opportunity to live with an enlightened family. She is 19 years old now.
- Education provides an alternative opportunity for girls.
- Education increases socio-economic status and earning potential for girls.

### Employment/poverty reduction

- The world's poorest countries have the highest rates of child marriage. Families often marry girls off to lessen their own economic burden and provide a future for their daughters.
- Girls from poor families are around twice as likely to marry young compared to girls from better-off households.
- Girls who earn a wage may be seen by their families as an economic asset, not a burden, as they are less dependent on others to provide for them.

### Increased advocacy

- An increase in advocacy against early marriage is a good means of reorienting communities who practice this tradition.
- Public enlightenment seminars/talks will broaden the knowledge of communities who practice child marriage and this may change their attitude, lessen their ignorance and encourage them to overcome their naivety.
- Making young girls aware of the dangers associated with underage marriage may curb the submission of young girls to marry. Girls often submit to marriage by withdrawing from primary schools (common in Plateau State of Nigeria and some other parts of northern Nigeria).

### Political will

Political will on the part of the government to enforce existing laws discouraging child marriage is a major factor against the prevention of child marriage.

Laws are already in place both nationally and internationally to discourage child marriage in Africa. For example, Article 21 (2) of the African Charter on the Rights and the Welfare of the Child specifies:

'Child marriage and the betrothal of girls and boys shall be prohibited and effective action, including legislation, shall be taken to specify the minimum age of marriage to be 18 years and make registration of all marriages in an official registry compulsory.'

In Nigeria, Sections 31 and 32 of the Child Rights Act (CRA), 2003, state forcefully that 'no person shall have sexual intercourse with a child.' Anyone who contravenes this provision 'is liable on conviction to imprisonment for life'.

It must be noted that the law specifies this may be immaterial if 'the offender believed the person to be of or above the age of 18' or that 'the sexual intercourse was with the consent of the child'.

In Kwara State, Nigeria, the CRA has been domesticated (through concerted efforts of various stakeholders, including this writer). Now the Child Rights Law (CRL), 2006, regulates the rights of the child in the state. In Kwara State, the legally prescribed age of a child is reduced to 16 years. Sections 21 to 23 discourage child/forced marriage and advocates stringent penalties for those who violate the law. It appears as follows:

'Section 21: No person under the age of 16 is capable of contracting a valid marriage, accordingly, a marriage so contracted is null and void and of no effect whatsoever.

Section 22(1): No parent, guardian or any other person shall betroth a child to any person.

Section 22(2): A betrothal in contravention of sub section (1) of this section is null and void.'

Section 23: A person

- (i) who marries a child; or
- (ii) to whom a child is betrothed or married; or
- (iii) who promotes the betrothal or marriage of a child; or
- (iv) who betroths a child

commits an offence and shall be liable on conviction to a fine not exceeding three hundred thousand Naira or imprisonment for a term not exceeding three years.'



## CHILD BRIDES: THE AFRICAN PERSPECTIVE

Despite these provisions protecting the rights of children, child brides are still common in Africa. Unless governments take the problem on directly and ensure such laws are enforced and violators penalised, the issue of child brides may be no more than rhetoric.

### The role of the Bar

The topic as contemplated by the Family Law Committee of the International Bar Association (IBA) is, I believe, to improve the lot of many African children susceptible to underage marriage. To this end, the Bar has key roles to play in addressing this shameful problem:

- Members of the Bar are encouraged to take family law cases, especially on child marriage on pro bono basis, at local, national and international levels. This will assist the young victims to get legal respite.
- The IBA should collaborate with and support Non-Government Organisations (NGOs) working in the field on issues of children's rights and, in particular, forced marriage.
- The IBA can help identify NGOs working on forced marriage cases in Africa in order to access funding from international agencies which may be used to support victims and organise educational programmes designed to curb the practices of child marriage.

### Conclusion

From the outset, it is clear that underage marriage prevents children from attaining their full potential.

However, an increase in the advocacy of human rights, whether in the form of women's rights or as children's rights, has significantly reduced the tradition of child marriage by demonstrating that it is both unfair and dangerous for the children involved.

Overall, though the African perspective traditionally was to use child brides to gain 'wealth', 'power' or to 'maintain culture and tradition', it should be noted that, education and various legal and health enlightenment programmes have exposed many Africans

to the advantages of marriage of children at maturity and this is gradually phasing out child brides in some parts of Africa. It is expected that if such educational programmes continue it may issue a change in attitudes towards child marriage in those communities in Africa where the practice is still deep-rooted. If this can be achieved Africa will be a better place for young girls to live without fear of being forced into an early marriage.

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# Fundamental human rights and the rights of the Nigerian child

*'We hold this truth to be self-evident that all men are created equal and are endowed with their creator with certain inalienable rights, amongst these are right to life, peace and the pursuit of happiness [...]'*  
(United States Declaration of Independence).

**T**his article is written in response to a survey of thousands of Nigerian children who have, on a daily basis, had their rights infringed upon in one way or another and cannot seek redress against the violators. Some of these children are still in the care of their parents, guardians or other relatives, while many are left to fend for themselves. Even when it appears there are people ready to come to their aid they are abandoned; the government of the day has done little or nothing meaningful to see that these helpless and vulnerable citizens are given adequate protection.

It would be neither incorrect nor far from the truth to say that both local and international laws *acknowledge* the rights of the Nigerian child in numerous statutes but it is disheartening that these same laws do little to protect these rights in actuality. These rights may be meaningful on paper but are better acknowledged than practiced.

In considering the rights of the Nigerian child we must first attempt to give this discussion a definite shape by exploring what the notion of 'fundamental human rights' means; expressed another way, we must first set out the context of our argument.

According to the *Webster's New World Dictionary* (3rd college edition) the term 'fundamental' is defined as that which is forming a foundation or basis; something which is basic, essential or most important. It defines 'right' as 'that which a person has a just claim to such as power, privilege, etc, that belongs to a person by law, nature, or tradition'.

The *Black's Law Dictionary* (7th edition) defines 'fundamental rights' by stating that a 'right' is derived from natural or fundamental law and is a significant component of liberty.

We may therefore assert that 'fundamental rights' are those which are basic natural rights, essential moral claims and, above all, a legal entitlement of individuals, groups of persons or the community at large, and the infringement of which is frowned upon by government organisations.

We should also note that fundamental human rights should be examined in the context of those rights secured by Chapter IV of the Constitution of the federal Republic of Nigeria, and under the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act.

## International perspective

Following major international conventions such as the United Nations (UN) convention on the rights of the child, Organisation of African Unity (OAU) charter on the rights and welfare of the child and the Geneva Declaration on the rights of the child there has been a global awareness of the need for the protection of children's rights. The UN convention in 1989 represented a significant milestone in the slow but perceptible movement towards the entrenchment of clearly definable rights for children.

## Nigerian perspective

The Nigerian Government, as a signatory to the aforementioned treaties, has been at the forefront of the legislative campaign for child rights protection; an Act within Nigerian Law for the rights of children was therefore essential and so the government created the Children and Young Persons Law (CYPL), intended to regulate the protection of children in Nigeria.

At this juncture, it is crucial to address these fundamental questions:

- 1 What are the rights of children?
- 2 Do these rights differ from the fundamental human rights as enshrined in the constitution of the Federal Republic of Nigeria?



- 3 Are these rights of the child absolute?
- 4 Are these rights intended to be acknowledged in our statutes only and not implemented or practiced?

Children's rights are the basic claims that all children have to survival, development, protection and participation. For brevity, we will make reference to the basic principles of child's rights as enshrined by the UN Convention, OAU charter on the rights and welfare of the child etc.

It is noteworthy that in 1979 the protection of the child was specifically entrenched in the Nigerian Constitution which provided that '[c]hildren and young persons [...] be protected against any exploitation whatsoever and against moral and material neglect'.

The 1999 Constitution of the Federal Republic of Nigeria, though not having the above provision, did clearly state in Chapter IV that the fundamental rights of every Nigerian (not exempting children) should not be violated.

The Child's Right Act (2) stated clearly that 'the provision of Chapter IV of the 1999 Constitution and any successive constitutional provisions relating to fundamental rights shall apply to this Act; and every child is entitled to the rights set out in this part'.

The fundamental human rights as set out in Chapter IV of the 1999 Constitution are the same as the rights of Nigerian children; the Child's Right Act has merely extended and expanded the basic rights due to the Nigerian child.

The provisions of these statutes are clear on the rights of the child within the Federal Republic of Nigeria. Therefore where do we turn next in attempting to ensure the rights of Nigerian children are protected. We must ask again, are these child's rights inalienable?

In answering this question what should first come to mind is the intention of the draftsmen of these laws. Were these laws regarding the rights of children in Nigeria written in haste to allow the passing of another bill, under pressure from the wave of international bodies crying out for the protection of children's rights, or out of genuine compassion and concern for the pain experienced by countless vulnerable Nigerian children out there on the streets.

It may be trite to say that 'even the devil does not know what is in the heart of a man' but, considering the laws in place intended to protect children's rights and yet the incessant silence on the daily abuse of these rights, it would not be far from the truth to say that the intentions when drafting

the legislation extended no further than simply being swept up in the global agenda. The draftsmen of such laws have not really seen the plight of the Nigerian child, those children hawking on the streets or those who have been sexually assaulted.

Given the government's inaction and silence on the daily abuses of children's rights including but not limited to the deprivation of a child's access to adequate healthcare or education, adequate rest or recreation, and perhaps above all, forced labour, we must take issue with the notion of children's rights as inalienable.

Are laws protecting child's rights just for mere show or are they meant to be implemented?

On the face of it no law is made for show. However, when a law is made and no punishment put in place for those who violate it, the sad truth we must acknowledge is that some laws are made with no intention of implementation. There are thousands of parents and guardians who have engaged children in forced labour, thereby depriving them of virtually all the rights accrued to these children. And we see these children every day on the streets, in the market places and even in-between traffic on highways.

Many of these people, parents or guardians, will have reasons for abusing the rights of the child. They may say that the child needed to help to provide money for the household. But we must ask, is it the duty of a child to do all the jobs they are asked to do? To work the hours they are asked to work, in such conditions as they do? Is it the duty of a child to provide for other family members or guardians?

On such issues, what does the Nigerian Government's silence imply? They are in effect saying that these people who are abusing a child's rights may continue unpunished. If this is not the intention, if the intention is to stop such abuses of children's rights, the government must wake up to their responsibility and take action to protect these citizens because they will be the ones to set the precedent.

There should be a body specifically for the protection of children's rights, to make sure that the rights of these children are not violated any more. This body must be responsible for the arrest, prosecution, and sentencing those who abuse children's rights.

We must not conclude without first mentioning the good work of the Governor of Lagos State, Babatunde Fashola SAN, who, on 31 March 2009, with assistance of his able Commissioner for Information and Strategy,

Opayemi Bamidele, set targets to implement the Child's Rights Act as reported by the Nigeria's national newspapers.

We must also applaud the Government of Rivers State for its contribution in the campaign for the protection of the child's right by its Social and Welfare Ministry, as well as the many others who have acknowledged the issues surrounding the rights of children in Nigeria and who support the campaigns aiming to address these issues.

Therefore we call on the Nigerian Federal Government to rise to its duty to see that the children who are Nigerian citizens are given adequate protection and to ensure that each time their rights are infringed upon

they have a place of refuge. Let it not seem as if our statutes are there for mere show and nothing more, that our draftsmen and lawmakers are incompetent, nor let it seem that their work so far has been nothing but an exercise in futility.

Having read thus far, I only hope you agree that the simple and fragile position of the Nigerian child in the society is reason enough to protect these children from those seeking to harm them. We must help protect these children because they are vulnerable members of society, dependent on parents and guardians who all too often abuse their rights. By failing to protect the rights of children the future of this great nation is at stake.

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# The right to development

## Introduction

Every human being has certain fundamental rights which governments must uphold and respect. This concept is rooted in most of the world's religions and cultures, reflected in many legal systems and is based on the belief that all people, wherever they live, have the same basic needs.

Fundamental rights and freedoms that are universally recognised have developed over several decades. Today these include:

- the right to life;
- freedom from slavery;
- freedom from torture;
- the right not to face discrimination because of racial or ethnic origin, or religion;
- the right not to be arrested and imprisoned arbitrarily;
- the right to fair trial;
- freedom of expression; and
- freedom of thought, conscience and religion.

Agreement on what these basic rights should be was reached by a collective of countries in 1948, when the United Nations General Assembly adopted the Universal Declaration on Human Rights. It stated that 'recognition of the inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'

## Definition of the term 'development'

Development is a multi-faceted process. At the level of the individual, it implies increased skill and capacity. It implies greater freedom, creativity, self-discipline, responsibility and material being. The achievement of these aspects of personal development is very much tied in with the state of the society as a whole.<sup>1</sup>

At the level of social groups, development implies an increasing capacity to regulate both internal and external relations. More often than not, 'development' is used in an exclusive economic sense. In this regard, 'development has been seen as simultaneously the vision of a better life, a life materially richer, institutionally more modern and technologically more efficient and an array of means to achieve that vision'<sup>2</sup>.

In the economic sense, development consists of a list of services and amenities that we take for granted. These include an adequate public transportation system, good communications (ie, radio, television, telephone and, with the information revolution, internet services).

'Development' includes the acceptance and spread to the population as a whole of, at least, minimal standards of housing, education and health. It means that all are reasonably clothed and fed. It means that in hard times,



## THE RIGHT TO DEVELOPMENT

such as periods of high unemployment, a minimum of assistance is available for those in need. In some countries, this is referred to as 'social security'. These, in broad terms, are the accepted results of development.<sup>3</sup>

The African Charter provides for the right to development thus:

'Article 22(1): All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.

Article 22(2): States shall have the duty, individually or collectively, to ensure the exercise of the right to development.'

Accordingly, this places the obligation of the enforcement of this right as an absolute and immediate state obligation, which is non-derogable in any circumstances, no discrimination of any kind is permitted in respect of this right and optimal international supervision, interpretation, application and enforcement is necessary.

There is, as yet, no generally agreed definition of the nature or scope of a 'right to development' in the context of human rights. An international conference convened by the International Commission of Jurists in 1981 proposed the following formulation: 'Development should [...] be seen as a global concept including, with equal emphasis, civil and political rights and economic, social and cultural rights [...]'

True development requires recognition that individual human rights are inseparable from justice and equity at the national level. Development should be understood as a process designed progressively to create conditions in which every person can enjoy, exercise and utilise under the rule of law all his/her human rights, whether economic, social, cultural, civil or political.

Every person has the right to participate in and benefit from development in the sense of a progressive improvement in the standard and quality of life. The concept of the right to development serves to express the right of all people all over the world, and of every citizen, to enjoy all human rights.

The primary obligation to promote development in such a way as to satisfy this right rests upon each state for its own territory and for the persons under its jurisdiction.

The Right to Development was introduced in the 1970s and 1980s as one of the several rights belonging to a third 'generation' of human rights.<sup>4</sup> The Right to Development belongs to the third generation of Solidarity

Rights which has in the past two decades been recognised as human rights.<sup>5</sup> It is now customary to discuss human rights in terms of generations.<sup>6</sup> According to this view, the first generation rights constituted of civil and political rights conceived as freedom from state abuse. The second generation rights constituted of economic, social and cultural rights, claims made against exploiters and oppressors. The third generation constituted of solidarity rights belonging to peoples and covering global concerns like development, environment, humanitarian assistance, peace, communication and common heritage. The cataloguing of human rights into such neat generations is appealing in its simplicity.

The Right to Development, as a derivative of solidarity rights, has been defined as the right of any people to freely choose economic and social system without outside interference or constraint of any kind. It includes the right of the people to determine, with equal freedom, its own model of development.<sup>7</sup>

Its contours, however, seem to be vague.<sup>8</sup>

The United Nations (UN) General Assembly, in 1961, designated the 1960s as the UN Development Decade.<sup>9</sup> The resolution of the Assembly did not, however, mention human rights. It was only four years later that the General Assembly adopted a resolution recognising the need to devote special attention to the promotion of respect for human rights. This, the resolution stated, should be done on both a national and international level, and was to be done within the context of the Development Decade.<sup>10</sup> But, by 1960, a UN report on the development activities<sup>11</sup> had clearly identified the link between human rights and development:

'One of the greatest dangers in development policy lies in the tendency to give to the more material aspects of growth an overriding and disproportionate emphasis. The end may be forgotten in preoccupation of the means. Human rights may be submerged, and human beings seen only as instruments of production rather than as free entities for whose welfare and cultural advance the increased production is intended. The recognition of this issue has a profound bearing upon the formulation of the objectives of economic development and the methods employed in obtaining them [...] the growth and well-being of the individual and larger freedom, methods of development may be used which are a denial of basic human rights.'<sup>12</sup>

Many factors were responsible for the emergence of this category of rights. One was the emergence of a numerically dominant group of developing countries. This in itself was a result of the wave of decolonisation that peaked in the late 1960s. This development led to the elevation of economic development goals to the top of the international agenda.<sup>13</sup>

There was feverish resentment over the negative consequences of colonialism. And the former colonial powers were reticent in recognising continuing obligation towards the people concerned. But developing (or 'Third World') countries were undaunted. They called, rather, for reparations. At the UN there were demands that greater attention be paid to economic and social rights. Third World countries argued that colonialism (neo-colonialism) was a gross violation of international law. They argued that some form of development co-operation be put in place and insisted that the imperialist world had a legally binding obligation to do so.

Another factor in the emergence of development rights was the 1973 Arab oil embargo. The embargo itself was as a result of the Yom Kippur war (or 'War of Ramadan').<sup>14</sup> The other was the intensity of a global north-south divide. All gave rise to the search for a new international economic order'.<sup>15</sup>

The political economy of human rights, thereafter, found increased resonance in the Charter of Economic rights and Duties of States.<sup>16</sup> The purpose of this Charter was to give the earlier demands and principles concerning the establishment of a new international economic order<sup>17</sup> at least some formal legal basis. In the preamble to the Charter, the General Assembly stressed that 'the Charter shall constitute an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality, and interdependence of the interests of the developed and developing countries'.

In 1977 the UN General Assembly adopted a resolution stating that:

'Human rights questions should be examined globally, taking into account both the overall context of the various societies in which they present themselves as well as the need for the promotion of the full dignity of the human person and the development and well-being of the society.'<sup>18</sup>

In the same year, the Human Rights Commission of the UN asked the Secretary-General, in a resolution,<sup>19</sup> to study the

international dimensions of the right to development as a human right. This resolution was the first recognition of the Right to Development as a human right and the starting signal for a series of UN activities.<sup>20</sup>

The Right to Development having quite a recent history, it was conceptualised as a tool to achieve that New International Economic Order pursued by developing countries. This right was first affirmed in 1981 by the Organization of African Unity.<sup>21</sup>

The UN General Assembly proclaimed development as a human right in its 1986 Declaration on the Right to Development.<sup>22</sup> This text, that remains the most important reference on this topic, was adopted by the UN General Assembly Resolution 41/128 with 149 votes in favour, eight abstentions (Denmark, Finland, Federal Republic of Germany, Ireland, Israel, Japan, Sweden and the United Kingdom) and with the United States of America casting the only negative vote.

It was at the end of the 1990s that the debate became even more interesting. In 1998 an Open-Ended Working Group was created by the UN Commission of Human Rights<sup>23</sup> and an independent expert, Arjun Sengupta, was called to present analysis and research regarding the content of this right, followed in 2004 by a High Level Task Force. The work of Mr Sengupta was very helpful in explaining the different dimensions implied in the Right to Development and the consequences following his affirmation. His six reports not only explained in detail the content of this right but also proposed ways for its concrete realisation.

But what, in summary, is the Right to Development? Sengupta defines it as 'the right to a process of development in which all human rights and fundamental freedoms can be fully realised'.<sup>24</sup>

This definition strictly follows the content of the Article of the 1986 Declaration which says 'the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised'.<sup>25</sup>

The first element that must be highlighted, then, is the definition of development in terms of right. Such a definition has clear implications: to assert that a subject (a person, community, a state) has a specific right means that this subject is entitled to demand of



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another subject that his/her right is respected, and this other subject has the duty to respect or to fulfill that right. Therefore the first element of a human rights discourse is the clear identification of rights-holders and duty-bearers.

The 1986 Declaration answers this necessity by identifying the human being at the centre of its framework: 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development'.<sup>26</sup>

The subject of the Right to Development is both every person in his/her double essential character of individuality and relatedness, and all peoples collectively. This means that the process of claiming is twofold; an individual may claim his/her right to development realised by his own country while the country has the same right in relation to the international community. The Right to Development is an individual right, a collective right and a right of solidarity, which poses a necessary correlation between the realisation of this right at the individual and at the collective level. In this sense equity, social justice and democratic participation become essential aspects of development process, understood as:

'a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.'<sup>27</sup>

The Declaration underlines the fundamental role of the concepts of equity and justice; only in a framework of equity regarding access to development process and fair distribution of its benefits can the Right to Development be realised both for the individual and for his/her community. The first guarantee of this equity is the free and meaningful participation of people in the political and economic choices that drive this process. As we can see the Right to Development shows here its debt to the human development theory.

Correlated with this broad individuation of right-holders, the Declaration provides a broad definition of the duty-bearers; the responsibility to fulfill the Right to Development is up to individuals, states and the international community together, but each to a different degree.

The first level of responsibility is that of the individual. The individual-community, as first beneficiary of the Right to Development, is

also his/her first responsibility. On the one hand in fact, the realisation of the Right to Development requires that everyone respects the rights and freedoms of the others; on the other hand, the commitment of the whole community of individuals (at local, national and international level) is indispensable in the creation of that environment of equity and social justice necessary to make development a right for all.

As the Declaration states, however, countries have the primary responsibility for the respect, the promotion and the fulfillment of the Right to Development. At the level of their internal activity, they have specific duties to formulate adequate development policies which aim to offer the whole community the possibility to develop, to take actions to promote a favorable environment for the realisation of the Right to Development, to take resolute steps to eliminate the massive and flagrant violations of human rights and to promote the realisation of all human rights, without distinction between political and economic rights.

But what most characterises the 1986 Declaration is its individuation of duties up to states as international players.

The Declaration states that the right to development implies the full realisation of the right of the peoples to self-determination. This includes the exercise of their inalienable right to full sovereignty over their entire natural wealth and resources.<sup>28</sup>

### Notes

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- 6 Vasak, K., "A 30-year Struggle", 11 UNESCO Courier 29(1977).
- 7 Bedjaoui, op. cit. fn.1 at p. 1182 et seq.
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 10 G.A Res. 2027 (XX) (1965).  
 11 UN Doc. E/3347/Rev.1 (1960).  
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 13 Philip Alston, 'Revitalizing United Nations Work on Human Rights and Development', *18 Melb. U.L. Rev.* 216, 318 (1991).  
 14 Bedjaoui, op.cit. p.21.  
 15 Alston, loc.cit., fn.43.  
 16 NN G.A Res. 3281 (XXIX) of 12 December 1974.  
 17 Cf. Res. 3202 (S-VI), 1974  
 18 G.A. Res. 32/130, para. 1(d).  
 19 CHR/Res/4(XXXIII), para.4.  
 20 Karel de Vey Mestdagh, 'The Right to Development', 28 N.I.L.R. 31, 34 (1981).  
 21 African Charter on Human and Peoples' Rights, Article 22. The acknowledgement of the RTD in the African Charter is very relevant. This text, in fact is the only legal-binding international document containing an explicit affirmation of the RTD. This importance, however, is weakened by the fact that the Charter affirms the RTD only as a peoples' rights and not as an individual right.  
 22 U.N GAOR, 41st Session. Supp. No.53, at 183, U.N.Doc.A/RES/41/128 (1986). The Commission referred to the RTD in resolutions before the General Assembly adopted the Declaration,  
 See, e.g., U.N. ESCOR, 33d Sess., Supp. No. 6, at 74-75, UN. Doc. E/CN.4/1257; ESCOR, 35th Sess., Supp. No. 6, at 107, U.N. Doc. E/1347; U.N. ESCOR, 37th Sess; Supp. No. 5. at 238, U.N. Doc.E/CN.4/1475. See also Commission Resolutions 4 (XXXIII) of 21 February 1977; 4 (XXXV) of 2 March 1979; 36(XXXVII) of 1981; 985/44 of 14 March 1985.  
 23 Resolution 1998/72  
 24 A. Sengupta, *First Report of the Independent Expert on the Right to Development*, UN Doc. E/CN.4/1999/WG.18/2, par.47.  
 25 UN Declaration on the Right to Development (DRD), adopted by the UN General Assembly with the Resolution 41/128, 4 December 1986, Article 1(1).  
 26 Article 2(1).  
 27 DRD, Prologue.  
 28 Article 1(2). Cf. The General Assembly Resolution on Permanent Sovereignty over Natural Resources; NU Res.1803 (XVII) of 14 December 1962. As Mohammed Bedjaoui points out, there is a necessary relationship between authentic sovereignty and the right to development, between true sovereignty over the wealth of a country and the country's right to development. See Bedjaoui, op.cit. fn.1p. 1182 et seq.

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## Disclosure of documents and assets: the Nigerian perspective

### Definition

The submission of facts and details concerning a situation or thing. This could be a requirement for litigation purposes on issues relating to family.

### Governing legislations

- Marriage Act;
- Matrimonial Causes Act;
- Child Rights Act; and
- Customary law - not codified and differs from tribe to tribe.

### Marriage types

- **Statutory marriage** – contracted and regulated by the provisions of the Marriage Act (includes Christian marriage).

- **Customary marriage** – contracted and regulated by a set of norms generally accepted by the tribe to which the couple belong (includes Islamic marriage).

### The general features are that

- the parties agree to marry;
- the parents of the girl give their consent at a formal introduction ceremony; and
- the prospective husband pays the dowry/ bride price (some form of monetary gift received by the family of the girl).

### Disclosure of documents and assets requirement

Generally each contracting party has the capacity to own assets. There are no formal rules mandating the disclosure of assets whilst



contracting marriage. However, under Islamic law, a wife cannot dispose of her property without the knowledge of her husband.

Upon the death of an individual, the surviving spouse is entitled to inherit a fixed portion of the husband’s property whether disclosed or not during his lifetime. This could be limited by the existence of a will in a statutory marriage. The children also entitled to certain a portion whether disclosed or not. Customary law entitles relations of the deceased to portions of assets. The widow had earlier been regarded as part of the assets to be inherited. This practice has however been gradually abolished as this is repugnant and inequitable.

**Processes for discovery**

- **By information** – Under the Evidence Act however information/communication between husband and wife is privileged information that cannot be used by either party against the other during the pendency of the marriage.
- **Legal discovery** – through mandatory requests for production of documents for litigation purposes.

Discovery may not be obtained from third parties except with the consent of the owner (excluding for the purposes of litigation where a subpoena is issued or notice to produce to the person in custody of documents).

**Nigerian perspective**

- Failure to disclose is not grounds for divorce as no disclosure requirement is established whilst contracting a marriage.
- Issues relating to custody of children are more germane in incidences relating to divorce.
- Marriages (both customary and statutory) have a strong background in custom (ie, that it not only involves the contracted parties but also their families).
- The resultant effect is stability of marriages until death.
- A strong support system in custom tends to override issues relating to disclosure.
- The stability of most Nigerian marriages it would seem has prevented a rapid development of the law in this subject matter.
- Since there are no disclosure requirements laid down, the issue of enforcement does not arise except in the specified cases examined above.

# Woong investors through the Public Procurement Law

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**M**any definitions have been thrown up on what can be termed ‘Public Procurement’. However it is my considered opinion that the definition propounded by Ghana Integrity Initiative (GII), which is a local chapter of Transparency International (TI), will best suit our purpose here. According to GII’s perspective ‘public procurement is the acquisition of goods and services at the best possible total cost of ownership in the right quantity and quality, at the right time, in the right place, for the direct benefit or use of governments, corporations, or individuals, generally via a contract’. This definition presupposes that all procurement of public supplies and equipment and their use should be an

integral part of budgetary management, and for which the processes must be made in the most economical way. Invariably, this is the ‘imperative’ for compliance even for Osun State Public Procurement Law (2008).

Osun State is one of the very few states in the south west of Nigeria to promulgate the Public Procurement Law and the state is gradually becoming an investors’ haven because of its bold step at ensuring that all the provisions of the law are implemented. Any investor wishing to invest in Nigeria is advised to consider coming to Osun State because the Osun State Public Procurement Law of 2008 possesses elaborate provision which ensure that an investor’s interest is properly protected though the instrumentally of the law.

### Rationale for compliance of the Law

Government agencies spend large sums of money through the public procurement process and in view of mounting budget constraints, it is important that government introduces efficient public procurement procedures and systems to ensure value for money.

The old system of procurement lacks unification and encourages multiplicity of practices for procurement service.

Donors and development partners require a good procurement system to allow their resources to be pooled and controlled by the government under one basket funding.

It encourages programme lending as opposed to project lending.

Procurement is considered part of budget and financial management in the state economy.

Lastly, improvement of the public procurement system which this law intends to achieve will have positive, direct and beneficial effect in the overall economic performance of the economy of Osun State.

The Law has, to a large extent, dealt with all complicated issues which hitherto bedeviled government procurement systems. The Law is divided into 13 separate parts all of which are subsumed to provide for Public Procurement Methods, Special and Restricted Methods of Procurement, Procurement Surveillance and review and Code of Conduct for Public Procurement. It is also geared toward the promotion of the use of public procurement as a tool for State development and to promote the integrity of the public procurement system that will guarantee confidence in the procurement process of government among others.

The Law provides for the establishment of the Council on Public Procurement which functions are to consider, approve and amend the monetary and poor review of thresholds for the application of the provisions of the law and to consider and approve policies on public procurement.

In a nutshell, the promulgation of the Law is an attempt by the government of Osun to comply with best practices around the world. It is a right step in the right direction as it will remove corruption from the system. It has the capacity to positively affect the economy of the State which would have a direct impact on the daily lives of its citizens. It is a way in which public policies are implemented. To my mind the Law will improve efficiency and transparency in public procurement thereby

curbing corruption in the procurement process in the State.

The intention of the Law's draftsmen (ie, the Osun State House of Assembly Members) is to make Osun State a corruption-free State in all spheres of human endeavour where people and institutions act with integrity, accountability and transparency.

The Bureau of Public Procurement, which is saddled with the responsibility of implementing the Law, must continually create awareness about the negative effects of corruption, empower citizens to demand responsiveness, accountability, transparency from people and institutions in Osun State. This, to my mind, is achievable by working with people and institutions to build a culture of integrity where corruption is unprofitable for people working in government, politics, business and civil society organisations.

'Corruption' refers to any situation whereby one misuses entrusted power for private gain. Corruption includes bribery, extortion, cronyism nepotism, patronage, graft and embezzlement. Corruption is a common phenomenon in any large business-like government, so much that it is expected that, when ordinary businessmen or citizens interact with public officials, they award contracts to companies that are not necessarily the best bidder, or allocates more than the cost of the contract. The company then benefits and, in exchange for betraying the public, the official receives a kick-back payment which is a portion of the sum the company received.

Most government spending is in the area of procuring goods and services and, therefore only improvements in the public procurement system would have a direct and substantive impact on the economic situation of State which will then translate into good governance for the people. The government should be commended for passing the Law which has clearly spelt out certain measures to minimise public procurement-related corruption such as the monitoring of public expenditures.

Elected and appointed officials in government must know that they hold power in trust for the people who elected them into office. Therefore it is just fair and reasonable that a good government should ensure the beneficiaries of the trust are not endangered through neglect and abandonment which is necessitated by corruption. The trustee of the people's wealth must use the wealth to the advantage and benefit of the people who entrusted with the power and wealth rather



## WOONG INVESTORS THROUGH THE PUBLIC PROCUREMENT LAW

than line their pockets with the people's wealth. The main objective of the Law is to ensure a judicious, economic and efficient use of State resources in public procurement that is carried out in a fair, transparent and non-discriminatory manner, and to attract investors. In other words one can say that the main aim is to reduce or eliminate corruption in the procurement process.

Consequently, this will guarantee a comprehensive and well-articulated public

policy in the State that will provide a legal regime to safeguard the integrity of the public procurement system through the creation of a central body: the Bureau, with the requisite capability, technical expertise and competence to develop a coherent public procurement policy, rules and regulations to guide, direct, ensure trained manpower, as well as to adequately monitor public procurement. The Bureau is available in Osun State and investors are therefore welcome.

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