

# Right to Development Governance in the Advent of the African Continental Free Trade Area

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## Abstract

In this article, I explore the question of whether the African Continental Free Trade Area (AfCFTA) could provide the framework mechanism for actualizing the right to development in Africa. The imperative for socio-economic and cultural development suggests rethinking the manner in which Africa is governed and, importantly, also the necessity of putting into place functional mechanisms in view of enacting the future that is envisaged for the continent. Article 22(2) of the African Charter enjoins state parties to individually or collectively undertake measures to give effect to the right to development. After several futile endeavours aimed at finding an appropriate mechanism for development, Africa eventually takes a giant stride in establishing the AfCFTA. From a decolonial perspective, I examine the prospects of the AfCFTA, particularly with regard to competing interests that dominate the African development space. At face value, the AfCFTA appears to provide an enabling framework for the nurturing of productive capabilities, the flourishing of local initiatives, the eradication of poverty and expanded opportunities for development. Notwithstanding, I contend that the inherently neoliberal nature of the AfCFTA leaves a further question of whether the free trade area is likely to deliver socio-economic and cultural development benefits to the peoples of Africa.

## Keywords

Right to development, development governance, AfCFTA, decolonial theory, neoliberalism, Africa

## INTRODUCTION

In this article, I posit a paradigm shift in perspective from the dominant neoliberal understandings of development that focus primarily on growth strategies and expansion of the market economy to a more resolute thinking about development from a right to development point of view. The right to development emphasizes the centrality of peoples as the key actors and primary beneficiaries, and hence the need for the processes and the

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implementation mechanisms thereof, to prioritize and optimize the human dimension to development.<sup>1</sup> More than anywhere else in the world, the shift in development thinking is particularly relevant for Africa, first, because it is imperative to seek practical solutions to the continent's endemic development challenges, and secondly, because the peoples of Africa are collectively entitled to assert their inalienable right to development.<sup>2</sup> The obligation for collective action for the realization of the right to development contained in Article 22(2) of the African Charter on Human and Peoples' Rights (African Charter) implies putting in place functional mechanisms such as the African Continental Free Trade Area (AfCFTA), which as commentaries indicate, has potential to accelerate development across the continent.<sup>3</sup>

I do not intend to water down the expectations that come with the AfCFTA, but rather to explore the question of whether its entry into force would change the dynamics in the development landscape in Africa. Previous continental development initiatives like the New Partnership for Africa's Development (NEPAD) have been slated for their neoliberal approach, which does not reflect the socio-economic and cultural realities in Africa.<sup>4</sup> Following the demise of NEPAD (replaced by the African Union Development Agency), I question the neoliberal thought inputs into the

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- 1 United Nations Development Programme *Human Development Report 1990* (1990, Oxford University Press) at 3. After several decades of the exclusive understanding of development as aiming solely to achieve economic growth, and following the wave of democratization and demands for the respect of socio-economic and cultural rights that swept across the world in the late 1980s and early 1990s, the UNDP ignited a "rediscovering [of] the essential truth that people must be at the centre of all development". The seminal report, which significantly shifted the parameters in the definition of development, highlights as the central message the fact that "while growth in national production (GDP) is absolutely necessary to meet essential human objectives, what is important is to study how this growth translates – or fails to translate – into human development in various societies". With regard to Africa, Aspiration 6 of Agenda 2063 envisages "an Africa whose development is people-driven, relying on the potential of African people".
  - 2 African Charter on Human and Peoples' Rights adopted by the Organization of African Unity in Nairobi, Kenya on 27 June 1981, OAU Doc CAB/LEG/67/3 rev. 5; 1520 UNTS 217, arts 20, 21 and 22.
  - 3 A Cofelice "African Continental Free Trade Area: Opportunities and Challenges" (2018) 31/3 *The Federalist Debate* 32 at 32–33; B Mureverwi "Welfare decomposition of the Continental Free Trade Area" (19th Conference on Global Economic Analysis, Washington DC, 15–17 June 2016) at 5–7; S Mevel and S Karingi "Towards a continental free trade area in Africa: A CGE modelling assessment with a focus on agriculture" in D Cheong, M Jansen and R Peters (eds) *Shared Harvests: Agriculture, Trade, and Employment* (2011, International Labour Office and United Nations) 281 at 282; R Akeyewale "Who are the winners and losers in Africa's Continental Free Trade area?" (17 October 2018) *World Economic Forum*, available at: <<https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcfta-sme-business/>> (last accessed on 08 November 2019).
  - 4 P Bond *Fanon's Warning: A Civil Society Reader on the New Partnership for Africa's Development* (2005, Africa World Press) 33; L Diamond "Promoting real reform in Africa" in E Gyimah-Boadi (ed) *Democratic Reform in Africa: The Quality of Progress* (2004, Lynne Rienner Publishers) 263 at 277.

formulation of the AfCFTA, which, in spite of its uniqueness as the world's largest free trade area by number of countries involved,<sup>5</sup> I argue is not sufficiently people-centred to guarantee better living standards for the peoples of Africa. The discussion is situated within the framing of decoloniality and intended to advance the argument for considering the right to development governance as the model for development that is reasonably relevant for Africa and, therefore, should inform implementation of the AfCFTA. My argument draws from the theoretical problematic in the formulation of development projects for Africa, which over the decades has left the continent trailing behind as the least developed in the world.

This argument raises a conceptual question with regard to the obligation to guarantee a "better life for the peoples of Africa",<sup>6</sup> which constitutes the foundational purpose for development enshrined in international law, namely "to promote social progress and better standards of life in larger freedom" and to protect the right of everyone to the enjoyment of the highest attainable standard of living.<sup>7</sup> The discourse on human rights and development has progressively shown that the people-centred dimension to development cannot be achieved without a decisive radical shift from economic growth-driven models. With the benefit in hindsight of the collapse of African economies, resulting from the technocratic neoliberal economic protocols known as the Structural Adjustment Programmes introduced by the World Bank in the 1990s,<sup>8</sup> I ask where Africa is heading with yet another neoliberal experiment in the form of the AfCFTA. Who is the AfCFTA envisaged to benefit? How would it contribute to bettering standards of living in Africa? Knowledge of how development is conceived is essential in gauging the extent to which it responds to livelihood exigencies, and which, I argue, is overlooked in the framing of the AfCFTA.

I expand this argument in two main parts. In the first part, I discuss the development imperative for Africa from the view point of decoloniality. I articulate the argument that the starting point from which the AfCFTA is conceived, following imported neoliberal models that prioritize the market economy much more than the well-being of the peoples of Africa, is fundamentally

5 K Kuhlmann and AL Agutu "The African Continental Free Trade Area: Toward a new legal model for trade and development" (2020) 51/4 *Georgetown Journal of International Law* 753 at 756.

6 Charter of the Organization of African Unity (OAU Charter) adopted in Addis Ababa, Ethiopia, 1963, art 1(b).

7 See the preambles to the UN Charter and the Universal Declaration on Human Rights as well as art 12(1) of the International Covenant on Economic Social and Cultural Rights.

8 A Thomson *An Introduction to African Politics* (2010, 3rd ed, Routledge) at 191–94; G Williams "Why structural adjustment is necessary and why it doesn't work" (2007) 21/60 *Review of African Political Economy* 214 at 215; SM Kawewe and R Dibie "The impact of economic structural adjustment programs [ESAPs] on women and children: Implications for social welfare in Zimbabwe" (2000) 27/4 *The Journal of Sociology & Social Welfare* 79 at 79–85.

flawed. I provide in the second part a critique of the AfCFTA in order to illustrate its ineffectiveness in transforming living standards for the impoverished populations on the continent. The conclusion highlights the argument that an appropriate governance system suited for development in Africa entails a systemic rupture of pre-existing models that are of a neoliberal heritage.

## DECOLONIALITY AND THE DEVELOPMENT IMPERATIVE FOR AFRICA

### In pursuit of a superior purpose

Although the arguments advanced in this article appear to contrast with the general level of optimism about the AfCFTA, I endeavour to ensure that my critique does not negate the importance of the economic growth dimension for development.<sup>9</sup> In seeking to retain equilibrium in the argumentation, I also do not intend to gratuitously mitigate the effects of neoliberalism and global coloniality that permeate the AfCFTA, and thus stand in the way of the right to development in Africa. I am primarily concerned with the theoretical reasoning that informs practical approaches to development in Africa, which, I contend, if not accurately contextualized, risks replicating models that have no potential to achieve transformative outcomes. This will require asking what development actually represents for the peoples of Africa and whether it could be achieved through the AfCFTA. Otherwise, teleological reasoning demands that we explore decolonial narratives that perceive the imperatives for development as intended to achieve a much more noble ideal or superior purpose.

By superior purpose (bigger picture consideration of what Africa is envisaged to become), I refer to the critical self-consciousness of the strategic priorities that consistently trigger a rethinking of the concept of development, and accordingly necessitate redefining the processes and mechanisms thereof from a decolonial and less neoliberalistic point of view. In retrospect, the superior purpose could be understood to derive from the motivations that informed the struggles for decolonization that ushered in political independence for Africa. The founding of the Organization of African Unity (OAU) was premised on the conviction that “it is the inalienable right of all people[s] to control their own destiny, [...] to fight against neo-colonialism in all its forms [...] so that the welfare and well-being of their peoples can be assured”.<sup>10</sup> The Constitutive Act of the African Union refers to these convictions as “noble ideals” to be achieved through collective action “in all fields of human activity

9 S Kanga and S Heleba “Can economic growth translate into access to rights?: Challenges faced by institutions in South Africa in ensuring that growth leads to better living standards” (2012) 9/17 *SUR – International Journal on Human Rights* 83 at 83–85; A Sengupta “The human right to development” (2004) 32/2 *Oxford Development Studies* 179 at 184–85; NJ Udombana “The third world and the right to development: Agenda for the next millennium” (2000) 22/3 *Human Rights Quarterly* 753 at 756.

10 OAU Charter, above at note 6, preamble.

to raise the living standards of African peoples”,<sup>11</sup> akin in every sense to Article 22 of the African Charter, which makes provision for the right to development.

The superior purpose manifests itself in theoretical form in search for meaning, including through the pan-African ideology of collective self-reliance and the philosophy of an African renaissance by which Africa seeks to position itself as a prominent global actor.<sup>12</sup> With the purpose of attaining the renaissance objective, the framework instrument for development outlines that Africa will, in pursuit of the “[...] social systems of global governance”, establish itself as a leading continent in the world.<sup>13</sup> These noble ideals are envisioned as germinating into an African dispensation with unique attributes and value systems. Expectations in this regard have, however, failed to materialize for several reasons, summed up by a continuous dependence on imported systems and models.

In an effort to reset the African frame of thinking, decolonial scholars have endeavoured to define the superior purpose in terms of a radical turn towards a decisive consciousness in exploring the continent’s creative potentials. This radical shift is crucial because global coloniality (colonialism and capitalism), as has been noted, has only aimed to forcibly drag Africa towards neoliberal capitalist modernity.<sup>14</sup> In that process, as Ndlovu-Gatsheni observes, complex problems have been inflicted on the African peoples for whom modernity proffers no pragmatic solutions.<sup>15</sup> The effects of neoliberal modernity in Africa are dismal, especially when the indices for poverty among other human development indicators for almost every country on the continent are scrutinized.<sup>16</sup> In the face of these stark realities, it is helpful to admit that Africa is not destined to remain impoverished. However, it would seem tragic if, following the recognition of differentiation among nations, Africa

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- 11 Constitutive Act of the African Union adopted in Lomé, Togo on 11 July 2000, preamble and art 3(k).
  - 12 DW Nabudere “The African renaissance in the age of globalization” (2001) 6/2 *African Journal of Political Science* 11 at 13; African Union Commission “Agenda 2063: The Africa we want” (2015) *African Union*, paras 59–63.
  - 13 AU Commission “Agenda 2063”, id, para 61.
  - 14 SJ Ndlovu-Gatsheni “A continuing search for a new world order” (2015) 36/2 *Australasian Review of African Studies* 22 at 28; AA Mazrui *The Africans: A Triple Heritage* (1986, BBC Publications) at 12.
  - 15 SJ Ndlovu-Gatsheni “The imperative of decolonizing the modern westernized university” in SJ Ndlovu-Gatsheni and S Zondi (eds) *Decolonizing the University, Knowledge Systems and Disciplines in Africa* (2016, Carolina Academic Press) 27 at 29.
  - 16 J Mensah “Introduction: Neoliberalism and globalization in Africa” in J Mensah (ed) *Neoliberalism and Globalization in Africa: Contestations from an Embattled Continent* (2008, Palgrave-Macmillan) 1 at 1–4; LS Lushaba “Development as modernity, modernity as development” (2006) (African Studies Centre Leiden, The Netherlands ASC Working Paper no 69); G Caffentzis “Neoliberalism in Africa, apocalyptic failures and business as usual practices” (2002) 1/2 *Alternatives: Turkish Journal of International Relations* 89 at 89–102.

failed to explore its inherent value potentials, alternative ideologies and home-grown models in responding to the challenges of poverty.<sup>17</sup>

The decolonial revolution in Africa gave birth to the conceptual framing of the right to development, which, as I illustrate in this article, embodies the superior purpose defined in terms of an imperative for socio-economic and cultural self-determination intended to achieve the yet to be completed decolonization process.<sup>18</sup> Completing the decolonization process entails that governance in post-colonial Africa (discussed below) should aim beyond mere contentment with the political freedoms acquired at independence. It should look to a status that is higher than prevailing circumstances and bigger in aspirational value, mirrored in the commitment to self-determination that informed the founding of the Organization of African Unity in 1963. This is prioritized in Agenda 2063 as the intention to achieve a high standard of living, better quality of life and improved well-being for all the peoples of Africa.<sup>19</sup> The African Union Commission estimates that “[b]y 2063, African countries will be amongst the best performers in global quality of life”.<sup>20</sup> This translates into a commitment to “transform the continent and ensure irreversible and universal change of the African condition”.<sup>21</sup>

African decolonial thinking finds justification in this light, which, from the perspective of the African conception of the right to development, exposes fundamental flaws in development programming on the continent that has principally pursued imported standards that prioritize economic growth rather than uplifting the peoples of Africa from impoverishment. After several decades of vain efforts to get Africa onto the right axis for development, Maseko indicates that, as a starting point, it is important, first of all, to dismantle, divest and indeed dispose of the “ill effects of colonially constructed inequities” and the “by-products of coloniality”.<sup>22</sup> The development future for Africa, if it is to produce transformative outcomes, demands a radical decolonial shift in modes of reasoning and functioning. These modes, unfortunately, have principally been defined by global categorizations and Eurocentric sub-standards with which Africa’s achievements are measured and, in effect, with which Africa is required to conform, no matter that the normative parameters for measurement largely only favour the global and Eurocentric systems that create them. Globalization, for example,

17 CC Ngang “Differentiated responsibilities under international law and the right to development paradigm for developing countries” (2017) 11/2 *Human Rights & International Legal Discourse* 265 at 270–81.

18 Ndlovu-Gatsheni “A continuing search for a new world order”, above at note 14 at 22–50.

19 AU Commission “Agenda 2063”, above at note 12, para 10.

20 Id, para 11 and paras 47–49.

21 Id, para 70.

22 PM Neo Maseko “Transformative praxis through critical consciousness: A conceptual exploration of a decolonial access with success agenda” (2018) 7 *Educational Research for Social Change* 78 at 79.

predominantly works more in favour of the Western capitalist economies than it does for Africa.<sup>23</sup>

Decoloniality for Africa entails that the processes for development and the mechanisms thereof be seen to operate for the attainment of the noble ideals for the continent, which, I argue, transcends the limitations of the AfCFTA as a mechanism for development. In seeking to redress the historical disadvantages that disenfranchised the peoples of Africa from opportunities for development, I contend that contemporary remedy mechanisms such as the AfCFTA must not aim to sustain existing structural imbalances, but rather to transform them. Rodney's narrative in *How Europe Underdeveloped Africa*<sup>24</sup> suggests that it is fatalistic to pursue analogous primitive neoliberal capitalist models that thrive on impoverishment, inequalities, dispossession and exclusion and expect to achieve different results. I describe neoliberal capitalist models as primitive, in the sense, as Nabudere explains, that by their internalization of capital "fewer individuals have come to own most of the world's wealth whilst the vast majority of the world's people have become impoverished".<sup>25</sup>

African decolonial thinking permits a shift from primitive neoliberalism, and thus also permits the exploration of other possibilities and alternative models and approaches suited to redressing current setbacks that limit development prospects for Africa. Dean affirms that "there is a multiplicity of rationalities, of different ways of thinking in a fairly systemic manner, of making calculations, of defining purpose and employing knowledge".<sup>26</sup> It provides justification for asserting the right to development, importantly because akin to the United Nations Development Programme (UNDP) human development model, it is much more contextually relevant than imported neoliberal capitalistic models that focus principally on expanding the market economy. The resultant aspiration for global economic hegemony<sup>27</sup> has come to mean for Africa a struggle to renegotiate from a position of disadvantage, as wa Mutua notes,<sup>28</sup> leverage against the odds, which by all indicators sees the nations of Africa consistently ranked only as emerging, developing, middle-income, low-income, least developed, fragile, heavily-indebted, underdeveloped or third world.<sup>29</sup>

23 K Ayenagbo et al "The impact of globalization on African countries economic development" (2012) 6/44 *African Journal of Business Management* 11057–76; JK Sundaram et al "Globalization and development in sub-Saharan Africa" (2011) (DESA Working Paper No 102).

24 W Rodney *How Europe Underdeveloped Africa* (1973, Tanzanian Publishing House).

25 DW Nabudere "The African renaissance in the age of globalization", above at note 12 at 13.

26 M Dean *Governmentality, Power and Rule of Law in Modern Society* (2010, 2nd ed, SAGE Publications) at 19.

27 AU Commission "Agenda 2063", above at note 12, para 61.

28 M wa Mutua "Why redraw the map of Africa: A moral and legal inquiry" (1994) 16 *Michigan Journal of International Law* at 1113.

29 JA Alonso, J Glennie and A Sumner "Recipients and contributors: Middle income countries and the future of development cooperation" (2014) (DESA Working Paper No 135) at 5; Udombana "The third world and the right to development", above at note 9 at 755.



## Imperative for socio-economic and cultural development

To present a more comprehensive picture of Africa in terms of the noble ideals or superior purpose discussed above requires a rethinking of the strategies for development. Development is understood in this context from a human rights point of view as a composite process that aims at making conditions for livelihood progressively better for all the peoples of Africa on the basis of their active, free and meaningful participation and equitable sharing of the benefits resulting from the process.<sup>30</sup> Accordingly, the processes for development need meticulous conceptualization, absent which the outcomes have been programmed poverty, inequalities and unprecedented crises, which the UN Human Rights office says makes the right to development more relevant today than ever before.<sup>31</sup> This is true for Africa, where the right to development is enshrined in Article 22 of the African Charter as a legally binding entitlement, which Kamga says, “sets obligatory standards that states cannot bargain away, or negotiate”.<sup>32</sup> The African Commission<sup>33</sup> and the African Court<sup>34</sup> have effectively adjudicated on the right to development and, in doing so, had occasion to provide clarity on the subjective element of peoples, which delineates the right to development in Africa as an entitlement that can only be claimed by a collective and not by individuals.<sup>35</sup>

The right to development as conceptualized in the African Charter has a binary nature: conceived on the one hand as a legal entitlement claimable through judicial processes, and on the other hand as a paradigm for development that imposes an obligation for policy making in shaping governance and development practice and in redressing development imbalances and injustices.<sup>36</sup> This article focuses more on the reading of the right to development

30 See Declaration on the Right to Development Resolution A/RES/41/128 adopted by the UN General Assembly on 4 December 1986, art 2(3); African Charter, art 22(1).

31 UN Human Rights “Frequently asked questions on the right to development: Fact sheet no 37” (2016) at 2.

32 SAD Kamga “The right to development in the African human rights system: The *Endorois* case” (2011) 44/2 *De Jure* 381 at 386.

33 *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003 (2009) AHRLR 75 (ACHPR 2009), paras 269–98; *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2009) AHRLR 9 (ACHPR 2009), para 95; *Sudan Human Rights Organisation & another v Sudan* (2009) AHRLR 153 (ACHPR 2009), para 224.

34 *African Commission on Human and Peoples’ Rights v Republic of Kenya* (2017) Appl No 006/2017, paras 202–11.

35 R Kiwanuka “The meaning of ‘people’ in the African Charter on Human and Peoples’ Rights” (1998) 82/1 *The American Journal of International Law* 80 at 82–88.

36 CC Ngang “Towards a right-to-development governance in Africa” (2018) 17/1 *Journal of Human Rights* 107 at 114–18; OO Oduwole “International law and the right to development: A pragmatic approach for Africa” (2014) *International Institute of Social Studies* 1 at 8; P Oyugi “The right to development in Africa: Lessons from China” in CC Ngang, SD Kamga and V Gumede (eds) *Perspectives on the Right to Development* (2018, Pretoria University Law Press) at 284–307; WP Nagan “The right to development and the importance of human and social capital as human rights issues” (2013) 1 *Cadmus* 1 at 30; I Slaus



as a development paradigm, with emphasis on the human dimension to development, which as Gawanas affirms, entails investing in advancing human productive capabilities and in maximizing prospects for well-being and improved standards of living.<sup>37</sup> It requires, as Olowu argues, political commitment to the realization of socio-economic and cultural rights.<sup>38</sup> Given their significance for development, the Limburg Principles emphasize that “particular attention should be given to measures to improve the standard of living of the poor and other disadvantaged groups, taking into account that special measures may be required to protect cultural rights of indigenous peoples and minorities”.<sup>39</sup>

It is reasonable that, in order to offset the odds that stand in the way of making living standards better for the peoples of Africa, asserting a claim to development as a definitive human right – not just as a means to an end but, indeed, as an end in itself – finds legal justification as enshrined in the African Charter among other instruments that compel state parties to create the conditions for its realization. To produce specific outcomes in aiming to achieve Africa’s noble ideals entails, as stated in Article 22(1) of the Charter in conjunction with the doctrinal clause in the preamble, that on a scale of preference, greater attention be given to socio-economic and cultural development. It originates from the decolonial reasoning that liberation from colonial rule granted political freedoms and civil liberties, but not socio-economic and cultural autonomy, without which political independence is of no consequence to the peoples of Africa.

Both the African Charter and Agenda 2063 contain provisions which, read together, articulate the view that development is to be considered as an inalienable right to socio-economic and cultural self-determination in making sovereign choices for the benefit of the peoples of Africa.<sup>40</sup> In accordance with the human development paradigm,<sup>41</sup> conceptualizing development as a human

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and G Jacobs “In search of a new paradigm for global development” (2013) 1 *Cadmus* 1–3; UN Human Rights *Realizing the Right to Development: Essays in Commemorating 25 Years of the United Nations Declaration on the Right to Development* (2013, United Nations Publication) at 495.

- 37 B Gawanas “The African Union: Concepts and implementation mechanisms relating to human rights” in A Bosl and J Diescho (eds) *Human Rights in Africa: Legal Perspectives on Their Protection and Promotion* (2009, Macmillan Namibia) at 145.
- 38 D Olowu *An Integrative Rights-Based Approach to Human Development in Africa* (2009, Pretoria University Law Press) at 289.
- 39 The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights UN Document E/CN.4/1987/17 adopted in Maastricht on 2–6 June 1986, para 14.
- 40 African Charter, arts 20(1), 21(1) and 22(1); AU Commission “Agenda 2063”, above at note 12, para 74(e).
- 41 UNDP *Human Development Report 1990*, above at note 1 at 10; S Fukuda-Parr “The human development paradigm: Operationalizing Sen’s ideas on capabilities” (2003) 9/2–3 *Feminist Economics* 301 at 303.

right emphasizes the centrality of peoples as the subject for development. Development is conceived in this instance not exclusively as a means of sustaining the market economy but, essentially, as a rights-based process intended to maximize human freedoms, productive capabilities and livelihood preferences at a higher level. The implication of framing development in this manner and, moreover, lodging it within the rubric of the law, makes it obligatory to perceive the right to development as a model for development by which Africa ought to be governed.<sup>42</sup>

Interestingly, Africa's framework instrument for development highlights the commitment to pursue an "African model of development" with an emphasis on the fact that the processes would be predominantly "people-driven".<sup>43</sup> It encourages recognition of the unique attributes that distinguish Africa from other regions of the world.<sup>44</sup> It is with conviction of the value-addition of the African uniqueness that decolonial scholars like Ndlovu-Gatsheni, among others, have been persistent in positing a systemic disobedience to unAfrican conceptions (that do not respond to African realities) of knowing and doing, which have, unfortunately, been infused with and corrupted by universal half-truths that are seeming far from easy to unlearn.<sup>45</sup> In conjunction with the understanding of decoloniality, the circumstances that evince the claim to development as a human right necessitate synchronizing various African value specificities into an exclusive governance model on the basis of which standard practices in thought, conduct and action could be gauged in relation to the duty to create an enabling environment for the right to development to be exercised without constraints.

Although implementation of the right to development in Africa is largely still shrouded in indifference, the unresponsiveness does not obfuscate the duties imposed on states to ensure its realization by setting priorities correctly and delineating an appropriate governance framework for the attainment of that purpose. The prescription for such a governance framework is anchored in acknowledging that development is indeed a human right.<sup>46</sup> Taking its cue

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42 CC Ngang "Systems problem and a pragmatic insight into the right to development governance for Africa" (2019) 19/1 *African Human Rights Law Journal* 365 at 387–93; Ngang "Towards a right-to-development governance in Africa", above at note 36 at 116; Ngang "Differentiated responsibilities under international law", above at note 17 at 278–80.

43 AU Commission "Agenda 2063", above at note 12, para 74(e) and paras 47–49.

44 Id, paras 40–46.

45 SJ Ndlovu-Gatsheni and S Zondi "Introduction: The coloniality of knowledge: between troubled histories and uncertain futures" in SJ Ndlovu-Gatsheni and S Zondi (eds) *Decolonizing the University, Knowledge Systems and Disciplines in Africa* (2016, Carolina Academic Press) 3 at 3–14; T Sithole "A decolonial critique of multi-inter-transdisciplinary (MIT) methodology" in SJ Ndlovu-Gatsheni and S Zondi (eds) *Decolonizing the University, Knowledge Systems and Disciplines in Africa* (2016, Carolina Academic Press) 107 at 118–21; SJ Ndlovu-Gatsheni "Global coloniality and the challenges of creating African futures" (2014) 36/2 *Strategic Review for Southern Africa* 181.

46 SP Marks "The human rights framework for development: Seven approaches" (2003) *François-Xavier Bagnoud Centre for Health and Human Rights* at 12.

from perceptions on decoloniality, which in effect entails decolonizing the concept of development in Africa, this duty is, in essence, to determine whether prevailing systems of governance inform political thinking and governmental conduct. It necessitates, in particular, examining how programming for development may contribute to actualizing the noble ideals or superior purpose in aiming to improve living standards for the peoples of Africa.

### Framework for the right to development governance

African human rights law, which embodies the African Charter, the African Youth Charter and the Protocol on the Rights of Women, among others, creates a regime that obligates states governments to prioritize the right to development.<sup>47</sup> Doing so requires a comprehensive angle of reasoning in synchronizing the law and livelihood experiences into actual practice, which involves looking at how governance is modelled. Governance generally delineates the ensemble of institutions, mechanisms, practices and processes for leadership and decision making and the implementation thereof in an effective manner for the general good. It denotes the form of organizing for purposes of creating balance, inclusivity and responsiveness to societal needs, demands and entitlements. As Yu Keping quite simply puts it, governance represents the capacity to get things done.<sup>48</sup>

Looking at it from the angle of governmentality, which Dean says deals with how we think about governance,<sup>49</sup> the situational exigencies in Africa necessitate interrogating how governance operates in response to those exigencies. The system of governance ought to provide the prism through which to analyse the rationality in coordinating complex dynamics and interdependencies, in harmonizing the interpretation and application of laws (norms, rules and policies), and in regulating ancillary actions, operations and irregularities. The emphasis on rationality is to the effect that governance must be seen to be, as Dean explains, “relatively clear, systemic and explicit”.<sup>50</sup> Interestingly, a judicious reading of African human rights instruments indicates that the law does not support or give credence to any system of governance that subjects the peoples of Africa to subservience. Governance in Africa needs to be perceived from Rose, O’Malley and Valverde’s notion of governmentality, which looks at diverse thought patterns to determine how they are

47 African Charter, art 22; African Youth Charter adopted in Banjul, the Gambia on 2 July 2006, art 10; Protocol on the Rights of Women in Africa adopted in Maputo, Mozambique on 11 July 2003, art 19; African Convention on the Conservation of Nature and Natural Resources (revised) adopted on 11 July 2003 in Maputo, Mozambique, art 3(2); the constitutions of Cameroon, Malawi, the DRC explicitly enshrine the right to development.

48 Yu Keping “Governance and good governance: A new framework for political analysis” (2018) 11 *Fudan Journal of the Humanities and Social Sciences* at 2.

49 Dean *Governmentality*, above at note 26 at 24.

50 *Id* at 18.

formulated, the derivative principles and knowledge that inform their formulation, the practicalities embedded therein, the contestations they generate and how they align with other aspects of governance.<sup>51</sup>

Governance, in this instance, cannot be concerned solely with power dynamics, as seems to be the phenomenon in Africa, but with the circumstances that give meaning to humanity as well; in which case, who actually governs must be made sufficiently clear, and according to what reasoning, with what techniques and for what purpose.<sup>52</sup> It involves an understanding of the rationality behind the way in which institutionalized politics is exercised, in conjunction with the active and willing participation of the peoples in determining how they are governed.<sup>53</sup> Contrary to this understanding, Olowu observes that “the bane of governance in much of post-colonial Africa is that holders of public offices operate the machinery of state in such a way that gives little or no consideration to the welfare of the people”.<sup>54</sup> As stated earlier, the African Charter and ancillary instruments obligate state parties to prioritize the right to development, which entails crafting a governance model that focuses on socio-economic and cultural development. Africa, however, seems instead to find favour with good governance,<sup>55</sup> which since the 1990s, following the World Bank and the International Monetary Fund’s (IMF) formulation of the concept,<sup>56</sup> has not been useful in transforming the development landscape in terms of raising living standards on the continent.

Patrick Utomi advances the argument, with which I concur, that Africa needs a new approach to development.<sup>57</sup> Utomi’s argument suggests that the prevailing system of governance, which is more concerned with political

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51 N Rose, P O’Malley and M Valverde “Governmentality” (2009) (Sydney Law School – Legal Studies Research Paper 09/94) at 3.

52 Ibid.

53 R Huff “Governmentality: Political science” *Encyclopaedia Britannica* available at: <<https://www.britannica.com/topic/governmentality>> (last accessed on 20 March 2020).

54 Olowu, above at note 38 at 288.

55 AU Constitutive Act, above at note 11, art 3(g); AU Commission “Agenda 2063”, above at note 12, paras 27 and 35; African Charter on Democracy, Elections and Governance adopted in Addis Ababa, Ethiopia on 30 January 2007, art 2(6); AU Convention on Preventing and Combating Corruption adopted on 11 July 2003 in Maputo, Mozambique, art 3(1); HA Wani and A Suwirta “Changing dynamics of good governance in Africa” (2015) 7/2 *International Journal for Educational Studies* 189 at 189–202.

56 Ngang “Towards a right-to-development governance in Africa”, above at note 36 at 116; D Gaoussou and P Plane “The World Bank and the genesis of the ‘good governance’ concept” (2012) 40/2 *Mondes en Développement* 51 at 51–52; N Maldonado “The World Bank’s evolving concept of good governance and its impact on human rights” (paper presented at the Doctoral Workshop on Development and International Organisations, Stockholm, Sweden in May 2010), available at: <[https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/news/doctoral\\_workshop\\_on/final\\_maldonado\\_nicole\\_paper.doc](https://warwick.ac.uk/fac/soc/pais/research/researchcentres/csgr/news/doctoral_workshop_on/final_maldonado_nicole_paper.doc)> (last accessed on 7 September 2020).

57 P Utomi “Africa needs a new approach to development” (3 May 2017) *Mail & Guardian*, available at: <<https://mg.co.za/2017-05-02-africa-needs-a-new-approach-to-development>> (last accessed on 7 July 2019).

economy than with emphasis on growth and governmental institutional capacity building, is not sufficiently transformative. The emphasis on the socio-economic and cultural aspects, which are more associated with livelihood, is intended to underscore the human dimension to development, which Kéba M'baye highlighted in his seminal conceptual argument that there is a human right to development that entitles every human person and all peoples to benefit from.<sup>58</sup>

The void created by the absence of a functional system of governance, which is reflected in extreme levels of poverty and underdevelopment across the continent, necessitates asking how state governments respond to the “duty to formulate appropriate national development policies that aim 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 the benefits resulting therefrom”.<sup>59</sup> This obligation, acquired from the Declaration on the Right to Development and which, in principle, is of no binding effect, is reinforced by the commitment under the African Charter (absolutely binding) to take concrete measures and actions with respect to ensuring that the end purpose of the right to development is attained.<sup>60</sup>

There is no other authoritative instrument that provides a more compelling vision and approach to development than the African Charter, which all African Union member states have ratified and are therefore bound by law to adhere to. Fundamentally, the guarantee in Article 22(1) that “[a]ll 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” compels state parties to prioritize the socio-economic and cultural well-being of their peoples. Adherence to the noble ideals that underline the African Charter among other AU (OAU) founding instruments demands that the right measures, actions and, of course, rational political conduct are put in place. Accordingly, governance in Africa needs to be informed by, and practically modelled to accomplish, the commitment to socio-economic and cultural self-determination at the national level and extra-territorially among African states working in collaboration.

A reasonable analysis of governmentality in Africa requires putting into historical context the continent’s socio-economic and cultural development contradictions alongside human rights law and the global realities that have been marked by a progressive shift towards rights-based approaches to development. It is sensible, in this regard, to look at governance on the African continent from the viewpoint of the incontrovertible entitlement to development as a human right, formulated in actual terms as the right to

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58 K M'baye “Le droit au développement comme un droit de l’homme” (1972) 5 *Revue des Droits de l’Homme* 503 at 513.

59 Declaration on the Right to Development, above at note 30, art 2(3).

60 African Charter, arts 1 and 22(2).

development governance on account of its transformative potential to actualize the imperative for socio-economic and cultural self-determination in Africa.<sup>61</sup> The right to development governance is not abstract. It originates from the African Charter and a broad range of other instruments and is implied in Agenda 2063, albeit in a fluid manner. Besides reaffirming the right to development for Africa,<sup>62</sup> the drafters of Agenda 2063 confusingly juxtapose different governance concepts, namely “people-centred governance”, “good governance”, “democratic governance” and “developmental governance”,<sup>63</sup> which ultimately do not define any governance model in concrete terms. The African Charter sets the threshold for development on the conceptual basis that all the peoples of Africa are entitled to socio-economic and cultural development for which they can articulate a legitimate claim, and with which states governments are obligated to comply.<sup>64</sup>

Guidance is thus provided on how to model the governance system for the attainment of that purpose and, moreover, in respect of the principle of the rule of law. The idea of “people-centred governance” comes close to the point, but yet – as with “good governance”, “democratic governance” or “developmental governance” – without an explicit recognition of the human right component with provenance from the African Charter, it takes away the legal obligation that is supposed to compel states to act in accordance. The drafters of Agenda 2063 ignored the need to reason along these lines in synchronizing the different governance concepts and the human rights dimension in order to produce the more comprehensible and lawfully grounded model that I describe as the “right to development governance”.<sup>65</sup> The right to development governance is, as I argue, the most rational form of governance to deliver on Africa’s noble ideals for better standards of living on the continent, especially because the African Charter imposes an obligation on

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61 Ngang “Systems problem”, above at note 42 at 387–93; Ngang “Towards a right-to-development governance in Africa”, above at note 36 at 116; Ngang “Differentiated responsibilities under international law, above at note 17 at 278–80. For other accounts on the right to development as a development paradigm, see B Ibhawoh “The right to development: The politics and polemics of power and resistance” (2011) 33/1 *Human Rights Quarterly* 76 at 103; A Sengupta “On the theory and practice of the right to development” (2002) 24/4 *Human Rights Quarterly* 837 at 846; UN Human Rights *Realizing the Right to Development*, above at note 36 at 495; Nagan “The right to development”, above at note 36 at 30; Udombana “The third world and the right to development”, above at note 9 at 762.

62 AU Commission “Agenda 2063”, above at note 12, para 76.

63 Id, paras 19, 27 and 35, 74(b) and 74(c).

64 African Charter, preamble para 8 and art 22.

65 Ngang “Towards a right-to-development governance”, above at note 36 at 114–16. The right-to-development governance is anchored on four conceptual principles, namely: effective people participation; liberty in the making of development choices; advancement of human capabilities for the sustainable management of the continent’s wealth of natural resources; and recognition of the African identity and value systems within a legal framework that guarantees genuine accountability and equitable (re)distribution for the improved collective well-being of the African peoples.

state parties to prioritize socio-economic and cultural development as a means by which to actualize the human dimension to development.<sup>66</sup> It reiterates entitlement to self-determination and the freedom to dissociate itself from the monoculture of universalism that propagates the reasoning that the only paradigms that provide salvation for Africa are those of a colonial heritage.

Although the right to development governance is largely still theoretical in its formulation, it represents the most rational governance model, with the potential to regulate the patterns of rapport between the state as a political institution and the peoples of Africa to whom the commitment to provide better living standards is due. It creates a binding people-centred relationship that compels the state to function in observance of the commitment to prioritize human entitlements, community participation in the processes for development and responsiveness to livelihood exigencies. On the reverse, however, when development is seen barely as a matter of political discretion of a government to its people, the state tends to dissociate itself from the obligation to protect the vulnerable, the dispossessed and the impoverished, and by implication also absolves itself of the duty to create the conditions and to facilitate the processes for the right to development to be actualized.<sup>67</sup>

Governance, according to Fukuyama, denotes “a government’s ability to make and enforce rules, and to deliver services, regardless of whether that government is democratic or not”, in the sense that an “authoritarian regime can be well governed, just as a democracy can be mal-administered”.<sup>68</sup> The right to development governance is much broader and aims to be both progressive and transformative, intended on the one hand to eliminate governance malpractices and democratic deficits of all sorts, and on the other hand to ensure a combination of efficiency in the governance processes, legitimate accountability and responsiveness to the needs of the peoples.<sup>69</sup> It looks at expanding the horizons for comprehensive development to be achieved in a manner that allows for increased productive capabilities, expanded alternatives and to progressively maximize well-being through the judicious use of natural resources, which, by right of priority, the peoples of Africa are entitled to derive equitable benefits therefrom.<sup>70</sup>

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66 African Charter, preamble para 8 and art 22.

67 For example, the Endorois case, *Centre for Minority Rights Development v Kenya* above at note 33, paras 269–98; Ogiek community land rights case, *ACHPR v Republic of Kenya*, above at note 34, paras 201–17. In these cases, the African Commission found the government of Kenya in violation of the right to development of the indigenous communities in question.

68 F Fukuyama “What is governance?” (2013) (Center for Global Development – CGD Working Paper no 314) at 34.

69 Ngang “Systems problem”, above at note 42 at 377–87.

70 CC Ngang “Right to development in Africa and the common heritage entitlement” (2020) 45/1 *Journal for Juridical Science* 28 at 41–42; Ngang “Towards a right-to-development governance”, above at note 36 at 115.



Unlike with economic paradigms that measure development in terms of GDP, the right to development governance model draws from the UNDP human development model, Sen's theory of development as freedom, and Nussbaum's capabilities approach.<sup>71</sup> It puts an emphasis not only on human livelihood preferences but, significantly, also on the governance processes relevant for defining acceptable standards of development. The right to development governance is accordingly envisaged to drive development on a comprehensive scale through guarantees of state sovereignty in policy formulation and domestic ownership of development processes. It equally ensures the simultaneous achievement of economic growth and the human dimensions to development, the realization of socio-economic and cultural rights concurrently with civil and political rights, and, most importantly, it prioritizes poverty eradication and hence ensures sustained improvement in living standards.

The performance indicators for almost every African country indicate that noble ideals or ultimate superior purpose remain elusive. Judging from the systems and the mechanisms in operation, which do not show evidence of a governance model of contextual relevance, Utomi's proposition for Africa to craft a new approach to development finds justification, and accordingly necessitates a different frame of thinking that admits "the essential truth that people must be at the centre of all development".<sup>72</sup> Agreeing with Lemke's suggestion to replace "reductionist [...] and economic models of explanations with social analysis carried out in historically concrete terms",<sup>73</sup> I suggest that in pursuit of the superior purpose or the noble ideals for better living standards, Africa is more in need of a socialistic well-being economy than a capitalistic market economy, which I explain by bringing the AfCFTA into close scrutiny.

## AFRICAN CONTINENTAL FREE TRADE AREA

### Neoliberal empire of a free market

The AfCFTA Agreement was adopted in Kigali, Rwanda on 21 March 2018, creating a framework for trade liberalization through a single African market aimed at strengthening regionalism and economic integration and facilitating the free flow of goods, services and the movement of persons.<sup>74</sup> With the ratification of the treaty in a record period of one year and its entry into force on

71 UNDP *Human Development Report 1990*, above at note 1 at 9–16; A Sen *Development as Freedom* (1999, Oxford University Press) at 87–95; M Nussbaum *Creating Capabilities: The Human Development Approach* (2011, Harvard University Press) at 43 and 33–34.

72 UNDP *Human Development Report 1990*, above at note 1 at iii.

73 T Lemke *Foucault's Analysis of Modern Governmentality: A Critique of Political Reason* (trans by E. Butler, 2019, Verso) at 70.

74 Agreement Establishing the African Continental Free Trade Area adopted by the AU at the 10th Extraordinary Session of the Assembly of Heads of State and Government in Kigali, Rwanda on 21 March 2018, AU Doc TI21086\_E, arts 2 and 3(a).

30 May 2019, the AfCFTA became the largest free trade area in the world, estimated to boost intra-African trade by 52 per cent by the year 2022 and remove trade tariffs on 90 per cent of goods.<sup>75</sup> Article XXIV of the GATT defines a free trade area as “an agreement among a group of two or more customs territories in which the duties and other restrictive regulations of commerce [...] are eliminated on substantially all the trade between the constituent territories in products originating in such territories”.<sup>76</sup>

The AfCFTA is thus established as an accord between consenting state parties whereby a free trade area is constituted, allowing for tariff-free trade in goods and also liberalized trade in services among member countries and the elimination of other non-tariff barriers.<sup>77</sup> Poverty features first in the taxonomy of Africa’s development challenges,<sup>78</sup> implying that in terms of priority, attention should, above other development considerations, be given first and foremost to poverty eradication. As a flagship project of the AU 2063 agenda for development,<sup>79</sup> I suppose that the AfCFTA should take into account the UNDP model and accordingly accentuate the human dimension to development. In aiming to achieve free trade, understood as a policy that allows for trade in goods and services across international borders with little or no government tariffs, the AfCFTA ought to outline concrete measures on improving living standards, probably in the form of a separate protocol.

Unfortunately, neither the AfCFTA Agreement nor its ancillary Protocols provide a blueprint for the well-being of the peoples of Africa as much as they repetitively emphasize liberalized trade. Apart from a perfunctory mention of human rights in the preamble (paragraph 7) and a few provisions in the AfCFTA Agreement (article 3(e)) as well as the Protocols on Trade in Goods (article 3(2)(f)) and Trade in Services (article 3(2)(b)), which highlight the need to promote sustainable socio-economic development, the rest of

75 CC Ajibo “African Continental Free Trade Area Agreement: The euphoria, pitfalls and prospects” (2019) 53/3 *Journal of World Trade* 871 at 872; Cofelice “African Continental Free Trade Area”, above at note 3 at 32; D Mumbere “AfCFTA Agreement to be Implemented after Gambia’s Historic Ratification” (3 April 2019) *AfricaNews*, available at: <<https://www.africanews.com/2019/04/03/afcfta-agreement-to-be-implemented-follo-wing-gambia-s-historic-ratification/>> (last accessed on 25 April 2019).

76 Article XXIV of the General Agreement on Tariffs and Trade (GATT 1947), para 8(b); see also UN Economic Commission for Africa “African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods” (2016) *United Nations UNCTAD/WEB/DITC/2016/7* at 4.

77 RY Simo “Trade in services in the African continental free trade area: Prospects, challenges and WTO compatibility” (2020) 23/1 *Journal of International Economic Law* 65.

78 S Sako and G Ogiogio “Africa: Major development challenges and their capacity building dimensions” (2002) (The African Capacity Building Foundation – Occasional Paper no 1) at 3–14.

79 Trade Law Centre “The African Continental Free Trade Area” A *TRALAC Guide*, 6th ed, November 2019, available at: <<https://www.tralac.org/documents/resources/booklets/3028-afcfta-a-tralac-guide-6th-edition-november-2019/file.html>> (last accessed on 7 September 2020) at 2 and 6; AU Commission “Agenda 2063”, above at note 12, para 72(h).

the document is awash with trade lingo and neoliberal ideologies. While the narrative on the AfCFTA lays an emphasis on trade liberalization, not much is said about how quality of life and standards of living would be achieved, which is largely only implied. For Kuhlmann and Agutu, “the AfCFTA could initiate a new, sustainable development approach [...] driven by the economic and social development considerations of all instead of market dominance by the few”.<sup>80</sup>

In a policy brief published in 2017, UNECA observes that the AfCFTA “present[s] a unique opportunity to bring enhanced growth and increased opportunity to millions of African citizens. The jobs and wealth that can be created through greater and easier intra-African trade have the potential to contribute significantly to eliminating poverty, creating jobs and promoting equality”.<sup>81</sup> By implication, the AfCFTA is envisaged to provide the enabling environment for the nurturing of productive capabilities, allow local economic initiatives to flourish, and thus trigger demand for ancillary capabilities. For van Lennep, the AfCFTA “has the potential to challenge the age-old dynamic of dependency, and give Africa command over its future”,<sup>82</sup> implying that by its nature it can enable Africa to achieve self-reliance and effectively exercise sovereignty against global coloniality. Mureverwi admits that the AfCFTA provides more of an enabling environment for expanded opportunities for development than is feasible under existing individual country development plans.<sup>83</sup> These optimistic views present the AfCFTA as constituting the kind of enabling framework for exercising the right to development envisaged in Article 22(2) of the African Charter.

Economic growth of the dimension envisaged to be achieved through the AfCFTA is indeed indispensable for development in Africa, as Luke states in his argument in favour of perceiving the continental market as an instrument for development, a means for economic industrialization and diversification, as well as for promoting gender equality.<sup>84</sup> I, however, contend that in its neoliberal formulation as a competitive market space (unhealthy for those without the capital strength), the AfCFTA does not demonstrate sufficient capacity to balance economic growth objectives and poverty eradication, which, I argue, is central to the aspiration of positioning Africa as an

80 Kuhlmann and Agutu “The African Continental Free Trade Area”, above at note 5 at 763.

81 United Nations Economic Commission for Africa and Friedrich-Ebert-Stiftung “Building a sustainable and inclusive continental free trade area: Nine priority recommendations from a human rights perspective” (2017) *UNECA-TEC Policy Brief* at 1.

82 T Van Lennep “The African Continental Free Trade Area III: Is Africa ready?” (2019) *Helen Suzman Foundation* available at: <<https://hsf.org.za/publications/hsf-briefs/the-african-continental-free-trade-area-iii-2013-is-africa-ready>> (last accessed on 26 April 2019) at 5.

83 Mureverwi “Welfare decomposition of the Continental Free Trade Area”, above at note 3 at 5–6.

84 D Luke ‘Making the case for the African Continental Free Trade Area’ in D Luke and J Macleod (eds) *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective* (2019, Routledge) at 5–12.

influential global power as envisaged in Agenda 2063. I base my argument on a broad perception of the realities of colonialism, globalization and neo-liberalism that Africa has experienced over the decades, which I posit are of the same nature and bloodline – defined by an obsession for market expansion, exploitation and capital accumulation at the expense of sustainable livelihood for the poor.

A crucial factor for the realization of the right to development is the prerequisite for sovereign ownership and equitable (re)distribution of natural wealth and resources,<sup>85</sup> which unfortunately has been of greater benefit to foreign stakeholders (investors) more than it has been to the peoples of Africa.<sup>86</sup> With an indication to phase out tariffs on 90 per cent of goods exchanged through intra-African trade,<sup>87</sup> a huge proportion of the resources needed to ensure the full realization of the right to development is guaranteed to remain within the African continent. The socio-economic benefits anticipated to accrue to the peoples of Africa is “estimated at 16.1 billion dollars, especially favoring women (who currently manage 70% of informal cross-border trade) and young people, who could benefit from new job opportunities”.<sup>88</sup>

With the expanded opportunities that the continental free market presents, it is accurate to imagine that socio-economic and cultural development could be achieved through the AfCFTA. To attain this goal, according to Mevel and Karingi, requires that expected gains be distributed fairly among the populations.<sup>89</sup> Taken in context, equitable redistribution would certainly satisfy the central defining element of collective well-being that underlines the concept of the right to development. However, a close scrutiny of the AfCFTA illustrates that, innately, it is not conceived with the end goal of equalizing living standards for the peoples of Africa. Even though a significant proportion of African countries are constrained by extreme poverty, among other livelihood challenges, Ajibo notes that, apart from the abstract guarantee to promote sustainable development, the AfCFTA provides no concrete indication of how these challenges would be redressed.<sup>90</sup> The AfCFTA founding instruments make no mention of the right to development, despite its protection in the African Charter and endorsement by the political leadership as instrumental for shaping the direction for socio-economic and cultural development on the continent.

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85 Declaration on the Right to Development, above at note 30, art 1(2); African Charter, art 22(1).

86 In a press statement in April 2019, former US Deputy Secretary of State for Africa, Nagy Tibor, observed that “Africa is an incredibly, incredibly rich continent and it seems, so far it has been incredibly rich for colonial powers, for the governments in place; it has not been rich for the peoples who live there”.

87 Cofelice “African Continental Free Trade Area”, above at note 3 at 32.

88 Id at 32–33.

89 Mevel and Karingi “Towards a continental free trade area in Africa”, above at note 3 at 283.

90 Ajibo, above at note 75 at 891.

The objectives set out in Articles 3 and 4 of the Agreement establishing the AfCFTA portray it as more neoliberal and market-focused, with a noticeable absence of any indication of how the continental common market would contribute to bettering living standards for Africa's predominantly impoverished peoples.<sup>91</sup> Mureverwi affirms that although the free market is estimated to culminate in improved welfare, the gains will only be registered at varying levels and, moreover, will not be evenly distributed.<sup>92</sup> In assessing the AfCFTA's prospects, the South African Institute of International Affairs notes that the benefits will be concentrated mostly in Africa's largest and most advanced economies, such as South Africa, Egypt, Nigeria, Morocco and Kenya, owing to their industrial base, better infrastructure and sizeable domestic markets, which make them more favourable destinations for foreign investors.<sup>93</sup> It contradicts prospects that all the peoples can hope to benefit equitably from the African free market. The apparent lack of a people-centred orientation of the AfCFTA (in disregard of member states' obligation to ensure the realization of the right to development) implies that equitable redistribution of development gains from trade across the continent is not guaranteed.

Scepticism about regional integration, trade liberalization and growing anti-globalization sentiments obligates Africa to rethink the neoliberal strategies that underline the AfCFTA in order to ensure a functional mechanism that can substantially benefit the African populations collectively.<sup>94</sup> Alluding to the UNECA policy recommendation to prioritize human rights as a means of eradicating poverty,<sup>95</sup> which remains the most daunting of development challenges in Africa, I argue that the success of the AfCFTA will make sense only to the extent that member states legitimately adhere to human rights standards, particularly with regard to realizing the right to development. Actualizing the right to development equally entails, as corroborated by Article 21(1) of the African Charter, asserting the right to sovereign ownership

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91 While trade can indeed contribute to raising living standards, there is no guarantee that it necessarily does. For example, Nigeria and South Africa are the largest market economies in Africa, but the same time, both countries have the largest number of impoverished people on the continent, according to the World Bank estimates: 83 million (40% of the population of Nigeria) and 30.3 million (55.5% of the population of South Africa), indicating that trade does not directly translate into improved well-being for the entire population.

92 Mureverwi "Welfare decomposition of the Continental Free Trade Area", above at note 3 at 15.

93 South African Institute of International Affairs "Understanding the Agreement on African Continental Free Trade Area: Considerations for Korean firms" (2020) Korean Ministry of Foreign Affairs at 16 available at: <<https://saiia.org.za/research/undersanding-the-african-continental-free-trade-agreement/>> (last accessed on 2 December 2020).

94 Cofelice "African Continental Free Trade Area", above at note 3 at 34; UNECA and Friedrich-Ebert-Stiftung "Building a sustainable", above at note 81 at 1–8.

95 UNECA and Friedrich-Ebert-Stiftung "Building a sustainable", above at note 81 at 10–18.

over natural resources, which must be disposed of only to the exclusive benefit of the peoples of Africa.

It would be logical to suggest that if the system of governance in Africa, and hence the AfCFTA, were conceptualized differently and, as I argue, in terms of the right to development governance, this would produce a different outcome, one that is more human rights-based and furthermore patterned to achieve exclusive collective benefits for all the peoples of Africa above the overriding free market and economic growth considerations. The UNDP report of 1990, unlike previously, has long since shifted the understanding of development solely in quantitative terms by economic growth indicators towards an understanding of development from a humanistic perspective. Viewed from an economic point of view, the AfCFTA would be acclaimed as a macro-economic accomplishment of gigantic proportions, geared to multiply growth rates and significantly transform Africa's economic outlook, especially in terms of industrialization, infrastructural development and technological advancement. The AfCFTA has enormous potential to succeed in its market expansion and economic growth objectives, the important question, however, being to succeed for what purpose, by what means and for whose benefit?

### **Capitalist problem, matrix of economic interest and the ineptitude of African governments**

It is worth admitting that the AfCFTA will create the opportunity for economic gains to trickle down to some of the impoverished peoples of Africa, and thus alleviate poverty and other socio-economic and cultural development constraints by a significant margin. However, its predominantly neoliberal modus operandi through trade liberalization without sufficient livelihood sustainability guarantees does leave a crucial concern about who is more likely to benefit from the free market. Even though it is said that the AfCFTA would produce welfare gains, quantified in the estimate of USD 16.1 billion for the peoples of Africa,<sup>96</sup> the calculation omits the reality that most, if not all, African countries are heavily indebted and dependent on foreign financing for development,<sup>97</sup> and thus lack the free sovereign hand to guarantee that their involvement in the continental free market would translate into livelihood benefits for their peoples.

96 L Abrego et al "The African Continental Free Trade Agreement: Welfare gains estimates from a general equilibrium model" (2019) (IMF Working Paper WP/19/124) at 19–23; J Cazares "The African Continental Free Trade Area: Benefits, costs and implications" *Infomineo* available at: <<https://infomineo.com/africa-continental-free-trade-area/>> (last accessed on 31 March 2020); Cofelice "African Continental Free Trade Area", above at note 3 at 32–33.

97 CC Ngang "Complexity in balancing the pursuit of FDI with the obligation to achieve the right to development in Africa: A focus on China–Africa relations" in CC Ngang and SD Kamga (eds) *Insights into Policies and Practices on the Right to Development* (2020, Rowman and Littlefield International) 267 at 277–79.

Following Ndlovu-Gatsheni's line of reasoning that capitalist modernity has for Africa created complex problems for which it proffers no solutions, I submit that while the AfCFTA is, on the one hand, acknowledged to have the capacity to transform the economic landscape and create opportunities for development, it will, on the other hand, amplify two pre-existing capitalist problems. First, without a level playing field on which the predominantly impoverished African peoples can compete in the free market space, liberalization gives economically privileged corporate actors unfair advantage over the economically disadvantaged. Second, in the absence of concrete measures for (re)distribution of the common African heritage and the gains from the free market (not spelled out in the AfCFTA Agreement), the AfCFTA, in its neo-liberal nature, may only further open up the continental frontiers to continuous unencumbered extraction of the continent's natural resources.

The level of Chinese penetration into almost every African economy, for instance, characterized by shady development financing arrangements and indeterminate ambitions for global dominance,<sup>98</sup> and in addition the seemingly inseparable relationship that binds some fourteen French-speaking African countries (the least developed on the continent) to France under the Colonisation Continuation Pact,<sup>99</sup> are all concrete illustrations that leave crucial questions about the AfCFTA yet to be answered. Even though the AfCFTA provides the said fourteen francophone countries with the opportunity to rupture the colonial bond with France, and thus gain greater sovereignty and development policy direction, the politics that informs the *Françafrique* pact is such that the AfCFTA might not stop those countries from protecting French economic interests.<sup>100</sup> For instance, the Economic Community of West African States (ECOWAS), at the end of its July 2009 Summit in Abuja, announced the decision to adopt the ECO as a single currency for the region – an initiative that has been seen as a milestone towards concretizing the AfCFTA.<sup>101</sup> In a political ploy, and with the complicity of France, the

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98 M Busse, C Erdogan and H Mulhen "China's impact on Africa: The role of trade and FDI" (2014) (Ruhr-University Institute of Development Research and Development Policy Working Paper vol 206) at 4–8; J Kamwanga and G Koyi "Impact of China–Africa investment relations: The case of Zambia" (2009) *Policy Brief* at 1–5; A Were "Debt trap? Chinese loans and Africa's development options" (2008) *South Africa Institute of International Affairs – Policy Insights* 66 at 6–7; Ngang "Complexity in balancing the pursuit of FDI", above at note 97 at 274–79.

99 G Martin "The historical, economic, and political bases of France's African policy" (1985) 32/2 *The Journal of Modern African Studies* at 189–208; FX Verschave *La Françafrique: Le Plus Long Scandale de la République* (1998, Stock).

100 K Amuwo "France and the economic integration project in Francophone Africa" (1999) 4/1 *African Journal of Political Science* 1 at 2–4; J Rousselot "The impact of French influence on democracy and human rights in Cameroon" (2010) 4/1 *Cameroon Journal on Democracy and Human Rights* 59; G Martin "The Franc Zone, underdevelopment and dependency in francophone Africa" (1986) 8/1 *Third World Quarterly* 205.

101 S Mati, I Civcir and H Ozdeser "ECOWAS common currency: How prepared are its members?" (2019) 78/308 *Investigación Económica* 89 at 90–92; A Salaudeen "West African



eight francophone ECOWAS countries proceeded prematurely in December 2019 to announce a rebranding of the CFA Franc to henceforth be called the ECO.<sup>102</sup> France followed through with new legislation in May 2020 purportedly ending its fiscal hegemony over the eight ECOWAS francophone countries, a move which Kamga finds unconvincing, in the sense that convertibility of the ECO would remain guaranteed by France and pegged to the Euro at the same rate that the CFA Franc is pegged to the Euro.<sup>103</sup>

A broad range of powerful foreign multinationals (wealthier than most African governments) are known to monopolize key sectors in Africa, such as commercial farming, mining, oil exploration, logging, manufacturing and even service delivery, among others. Although these multinationals are generally acclaimed for their capacity to create jobs and keep the economies of African countries afloat, the dark side of their operations on the livelihood of local communities, driven by the obsession to multiply profits, cannot be overlooked. As was the case involving the giant oil exploration multinational Royal Dutch Shell Corporation, which became a matter of litigation before the African Commission in the *Social and Economic Rights Action Centre & Another v Nigeria* case,<sup>104</sup> African states governments often find themselves incapable of regulating these multinationals when they commit gross human rights violations in the course of their operations.

The African Commission found that Shell Corporation's abusive exploitation of crude oil in the Niger Delta region of Nigeria caused extensive environmental hazards, which adversely impacted on the livelihood of the Ogoni community, resulting in massive violation of a broad range of human rights protected by the African Charter, and consequently ordered, among other measures, the payment of compensation to the affected communities.<sup>105</sup> Even so, the Nigerian government, instead of providing adequate protection to its citizens, colluded with Shell Corporation in perpetrating the human rights violations in the Niger Delta region and has never managed to

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countries choose new 'ECO' single trade currency" (9 July 2019) CNN, available at: <https://edition.cnn.com/2019/07/01/africa/single-trade-currency-ecowas/index.html> (last accessed on 12 July 2020); L Dewast "West Africa's Eco: What difference would a single currency make?" *BBC Africa* (Dakar) available at: <https://www.bbc.com/news/world-africa-48882030> (last accessed on 6 July 2019).

- 102 E Smith "West Africa's new "eco" currency sparks division over timetable and euro peg" (17 Jan 2020) CNBC, available at: <https://www.cnbc.com/2020/01/17/west-african-eco-currency-sparks-division-over-timetable-and-euro-peg.html> (last accessed on 31 March 2020); AM Gbenga "Political undertones in moves to adopt ECO by francophone West Africa" (21 Jan 2020) *Ventures*, available at: <http://venturesafrica.com/political-undertones-in-move-to-adopt-eco-by-francophone-west-africa/> (last accessed on 31 March 2020).
- 103 GEK Kamga "Empty currency and the mechanics of underdevelopment within the Franc zone" (2020) 45/1 *Journal for Juridical Science* 120 at 139.
- 104 *Social and Economic Rights Action Centre (SERAC) & another v Nigeria* Comm 155/96 (2001) AHRLR 60 (ACHPR 2001).
- 105 *Id.*, para 70.

implement the rulings of the African Commission. The victims, rather, only obtained justice by resorting to a foreign jurisdiction in the *Ken Saro-Wiwa v Royal Dutch Shell* litigation before the United States Supreme Court, which forced Shell into an out-of-court settlement of USD15.5 million.<sup>106</sup>

In a similar development that gave rise to the *Lungowe and others v Vedanta Resources PLC* case, a group of Zambian nationals from four local farming communities had to resort to the courts in the United Kingdom (UK) to assert a claim against the parent UK-based mining conglomerate, Vedanta Resources PLC, for the abusive mining operations perpetrated by its subsidiary company at the Nchanga Copper Mine in the Chingola District in Zambia.<sup>107</sup> The complainants, said to be extremely poor, alleged damages ranging from bodily injuries, loss of income, damage to land and property and contamination of their water sources.<sup>108</sup> The UK High Court dismissed the case for lack of jurisdiction, but on appeal, the UK Supreme Court ruled in favour of the claimants' standing right to seek remedy in the UK, on the basis that "the claimants would not obtain substantial justice if required to proceed [with their claim] in Zambia".<sup>109</sup> By this ruling, the Zambian government and its domestic justice system was shown to be incapable of providing legal protection to its citizens against abuse and human rights violations committed by a foreign mining company.

With such illustrations in mind, it would not be out of place to be concerned that, without a human dimension to the trade liberalization policies of the AfCFTA, other uncontrolled multinationals could take advantage of the African free market space and continue to exploit the continent's natural resources with impunity, and with no guarantee that the host governments would be able to regulate their operations. Note is taken of the Draft Pan-African Investment Code that seeks to promote, facilitate and protect investments that foster sustainable development in Africa, particularly those where investments are located.<sup>110</sup> It is noted that the AfCFTA is designed to favour existing giant economies while posing a range of threats and challenges to smaller and fragile ones, which, interestingly, form the bulk of the member states that make up the African free market.<sup>111</sup> In order to deal rationally with this capitalist problem, van Lennep suggests that implementation of the

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106 *Ken Saro-Wiwa and others v Royal Dutch Shell Petroleum Corporation* 2009 WL 1574869 (S.D.N.Y. 23 April 2009); The Guardian "Shell pays out \$15.5m over Saro-Wiwa killing" (9 June 2009) *The Guardian*, available at: <<https://www.theguardian.com/world/2009/jun/08/nigeria-usa>> (last accessed on 5 April 2020).

107 *Lungowe & others v Vedanta Resources PLC and another* [2019] UKSC 2 UKSC 2017/0185, paras 77–96.

108 *Lungowe & others v Vedanta Resources*, para 1; EN Chegwe "Case review: *Vedanta Resources PLC & another v Lungowe & others*" (2019) *National Open University of Nigeria* at 7.

109 *Lungowe & others v Vedanta Resources*, para 84.

110 African Union Commission Economic Affairs Department Draft Pan-African Investment Code, December 2016, art 1.

111 Akeyewale "Who are the winners and losers ...?", above at note 3.

AfCFTA requires creating feasible conditions to leverage on the opportunities it offers.<sup>112</sup> This cautious suggestion hinges on the red signals from previous continental flagship initiatives that have largely not been successful.

For Cofelice, with whom I concur, the effectiveness of the AfCFTA is preconditioned on the establishment of an appropriate governance system,<sup>113</sup> which, as I argue, should embody a rights-based approach that emphasizes the human dimension to development, entailing by every measure the realization of the right to development. Accordingly, the core argument in this article has been in favour of a system of governance that puts the well-being of the peoples of Africa over the market economy. If my argument in favour of a right to development governance makes sense, the success of the AfCFTA would then only be ascertained to the extent that its implementation is guided by the commitment to the socio-economic and cultural development exigencies on the African continent.<sup>114</sup>

## CONCLUSION

The concept of development is not subject to any uniform pattern, and therefore its processes and mechanisms cannot be required to pursue universally crafted standards. Africa has always had the option, within the context of a plurality of development approaches, to craft its own pathway through initiatives like the AfCFTA. However, the neoliberal thought patterns that informed its conceptualization might have resulted from a discreet interest in avoiding alternatives that might later prove to be counterproductive. Decolonial thinking suggests otherwise, and indeed advises against the importation of neoliberal models as a template for development in Africa, which is definitely not devoid of contextually relevant alternative models to development. Unless put to the test first, the functionality of the suggested alternative development models cannot fully be appreciated. I illustrate this by arguing in favour of the right to development governance, in the sense that with regard to producing transformative outcomes, Africa is more in need of a socialistic than a capitalistic model for development.

Even though it is important to admit that there is no shortage of alternative remedy models suited to redressing Africa's development contradictions, the actual problem, however, lies with the fatalistic distrust by Africa's political leadership in paradigms of African origin, which have, for the most part, remained the subject of scholarly debate. The level of academic contributions in influencing policy formulation, political decision making and development programming is still quite rudimentary – a scenario that continues to rob Africa of effective political sovereignty and socio-economic and cultural self-determination. In order to settle on an appropriate governance model that

112 Van Lennep "The African Continental Free Trade Area III", above at note 82 at 5.

113 Cofelice "African Continental Free Trade Area", above at note 3 at 33.

114 CC Ngang "Systems problem", above at note 42 at 387–92.

can suitably reshape development thinking in Africa as experience, and that situational realities provide justification for, decolonial scholars advance an argument that begins with a decolonization of the African patterns of reasoning, knowledge and operating systems and, more essentially, engages with the process of systemic rupture of pre-existing models of a colonial, neocolonial or neoliberal heritage.

## **CONFLICTS OF INTEREST**

None