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Land Entitlement and the Right to Development in Lesotho

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Abstract

This article explores the question of land entitlement in Lesotho in relation to the right to development enshrined in the African Charter. The Charter guarantees that the right to development is to be achieved with due regard to ‘the equal enjoyment of the common heritage’. The article argues that land is a common heritage, which ought to be utilised in a manner that meets a people’s collective aspirations for socio-economic and cultural development. The article enquires how and to what extent the statutory and customary law regimes in Lesotho guarantee entitlement to the land as a common heritage, from the standpoint of law.

Introduction

This article explores the question of land entitlement in Lesotho in relation to the right to development, which – broadly defined in accordance with the United Nations Declaration on the Right to Development – guarantees to all peoples the right to self-determination and full sovereignty over their natural wealth and resources.¹ While land is incontestably a major natural resource, which all peoples ought to exercise full sovereignty over by virtue of the right to self-determination, the question of land entitlement in Lesotho has compounding challenges.² These challenges impact on the envisaged extent to which the right to development can be achieved in Lesotho, which remains one of the least developed countries in the world. Close to half (49.7 per cent) of Lesotho’s population of 2.2 million is multi-dimensionally poor,³ with

youth unemployment currently at 40 per cent.⁴ Largely dependent on subsistence farming and animal husbandry, Lesotho's economy weighs exceedingly heavily on a 'fragile rural base, which accommodates (but does not support) the bulk of the population', resulting in increased landlessness and impoverishment.⁵

Our aim with this paper is to draw attention to the statutory-law sanctioned shift towards liberalised landholding in Lesotho, as there is an inherent risk of dispossessing the Basotho people of their customary-law regulated entitlement to the land (ancestral common heritage) and, consequently, of depriving them of the opportunity to utilise the land as a major factor of production in realising their right to development. Drawing from the understanding that it is the state's duty to set the trajectory for development and to ensure its realisation as a matter of human right, we formulate the argument that a governance policy that guarantees communal entitlement to land in Lesotho is crucial, particularly because the land question is currently regulated by conflicting (communal and neo-liberal) regimes that legitimise structural imbalances and, accordingly, limit prospects for realising the right to development guaranteed to the Basotho people under the African Charter.

For purposes of clarity and proper understanding, it is worth highlighting that the concept of development as it is used in this article obtains not from the point of view of economics as entailing the pursuit of per capita income, GDP growth rate and market expansion, among other indices, but from a human rights perspective that envisages improved well-being and a better quality of life for humans, based on the enjoyment of basic rights and fundamental freedoms. From this viewpoint, since the 1990s (following the publication of the first UNDP Human Rights Report and other seminal publications), perceptions of development have increasingly shifted towards an emphasis on rights-based approaches to development.⁶ Indeed, contemporary framings of development delineate development as a human right.⁷ In the context of the African Charter, the right to development is always read in conjunction with the right to sovereign ownership over natural resources, which incorporates land, to which all peoples of Africa ought to enjoy equitable access if their right to development is to be achieved.

Under the Lesotho Constitution of 1993, all land is vested in the Basotho nation,⁸ which, when read in conjunction with the Land Act No. 8 of 2010,⁹ is understood from a Marxist point of view as guaranteeing collective ownership. Besides recognising the land as belonging collectively to the Basotho nation, the statutory law regime controversially also attributes to the land a free-market value as a commodity to be bought and sold.¹⁰ Contrarily, Lesotho customary law attributes value to the land exclusively as a communal legacy. Although entitlement to land under the customary law regime appears to be discriminatory and uneven, customary law, by default, provides more secure guarantees of sovereign ownership to the Basotho people than statutory law does. We suppose that the Basotho people would be more in favour of customary land tenure, which Noronha and Lethem define as 'the rules accepted by a group of the ways in which land is held, used, transferred, and transmitted'.¹¹ Against the backdrop of the national reform consultative process that is aimed at achieving structural transformation across all sectors of the political economy, with regard to the land question,

the Multi-stakeholder Dialogue that ended in November 2019 arrived at the decision to ‘retain the current [bifurcated] land tenure system’.¹²

This discussion is anchored on the assumption that, because customary and statutory laws both vest all land in the Basotho nation, land entitlement in Lesotho resonates with the common heritage principle embodied in the right to development enshrined in the African Charter on Human and Peoples’ Rights.¹³ Although the land component is not explicitly contained in the conception of the right to development, as a natural resource, it is read into the common heritage principle as a collective entitlement to be shared equitably for the attainment of socio-economic and cultural development. In principle, the statutory and customary law guarantees of collective entitlement to the land increase prospects that, if taken seriously, will lead to the realisation of the right to development in Lesotho. This is true in the sense that, with adequate support and investment in the development of their human capabilities, the impoverished rural population will be able to put the land at their disposal to more productive use and, consequently, improve their standard of living, quality of life, and well-being.

The right to development is, however, not enshrined in the Lesotho Constitution or any other domestic legislation, which makes the argument on land entitlement as a contributing factor to the realisation of the right to development a little convoluted. Nonetheless, Lesotho ratified the African Charter on 10 February 1992¹⁴ and is, accordingly, enjoined to ensure domestic enforcement of the provisions therein, including Article 22 on the right to development, which is envisaged to be achieved with due regard to ‘the equal enjoyment of the common heritage’. Although the vesting of land in the Basotho nation resonates with the common heritage principle, it is worth noting that customary land tenure unnecessarily limits women from equitable entitlement. Even though they make up over half of the country’s population, Basotho women, do not have equal access to land as a means of subsistence and a factor of production and, therefore, are hampered in terms of the extent to which they may contribute to the realisation of the right to development.

As at 2020, 70.97 per cent of the Lesotho population was predominantly rural.¹⁵ Although the rural population has, since time immemorial, been inclined to customary law practices that entitle them to land, by political design they have remained disadvantaged in terms of exposure to the opportunities for development that they ought to enjoy as a human right.

Given these apparent inadequacies, the reasoning articulated in this article is rooted in the political economy theory, which necessitates exploring how the government of Lesotho’s land governance policy impacts the human right to development that is owed to the Basotho people. Although subject to and informed by diverse ideologies (capitalist, socialist, and communist) as the context may necessitate, the political economic theory generally explores the relationship between a government and its people on the basis of enacted public policies.¹⁶ This article fleshes out the argument that land in Lesotho has, as far as history recounts, been perceived invariably as a communal legacy (common heritage), which necessitates a land governance policy that ensures not only equitable distribution but, importantly, also that the land is utilised optimally and productively for the realisation of the right to development as envisaged in the African Charter. In the conclusion, it is posited that, with respect to historical antecedents and contemporary arguments in favour of customary land tenure

practices, Lesotho's undertaking on the right to development obligates upholding the communal model on land entitlement.

The political economy of land governance in Lesotho

As highlighted earlier, land governance in Lesotho is regulated by the interwoven customary law and statutory law. These legal systems practically define the value attached to land and, hence, land use patterns; consequently, they also inform government's approach and strategies to utilising land for development. Parts IV & V of the Land Act of 2010 essentially carve Lesotho into a rural communal economy, and an urban neo-liberal economy. Meanwhile, under the customary law regime, land is perceived as an ancestral communal asset, as opposed to the neo-liberal market value attributed to it under statutory law. While the transition in terms of land governance, from the communal model under customary law to the commodification model under statutory law, may be justified for economic reasons, this paper contends that it perpetuates an approach to development that excludes the poor.

As Kumar and Maro point out, customary laws are regrettably, no longer '... as important today as they used to be as more and more of them are being replaced by the legislation'.¹⁷ Some scholars describe this phenomenon as a turn to 'neo-customary practices'.¹⁸ This article finds this subject position inappropriate for the reason that changes in customary law practices should not necessarily be viewed as neo-customary, which is essentially a neo-liberal perspective whereby land is stripped of its worth as a communal asset and given a market value and a price tag, which renders it a tradable commodity. When changes happen in statutory law, it does not become neo-statutory. It is, therefore, inexplicable that changes in customary law earn the description of neo-customary. Without proper reasoning, customary law may eventually be set aside, and the implication is that the predominantly impoverished Basotho people risk being robbed of their ancestral birthright to the land.

Customary law regulations on land entitlement

Prior to independence from British rule and the crown colony of Basutoland acceding to statehood as a political entity that became known as the Kingdom of Lesotho in 1966, the Basotho people existed as a nation. The land belonged to them and entitlement to it was governed by customs and traditional practices that were codified in 1903 into the Laws of Lerotholi.¹⁹ These laws legitimised the customary land tenure system, whereby the land could neither be bought nor sold, but was collectively utilised for livelihood and sustenance.²⁰ Section 7(1) of the Laws of Lerotholi mandates chiefs and headmen the discretionary power to make *gratis* allocation of land to their subjects in a fair, impartial and equitable manner, as was upheld in the case of *Nkhasi v Nkhasi*.²¹ Section 7(3) states that, in the event that allocated land is put to wrongful use or not utilised for two consecutive years, the allottee shall be dispossessed of

the land. Section 7(8) further assures that, except if it is in the public interest, it shall not be lawful to deprive any person of land that has been allocated to them.

Basotho customary law, which is entrenched in norms and practices that have been passed down from generation to generation, guarantees entitlement to land on the condition that the land is effectively occupied and put to productive use. In this way, customary law requires that land be utilised in a manner that guarantees socio-economic and cultural development benefits to the entire Basotho nation, which is, of course, a progressive approach in ensuring that no one is left behind – as is currently the principle under the contemporary global Sustainable Development Goals framework.²² Under Article 22 of the African Charter, development is conceived and guaranteed recognition and protection as a collective human right, which enjoins state parties to facilitate its realisation, including due regard to the equal enjoyment of the common heritage (land). It obligates Lesotho, as a state party to the African Charter, to adopt suitable policies to ensure equal entitlement to the common heritage, and that the Basotho people are equipped with the skills and the means to be able to put the land to productive use and reap the benefits of doing so.

Accordingly, land is not valued as a commodity with a market price tag (to be bought and sold) under the Basotho customary law regime; rather it is valued as a communal asset from which collective well-being and shared prosperity can be derived. Typical about Lesotho customary law is that it guarantees entitlement to use the land, but no absolute ownership of the land. Even as individuals and households are entitled to utilise allocated pieces of land for as long as they have need of it, the land customarily eventually reverts to communal ownership and, thus, provides a threshold starting point from which all Basotho people, including generations to come, could possibly propel themselves into the highest attainable standards of living and well-being. It is the duty of the state to ensure that this is achievable, and the government has a legal obligation to the Basotho people to do so. For all intents and purposes, it can be supposed that without the 98-year interval of colonial interruption by the British (from 1868 to 1966), and based on customary preconceptions, the Basotho nation would have evolved and developed the communal model on land governance, which would have uniformly shaped the country's development trajectory.

By codifying the Laws of Lerotholi as early as 1903, which meant making customary law the governing authoritative legislation to which recourse could be had in resolving disputes and matters of contention, Lesotho demonstrated evidence of a society regulated by the rule of law (including regarding the governance of land). According to Elizabeth Bunn (2000), the rule of law is a major guiding principle in actualising the right to development.²³ Upon independence from colonial governorship, in demonstration of the right to self-determination and in view of reclaiming and consolidating territorial sovereignty over the land, the government of Lesotho should have reverted to developing customary law, which is by no means inferior to any other system of law. Despite its conceptual limitations, Lesotho customary law provides an appropriate legal framework for a comprehensive reading of its provisions in function of the right to development. Customary law and the African conception of the right to development both endorse the collective entitlement of present generations of the Basotho people to utilise the land in order to meet contemporary socio-economic and cultural

development needs, without compromising the right of future generations to eventually also use the land for their own development exigencies.

From independence in 1966 to the adoption of the 1993 Constitution, the Basotho people retained the understanding that the land inherently belongs to the entire nation and is administered in trust by local chiefs and headmen²⁴ who are tasked with allocating portions of it to households for residential and agricultural purposes.²⁵ It is argued that the restrictive customary land tenure system was instituted to exclude non-Basotho people from entitlement to land holding,²⁶ probably in recognition of the land, being limited, by its nature, in quantity, and, therefore, that it ought to be preserved as a communal legacy for the benefit of succeeding generations. The introduction of conflicting (borrowed) statutory laws post-independence, with an inclination to neo-liberalism, not only changed the dynamics in land governance in Lesotho, but also made it problematic in the sense that the neo-liberal model (with its nominal merits) is essentially not 'pro-poor' compared to the customary law guarantees that protect the Basotho people's communal entitlement to the land. Limpho Kokome has argued, in this regard, that Lesotho's donor-funded land tenure reforms, which resulted in the adoption of the 2010 Land Act, amount to nothing other than putting Basotho land up for grab by economically powerful stakeholders.²⁷

However, despite the positive aspects of customary land tenure, which, as noted, guarantee protection of the land as a communal legacy to be utilised to the exclusive benefit of all Basotho people, in its classical form, the system is riddled with deficiencies. For instance, customary law does not prescribe any form of punishment in response to abusive and discriminatory practices in the allocation and use of land.²⁸ In addition, customary tenure is traditionally skewed in favour of married men. The practice has, therefore, been critiqued for being patriarchal and discriminatory against women, as their entitlement to land is principally defined by affiliation to the institution of marriage.²⁹

It does not seem, though, that women are particularly targeted for discrimination. It is more of a customary tenure practice (albeit unfair) that denies access to land, not only to women, but also to unmarried men. This means that outside of marriage, Basotho women and men cannot utilise the land for socio-economic and cultural development purposes, which deprives them of any meaningful contribution to the advancement of the political economy and, crucially, the advancement of their own well-being. In this way, customary law overtly contradicts the egalitarian principle embodied in the right to development, which entitles every individual and all peoples to participate in, contribute to, and equitably share the benefits of development.

Case law, and specifically *Maseela v Minister of Home Affairs*,³⁰ which significantly influenced the drafting of the 2010 Land Act, has been instrumental in redressing the problem of women's lack of entitlement to land. The problem of lack of access for unmarried men remains unresolved, however. As Sam Rugege points out, the imperfections in the 'undemocratic nature of the chieftainship institution',³¹ which allow for abuse of the customary land tenure system, necessitate reforms to ensure equality of access and of providing all Basotho people with the opportunity to utilise the land for their socio-economic and cultural development.³² However, the reforms do not necessitate substituting customary law with statutory law, as

has been the case. Customary law, just like any other system of law, is subject to reform and amendment. Lesotho customary law could, and indeed should, be reformed to eliminate the parts of it that are repugnant to social justice and equity considerations in terms of governance of land. However, a predominantly foreign law-informed legal framework was introduced, which resulted in a range of land legislation³³ that conflicts with customary law on the question of land governance.

Statutory law framework on land entitlement

As discussed in the previous section, parallel to customary law, entitlement to land in Lesotho is equally governed by statutory law, which comprises the constitution in combination with land legislation, which have either remained in force or been amended/repealed since their enactment after 1967.³⁴ As Motlatsi Thabane observes, the various Constitutions of Lesotho promulgated since 1966 subscribe to the customary law understanding that the land belongs to the people and is held in trust by the paramount chief whose powers are delegated to the local chieftainship.³⁵ Section 107 of the 1993 Constitution reiterates the principle that all land is vested in the Basotho nation. Section 108 grants trusteeship over the land to the king, who is constitutionally recognised as the head of state. Section 4 of the 2010 Land Act provides that the land is vested in the Basotho nation and held in trust by the king who, as stated in Section 7, is equally vested with the power to grant land titles and/or revoke them. These provisions may translate into the misconceived reading that the land belongs to the state, which exercises territorial sovereignty. A proper reading, however, necessitates looking at the specific attribute, 'Basotho nation', which is instructive in determining actual sovereignty over the land.

The word 'nation' as it is used in this instance, conceptually refers to people.³⁶ Nation is defined as 'a group of people who feel that they "belong together" in sharing elements of a common past and a common destiny'.³⁷ By vesting land in the nation, the constitution affirms that the land belongs to the Basotho people and not to the political entity called the state. Although not explicitly stated, vesting the land in the Basotho nation means that the people may use it freely for their economic, social, and cultural development, and by so doing, improve their well-being and quality of life. However, before the 2010 Land Act came into force, in the *Thatho v Ntsane* case, the court interpreted the 1979 Act together with customary law as conferring entitlement to land to the Basotho people as a birthright.³⁸ Being a birthright means that the people are inherently entitled to the land by virtue of being born Basotho and, by inference, in terms of Section 107 of the Constitution, that birthright cannot be revoked.

The Basotho people's sovereignty over the land is, therefore, incontestable. The king, being the head of state, is only constitutionally vested with the custodianship role to hold the land in trust for the people. This necessitates, as a matter of accountability, that land governance policies must prioritise the exclusive interest of the people as a nation, by virtue of their belonging together and sharing elements of a common past and a common destiny. In this instance, the political economy theory – which explains how political factors, economic

systems, and social considerations influence each other³⁹ – leaves Lesotho with no latitude or rational choice to deviate from the communal model on land governance. In instituting a legal system in parallel to the customary law regime that has regulated the Basotho nation from time immemorial, the end goal should have been to make land governance more equitable and beneficial to a greater number of persons, as some are, admittedly, disproportionately disfavoured and disadvantaged. That has not been the case.

Rather, statutory law opens avenues for the rural population to be dispossessed of their entitlement to the ancestral land and, thus, to be confined to a paralysed and handicapped rural economy. This is fundamentally problematic, in the sense that because the 70.97 per cent of the population that makes up the rural economy are impoverished, they are systematically excluded from the prospect of purchasing land for investment purposes in the neo-liberal urban economy. Therefore, they do not stand any chance of competing effectively with the economically powerful who can, on the basis of the neo-liberal provisions of statutory law, readily acquire land – including land situated in the rural areas, when such land is found to be valuable for investment purposes. An estimated 27 000 to 30 000 members of local communities have, for instance, been displaced and forced to surrender their lands, which have been submerged by dams constructed to harvest water from the communities under the Lesotho Highlands Water Project to supply water to South Africa and, prospectively, to other neighbouring countries.⁴⁰ It is also noted that, in urban areas, pressure is mounting on people with access to agricultural land to sell their fields, so that the land can be rezoned for development, in what has been described as a ‘small scale land grab’ by local elites.⁴¹

While the question of gender equality regarding entitlement to land has indeed been re-addressed under statutory law, as noted earlier, glaring deep-rooted inadequacies remain in the legislation. While land is, by law, vested in the Basotho nation as an entity in whole, Parts IV and V of the 2010 Land Act unnecessarily carve out some parts as rural land and other parts as urban land, and define the processes and systems through which land entitlement is guaranteed within these jurisdictions. It is not wrong to demarcate land by geographical location. It is problematic, however, when, with respect to exposure to opportunities for development, the legislation gives the impression of a rural communal economy operating side-by-side with an urban neo-liberal economy. As opposed to openness to economic development within the neo-liberal urban economy, Section 14(3) of the Land Act makes the granting of title deeds to land for commercial and industrial purposes within the jurisdiction of the communal rural economy a bureaucratic process. It appears to be a good safeguard measure against land grabbing, but does not eliminate the fact that land in the rural economy is also susceptible to lease.

Without negating the political and economic expediency that informed the crafting of the provisions of the Land Act, it is worth pointing out that the implications are ominous for the rural population. While the Land Act is said to ‘promote efficiency in land services and enhance [the] use of land as an economic asset in Lesotho’⁴² (thus justifying having a market value attributed to it), it is worrying that, by so doing, the land is discreetly put on the market for acquisition by stakeholders with the requisite purchasing power. The Land Act, thus, systematically deviates from the gratis entitlement to landholding under customary law,

and makes provision in Part VI to the effect that Basotho land could henceforth be leased (acquired on financial terms) for extensive periods of up to 90 years.

Lease holding may have the advantage of opening up the country to foreign direct investment, as stipulated in the National Investment Policy of Lesotho.⁴³ However, the policy document provides no certainty on how such investments will facilitate development in local communities.⁴⁴ The market-based lease holding arrangement makes it possible for corporate entities and other stakeholders with the requisite purchasing power to readily acquire the land for such long term leases. Macro-trends indicate that the average life expectancy in Lesotho is about 55;⁴⁵ therefore, a lease that goes beyond that timeframe has the implication of permanently dispossessing the Basotho people of their birthright to the land and the prospects of reaping direct socio-economic and cultural development benefits from it for the duration of the lease. Besides, Part IX of the Land Act grants the state the right to expropriate land for a public purpose or in the public interest, which is, of course, commendable if the exclusive interest of the people is prioritised. Controversially, the execution of projects of national interest (including, for example, the Lesotho Highlands Water Project), has seen local communities arbitrarily displaced from their land without adequate compensation.⁴⁶

Section 4(3) of the 2010 Land Act stipulates that where customary law is inconsistent with the provisions of the Act, the Act shall prevail. This signals an implied recognition of customary law, albeit that it is only envisaged to apply in conformity with statutory law. Despite the progressive regulatory prescriptions contained in statutory law, customary land tenure principles and practices remain in force and applicable to the greater part of the Basotho nation, which is predominantly rural.⁴⁷ It is irrational that statutory law is portrayed as predominating over customary law, even though many of the neo-liberal provisions contained in the land legislation basically make Basotho land a market commodity that can be bought and sold. The neo-liberal undertone of the entire Act necessitates asking whether, how, and to what extent the legislation takes into consideration entitlement to the land as a common heritage, on the basis of which the realisation of the Basotho's right to development ultimately depends.

The human right to development

The human right to development, as conceived in the Declaration on the Right to Development and the African Charter, among other instruments and scholarly literature,⁴⁸ is unique in its conceptual formulation when compared to all other human rights, as it embodies a combination of abstract guarantees of genuine freedoms and liberties, as well as tangible entitlement to material benefits. It is interwoven with livelihood-related constitutive elements that are relevant for ensuring human well-being and the attainment of better standards of living through the processes of development. Arjun Sengupta posits that the processes for development ought to be human rights-based and intended to make living conditions increasingly better for humans.⁴⁹

The right to development guaranteed in the African Charter

The contemporary concern relating to the right to development enshrined in the African Charter is implementation. Since the adoption of the African Charter in 1981, and despite massive ratification of this by all African Union member states with the exception of Morocco, there is no indication of genuine commitment, as stipulated in the preamble to the Charter, to pay particular attention to the right to development. This is not because the right to development is impossible to achieve, but rather because African state governments simply deviate from practical measures that need to be taken to ensure its realisation.

Deviation from the communal land entitlement model in Lesotho is a case in point. The analysis here aims to illustrate that implementation of the right to development in Lesotho could be achieved through proper conceptualisation of the land question embodied in the common heritage principle, which is a core determinant of the African conception of the right to development. The African Charter provides that:

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.* (Emphasis added).
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.⁵⁰

The emphasis on all peoples suggests that the Basotho people are not exempt from the right to development, which is envisaged to be achieved only with due regard to the equal enjoyment of the common heritage, including land – an indispensable natural resource – which all of humanity depends on for livelihood and subsistence. The common heritage, which incorporates sovereign ownership rights over land, is conceived as a major determinant in the realisation of the right to development and thus, allows the peoples to whom the right is guaranteed, to convert use of the land into development gains that ought to be shared equitably for the benefit of the collective.

The right to development has a central purpose, i.e. to equalise opportunities for development; this entails that basic rights and freedoms are protected in a manner that allows for active participation and meaningful contribution to the processes of development. As stipulated in Article 2(3) of the Declaration on the Right to Development, states should adopt suitable policies, including those related to land governance, to ensure improved well-being and a better standard of living for the populations.⁵¹

Article 22(2) of the African Charter compels state parties to create the requisite conditions for the right to development to be achieved.⁵² When states fail in this regard, they contravene the right to development and, accordingly, are subjected to legal accountability, even if domestic legislation does not enshrine such a right. Lesotho has not domesticated the African Charter. It is worth reiterating, however, that by virtue of having ratified the Charter in February 1992 as indicated earlier, and in accordance with the law of treaties, Lesotho is bound to adhere to the terms and provisions of the Charter. Case law provides evidence to the

effect that the lack of domestication and the absence of any constitutional basis for applying the Charter at the domestic level, does not insulate any state party, including Lesotho, from its obligations under the African Charter.

In the *Endorois*⁵⁵ and *Ogiek Community*⁵⁴ cases, for example, even without an explicit provision on the right to development being included in the Kenyan Constitution or any of its municipal legislation, the African Commission and the African Court read from the African Charter, a right to development obligation imposed on the Kenyan government. By virtue of that right, the indigenous Endorois and Ogiek peoples were considered to be legitimately entitled to their ancestral lands, which they have owned and lived on from time immemorial.⁵⁵ The Commission and the Court grounded their findings of a violation of the right to development in the Kenyan government's dispossession of the Endorois and the Ogiek communities of their ancestral lands.⁵⁶ Both cases set a precedent on entitlement to land as an integral component of the right to development, which is, by default, binding on all African states by virtue of their obligations under the African Charter.⁵⁷

The right to development accordingly applies to Lesotho and embodies entitlement to land as an ancestral common heritage, as affirmed in the *Mokoena v Mokoena* case.⁵⁸ The question of land entitlement in Lesotho is explored in this regard as an embodiment of the right to development for the reason that as a rights-based model to development and hence, to poverty eradication,⁵⁹ it provides the mechanism through which poverty in Lesotho – which Hassan identifies as a major development challenge – could effectively be eradicated, and socio-economic and cultural development guaranteed to the Basotho people.⁶⁰ The right to development is presented in this regard as a conceptual framing that should be read together with Lesotho's domestic laws on land governance as giving rise to a collective entitlement to the land as a common heritage, and which ought to be utilised to create development for the collective benefit of the Basotho people.

Equitable entitlement to Lesotho's common heritage

For a state party like Lesotho that has a predominantly poverty-stricken rural population, entitlement to the land guarantees that the land can be put to optimal use to eradicate poverty, and to achieve socio-economic and cultural development for the entire Basotho nation. Land is essentially valued as a source of livelihood and a means of subsistence through which capital wealth could be generated to sustain development. While land will deliver only minimal benefits if entitlement to it is inequitable, when perceived as a common heritage, it has the potential to produce a multiplier redistributive effect that could transform livelihoods significantly. Aside from the international law origins of the concept of the common heritage of mankind,⁶¹ its framing in Article 22 of the African Charter draws from its rooting in African customary perceptions and practices of entitlement and ownership, which denotes an ancestral communal legacy, as is the case in Lesotho, where communal entitlement to land is guaranteed protection under customary law.

Rebecca Leonard and Judy Longbottom observe:

Use of the term common heritage or patrimony is based on the concept of the 'common heritage of mankind' and can be seen as a possible alternative to exclusive ownership, within the context of land and natural resource management in Africa. It refers to common rights over a shared resource, which are governed by rules aimed at protecting and perpetuating these resources. This concept can be invested with a specific legal status and may involve various legal entities which share the objective of protection and conservation of the resource, declared to be the common heritage of the village community, region, nation, or mankind. The term can be used to recognise the claims of groups that lack formal legal status, for example the nation, or a village community that does not have a recognised legal entity.⁶²

Recognition of the land as belonging to the Basotho nation is understood from this viewpoint as being a common heritage from which equitable benefits ought to cascade to the legitimate trustees, both present and future. Conceptually, and by human rights standards, land, together with all its appurtenant resources, is perceived as a sovereign entitlement that belongs to the people (rather than to the state); therefore, it is of intrinsic value as a means of livelihood and subsistence.⁶³ It is irrational that the government (as is presently the case in Lesotho) should adopt legislation that basically alienates the people from the land, which is supposed to constitute a dependable source of livelihood and subsistence.

Sovereign entitlement to the land guarantees a collective right of equitable access to, genuine ownership of, effective control over, and productive use of the land to generate development gains. Lesotho's political economy, particularly with regard to land governance, ought to mirror this pattern on account of the Basotho people's right to development, which allows for a rights-based model that legitimises entitlement to the common heritage and unfettered collective ownership thereof. It implies that the prerequisites for accessing and utilising the land ought to apply equitably, indiscriminately, and subject to the government's responsiveness and accountability to the Basotho people.

In spite of the partisan political differences that often divide the country,⁶⁴ the land has remained a coalescing factor that binds the Basotho people in the common purpose of belonging together as a nation. Although customary law, which guarantees genuine protection of the land as a common heritage, is increasingly overshadowed by statutory law, it is crucial to note that the trusteeship responsibility attributed by the Constitution and the 2010 Land Act to the king (as the representative of the people) is only a fiduciary one, which entails the duty to protect the rights and interest of the trustees (the Basotho nation). On the contrary, the 2010 Land Act spells out the conditions, the manner, and the processes through which land may be acquired under statutory law, and makes land tenure in Lesotho look more like a constitutional feudal system under the land-lordship of the king and state institutions. To the extent that the land reform that culminated in the enactment of the 2010 Act does not guarantee adequate protection of the land as a communal legacy, we contend that it compromises prospects for actualising the right to development that is guaranteed to the Basotho people under the African Charter.

In classical economic terms, land (alongside labour and capital) is valued as a major factor of production and, therefore, of enormous socio-economic and cultural benefit.⁶⁵ Considering that land is central to development, which in itself is recognised as a claimable human right,

the government of Lesotho is enjoined to ensure, through appropriate legislation and policies, adequate protection of the Basotho peoples' collective entitlement to land, as a means to realising their right to development. An illustration is land use for agricultural production. First, agriculture plays a crucial role in development, with empirical findings indicating that agriculture-led growth allows for greater participation by the poor in the growth process; thus, it is more pro-poor than industrial or export-led growth.⁶⁶ Second, the government of Lesotho affirms that the country's economy depends principally on subsistence farming⁶⁷ by the predominantly impoverished rural population.

More than 80 per cent of the population in Lesotho is rural, and the people attach great value to the land as their primary source of livelihood.⁶⁸ According to the World Bank, as at 2018, 80.15 per cent of Lesotho's total land area is made up of agricultural land, while only 14.1 per cent is arable land.⁶⁹ Arable land is land that is suitable and available for growing crops, which is the primary occupation of the rural population in Lesotho. Arable land does not reproduce, that is to say, more of it is not being created. This means that the Basotho people have a competitive claim to only 14.1 per cent of the land, with the possibility that they might, eventually be dispossessed of it through lease, acquisition, expropriation, or otherwise, as the 2010 Land Act makes provision for, and as happened with the Endorois and Ogiek communities in Kenya (as explained above). As stipulated in Article 22(2) of the African Charter, the duty to ensure that the right to development is achieved is imputed to the state, as the guarantor of human rights.⁷⁰ It invokes the government of Lesotho's fiduciary duty to enable the Basotho people to develop capabilities for advanced forms of agriculture, so that they are able to utilise the land more productively.

Despite the potential for agriculture to drive transformation in Lesotho, as noted in the National Strategic Development Plan II, its contribution to the gross domestic product of the country has declined drastically over time – from 15.2 per cent in 1984 to 5.2 per cent in 2014, with only a slight increase to 6.9 per cent recorded in 2016.⁷¹ The probabilities are that the land is under-utilised or that arable land is increasingly lost through exposure to multiple mounting pressures such as population growth, encroaching urbanisation, economic expansion, infrastructural development and land-grabbing by multinationals. Meanwhile, the land could and indeed should be put to more productive use through, for example, mechanised commercial agriculture, which has the potential to generate greater collective benefit than is achievable through subsistence farming, which has not been able to transform standards of living for the majority of the impoverished rural population.

It is worth pointing out that customary law does not prohibit mechanised commercial agriculture, and does not confine its practitioners to subsistence farming. Rural communities practise subsistence farming, not as a customary law obligation, but because they lack the skills, the means, and the resources to engage in mechanised commercial agriculture. The argument in this regard centres on the proposition that rural communities need to be empowered with the skills, the financial means, the material resources, and access to markets to enable them to transition from subsistence farming (which is not as profitable) to mechanised commercial agriculture (which is more profitable). Otherwise, because the proportion of land

that is arable and available for agriculture is quite small, the land could be utilised for other gainful purposes such as tourism and industrial development.

King Moshoeshoe I, the founder of the Basotho nation, is reported to have felt his 'soul revolt' at the thought of severing and surrendering parts of the Basotho ancestral land to invading European colonialists who wanted to grab large chunks of the land for settlements.⁷² The competition for land 'as a means of production to be had at all cost', as Motlatsi Thabane explains,⁷³ means that if Moshoeshoe I and the Basotho people had not fought to keep it or if they had allowed the kind of legislation that permits liberalised access to and long-term leasehold over the land, the outcome might have been similar to the situation in South Africa. In South Africa, the indigenous population has remained dispossessed of their ancestral land and are thus impoverished and robbed of the opportunity to own and utilise the land to ensure development for themselves and for their impoverished communities.⁷⁴

New directions in land governance in 'The Lesotho We Want'

Contrary to the position on land tenure adopted during the 2019 multi-stakeholder consultations, as highlighted earlier, this paper contends that the vision for transformation envisaged for Lesotho will not be attained without giving the land question thorough scrutiny. Contemporary global mechanisms for land governance (including the UN Habitat pro-poor Global Land Tools Network⁷⁵ and the Voluntary Guidelines on the Responsible Governance of Tenure) that have emerged as global norms, are designed to protect land rights for development outcomes, especially for impoverished peoples around the world.⁷⁶ Mika-Petteri Törhönen explains that land tenure security is key to ending poverty, eliminating hunger, achieving gender equality, and sharing prosperity. This can be achieved through official policies and statutory laws, as well as, importantly, through customary tenure practices that are increasingly gaining legal protection at par with statutory land tenure systems in many jurisdictions around the world.⁷⁷ Sam Moyo has equally underscored that studies on land in Africa, including those done by the World Bank in 2002 and the European Union in 2004, have progressively focused on customary land tenure and livelihood concerns, rather than on the broader land question relating to agrarian, mining, and industrial development.⁷⁸

Interestingly, while the global trend is progressively in favour of customary land tenure systems, Lesotho is instead defying the practice and seems to be drifting towards eventual abandonment of the communal land entitlement model that is backed by customary law, which would have dire consequences for the rural poor. For purposes of realising the right to development in Lesotho, it is crucial that the focus on land is not based solely on the question of entitlement, but, essentially, on how the land could be utilised more productively as a communal holding for the collective benefit of the entire Basotho nation. Richard Weisfelder observes that Lesotho's once-productive agriculture-driven economy is being obliterated in favour of public sector employment, which means the economy is heavily dependent on external development funding.⁷⁹ By implication, attention systematically shifts from the land as a vital source for generating capital resources for development.

According to Péter Bauer, if the conditions for development other than capital – that is land and labour – are present, capital will be generated locally; absent which it would have to be secured from external sources in the form of development aid, which is unproductive, ineffective, and not sustainable in facilitating development.⁸⁰ Bauer further explains that if the mainsprings of development are present, material progress will occur even without external funding; and, if, on the contrary, the mainsprings are absent, progress will not take place even with much external funding.⁸¹ For Ronald Bailey, the mainsprings of development entail both harnessing the rule of law, and maximising human productive capabilities.⁸² When applied in context in crafting a suitable model to stabilise Lesotho's political economy, cognisance needs to be taken of land and labour being present in abundance. This means that, if effectively harnessed within a proper legal framework that genuinely guarantees the rule of law, sufficient capital for financing development could be generated locally (from within Lesotho), without having to source investment from external donors.

New directions in land governance in Lesotho will require sturdy support mechanisms for responsiveness and accountability to be put in place as far as collective entitlement and communal landholding are concerned. With respect to the right to development, maximising human productive capabilities as a mainspring of development necessitates equipping the Basotho people with the technical know-how to be able to effectively put the land to productive use, so that it can generate greater socio-economic and cultural development benefits and, hence, shared prosperity. The right to development imposes a normative duty on the government of Lesotho to remove unnecessary obstacles, including existing legislation that exposes Basotho people to land dispossession. Equally, it entails creating an enabling environment for productive utilisation of the land for gainful purposes, including for agriculture and tourism, so that secure collective entitlement to the land can have an optimised multiplier effect on development that benefits the nation.

Conclusion

This article has drawn attention to the conflicting customary and statutory land tenure systems in Lesotho, and the impact of conflict on prospects for actualising the right to development, which, by virtue of Lesotho's obligations under the African Charter, ought to be given particular attention. Important about the right to development is that its realisation is contingent on equal enjoyment of the common heritage, which implies the land in the context of Lesotho (as illustrated). In Lesotho, the land is, by customary law guarantee, recognised and protected as a communal legacy that all Basotho people are collectively entitled to benefit from. While the Basotho people have historically depended on the land for subsistence farming, which leaves them with marginal standards of living, the value of the land as a means of production could be maximised for greater collective benefit, particularly eradicating poverty and transforming the livelihood of the rural population. The challenge is that land governance in Lesotho has been overtaken by statutory law, which, in spite of its progressive assurance of equitable entitlement to women and other previously excluded stakeholders, is

fundamentally defective to the extent that it deviates from guaranteeing protection to the land as an ancestral common heritage.

The neo-liberal leaning of statutory law towards commoditisation and marketisation of the land alienates the Basotho people and exposes their land to appropriation, which limits prospects for utilising the land to achieve the right to development. Customary law, with its underlining imperfections (as illustrated in this paper), provides greater protection of the land as an ancestral common holding, which has defined the lifestyle patterns of the Basotho nation from time immemorial. Basotho customary law and its related land tenure system is, admittedly, not without flaws, which, like any other defective law, could and, of necessity, should be amended. Customary law is not inferior to any other system of law, especially with respect to the land question; thus, there is no justification for giving customary law subordinate status to statutory law in Lesotho.

Because customary and statutory laws are designed to co-exist in Lesotho as far as land governance is concerned, there is a need to harmonise the conflicting land tenure regimes, such that the harmonised framework upholds customary tenure practices as a guarantee to protecting the Basotho people's right to development. The right to development does not necessarily entail liberalising landholding, rather, it requires equipping and empowering the Basotho people with the requisite skills and capabilities, the material resources, and the financial means needed to put the land to productive use. The harmonised land governance regime should, therefore, not only emphasise vesting the land in the Basotho nation, it should unambiguously illustrate how the land should be utilised in a manner that guarantees equitable benefits in ensuring the realisation of the right to economic, social and cultural development that is guaranteed to the Basotho people as a nation.

With respect to historical antecedents and contemporary trends in favour of customary tenure, as underscored in the UN Habitat Global Land Tools Network and the Voluntary Guidelines on the Responsible Governance of Tenure (cited above), it is posited that Lesotho's right to development obligations under the African Charter enjoin the government to uphold the communal model on land entitlement.

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