



Accommodating the Right to Development in Kosovo: A Human Rights Perspective

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Abstract: The right to development is the right of individuals and peoples to an enabling environment for development that is equitable, sustainable, and participatory and in accordance with the full range of human rights and fundamental freedoms. A wide range of international law on development exists, and numerous Declarations and Programs of Action from the UN World Conferences have been proclaimed. Nevertheless, due to its nature and its legal status the right to development continues to be one of the most contested rights in academic and political circles. The conflicting interpretation of the right to development and its contested legal status affects realization of development to which every human person is entitled by virtue of the right to development. But, if the right to development is read through the human rights “lenses”, it can result in an interpretation that can be most helpful for its realization in practice. The relevance of interpretation of the right to development as a human right becomes imperative in transitional society such as the one in Kosovo where the environment continues to encounter legal and structural obstacles to development. In light of this situation the present paper analyses the relationship between human rights and development, the relevance of development in post conflict society and its impact on overcoming the transition and securing a lasting peace.

Keywords: human rights; right to development; post conflict society; transition; Kosovo

1. Introduction

Human rights are not entirely generational since they are interrelated, they overlap and can be concurrent (UN GA Declaration on the Right to Development, 1986, Article 6(2); UN Vienna Declaration and Program of Action, 1993, Article 5). The right to development belongs to the “third generation” of human rights and is considered to be a collective right. Currently in the legal and political circles there is considerable degree of uncertainty about who is the duty bearer of the right (the individual, or the collective, the state, the community, or people). In practice, to ease

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the implementation of the right to development the criteria's, sub-criteria and indicators have been established in order to facilitate the development that is equitable, sustainable, participatory and in accordance with the full range of human rights and fundamental freedoms (UN Right to Development Report, 2010).

A wide range of international law that involve the development exists and is comprised of the UN Charter; the Universal Declaration on Human Rights; the 1986 General Assembly Declaration on the Right to Development, International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights; General Comment No. 3 (the nature of States parties obligation) of the UN Committee on Economic, Social and Cultural rights; European Convention on Human Rights and its Protocols. A variety of international human rights and environmental treaties, Declarations and Programs of Action have been enacted, and a numerous UN World Conferences on development have been organized. Still, due to its nature and its (lack of) legally binding status the right to development continues to be one of the most marginalized rights in the academic and political circles (Donnelly, 1985 p. 473).

Human rights lawyers consider that development should rightly be seen as an integral part of human rights (Otto, 2000, p. 734). Human rights are *instrumentally* useful to enhance development processes, and through their implementation can be addressed certain types of social risk, and they ensure accountability (Darrow & Tomas, 2005, p. 450). However, the conflicting interpretation of the right to development and its contested legal status often results with no realization of the process of development to which every human person is entitled by virtue of the right to development (UN, Vienna Declaration and Program of Action, 1993). The Declaration on the Right to Development refers to the right to development mainly as a collective right, but also highlights the human person as a central subject of development, and has a rather individual approach to the right (UN Vienna Declaration and Program of Action, 1993, Article 2 and Article 28). However, if the right to development is viewed through the human rights 'lense', it can result in an interpretation that the individuals of the group have the right that allows to be exercised individually and collectively. The relationship between human rights and development is arguably defined more by its distinctions and disconnects than by its points of convergence. (Alston, 2005, p. 778; McInerney-Lankford, 2009, p. 52)

The relevance of understanding and interpretation of the right to development as a human right becomes imperative in societies in transition such as the one in Kosovo

where the legal and political environment continues to encounter structural and unfair barriers to development. In Kosovo, the legal framework adequate to accommodate the right to development is fairly established. However, the key attributes of participatory development in particular social justice; participation, accountability and transparency; and international economic cooperation are still at the infancy stage of development. In light of this state of affairs the present paper analyses the relationship between human rights and development and how it is perceived by the Kosovar society, and the benefits of the overall development in overcoming the transition, if the right to development is identified as a human right. The first part of this article provides a theoretical perspective related to the concept of the right to development as a human right. The second part synthesizes the analysis of the Kosovo context, political processes and its legal framework for accommodating the right to development. The third part will explore challenges of interpreting the right to development as a human right in the new legal discourse and policy frameworks as a part of state building processes in Kosovo. Finally, it will highlight the relevance of interpreting the right to the development as universal value, as a precondition for the overall development and as such contributing to the enhancement of the peace and state building processes in Kosovo.

2. The Concept of the Right to Development–A Theoretical Perspective

Although human rights standards enshrined in international and regional human rights treaties relate to the right to development, the right to development as a human right explicitly is mentioned only in the Declaration on the Right to Development which was adopted by the UN in 1986 (UN Declaration on the Right to Development, 1986). Latter, this right is also recognized in the African Charter on Human and Peoples' Rights (African Charter, 1982), the Arab Charter on Human Rights (Arab Charter, 1994), and has been re-affirmed in several instruments including the 1992 Rio Declaration on Environment and Development (Rio Declaration, 1992), the 1993 Vienna Declaration and Programme of Action (Vienna Declaration, 1993), the Millennium Declaration (Millennium Declaration, 2000), the 2002 Monterrey Consensus (Monterrey Consensus, 2002) the 2005 World Summit Outcome Document (UN General Assembly, 2005), and the 2007 Declaration on the Rights of Indigenous Peoples (Declaration, 2007).

The Declaration on the Right to Development states unequivocally that the right to development is a human right. The first article of the text of the Declaration on the

Right to Development succinctly puts forward the concept of this right. It states, “The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized”. From this definition it is to be understood that the right to development, is a human right and that this right is “inalienable”, meaning it cannot be bargained away. Also, this right embodies a process of “economic, social, cultural, and political development”, which is recognized as a process in which “all human rights and fundamental freedoms can be fully realized”. The right to development is a human right, of “every human person and all peoples which entitles them not only to “participate in, but also to “contribute and enjoy” the processes of development.

Still, there are several issues raised about the foundational basis of the right to development as a human right. The contesting issues relate to its legitimacy, justifiability, its coherence, and to the very nature of this right. At first the division between those who deny that economic, social, and cultural rights could be regarded as human rights, and those who considered that economic, social and cultural rights as not only fully justifiable human rights; then the non-obligatory nature of the Declaration on the Right to the Development, and above all existing limitations of the environment(s) where the right to development needs to be realized. Related to the nature of the right a new consensus reaffirming the right to development emerged at the Second UN World Conference on Human Rights in 1993 (UN Vienna Declaration and Program of Action, 1993). The Declaration adopted there reaffirmed that “the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and is an integral part of fundamental human rights.” Further the same conference reaffirmed that the “Human rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of government”. Despite declarative and re-affirmative statements’ the non-obligatory status of the declaration is harming the realization of this right in particular in the developing countries, and that are not part of the international human rights treaty body protection mechanisms. We are witnessing the tendency that the post- conflict territories and the newly created states by the virtue of their legal and political system integrate the very positive content of the human rights treaties and of the declarations in their legal and constitutional set up (i.e. Bosnia and Herzegovina, Kosovo, Afghanistan, and East Timor). Still, the main struggle related to realization of the

right to development remains the war torn and fragile economic and political environment. The right to development does not mean only having an advanced legal framework but in a broader sense it should involve overall improvement of the social, political, and cultural sector of a given state. The Declaration on the Right to Development explicitly calls the international community to the obligation of cooperation in order to realize these rights. Myriad bodies within the international organizations have been established to support the realization of this right in post conflict and war torn societies. The intergovernmental open-ended Working Group on the Right to Development established in 1998 is mandated to report once a year to the Human Rights Council (HRC) and the General Assembly (GA). Until April 2010, the Working Group was supported by the high-level task force on the implementation of the right to development, established in 2004 with the composition of five independent experts, to provide expert advice to the Working Group. Also, the High Commissioner and OHCHR is mandated to provide international assistance concerning the Right to Development by the virtue of the GA resolution 48/141 which established the post of High Commissioner (HC) (UN General Assembly Resolution, 1993). The GA resolution 48/141 explicitly includes the mandate “to promote and protect the realization of the right to development and to enhance support from relevant bodies of the UN system for this purpose.” The right to development has been consistently highlighted by the GA and the HRC which both request the Secretary-General and the HC to report annually on progress in the implementation of the right to development including activities aimed at strengthening the global partnership for development between Member States, development agencies and the international development, financial and trade institutions. Other UN agencies and international institutions involved in the work of human rights and development as well as the right to development include UNDP, UNCTAD, UNFCCC, ECA, the World Bank, IMF, WTO, UNESCO, WIPO, WHO, the Global Fund and ICTSD. Despite the above mentioned international human rights treaties and declarations, numerous mechanism and agencies ranking from international organizations, funds, banks and aid agencies, realization of the right to development in post conflict societies remains low. What follows is the discussion on specificities of the (lack of) realization of the right to development in internationally supported Kosovo, its newly enacted human rights legal framework, international agencies efforts, and prospects for realization of this right by the Kosovo authorities.

3. The Right to Development in Kosovo – The Contexts

The overall crisis in former Yugoslavia during the 1980s aggravated the economic situation in Kosovo, with a fall in domestic output, increasing unemployment and neglect, and exclusion and persecution of the Albanian community during the Milosevic 'era (Clark, 2000, pp. 70-92; Mertus, 1999, pp. 30-77). Armed conflict followed in 1998; lead to further economic destruction, and massive population displacements and loss of human life. Unemployment rate continues to be at the highest, while society is faced with the huge division between communities as a consequence of historic injustices including the violation of the right to development. As such the full enjoyment of the right to development becomes an imperative for improving the situation and overcoming the divisions between communities, and securing a long lasting peace and reconciliation.

After the ending of the NATO intervention, the United Nations established the international civilian presence known as United Nations Mission in Kosovo (UNMIK) with extensive mandate to administer Kosovo (UN SC Resolution 1244, 1999). UNMIK is a peace building mission mandated to protect and promote human rights, create conditions where all communities will enjoy relative peace paving the way for the final political status of Kosovo. The UN resolution 1244 does not specifically mention the right to development. This document was drafted in order to provide the legal basis for managing the overall crisis after the very much disputed international humanitarian intervention (Wippman, 2001, pp.139-139; Tesón, 2009, pp. 1-7; Greenwood, 2002, pp. 144-152). Return of thousands of displaced persons, reestablishing public order, ensuring a solid public security, and establishment of public institutions were UNMIK priorities in the first years of its administration. Generally, peace-building practice by international community' does not provide explicitly for the development as a human right. It refers and emphasizes more to the development as an integral element of overall nation-building and state-building strategies. Moreover, the right to development as a human right has been neglected or underestimated when international peace-building missions prioritized the processes of institutional and state-building. UNMIK peace building mission is not an exception either. UNMIK was tasked with an overwhelming mandate for rebuilding the entire infrastructure and social life in midst of the overall destruction. Rebuilding the overall societal sectors after conflict is about far more than repairing damaged buildings and re-establishing public institutions. Fundamentally, it is about restoring the people's trust and confidence in governance systems and the rule of law, rebuilding relationships at all levels, and providing the population with greater

hope for the future. These processes are all critical to the consolidation of peace and security in fragile post-conflict situations. When they are neglected, the threat of conflict re-emerging is very real. The disappointment on the slow progress while under UNMIK administration has created much frustration in the fragile post conflict society which was manifested with public unrest culminating with February 2000 events (Human Rights Watch, 2001), minority violence in March 2004 (Amnesty International, 2004), February 2007 (Amnesty International, 2017). These events has served as wake up call for international community to undertake very complex policies related to the status of Kosovo (UN SC, Status before Standards, 2002; Proposal for Kosovo Status Settlement, 2007) till the Declaration of Independence in 2008.

3.1. Realization of the Right to Development as a part of State Building Processes

Most of the liberal theories of International Relations maintain that for a successful peace-building a minimally effective and legitimate state is necessary that it can occur only in the context of capable state institutions (Call & Hawkins, 2007, pp. 12-14). The process of state-building for peace then focuses at first on formation and functioning of the public institutions, and increasing institutional legitimacy and accountability with its constituents, and building the capacity of the state to perform certain critical functions (OECD, Principles, 2005). This liberal model has been reflected in the UNMIK institutional building in Kosovo. In 2001 UNMIK enacted regulation on the Constitutional Framework for Provisional Self-government in Kosovo (Constitutional Framework, 2001) which has regulated the functioning of the Kosovo Provisional Institutions. In this much debated document UNMIK set up the extensive human rights and community rights (Stahn, 2001, pp. 531-561; Benedek, 2005, p. 216). Without explicit mentioning of the right to development as a human right in the Chapter 3 and 4 of this document UNMIK set up a very high human rights standard to be implemented and observed by the newly established locally led provisional institution. However, this document still maintains that the sole responsible person for the overall decision making in Kosovo remains the Special Representative of the Secretary General (SRSG) (Constitutional Framework, 2001, Chapter 8).

While broad responsibilities have been set for the local provisional institution of Kosovo, the SRSG and all other representatives of international community are immune from the jurisdiction of the Kosovo judicial and other institutions in cases when there is an alleged violation of the human rights (UNMIK Regulation 200/47).

The splitting up of rights in to: Chapter 3. Human Rights, and in Chapter 4. Rights of Communities and Their Members in the Constitutional Framework gives the impression that the human rights have been more ethnically centered, and less referral is given to the human rights as human entitlement and overall universal category. In practice this spreading of the human right has resulted with resentment and further division between the communities (Beha, 2014, p. 90), and non realization in practice.

UNMIK and provisional institutions of Kosovo under the Constitutional Framework have done little to emphasize the interconnection between human rights and the right to development. Realization of the human rights as overall universal values could have led to the improving the overall economic situation and with it contribute to the improvement of interethnic relations which have been shattered as consequence of the conflict. Only cataloging of rights in a legal document without their actual implementation in practice gives the impression that international community is just fulfilling the international obligations not the needs of citizens. Indeed, when evaluating the implementation of human rights and with it the right to development the overall political and security environment under which UNMIK operated needs not to be underestimated. The founding political document of Kosovo statehood the Comprehensive Proposal for the Kosovo Status Settlement (Proposal for Kosovo Status Settlement, 2007) that provided for 'supervised independence' is a political settlement with the strong guarantees to the rights of minority communities in order for their rights and interests be protected under the new Kosovo authorities. The catalogue of rights listed in the Ahtisaari plan exceeds the rights provided by the European Convention for Human Rights (European Convention, 1950) and Council of Europe Framework Convention for the Protection of National Minorities (Council of Europe, 1995). The overall aim of the Ahtisari Plan was to create a state of citizens, where political loyalty and collective identity is generally directed towards a political community, pluriethnic, and a state that provides equal treatment and freedom for all. These values have been reflected on the key dimensions of the state of Kosovo: (1) The Constitution of the Republic of Kosovo; (2) Kosovo's political system; (3) state symbols; and (4) public culture, which have specified further in other legal acts after the declaration of Kosovo independence. However this document does not mention the right to development as a human right for all the citizens of Kosovo. Infusion of human rights values and equality for all by international presences through the legal and political settlements provides for particular constitutional and political order for reorienting the loyalty of citizens

towards the newly established Kosovo authority. However in practice this ethnic centered human rights guarantees have caused much division among communities and it is questionable if these political and legal set up creates conditions to enable people to live together peacefully. With the declaration of the independence the human rights and rights of communities in Kosovo are explicit constitutional category (Kosovo Constitution, 2008). Chapter II of the Kosovo Constitution provides for Fundamental rights and freedoms, and Chapter III for Rights of Communities which enumerate an extensive list of human rights. Despite long list of enumerated human rights, the right to development as a human right has not been provided. Moreover, in the Article 22 of the Kosovo Constitution that provides for Applicability of International Agreements, the main international human rights treaties have been listed as being applicable excluding only the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966).

The 1986 Declaration for the Right to Development is not listed either as applicable document. The drafters of the Kosovo Constitution when excluding this international document from the list of implemented treaties considered the fact that Kosovo as a new state will not be able to accommodate the rights listed in the covenant considering the very nature of the economic, social and cultural rights. Therefore, realization of the right to development through interpretation of the existing human right standards becomes an imperative for enhancement of this right. Kosovo Constitution, like all constitutional documents it is open to interpretations. If the human rights enumerated in the Kosovo Constitution are read with other applicable instruments, i.e. the Universal Declaration of Human Rights, the Covenant on Civil and Political Rights, European Convention on Human Rights, result in the realization of the right to development in practice. Additionally, the realization of the right to development as a human right can be further enhanced through overall implementation of the extensive legislative framework which was adopted in order to further strengthen implementation of specific rights.

Implementation of the Law on Ombudsperson (Law on Ombudsperson, 2015), Law on the protection from discrimination (Antidiscrimination Law, 2015), and Gender Equality Law (Law on Gender Equality, 2015) that provide for human rights equal protection for all and offer for mechanisms of redress will result with the realization of the right to development as a realistic and existential need of society and support in overcoming divisions and enhance the peace building and state building processes.

4. Conclusion

From the above discussion it can be concluded that although first the international community and latter Kosovo authorities have ensured the legal entrenchment of very high human rights and community rights they did not however guarantee the right to development as a human right. The modalities for infusion of the human rights in post conflict Kosovo was done through its newly established legal framework and political settlements as a part of peace and state building processes. This conception of rights and its weak implementation in practice reflects political compromises for undergoing transition and establishment progressive legal foundations for Kosovo's statehood. Peace and state building will be compromised without the genuine commitment by the authorities -be that international or local- to meaningfully to embrace human right as an existential necessity for Kosovo society to break with its violent past and to overcome the transition. Kosovo society has undergone through the very traumatic experiences characterized with human and economic loss, the realization of the right to development is a must in order to enhance the individual and collective development. The interpretation of the of the right to development as a human right using the current legal set up is of particular relevance in the process of overcoming the transition, it assist the process of Kosovo membership to international human rights covenants and attaining its membership in international and regional organizations.

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