

Unsettling Colonial Paradigms: Right to Development Governance as Framework Model for African Constitutionalism

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Abstract: In this article, we discuss the need to dispose of colonial paradigms that hold back progress in Africa. Fundamentally challenging is the fact that Africa is not only lacking an operational model for governance and development but has remained stuck to colonial paradigms, which by their paternalistic nature defeat the purpose for which independence was achieved. We identify that the right to development has evolved in the course of African history as an alternative model to the 'civilization paradigm' that laid the foundation for imperial domination. In substitution, we propose the right to development governance as a framework model by which to constructively remodel African constitutionalism and set the parameters for advancing the continent towards effective governance and self-reliant sustainable development.

Introduction

In this article, we discuss the need to get rid of colonial paradigms that hold back progress in Africa, and in substitution, we propose the right to development governance as a framework model by which to constructively remodel African constitutionalism and set the parameters for advancing the continent towards effective governance and self-reliant sustainable development. By colonial paradigms, we refer to the models and systems, including for example, the structural patterns, political regimes and the socio-economic and cultural practices, which as a colonial legacy have stood as an impediment to the enjoyment of the right to development.

Over half a century after the acquisition of independence in most of Africa, the need to dismantle these paradigms inherited from colonialism is explained by the fact that decolonization was conceived narrowly as a once-off political event, marked by the physical withdrawal of the colonial administration, notwithstanding that the institutionalized system for sustained socio-economic and cultural dependence remained unaffected.¹ Despite attaining independence, which guaranteed absolute sovereignty, the successor states that were born out of the colonial empire, virtually replicated the tenets of colonial rule and therefore, created the lapses that allowed for continuous domination, subjugation and exploitation of the African peoples even by their own leaders.

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This was facilitated by a colonial continuation mechanism in the form of national constitutions, which exceptionally, were crafted by the colonial powers and imposed on the decolonised states at independence without consultation or participation of the African peoples in the constitution making processes. Constitutionalism traditionally denotes adherence to a regulated system of government devoted to achieving the common good through the preservation of individual and collective entitlements that are guaranteed and protected by a code of binding precepts agreed to as the supreme law that governs a polity.² This conventional understanding of constitutionalism was supposed to constitute the framework by which independent African states were to operate.

On the contrary, a model of constitutionalism was adopted which in every aspect remain stifled by paradigms that protected the imperial governments that had ruled in Africa rather than that of the African peoples. It is not unintentional that we make reference to this phenomenon, which we call “African constitutionalism” in a generalized manner, being conscious of the fact that Africa is geopolitically not a homogenous entity. We make this generalization on the basis that African constitutionalism exhibits unique features that are common to all of Africa, which Prempeh (2007) describes as “African exceptionalism.”³ But for a few exceptions like South Africa and to a small extent Benin and Kenya, the rest of Africa is more similar than different in the framing of constitutionalism.

Thus, we make the case for a decolonization of African constitutionalism as an inevitable first step in paving the way to effective governance and sustained socio-economic and cultural development on the continent. The reasoning is that systems operate on established paradigms that set functional standards and the *modus operandi*. For instance, the “civilization mission” sustained colonialism in Africa for a period of over seventy years albeit that it only inflicted pain and misery on the colonized peoples. Colonialism was replaced by a constitutional framework that was supposed to respond to the wellbeing entitlements of the peoples of Africa and their aspirations for improved living standards.

In making the quest for a decolonization of African constitutionalism, our aim is to illustrate that the existing constitutional framework was ill conceived and not designed to promote effective governance and development in Africa. In spite of subsequent reforms, African constitutionalism has still not adequately been structured to equip the African peoples with the capabilities to advance the continent. Born out of the revolutionary consciousness to reverse the effects of colonialism, Fanon (1963) describes decolonization as a process that can only be understood within the context of the movement that ascribes to it “historical form and content.”⁴ For Mbembe (2015), decolonization entails getting rid of its preexisting models and systems and cease using them as paradigms.⁵ Decolonization requires a new set of radical concepts and independence did not put these in place.

Most of the territories that acquired statehood in the 1960s have not sufficiently progressed in the area of governance and development, implying, as we argue, that an important first step to independence was overlooked. Independence entailed conceptualizing a substitute model to replace the “civilization paradigm” as a prelude to ensuring the optimal functioning of the decolonized states. While the call to decolonize key sectors of African society has intensified since independence, decolonization of African constitutionalism appears to have been ignored. This has meant that the actual obstacle to progress in Africa is yet to be conceived as a constitutional matter, which in our estimation poses a fundamental problem.

Indeed, “the emerging independent African states of the 1960s proclaimed their commitment to democracy, good governance and respect for human rights.”⁶ However, the prevailing circumstances hold evidence to the contrary in the attainment of these standards, owing to the lack of a compelling obligation to do so and to the fact that the foundation for failure was laid during colonialism.⁷ In line with Mbembe’s argument in favor of substituting colonial paradigms, asserting the right to self-determination implied a claim on the right to development, which we envisage, should have been incorporated into African constitutionalism as an alternative model to colonial absolutism.

By postulating the right to development governance (discussed below) as a substitute to preexisting colonial paradigms, we envisage on the one hand, a constitutional principle similar to the ‘social state principle’ used in German constitutional law to guide interpretation of the law and policy making⁸ and on the other hand, a positive right by which states may be constrained as a matter of constitutional obligation to take concrete action to ensure the attainment of wellbeing for the peoples of Africa. The central question is whether Africa is capable of formulating such a model as a substitute for the obsolete colonial paradigms that permeate African constitutionalism?

In responding to this question, we delve into an insightful analysis of the absolutism that characterized the colonial dispensation. We explain why decolonization became inevitable and the transitions that Africa has experienced since independence, with highlights on the insufficiencies that necessitated the shift from one phase to another. We then proceed to look at the independence project and the advent of African constitutionalism. On account of this analysis, we make the case for the *right to development governance* as a framework model for African constitutionalism within the context of the African agenda that envisages self-reliant sustainable development. We conclude with the argument that without a radical model of the sort, the future of Africa may remain hanging on the balance between the opposing forces of decolonization and globalization.

In the Conundrum of Colonial Absolutism

The Iniquities of Colonialism

This narrative on the iniquities of colonialism is important for a better understanding of the need to get rid of the colonial paradigms that provided justification for colonialism. It paves the way for the enquiry on how and to what extent African constitutionalism has aided or is likely to drive the decolonization project. The colonial state not only deprived the subjugated peoples of representative institutions, it also deprived them of the constitutional powers to hold the colonial administration accountable.⁹ If constitutions existed at all, their implementation was based on legalism rather than legality. The colonial era was thus largely devoid of constitutionalism, absent which colonial rule primarily aimed only at promoting European capitalist interests. As Oloka-Onyango (1999) highlights, the peoples of Africa were dispossessed of effective control over their own affairs and the fate of the continent.¹⁰ It is not unfounded to state that the legal and political factors that fueled colonization also created an overwhelming socio-economic and cultural impact that robbed the peoples of Africa of their productive capacity and self-sufficiency.

Thus, the European mission to civilize Africa did not only fail, it also flouted the processes through which genuine governance and development could have been achieved on the continent. Coupled with the fact that the codification of international law in the

period after the Second World War rendered colonialism unlawful; the quest for independence originated from the consciousness that the colonizers' civilization paradigm was flawed and detrimental. The dehumanizing conditions under which the peoples of Africa were subjected not only sowed the seeds for decolonization on the basis of the right to self-determination, it also provided justification for eventual claims for the right to development, which we argue, constitutes an alternative to the civilization paradigm that laid the foundation for imperial domination.

Decolonization, Transitions and Fundamental Insufficiencies

As Sium, Desai and Ritskes (2012) make clear, “[d]ecolonization is indeed oppositional to colonial ways of thinking and acting.”¹¹ It therefore, provides the starting point in the articulation of the fundamental precept that “[u]nless we hate what we are not, we cannot love what we are.”¹² This precept does not seem to bond with decolonization in Africa, leaving us with the argument that the acquisition of independence was not only hastily and haphazardly concluded, efforts at ensuring progress remain marred with deficiencies that expose the continent to continuous neocolonial and imperialistic practices.

In retrospect, the period after independence from 1957 to 1981 was regulated by a legal framework constituting of a range of domestic constitutions adopted at independence together with the Charter of the Organisation of African Unity (O.A.U. Charter) adopted in 1963. We describe this period as the ‘liberation phase,’ understandably because the legal instruments were basically modeled to uphold the right to liberation. Inspired by Nkrumah’s ideology for independence, articulated in the belief to “seek first the political kingdom” with the anticipation that other aspirations would be achieved thereafter, the focus on liberation was unfortunately narrowed down to securing individualistic civil and political rights.¹³ As reflected in the preamble and in article 2 of the O.A.U. Charter, the liberation philosophy was framed in the determination to consolidate political independence and to ensure a complete decolonization of the entire African continent.

In spite of the assurances of full emancipation embodied in the right to self-determination, which guaranteed the legal basis for decolonization, the liberation period produced deficiencies owing to the misplaced formulation of a post-independence legal framework that focused primarily on the protection of civil liberties and political freedoms without much regard to socio-economic and cultural development. As Aguda (1989) observes, the independence constitutions gave liberation leaders false hope that political independence with guarantees of basic civil liberties would bring about development.¹⁴ Liberation leaders believed, albeit wrongly, that the future of Africa would be determined by the common people through politics.¹⁵ We contend that such thinking grossly misjudged the degree to which ordinary people had been dispossessed of the productive capacity to meaningfully engage in politics. This allowed for continued operation of the colonial machinery of exploitation with the complicity of a corrupt governing elite.¹⁶

By implication, a decolonized Africa ought to have been structured to operate on a model that emphasized human rights and improved wellbeing, protection of the African patrimony and value systems, progress and sustainable development. The right to development governance could have been conceptualised to constitute such a model for Africa. As it appears, the liberation leaders were conscious of this fact and therefore, randomly fumbled with several conflicting models. The likes of Jomo Kenyatta and Mobutu

Sese Seko advocated for western-style capitalism while Julius Nyerere, Kwame Nkrumah and Sékou Touré lobbied for African socialism. Unfortunately, these leaders failed to settle for any of these models.

Knowing the necessity of a substitute model to complement the decolonization process and then failing to formulate one amounted to acquiescence to the neocolonial models that readily crept in to fill the gap in postcolonial Africa. The vision of a liberated Africa with promises of improved wellbeing thus summarily paled into inconsequentiality as the reality dawned that independence guaranteed autonomy only to the extent that the peoples could freely make political choices while the power of socio-economic decision making remained in the hands of the imperial powers.¹⁷

The anti-colonial struggles for liberation were motivated by aspirations for improved human wellbeing in postcolonial Africa but the aftermath proved rather the contrary, especially faced with the complexity of domestic challenges and encroaching globalization.¹⁸ African liberation leaders not only demonstrated shortsightedness in formulating a radical governance and development model to substitute colonial paradigms, they shortsightedly believed in forging relations with the colonial masters through international cooperation even though the preamble to the Charter compels them “to fight against neocolonialism in all its forms.” We are not stating a claim against promoting cooperation, which of course is envisaged by international law. Of concern are the fault lines resulting from the conflicts of interest within the cooperation frameworks that African countries align to and how these fault lines impact on the paradigms that continue to shape African societies.

Despite the obligation imposed by article 2(2) of the O.A.U. Charter necessitating horizontal cooperation, there has been more vertical cooperation with countries of the west and currently with China than among African countries. Although international cooperation is authorized by international law, Anghie intimates that international law, in its current form, is designed essentially to promote the interests of “civilized nations.”¹⁹ Accordingly, Kwakwa (1987) cautions that international law should be embraced with caution because its application engenders a *status quo* that is not protective of developing countries.²⁰ Quite evidently, cooperation with industrialized countries has never favored partner countries in Africa.

The moments of turbulence that Africa experienced after independence were not unconnected to the lack of an operational governance model to advance the continent. Thus, because the decolonization project was embarked upon quite nonchalantly as Oloka-Onyango points out, it rather quickly became apparent that liberation needed to mean much more than the acquisition of nominal political independence.²¹ As highlighted earlier, decolonization entails the rejection of preexisting paradigms. These paradigms must be substituted with models that foster socio-economic and cultural rights rather than those which only favor civil rights or the freedom to make political choices without the ability to sustain livelihood with dignity.

Without an alternative to the inherited colonial models, the decolonized African states exhibited the “classic attributes of statehood” and “judicial sovereignty” but remained porous and incapable of the economic potential to uplift their peoples out of poverty and deprivation.²² Within the context of the ongoing debate on decolonization, Grosfoguel (2011) portrays capitalism as a universally applicable paradigm, which we contend is unsuited for Africa.²³ Like other postcolonial models, we argue that capitalism bears the seeds of

imperialism and therefore, threatens the essence of decolonization that is still in process of being fully achieved in Africa. However, consciousness has continued to build towards the realization that reliance on neocolonial or imported models constitutes a hindrance to progress in Africa. The recognition of this essential fact motivated the shift from the mindset of liberation into a new era of decolonization that emphasizes the right to development. We describe this period marked by the adoption of the African Charter on Human and Peoples' Rights in 1981 as the "transformation phase" because of the underlining focus on radical change that envisages the simultaneous achievement of human rights and sustainable development across the continent.

In line with the foregoing analysis, Borella makes clear that the codification of African law has increasingly taken a developmental orientation.²⁴ Unlike the O.A.U. Charter, subsequent African treaty instruments have placed greater focus on the mutually reinforcing aspects of human rights and development. While it became necessary only later to reemphasize the need for full realization of the right to self-determination, we argue that the emphasis on development as a matter of human right ought to have been given particular attention prior to the acquisition of independence. However, the adoption of the African Charter and the Constitutive Act eventually laid down the minimum standards for the legal protection of the African patrimony against foreign domination and exploitation.

These transformative measures undertaken at the continental level impose a binding obligation for concomitant action at the domestic level in conformity with article 1 of the African Charter that enjoins state parties to adopt legislative and other measures to give practical effect to provisions of the Charter. It suggests that attention needs to focus not only on domesticating the provisions of the Charter but that as a culmination of the process of self-determination, the right to development is given special protection as underscored in the preamble. It requires giving domestic constitutional recognition to the right to development as standalone right and also as a constitutional principle to guide in the interpretation of laws and in policy-making. Lack of political resolve to craft appropriate constitutional reforms to facilitate transformation has unfortunately remained one of the primary causes for retarded progress in Africa. It was not until a decade later, after the wave of democratization in the early 90s that most African countries embarked on the process of remaking national constitutions to replace the obsolete ones adopted at independence.

Besides the delay, the constitution-making processes were marred by two fundamental shortcomings. First, the project was not informed by a commitment to incorporate the agenda for transformation as envisaged by the African Charter and the Constitutive Act. On the contrary, the constitutional revolution was rather influenced more by pressure from international financial institutions constraining developing countries to democratize by embracing "good governance" as a prerequisite for accessing foreign loans.²⁵ Second, many of the constitutions adopted post-1990 failed to enshrine the full range of human and peoples' rights, particularly the right to development envisaged by the African Charter, and therefore compromised prospects for full-scale transformation.

Among the range of entitlements guaranteed by the African Charter, we argue in favor of prioritizing the right to socio-economic and cultural development. In like manner as the right to self-determination provided the platform for political independence, socio-economic and cultural transformation in Africa can only be achieved through asserting the right to development as a means to culminate of the process of decolonization.²⁶ Thus, because the

independence constitutions emphasized the right to self-determination to achieve political liberation, it makes sense to argue that post-1990 constitutionalism ought to prioritize the right to development as the basis for asserting socio-economic and cultural autonomy.

Contrary to the right to development which guarantees collective protection and the assurance that it is the inalienable right of the peoples of Africa to make their own development choices, inadequate political will to decisively part ways with the colonial paradigms that limit the realization of these entitlements has led to state sanctioned practices that keep the populations in perpetual subjugation. The example of francophone Africa is illustrative of such a conscious political design to continuously oppress and exploit the African peoples to the benefit of France.

Following a series of cooperation accords signed in 1959, France has in spite of independence, retained substantial control over fourteen of its former colonies, which despite being among the least developed in the world, continue to pay royalties to France for supposedly benefiting from French civilization.²⁷ These countries have remained loyal to the abusive fiscal policies under which their national reserves are held by the French Central Bank in conditions that prevent free access to the reserves for domestic development purposes. This is a policy, which as Koutonin (2014) notes, France spares no effort to enforce including, through the use of military force.

In view of protecting French interests, francophone African countries have not produced the kind of constitutional systems that would empower the oppressed peoples to assert autonomy but instead invest absolute powers in political elites. With the exception of Benin, where genuine post-1990 constitutional transformation seems to have taken place, almost all other francophone African countries adhered to the constitutional revolution in the 1990s only as a matter of formality. Cameroon for example, allowed some cosmetic constitutional changes, meanwhile the entire system remained devoid of real reform.

The right to sovereign ownership by a people over their natural wealth and resources constitutes an essential component of the right to development. However, by virtue of the *Françafrique* cooperation accords, France is granted the right of privileged access to strategic resources in their African “colonies.” Without a robust constitutional framework, injustices of this kind render the peoples of Africa incapable of exercising the right to dispose of their wealth and resources in a manner that is appropriate to their circumstances.²⁸

The preamble to the Declaration on the Granting of Independence provides that no state has the right to dominate or exploit another, the foundation on which the right to self-determination engineered the decolonization process that witnessed the acquisition of independence by the colonies.²⁹ Considering that this is the vexing concern that triggered the wind of change across Africa in the 1990s, the question that has not been addressed is whether and to what extent the adoption of new constitutions or the reform of old ones address this concern as an assurance for genuine transformation on the continent.

As part of the broader decolonization project, further measures have continued to see the light, including “Agenda 2063” framed as Africa’s comprehensive program for development.³⁰ The document provides the policy framework for harmonizing national development plans to achieve structural transformation through optimal use of the continent’s resources. It further highlights the need to focus on self-reliant efforts through a decisive shift from aid dependency.³¹ Although promising, Agenda 2063 “leaves unanswered questions relating to the right to development enshrined in the African Charter

and ancillary treaties, which impose legally binding obligations on states parties to ensure its realization.”³²

The obligation imposed by the African Charter on states parties to take measures to ensure domestic implementation of the Charter provisions also imposes an implied obligation to consider a uniform model to guide African constitutionalism. Contrary to the preference for good governance highlighted in paragraph 27 of Agenda 2063, we contend that the good governance model is inappropriate for Africa. As a substitute to the structural adjustment programs that plunged Africa into depression, Maldonado (2010) portrays good governance as a World Bank initiative that was introduced to coerce African countries into more and more debts.³³ As an imported, principally neoliberal model, we argue that good governance is by nature paternalistic and not sufficiently inclusive of popular participation to redress the development setbacks in Africa.³⁴ Rather, it makes more sense if African constitutionalism is driven by a framework model on the basis of functionality than doctrine, which entails first and foremost, conceding to the reality that socio-economic and cultural development in Africa is still largely determined by external actors.

Independence and the Advent of African Constitutionalism

The decolonization campaign was informed by an overriding goal to substitute the excesses that characterized the colonial system with a more equitable dispensation based on legality. The envisaged decolonized Africa was couched in the vision of a transformed modern and independent society, which ideally necessitated total emancipation from the arbitrariness of the colonial system. Taiwo (1999) posits that genuine emancipation ought to be achieved both at the political and human levels.³⁵ This manifested in the right to self-determination on the basis of which the peoples of Africa asserted the liberty to “determine their political status and [to] freely pursue their economic, social and cultural development.” By wholly embracing the system of constitutional government imposed by the colonial administration, the foundation for African constitutionalism was laid, which in effect barely shifted the system of colonial absolutism to the successor neocolonial states.³⁶ The form and contents of the independence constitutions were limited by the inordinate craving for political independence rather than socio-economic and cultural empowerment.

As an antithesis to arbitrary rule, Nwabueze (1991) defines constitutionalism as a system of government predetermined by established rules, where state authority is significantly limited by a constitution that bequeaths power to the people.³⁷ The independence constitutions fell short of establishing such a doctrinal standard in Africa. Article 2 of the O.A.U. Charter enjoined states parties to harness the gains of independence and to ensure increased well-being for the African peoples, which ought to have translated into reality at domestic levels. However, most domestic constitutions only serve as “doctrinal tools” that set standards for legality without consideration for an operational model to define the proper functioning of the state. Decolonization thus set off on a wrong footing owing to the fact that the neoliberal dispensation excluded the majority of African peoples from meaningful participation in mainstream politics.

This triggered internal conflicts and political instability in the years after independence, which we attribute to the absence of a defined model to guarantee the right to socio-economic and cultural self-determination. Emerging from a colonial past characterized by illegality, gross injustices, and abuse, we hold that these unconventional behaviors would

have served as a justification for the rejection of preexisting colonial paradigms in their entirety. An alternative model, which we argue should have been established within the constitutional framework, would have laid the groundwork to forestall further imperialistic practices, development injustices, and governance malpractices.

The expectations that the advent of constitutionalism ushered into Africa were short-lived, as the continent experienced significant decline during the period up to 1990. The post-1990 constitutional revolution ushered in another promising era, but which by no means envisaged redressing the deficiencies of the independence constitutions. However, the post-1990 constitutional framework marked a major turning point with increased guarantees of human rights, separation of powers, and democratic institutions. These reforms were only symbolic given that, like the outdated constitutions, post-1990 constitution making failed to establish an operational paradigm to ensure effective implementation of the legal guarantees for better African societies.

While in some rare instances constitutional transformation genuinely took place, e.g. the 1990 Constitution of Benin and the 1996 Constitution of South Africa, most other African countries only allowed cosmetic reforms for the sake of complying with global standards or to achieve international legitimacy.³⁸ According to Gavison (2002), any functional constitution must be embedded with three essential components namely, basic governmental structures, core values and commitments, as well as human rights.³⁹ The framework model for African constitutionalism that we posit in this article responds to the second component (core values and commitments) to ensure a stable, functional, and self-sustainable society, that which Gavison calls the “credo of the state,” absent which, the governmental apparatus is destined to fail.

The framework model to constitutionalism that we envisage for Africa is embodied in South Africa’s “transformative constitutionalism,” which is designed to engineer large-scale socio-economic transformation of the systemic injustices and inequalities inherited from apartheid.⁴⁰ Many scholars agree that it was imperative to lodge the project for transformation in South Africa within the constitutional framework to ensure that it is guided and regulated by law as a safeguard against a recurrence of the injustices of the past.⁴¹ Gutto (2006) argues that although the right to development is not enshrined in the South African Constitution, it is implied, and indeed constitutes the defining paradigm to the country’s constitutional gains.⁴² Unlike with the rest of Africa, the South African model of transformative constitutionalism has been more sustainable.

A number of other African countries including Cameroon, Malawi, Ethiopia, and the Democratic Republic of Congo have also enshrined the right to development as an explicit constitutional provision. However, African governments are noted for making laws and policies which unfortunately are often not implemented. Our argument is built around the fact that it does not suffice to enshrine the right to development in the constitution. It is imperative, as stipulated in the preamble to the African Charter, that particular attention is given to the right to development, which by interpretation, necessitates its conceptualization as a functional model for governance and development.

It is important to clarify that our argument in favor of the right to development governance is a theoretical contribution, which if applied as a framework model to African constitutionalism, has the potential to transform the governance and development landscape in Africa. While China has shown evidence of remarkable achievements by prioritizing the

right to development, Africa is yet to see a shift towards a right to development governance as a means to achieve transformation on the continent.⁴³

Decolonization entails, as we argue, not only the formulation of a defining model but that such a model is entrenched into the African constitutional framework. To decolonize African constitutionalism entails a complete detachment from pre-existing colonial paradigms that deny basic liberties and fundamental rights, including the right to shape Africa's development priorities without external pressures and constraints. Colonial models of constitutionalism have often focused on parliamentary or presidential democracies, which we contend are not workable in Africa. The political, socio-economic and cultural dynamics in Africa are generally unable to readily accommodate western models of democracy. Our point of contention is that democratic systems are driven by other determining factors such the dominant paradigm within every society; as well as the associated institutions and structures that determine the effective functioning of those systems. There is no evidence of any such dominant paradigm to sustain the presidential regimes established at independence. Thus, most of decolonized Africa plunged into difficulties due the lack of an operational model to guard against imperial influences over the elitist presidential systems.

Good governance has been embraced by almost every African country, through the imperial practices of globalization, without consideration of its effectiveness in addressing local realities.⁴⁴ If constitutions are intended to limit political power, to enhance legitimacy and stability of the political order, and to regulate the political playground, we are tempted to ask whether constitutionalism is only about politics. Should constitutionalism not also regulate the socio-economic and cultural aspects of society? Should constitutionalism not be modeled to limit the foreign influences that have, in spite of independence, retained control over socio-economic and cultural development in Africa?

Importantly, Gavison (2002) points out that effective constitutionalism can only be determined by the social and political problems facing any given society and that "[s]ince these problems are different, importation of constitutional arrangements should be done, if at all, extremely cautiously."⁴⁵ With the understanding that effective constitutionalism entails a radical change of the prevailing status quo, the right to development as a tool for culminating the decolonization process and as a paradigm for modeling African constitutionalism represents a quest for liberation from domination, a claim for justice and equity, and an expression of socio-economic and cultural self-determination.⁴⁶

Right to Development Governance

Conceptual Nature

What do we mean when we talk about the right to development governance? In terms of its preference as a framework model for African constitutionalism, it is important to highlight that unlike the range of rights enshrined in the African Charter, the preamble actually articulates the conviction to prioritize the right to socio-economic and cultural development over the quest for civil and political rights. The preamble makes it clear that the enjoyment of civil and political rights is dependent on the achievement of socio-economic and cultural development. By interpretation, the right to development is understood to bear greater relevance to Africa as a framework model through which other rights can be achieved, the

basis for a systems change in Africa, and therefore an invaluable interpretative tool for policy making.

The right to development governance derives from the generic concept of the right to development, which has evolved in its dual nature both as a claimable human right and as a paradigm for development.⁴⁷ It is designed to respond to the factual realities relating to economic, social and cultural development in Africa, and in the process of doing so, guarantees that civil and political rights can be enjoyed. It envisages a dispensation that transcends a post-independence ideology that simply consolidates political freedoms and civil liberties.

Within the context of the governance and development challenges that confront Africa, the right to development governance is conceived as:

An integrated rights-based development model, grounded in popular participation and liberty of action in advancing human capabilities for the sustainable management of Africa's resources, and the propagation of the African identity and value systems within a legal framework that guarantees genuine accountability and equitable redistribution for improved wellbeing.⁴⁸

The right to development governance is thus, by nature an instrument for socio-economic and cultural emancipation as well as for civil and political liberation, suited to redressing the human rights abuses, extreme levels of poverty, and low standards of living. Prevailing models for governance and development are often conceptualized in isolation either in political terms as intending to achieve democratization of the public sector or in economic terms as intending to achieve growth of the market economy. The right to development governance in contrast, envisages an African society that guarantees the highest attainable standard of living for all its peoples and thus, combines the political as well as the socio-economic and cultural aspects to achieve that goal. According to Nagan (2013), the right to development demonstrates an understanding in terms of an all-inclusive value system other than just the pursuit of economic growth driven by the accumulation of wealth.⁴⁹

Accordingly, the right to development governance is conceptualized as an integrated, inclusive and holistic model. Unlike imported constitutional models that often only emphasize democratic governance as the credo of the state, the African Charter sets the standard for African constitutionalism on the premise that civil and political development cannot be dissociated from socio-economic and cultural development. The right to development governance entitles the peoples of Africa to participate in making the choices that result in collective well-being. It provides the opportunity for African governments to become genuinely accountable as a means to redressing the malpractices and livelihood challenges that retard progress on the continent.

A Tool for Governance and Development Policy-making

In line with the international law principle that guarantees state sovereignty, article 2(3) of the Declaration on the Right to Development charges states with the duty to formulate development policies to ensure improved wellbeing. The African Charter remains the most authoritative instrument that enshrines the right to development as a legal entitlement.⁵⁰ It sets obligatory standards that state parties are duty bound to comply with to ensure legally binding effect at the domestic level.⁵¹

Given the role of the state in driving decolonization and the transition to sustainable development, African governments are bound to ensure that the stage is set for legitimate governance so that development is achieved as a matter of human right. States parties are obligated to ensure that their domestic constitutions are modeled to embody the ideology of the right to development governance. This requires the commitment: 1) to eradicate foreign domination by which the peoples of Africa are dispossessed of the liberty to make their own choices; 2) to consolidate actions aimed at advancing human dignity and socio-economic and cultural emancipation; and 3) to limit recourse to imported paradigms such as the structural adjustment programs, economic globalization and debt burdens that impact negatively on the human condition in Africa.⁵²

As a policy mechanism, the right to development governance envisages legislative measures to protect the African patrimony from the abusive exploitation by foreign stakeholders, a development process that is people-driven, and an integrated system that guarantees meaningful participation and the equitable distribution of development gains. It envisages legal accountability against development injustices and therefore provides the context for the rule of law.

The African Charter for Popular Participation underscores the fact that development policy making must align with the African peoples' aspirations and must also incorporate rather than alienate their value systems.⁵³ It requires a "development approach rooted in popular initiatives and self-reliant efforts" devoid of preventable constraints and unwarranted external pressures.⁵⁴ Faced with global inequalities, the challenge is whether Africa is capable of exercising the duty to establish such a policy framework for governance and development.⁵⁵

The rationale for considering a context specific constitutional policy framework draws from the absence of an African governance and development model in spite of the growing global quest for innovative models to replace outdated conventional paradigms.⁵⁶ Despite pioneering the concept of the right to development as a safeguard against injustice and impunity, Africa seems to have lost track of its transformative potential as a model originally conceived to redress the setbacks to governance and development on the continent. For instance, similar to the haphazard manner by which independence was achieved in the 1960s, the 2063 African agenda for development outlines an ambitious program for development but fails to specify the applicable model to deal concretely with the aspirations set out therein.

While Agenda 2063 outlines an African model for development and transformation, it does not accurately articulate what that model is and how it intends to drive the roadmap for development to effective realization.⁵⁷ We envisage that the African model ought to be anchored on the right to development as a policy tool to address the continent's challenges, which does not exclude the overbearing influence of foreign stakeholders. If Africa is to advance in a comprehensive manner, a radical shift is required in development thinking towards greater focus on the right to development governance as a framework model for African constitutionalism.

Conclusion

We claim that Africa would have experienced significant transformation if, as stipulated in the preamble to the African Charter, the right to development were taken seriously as an

interpretative guide to governance policy making and development programming. Africa is confronted with a systems problem that requires not cosmetic remedies but a revolutionary overhaul of the inherited colonial systems and imported models that generate and sustain these obstacles.⁵⁸ These challenges have in fact been amplified by the fact that Africa faltered in making the first steps towards decolonization by failing to conceptualize an operational model to substitute for colonial paradigms. Notwithstanding the deficiencies in African constitutionalism established at independence, the move towards radical transformation remains handicapped in that post-1990 constitutionalism largely still retains colonial models that impede effective transformation and guarantees of the right to development. An extensive overhaul of African constitutionalism would give new direction in the pursuit of better standards, which the peoples of Africa are entitled to enjoy as a human right.

The ambitious roadmap for structural transformation which African governments have committed to under Agenda 2063 is an expression of political goodwill. However, guaranteeing that the right to development is recognized as the appropriate model for the realization of the development agenda as envisaged by the African Charter is even more crucial.⁵⁹ The process of transformation necessitates extensive restructuring of political systems as well as socio-economic and cultural circumstances, which in effect can only be achieved by a liberated and empowered people. It is crucial as a preliminary measure, to avoid replicating historical errors that have hindered progress on the continent. To achieve transformation on the scale envisaged in the agenda for development requires incorporating the right to development governance into African constitutionalism.

Notes

- 1 Von Bismarck 2012.
- 2 Adagbabiri 2015, p. 109.
- 3 Prempeh 2007, pp. 470-71.
- 4 Fanon 1963, p. 36.
- 5 Mbembe 2015, p. 14.
- 6 Mbondenyei and Ojienda 2013, p. 4; Mbondenyei 2010, pp. 89-90.
- 7 Alemazung 2010, pp. 64-70.
- 8 Karpen 2000, pp. 10-11; King 2014, pp. 13-14
- 9 Ndulo 2003, p. 331; Prempeh 2008, p. 803.
- 10 Oloka-Onyango 1999, p. 175.
- 11 Sium, Desai and Ritskes 2012, p. i.
- 12 Shahi 2017.
- 13 Gassama 2008, p. 352.
- 14 Aguda 1989, p. 13.
- 15 Gassama 2008, p. 345.
- 16 Alemazung 2010, p. 62.
- 17 Ngang 2017, p. 274; Poku and Mdee 2011, pp. 18 & 22.
- 18 Gassama 2008, pp. 334-52.
- 19 Anghie 2005, p. 108.
- 20 Kwakwa 1987, p. 453.
- 21 Oloka-Onyango 1999, p. 171.

- 22 Le Vine 1964, p. 217.
- 23 Grosfoguel 2011, p. 1.
- 24 Borella 1971, p. 246.
- 25 Cottrell and Ghai 2007, p. 4.
- 26 Kiwanuka 1988, p. 95.
- 27 Koutonin 2014.
- 28 Mahalu 2009, p. 18.
- 29 Özden and Golay 2010, p. 1.
- 30 AU Commission 2015, para 47-58.
- 31 AU Commission 2015, paras 19 & 72(o).
- 32 Ngang 2018, p. 107.
- 33 Maldonado 2010, p. 4-10.
- 34 Ngang 2018, p. 117.
- 35 Taiwo 1999, pp. 165-66.
- 36 Poku & Mdee 2011, p. 18, 22
- 37 Nwabueze 1991, p. 1.
- 38 Chanock 2000, p. 34.
- 39 Gavison 2002, p. 89.
- 40 Klare 1998, pp. 148-50.
- 41 For a comprehensive account of transformative constitutionalism, see Klare 1998, p. 150; Langa 2009, p. 2; Sibanda 2011, pp. 482-500; Rosa 2011; Van Marle 2009, p. 286; Roux 2009, p. 258; Pieterse 2005, p. 155. See also *Certification* judgement, para 5.
- 42 Gutto 2006, pp. 109-118.
- 43 Chinese White Paper 2016.
- 44 Ngang 2018, pp. 116-17.
- 45 Gavison 2002, p. 90.
- 46 Ngang 2018, pp. 114-16.
- 47 U.N. Human Rights 2013, p. 495; Ibhawoh 2011, p. 103; Udombana 2000, p. 762.
- 48 Ngang 2018, p. 115.
- 49 Nagan 2013, p. 34.
- 50 Murray 2004, p. 241.
- 51 Kamga 2011, p 386.
- 52 Murray 2004, p. 242; Eckel 2010, p. 111; A.U. Constitutive Act 2000; Hausermann 1999, p. 20.
- 53 African Charter for Popular Participation 2007, art 23(a)(1).
- 54 African Charter for Popular Participation 2007, art 4(b); A.U. Commission 2015, para 59.
- 55 Šlaus and Jacobs 2013, p. 2-3.
- 56 Ibid, p. 4-5.
- 57 A.U. Commission 2015, para 74(e) & (h).
- 58 Brand et al. 2013, p. 275-276.
- 59 Ngang 2018, p. 107-108.

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