Understanding the Rule of Law in Africa through the lens of the African Commission on Human and Peoples Rights' interpretation on the right to development in Africa.

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Abstract: The right to development has evolved over the years, and in the African context, is viewed as a legal right that ensures that the people are part of the development process. The unpacking of the content and application of this right by the African Commission on Human and Peoples Rights has gone a long way in enumerating what exactly this right means to Africans. The jurisprudence of the African Commission shows that the commission has adopted a bottom-up approach to the right to development. An approach that focuses on the participation of the people in their own development plans and initiatives, in order to capacitate themselves in their own development. It focuses on what the people can do to foster their own development, rather than on what external sources can do. In terms of the rule of law, it is clear that for law to be able to work and function among the people, it has to be legitimate. There must be a sense of ownership by the people, an identification by the people whom the law seeks to govern, that they are bound by the very law. Thus such law must come from within, and not be imposed externally. This article seeks to draw from the African Commission's grassroots approach to the right to development in Africa, in order to further our understanding of the rule of law in Africa, and the way in which our laws are actually meant to be products of the society. In doing this, the article will investigate how the unpacking of the right to development by the African Commission can be used to interpret and enhance our understanding and application the rule of law in Africa.

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A. INTRODUCTION

Following the atrocities and mistrust amongst nations resulting from World War II, a common commitment to human rights was established which led to the adoption of the 1966 International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The Covenants brought together ideologically diverse and diametrically opposed forces: the West and developed

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countries, the East and developing countries, and what would become known as the newly independent states of the global south.[1] Intrinsic divisions and interests of these groups, however continued to play a profound role which is clearly manifest in the controversy associated in the reaching of agreement on the need for a 'right to development' (RTD). Such a right was strongly lobbied for by developing and newly independent states as key to their growth and development; but was seen as a challenge to the vested interests of the global north. The right to development eventually came into international prominence in 1986, when the UN General Assembly adopted the United Nations Declaration on the Right to Development (UNDRTD). Article 1.1 of the declaration recognises the right of every human person (and all peoples) to a process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised. At its conception, the right to development was not clearly enunciated and suffered from a clarity deficit, having been conceived then as a right within the state, and between states.[2] True to form, the developed countries felt that there was no basis for such a right, as the benefits thereof (if at all) were already catered for in some of the other existing rights such as the right to self-determination and the right to life. Developing countries, on the other hand argued that such a right was pivotal to contend against the unequal aspects of international trade, of access to technology and other factors that they construed to be militating against their development. Some level of consensus on these issues was reached in 1993 when the Vienna Declaration and Program of Action was adopted which explicitly included the right to development,[3] recognising its status as a human right within the body of interdependent and indivisible human rights.[4]

This inclusion within the body of human rights however, did not mean that the right to development had completely come of age. Its embodiment in a declaration, and not a treaty like the ICCPR and the ICESCR, underlined the nascent nature of this 'right'. Unlike covenants, declarations such as the UNDRTD are not a legally binding per se and thus the right to development was initially regarded as soft law or non-binding international law. However, its express incorporation in the Vienna Declaration and the fact that it draws its legal foundations from the very same human right documents that make up the International Bill of Human Rights[5] lent legal credence to it.

1 *Felix Kirchmeier*, The Right to Development – where do we stand?, Occasional Papers 23 (2006), p 6; see also *Karin Arts/Atabongawung Tamo*, The Right to Development in International Law. New Momentum Thirty Years Down The Line? Netherlands International Law Review 63 (2016), p 222-226; *Noel Villaroman*, The Right to Development. Exploring the Legal Basis of a Supernorm, Florida Journal of International Law 22 (2010), p 299-332; *Fantu Cheru*, Developing Countries and the Right to Development. A Retrospective and Prospective African View, Third World Quarterly 37 (2016), p 1270-1271.

2 *Kirchmeier*, note 1, p 7.

3 Part I, provisions 10 and 11 of the 1993 Vienna Declaration and Programme of Action.

4 Part 1, provisions 5 and 8 above.

5 *Kirchmeier,* note 1, p 11.

For the past three decades, the right to development has seen a slow and steady adoption into national constitutions, and consequently a rise in its application thereof. The African Union (AU) and its agencies have been in the forefront of the drive to mainstream the right to development into the corpus of human rights law, as seen in the expanding jurisprudence on the right, and also its inclusion in some form or the other in other instruments on the continent. The right to development is guaranteed in article 22 of the African Charter on Human and Peoples Rights adopted in 1981, and it provides that

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.[6]

It must be noted that the African Charter right to development provision predates the UNDRTD, and does not provide for a right to political development as found in the UNDRTD. It imposes this right as a duty on states, to be exercised either individually or collectively. Article 22 transforms the right to development from the realm of soft law to an enforceable legal right in Africa. The scholar *Oduwole* suggests that it also bequeaths on the international community, the People's Right to Development (PRTD), due to the fact that the African Charter guarantees this right to the African peoples.[7] People's Right to Development recognises the composite nature of the right guaranteed in the African Charter, by the phrasing of 'all peoples'. There is also a notable difference in the way in which the right to development is interpreted and understood in Africa, as opposed to its conception internationally.[8] The desire to give more substance and depth to the right has seen a progressive interpretation of the right, aimed at understanding its full purview, and granting people and institutions more leeway to manoeuvre in implementing the right. At the same time, it imposes a negative legal obligation on states, not to inhibit the development of African peoples.[9] Meaning that states must not do anything or leave undone anything that will hamper the exercise of the right to development by African peoples. The African Commission on Human and Peoples Rights (the African Commission) has taken a leading role through its decisions affording a progressive interpretation of the right thus strengthening the hand of

6 1981 African Charter on Human and Peoples' Rights also referred to as the Banjul Charter.

7 See *Olujumoke Oduwole*, International law and the right to development: a pragmatic approach for Africa, 2014, p. 4. Available at: https://s3-eu-west-1.amazonaws.com/oneworld-wp/app/uploads/2014/06/07102655/www.iss.nl_fileadmin_ASSETS_iss_Documents_Academic_publications_PCC_Inaugural_Lecture_20May2014.pdf (last accessed on 01 July 2018).

8 This interpretation is a contribution by the continent to the discourse on the meaning and interpretation of the right. This is evidence in the communications of the ACHPR on article 22 of the African Charter on Human and Peoples Rights.

9 See *Oduwole,* note 7, p 3, where the author defines this as a negative 'legal obligation not to inhibit the development of African peoples'.

African countries in their journey towards development,[10] as will be explored by this article.

This article will address the question namely to what extent can the jurisprudence of the African Commission in establishing an enforceable right to development, contribute to our understanding of the rule of law in Africa? Flowing from that, the following questions will be addressed: what is the content and scope of the right to development, and how does the interpretation of the right open up the possibility for a bottom up approach to the rule of law understanding?

The positive and overtly robust interpretation of the right by the African Commission has promoted a 'bottom-up' approach to the application of the right, and thus opened the possibility for African peoples to 'own', 'act', and 'live' the right, rather than wait for external players to action the right on their behalf. A robust interpretation of the rule of law in Africa will be followed in this research. The feasibility of a more robust approach to the rule of law in Africa will be explored to engender a more normative and ontological understanding (deriving from and inspired by the people) of the rule of law as a way of life that the people will identify with, 'own', 'act' and 'live'. It seeks to turn the tables on the traditional approach to the rule of law as responsibility of the state, and institutions, and instead use it to empower the people. When the people take control of their reality in order to ensure a proper functioning of the law, then it can be said that the rule of law is fostered and enthroned within a society.

This article is divided into four parts. The first part is the introduction which provides a background and sets the stage. In part B, the concepts of the right to development and the rule of law will be discussed. The theoretical framework of these concepts and the context in which they are used will also be explored. Thereafter, in part C, the communications of the African Commission on the right to development, and the way in which the commission has clarified the reach and application of the right will be analysed. Thereafter, the way in which the rationale behind the African Commission jurisprudence can be used to broaden our understanding and application of the rule of law in Africa will be examined in order to see how the same ideas could be used to enhance our understanding the rule of law in Africa. Part D is the concluding portion which rounds up the discussion.

10 It is important to note that the idea of 'developed' and 'developing' countries was based on indices that considered growth and development in terms of the financial capacity of a country. Development as frequently viewed through the per capita output of a country neglected to look at the human capital development and the conditions of the people on the ground. In recent times, this conception has been amended in some fields as we can see through the Human Development Index (HDI) which is a way to **measure** well-being within a country. It is social measurement because it takes into consideration education, which is adult literacy rate and years of schooling, health care, which is judged by life expectancy and finally the economic factor of GDP of the country.

B. THEORETICAL FRAMEWORK

I .Right to development

First mentioned as a duty on states, individually and collectively by article 22 of the African Charter on Human and Peoples Rights in 1981,[11] Arts and Tamo highlight the significance of UNDRTD as the first international instrument to express development both as an individual right, as well as the collective right at a global level.[12] Thereafter, numerous other instruments recognising the right to development within a variety of contexts followed including the 1994 Arab Charter on Human Rights;[13] the 1992 Rio Declaration on Environment and Development;[14] the 1993 Vienna Declaration and Programme of Action;[15] the 2000 UN Millennium Declaration;[16] the 2002 Monterrey Consensus on the International Conference on the Financing of Development;[17] the 2007 Declaration on the Rights of Indigenous Peoples,[18] and the 2030 Agenda on Sustainable Development.[19]

Years prior to the formal endorsement of the right to development by the UN, the concept of 'development' had long formed the topic of discussion internationally. For purposes of the present discussion, it is important to clarify the meaning of development in order to engage with the meaning of the right to development. Academic literature is replete with different theories and ideas on the concept of development.[20] These can be grouped into

11 Article 22 of the Charter provides that 'all peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind'.

12 *Arts/Tamo,* note 1, p 224.

13 Article 1 of which provides that 'All peoples have the right to self-determination and to have control over their wealth and natural resources. By virtue of that right, they have the right to freely determine their political status and *to freely pursue their economic, social and cultural development*' (emphasis mine).

14 Principle 1 of which places human beings right at the centre of concerns for sustainable development. Principle 3 goes further to affirm the importance of the right to development when it says 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

15 Paragraph I (10) of which reaffirms the right to development as a 'universal and inalienable right and an integral part of fundamental human rights'. Various other provisions in this instrument point to the importance of development for the attainment of the ideals of human rights.

16 Paragraph III (11) of this declaration includes a pledge to 'making the right to development a reality for everyone and to freeing the entire human race from want'.

17 Available at http://www.un.org/esa/ffd/monterrey/MonterreyConsensus.pdf (last accessed 27 February 2018).

18 Available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (last accessed 27 February 2018).

19 Available at http://www.un.org/ga/search/view_doc.asp?symbol=A/RES/70/1&Lang=E (last accessed on 6 August 2018).

20 For some, see *Dudley Seers*, The Meaning of Development, International Development Review 11 (1969), 3; *Walter Rodney*, How Europe underdeveloped Africa, London 1972; *Lewis Coser*, Mas-

two general schools of thought, with one viewing development as a solely quantitative reality, and the other as a qualitative reality.[21] The quantitative aspects of development are viewed more at the structural level, in the building of industry, dams and various structural projects that are meant to trigger growth and economic growth. At the qualitative level, development is conceived as intrinsic in the material wellbeing of the people, in the ways people make a living or not, and in their 'capabilities' to so do or not. These streamlined conceptualisations can be problematic, as they limit the scope of development and the extent to which issues of development impact on the lives of people leading to the term being viewed as conceptually ambiguous.[22] For present purposes, the ideal position is repeated by Akintunde *et al* that 'if development is to really ensue, it most comprise both quantitative and qualitative changes in the structure, composition and performance of the forces of production in any society'.[23]

Amartya Sen views development as a qualitative reality in which humans are the most important factors in the process.[24] Human life is seen as a set of 'doings and beings', which are referred to as 'functionings'.[25] It is when a person is functioning in these, and able to make choices about which functioning to adopt (capability), that the person is said to have 'freedoms'. Thus, capability is actually evidence of various kinds of functionings that a person can achieve. It reflects a person's freedom to choose between different ways of living.[26] For Sen, development can only exist when humans have certain capabilities/freedoms. Freedoms here means increasing citizens' access and opportunities to the things they have reason to value. Thus, 'development consists of the removal of various types of 'unfreedoms' that impose a limitation on people, leaving them with little choice and little opportunity of exercising their agency'.[27] Sen states that there are external factors that limit the

ters of Sociological Thoughts, New York 1977; *Christoffel Nieuwenhuijze*, Development Begins at Home. Problems and Prospects of the Sociology of Development, New York 1982, p 306-307.

21 *Abel Akintunde/Ayokunle Omobowale,* Conceptualizing and Framing Realities of Africa's Development, in: Olayinka Akanle & Jimi Adesina (ed.), The Development of Africa. Issues, Diagnoses and Prognoses, Switzerland 2018, p 11. The authors note that authors like *Seers,* note 19; *Rodney,* note 19; and *Harrison and Berger,* note 19 are of the qualitative school, while others are of the quantitative school.

22 *Vilaroman*, note 1, p 306-307; *Kirchmeier*, note 1, p 9-10.

23 *Akintunde/Omobowale*, note 21, p 11.

24 Amartya *Sen*, Development as Freedom, available at https://www.uio.no/studier/emner/matnat/ifi/INF9200/v 10/readings/papers/Sen.pdf (accessed on 27 February 2018).

25 *Amartya Sen*, Development as Capability Expansion, available at http://morgana.unimore.it/Picchio_Antonella/Sviluppo%20umano/svilupp%20umano/Sen%20development.pdf (accessed 13 Feb 2018) p 43.

26 *Sen,* note 25*,* p 44.

27 *Sen*, note 24, p xii.

freedoms of people, some of which are factors arising due to failures in society.[28] Sen's views introduced a change in the way in which development is viewed by placing the person / human at the centre of development initiatives. The importance of development to the human person translates to development of a people, a society, and led to the lobbying referred to above, by the global South for the right to development to be acknowledged by the international community.

Sen, transposed his definition of development to the right to development, by viewing the right as 'a conglomeration of a collection of claims, varying from basic education, health care and nutrition to political liberties, religious freedoms and civil rights for all.[29] Within this context, Arjun Sengupta lays down the nature and meaning of the right to development as a human right that combines all the rights enshrined in both the ICCPR and ICESCR, with each of the rights being exercised with freedom.[30] He explains in detail that when reading freedom and capabilities into the right to development, 'the meaning of exercising these rights consistently with freedom implies free, effective and full participation of all the individuals concerned in the decision-making and the implementation of the process'.[31] This according to him means that the process must be transparent and accountable.[32] This is very necessary in facilitating the right to development that is inclusive of all peoples. Transparency of, and access to, the decision making process gives equal opportunity of involvement and beneficiation to all.

These types of definitions have lent credence to the conceptual ambiguity claims concerning the right. Bentham laments how such definitions have unnecessarily expanded the right well beyond its core meaning and thus diluting its normative force.[33] Villaroman views such definitions as being overly expansive and not providing a source of concrete entitlements on the part of the rights-holder and identifiable obligations on the part of the du-

28 *Sen*, note 24, p 1. For example, poverty, tyranny, poor economic opportunities, social deprivation, neglect of public facilities are some of the factors identified by Sen as major factors limiting freedom.

29 *Amartya Sen*, Human Rights and Development, in: Bard-Anders Andreassen / Stephen Marks (eds.), Development as a Human Right: Legal, Political and Economic Dimensions, Harvard 2006, p. 1, 5.

30 *Arjun Sengupta,* The Right to Development as a Human Right, Economic and Political Weekly 36 (2001), p. 2528.

31 *Sengupta* note 30, p. 2529.

32 *Sengupta,* note 30, p. 2529.

33 *David Beetham*, The Right to Development and Its Corresponding Obligations, Development as a Human Right, in: Bard-Anders Andreassen / Stephen Marks (eds.), Development as a Human Right: Legal, Political and Economic Dimensions, Harvard 2006, p. 81. He laments the unnecessary expansion of the right beyond its core meaning, and pushes for narrowing down of the right to development to a nation's right to economic development.

ty-bearers.[34] He calls for the right to development to be viewed solely as a collective right of a people, and also limited to economic development.[35] Vandenbogaerde in an insightful paper, questions the need for a specific instrument catering for the right to development. The author argues that the core norm of the right to development as identified by the High Level Task Force on the Implementation of the Right to Development (HLTF) is already contained in the existing human rights framework[36], particularly in the economic, social and cultural rights.[37] The author further notes that instead of the focus and effort on the right to development, the focus should rather be in clarifying the extraterritorial and transnational human rights obligations that will lead to creating an enabling environment for the flourishing of all rights.[38]

The above form some of the interpretative milieus, which framed the discussions on the right to development, and have lent credence to the upholding of a right to development, as a human right. The right to development has the potential of either direct or indirect application in upholding many other guaranteed human rights. The preamble of the UNDRTD,[39] firstly recognises development as

> *a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.*[40]

Furthermore, in article 1, the right to development is defined as

> *an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.*[41]

34 *Villaroman* note 1, p. 306. The author queries the use of the terms 'conglomeration' and 'collection' of human rights as meaning that the RTD covers all virtually all human rights, thus making it a mega right. On Sengupta's definition, he sees it as being tautological and all-encompassing.

35 *Villaroman,* note 1, p. 309-310.

36 *Arne Vandenbogaerde*, The Right to Development in International Human Rights Law: A Call for its Dissolution, Netherland Journal of Human Rights 31 (2013), p. 187, 192.

37 *Vandenbogaerde*, note 36, p. 203.

38 *Vandenbogaerde*, note 36, p. 209.

39 A/Res/41/128 available on the UN website at http://www.un.org/documents/ga/res/41/a41r128.htm.

40 Preamble to above.

41 Article 1 of the UNDRTD.

Going by the above, this article views the right to development as a group/solidarity right, and at the same time an individual right.[42] It is a human right that accrues to a group and to individuals, and gives them the right and mandate to own the developmental process, or to participate constantly in it, through their actions to improve their own wellbeing, to enhance themselves, and to capacitate themselves. This is expatiated on below in the discussions on the jurisprudence of the African Commission. The next part of this section will analyse the rule of law.

II. Rule of law

The rule of law is a global concept, which is generally accepted as necessary for the good functioning of a state. It is the rule by the law; rule according to the law. The rule of law is said to be present when the provisions and contents of the law are honoured, obeyed and observed in the way that the particular law provides for. Sriram et al. note that over the years, there has been an abundance of jurisprudential debate surrounding the concept and content of the rule of law,[43] with different legal traditions approaching the definition of the rule of law from different perspectives.[44] The concept carries different meanings for different people, and is applied in different ways and for different purposes.[45] For some, the concept carries the notion of rulers being bound by higher law;[46] while for others, they mostly think in economic terms of established property rights when referring to the rule of law.[47] Still there are those who argue that the rule of law means that law must be based on consent, and that its authority lies on democratic decision-making.[48] This unsettled nature of the meaning and content of the rule of law led Tamanaha to observe that 'the rule of law thus stands in the peculiar state of being the preeminent legitimating political ideal in the

42 See the interpretations given by the African Commission in the *Endorois case*, in the different articles on RTD; also *Serges Alain Djoyou Kamga* / *Charles Manga Fombad*, A Critical Review of the Jurisprudence of the African Commission on the Right to Development, Journal of African Law 2 (2013), p. 204.

43 See *Chandra Sriram* / *Olga Martin-Ortega* / *Johanna Herman*, Promoting the Rule of Law. From Liberal to Institutional Peacebuilding, in: Chandra Sriram/Olga Martin-Ortega/Johanna Herman (eds.), Peacebuilding and rule of law in Africa. Just peace? New York 2001, p. 3.

44 *Sriram,* note 43, p. 3.

45 *Randell Peerenboom,* The Future of Rule of Law. Challenges and Prospects for the Field, Hague Journal on the Rule of Law 1 (2009), p. 7, who explains that as the field has expanded, so have the definitions of rule of law expanded. See also *David Kairys*, Searching for the Rule of Law, Suffolk University Law Review 36 (2003), p. 307, wherein the author debates the extent to which the term has being used to mean different things to different people, and ultimately how the term is being held up to be something even more superior to the rights of the people. Such over-usage of the term is ultimately problematic and leaves it vague and without meaning.

46 *Brian Z Tamanaha,* On the Rule of Law. History, Politics, Theory, Cambridge 2004, p. 27.

47 *Francis Fukuyama*, Transitions to the Rule of Law, Journal of Democracy 21 (2010), p. 33-44.

48 *Jurgen Habermas*, Between Facts and Norms. Contributions to a Discourse Theory on Law and Democracy, Cambridge 1996.

world today, without agreement upon precisely what it means'.[49] Despite this lack of congruence on the meaning of the concept, there is widespread agreement and acceptance of the need for the rule of law to exist and to be honoured within a state, in order for the state to function effectively. To this effect, Tamanaha further notes that 'no other single political ideal has ever achieved such global endorsement'.[50] Thus, Tamanaha acknowledges that even though there is a lack of agreement on the meaning and the content of the rule of law, it is still a highly used concept.

Kairys notes that the concept seemed to be increasingly used as if the rule of law were a political or social system on its own.[51] The varied usage of the rule of law as a concept of state legitimacy led Kairys to warn against the notion that adherence to the rule of law is always a solution to the problems facing humanity and societies. This is especially true where the content of the law itself is oppressive, and where mere observance of the rule of law would actually inflict more harm than good. He gives the example of apartheid South Africa in which the courts, by following the law to the latter, and following the spirit of the law, ended up delivering oppressive rulings and judgements.[52] Thus in these cases, the law and the legal system that existed were actually part of the problem, and the changes that came to South Africa, only came because of the inherent notions of right and wrong that the people had. He notes that change came through various political movements and formations; and other forms of activism, which gained agency, and were able to rise up against the apartheid system and its laws.[53]

Thus, the law itself can fail and does fail to effect good governance or to meet the needs of the society. It is deceptive to punt the law or the 'rule of law' as the solution to problems of governance by itself, much more as the solution to Africa's problems.[54] Law can be repressive, and can work against the people that it is binding on; in the same way, law can be an important factor for good governance. The only way to avoid a situation of the law being repressive (or repressively enforced) is to ensure that the people (which the laws are meant to bind) are part of the law-making process; that the process is inclusive; and that the law reflects the values, norms and mores of the people, and as such, the law is conferred legitimacy. As already discussed by this author, 'the extent of genuine societal participation in

49 *Tamanaha*, note 46, p. 4. He went further to indicate that 'notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law is an exceedingly elusive notion'.

50 *Tamanaha*, note 46, p 3.

51 *Kairys*, note 45, p 308.

52 *Kairys,* note 45, p 322. He points out that the occasional court ruling that protected human rights was borne out of value judgements by certain judges, who decided to place a higher value on rights like 'equality' than on what the law provided.

53 *Kairys,* note 45, p 322.

54 Apartheid South Africa had the 'rule according to the law' operating at the time, but the law was a repressive law.

law-making, the extent to which the outcome of the process *captures and reflects the input of the people*, would indicate how legitimate the process is'.[55]

Therefore, the rule of law in this article is understood to mean a legitimating concept. The same 'legitimating concept' that Tamanaha refers to above. It is that idea, the existence of which, confers legitimacy on a process, procedure, institution, or even a state. The rule of law confers legitimacy. Tamanaha notes that 'the mere fact of its frequent repetition is compelling evidence that adherence to the rule of law is an accepted measure worldwide of government legitimacy'.[56] Legitimacy here speaks to the participation of the people in the law making process. Thus, those who are to be bound by the law, are part of the law making process itself.[57] The question that arises is that, at any level or strata of the state, to what extent do the people influence the content of the laws? While it is true that most law making models provide for participation of the people[58], the quality and extent of such participation is called into question. At what stage is the participation? How effective is the participation? Where laws are gazetted and comments and suggestions from the public are sought, how do we measure if the comments and suggestions of the people have been incorporated in the outcome? Is it active, free and meaningful as explained in the *Endorois* case (discussed in the next section)? Are 'the people' able to exercise their freedoms and capabilities in influencing and shaping the laws that will be binding over them? In other words, do the values and mores of the people reflect in the laws or are they just content imported from elsewhere?

The jurisprudence developed by the African Commission on Human and Peoples Rights in respect of the right to development is useful in explaining and further clarifying the nature of participation and involvement that is required in order to ensure laws are legitimate and legitimately developed. Even though, the communications deal with cases of the violation of the right to development, it is also very instructive and applicable to what we understand the nature of the rule of law in Africa to be. We will now examine these communications in the next section.

55 *Funmilola Abioye*, Rule of Law in English-Speaking African Countries. The Case of Nigeria and South Africa, (Unpublished LLD dissertation), University of Pretoria 2011, p 8. Emphasis mine.

56 *Tamanaha*, note 46, p 4.

57 See *Funmi T Abioye,* Constitution-making, Legitimacy and Rule of Law. A Comparative Analysis, Comparative and International Law Journal of Southern Africa 44 (2011), p 60-61, where I have argued in respect of the constitution-making process in many African countries, for those processes to be informed by the people, giving their input and consent, and in order for the processes to reflect the values of the people.

58 These are the rationalist model, the functionalist view, the conflict perspective and the moral entrepreneur models.

C. ACHPR COMMUNICATIONS ON THE RIGHT TO DEVELOPMENT AND IMPACT ON THE RULE OF LAW

I. ACHPR communications

The African Commission on Human and Peoples Rights has extensively defined the right to development as conceived in the African Charter on Human and Peoples Rights, and other normative framework. The commission has also pronounced on the violation of this right by member states, through communications, in which matters concerning the violation of article 22 of the African Charter were decided on the merits.[59] These are *DRC* v *Burundi, Rwanda and Uganda; Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya; Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE)* v *Sudan,* and *Open Society Justice Initiative v Cote d'Ivoire.*

Firstly, in *DRC* v *Burundi, Rwanda and Uganda*[60], a matter decided in 2003,[61] the commission stated, pertaining to the right to development, that

> *[T]he deprivation of the right of the people of the Democratic Republic of Congo, in this case, to freely dispose of their wealth and natural resources, has also occasioned another violation – their right to their economic, social and cultural development and of the general duty of States to individually or collectively ensure the exercise of the right to development, guaranteed under Article 22 of the African Charter.*[62]

Thus, the commission found in this respect, that the actions of the defendant states had deprived the people of Eastern DRC of the right to freely dispose of their natural resources. This deprivation was viewed by the commission as firstly, a violation of the right of the people to the forms of development guaranteed by the charter; and secondly a violation by the affected States of their 'duty' (whether individually or collectively) to provide conditions favourable in which the right to development could be exercised.[63]

In 2009, the African Commission gave its decision on the merits in Communication 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE)* v *Sudan*. Though part of the decision related to the right to development, it was more to the effect of the determination of 'people' and did not further expatiate on the

59 There have been other cases that were declared inadmissible.

60 Communication 227/99 *Democratic Republic of Congo (DRC)* v *Burundi, Rwanda, Uganda*.

61 The Democratic Republic of Congo had alleged that the defendants had committed grave and massive violations of the rights of its people in eastern DRC by invading that part, killing and maiming people, and looting its natural resources over a period. The DRC claimed that this was a violation of several provisions of the African Charter on Human and Peoples Rights, including article 22 which guarantees the right of the peoples of an area to 'economic, social and cultural development'. See paras 1 and 8 of the communication.

62 *DRC v Burundi*, note 60, para 95.

63 *DRC v Burundi*, note 60, para 95.

right in article 22.[64] The 2009 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v Kenya* case[65] (commonly referred to as the *Endorois* case), dealt in detail with the nature and extent of the right to development. The commission held *inter alia* that the test for the right to development is 'a two-pronged test that is both constitutive and instrumental, or useful as both a means and an end' in itself. The commission further explained that a violation of either the procedural or the substantive element constitutes a violation of the right to development, as fulfilling only one of the two prongs will not satisfy the right to development'.[66]

Referring to the theoretical framework laid down by Armatya Sen, the commission went on to indicate that 'freedom of choice must be present as a part of the right to development'.[67] In its decision, the commission referred to a report by Arjun Sengupta, during his time as a UN Independent Expert on the Right to Development, who viewed development not simply as the state providing housing (for example) for individuals, but rather that development is about providing people with the ability to choose where to live.[68] Such freedom allows concerned communities to be involved in the processes and decisions that they make for themselves. If put in a situation in which they are given no choice of input in a particular decision, then their freedom of choice is being curtailed, and as such it amounts to a deprivation of their right to development. This freedom of choice can also be extended to issues relating to the rule of law (discussed in the section below). In the same vein, such freedom expects that the people / society would be instrumental in determining the laws that bind /govern them. Such freedom expects them to contribute in modelling and shaping of the law.

The Commission held in this case, that for the right to development to be realised, the particular community or peoples ought to participate in the planning and process of development as noted by article 2(3) of the UNDRTD.[69] Thus, development must be geared towards empowerment of the people, towards improving the 'capabilities and choices of the

64 The commission in paras 217 – 224, sought to establish the violation of article 22 first by ascertaining if the people of the Darfur Region of Sudan could be defined as a collective 'people', in order for them to qualify for the right protected in the charter. It was held that the people of the Darfur region did constitute a 'people', as defined under article 19 of the Charter. The commission further held that violations were committed against the people by the government forces and the Janjaweed militia. These violations were in the form of attacks and forced displacement of the people, which denied them the opportunity to engage in economic, social and cultural developmental activities.

65 Communication 276/03 *Centre for Minority Rights Development (Kenya)* and *Minority Rights Group (on behalf of Endorois Welfare Council)* / *Kenya*.

66 *Endorois case*, note 65, para 277.

67 *Endorois case*, note 65, para 278.

68 *Endorois case,* note 65, para 278. See *Sengupta,* note 30, p. 2530.

69 *Endorois case,* note 65, para 282. Art 2(3) of the UNDRTD makes it the states' responsibility to formulate appropriate national development policies aiming at constant improvement of the well-being of the entire population and all individuals on states, but this is to be done together with the

Endorois'.[70] This means that it is no longer acceptable for a state or party to impose 'so-called' developmental solutions on the people, solutions must be through a joint process of participation and consultation. Such process in itself is empowering, and improves the capabilities and choices of the community, thereby allowing them to take ownership of their progress and development. In the same way, it is not acceptable for a state to impose laws on its people, or even to have laws imposed on it by external forces. The process of law making and law creation must be thus a process of which the result reflects the values and mores of the people. One however bears in mind the fact that no state is made up of one homogenous group of people and thus the values will not be homogenous. This is all the more why such right to development type of consultation is necessary to ensure that there is law that speaks to the people and something they can identify with. Also, in this is the understanding of the effects of globalisation and international law and politics. No country lives in isolation from others. The role of international law and politics in influencing the laws within a state is very much acknowledged. However, it is necessary that the domestic law within a state should be moulded by the people for the people.

The above raises the issue of the nature of consultation and participation. The Kenyan government in the *Endorois case* submitted to the commission that it had consulted sufficiently with the Endorois community, however, this consultation was not considered adequate and could not be considered 'effective participation' in the view of the commission. The commission noted that its developed standards meant 'that a government must consult with respect to indigenous peoples especially when dealing with sensitive issues as land'.[71] The decision of the commission is instructive in noting the type and form of consultations required in order to meet the necessary threshold of effective participation. Communication with a party that merely serves as an information session, in which decisions are communicated as a *fait accompli* does not qualify as 'consultations'. The commission stressed that it is necessary that the party (parties) must be 'given an opportunity to shape the policies or their role in the game reserve'.[72] Furthermore, consultation that is not clearly communicated in a language and manner in which the recipient community would understand and appreciate the implications thereof;[73] consultation that is not far-reaching enough, or not with the rightly-designated representatives of the community (especially when the lack of representation is glaring), was deemed inadequate by the commission.[74] The commission felt that in conducting consultations, it was crucial that the representatives of the affected

input of the target population 'on the basis of their active, free and meaningful participation in development and the fair distribution of the benefits resulting therefrom'.

70 *Endorois case,* note 65, para 283.

71 *Endorois case,* note 65, para 281.

72 *Endorois case,* note 65, para 281.

73 *Endorois case,* note 65, para 282.

74 *Endorois case,* note 65, para 282.

community should be fully informed[75] of the agreement, and participate in developing solutions in areas that affected the life of the community. This involvement of the affected person or group is crucial to the right to development, and the group must engage in 'active, free and meaningful participation' as stated earlier.[76] The commission noted specifically that 'the capabilities and choices of the Endorois must improve in order for the right to development to be realised'.[77]

The most recent communication before the ACHPR dealing with the right to development is the 2015 decision in the case of *Open Society Justice Initiative v Cote d'Ivoire*.[78] Here, the commission reiterated that the guarantee of the right to development contained in article 22 of the charter applied both as an individual right and as a collective right. The commission found that

> *[T]here is indeed a fundamental convergence to comprehend the right to development as an inalienable, individual or collective right … In spite of its community emphasis, particularly with regard to the right to development, the charter clearly recognizes the crucial role of the individual without whose self-fulfilment the development of the peoples may be compromised.*[79]

The commission further found in this case that there had been a serious violation of the right to development, as the denial of Cote d'Ivorian nationality to the community of the Dioulas by the state had led to an incalculable loss of life plan, and an accumulated loss of generation-to-generation of the people over the decades.[80] Thus this means that the failure of the individual /community to be engaged, involved and given an identity or a basis to participate in life and livelihood, led to an incalculable loss of life-plan and unquantifiable loss of generations.

II. Meaning of the ACHPR interpretation for the rule of law in Africa

As already discussed, article 22 of the African Charter on Human and People's Rights is one of the earliest instruments that recognised the legally binding nature of the right to development. This right has been tested within the continent by the African Commission, and

75 Such information must be convened in a language of their understanding, and to the extent of their understanding. The Endorois had a different conception of property use and ownership than that of the Kenyan authorities, and this was not clarified by the state.

76 Article 2(3) of the UNDRTD (emphasis mine).

77 *Endorois case,* note 65, para 283.

78 Communication 318/06 *Open Society Justice Initiative v Cote d'Ivoire.*

79 *Open Society Justice case*, note 78, para 183.

80 *Open Society Justice case*, note 78, para 186. The commission had held in para 183 *inter alia* that, '… State Parties have [an obligation] to meet the requirements for the enjoyment of this right and an immediate obligation to at least create the opportunities and environment conducive to the enjoyment of the said right'.

has given rise to a quasi-jurisprudence on the subject for African states.[81] The cases discussed above have enabled the African Commission to clarify the nature, content, depth and extent of the right to development. In the *Endorois* case, the ACHPR saw the test of the right to development as being a two-pronged with both constitutive and instrumental uses. Constitutively, the article grants the right to development (cultural, social and economic) to the people. It is constitutively theirs, and to be enforced. In its instrumental use, it imposes a duty on states to ensure the exercise of the right to development, meaning that the state must, through its actions, ensure that people can exercise this right. Deliberate action or inaction on the part of the state that does not ultimately *ensure* the exercise of this right would be construed as a violation of the article as seen in the cases discussed above.[82] Reference was made to the statement of the UN Independent Expert on development, who indicated that development is not simply the state providing housing (for example) for particular individuals or peoples; *but rather about providing people with the ability to choose where to live*. Freedom of choice must be present as a part of the right to development.[83] In the same vein, this is pertinent to the rule of law. The people to whom the law is to apply must be part of the law-making process. The people's freedom of choice must be present and exercised in the processes that lead to the determination of the law.

The emphasis on the right of people to the ability to choose, to make a choice, is a reiteration and emphasis of an earlier decision of the Commission. In the *DRC* case, the Commission held that

> *the deprivation of the right of the people of the DRC in this case, to freely dispose of their wealth and natural resources, resulted in a violation of their right to their economic, social and cultural development, and of the general duty of states to individually or collectively ensure the exercise of RTD, guaranteed under article 22 of the Charter.*[84]

This was emphasized in the *Open Society Justice Initiative* matter where the commission stressed the individual and collective nature of the right, and held that the state had failed in its duty to ensure that the people enjoyed their right.[85]

The emphasis that is apparent in these cases is the view of the commission on the 'freedoms' or 'unfreedoms' of the people, the 'right to choose', the 'right to determine' their own destiny. This translates into people being the masters of their own destiny; into people / persons having the right and responsibility to chart their own way forward, and to

81 By 2016, out of 229 decisions that had been rendered by the African Commission, at least 7 of such have had relevance for the right to development. These decisions have sought to set out the scope and interpretations of RTD.

82 See again *DRC v Burundi*, note 60, *Open Society Justice case,* note 78 where the states were held to have violated the right to development of the people.

83 See *Endorois case,* note 65, para 277-278, as quoted in *Arts & Tamo*, note 1, p. 245.

84 *DRC v Burundi*, note 60, para 95.

85 *Open Society Justice case,* note 78, para 183.

move beyond their present constraints in mapping out their own developmental, and even rule of law objectives. It is only when these objectives are 'home-grown' and internal to the people, that the potential and the ability to achieve can be seized by the people. This conception and understanding is important to the development of the continent as it places 'the ball right in the courts' of the African peoples, both the leaders and the followers. This resonates with the issues of legitimacy of the legal system and the rule of law that have been discussed elsewhere by this author.[86] Right from independence, the content of the law in most African states was heavily influenced by colonial rule. This was visible in the constitutions, which were modelled after the colonial influence, and in some cases actually drafted overseas.[87] In order to combat these problems, African states have over the years implemented attempts at legal reform; as these laws have been revised, and improved marginally over the years, showing more of the values and traditions of the societies that they preside over. Despite this however, the underlying philosophy and theory behind our legal systems still mostly remain western and alien to us as Africans.[88]

Kairys gives more understanding to the rule of law, when he notes in relation to human rights that

> *[I]n any event, the rule of law is not self-executing, does not guarantee human rights through the power of its ideas or the processes of its tribunals, and has posed a barrier to human rights at least as often as it has protected them. Protection of human rights depends on people – within the judiciary and throughout society-committed to particular values.*[89]

This understanding must be extrapolated to all the meanings attributable to the rule of law and the role of the law in Africa. This can either be in the form of the constitutions or the structures and institutions set up to maintain the rule of law. It is essential that these must be people-based and people-inspired, and not some system, law or structure that is borrowed from the west, or some other society. The rule of law is not a magic wand and cannot of itself make any impact in terms of engendering development in Africa. This depends on the people, and can be achieved as already analysed above in the ACHPR communications, and also in the theoretical underpinnings of the right to development itself. [90] These have placed the 'person, the individual, the collective, the people…at the centre of development. The commission in the *Endorois* communication emphasized that participation by the people in

86 *Abioye*, note 57.

87 *Abioye*, note 57. Here the author shows through a historical summary of the constitutions of Nigeria, the manner in which the colonial influence is felt in the constitutions right from 1914 all the way through to 1999 constitution.

88 As observed by *Werner Menski,* Comparative Law in a Global Context. The Legal Systems of Asia and Africa, Cambridge 2006, p. 490, the problem with some of the legal reform measures however, is the western-focused thrust of recommendations for these improvements in the law.

89 *Kairys*, note 45, p. 327 (emphasis mine).

90 See the discussion on *Sen*, note 24 and *Sengupta*, note 30 above.

the process and planning of development must be active, free and meaningful. In the same vain, the people must be at the centre of the development and evolution of the law and the legal system in Africa, and participation of the people must be free, active and meaningful. In order for this to happen, it means that the contents of the resultant law must have been influenced by the people. This is necessary in order for the law to be valid and legitimate and for it to have a binding and ontological effect on the society, by which it is easier to enforce and to implement and force / penalty does not become the foremost instrument of enforcement.[91] Thus, the people of Africa must actively map out and determine their own trajectory in terms of development of the law. This should be based on their mores, values and norms that they can identify with and that they can follow through with.

Therefore in our rule of law engagement in Africa, the people must be given the 'freedoms' / 'capabilities' to participate in the planning and drafting of the laws, and influence the laws that govern them. People must have 'increasing access to' impacting and moulding their laws. While it is trite that the law should be reflective of the society it governs, that has not been the case in Africa. It is actually the law being reflective of the society that colonised the society it seeks to govern. In this case, therefore, the duty of the state is to remove the un-freedoms, such as poverty, lack of education, mis-education, tyranny, western imposed ideas of governance, over-dependence on external players, and others that keep the people down in a perpetual state of dependency.[92] Furthermore, even if we view the rule of law in a different context, such as the formalised setting up of institutions, structures, the constitution itself, legal system, socio-political, the people must have the 'freedom' to influence and determine the trajectory these. This is fundamental to the development and advancement of any society.

At the continental level, we see that Africa has been very good at drawing up documents, treaties, laws and rules designed to provide a springboard for development, and for the advancement of the rule of law in Africa. The path to development has been characterised by initiatives, strategies, programs and projects that have been implemented over the years. From the Lagos Plan of Action, the Abuja Treaty, the NEPAD framework, the APRM, and others, the OAU and later the AU, have contributed a great deal to the preponderance of a normative and institutional framework and jurisprudence in this area. Unfortunately, despite these efforts, African countries continue to rank at the bottom of the list of most development indices.[93] This indicates that the existence of law(s) is not the solution, it

91 *Paul Ocheje,* Exploring the Legal Dimensions of Political Legitimacy. A Rights Approach to Governance in Africa in: Edward Kofi Qaushigah / Chinedu Okafor Obiora (ed.)., Legitimate Governance in Africa. International and Domestic Legal Perspectives, The Hague 1999, p. 165-166.

92 *DRC v Rwanda, Uganda and Burundi* and *Open Society Justice Initiative* communications found the state parties in these cases to have violated RTD by their failure in their duty to remove the un-freedoms that prevented the people from being able to freely choose what to do with their natural resources in the first case, and prevented the people from the ability to have a life plan for their future by virtue of their denial of nationality.

93 See UNHDP Report available at http://hdr.undp.org/en/data (last accessed on 10 February 2018).

is the implementation, the acceptance of the place of the law over the society, the people accepting that the law is binding on them, and acceding to the law and agreeing to be bound by its terms and conditions. This ownership by the people is what will enhance the implementation of law, or any treaties or instruments designed by the continent. As things stand now, many of the initiatives at continental level mentioned above have become obsolete due to non-implementation.

D. CONCLUSION

The decisions of the African Commission on Human and Peoples Rights in relation to article 22 of the African Charter on the right to development are instructive in assisting African countries and the continent as a whole to ensure that the rule of law in Africa is directed by the values and mores of the people. The top-down approach of past initiatives at Africa's development mean that they are prescriptive, as many of the earlier treaties and instruments adopted at the continental level were either 'recommended' by or influenced by institutions within the very same countries that colonised African countries. They did not necessarily speak to the realities of the African people on the ground; they did not address the daily struggles of an African. It is thus of little wonder that these various attempts have not worked as well as they ought to. As 'foreign-inspired' interventions, the solutions were devoid of an understanding of the issues that Africans face, and devoid of the input of Africans in the attempts to solve the problems. It is this same failure that has contributed to the hampering of the rule of law in Africa. Though there are laws and a system of governance, the existence of the law has not assisted Africa in tackling its many challenges. The law exists, but mostly implementation depends on the wishes of the political principal. A bottom-up approach is what is advocated. An approach that legitimises the process of development and the rule of law by putting the people at the driving seat of their own solutions. That makes the people the engine to finding their own solutions; an approach in which the state is there to support, and provide an enabling environment for the people to advance and begin to proffer solutions to their own issues. This is what the right to development jurisprudence offers to the African continent. Ngang has coined this idea as the right-to-development-governance.[94] He describes it as 'fundamentally an assertion of socioeconomic and cultural self-determination.' He goes on further to explain that 'in the African context, it is said that the right to development represents the collective potential of the African peoples to actively participate in the development process and to freely formulate policies that allow for human rights protection and for justice in development to prevail'.[95]

94 *Carol C Ngang*, Towards a right-to-development governance in Africa, Journal of Human Rights 17 (2018), p. 112.

95 *Ngang*, note 94, p. 112.