

Misappropriated Development: Exploring Accountability as the Rate-determining Step to the Realisation of the Right to Development in Select African Countries

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Abstract

The right to development seeks to provide the enabling environment for the participation, contribution and well-being of persons in their freedom to enjoy their socio-economic development. The realisation of the right to development, therefore, imposes a duty on the state to ensure that the basic needs of the people are met without any impairment. The challenge in promoting the quality of life of the people as envisaged in the right to development often falls on a strong public service where accountability is a core component. Misappropriation of allocated funds, especially in the public sector, results in misgovernance of the institutions of state. Africa also struggles with the misappropriation of public funds, which hinders the provision of basic goods and quality services for the well-being of the population. Accountability, therefore, is the rate-determining step to the social, economic, political and cultural development of the people. In this article, the concept of the rate-determining step seeks to eliminate the challenges to the process of development to engender social transformation, with specific reference to Nigeria and South Africa. Rampant corruption and misgovernance in many provinces, especially the Free State, undermine South Africa's strength in fulfilling its development plans. Nigeria is an oil-rich country, yet the region where the oil is produced remains impoverished. This article focuses on accountability as the essential element in curbing misgovernance and misappropriation and examines the development agenda of these regions and the rate-determining step to the realisation of these development objectives, with a view to advancing a development model that puts the individual at the core of its development programmes and processes.

Keywords: rate-determining step; right to development; accountability; socio-economic development; corruption; misgovernance and misappropriation

Introduction

In recent years, the understanding that development is about people has gained traction in international human rights law. That people must benefit from the development process is aptly captured in the United Nations Declaration on the Right to Development (UNDRD) in Article 2, which provides that ‘the human person is the central subject of development and should be the active participant and beneficiary of the right to development.’¹ Accordingly, it is vital for development to include the human persons as resources and drivers to accelerate the process of development. The provisions of the UNDRD, though adopted five years after the African Charter on Human and Peoples’ Rights (‘African Charter’),² have provided content to the Right to Development (RTD) and supplemented the provisions of the African Charter. The African Charter was the first international human rights instrument to provide for the right to development in terms of Article 22:

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.

States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

The nature of this provision is such that it places a deontological duty on states individually or as a collective to realise the RTD. Although there is no comprehensive notion as to what the RTD should constitute, there are nonetheless, three distinguishing aspects that can be discerned from the text. The first relates to the economic development of the people through improvement and growth in an adequate standard of living that is inter-generational³ and the right to an occupation, profession or trade⁴ for self-actualisation. Secondly, it is also clear from the provision of Article 22 that the social dimension must include the well-being of the people. Implicit in social development is the right to social protection and access to social security. Social distress is caused by misappropriation of public funds, violence and corruption that has an impact on personal well-being. The cultural dimension stresses the importance of protecting the traditions, culture of, and respect for indigenous groups. Participation in one’s cultural and linguistic or religious community is core to the realisation of the

1 UN Declaration on the Right to Development Art 2(1) adopted by the UN General Assembly 4 December 1986 at its 97th Plenary Meeting, 41/128.

2 African Charter on Human and Peoples’ Rights adopted in Nairobi, Kenya on 27 June 1981, OAU Doc CAB/LEG/67/3 rev.5; Christof Heyns and Magnus Killander (eds), *Compendium of Key Human Rights Documents of the African Union* (6th edn, PULP 2016) 29.

3 The Constitution of the Republic of South Africa 1996 s 24(a) as read with s 24(b).

4 *ibid* s 22.

RTD.⁵ A key aspect in the obligation of the state in the realisation of the RTD is the provision, use and management of resources for the benefit of the people, a duty that rests with public service administration.⁶ Misappropriation of public funds by government officials is widespread in many countries, both at national and local levels, which is detrimental to development.⁷ This is accompanied by a culture that nurtures misappropriation and embezzlement; tendencies that have no place in a modern democracy.⁸ On the other hand, maintaining accountable governance remains a challenge, which can be attributed to the fact that very few countries on the African continent criminalise the offence of misappropriation of public funds. To this end, holding public officials accountable for misuse, theft or misappropriation of public funds acts as a rate-determining step to the realisation of the RTD. The author argues that one of the reasons for the development deficit found in many countries on the continent, especially Nigeria and South Africa, which are the case studies in this article, arise from a lack of accountability in the use and management of public funds intended for the benefit of the well-being of the populace.

In the first instance, this article analyses the rate-determining step as a relevant tool in critically appraising the development trajectories and the intricate mix of developmental challenges, with reference to the Free State province in South Africa and the Niger Delta region of Nigeria. Secondly, the article examines the RTD as a means and end to protecting full freedom and participation in the development process. In the third place, the article explores how accountability faces a threat from the twin challenges of misgovernance and misappropriation in relation to specific development projects deliberately made defunct or unworkable through corrupt activities of government officials. Finally, the article draws on values implicit in environmental, social and governance issues as an option to redirect the development agenda of the two most important economies of the continent, with a view to removing the weakest link in the development process.

5 *ibid* ss 30 and 31.

6 The Public Administration Ministry or Department in most countries was created to assist the government in the effective governance of public funds. As a result, it is accountable to the people for service delivery. At the global level, the United Nations annually convenes Sessions of the Committee of Experts on Public Administration between March and April at the UN Headquarters in New York. The 18th CEPA Session was chaired by former South African Minister for Public Administration, Geraldine Fraser-Moleketi in 2019.

7 Paul D Ocheje, 'Norms, Law and Social Change: Nigeria's Anti-Corruption Struggle 1999–2017' (2018) 70 *Crime Law, Social Change* 363–381.

8 Bartholomew Ugwuanyi and Ralph Nwokedi, 'Prebendalism as the Albatross to Democratic Practice and National Development in Nigeria: A Critical Discourse' (2015) 9(4) *Journal of Policy and Development Studies* 18–31.

Realisation of the Right to Development in Africa: Are We Making Any Progress?

The high level of misappropriation of funds leading to maladministration contributes to under-development, inequality and poverty as evidenced from the situations in the Free State province of South Africa and the Niger Delta of Nigeria. The progress is slow and the development trajectory of these two countries has serious relevance to the enjoyment of all human rights and freedoms encapsulated in the RTD.

The RTD is an expansive right contained in the African Charter.⁹ The import of these provisions often appears lost on key actors in government because it did not explicitly lay down the substantive content or principles to guide the interpretation of the right. It is also clear that from an African perspective, the African Charter is global in outlook with core elements that resonate with international human rights law. The principles laid down in the RTD provide the basis to set out the fundamental premise on which the RTD stands as an inalienable and universal human right, entitling every human being to participate, contribute to, and above all, enjoy socio-economic rights and freedoms. Article 1(1) of the UNDRD provides:

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 realized.¹⁰

The UNDRD provides an explicit articulation of the RTD, although it remains soft law. Notwithstanding that the content and nature of the right remain controversial at the global level, developing countries claim the RTD as a right for individuals and groups as a collective right.¹¹ The development challenges of the developing countries has necessitated the conceptualisation of development as a right since the 1970s by its main proponent, Senegalese jurist, Kéba M'baye, who demanded equitable development to place developing countries on the same level as the rest of the world.¹² Ultimately, the goal of the right to development is the improved well-being of the people, the attainment of better living standards and the enjoyment of all freedoms. Consequently, the African Charter imposes an obligation on states to ensure development based on participation,

9 Heyns and Killander (n 2) 29.

10 UN Declaration on the Right to Development art 1(1) adopted in terms of Res 41/128 adopted at the 97th Plenary Meeting on 2 December 1986, New York, USA.

11 Carol Ngang, Serfes Kamga and Vusi Gumede, 'Introduction: The Right to Development in Broad Perspective' in Ngang, Kamga and Gumede (eds), *Perspectives on the Right to Development* (PULP 2018) 1.

12 Declaration on the Establishment of a New International Order, UNGA Res S-6/3201 (1 May 1970).

transparency, equity, non-discrimination and accountability.¹³ Thus, the RTD requires that the state creates an environment that enables the fulfilment of the basic needs of its people.

In African countries, many development plans have failed due to the misappropriation of allocated funds for development. This has undermined the socio-economic development of the people, devalued their inherent dignity, and by implication, negatively affected their development. Development is a process that requires specific steps for its realisation. The second paragraph of the Preamble to the United Nations Declaration on the Right to Development ('UNDRD') provides:

Development is 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.

Clearly, from the above, development is not a once-off event but continually builds on specific aspects of peoples' lives with the goal of constantly improving them. Development is a process that seeks to ensure the overall well-being of the people and the right to development underscores the enjoyment of all rights and freedoms embedded in the human persons as the beneficiary of development.¹⁴ In other words, development broadly encapsulates the social, economic, political and cultural development¹⁵ with the ultimate goal being to ensure human development or improve the well-being of people. In recent times, development is no longer solely associated with national economic growth but also involves participation, contribution and empowerment. The underlying principle of this shift is the capacity of people to have agency over their process of development. According to Todaro and Smith,¹⁶ a development strategy that merely supports economic and political stability without any improvement in the quality of life is fundamentally inappropriate.

The rate-limiting step¹⁷ therefore, becomes a theoretical analytical tool to highlight the necessity of removing anything that reduces or impedes the speed of the development process. Both Nigeria and South Africa were impacted by colonisation and should thus

13 *Centre for Minority Rights Development and others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case) para 277.

14 Ministry of Development Planning and Statistics, 'Qatar National Vision 2030 Right to Development' Report of Qatar Fourth National Human Development (2015) 13.

15 UN Declaration on the Right to Development (UNDRD) Preamble para 2.

16 Michael P Todaro and Stephen C Smith, (2003) *Economic Development* (8th edn, Pearson Education Asia) 16–17.

17 KW Mak Kendrew, Chang Wingfat and others, 'Probing the Rate-Determining Step of the Claisen-Schmidt Condensation by Competition Reactions' (2007) *Journal of Chemical Education* 1819–1821.

strive for a developmental state. Exacerbating this in South Africa, was apartheid, which was characterised by a system that excluded the majority in many respects and violated the human rights of more than eighty per cent of its people. To engender equal development, equality,¹⁸ dignity¹⁹ and freedoms²⁰ become values as well as rights enshrined in the Constitution. It is common knowledge that the constitutional agenda seeks to transform society and advance development through social justice and the realisation of socio-economic rights. It is, however, noteworthy that more than twenty-five years into the South African democracy, inequality and poverty remain intractable, jeopardising the development process. The majority of people in the country do not have access to housing, water and sanitation.²¹ Intricately linked to these persisting challenges are corruption and mismanagement that pose a serious threat to development.

Likewise, the key elements of development such as well-being, participation and benefit are notably absent in the strategies of the institutional agencies established for the development of the Niger Delta. It is therefore evident, that from the onset, the intention for that region was to exploit and seize natural resources, with the complicity of the government. Therefore, for more than five decades, no effective strategy or regulatory mechanism was put in place for development in the region, resulting in massive mismanagement of funds and corruption.²² It is clear that development requires clear lines of accountability with appropriate systems and the consistent and fair application of rules. According to Booth, there are three specific markers: policy content, an approach that matches the content, and a political settlement that measures development.²³ According to him, these three aspects are inter-dependent and more importantly, the political settlement requires leadership, without which the policies become undeliverable. Sengupta also made similar statements where he explicitly supports development as a process that requires appropriate policy content.²⁴ For the people on the continent and the path of development envisaged, only the principles embedded in the RTD will effectively address the issues of maladministration, misgovernance, and misappropriation, particularly in the public sector.

18 Constitution of South Africa s 9.

19 *ibid* s 10.

20 In terms of the Constitution, freedom and security of the person (s 12), freedom of religion, belief and opinion (s 15), freedom of association (s 18), freedom of movement and residence (s 21), and freedom of trade, occupation and profession (s 22) are guaranteed.

21 In the Free State, a number of municipalities are unable to provide basic services to the people and in communities such as those of the Setsoto Municipality, people still use the bucket system.

22 Nicholas Shaxson, *Poisoned Wells: The Dirty Politics of African Oil* (Palgrave Macmillan 2007).

23 David Booth, *Missing Links in the Politics of Development: Learning from the PRSP* (Overseas Development Institute 2005) 1–10.

24 Arjun Sengupta, 'Conceptualizing the Right to Development for the Twenty-first Century' in *United Nations Realizing the Right to Development: Situating the Right to Development* (2013) 67–87; 83.

The realisation of all human rights and freedoms, as stipulated in the RTD, face a number of obstacles such as the constituent nature and content of this right. Article 2 places the human person at the centre of development and the direct beneficiary of development.²⁵ The development process in the Niger Delta for instance, has neglected to place the human person at the centre of development. The development process must ensure the following: respect for all human rights, respect for the right of participation and the promotion of social justice, whilst placing the human person at its centre.²⁶ Above all, the right to development places the primary responsibility of realising the RTD on the state at the national level but also through appropriate international policies and international cooperation.²⁷ The RTD, therefore, creates active participants in the development process with greater legitimacy to demands, which will ultimately require accountability from all actors in the development process. Hence, the importance of the right to development as a critical and useful tool in eliminating the rate-determining step to its realisation on the African continent.

South Africa and Nigeria are major players in the political and economic spheres of the continent, yet their capacity to promote the RTD falls short. One of the reasons could be found in their constitutions. In Nigeria the domestication of the African Charter in full in terms of Cap 10 Laws of the Federation of Nigeria 1990 (as amended), guarantees the RTD. In addition, the derivation principle was stipulated as a means to encourage development, particularly in the Niger Delta region where about ninety-five per cent of Nigeria's oil is located. The derivation principle refers to a set value in percentage of collected revenue derived from a state and returned to the state as a form of compensation for its contribution to the federal finances.²⁸ By declaring the oil and gas derived from the Niger Delta a 'special development zone' was a recognition of its complex landscape and the centrality of the region to the Nigerian economy. Although a constitutional principle²⁹ as well as a fiscal tool, the derivation principle is susceptible to political interference or manipulation.³⁰ The resulting effect is that the percentage allocation has always been inconsistent, making it impossible to create an appropriate development programme for the Niger Delta, in contrast to other oil-producing areas of the world. The Niger Delta resource governance is characterised by corruption,

25 UN (n 15) Art 2 (1).

26 Laure-Hélène Piron, 'The Right to Development: A Review of the Current State of the Debate for the Department for International Development (The Report Commissioned by DFID, Social Development, Department) 9–14); Hespina Rukato, 'The Right to Development and Poverty Eradication in Africa' in Ngang, Kamga and Gumede (eds) (n 11) 366.

27 Ngang, Kamga and Gumede (n 11) 10.

28 Zacchaeus Adangor, 'The Principle of Derivation and the Search for Distributive Justice in the Niger Delta Region: The Journey So Far' (2015) *Journal of Law, Policy, and Globalisation* 115–133.

29 Constitution of the Federal Republic of Nigeria s 162(2). The percentage allocation was 100 per cent 1953–1960, fifty per cent in 1960, forty-five per cent in 1970 and a paltry three per cent 1992–1999.

30 Francis Oluleye and Kunemoemi Zacchaeus, 'Revenue Allocation and the Quest for Economic Development in Nigeria' (2019) *Saudi Journal of Economics and Finance* 435–441.

misappropriation and lack of accountability and the development projects initiated in the region through the various commissions do not always have the consent of the people, which accounts for the large number of unfinished, abandoned or inadequately planned projects. Additionally, the failure of the Nigerian government to protect the socio-economic rights of the people of the Niger Delta became the rallying point against prebendalism³¹ or misappropriation within state institutions. For instance, the Interim Management Committee managing the Ministry of Niger Delta Affairs, which was specifically created to manage the affairs of the Niger Delta is technically dormant. Within three months, the committee allegedly mismanaged about USD10.46 million and misappropriated N40 billion (naira).³² Evidently, in July 2020 during a probe into the operations of the Development Commissions, the Niger Delta Development Commission (NDDC) and the Ministry of Niger Delta Affairs, it was found that these agencies made extra budgetary expenditure amounting to about N4.923 billion for staff and contractors in breach of the procurement process and approval. The Senate probe decided that these agencies must refund the overspent monies, which was in excess of USD8million.³³ For Nigeria's Niger Delta, the contrast of enormous wealth versus abject poverty, coupled with poor governance, are indicative of institutional failure that threatens the people's sustainable socio-economic development.

In South Africa, a similar pattern of wasteful expenditure and misappropriation of public funds came to the fore during the Zondo Commission's investigation of the so-called phenomenon of 'state capture' during President Jacob Zuma's reign. During the hearing, Justice Raymond Zondo decried the exclusion of ordinary people from economic empowerment, when the Free State government paid roughly half a billion rand to contractors who failed the Estina Dairy Farm project, in the town of Vrede.³⁴ In the Free State province, the Department of Agriculture concluded an agreement with an Indian company, Estina and a South African company, Paras. The project was intended to benefit about 100 farmers having a fifty-one per cent stake in the R570 million business, with South Africa having a forty-nine per cent share equalling an investment to the amount of R228 million.³⁵ Further, the failure to remove asbestos roofing in Free State

31 Richard Joseph, 'Epilogue: The Logic and Legacy of Prebendalism' in Wale Adebani and Ebenezer Obadare (eds) *Democracy and Prebendalism in Nigeria: Critical Interpretations* (Palgrave MacMillan 2013) 261–279.

32 Solomon Ayodo, 'Senate Stakeholders Meet Over Alleged N40bn Misappropriation in NDDC' *Business Day* (9 July 2020) <www.businessday.ng/news/article/senate-stakeholders-meet-over-alleged-n40bn-misappropriation-in-nddc> accessed 11 September 2020.

33 'Interim Management Committee of the Niger Delta Commission Chair – Prof Kemebradikumo Pondei Accused of Financial Recklessness' *Sahara Reporters* (23 July 2020).

34 'Free State Corruption may have been replicated in all Provinces, Says Zondo' *Africa News Agency* (23 September 2020) <iol.co.za/news/politics/free-state-corruption-may-have-been-replicated-in-all-provinces-says-zondo-33e1f849-cba3-480e-bcbb-19cdf7dc131> accessed 9 July 2021.

35 Report of the Public Protector South Africa, 'Investigation into Complaints of Maladministration against the Free State Department of Agriculture in Respect of Non-Adherence to Treasury Prescripts

communities points to another example of short-changing the people and enriching those in control.³⁶

Evidently, the South African developmental plan focuses on the notion of a developmental state,³⁷ and in this article it is argued that this plan ignores the vital ingredient to advance the right to development. The current framework focuses on establishing a ‘capable state’ without taking into account the centrality of the human capital as driver of development.

The development agenda created in these countries has persistently excluded the material aspect of a twenty-first century development model, which embodies the constant improvement of wellbeing embedded in the right to development.³⁸ Undeniably, the common heritage inherent in the right to development in terms of the African Charter faces an uncertain future as this vicious cycle of mismanagement hampers any effort at improving the socio-economic development of the people, which is underscored by the lack of accountability for mismanagement of funds and demands a significant shift in the development model by focusing on the RTD. Presently, this persistent misappropriation is the rate-determining step to the realisation of the RTD on the African continent as seen from the examples of the Niger Delta and the Free State province. The elements of the RTD as enunciated in the *Endorois* case, is vital for a significant shift towards a development agenda that puts people first on the continent.

The Rate-determining Step: A theoretical Analysis

The ‘rate-determining step’ (RDS) or rate-limiting step (RLS)³⁹ is a theoretical framework used mainly in chemical sciences, though its use to explain certain phenomena can be found in other disciplines. This step is the slowest rate in the process chain and also the most important step in the various reaction steps that lead to the production of a desired product.⁴⁰ To ensure progress, it is vital to remove a bottleneck that may exist, in other words, the slow step that is controlling the speed of the entire process. This article draws on the concept of the RDS to highlight the intractable

and Lack of Financial Control in the Administration of the Vrede-Integrated Dairy Project’ Report of the Public Protector (2017/2018) 3.

36 *Africa News Agency* (n 34).

37 National Planning Commission NDP2030.

38 Obiora Chinedu Okafor, ‘A Regional Perspective: Art 22 of the African Charter on Human and Peoples’ Rights’ in *United Nations Essays in Commemoration of 25 years of the United Nations Declaration on the Right to Development* (2013) HR/PUB/12/4 373–383; 380.

39 Mak Kendrew (n 17) 1819–1821.

40 ‘Rate Laws in Kinetics’ <<http://ch302.cm.utexas.edu>> accessed 1 March 2021.

challenges to the development process in Africa but more specifically in the Niger Delta and the Free State province.

The Free State province consists of eleven municipalities, all of which underwent a qualified audit for the 2019/2020 financial year, according to the Auditor-General.⁴¹ Lack of accountability in the province undermines service delivery, leads to disrespect for regulations and the mismanagement of resources, that impacts mainly on the poor. South Africa recorded more than 900 service delivery protests within six months.⁴² In addition to poor service delivery that public officials hardly take responsibility for, unaccounted-for funds such as fruitless and wasteful expenditure add to the woes. For example, about R22 billion in unauthorised expenditure and R26 billion in irregular expenditure added up to a cumulative irregular expenditure of R79.22 billion.⁴³ Poor accountability practices erode the socio-economic development of the people and undermine their well-being due to the failure of the ethical obligation imposed on public service administrators. Accountability serves as the RDS in the realisation of the right to development. According to the South African Auditor-General, lack of decisive leadership and poor accountability practices remain a contributory factor to the poor services faced by people in the Free State province.⁴⁴ Further, the missed opportunity to demonstrate responsive and ethical governance required at a time of crisis exacerbates an already bad situation. Allegations of misappropriation of funds made available to municipalities for the Covid-19 response in the Free State as well as across the country abound. By 31 March 2021 in terms of the real time audit, municipalities had spent about forty-two per cent of the R23.937 billion with about R14.4 billion already spent by the municipalities.⁴⁵ Notwithstanding this revelation from the audited report, few public service officials have been charged with the offense of misappropriation of funds.

Another allegation that surfaced in 2021, was that about R1 million landed in the family business of the former South African Minister of Health (Digital Vibes).⁴⁶ These funds had been allocated for communication on the Corona Virus to ensure the health, safety and well-being of South Africans during the pandemic, but ended up in private

41 2019-2020 Municipal Financial Management Media Release by Auditor General, Maluleke on 30 June 2021.

42 Guy Martin, '900 Service Delivery Protests in South Africa in Just Over Six Months' (20 April 2021) <www.defenceweb.co.za/featured/900-service-delivery-protests-in-southafrica-in-over-six-months> accessed 2 December 2021.

43 2019-2020 Municipal Financial Management Media Release by Auditor General Maluleke on 30 June 2021.

44 *ibid.*

45 *ibid.*

46 The report on the misappropriation of funds linked to Digital Vibes has been submitted to the President and he is yet to make public his decision on the report.

pockets.⁴⁷ Clearly, this failure resulted in the inability of the Department of Health to disseminate information on the pandemic to the population, negatively impacting on its health and well-being. One of the challenges regarding the ‘misappropriation of funds’ is that it is a term not properly formulated in the Prevention and Combating of Corrupt Activities Act 12 of 2004 or the Public Finance Management Act 1 of 1999. In terms of sections 3 and 4(2) of Act 12 of 2004, the provisions concern public officers abusing their authority by gratification for their benefit or the benefit of others. This formulation makes it difficult to hold any official specifically accountable for misappropriation of funds. More so, there is no explicit inclusion of misappropriation as an offence falling under corruption, but rather an umbrella term that refers to corruption-related activities is employed. I argue that this formulation lies at the root of the lack of accountability by public office holders.

Similarly, in the Niger Delta region, the massive misappropriation of funds allocated for development, has left the region in a state of devastation, degradation and perpetual conflict.⁴⁸ This situation is continuing, despite the region being the fiscal basis of the Nigerian economy for more than five decades. Different governmental institutions established within this period such as the Oil and Mineral Producing Development Commission (OMPADEC) and the Niger Delta Development Commission (NDDC) have failed to make significant impact on the socio-economic conditions of the people, despite the allocation of funds to accelerate development in that region.⁴⁹

Although the Special Investigating Unit of South Africa (SIU) is currently prosecuting cases of misappropriation by way of a Special Tribunal, there remains an incapacity to halt the drain on the Treasury.⁵⁰ It is clear that the lack of progress in meeting development goals in the regions under review is the result of bottlenecks in the system that prevent the law from working optimally by holding individuals accountable.⁵¹ What remains unclear is the requisite understanding of the impact of misappropriation and misgovernance in weakening states’ capacity to realise its objectives in establishing a

47 Greg Nicolson and Bheki Simelane, ‘Ace Magashule Questions Whether Former assistance has Actually Turned State Witness’ <Dailymaverick.co.za/article/2021-08-11-ace-magashule-questions-whether-former-assistant-has-actually-turned-state-witness> accessed 11 August 2021.

48 Cyril I Obi, ‘Oil Extraction, Dispossession, Resistance and Conflict in Nigeria’s Oil-Rich Niger Delta’ (2010) 30(1–2) *Canadian Journal of Development Studies* 219–236.

49 Fidelis Paki and Kimiebi Ebienfa, ‘The Oil and Development Deficit in Africa: The Failure of Intervention Agencies in Nigeria’s Niger Delta’ (2011) *International Journal of Business and Social Science* 138.

50 The South African Special Investigating Unit is currently investigating misappropriation, fraud and corruption in the amount of R13.3 billion from 2020 in relation to personal protective equipment (PPE), food parcels, etc.

51 Paki and Ebienfa (n 49) 136–138.

responsive, ethical and accountable developmental state. Hence, the need to eliminate the determining step that affects the speed of development.

Misgovernance and Misappropriation: Complicit in Weakening State Capacity

In public office, accountability for the use and management of funds should be unambiguous in terms of its formulation and operation. This is vital for the management of resources available for the progressive realisation of the socio-economic development of the people, because institutions of the state are established to provide services in the interest of the people. In other words, governance is an enterprise located within the public service intended to exude the hallmark of ethics, accountability and integrity. It is now commonplace to find that in many countries in Africa and around the world, the ethics and integrity of public office are largely compromised due to misappropriation of public funds.

Misappropriation is a well-known concept in the public service, yet it has become a challenge that defies specific definition. Posner refers to misappropriation in intellectual property to describe a fluid movement between protectable ideas and the use of a similar idea that deprives the original owner from benefits.⁵² In his explanation, Posner underscores the seamlessness that has become largely undetectable in cases of misappropriation, particularly on the African continent. The Republic of Cameroon for instance, is one of the few countries that have specifically criminalised misappropriation in terms of section 184 of the Penal Code.⁵³ It was necessary to use the term ‘misappropriation’ to clarify that it involves public funds or public property. The primary objective of its criminalisation is to promote and protect the integrity of public office and those who occupy it or conduct business on behalf of the state. Other forms of unauthorised use of public funds are embezzlement, patronage, rent seeking, bribery and clientelism; sometimes they fall under the more general term of corruption. The resultant effect of misappropriation is misgovernance or maladministration where unethical practices or conduct, procurement transgressions and other service delivery complaints contribute to the weakening of state institutions to the detriment of public interest. Corruption is a governance issue because it adversely affects the ability of state institutions to effectively serve the public, thereby undermining the rule of law and democratic governance. Chaskalson, in support of this point aptly said:

Corruption and mal-administration are inconsistent with the rule of law and the fundamental values of our constitution. They undermine the constitutional commitment

52 RA Posner, ‘Misappropriation: A Dirge’ (2003) 40 *Houston Law Review* 621.

53 Avitus A Agbor, ‘Prosecuting the Offence of Misappropriation of Public Funds: An Insight into Cameroon’s Special Criminal Court’ (2017) 20 *PELJ* 1727–3781.

to human dignity, the achievement of equality and the advancement of human rights and freedoms. They are the antithesis of the open, accountable democratic government required by the Constitution. If allowed to go unchecked and unpunished they will pose a serious threat to our democratic state.⁵⁴

It is not only state institutions that bear the consequences of corruption, but also the people who are caught in the middle. In Nigeria for instance, a 2019 report showed that incidents of bribery occurred more than seventy-five per cent of the time, with direct offers of bribery accounting for sixty per cent of all transactions whilst indirect bribery offers stood at twenty per cent and spontaneous payments to facilitate procurement for any procedure at eight per cent.⁵⁵ Evidently, socio-economic development of the people remains at a crisis point due to the high levels of misappropriation, misgovernance and all other forms through which public funds or property are siphoned into private use. A much more aggressive approach is needed to deal with this social menace.⁵⁶ The Niger Delta region is an example of a recurring cycle of under-development caused by misgovernance, embezzlement and misappropriation resulting in violence and conflict that has aggravated many lives without recourse to the law.⁵⁷ Similarly, the state capture report on the Estina-Vrede project in the Free State province⁵⁸ and the subsequent inquiry in South Africa have revealed wastage and misappropriation in public service spanning decades, resulting in the inability of state institutions to alleviate the persistent poverty and inequality of the majority of people in the country. The South African position is worrisome given the exclusion and marginalisation during the apartheid system, by excluding Blacks from White urban areas, which affected socio-economic development. It was, therefore, vital for South African society to foster inclusive development and the ruling African National Congress (ANC) sought to achieve this priority goal through its first policy named the ‘Reconstruction and Development Programme.’⁵⁹ Unfortunately, the transformation agenda that seeks inclusive development is heavily under threat due to misgovernance and corruption bedevilling the public sector in South Africa. In the Free State province for example, the former Premier and fifteen others, including former Mayor of Mangaung and the Head of

54 *The South African Association of Personal Injury Lawyers v Willem Hendrik Heath, Special Investigating Unit, President of the Republic of South Africa and the Minister of Justice* CCT 27/00 (28 November 2000).

55 Yemi Kale and Oliver Stolpe, *Corruption in Nigeria: Patterns and Trends, Second Survey on Corruption as Experienced by the Population* (United Nations Office for Drugs and Crime (UNODC) December 2019).

56 Leena Koni Hoffman, Raj Patel and Paul Arkwright, ‘Collective Action on Corruption in Nigeria: A Social Norms Approach to Correcting Society and Institutions’ *Africa Programme* (Chatham House 17 May 2017) 2.

57 Obi (n 48).

58 Report of the Public Protector (2017/2018) (n 35) 31.

59 Khotso De Wee, ‘South Africa’s Democratic Transformational Agenda: A Personal Encounter (2016) 4(2) Africa’s Public Service Delivery and Performance Review 209–226, 211.

Department of Human Settlements are on trial for corruption, fraud and misappropriation of public funds to the amount of R255 million earmarked for the assessment and removal of asbestos roofs and housing.⁶⁰

Evidently, there is a correlation between government accountability failures and development, given the performance of the public service as the powerhouse for development, in virtually all spheres of government, which is an indication of the rapacity in governance structures and the resulting operational and management problems.⁶¹ Corruption in Nigeria and South Africa operates on a grand scale and may be referred to as state capture⁶² wherein all spheres of governance are affected adversely.⁶³ The reach of misappropriation and corruption in governance ranges from undermining democratic values, the rule of law and good governance to distorting the representation of the people, thereby reducing accountability in the legislative sphere. The effect of unbridled misappropriation impacts negatively on the process of development and has the potential of plunging a country into an unrelenting cycle of institutional collapse.⁶⁴

In over twenty-five years of South African democracy, inequality and poverty remain intractable, jeopardising the developmental state agenda as encapsulated in the National Development Plan (NDP 2030).⁶⁵ The NDP 2030 envisages a capable state that is people-driven and yet, the majority of the people in the country do not have access to housing, water and sanitation.⁶⁶ According to the report of the South African Public Protector, the misappropriation and mismanagement of public funds from this project was enormous and had an adverse effect on the growth of the economy of the country through loss of government revenue, while the beneficiaries were a ‘ghost list’

60 Alex Mitchley, ‘Ace Magashule’s R255m Asbestos Tender Case Postponed’ <News24.com/news24/southafrica/news/ace-magashule-r255-million-asbestos-tender-case-postponed-2010811> accessed 2 September 2021.

61 Glen Hollands, *Corruption in Infrastructure Delivery in South Africa: A Case Study* (Mbumba Development Services 2007) 52; Abhijit V Banerjee, ‘The Theory of Misgovernance’ (1997) 112(4) *The Quarterly Journal of Economics* 1289–1332.

62 This term is referred to in the instance where economic elites or business persons develop relationships with political officials over whom they exert undue influence for their own personal gain. President Cyril Rampahosa was obliged to establish the State Capture Commission in terms of the recommendations of the former Public Protector, Thuli Madonsela, wherein Jacob Zuma (the President at the time) was implicated.

63 Samuel Mondays Atuobi, ‘Corruption and State Instability in West Africa: An Examination of Policy Options’ (Occasional Paper, Kofi Annan International Peace Keeping Training Centre December 2007) (KAIPTC) 1–24.

64 *Glenister v President of the Republic of South Africa and others* 2011 (3) SA 347 (CC) para 166.

65 South African National Planning Commission, *A Review of the National Development Plan 2030: Advancing Implementation towards a more Capable Nation* (2020) 5.

66 In the Free State, a number of municipalities are unable to provide basic services to communities such as the Setsoto Municipality, where people still use the bucket system.

developed to siphon off public funds.⁶⁷ The misgovernance of this project indicates the intricate play of misappropriation and its role in limiting the socio-economic development of the people. The inflated prices of infrastructure for the project amounted to R342million.⁶⁸ The Chief Executive of Finance of the Free State government at the time and other officials were responsible for the misgovernance and misappropriation of the Estina-Vrede project funds. The Secretary-General of the ANC, Ace Magashule was suspended in 2021, pending the outcome of a case of corruption against him and others relating specifically to this matter.

Similarly, in Nigeria, the N6trillion (equivalent of USD13bn) misappropriation at the Niger Delta Development Commission (NDDC) calls for accountability.⁶⁹ In the Niger Delta region, the NDDC advanced socio-economic development of the region and approximately 362 bank accounts exist as conduits for the payments regarding about 13 777 projects that were either abandoned or not executed by the contractors.⁷⁰ The Niger Delta region is at the centre of the oil and gas industry in Nigeria, producing about ninety per cent of the total export earnings of the country, yet the region is among the most impoverished parts of the country.⁷¹ Notably, misappropriation of funds, corruption, conflict and weak governance characterise the contradictions of poverty in the midst of wealth in the region.⁷² The Akwa Ibom, Bayelsa and Rivers states bear the consequences of enormous environmental degradation, under-development and poverty in the region.⁷³ The enormity of the challenges faced in the region indicates that at the institutional level, the intention of the structural design created for oil extraction was not to formulate any development agenda that would have promoted socio-economic development.⁷⁴ This is evident in the numerous development commissions established and that, in the last six decades, have failed to make any meaningful contribution to the lives of the people. The development commissions have, instead, become instruments to defraud, misuse and loot the common wealth and heritage of the region and its people. Clearly, the extent of the misappropriation and corruption confirms the resource curse thesis proposed by many writers in that the oil exploration in the region has failed to

67 Report of the Public Protector (2017/2018) (n 35) 17–18.

68 *ibid* 17.

69 Francis Ezedumo, 'Heads to Roll Over 6 Trillion Naira Misappropriation in NDDC, Buhari Vows' (2 September 2021) <<https://dailypost.ng/2001/09/02heads-to-roll-over-6-trillion-naira-misappropriation-innddc-buhari-vows>> accessed 4 September 2021.

70 *ibid*.

71 Nseabasi Akpan and Emmanuel Akpabio, 'Oil and Conflict in the Niger Delta Region, Nigeria: Facing the Facts' (2009) *Journal of Social Development* 9–35.

72 Paki and Ebiefa (n 49) 138.

73 Kaniye Ebeku, 'Assessing the Performance of the Niger-Delta Development Commission (NDDC) 2001-2020: Another Failed Dream' (2020) 3(3) *International Journal of Law and Society* 78–90.

74 Paki and Ebiefa (n 49) 135.

accelerate development.⁷⁵ In the efforts to express the need to set the Niger Delta on the path of sustainable growth, former Nigerian President, Olusegun Obasanjo⁷⁶ said the following two decades ago:

As we launch the master plan today, it is my abiding belief that we are also launching the commencement of a voyage of hope that will sail the Niger Delta past a legacy of Turbulence, neglect and poverty into an assured future as our nation's most peaceful, most Prosperous and most ecologically regenerative region by 2020.

Since this statement, no significant change has taken place in the region. Rather, misappropriation is institutionalised in the Niger Delta, contributing to weakness in the states' capacity to advance socio-economic development of the people, slowing the rate of development.

Exploring Accountability for Development

The definition of development is comprehensive according to the UNDRD.⁷⁷ Similarly, the right to development has been described as a sequence of rights capable of holding persons accountable where one aspect of a right is violated. It is, therefore, imperative that there is adequate redress through appropriate accountability mechanisms for violations of the right to development. Accountability and transparency are the elements that make up the content of the right to development as already alluded to in the *Endorois* case. In this case, the government of Kenya, without the participation of the affected people, sought to create an alternative development process by removing the people from their ancestral land and placing them on a government reserve. The actions of the government of Kenya in this instance were unethical and unresponsive to the well-being of this group of indigenous people. The lack of accountability and transparency in the process undermined the people's right to development. Key in holding government office-holders accountable for decisions include: consultation or participation, respect for regulation or laws, service standards and redress. These principles are also found in the Batho Pele principles developed by the former South African Minister for Public Service and Administration, Zola Skweyiya in 1997.⁷⁸ The core objective of these principles is to put people first in respect of service delivery, which provides an enabling environment for socio-economic development and by implication, the right to development. Accountability is at the root of the deontological

75 Alan H Gelb, *Oil Windfalls: Blessing or Curse* (Oxford University Press 1988); Michael Ross, *The Oil Curse: How Petroleum Wealth Shaped the Development of Nations* (Princeton University Press 2012); Shaxson (n 22).

76 AA Akinwale and E Osabuohien, 'Reengineering the NDDC's Master Plan: An Analytical Approach' (2009) 11(2) *Journal of Sustainable Development in Africa* 142.

77 UNDRD (n 15).

78 <www.gsdr.org/document.library/batho-pele-people-first> accessed 3 December 2021.

obligation imposed on the state for the overall benefit of the people. This can only be accomplished through an environment that is conducive, free from social distress and engendering social development that promotes well-being as well as governance that is respectful of the rule of law to enable the realisation of the right to development to flourish on the continent.

Conclusion

Accountability in public service is crucial for the realisation of the right to development. Misappropriation and the attendant misgovernance are two sides of a coin that has the potential to destroy the African continent by encouraging corrupt practices that contribute to the weakening of institutions that should be advancing development. Without core values of accountability such as respect for the rule of law, ethical governance underpinned by an enabling environment, social development and good governance, the right to development remains unrealisable. Corruption is slowing the speed of development in South Africa and Nigeria and by implication, the entire continent. The realisation of all human rights and freedoms underscored in the RTD remains under threat from misappropriation and maladministration of resources that are meant for the people. The Niger Delta region has remained a developmental challenge for virtually all the administrations in the history of Nigeria. For at least the past six decades, the region has battled with poor infrastructure, environmental degradation, lack of participation, and poverty that have contributed to a deterioration in development of the people of this region. The discovery of oil in the region is controversial and has had an impact on the entire social, political, economic and cultural spectrum of the country. Nigeria is a country battling with a resource 'curse', in the form of enormous capital having accrued to the country since the advent of the oil boom to the present. Yet, the Niger Delta remains pervasively poor and under-developed. From the time of the Niger Delta Development Board to the establishment of NDDC, there have been allegations of mismanagement, corruption and lack of participation from the people of the region in their own development. Further, the national and state laws have not held persons within the Commission responsible for gross abuse of office through corruption and mismanagement of funds. Clearly, the law is ineffective in appropriately dealing with these challenges because it has failed to identify, prosecute and punish those who have broken the law through corruption and mismanagement.

South Africa seems to understand the principles of the RTD, as evidenced in the Batho Pele principles of public service, as a vital tool in dealing with the socio-economic challenges of the majority. Yet, it is a country whose divisive nature prevents the closing of the gap between the different strata of society. The RTD provides for the active contribution and participation of persons in their development process in terms of Article 22 of the African Charter. The inability to frame the development challenges on the continent has resulted in persistent poverty and inequality in South Africa.

Corruption in all its forms continues to have a debilitating effect on the institutions of state. Poor levels of accountability on the continent cause corruption to thrive and the situation requires a significant shift in focus by governments of countries individually and collectively. The continent must undergo a culture change to augment pure capital power with human power, underscored by the principles of the RTD. I argue that well-being and adequate standards of living, underpinned by appropriate accountability practices, so vital to human development, are lacking in the development architecture found in the National Development Plans of many countries such as South Africa and Nigeria. Further, the governments hardly support accountability, even though anti-graft agencies of both countries have ostensibly taken steps to curb corruption. They, unfortunately, remain insufficient in eliminating the weakest link in the realisation of the RTD.

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