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**RETHINKING THE RULE OF LAW ANTIDOTE TO AFRICAN
DEVELOPMENT CHALLENGES: ADVOCATING BROADER SOLUTIONS
FOR COMPLEX CONTINENT**

Joseph M. Isanga

INTRODUCTION

Since the 1990s, many African have conducted legal reforms—adopting new constitutions, entrenching bills of rights and judicial review of legislative and executive acts—in response to the rule of law promptings, even conditionalities, which were part of a concerted international effort to rid Africa of biting and seemingly intractable poverty. Those efforts effected a modicum of political, legal, and human rights improvements on the continent. International actors justified their support for rule of law initiatives by citing studies that demonstrated the importance of functioning, fair, and accessible justice institutions to ensure social cohesion and combat poverty. For example, the World Bank’s 2000 *Voices of the Poor* report pointed to the negative role played by the police—considered corrupt and harassing small traders.¹ It is to be expected that the absence of rule of law would hamper investment efforts.

Yet, the promise of an economically bright future continues to elude many African countries that established a good measure of rule of law and yet continue to lag

¹ Laure-Hélène Piron, *Time to Learn, Time to Act in Africa*, in Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge*, (Wash., D.C.: Carnegie Endowment 2006) 275, 279

behind similarly situated Asian nations² that were reluctant to implement such measures. Recently, the International Monetary Fund (IMF) Managing Director, Dominique Strauss-Kahn, conceded “[w]e understand that we need to change the way we work with Africa.”³ Even in Africa, there are examples of economic growth not directly linked to democratic reforms. For example, disregarding foreign aid, Togo gained relative prosperity in the 1980s not exclusively because of its governance but external factors such as the soaring prices for its major export commodity.⁴ Recently, the new U.S. administration seemed to deemphasize the role of human rights in U.S.-China relations, although human rights and good governance have long occupied priority of place in U.S. international trade and financial assistance programs.⁵ Is this the dawn of a new era or is it still business as usual? Human rights and the rule of law remain extremely important at any given time. But, when it comes to development, it appears that the need to seek broader solutions has never been more urgent and timely. Africa’s development challenges are extremely complex as they involve deep historical, geographical, ethnic,

² China and East Asian countries are increasingly understood to be proofs that formal laws and legal institutions are not central determinants of a country’s economic development and that informal mechanisms that recognize and protect private property rights and ensure performance of contracts are often effective substitutes. See, Kevin E. Davis, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 47 (2008) (forthcoming in *The American Journal of Comparative Law*), available at <http://ssrn.com/abstract=1124045>, [Accessed on May 9, 2009]

³ International Monetary Fund, *Africa Conference Debates Way Forward Amid Crisis*, <http://www.imf.org/external/pubs/ft/survey/so/2009/car031309a.htm>, March 13, 2009

⁴ Dirk Kohnert, *Does Democratic Transition in Africa Enhance Economic Performance? The Case of Togo*, <http://ssrn.com/abstract=1210865> [Accessed on May 9, 2009]

⁵ See, Richard Spencer, *Hillary Clinton: Chinese Human Rights Secondary to Economic Survival*, available at <http://www.telegraph.co.uk/news/worldnews/asia/china/4735087/Hillary-Clinton-Chinese-human-rights-secondary-to-economic-survival.html>, [Accessed on May 18, 2009] (reporting that while U.S. Secretary of State, Hillary Clinton, said the U.S would continue to press China on issues such as human rights and Tibet, she added: "Our pressing on those issues can't interfere on the global economic crisis, the global climate change crisis and the security crisis."). This is not a suggestion that the rule of law played no role in Chinese economic growth. See John K.M. Ohnesorge, at 19, <http://ssrn.com/abstract=1006093> [Accessed May 18, 2009] (observing that China conducted legal modernization efforts, although this did not go hand in hand with fundamental political reform.)

social, economic, as well as legal issues⁶ that call for multi-faceted approaches and may continue to defy monolithic solutions. Seizing upon indicators of opportunity that some important international actors, such as the United States, may now be more willing to engage broader approaches, this article first engages in a critical evaluation the role of law in development so far and then offers some insights with regard to understanding the complex nature of the African society and why some other broader approaches now seem imperative. In particular, this article calls for a reinvigorated attention to educational programs for a sustained and radical transformation of African communities, while being attentive to the imperative of authentic development rooted in contemporary African traditions, sensibilities and social realities.

RULE OF LAW, SOCIAL ENGINEERING AND DEVELOPMENT

The argument often made is that the rule of law is a condition *sine qua non* for sustainable economic development.⁷ Whereas there is some truth in that proposition, there seems to have been too much focus and effort devoted to the promotion of the rule of law and less than is deserved to other important factors in the development equation. Some have even suggested that, at exactly when humanity ought to be cultivating new attitudes consistent with a new horizon or world order, after the end of old paradigms such as colonialism and the wrenching Cold War divisions, in some respects the emphasis on rule of law risks disingenuously resuscitating the long discredited colonial

⁶ Davis, *Supra* note 2, at 3, 6

⁷ National Research Council, *Assessing Progress Towards Democracy and Good Governance: Summary of a Workshop 1* (Daniel Druckman ed., 1992)

insistence on ‘modernization’⁸ of Africa—the uncritical transplantation of Western models. Economic development of Africa, it is argued, should not be predicated on the “Westernization”⁹ of African societies, although this is precisely what to a significant extent historically happened. The contemporary African State is has a high dosage of “western”¹⁰ characteristics.

⁸ Some have a more favorable view of the connection between rule of law, development and modernization, in the sense of establishing effective modern market systems. David M. Trubek describes that law is necessary to the establishment of markets because law provides universal and predictable rules. See, David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L. J. 1, 7 (1972). See also Voxi Heinrich Amavilah, *Domestic Resources, Governance, Global Links, and Economic Performance of Sub-Saharan Africa*, REEPS WORKING PAPER, available at <http://ssrn.com/abstract=1359944> [Accessed May 9, 2009] (arguing that where the “rule of law is absent or weak, property rights will be fragile, markets dysfunctional, and economic performance most likely unsustainable.”). But some suspect in these arguments some ulterior economic advantage for the advocates of market systems that does not necessarily result in progress for Africa. See e.g., James Thuo Gathii, *Representations of Africa in Good Governance Discourse: Policing and Containing Dissidence to Neo-Liberalism*, *Third World Legal Stud.* 65, 65-66 (1998-1999) (*hereinafter* *Representations of Africa*) (arguing that good governance is an imposition of the Western, industrialized nations and international agencies and that the push the “underlying aim of this push for market governance is that of increasing the role of the private sector as the engine for economic growth and releasing market forces from what were considered to be the constraints or clutches of government-imposed regulatory controls.”)

⁹ This view seems to have some credibility in light of African colonial history. European colonialists understood that they had to change the culture if their colonial experiment was to succeed. There was a deliberate attempt by some colonial masters to introduce British, French and Portuguese culture through assimilation. Thus Colonel Trentinian, the governor of French Sudan in 1897 sent this circular to his subordinate: “Here in the Sudan, we confront a population which has been defeated militarily, it must now be conquered intellectually and morally. We must therefore draw the people to us, work with them constantly so that we can curb their spirit, impose our ideas upon them, and brand them with our particular stamp.” Quoted in Elliott P. Skinner, *Development in Africa: A Cultural Perspective*, 13 *Fletcher F. World Aff.* 205, 208 (1989).

¹⁰ Postcolonial African States have strived to fashion themselves in the image of the Western liberal state with limited success. The primary reason for this, it is argued, is that the Western liberal conception of States and democracy does not fit in Africa. The term “Modern State” is usually meant for polities with three independent organs—the legislature, the executive, and judiciary and the Western multiparty system presumes the existence of a Modern State, a fully functioning civil society, and a free press, and constitutions grounded on the soil and clearly defining powers, rights and responsibilities of all participants. But the African state, which is multicultural, significantly differs from the Western State, which is why wholesale transfers of legal structures into the African setting without appropriate adaptations cannot readily translate into development. Colonialism imposed boundaries on existing ethnic communities and called

That said, the African State certainly needed to shed some of its postcolonial autocratic and predatory attributes, which thrived on the Cold War divide. The colonial experience should never have been and never was a plausible justification for mistakes and atrocities committed by postcolonial administrations during that time. That is precisely why the end of the Cold War precipitated the demise of most brutal dictatorships in Africa, unleashing a wave of democratization, constitutionalism and rule of law emphases, beginning with democratic elections in Benin in 1991. Throughout the 1990s and beginning of the new Millennium, these reforms, often promoted by development actors as the antidote to Africa's economic challenges, seemed to hold the key to a political, legal, and economic dispensation in Africa. It was hoped that the single-minded and consistent pursuit of the rule of law and good governance principles would automatically and instrumentally turn African economies around. This seemed to make sense in light of the preceding postcolonial experience.

As part of this process, many African states ratified international human rights instruments that expanded the freedoms of their constituencies, in particular right to

them "Modern States," but that could easily create 'imagined political communities' without the necessary cohesiveness and communion that was necessary to create a state. The boundaries of current African States do not coincide with the geographic extensions of ethnic entities. Anthony D. Smith, *National Identity: Ethnonationalism in Comparative Perspective* 15 (Walker Connor ed., 1991). It is no surprise that tribalism, nepotism, ethnic strife, corruption continued to thrive in the African state. It was simplistically presumed that Western law would create a modern state out of these ethnic groups. Yet, many years since colonialists imposed Western law, ethnic norms and structures of authority persist, which is why they are recognized in several Constitutions. See, Nsongurua J. Udombana, *Articulating the Right to Democratic Governance in Africa*, 24 Mich. J. 5 Int'l L. 1209 (2002-2003)

freedom of every individual to take part in the conduct of public affairs, directly or indirectly through freely chosen representatives.¹¹

Yet, almost two decades into the rule of law experiment and only a few countries in the region can claim to have really made any significant gains on the economic front itself. Africa is the only continent that has grown poorer over the last three decades. While all other regions of the world had tremendous economic growth except Africa,¹² Africa continued to have the slowest growth.¹³ The question then is whether the western style democracy and rule of law can instrumentally and exclusively produce an economic miracle in Africa or whether it is now time for African States and international actors to

¹¹ International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976, Art. 25. An overwhelming majority of African States signed and ratified this covenant. Indeed, the African Charter on Human and Peoples' Rights (adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986) also provides for the right to participate freely in government. See Art. 13. The African Commission on Human and Peoples' Rights had the opportunity to affirm this right in *Constitutional Rights Project and Civil Liberties Organization v. Nigeria*, Communication 102/1993 (holding that the annulment of election results—reflecting “the free choice of the voters”—by the military government was in effect a violation of Article 13.1 of the Charter. See also the Commission's decision in *Legal Resources Foundation v. Zambia*, Communication 211/1998 (holding that Article 13 of the Charter included the freedom of everybody to compete for elective office). Indeed, the African Commission also adopted a Resolution on Electoral Process and Participatory Governance (ACHPR /Res.23(XIX)96) at its Nineteenth Ordinary Session at Ouagadougou in Burkina Faso in 1996 (asserting that “elections are the only means by which the people can elect democratically the government of their choice in conformity to the African Charter on Human and Peoples' Rights.”

¹² For example, while the share of Africa's population earning less than US \$ 1 per day fell by 1.4 percentage points over the 1990-98 period, it declined by 4 percentage points in South Asia and by 12.3 percentage points in East Asia. This meant that Sub-Saharan Africa's share of the world's population living below US \$1 per day increased from 19 percent to 24 percent in 1998. Gary Moser and Toshihiro Ichida, *Economic Growth and Poverty Reduction in Sub-Saharan Africa*, IMF Working Paper, 8 (2001)

¹³ USAID Africa: Economic Growth, http://www.usaid.gov/locations/sub-saharan_africa/sectors/eg/index.html [Accessed May 13, 2009]

broaden their outlook and try new approaches.¹⁴ Critics argue that the insistence on rule of law is no more than an exercise in nomenclature and semantics—the underlying substantive ideology remaining unchanged. They argue that this new approach is essentially masquerading and recycled¹⁵ old IMF and World Bank (collectively also known as the Bretton Woods institutions) already discredited strategies. They point out that the IMF and the World Bank—with a sense of vindication and leverage of Western economic systems—first tried structural adjustment programs, forcing humbled former authoritarian regimes to deregulate their economies and restructure public administration. It never really died away. It seems to continue under the guise of rule of law. This meant in practice the privatization of failing State enterprises, removal of price controls and subsidies for social services, and reduction of public expenditure. But, according to critics, these reforms were imposed, top-down and lacked a domestic African constituency. In spite of this, several African leaders adopted them as they had limited

¹⁴ Some have even been highly critical of attempts to use Western style rule of law and democratization as attempts to draw attention away from the onslaught and prepare the way for neo-imperialism or to legitimize it. That is, the African State or public apparatus is made to retreat so that global capital can replace it in the name of private (read ‘foreign’) capital. See, e.g., Martti Kostenniemi, “*Intolerant Democracy*”: A Reaction, 37 Harv. Int’l L. J. 231 (1996). Susan Marks, Democratic Celebration, Democratic Melancholy, 9 FINNISH Y.B. Int’l L. 73, 77 (1998) (essentially arguing that insistence on good governance principles is an attempt to promote, legitimate and refashion the world in the interests of global capital). Certainly, the rule of law and good governance are universal, not merely western, values applicable to all humanity. It should be noted that some African scholars actually subscribe to the view that establishment of rule of law itself will generate development. Professor Muna Ndulo, for instance, argues for this position. Muna Ndulo does not advocate for the transplanting of foreign models into Africa, but rejects the opposite view which advocates for “African solutions to African problems” as a pretext for perpetuation of so called peculiar variants of democracy in Africa which in essentially endeavors to consolidate political power. Muna Ndulo, *The Democratic State in Africa: The Challenges for Institution Building*, 16 Nat’l Black L.J. 70, 78-79(1998-2000).

¹⁵ See, Tola Olu Pearce, Human Rights and Sociology: Some Observations From Africa, 48 Soc. Probs. 48, 49-50 (2001)

options with respect to credit.¹⁶ Critics maintain that after many years of such experiments, when these programs ultimately proved to be ineffective—as was evident in the massive layoffs, unemployment and civil strife—the Bretton Woods institutions merely shifted their strategies by insisting on the African leaders adopt the rule of law without changing the substance of the underlying ideology.

Notwithstanding such criticism, for a number of years the number of international development actors engaged in rule of law¹⁷ projects with the objective of effecting social change proliferated.¹⁸ Performance with regard to governance and the rule of law became the primary benchmarks to measure progress toward economic development.¹⁹ Indeed, the African Union itself bought into this logic by providing that the Union would be premised among others on the principle of “respect for democratic principles, human rights, the rule of law and good governance.”²⁰ In fact, the African Union adopted the African Charter on Democracy, Elections and Governance, which provides that States Parties “shall commit themselves to promote democracy, the principle of the rule of law

¹⁶ Kwasi Prempeh, *Africa’s “constitutionalism”: False Start or New Dream?*, Oxford University Press, 2007, 15

¹⁷ The principles for evaluating rule of law include: 1. The government and its officials and agents are accountable under the law; 2. The laws are clear, publicized, stable and fair, and protect fundamental rights; 3. The process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and, 4. The laws are upheld, and access to justice is provided, by competent, independent, and ethical law enforcement officials, attorneys or representatives, and judges who are of sufficient number, have adequate resources, and reflect the make up of the communities they serve. See, World Justice Project, Rule of Law Index, at available at http://www.lexisnexis.com/documents/pdf/20080828015427_large.pdf. [Accessed May 11, 2009]

¹⁸ See e.g., Aspen Institute Justice and Society Program, ABA Rule of Law Initiative, International Network to Promote the Rule of Law, International Rule of Law. See, Rule of Law Resource Center, available at <http://law.lexisnexis.com/webcenters/RuleoflawResourceCenter>. [Accessed May 11, 2009]

¹⁹ See Rod Alence, *Political Institutions and Developmental Governance in Sub-Saharan Africa*, 42 J. MOD. AFR. STUD. 163 (2004).

²⁰ Constitutive Act of the African Union, Art. 4(m), available at http://www.au2002.gov.za/docs/key_oau/au_act.htm, [Accessed on May 19, 2009]

and human rights.”²¹ Indeed, the New Partnership for Africa’s Development (NEPAD), operating under the auspices of the African Union, adopted the Declaration on Democracy, Political, Economic and Corporate Governance, which provides that member states would commit themselves promote and protect democracy and human rights, rule of law in their respective countries and regions, by developing clear standards of accountability, transparency and participative governance.

In order to promote the rule of law, many countries in Africa that were experiencing democratic transitions tried to institutionalize judicial review.²² Many African Courts of judicial review even borrow the jurisprudence of many Western Court of judicial review to fit the image of countries where the rule of law prevails.²³ Even the West tends to focus on the relatively successful experiment in Constitutional jurisprudence of South Africa and tends to neglect positive developments elsewhere on the continent.²⁴ The assumption was that given a new constitution with an entrenched bill

²¹ African Charter on Democracy, Elections and Governance, Art. 4(1), adopted on January 30th 2007. The instrument is yet to come into force. It provides that the instrument will come into force after the deposit of 15 instruments of ratification. As of May 12, 2009, only two countries had filed instruments of ratification—Ethiopia and Mauritania.

²² In *Marbury v. Madison*, 1 Cranch, 137 (1803), Marshall C.J. observed that the U.S. Constitution was the fundamental law of the nation. It follows from this that any law repugnant to the Constitution is void. Second, that it was the particular duty of the courts to interpret the law. It therefore falls to the courts to pass judgment upon the constitutionality of a law alleged to run counter to its norms, otherwise the legislature would be omnipotent and be able to do what is expressly prohibited

²³ Thus, in *Charles Onyango Obbo and Andrew Mujuni Mwenda v. The Attorney General Uganda Supreme Court*, (Constitutional Appeal No.2 of 2002) [2004] UGSC 1 (11 February 2004), the Uganda Supreme Court argued that “[engagement in comparative constitutional jurisprudence by emerging democracies is a sign of hope because the process of sustained exposure to principles evolved in more democratic countries provides lessons and challenges which cannot be ignored especially if foreign judgments can only be ignored for good reason.” In *State v. Makwanyane*, 6 BCLR 665(1995), South Africa’s Chaskalson P., referred to a plethora of foreign decisions, and justified that on the ground that the Constitution of the Republic of South Africa permitted the use of public international law and comparable foreign case law

²⁴ Kwasi Prempeh, *Supra note* 16, at 2

of rights, significant checks and balances or limits on governmental power, and guarantees of judicial independence, judicial review would lead to a liberal-democratic jurisprudence²⁵ and the rule of law almost as a matter of course.²⁶ However, establishing judicial review was the easy part. When it came to actually exercising that power, very few Courts could stand up to omnipotent executives whose power the constitutional clauses providing for judicial review had tried to tame in the first instance. In some countries, in fact, the executive branch of government has pushed the judiciary to issue only decisions that would, as it was argued, not ‘destabilize’ their nations and, by extension, derail the country’s march to development by and if they still dared issue decisions contrary to the wishes of the executive, the military might intervene to ensure that peace and development prevails. Thus, in some cases the judiciary has balked and subscribed to self-censorship. The executive could get away with whatever they wished.

The Ugandan and Ghanaian cases exemplify that trend. As Kwasi Prempeh notes, while the Ghanaian Constitution contains generous provisions on freedom of expression, Supreme Court of Ghana ruled, for a seditious libel statute, first enacted during the colonial period and later reenacted without much modification during the one-party era of

²⁵ Under classical (conservative) liberalism, the rule of law is understood as liberty under standing law. See, Brian Tamanaha, *Dark Side of the Relationship Between the Rule of Law and Liberalism*, Legal Studies Research Paper Series (2008), at p. 5, available at <http://ssrn.com/abstract=1087023> (Accessed on May 9, 2009). Classical liberalists argue that “the first condition of free government is government not by the arbitrary determination of the ruler, but by fixed rules of law, to which the ruler himself is subject.” L.T. Hobhouse, *Liberalism* (NY: Oxford 1964 [1911]) at 11 cited in Tamanaha, *Supra* note 25, at 5

²⁶ H. Kwasi Prempeh for example observes that “a matter of genuine concern, because judicial review, though widely celebrated by democrats and constitutional architects in transitional democracies, is not quite the unmitigated virtue it is frequently made out to be.” H. Kwasi Prempeh, *A New Jurisprudence for Africa*, *Journal of Democracy* Volume 10, Number 3 July 1999, <http://ssrn.com/abstract=1324005>, 135 [Accessed May 9, 2009]

the 1960s, did not violate the Constitution.”²⁷ This ruling would pave the way for the criminal prosecution of journalists for alleged defamation of the government and of certain influential public figures. In Uganda, in *Kizza Besigye v. Y.K. Museveni and the Electoral Commission*,²⁸ the case that challenged the 2001 presidential election, the Supreme Court noted that “[t]he fact that these malpractices were proved to have occurred is not enough...the petitioner had to go further and prove their extent, degree, and the *substantial* effect they had on the election.” This was the case even though, according to the relevant electoral law, it was sufficient to invalidate the election if certain malpractices were found to have been committed, which the Court admitted were proven. Thus the African state has creatively navigated past or reigned in the constitutional courts to protect the interests of the ruling elites. Thus exclusive reliance on judicial review of executive and legislative acts or rule of law to bring about the necessary social change such as the liberation of the African state from their authoritarian rule and set the nation on the road to economic development, can prove futile and illusory.

Where the Courts of judicial review have held the line in standing up to the executive, this could be attributed to other factors specific to that particular country. It could not be argued that the mere generous provisions of the Constitution or statutes were sufficient conditions for that to happen. The existence of a Constitution or judicial review cannot act be relied on like a magic wand. Why Benin’s,²⁹ Ghana’s³⁰ Namibia,

²⁷ *Id.*, at 137

²⁸ Uganda Supreme Court, Election Petition No.1 of 2001. [Emphasis added].

²⁹ In 1993, the Constitutional Court of Benin stood its ground against government attempts to restrict the right to freedom of association. In Benin, democratic reforms were due to a confluence of social, economic and political conditions were grassroots, homegrown, and popular

Malawi's,³¹ Mali's, Zambia's, Botswana's and South Africa's³² constitutional Courts have been successful in their judicial review where other country's courts have failed may have had nothing or little to do with their respective Constitutions or statutes as such but with the socio-political conditions obtaining in their respective countries.

Many African leaders, who were once viewed by some in the international community as a "new breed" of African leaders because of their rule of law reforms, have cleverly navigated the new constitutional configurations³³ to extend their hold on power,

movement which consisted in nationwide demonstrations rejecting authoritarian rule. See generally, Anna Rotman, *Benin's Constitutional Court: an Institutional Model for Guaranteeing Human Rights*, 17 HARV. HUM. RTS. J. 281 (2004).

³⁰ *New Patriotic Party v. Attorney-General*, [1993-95] S. Ct. G.L.R. 1 (Ghana) (holding that the celebration of public-funded anniversary of a coup d'état would be inconsistent with the constitution).

³¹ *State v. President of Malawi* (Ex parte Malawi Law Society), [2002] ICHRL 15 (2002) (Malawi) (holding that the banning of public protests regarding a proposed constitutional amendment to extend a two-term presidential limit was constitutional).

³² These countries' courts of judicial review have been strikingly less deferential to the executive branch than others in Sub-Saharan Africa. Kwasi Prempeh, *Supra note 26*, at 147

³³ There are a number of presidents who changed their nation's Constitution to extend their presidential terms or eliminate them completely. Algerian lawmakers in November 2008 approved the lifting of presidential term limits to let President Abdelaziz Bouteflika stay in office for life. Burkina Faso's Blaise Compaore, who seized power in 1987, removed a limit on terms in 1997. Cameroon's Paul Biya had Cameroon's national assembly to adopted a constitutional bill in April 2006 removing a two-term presidential limit to allow Biya to extend his 25-year rule in the central African country past 2011; Chad's Idriss Deby, who took power in a coup in 1990, won a third term in 2006 after a referendum the year before removed a two-term limit. Gabon's Omar Bongo, who came to power in 1967, Africa's longest-serving ruler, secured a change in the law in 2003 so he can seek re-election as many times as he wanted; Guinea's Lansana Conte won disputed elections in 1993, 1998 and 2003 after a change in the constitution allowed him a third term, Namibian president Sam Nujoma, Tunisia's Zine el-Abidine Ben Ali - Ben Ali, who took office in 1987, won nearly 100 percent approval for 2002 reforms to let him keep standing for re-election. Uganda's Yoweri Museveni, in power since 1986, won re-election in February 2006 after he changed the constitution in 2005 to let him stand for a third term. Other leaders do not have to worry about changing their Constitutions because they simply do not provide for any term limits. See, Reuters, *Factbox-Africa's Third Term Presidents*, available at <http://www.alertnet.org/thenews/newsdesk/LC738182.htm>, [Accessed on May 11, 2009]. See also, H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox*, in *CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD* 75 (Douglas Greenberg et al. eds., Oxford Univ. Press 1993) (arguing that provisions "limiting the tenure of office of the President have never been, nor are they likely, to be successful"). While that may be an overstatement, there have been so many

demonstrating once again the limits of artificially insisting on rule of law in Africa as the engine for economic development. These leaders often legitimate their actions by conducting referendum to so the majority of the population—primarily a rural or ethnic constituency—appears to ratify of their actions.³⁴ The rural populations relate to and lend support to some leaders who are inclined toward authoritarianism.³⁵ And yet, some of those countries continue to be lauded for their economic progress, albeit marginal compared to other similarly situated nations in other regions of the world.

So criticisms only increased in recent times as to the extent the rule of law should be pushed by policymakers in order to effect social change as a precondition for ‘modernization,’³⁶ given that the broad Western democratization and economic liberalization agendas of the past two decades, including an emphasis on developing the

cases of where they failed to work. They certainly worked in the case of Malawi’s Bakili Muluzi, Kenya’s Daniel arap Moi, Zambia’s Frederick Chiluba, and Nigeria’s Olesegun Obasanjo, but by far the defaults outstrip the cases where the term limits were respected.

³⁴ In Uganda for example, after the Uganda Constitutional Court invalidated a referendum law and by implication questioned the legality of the system of government put in place and elections subsequent to that referendum, President Museveni responded that the result was “totally unacceptable,” arguing, “[i]f we are to go by the ruling, it will land the country in a lot of problems.” Instead of looking to the judiciary, Museveni said “I will count on the support of Parliament and the population. We shall bring you some issues to decide on. Once the people have spoken in a referendum, nobody on earth can question it except God.” Felix Osike and S. Candia, Museveni Disputes Referendum, The New Vision, <http://www.newvision.co.ug/D/8/12/368947/Referendum%20museveni>. [Accessed May 11, 2009]

³⁵ See e.g. Robert I. Rotberg, *Africa’s Troubled Leadership and What To Do About It*, 31 Fletcher F. World Aff. 149, 150, Vol. 31:2, (2007) (arguing that both Sir Seretse Khama of Namibia and Sir Seewoosagur Ramgoolam, the founding prime minister of Mauritius, “could have obtained support within their young nations for authoritarianism.”). In Zimbabwe, for a for some time urban Zimbabweans were demonstrably discontented while rural Zimbabweans continued to support and believe in Robert Mugabe as the “father of the nation” and tolerated his corrupt regime. See, Rotberg, *Supra* note 35, at 154

³⁶ Modernization theory was criticized in the 1970s and 1980s but it did not disappear. It quietly found its way into applied fields and undergirded numerous development programs especially when focusing on cultural institutions that did not fit Western models. See, Pearce, *Supra* note 15, at 49-50

rule of law, has had uneven success across Africa, the results have been modest³⁷ and not as fast as expected.³⁸ It is important to explore the merits, if any, of rule of law initiative, why it appears to be compelling even to African leaders and why in some respects its continued use would continue to constitute a legitimate contribution, even when they are so much criticized. In this regard, it is imperative to assess the theoretical assumptions that undergird the appeal to rule of law as an instrument of development and social change—in sum, social engineering. The assumption is that law can effect social change or behavior. If law is capable of influencing social norms and thus development, then rule of law had to be strengthened in States where it was weak.³⁹

But what does rule of law itself mean as a function of social change and development? The rule of law, it is argued, can bring about desired change because at its core, it requires that government officials and citizens are bound by and act consistent

³⁷ Despite billions of dollars in aid law and development programs have not been successful. See, Thomas Carothers, *The Rule of Law Revival*, FOREIGN AFFAIRS 95, 1 (March/April 1998), observing that despite a “multimillion-dollar effort to promote the ‘rule of law’ in the Russian Federation” problems facing legal-development programs seemed immense and intractable. Some also say that the extraordinary economic development of China in the past two decades, when lacking key, although some argue that the link is questionable and has yet to be demonstrated (See e.g., Thomas Carothers, *The Problem of Knowledge, in Promoting the Rule of Law Abroad: In Search of Knowledge*, edited by Thomas Carothers (Wash., D.C.: Carnegie Endowment 2006) 17-18, cited in aspects of the rule of law, serves as a major counter-example, cited in Brian Tamanaha, *Supra note 25*, at 12.

³⁸ Sub-Saharan Africa’s growth from the mid-1990s might have given rise to optimism that Africa was turning the corner on the path to sustained growth, but that seems to have been attributed to high international demand for commodities in general, and hence for raw materials, which Africa is famous for. Without other fundamentals, Africa’s growth would quickly slow down or even come to a halt once the global demand for raw materials slows down. Those fundamentals include savings, foreign direct investment and private investment. The magnitudes of savings and investments as a percentage of GDP were not large relative to levels in other successful sustained growth economies such as those in South and East Asia. Thus Africa’s economic growth remains fragile and vulnerable. See, Jorge Saba Arbache and John Page, *Is Africa’s Recent Growth Robust?*, January 2008, available at: <http://ssrn.com/abstract=1090274>, [Accessed on May 8, 2009]

³⁹ Lan Cao, *Culture Change* 6, (June 2006). Available at SSRN: <http://ssrn.com/abstract=906767>, [Accessed May 9, 2009]

with the law. The basic requirements entails a set of a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms.⁴⁰ This means that in authoritarian states it would hamper the ruling authority from using the law to do as it desires.⁴¹ In addition, the second function of the rule of law, it is argued is to maintain order and coordinate behavior and transactions among citizens. This aspect of the rule of law holds that a framework legal rules governs social behavior. Advocates of the rule of law concede that this function does not entail that the entire realm of social behavior must be governed by state legal rules, as it is neither possible nor desirable. Multiple normative orders exist within every society, including customary norms, moral norms, religious norms, family norms, norms of social etiquette, workplace norms, norms of business interaction, and more. In some societies or regions, state law has a marginal or negligible role in social ordering—usually when state law is relatively weak—and disputes are resolved primarily through social institutions.⁴² The benefits of law, it is argued, include certainty, predictability and security. Predictability is said to be critical to liberty. With respect to fellow citizens, people are able to interact with one another knowing in advance the rules that will be applied to their conduct should a problem or dispute occur. Such predictability furthers their ability to make choices and to engage in conduct with others.⁴³ Because the rule of law enhances certainty, predictability, and security, it is said to promote liberty.

⁴⁰ Brian Tamanaha, *A Concise Guide to the Rule of Law*, Legal Studies Research Paper Series, (2007), at 3, available at <http://ssrn.com/abstract=1012051> [Accessed May 9, 2009]

⁴¹ *Id.*, at 5

⁴² *Id.*, at 6-7

⁴³ *Id.*, at 8

It is widely thought that market-based economic systems benefit from these qualities in two different respects. The first is related to contracts and the second concerns property. First, economic actors can better predict in advance the anticipated costs and benefits of prospective transactions, which enables them to make more efficient decisions. One can enter into a contract with some assurances of the consequences that will follow if the other party fails to live up to the terms of the contract. This encourages the creation of contracts with strangers or parties at a distance, which expands the range and frequency of commercial interactions, increasing the economic pie. Second, the protection of property (and persons) conferred by legal rules offers an assurance that the fruits of one's labor will be protected from expropriation by others. These economic benefits conferred by the rule of law have been identified in connection with capitalism on local and global levels. But one must examine both the law and the relationship between the law and the system of economic exchange in a given situation to determine whether and to what extent these claims are borne out.⁴⁴ People must believe in and be committed to the rule of law. They must take it for granted as a necessary, proper, and existing part of their political-legal system. This attitude is a shared political ideal that amounts to a cultural belief. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations. When this cultural belief is not pervasive, however, the rule of law will be weak or non-existent.⁴⁵ This cultural belief to be viable, people must identify with the law and perceive it as worthy of ruling. General trust in law must be

⁴⁴ *Id.*, at 9

⁴⁵ *Id.*, at 13

earned, and it takes time to become what is tantamount to a cultural view about law passed on through socialization.⁴⁶

This theoretical analysis must be pursued to its ultimate logical conclusions and to do this, it is necessary to explore the jurisprudential or legal theories most commonly associated with law in relation to its social functions. Law, it is argued, is meant to serve social needs—a functionalist or goal-oriented concept and development view of law. Advocates of this approach insist that it is possible to use law as a vehicle to direct social change because law fosters a set of behavioral norms.⁴⁷ Sociological jurists such as Rudolf Von Jhering, Eugen Ehrlich, Roscoe Pound postulate that no true study of law can be made without an understanding of the social milieu which the law governs and that to be binding, efficacious and respected, law has to be dictated by the social life of the community. Roscoe Pound argued that where change is needed but society itself has not considered or demanded it, then the role of legislation in changing social norms should be conceded. Pound's theory of social engineering, i.e. ordering human relations through the action of a politically organized society has contributed to the development of a sociological jurisprudence. Observers argue that sociological jurisprudence seems to be particularly appealing to African developing societies because of their diverse ethnicity. Coexistence among individual citizens, tribal and other groups means that when the interests of these groups and individuals come into conflict, it is only through law that

⁴⁶ *Id.*, at 14

⁴⁷ Lee W. Potts, Law as a Tool of Social Engineering: The Case of the Republic of South Africa, 5 B. C. Int'l Comp. & L. Rev. 1. 2-3 (1982)

social compromises can be made.⁴⁸ The rule of law and development advocates insist that law can mold norms and be a catalyst for social change.

Still the recognition seems to be emerging that even that insistence is not yielding the desired results because mere law reforms without change in the concrete conditions of the people lacks legitimacy to the extent they do not adequately produce real change in the fundamental historical, economic, cultural or political life conditions on the ground. African societies have steadfastly resisted top-down attempts at reform.⁴⁹ The legal process is only effective if the populace accepts it as meaningful and this is only possible if the process is compatible with preexisting concepts of justice and relevant to their real life conditions.⁵⁰ The empirical literature itself has documented a large variability in the quality of rule of law across democracies.⁵¹ Theories of democratization either postulate a positive relationship between democracy and economic development, but some leave open whether democracy implies better economic institutions⁵² and role of interactions between inequality and democracy for institutional quality has not been explored.⁵³

According another view, law is a dependent variable in the nexus of social processes. Scholars of law and social change generally assert that legal change and social

⁴⁸ M. Mwalimu, *The Need for A Functionalist Jurisprudence for Developing Countries in Africa*, Third World Legal Stud. 39, 44-45 (1986). Roscoe Pound postulated that the end of law the satisfaction of different society interests, which he categorized as individual interests, public interests and social interests and that it is the task of law to achieve a balance and harmony among all of these interests.

⁴⁹ Davis, *Supra* note 2, at 31

⁵⁰ Potts, *Supra* note 47, at 7

⁵¹ Barro, R. J. (2000): "Rule of Law, Democracy, and Economic Performance," in 2000 Index of Economic Freedom, ed. by M. Miles, and et al. The Heritage Foundation, Washington.

⁵² Acemoglu, D., and J. Robinson (2005): *Economic Origins of Dictatorship and Democracy*. Cambridge University Press, Cambridge.

⁵³ Uwe Sunde, Matteo Cervellati, Piergiuseppe Fortunato, *Are All Democracies Equally Good? The Role of Interactions Between Political Environment and Inequality for Rule of Law*, available at <http://ssrn.com/abstract=1012340> [Accessed on May 9, 2009]

change may flow in either direction.⁵⁴ Law, in other words, emerges as a product of other social processes. Sociologists, such as Emile Durkheim, saw law as a representation of the community consensus on both the need and the acceptable procedures for conflict resolution. They view the primary service of law as being a mechanism for preserving community integrity in the face of conflicting interpretations of proper and improper conduct and individual incidents of norm violation. In their view, then, the social norm precedes and legitimizes the legal procedures. Thus law derives from principles previously developed in non-legal spheres of action. Accordingly, legal change follows, but does not initiate, social change.⁵⁵

In light of these postulations, the role of law in shaping the development of African nations must be understood in a specifically African rather than non-African perspective because law must be responsive to the actual social needs of each particular society.⁵⁶ This is one important reason why broader approaches to African development ought to be considered given the complex situation of the African setting. In many African countries, there is both statutory law by which all society members are governed and then there is unwritten customary law that governs the relationships of people living according to traditional patterns of behavior. Customary law is seen as a distinct social phenomenon. And since it is different from statutory law, sociological engineering may not be appropriately applicable. Customary laws are reflections of social practices and not the other way round. Customary laws emanate from society and not from a sovereign or legislature. Thus according to this view, sociological jurisprudential top-down

⁵⁴ See generally, V. Aubert, *Sociology of Law* (1969); Dror, *Law and Social Change*, 33 *TUL. L. REV.* 787, 794 (1959) cited in Potts, *Supra* note 47, at 4

⁵⁵ Potts, *Supra* note 47, at 3-4

⁵⁶ Mwalimu, *Supra* note 48, at 40

approaches would need to be complemented by some aspects of legal realism. Legal realism is based on the premise that law cannot be understood without reference to the realities of human social life and one of those realities is that judges conversant with historical, economic and social aspects of life define the true state of the law. In this connection, some theorists urge that the maximum utility of law would be achieved by the use of techniques or processes that would assure the harmonious coexistence of old customary laws and new statutory ones. Thus they emphasize utilizing past culture in understanding and improving the present cultures, which would be particularly apt for the circumstances of developing nations in Africa.⁵⁷

Still, law may be relevant in educating people as to what is anti-development in the culture. This could include targeting cultural practices, beliefs, general inclinations, values such as customs that restrict the education of girls, spending too much time on funeral ceremonies, inheritance law and other traditional beliefs regarding wealth such as, opposition to individual initiative, that do not positively contribute to economic development. For this to happen, it may be necessary to begin by passing some necessary laws but going beyond by introducing norms that may improve the culture. Japan adopted precisely that strategy by introducing campaigns in the Ministry of Education campaigns to reform norms and habits of the poor.⁵⁸ Japan involved community leaders, religious groups, civic organizations, media, motion pictures, etc, in its education campaigns. But in all this, the effort is to try to mold cultural norms that can then be made part of the law essentially because law and development efforts are likely to fail if the underlying

⁵⁷ *Id.*, at 46-47

⁵⁸ SHELDON GARON, *Molding Japanese Minds* 15-16 (1997).

cultural norms are foreign or imposed. This may look like norm-shaping or manipulation, but no cultures change all the time and so if this process is guided but using methods that are persuasive and not coercive, there should be no questions of legitimacy.

There are some intangibles that might elude even the most careful and good-faith efforts to measure the rule of law from an objective standpoint. It is, for example, acknowledged that

An analysis of legal and judicial institutions within a country or across countries must take into account variations that stem from many factors, including ethnic, cultural and religious differences, socio-economic status and geographic conditions. A particular concern is the role played in many countries, and particularly developing countries, by traditional or “informal” systems of law—including traditional tribal and religious courts and community-based systems for resolving disputes. These systems play a large role in many cultures in which formal legal institutions fail to provide effective remedies for large segments of the population.⁵⁹

AFFIRMATION OF CULTURE IN DEVELOPMENT

Broad approaches must be open to the cultural complexities of Africa that cannot just be wished away, ignored or allowed to occupy a blind spot. They must be affirmatively and enthusiastically engaged especially because the greatest numbers of African people live in cultural or traditional settings. The notion that culture is important to development has been long recognized by social scientists. If attention must be paid to non-legal frameworks because they influence the efficacy of formal laws, the first of

⁵⁹ See, *World Justice Project, Rule of Law Index*, at available at http://www.lexisnexis.com/documents/pdf/20080828015427_large.pdf. [Accessed May 11, 2009]

those that comes to mind is culture. Culture provides the knowledge and tools by which people adapt to their environments and the rules by which they relate to each other, which in turn provide the rules that inform their response to any development or economic interventions and initiatives targeting their communities.⁶⁰

The cultural complexity of African societies cannot be overemphasized or regarded as a thing of the past.⁶¹ African societies are predominantly rural, living under what is referred to as a ‘moral economy’⁶², although they are also increasingly urban. This contributes to the persistence of customary law. Many Africans believed and many in rural areas continue to be guided by customary law. Many of these people in rural settings exist outside the formal structures of the State. In those settings, customary law regulates virtually every facet of life from marriages to divorce, from land tenure and trade to inheritance.⁶³ The concept of human rights itself is not alien to customary law.⁶⁴ That said, it is important to note and address the persistence of certain biases towards customary law and traditional institutions, which is an essentially colonial legacy.

⁶⁰ Skinner, *Supra* note 9, at 205, 206

⁶¹ Sub-Saharan Africa alone contains approximately two thousand ethnic groups and 1200 languages. Alan P. Merriam, *Traditional Cultures of Africa and Their Influence on Current Problems*, 55 Am. Soc’y Int’l L. Proc. 146, 146 (1961)

⁶² Moral economy is defined as the original state of all economies prior to modernization. See, Bongo Adi Yashihito Shimada, *Is Market Capitalism Possible Under the Moral Economy of Africa? How the IFIs Can Help*, p. 3 (2004) (Check for full citation)

⁶³ John Miles, *Customary and Islamic law and Its Development in Africa*, Law for Development Review, at 5, available at <http://ssrn.com/abstract=1015783>. [Accessed May 9, 2009]

⁶⁴ Ziyad Motala, *Human Rights in Africa: A Cultural, Ideological, and Legal Examination*, 12 Hastings Int’l & Comp. L. Rev. 373, 380, 387 (1988-1989) (arguing for the existence of the individual and group rights, such as the right to life and security, freedom of expression, freedom of religion, freedom of movement)

Colonial regimes conceded the persistence of customary life and thus tried to leave in place most customary laws.⁶⁵ But colonial acknowledgement of customary law also involved the voidance of some aspects of it through the so-called repugnancy clauses which were used to impose limitations on the extent and content of customary law, usually targeting aspects of custom which Europeans found diametrically irreconcilable with their own culture. Some of these clauses stated that customary rules had not be “repugnant to natural justice, equity and good conscience.” Thus, marriage consideration was declared repugnant,⁶⁶ and a host of other cultural norms. The repugnancy clause was an ambiguous standard. Thus as a matter of fact, the colonial leaders and jurists ended up imposing their European standards. For example, in 1938, a British judge in a Tanzanian case admitted as much: “I have no doubt whatever that the only standard of justice and morality which a British court in Africa can apply is its own British standard.”⁶⁷

After independence, many African administrations would quickly tried to modify those repugnancy clauses as they felt that certain aspects of African customary law remained valid and legitimate. Be that as it may, several African Constitutions still enshrined some standard by which they could limit customary law. For example, some would state that a rule of customary law was void if it was inconsistent with the

⁶⁵ Customary law is defined as rules of custom, morality and religion that the indigenous people of a given locality view as enforceable either by the central political system or authority or various social unites such as the family. If custom emanates from the people, there could be as many customary laws as there were different communities. The modern State was not present in 19th Century African communities. Modibo Ocran, *Clash of Legal Cultures: The Treatment of Indigenous Law in Colonial and Post-Colonial Africa*, 39 Akron L. Rev. 466, 467-68 (2006).

⁶⁶ See e.g., *R v. Amkeyo* (1917) 7. E.A.L.R. 14 (condemning the institution of bride price saying that in that case the African customary marriage appeared to have all the elements of “wife purchase,” the description given to an African customary marriage)

⁶⁷ *Gwao bin Kilimo v. Kisunda bin Ifuti* (1938), 1 T.L.R. (R.) (403)

Constitution or human dignity.⁶⁸ While that may not in itself be a bad thing to do since customary law itself must be subject to critique where it is not perfect, it may have occasioned the perpetuation of attitudes of subordination of customary law to other systems of law regarded ‘modern’ in relation to the development of African society. Some among the African leaders and jurists continue to regard customary law as a relic of the past that with time will die away and that should not be allowed to develop or thrive. Indeed some jurists have noted this tendency.⁶⁹ Some African jurists view customary law as inimical to development. They would rather “modify customary law in aid of modernization.”⁷⁰ Unsurprisingly, they would uncritically subscribe to the prescription of the rule of law and development approach without first paying sufficient attention to how such an antidote related to the overall complex realities of Africa.

Paying sufficient and affirmative attention to preexisting concepts of justice is critically is to authentic African development. For the foreseeable future, African societies will remain characterized by a dualistic legal system—customary law and ‘modern’ statutory law—before a sufficiently homogenous society emerges and thus

⁶⁸ Most African Constitutions, though, continue to void some aspects of customary which are inconsistent with human dignity. See e.g., Kenya’s Constitution, Art. 38(3); Uganda Constitution, Art. 2(2) provides that “if any other law or any custom is inconsistent with any of the provisions of this Constitution, the Constitution shall prevail, and that other law or custom shall, to the extent of the inconsistency, be void.” The 1996 South African Constitution provides that everyone has the right to participate in the cultural life of his or her choice provided that no one exercising this right does so in a “manner inconsistent with any provision of the Bill of Rights. Section 30 of the 1996 Constitution of South Africa.

⁶⁹ In *Mabuza v Mbatha*, 2003(4) SA 218, 227-28(C), Hlope JP commented on the application and development of customary law arguing that “if one accepts that African customary law is recognised in terms of the Constitution and relevant legislation passed thereunder, ... there is no reason, in my view, why the Courts should be slow in developing African customary law” and that African law is should not be “recognised only when it does not conflict with the principles of public policy or natural justice” because “the Courts have a constitutional obligation to develop African customary law.”

⁷⁰ Ocran, *Supra* note 65, at 480

require a unified legal system. Some analysts see in this duality an unacceptable dilemma or challenge, because African polities seem to be at once urban and rural, modern state and the ethnic nation, modern and traditional.⁷¹ It is indeed true that many African states seem to harbor two worlds. On the one hand, they have a world that is largely urban and characterized by modernization, evident in terms of the impact of the Constitution, Western-oriented laws, relatively developed infrastructure, education, health and other amenities. On the other hand, they have a world that is predominantly rural, inhabited by the majority of the population that is hardly touched by the first world and where customary law prevails.⁷² But does this plurality hamper development? If so, how can the seemingly problematic chasm be bridged in order to avoid these apparently parallel realms?

The indigenous institutions need not be expurgated in order to promote development, as the modernization theories would have it, after all the majority of the people already live in those institutions. The fact that majority of the poor in developing often live in a world of their own often defined by a different set of norms only needs to be embraced and affirmed in so far as some of aspects of that world are pro-development.⁷³ On that basis, there can be engagement across the divide or chasm. The quick appeal to the rule of law if this is meant to sideline even authentic African values would be ill-advised.

It is important to allow development to grow from within, allow local populations to take charge and ownership of their destiny. This means being attentive and adaptive to

⁷¹ See, Shimada, *Supra* note 62, at 6

⁷² Don McKinnon, *The Rule of Law in Today's Africa*, 32 *Commw. L. Bull.* 649, 650(2006)

⁷³ Cao, *Supra* note 39, at p. 7

local conditions and needs in order to avoid unnecessary social stress. Each country has its unique cultural, political and economic history that informs it takes into account when determining issues of legitimacy. But in far too many countries, there has been a failure to promote homegrown customary institutions and take charge of development. It seems to be shortsighted and counterproductive to exclude formal structures of local government that command habitual allegiance and are familiar to a significant population.⁷⁴ This results glossing over norms that guide a whole group of the nation's population and ignores the reality of Africa's largely rural citizenry.⁷⁵

The rule of law rhetoric gives the impression, in the words of one author, that Africa is a "lawless world."⁷⁶ But it is important to consider local conditions of legitimacy. It makes sense to make accommodations of traditional features of the African States because they simply cannot be wished away and yet they represent legitimacy.⁷⁷ Thus it is necessary to examine attributes of every culture that may be an impediment to economic development. Some have suggested that the diminution of the significance of diverse cultural loyalties that attended the promotion of a unitary culture was important for national unity. And yet, African indigenous cultures still play an important role in

⁷⁴ Kwasi Prempeh, *Supra note 16*, at 27 (arguing that "Africa's newly emergent democracies have failed to emulate the successful example of Botswana, one of only two African countries with an unbroken record of postcolonial democracy, and one that has had a postcolonial policy of making selective use of traditional customary institutions at the basic or community level of its system of local administration.")

⁷⁵ Ali A. Mazrui, Constitutional Change and Cultural Engineering: Africa's Search for New Directions, in *CONSTITUTIONALISM IN AFRICA: CREATING OPPORTUNITIES, FACING CHALLENGES* 20, 21 (J. Oloka-Onyango ed., Fountain 2001).

⁷⁶ Mary L. Dudziak, *Who Cares About Courts? Creating a Constituency for Judicial Independence in Africa*, 101 MICH. L. REV. 1622, 1630 (2003) (reviewing JENNIFER A. WIDNER, *BUILDING THE RULE OF LAW: FRANCIS NYALALI AND THE ROAD TO JUDICIAL INDEPENDENCE IN AFRICA* (2001)).

⁷⁷ South Africa, for example, despite its being highly urbanized about sixty percent of its people live in rural areas under traditional leaders. Ndulo, *Supra note 14*, at 86

many people's socialization, economic and political lives—they are part of their identity. Some have argued that cultural diversity can enhance the sense of nationhood and therefore is not necessarily antidevelopment. Nationhood can coexist with cultural pluralism.⁷⁸ Cultural diversity on the African continent, while in some respects an asset, is the root of some of Africa's problems.⁷⁹ Pluralism can pose challenges to nationhood, but the two are not necessarily incompatible and cultural diversity may itself constitute the identity of a particular nation as in the case of the United States or Switzerland.⁸⁰ Nationhood or nationalism cannot be legislated. It is something that evolves from perceptions of common identity and aspirations. As long as there such shared values, it does not matter that the nation is fundamentally multicultural. Cultural diversity becomes problematic only when manipulated or used as the basis for the allocation and distribution of political power and economic resources.⁸¹ It is possible to have complementary loyalties in a single State, as long as the central authorities adhere to respect for equality, fairness, and justice. Thus, perhaps it is important in Africa to give serious attention to studying and , appraising, engaging cultures and traditions more than has been the case. Studies show that culture is an important factor in economic development; in fact some have asserted that culture plays a primary role—"culture makes almost all the difference."⁸²

⁷⁸ Ibrahim J. Wani, Cultural Preservation and the Challenges of Diversity and Nationhood: The Dilemma of Indigenous Cultures in Africa, 59 UMKC L. Rev. 611, 634 (1990-1991)

⁷⁹ Merriam, *Supra* note 61, at 147

⁸⁰ Wani, *Supra* note 78, at 635-36

⁸¹ *Id.*, at 637

⁸² David Landes, *Culture Makes Almost All the Difference*, in CULTURE MATTERS, (*Check full details of this source*) at 2

The international community should be able to work with various regimes to bring about social change while respecting each country's social traditions, history, challenges, rather than first insisting that that society changes or conforms to a pre-determined image. This means that there should be a focus on the community and not just the state and its law institutions.⁸³ Traditional institutions should be incorporated because it is more legitimate⁸⁴ to use them rather than the untraditional institutions. In most African countries authority figures, usually paramount chiefs or Kings, continue to play a significant role in development. Tight central control, with very little if any participatory values, used to be justified on the basis of trying to create national unity after colonialism,⁸⁵ even if it tended to be accompanied by mostly negative economic growth. In fact, some of these nations' Recognizing and affirming traditional institutions has already taken place in some countries although more needs to be done. Some constitutions recognize local centers of authority⁸⁶, which vary from ethnic group to

⁸³ Cao, *Supra* note 39, at 3

⁸⁴ The success of law in achieving its intended objectives often depends on the popular support of the changes brought about by law. Thus societal input in the formulation of the law is of utmost importance. Mwalimu, *Supra* note 48, at 42

⁸⁵ Africa's postcolonial elites objected to multiparty politics arguing in part that it was based on class-stratified societies of industrialized Western economies, and since African societies were supposedly 'classless' and preindustrial, political parties served no constructive interest-aggregation function, but instead divided people along the unconstructive lines of identities of ethnicity and religion. The single party was seen as the means for uniting the African polity and focusing the meager resources on national development. Similar arguments were used to undermine the legitimacy of traditional leadership structures because considerations of national considerations had to trump all local and subnational sentiments considered subversive to national interest and identity. It became fashionable to suggest that economic development fast, democratization later. Kwasi Prempeh, *Supra* note 16, at 8-9, 12. See also Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AMER. POL. SCI. REV. 69 (1959). Many leaders in Africa justified one party rule on the need to maintain unity "in the face of ethnic, linguistic, and cultural differences." John Kpundeh, *Democratization in Africa: African Voices, African Views* 12 (1992).

⁸⁶ The following are examples of that from the Constitutions of various African countries.. Angola, Art. 90 (k), provides that the National Assembly shall have "relative sole legislative powers" on, among others, the "participation of traditional authorities and citizens in local

ethnic group. In Uganda for instance, the Constitution provides for decentralization and traditional leaders. Decentralization is particularly suitable to many African nations because they are composed of a great number of entities and groups that have kept their specific traditional structures can best be included by allowing them to take charge of their destiny by allowing to be affirmed and to operate through structures they are familiar with.⁸⁷ Decentralization means respectful adaptation to the local particularities.⁸⁸ Decentralization focuses on responses attuned to local needs.⁸⁹ Decentralization is also important because it is a means of allowing development through participatory

government.” Cameroon, Art. 1 (2), provides that Cameroon “shall recognize and protect traditional values.” Republic of Congo, Art. 35, provides that “[c]itizens shall possess a right to culture and to the respect of their cultural identity.” Ethiopia, Art. 39 (2) provides that “[e]very nation [in Ethiopia], nationality and people shall have the right to speak, write and develop its language and to promote its culture, help it grow and flourish, and preserve its historical heritage.” Gambia, Art. 32, every person has the right to practice their tradition. Kenya, Art. 26[1], recognizes culture as the “foundation of the nation, the cumulative civilization of the Kenyan people and communities” and “affirms the values and principles of the communities of Kenya, their tradition, and Art. 178(3) provides that “the use of traditional courts, where appropriate, shall be promoted.” Lesotho, Art. 35: “Lesotho shall endeavour to ensure that every citizen has an opportunity to freely participate in the cultural life of the community and to share in the benefits of scientific advancement and its application.” Malawi, Art. 110(3), Parliament may “provision for traditional local courts presided over by lay persons or chief.” Mozambique, Art. 53, State “shall promote the development of national culture and identity, and shall guarantee free expression of the traditions and values of Mozambican society.” Namibia, Art. 102, recognize centers of traditional authority and provides that for a “Council of Traditional Leaders” to “advise the President on the control and utilization of communal land and on all such other matters as may be referred to it by the President for advice.” Nigeria, 7(2), provides that local authority must be prescribed having regard to the “traditional authority of the community in the area.” Sierra Leone, Art. 12, the government shall “recognize traditional Sierra Leonean institutions compatible with national development.” South Africa, Arts. 211 and 212 recognize traditional leadership with respect to matters affecting local communities and the application of customary law when that law is applicable. Uganda, Art. 246 provides for the existence of the institution of traditional leader or cultural leader in any area Uganda. Art. 126 provides that judicial power must be exercised in conformity with the norms of the people and Art. 127 provides that “parliament shall provide for the participation of the people in the administration of justice by the courts.”

⁸⁷ Jean du Bois de Gaudusson, *Administrative Decentralization in Former French Africa: New Hallucinations or a New Policy*, 105-106, *Third World Legal Stud.* (1989)

⁸⁸ *Id.*, at 110

⁸⁹ Ndulo, *Supra* note 14, at 84

methods.⁹⁰ Even local administrations mirror some of those traditional authority frameworks to some extent.

Not everything in a culture may be pro-development. It is precisely for this reason that efforts to challenge culture to change must be included. Indeed, with forces of globalization, no culture is immune from change as long as this is a legitimate process, not threatening to the integrity and identity of the community, and that does not appear to be imposed from outside. Years of exposure to foreign law and cultures has left Africa with a mosaic of cultures comprised indigenous, Arabic, Islamic, Western European and Christian, among others.⁹¹ This legacy has undoubtedly enriched African culture. Still, some cultures need to change with regard, for instance, to women's rights. Also, self-consciousness and over-attachment to each one's ethnic group can be a source of tension and a source of intolerance, disunity and lack of cohesiveness. Hence the need for African states to educate cultures toward a sense of accommodation of diversity and inclusiveness.⁹² Efforts aimed at effecting such change can involve both legal and non-legal⁹³ approaches.

While paying attention to culture is important, essentially because development should involve grassroots participation, in an age of globalization culture cannot remain

⁹⁰ Balakrishnan Rajagopal, *From Modernization to Democratization: The Political Economy of the "New" International*, in Richard Falk et al, (eds.) *Reframing the International Law: Law, Culture, Politics*, (Routledge, London 2002), 136, at 142.

⁹¹ Wani, *Supra* note 78, at 611

⁹² Ndulo, *Supra* note 14, at 81

⁹³ See e.g., Cao, *Supra* note 39, at 17 (arguing that although the formalistic approach emphasizing rule of law and market development is necessary it is far from sufficient, "[m]uch more attention needs to be paid to the non-law framework-norms and culture—that influence the efficacy of formal laws.")

pure or monolithic.⁹⁴ In an increasingly urbanizing Africa, it is important to pay attention also to mediating sub-cultures in some cultures, not strictly traditional, nor strictly 'modern' in the ordinary sense of the word, but pre-modern. This sub-culture accepts something of both worlds—the old and the new. Members of this sub-culture, for instance, are likely to accept all the modern amenities that modern life brings. Thus, they will transpose some models of traditional authority to modern forms of authority. They tend to resist liberal ideologies of democracy insisting on a less than critical attitude of the authority. They tend to be beholden to the beneficence of the authority. Many government leaders seem to be drawn to this sub-culture. It is against that backdrop that corruption, clientelism, political patronage, can be understood, which has almost become intractable in many African states.⁹⁵ This has facilitated many African leaders' tendency to be patriarchal and imperial, and to be seen as personifications of the state.⁹⁶ This is important as it makes personal rule and personality cult seem legitimate and even normal. The African leaders rely on the military and members of this subculture to further this

⁹⁴ *Id.*, at.5

⁹⁵ A more recent example is the newly elected leader of South Africa, Jacob Zuma. In spite of allegations of corruption (formerly dropped) and confessed sexual misconduct, he was overwhelmingly elected President of South Africa, following his party's landslide victory in the national elections. A self-described "farm boy" known to don traditional garb—including leopard skins and a spear -- at ceremonial events, Zuma, puts a different face on the South African leadership than Mandela, the attorney imprisoned under segregationist apartheid rule, and the Western-educated Thabo Mbeki, his predecessors in office. CNN, ANC Scores Landslide Win in South Africa, available at <http://www.cnn.com/2009/WORLD/africa/04/25/south.africa.elections.results/index.html?ref=newssearch>. [Accessed May 11, 2009].

⁹⁶ The African leader sees himself in some respects as the continuation of the former kings. A recent example Libyan leader, Muammar Gaddafi, who allowed himself to be proclaimed "King-of-kings of Africa," by over 200 traditional leaders from all over Africa. Gaddafi, who has been insistent that African revolutionary leaders should never retire, invited traditional leaders to join his cause for a United States of Africa, believing that they represented grassroots legitimation for his cause. See, BBC, *Gaddafi: Africa's 'King of Kings'*, available at <http://news.bbc.co.uk/2/hi/africa/7588033.stm>. [Accessed on May 11, 2009]

political dispensation. Perhaps the greatest and most stubbornly intractable challenge to African development has been and continues to be corruption.

RULE OF LAW: AN ANTIDOTE TO CORRUPTION?

One important area where the rule of law is thought to be closely connected to underdevelopment is with regard to the prevention and combating of corruption after all, rule of law approaches target official conduct. But can the rule of law, having regard to the cultural complexities of Africa and limitations intrinsic to rule of law relating to social change, really stem corruption in Africa? Some have argued that any serious movement for social change cannot treat the legal process or the rule of law as a mere sham as it is the only way to make corrupt leaders accountable.⁹⁷ But that the insistence on rule of law must be tempered by reality because it is only when enforcement of those laws is possible that law becomes of instrumental in a practical sense. Legal reforms alone, although important, might not suffice. Indeed, some have argued that although “the rule of law reforms are significant for reducing opportunities for abuse of public office, these do not necessarily guarantee or entail...substantive outcomes.”⁹⁸ Thus, this is another important area where broader approaches become necessary.

Efforts within the realm of law have not been lacking. In the wake the United Nations Convention Against Corruption, the African Union adopted the Convention on Preventing and Combating Corruption, whose foremost objective is promoting development through preventing, detecting and punishing acts of corruption, and to this

⁹⁷ James Thuo Gathii, *Corruption and Donor Reforms: Expanding the Promises and Possibilities of the Rule of law as an Anti-Corruption Strategy in Kenya*, 14 Conn. J. Int'l L. 407, 407 (1999), citing Karl Klare, *Law-Making As Praxis*, 40 TELOS 133 (1979) (hereinafter *Corruption and Donor Reforms*)

⁹⁸ *Id* at 408.

end recommends that States parties to the convention should adhere to “democratic principles and institutions, popular participation, the rule of law and good governance.”⁹⁹ Thus, the African Convention on Preventing and Combating Corruption takes a good governance approach to the problem of corruption. Whereas this is itself a significant step, it remains to be seen what, if any, impact it will have. In fact in many African countries, statutes aimed at combating corruption, have been on the law books for many decades. Kenya, for example, has had the Prevention of Corruption Act since 1956. Yet, Kenya is one of the most corrupt countries in the world according to Transparency International, ranking 147th in its 2008 Corruption Perceptions Index.¹⁰⁰ In many countries in Africa, corruption is pernicious in the judiciary, the very institution expected to uphold the rule of law. Indeed, in so many countries corruption has become endemic, systemic and ubiquitous—in sum, cultural.

In such circumstances, engaging the culture itself is important and for that broad approaches are imperative. Cultural perceptions are important because the population acceptance of corruption as a fact of life and its despondency or complacency in that respect matters. When corruption is so endemic, systemic and insipient, it is doubtful that it can be rooted out by the mere enactment of laws, for example, when the enforcement officials themselves are corrupt. Africa has unique challenges with regard to

⁹⁹ African Union Convention on Preventing and Combating Corruption, Art. 3(1). Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, July 11, 2003, entered into force Aug. 5, 2006. As of May 14, 2009, 29 countries had ratified the convention and 43 had signed it. See e.g., Daniel Jordan Smith, *A Culture of Corruption: Everyday Deception and Popular Discontent in Nigeria* (Princeton University Press, 2008).

¹⁰⁰ Transparency International, Corruption Perceptions Index 2008, *available at*: http://www.transparency.org/policy_research/surveys_indices/cpi/2008 [Accessed May 14, 2008]

corruption.¹⁰¹ Thus the drafters of the Convention on Preventing and Combating Corruption incorporated and emphasized traditional notions of justice.¹⁰² When a State faces endemic levels of corruption, it becomes generally accepted as a part of life. In such a situation, much more needs to be done than appeal to rule of law.¹⁰³ It requires engaging with citizens regarding their attitudes towards corruption and changing cultural perceptions towards corruption and towards the rule of law. It is important to create a culture of intolerance toward corruption, and this means awareness activities.¹⁰⁴ This may help change the culture of complacency and helplessness towards corruption. Once people are sufficiently motivated and aware, the underlying support for corrupt leadership disappears. In some countries the pressure of public opinion of a sufficiently empowered population has been sufficient to undermine corrupt leadership.¹⁰⁵ The rule of law to be an effective instrument in combating corruption must be preceded by an society-wide internalization process of norms that are decidedly anti-corruption.

Moreover, any meaningful and legitimate struggle to end corruption must pay attention to underlying and substantive social and historical inequities. The laws, after all, could be the cause of the problem in the first instance. Laws could be an instrument for the wealth and powerful, even when it appears to be neutral. This means that laws must be attentive to the fact that they may be facially neutral, while the outcomes could be

¹⁰¹ In some countries, this even led to what has been described as a culture of corruption due to high levels of popular tolerance of corruption.

¹⁰² Thomas R. Snider and Won Kidane, *Combating Corruption Through International Law in Africa: A Comparative Analysis*, 40 *Cornell Int'l L.J.* 691, 743 (2007)

¹⁰³ Melissa Khemani, *The Role of Anti-Corruption Commissions in Changing Cultural Attitudes Towards Corruption and the Rule of Law*, 2 (2009), available at <http://ssrn.com/abstract=1386496>, (Accessed May 9, 2009)

¹⁰⁴ *Id.*, at 10

¹⁰⁵ Jeremy Pope, *Corruption in Africa: The Role for Transparency International (TI)*, 20 *Commw. L. Bull.* 1468, 1469 (1994)

unequal or might fail to redress underlying institutional, historical, and structural circumstances.¹⁰⁶ Those laws would require change having regard substantive fairness, which is prerequisite for legitimacy.

RECOMMENDATIONS: TOWARDS A 'BROAD APPROACHES' PARADIDGM

If international financial institutions and major development partners such as the United States are at the threshold of rethinking or even adopting new, inclusive, broader and pragmatic approaches to dealing with development challenges as it seems to be the case, then it may be helpful to underscore approaches what have been tried and seem to be effective. This approach would not regard legal reforms as unnecessary but it would consider them as one of the means and part of a package of tools to the desired end.¹⁰⁷ Emphasis and efforts should be placed, for instance, on the affirmation and socialization of African leaders around the existing best practices or positive role model leadership with the hope that several other leaders in the region will seek to emulate exemplary leadership among their peers, since it seems human beings tend to learn best from their own environment. In addition, special efforts should be place on the education of the masses and to affirmatively develop elements of African traditions that are pro-development.

Whatever measure of growth has taken place in Africa in recent years it has been in part due to better leadership in some countries.¹⁰⁸ These leaders have encouraged full

¹⁰⁶ Gathii, Corruption and Donor Reforms, *Supra note 97* at 416

¹⁰⁷ Davis, *Supra note 2*, at 28

¹⁰⁸ See, Jorge Arbache, Delfin S. Go and John Page, Is Africa's Economy at A Turning Point?, World Bank Policy Research Working Paper, at 26-27 (2008) (arguing that the current accelertion of growth is due in part to improved governance under the African Union and the New Partnership for Africa's Development Initiatives which insist on good practices in governance).

participation and accountability, stemmed corruption, and have thus propelled their countries toward development. African leaders are more inclined to look to their African peers than to ‘outsiders’ some of whom they continue to blame for the colonial legacy and persisting inequalities in the international system. Africa has examples of models of distinguished and development-oriented leadership. South African Nelson Mandela laid the ground for South African future leaders. Botswana’s Sir Seretse Khama, followed by Sir Ketumile Masire and after him, Festus Mogae, were exemplary democratic leaders credited with inclusionary, participatory values.¹⁰⁹ They each set in place a tradition within those countries which law could have taken years, if ever, to create. There are others, such as Benjamin Mkapa of Tanzania, Abdoulaye Wade of Senegal, and John Kufuor of Ghana. Their number is increasing, even as on the other side, there are some brazenly dictatorial, ruthless and autocratic leaders such as Robert Mugabe of Zimbabwe.

Once exemplary leadership is in place, it becomes easier to use the resources, human and physical, with which so many African nations are incredibly endowed, to propel development. For example, Botswana discovered diamond wealth just about the same time they had sensible leadership, so they could manage the resources, not for individuals in the leadership, but for the nation as a whole. This did not happen in Nigeria and Congo, despite their incredible mineral resource base, for as long they maintained authoritarian regimes. Institutions of good leadership are already in place but they need greater international support and resources to make them especially effective. The African Leadership Council as well as the voluntary African Peer Review Mechanism¹¹⁰

¹⁰⁹ Rotberg, *Supra note 35*, at 149

¹¹⁰ As of June 29 2008, APRM counted 29 States members as follows: Algeria, Angola, Benin, Burkina Faso, Cameroon, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Kenya, Lesotho, Malawi,

under the auspices of the New Partnership for African Development (NEPAD) are positive developments in support of a culture of good leadership and construction of a development oriented leadership profile on the African continent as they represent an attempt to recognize, affirm, reinforce and make visible the positive role models around the country. The African Union itself has been promoting good leadership by condemning coup d'états on the Continent.¹¹¹

But the programs aimed at development should pay particular attention to education. The conventional conception of rule of law is merely procedural, that is, the performance of the state is assessed based on the extent to which it fulfills predetermined rules or principles as opposed to predetermined end. There is need to move to a conception of rule of law that is substantive in nature—one that measures the performance of the State from the extent to which it incorporates and delivers on specific public policy goals such as public education, housing or health programs.¹¹² Meaningful¹¹³ democracy means reciprocity. An educated and enlightened population is the strongest foundation of development, not just the rule of law or good governance. The insistence on only civil and political rights in Africa and ignoring economic, social and cultural rights will not provide a recipe for success in Africa. As Professor Oloka-Onyango observes

Mali, Mauritania, Mauritius, Mozambique, Nigeria, Republic of Congo, Rwanda, Sao Tome & Principe, Senegal, Sierra Leone, South Africa, Sudan, Tanzania, Togo, Uganda and Zambia.

¹¹¹ Article 30 provides that “Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union.” But, of course, this says nothing about those leaders that amend the constitution to perpetuate themselves in power. Nevertheless, the AU was instrumental in reversing the coup in Togo in 2005, and pressing others to hold democratic elections.

¹¹² Gathii, *Corruption and Donor Reforms*, *Supra note 97*, at 423

¹¹³ See, Rita Abrahamsen, *Disciplining Democracy: Development Discourse and Good Governance in Africa* 145 (2000) (noting that the birth of democracies in Africa did not “incorporate the poor majority in any meaningful way.”)

[I]t is just as futile to speak of the right of participation in conditions where basic human necessities, such as food, shelter, and water are beyond the reach of the majority of the population. What is the meaning of the ‘right to vote’ when the voter may be too weak from disease and hunger to exercise his or her franchise?...In sum, for a human to be considered whole, he or she must be able to enjoy both civil and political rights and economic, social and cultural rights as well.¹¹⁴

Indeed, some have argued that international concern should be focused on human welfare rather than civil and political human rights record because a government with limited resources would rather seek to enhance the capabilities of its population through investment in education, health, and infrastructure. Development assistance would be provided only States that show progress with regard to human welfare.¹¹⁵ The people must be able to understand what is going on inasmuch as knowledge is power and their health should be promoted inasmuch as it is precondition for their participation in development efforts.

After all, it ultimately means very little to have an enlightened free media in the urban centers with a vibrant civil society—important as this may be—when the majority of the people who live in rural settings are not sufficiently equipped to make critical analysis of matters of great moment so as to meaningfully participate in governance and make decisions vital to their wellbeing. To begin by insisting on democracy and the rule of law without first having in place a properly educated populace is analogous to putting the cart before the horse.¹¹⁶ Only a population that can fully analyze the implications of

¹¹⁴ J. Oloka-Onyango, *Human Rights and Sustainable Development in Contemporary Africa: A New Dawn, or Retreating Horizons?* 6 *Buff. Hum. Rts. L. Rev.* 39, 44 (2000)

¹¹⁵ Eric A. Posner, *Human Welfare, Not Human Rights*, at 13, 38. Available at <http://ssrn.com/abstract=1105209>, [Accessed May 9, 2009]

¹¹⁶ The United Nations acknowledges and affirms that “basic education for all is essential for achieving the goals of eradicating poverty, reducing child mortality, curbing population growth,

political, legal and policy choices at stake can meaningfully contribute to public discourse and development, and become less susceptible to political manipulation by ruling elites. If democracy and the rule of law means putting a set of policy choices and controlling the use of power of elected leaders through a rational system of checks and balances, then the population should first be in a position to understand those policies and the operations and outcomes of their system of checks and balances, otherwise transparency and accountability, which are so critical to development, will not be effectively promoted. Any meaningful approaches to development then, must first focus on ensuring that the population is in a position to understand what is going on.

Raising literacy levels to critical mass is particularly urgent component of this process. Research has shown that the accumulation of human capital—specifically knowledge—is a key factor in explaining the growth experiences of countries.¹¹⁷ A study on Asian economies, found that an increase in investment in secondary education was significant in achieving high rates of investment and¹¹⁸ high per-capita GDP growth. Although there are some who would disagree,¹¹⁹ the impact of education on human

achieving gender equality and *ensuring sustainable development, peace and democracy.*” See, *General Assembly Resolution on Education for All*, A/54/595 of the 54th session of the United Nations General Assembly, October 1999. [Emphasis added]

¹¹⁷ See generally, Robert E. Lucas, Jr., *On the Mechanics of Economic Development*, *Journal of Monetary Economics* 22, 3-42 (1988).

¹¹⁸ See generally, Walter W. Mchahon, “Education and Growth in East Asia,” *Economics of Education*, 17 (2), 159-172 (1998). But an influential and much-cited cross-national econometric study by Pritchett suggests that increases in education capital resulting from improvements in the educational attainment of the labor force have had little impact on the growth rate of output per worker. Lant Pritchett, “*Where Has All the Education Gone?*,” Policy Research Working Paper 1581 (The World Bank, 1996).

¹¹⁹ See e.g., Voxi Heinrich Amavilah, *Domestic Resources, Governance, Global Links, and Economic Performance of Sub-Saharan Africa*, REEPS WORKING PAPER, available at <http://ssrn.com/abstract=1359944> [Accessed May 9, 2009](arguing that with respect to economic performance, investment plays the most important part and education(knowledge) as a component of human capital plays a modest part).

capital accumulation is well-established¹²⁰ and well-accepted by policy makers. It does not appear that many development partners have made enough emphasis on this component. Critics even argue that this lack of focus on education is because international aid is usually tied to the purchase of the donor country's products, which tends to favor physical, rather than human, capital investment.¹²¹ But if development actors are serious about their interventions in Africa, focus on education appears to be a precondition for technological innovations, without which few countries have made any significant economic advancement. Quality of education matters: universal primary and secondary educations are important, but only as a first step. Attainment at the primary level turns out not to be significantly related to growth rates.¹²² A lot more needs to be done to expand University education in Africa. Moreover, there should be efforts aimed at inculcating attitudes and creating the skills tailored to the unique challenges of the particular or specific social and cultural milieu. Education should create consciousness regarding the positive attributes of cultural diversity that at once values the underlying commonality of national values rather would the differences of that distinguish one cultural group from another.

The affirmation and development of positive cultural values is a prerequisite to sustainable and authentic human development and should be part of the broad approaches strategy. There are a plethora of positive African cultural values but it suffices to

¹²⁰ See Simon Johnson, Jonathan D. Ostry and Arvind Subramanian, *The Prospects for Sustained Growth in Africa: Benchmarking the Constraints*, IMF Working Paper, at 7 (2007) (observing that there are inadequate education and poor health is two other explanations of poor longer-term growth performance in Africa).

¹²¹ Koh, Winston T.H. and Leung, Hing Man, *Education, Technological Progress and Economic Growth* p. 5 (July 28, 2003). Available at SSRN: <http://ssrn.com/abstract=637462>.

¹²² See, Barro J. Robert and Jong-Wha Lee, *International Measures of Schooling Years and Schooling Quality*, American Economic Review, 86, 218-223 (1996)

highlight by way of example a few of them with particular relevance to development. Whereas the liberal view of the rule of law is based on individualism rather than a set of shared values in several African societies bonds of social obligation are still strong precisely because culture and tradition continue to provide sources of norms that are solidaristic and communal.¹²³ Some argue that rule of law programs are based on an individualistic bias presupposes the priority of individual as opposed to or instead of the community. That proposition would be mostly an inaccurate and inauthentic prescription for most African societies.¹²⁴ It is precisely because of this that every effort should be made to “adapt African indigenous law to make it a tool of socio-economic development.”¹²⁵ Authentic African development would require the preservation of African values such as the idea of being each other’s keeper, and the notion that the development of each is indeed a condition for the development of every body because according to African communitarian values each person is connected to every other and that defines existence and authentic development. As Professor Mbiti says, for the African the guiding existential philosophy is “I am because We are, and since we are, therefore I am.”¹²⁶ Certainly these values have not remained intact in light of a creeping sense of individualism that is part of globalization and modern life particularly in urban Africa where the emphasis is on individual achievement and status symbols. The urban people—students, laborers, business people, civil servants—tend to have different

¹²³ Gathii, Corruption and Donor Reforms, *Supra* note 97, at 420

¹²⁴ Gathii, Representations of Africa, *Supra* note 8, at 67

¹²⁵ Ocran, *Supra* note 65, at 480

¹²⁶ John S. Mbiti, *African Religions and Philosophy*, 2nd ed. Heinemann Educational Publishers, 1989, p. 219. But see the argument that some of these African values are anti-development because they subordinate the individual to the community and thus suppress individual initiative. See, Daniel Etounga-Manguelle, *Does Africa Need a Cultural Adjustment Program?* in CULTURE MATTERS, (*Check for full details of this source*) at 75.

characteristics from their rural counterparts. Traditional constraints of family, class and religion do not fully apply to them.¹²⁷ But, those urban values have some inbuilt costs, which are not difficult to delineate. As Mbiti, notes, at every turn of his life the African individual in the city and under modern change discovers constantly that he is alone,¹²⁸ an outcome that an authentic development would try to avoid.

With regard to customary law itself, it is important particularly in rural places to continue to affirmatively recognize community-based models of customary or popular justice.¹²⁹ These can be important mechanisms in empowering local movements towards development and challenging manifestations of individualism such as abuse of office and corruption. One basic flaw of liberal legalism¹³⁰ that underpins the rule of law ideal is the assumption that the role of the state is merely to support basic rights and liberties without affirming any particular social and economic goals.¹³¹ The assumption is that as long individuals have their basic rights and liberties, they can choose the type of economic or

¹²⁷ Minasse Haile, *Human Rights, Stability, and Development in Africa: Some Observations on Concept and Reality*, 24 *Va. J. Int'l L.* 575, 596 (1983-1984)

¹²⁸ Mbiti, *Supra note* 126, at 219

¹²⁹ It is conceded that the received Western European judicial system would overhaul in the African setting especially because of its adversarial character, its complex rules of evidence and procedure intelligible only to the initiated and experienced, and the tendency to proceed in a slow and costly fashion which would make it available only to a few people in an the African setting where poverty dominates. Samuel O. Gyandoh, Jr., *Popular Justice and the Development of Constitutional Orders in Sub-Saharan Africa*, *Third World Legal Stud.* 139, 157 (1988)

¹³⁰ Some have argued that the institutional and cultural practice embodied in the rule of law ideal is liberal legalism. Klare, *Supra note* 97, at 134. Some argue that as the liberals see it, the task of the State consists solely and exclusively in guaranteeing the protection of life, health, liberty and private property against violent attacks. See, Ludwig von Mises, *Liberalism: The Classical Tradition* (Indianapolis: Liberty Fund 2005) at 26, cited in Tamanaha *Supra note* 25, at 7. Pure or classical liberalism would oppose the social welfare State. Social welfare state would lay burdens on property rights to achieve greater social justice. Advocates of the social welfare State observe that genuine liberty is defeated by social and economic conditions beyond the control of individuals so that government has the obligation to address circumstances that defeat the exercise of liberty.

¹³¹ Gathii, *Corruption and Donor Reforms*, *Supra note* 97, at 451-52

social arrangements they desire. But critics of this view, especially communitarians, question the underlying individualism and well as the separation of the individual from any social engagement. Prescriptions for fighting for justice and development should not be based on abstract theories of justice that claim universal truth or application irrespective of history and context.¹³²

CONCLUSION

For over two decades, the international community has attempted to promote development of the African continent through approaches that are in many extrinsic to the African cultural, historical, social, and political milieu. The insistence on the rule of law in particular has produced minimal results, even if it remains an important component of development efforts. Now, it seems, international development partners seem to be recognizing, once again, that some of the approaches that have been tried for so long and at high price, have not been particularly effective and seem poised to rethink their strategies. It may well be important to take into account approaches tailored to the specific needs of Africa, and focus less on models that seem to have worked elsewhere but may not necessarily be appropriate to the African setting. This may imply adopting a broad and multi-faceted approaches, which gives due attention to even non-legal issues such as education of the African populace, health programs, and the affirmation of African traditions that are pro-development. None of this is necessarily is opposed to the rule of law. It is only a question of emphasis.

¹³² *Id.*, at 452

