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‘It is participation, stupid!’

Development, Law and Human Rights: A Political Economy Approach

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Abstract: After a short introduction on conceptualizations of development, this public lecture will examine the meaning and possible implications of law in a developmental context. Issues that will come to the fore are: the legal legacy of colonialism, universalist vs. particularist approaches (including the impact of customary law), ‘law for development’?, development and equity (with a focus on land reform). The second part of the lecture looks particularly at the impact of human rights. After a brief glance at international human rights in the context of the Universal Declaration (December 10th: Human Rights Day), the focus will shift to the global human rights deficit with particular emphasis on its significance in respect of law and development. The ‘Right to Development’ will be critically discussed, while the lecture will be concluded in defense of ‘upstream human rights’. Notably, methodological observations will be amply illustrated with practical examples.

To be invited to give this lecture here in Leuven on International Human Rights Day is a real honour and a great pleasure. Ten years ago, in 2004, I accepted Leuven University’s Msgr Willy Onclin Chair in Comparative Canon Law with an inaugural address entitled *Quod Omnes Tangit*. It was the Dean of the tiny Faculty of Canon Law, current rector Rik Torfs, who had envisioned this Visiting Professorship as a way of confronting his students, among whom many clerics, mostly from abroad, with crucial global issues, including human rights.

My thematic focus was a *regula iuris*, an old legal principle that had been incorporated in the Corpus Iuris Canonici, too: *Quod omnes tangit debet ab omnibus approbari*: What touches all, must be approved by all. Its origin lies in private law, in the context of the *tutela*: common guardianship of property such as an aqueduct. In Canon law its outreach had been extended to institutional decision-making in the Church; the appointment of a new bishop, for example.

Obviously this principle is relevant in regard to development, too. Indeed, its contemporary version is what might be called the principle of *participation*. In international human rights law we find it recognized as a modern *regula iuris* in the United Nations General Assembly Declaration on ‘The Right to Development’. *Development* remains undefined there, a usual omission in texts proclaimed by the United Nations. The Declaration simply pronounces the relevance of all current implications of human dignity in the realm of development. Yet, it just adds two crucial element, both in article 2(3). I am referring here to the State’s responsibility for national development through policies in which the population’s ‘free and meaningful *participation* in development’ and in the ‘fair distribution of the benefits resulting therefrom’ are plainly stipulated. Thus, in top-down or—in my own terminology *downstream* development—public authorities have a duty to ensure free and meaningful participation of all those whose daily livelihoods are affected by such policies. I should like to refer here to Irene Hadiprayitno’s doctoral dissertation ‘Hazard or Right’—which I had the pleasure of supervising—in which she discusses the right to development primarily as a necessary protection against development hazards. Just to illustrate this phenomenon: have you heard of the phrase ‘development-induced displacement’? It is part of the World Bank idiom and has already affected the lives of hundreds of millions of people, in India and China alone.

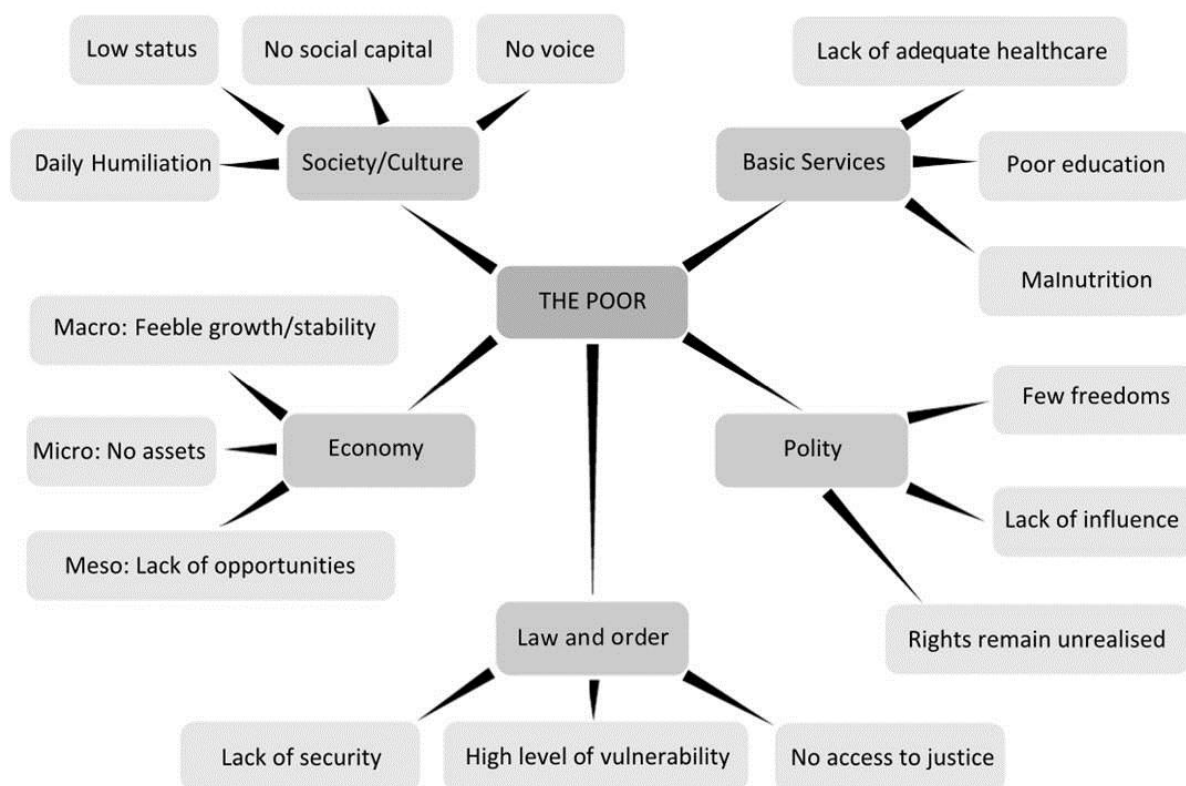
Development hazards habitually occur when development policies are imposed from above, without opportunities to participate for those affected at the grassroots. It is particularly large-scale development projects that tend to entail such negative consequences for people. A striking example mentioned by Hadiprayitno is the Kedung Ombo Dam Project in Central Java in 1985. That scheme aimed at creating a 22.5-megawatt electricity generator while a side effect of the dam would be to irrigate 70 hectares of rice fields. Yet, this

massive project has displaced 37 villages in 3 regions in Central Java. The term used in such a predicament is that astonishing euphemism: development-induced displacement. An update of just one week ago mentions the following environmental impacts: ‘Biodiversity loss (wildlife, agro-diversity), food insecurity (crop damage), loss of landscape/aesthetic degradation, soil erosion, deforestation and loss of vegetation cover, groundwater pollution or depletion, large-scale disturbance of hydro and geological systems, reduced ecological-hydrological connectivity’. Added to these are socio-economic impacts: ‘displacement, loss of livelihood, loss of traditional knowledge/practices/cultures, militarization and increased police presence, land dispossession, loss of landscape/sense of place’. But don’t these villagers enjoy access to justice? Can’t they present their strong cases against unlawful acts in courts of law? Well, they actually did, duly assisted by NGOs well versed in legal advocacy. And, indeed, they achieved a victory in the Indonesian Supreme Court, a decision in which their rights and titles had been duly recognized. Yet, that judgment was cancelled by a political authority and so far neither proper compensation nor fair rehabilitation has been delivered to those affected. What to conclude?

First, dam ventures constitute a type of development project that stands out as the largest source of development hazards. In such cases people do not benefit but suffer from development. What is at stake here is the whole interpretation of development. Development means change, and change affects daily livelihoods, positively, negatively or both. Hence, change has to be assessed before policy plans are drawn, let alone executed. Crucial is people’s participation right from the start. Is that an odd conclusion, which actors would be excused to ignore? Not for the World Bank at any rate. When it began drafting its World Development Report on Poverty 2000/2001, it prepared that whole exercise with two Voices of the Poor Studies. Part I was based on a review of lots of so-called Participatory Poverty Assessments mandated by the

Bank itself in fifty different countries in the course of the 1990s. *Can Anyone Hear Us?* was its striking subtitle. Indeed, these ‘voices of the poor’ had been shouting out already for quite some time. *Crying Out for Change* is the title of Part II of *Voices of the Poor*. This study, based on comparative fieldwork, conducted, collected and examined the voices of over twenty thousand poor women and men in 23 different countries. Here elements of powerlessness and ill-being were brought together in one ‘many-stranded web’. On the basis of a multi-dimensional analysis of poverty by the OECD’s Development Assistance Committee—path-breaking since poverty analysis used to be tuned to just lack of income—as well as the two volumes of *Voices of the Poor* studies I have constructed the following representation of that predicament:

***The poor in a many-stranded web* (Bas de Gaay Fortman, *Political Economy of Human Rights*, London/Oxford: Routledge, paperback 2012, p. 141)**



Graham Pyatt, a colleague at the Institute of Social Studies in The Hague once wrote an article on ‘Poverty vs the poor’. What he meant is that macroeconomic

poverty analysis as a basis for economic policies often neglects what actually happens in poor people's lives. Indeed, even the term 'poor' may just stigmatize and confuse the issues. Hence, I prefer to speak of 'those living in daily hardship' or 'those struggling to sustain their daily livelihoods'. The figure shows the contextual background to such trouble. I suggest to focus today on the role of Law and Order, including deficient access to justice. Those living in daily hardship generally lack the protection that law is supposed to ensure.

In the world of development the role of law first tended to be neglected. True, in the United Nations it had already been included in the Charter, a kind of international constitution providing a statutory base for a threefold venture on *International Security*, *International Justice* and *International Development*. International Security became a political endeavour entrusted to the Security Council, International Justice a juridical one entrusted to certain Commissions, and International Development was seen as an economic challenge for certain specific agencies with the United Nations Development Program (UNDP) in the forefront. Unfortunately, there has not been much interaction between these three distinct realms. Multilaterally as well as bilaterally the emphasis was on Assistance, both technical—education and training— and financial: through capital transfer.

At the end of the nineteen sixties I worked in Zambia. I had read both Law and Economics but Dutch (civil) law was not of much there. My position was in the Department of economics. The whole idea those days was *Development = Westernization = economic modernization*: Economics the base with law sustaining the economy. This conceptualization does imply a need for Western law, which was founded those days—and still is today—on a *colonial legacy* tuned to making and enforcing rules. Yet, in terms of legal development, too, colonialism had been a *False Start*, based on victors' power. Law was meant to sustain political domination based on conquest. It implied social stratification

with the Colonial Service on top of the pyramid, then the settlers and finally the natives.

The system resulted in legal subordination of the local population. It served their economic exploitation. Yet, after independence it was still seen as essential to provide the foundation for an economy based on specialization in production, economies of scale and exchange based on markets and prices. And, one might say, meant to entrench the new political elite that simply took the positions of their former masters without reforming the system as such. In 1967, the year I moved to Zambia, René Dumont wrote his *l'Afrique noir est mal parti*, translated as A False Start in Africa. Actually, this may be seen as Africa's second false start. (There has been a third in false start in the period of democratisation after the fall of the Berlin Wall: multiparty systems dominated by full manipulation of election processes.)

Back to development. It is generally held that there can be no well-functioning economy without a solid basis in law and order, and rightly so. Actually, I see my own field, political economy, as an *interdiscipline* regarding Economy, Polity, Law as interrelated domains. So during my thirty years as Professor of Political economy at the Institute of Social Studies in The Hague—actually a kind of social faculty of an (imaginary) Dutch Third World University I focused my Chair on Political Economy of Jurisprudence. While state-led development has generally been unsuccessful, the role of the state in development is in fact essential. Adam Smith, theoretical founder of political economy already mentioned three crucial functions: (1) to protect against aggression, (2) to provide an effective infrastructure and (3) to establish 'an exact administration of justice'.

Well, let us look at UNDP's Human Development Index (HDI), based on indicators of both material welfare (GDP/capita) and immaterial ones such as average life expectancy, infant mortality and education. Countries at the bottom

of that ranking manifest a deficient legal order corresponding with bad governance and a malfunctioning economy.

Notably, the lack of a socio-economic perspective, as a result of poverty and exclusion, may be seen as a major factor contributing to intra-state violence. Indeed, the following observation from Adam Smith's *Inquiry Into the Nature and Causes of the Wealth of Nations*, published in 1776, is still valid:

[c]ommerce and manufactures gradually introduced order and good government, and with them the liberty and security of individuals, among the inhabitants of the country, who had before lived almost in a continual state of war with their neighbours, and of servile dependency upon their superiors.

Now what kind of law would those in need of such successful 'people-centred' development require? I discern three categories: (a) Regulation to sustain commerce and industry (administrative law); (b) a criminal justice system to ensure protection in their *person* (personal security) and in their *goods* (stability of possessions), and (c) well-functioning private law to provide trust in the *deals* that are made (*pacta sunt servanda*). Modern state law, in other words.

So all this is tuned to a formal economy but typically, in developing contexts a quite substantial part of the population cannot find a welfare basis there. Notably, while urban poverty finds some sort of relief in an informal economy, rural poverty implies primary dependency on a rural subsistence economy: production for people's own consumption. It is in such conditions that huge projects aimed at high levels of production for global markets tend to have highly disturbing impacts on life and work in village communities. Indeed, for the two billion people at the bottom of the global income distribution scale, surviving on a purchasing power of less than US\$ 2/day, the law sustaining mega-projects does not in any way contribute to their welfare. Yet, it does affect their lives.

What is essential here is to understand *legal pluralism* as experienced at the grass roots. People's legal security there is not based on a system of 'impartially' and impersonally administered and enforced rules but rather on ways and means to keep a community together. This is based on personal relations and governance close to those actually working the land. Now in order to avoid turning this public lecture into some kind of tutorial, let us examine another case involving development-induced displacement.

I am referring here to Kalumbila Mine, a new copper mine in north-western Zambia to be operated by First Quantum Minerals, a big Canadian mining company, already quite active in Zambia. NW province covers an area almost four times Belgium with a population of not much more than half a million. The US\$ 2 billion mine is expected to produce 300,000 tons of copper a year. After it had announced its plans, the province's secretary, Daniel Bowasi, said the new Kalumbila might well become the country's biggest copper mine by output, and he claimed: 'This is a big project which will turn north-western province into Zambia's new Copper belt and contribute a lot of resources to the treasury through taxes'.

Well, there we are: back at the role of law, which, in terms of the internationally recognized right to development would be supposed to not just regulate production but to secure 'free and meaningful *participation* in development and in the *fair distribution* of the benefits resulting therefrom' too, as stipulated by article 2 (3) of the General Assembly Declaration on the Right to Development. Now *First Quantum* buys its estate from the government of Zambia. Now regarding themselves as legal owners of the land, they do with it what they bought it for: extracting minerals. But this land in an outlying area of NW province is held under customary law. Native Trust Land it used to be called in the colonial era. This means that any use of such land requires authorization from the Chief. Indeed, this poor fellow has put his signature at the bottom of a

piece of paper, which he now regrets as what is written there implies a sale in freehold, a legal act to which under customary law as operative through the ages he is not entitled to since it means that he and his people lose all authority in the land they inherited from their ancestors. Yet, economically speaking, there is supposedly good compensation. First Quantum relocates people who are living on the land in return for a bigger house, gives them a pecuniary compensation, and provide vans to help them move.

In the Northern Netherlands some weeks ago we watched a fascinating Dutch TV programme 'Dwars Door Afrika' (*Across Africa*) in which Bram Vermeulen follows these removals and speaks to people. Indeed, the locals admit the new house is objectively better. It has a flushing toilet, for one thing, but, typically, they complain that it is outside. 'But so was the loo in your old house', First Quantum's staff respond. Obviously, however, the locals feel that if they have to pay a price for modernization, compensation must be up to modern standards. Meanwhile, it becomes crystal clear that the two parties involved have different ideas about property. In several conversations, locals say they are still the legitimate owners of the land, including the minerals in it, since their families have been living on the land and working it for many generations, and they are the hereditaries. Hence, they feel they should not have a share in the wealth extracted from their land. Through strong persuasion, also by their Chief they had been convinced that moving to another area might well be advantageous in terms of their daily livelihoods, including money to pay school fees and buy uniforms for their children—modern requirements that they can't escape—but the land continued to be theirs. Moreover, inspecting the new fields where they were to plant, weed and harvest, they got some doubts in regard to food security. Evidently, no matter the attempts to have their thinking modernized, they remained what they were born into: rural peasants for whom subsistence production always comes first.

On his way to interview a group of people who had to leave their houses, Vermeulen, asks a representative of ActionAid Zambia whether the villagers can really say that they are the legitimate owners of the land. The man responds with an immediate counter-question: ‘What do you mean by legitimate? A piece of paper? The whole point is First Quantum has not yet learnt that under customary law, ownership is not written on a piece of paper. It goes according to history and oral tradition.’

It is here that we touch upon a crucial distinction in the sphere of law and development: legitimacy versus legality. While legality refers to due legal process in terms of law-making and its execution, legitimacy implies acceptancy by observing the right principles, following the right processes and securing the right outcomes as experienced by those involved. Without participation no legitimacy in other words. In this respect I should like to make an observation in regard to human rights whose universal proclamation we celebrate today. From a legal perspective their command is rather inconsequential, particularly in the case of ‘soft law’ such as the UNGA Declaration on the Right to Development. Yet, in terms of legitimacy the same ‘rights’ may exert an immense influence. In the field of law and development this certainly applies to stipulated entitlements to *participation* in processes of ‘development’ and a *fair distribution* of benefits.

Standing in a new village constructed by First Quantum Vermeulen asks a representative of the mining company whether *he* understands that locals view the land as theirs because their families have lived there for generations. The representative does not answer the question, but immediately refers to the laws of the land, which happen to best serve the company’s interests, too. He stresses that the law of Zambia requires the company to deal with the state alone and that, in accordance with that law, the company’s acts are legitimate and justified. Legitimacy equals legality, in other words. Yet, through their choice to deal with the state alone—with a marginal role for the Chief—they left the local

population without a choice and in that way relinquished legitimacy. In Nigeria Shell has learned a very costly lesson in this respect. Now Shell's legal commitment is no longer to just the law of the land and the political authorities that be, but to 'international human rights' in the first place. 'We integrate human rights in our activities by building on the strength of our experience and the benefits of using our existing governance and business management systems', the Company now declares, and 'We are an active member of the Voluntary Principles for Security and Human Rights'. And consequently, 'We provide our staff, partners and suppliers with knowledge and skills to help support fundamental human rights'.

Concluding this review of the Kalumbila mining case, I was struck by a statement on the website of the Africa Studies Centre in Leiden, which refers to the great anthropologist Max Gluckman whose research on West Zambia is still highly topical': 'Gluckman argued against understanding property as a relation between persons and things, stating that all property relations were ultimately social and political. In other words, 'property' is not just a legal term to determine who owns what. It is also a notion in which ideologies of distribution and sharing, control, and power intertwine.

So what Kalumbila teaches us is that downstream development in the sense of state and/or market-imposed development from above implying serious hazards for those affected at the grass roots, is bound to encounter serious problems of illegitimacy. Moreover, apart from disregarding legal pluralism there is another legal snag in such policies: *instrumentalism*. This is the term for viewing law as an instrument for social change. It was particularly strong in the 1970s and the 80s, resulting in huge overproduction of laws meant to drive development. The problem is of course that legal subjects do not simply conform to legal norms without regarding the effects on their own livelihoods. If they don't like the government's intended effects, they circumvent or even evade these

consequences depending on the strength or weakness of state control. The ‘principals-agents problematique’ we call this in political economy. Leaving aside a system of full repressive coercion, why should the agents follow the orders of their principals if that does not benefit themselves. Indeed, bureaucratic price control, for one thing, tends to result in a black economy in which things are either left unsold or bought at the backdoor.

Coming back now to the World Bank’s *Voices of the Poor studies*, when asked what she saw as the main finding of this research, which had been undertaken under her guidance, Deepa Narayan’s response was: ‘Participation!’¹⁹ The crux, in other words, lies in development processes that include rather than exclude the weaker and more vulnerable sections in society. So far, I have set out to make this point in respect of *downstream* development.

Notably, apart from participation in downstream development the GADR also contains a stipulation in respect of upstream development. I am referring here to article 8(2): *States should encourage popular participation in all spheres as an important factor in development and in the full realization of all human rights.* Let me turn at once to a case again: the local fishermen at Laguna de Bay. Laguna de Bay is a salty lake not far from Manila, the capital of the Philippines. On its shore are fishing villages. The catch in open waters is primarily for local consumption. However, a boom in urban demand for lake fish in the early 1980s resulted in the establishment of fisheries through exploitation of fish pens. For commercial purposes ‘waterlords’ from Manila have affixed nets to the bottom of the lake, in effect trapping ‘their’ fish in these private ponds, privatising what was once the commons. The small fishermen at the lakeside could not afford the investments required to construct their own fish pens. As a result only about a third of the lake is still open water, accessible to the locals; the rest is exploited by rich individuals from Manila with strong connections to government. But

every once in a while a typhoon sweeps the water across the lake and the fish are 'liberated' from the private ponds. 'Today God is with us,' the local fishermen say. But what about tomorrow? Should the lives of these poor villagers remain forever limited by the status quo of inequitable access to basic (communal) resources? Should things always stay as they are? Or might God be assisted in righting the wrong, in line with the title of that French movie 'Dieu a besoin des hommes' ?

Meanwhile, traditional fishermen have organised in cooperatives, to demand dismantling the big fish pens owned by the Manila-based investors. The aim is a fair allocation of the area accessible to the locals. This struggle for greater access to the lake is, counterintuitively, a fight against legality (as embodied in the status quo) in favour of legitimacy (a generally held conviction on what is right and wrong) and human rights play a crucial part here. With the support of NGOs the villagers have become aware that they have rights related to protection of their basic human dignity. Human rights may, in other words, transform a clash of interests as protected by different power positions into a struggle for public justice. Hence, in adverse environments the primary meaning of human rights is to recraft common standards of legitimacy. Cultures of passivity, determinism and submission may thus give way to new forms of initiative and resistance. A necessary condition here is some form of empowerment of those struggling to sustain their livelihoods. Indeed, just to allocate power to people at the grass roots is not enough. 'Power is where power goes', US President Lyndon B. Johnson used to say. What he meant is that if a position is in itself is rather powerless, a forceful personality holding it will transform it to a strong one. Thus, participation by non-assertive individuals will tend to be rather meaningless compared to *voice* on the part of those involved.

It is time to conclude. Apparently stimulated by the appointment of a Special Rapporteur on the 'Right to Development' to the UN Commission on Human

Rights—14 years after the UN General Assembly Declaration on ‘The Right to Development’— the World Bank decided to take this right as a new guideline to its policies. In the Bank’s development efforts the clause on free and meaningful *participation* in development and in the fair distribution of the benefits resulting therefrom would seem to imply, among other things, a persistent focus on strong participation from the grassroots as well as on distributional equity. The point is made, rather strongly, in the tenth guideline for a ‘Human Rights Approach to Poverty Reduction Strategies’, drafted under the auspices of the United Nations High Commissioner for Human Rights (2002):

A human rights approach to poverty reduction also requires active and informed participation by the poor in the formulation, implementation and monitoring of poverty reduction strategies. The international human rights normative framework includes the right to take part in the conduct of public affairs. This is a crucial and complex human right that is inextricably linked to fundamental democratic principles.

Today, we celebrate 64 years of the UNDHR adopted by the GA on 10th December 1948, focusing as we did on development and law. When preparing for this fixture, what came to my mind is a poem by Cecil Rajendra that alumni of the Institute of Social Studies distributed at the UNCTAD V Conference in Manila (1979) meant to decide on new structures for global trade favorable to the developing world. That Conference took place in a newly constructed Hall, costing US\$ 300 million, those a fortune. The outcome was negligible: a set of documents with recommendations, represented by Dutch cartoonist Opland in a setting in which rich men representing ‘the West’ turn to some starving scroungers pointing to that pile of papers, saying ‘Eten jullie dit dan maar op!’ (*Just eat these!*)

It is in such a context that Cecil Rajendra wrote his poem 'No Celebratory Song':

So long as car parks take precedence over hospitals.
Multi-story hotels over homes for people,
Irrelevant factories over fields of our daily sustenance

I shall sing no celebratory song no matter how many suns go down
This tongue will be of thistle and thorn until they right the wrong!

So long as law comes before justice
The edifice before service
The payment before treatment and appearance before essence

I shall sing no celebratory song no matter how many suns go down
This tongue will be of thistle and thorn until they right the wrong!

So long as the poet is debased and the businessman praised
The realist rewarded and the idealist degenerated

I shall sing no celebratory song no matter how many suns go down
This tongue will be of thistle and thorn until they right the wrong!

So long as foreign investors devastate our estate
and the voice of capital speaks louder than the pleas of fisher folk

I shall sing no celebratory song no matter how many suns go down
This tongue will be of thistle and thorn until they right the wrong!

So long as blind bulldozers are allowed unchecked to guard our landscape
and multi-nationals licensed to run amuck across this land

I shall sing no celebratory song no matter how many suns go down
This tongue will be of thistle and thorn until they right the wrong!

So long as the rivers and streams, our beaches, our air, our oceans,
Our trees, our birds, our fish, our butterflies, our bees
Are strangled, stifled, polluted, poisoned, crushed, condemned by
lopsided development

I shall sing no celebratory song no matter how many suns go down
This tongue will be of thistle and thorn until they right the wrong!

This is our context, still today. And yet, in a world of too much development that destroys and too little development that liberates, I still end this lecture with Celebratory praise to human rights as spiritual, legal, and moral-political weaponry in the struggle for universal realization of people's human dignity, albeit in a somewhat dialectical role:

As *legal norms and rules* weak; as legal principles **strong**!

In terms of *legality* weak, as a moral-political foundation for *legitimacy* **strong**!

From an *epistemological* perspective (knowledge) weak; from a *hermeneutical* perspective (faith, insight and interpretation) **strong**!

As *legal resources* weak, although normatively well developed; as *political instruments* **strong**, although normatively underdeveloped.

In conclusion, then, there is good reason to celebrate today, as well as to continue our participation in the struggle for truly universal human dignity.

And finally, in regard to development, please remember that strong admonition from Ki-Zerbo, inspiring African philosopher:

On n'est pas développé, on se développe!