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**The Role of Law and the Rule of Law in the Economic Development Process:  
Quest for New Directions and Approaches in International Development Law  
Regime**

**THE ROLE OF LAW AND THE RULE OF LAW  
IN THE ECONOMIC DEVELOPMENT PROCESS:  
QUEST FOR NEW DIRECTIONS AND APPROACHES  
IN INTERNATIONAL DEVELOPMENT LAW REGIME**

BRIAN-VINCENT IKEJIAKU\*

INTRODUCTION

“Trends of events in the international system appear to have clearly established that developing countries have been placed in a weaker structural position in the global-economy<sup>1</sup> but also tend to be placed in a less dominant position on other variable indicators”<sup>2</sup> of power within the international system, including political, military, and legal.<sup>3</sup> Evidence also suggests that the international development “le-

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1. Millenium Development Indicators: World and Regional Groupings, UNSTATS, <https://unstats.un.org/unsd/mi/worldmillennium.htm> (stating “there is no established convention for the designation of “developed” and “developing” countries or areas in the UN system.”). In this article, the term *developing country* will be used interchangeably with *Third World* or *Global South* and, the term *developed country* used interchangeably with *Global North* or *Western World*. *Id.*

2. See Brian Ikejiaku; *International Law, the International Development Legal Regime and Developing Countries*, 7 L. & Dev. R. 1, 131 (2014).

3. *Id.*; See R.P. ANAND, CONFRONTATION OR COOPERATION?: INTERNATIONAL LAW AND DEVELOPING COUNTRIES, (1987). Stating,

For example, in legal trends, the [U.S.] and Britain still strongly influence undertakings in the international legal regime. In economic trends, significant [developments] since the 1980s show the virtual collapse of the market value of the natural resources extracted from the territories of developing countries and the continued triumph of Western owned multinational corporations ([“MNCs”,] which control processing) and under political trends, Western countries’ occupation of most of the strategic positions in global organizations such as the United Nations (including wielding “veto power”) as well as in other international [organizations] or agencies.

See Anthony Carty, *The Concept of International Development Law*, 1 INT’L SUSTAINABLE DEV. L.

gal regime shows a clear, wide-gap between the more developed and prosperous global north as compared to the miserable realities of violent conflict and chronic poverty experienced by a significant proportion of the" global south's population, particularly in developing poor countries.<sup>4</sup> "These gaps and inequalities reflect not only failures of understanding, conflicts of interest, resource constraints, and poor implementation,<sup>5</sup> but also a kind of concerted practice involving the leaders of rich western countries" and international organizations do not show practical and convincing development commitments, particularly strategic and functional legal reforms in developing countries.<sup>6</sup> For example, 1 billion dollars of the financing mapped out for development "were diverted from the war on poverty, going instead towards the war on terrorism,"<sup>7</sup> thereby making ~~things~~ economic situation more difficult globally, especially in the developing countries., One key negative spill-over effect or implication is the rise on terrorist activities within the international system.<sup>8</sup>

The paper identifies that the specific issue borders on the "Role of Law" and the formal legal system in development process and the effects within the countries of the global south. The paper examines approaches to the "Role of Law" and importance of the "Rule of Law" in economic development process.<sup>9</sup> It is submitted

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(2008); see also Kevin Narizny, *Anglo-American Primacy and the Global Spread of Democracy: An International Genealogy*, 64 *WORLD POL.* 341, 342 (2012). Westerners, particularly the U.S. and Britain, have been able "to influence the political . . . development of states around the world. In many of their colonies, conquests, and clients, they have propagated ideals and institutions conducive to democratization." *Id.* at 341.

4. ROY CULPEPER ET AL., *HUMAN SECURITY, SUSTAINABLE AND EQUITABLE DEVELOPMENT: FOUNDATIONS FOR CANADA'S INTERNATIONAL POLICY* 23 (2005).

5. See K. Donovan, Bono and Geldof: World Leaders Failing to Keep Promises (May 16, 2020) <https://www.christiantoday.com/article/bono.and.geldof.world.leaders.failing.to.keep.financial.pledges/10795.htm>; Brian-Vincent Ikejiaku, *International Law Is Western Made Global Law: The Perception of Third World Category*, 6 *AFR. J. OF LEGAL STUD.* 337, 353 (2014).

6. Ikejiaku, *supra* note 2; Andreas L. Paulus, *International Law After Postmodernism: Towards Renewal or Decline of International Law?*, 14 *LEIDEN J. OF INT'L L.* 727, 732-33 (2001).

7. Ikejiaku, *supra* note 2; See Shahrbanu Tadjbakhsh, Human Security Center presentation at the University of British Columbia Human Security Report: War and Peace in the 21st Century, (Sept. 09, 2005) (transcript available at <https://web.archive.org/web/20070320123627/http://www.peacecenter.sciences-po.fr/conflicts-ip-st.htm>).

8. See Robert I. Rotberg, *Failed States in a World of Terror*, 81 *FOREIGN AFF.* 127, 139 (2002).

9. James A. Grant, *The Ideals of the Rule of Law*, 37 *OXFORD J. OF LEGAL STUD.* 383, 383 (2017). In this paper, the Law is seen as a precursor to the Rule of Law, in the sense that Rule of Law cannot exist or thrive where there is no Law in place. The level of success of the Rule of Law depends on how active the Law plays its roles in the society. *Id.* at 383. Jurists and Philosophers have attempted to bring a sharp distinction between the Rule of Law and the Law, but the problem is lack of simplicity; some differentiate them as two kinds of Rule of Law ('rule of authority and procedural rule of law' and, 'rule of reason and substantive rule of law.'). *Id.* The Law or Rule of Law is simply rule by any law that is created by the highest law-making body of any nation; what the law is and its purpose is not usually the concern. It is merely the spirit of the law, the procedure and value neutral. There might be letters of the law stipulating how a country should be governed (particularly in dictatorial society) without the Rule of Law present or in practice in the same society. The Rule of Law connotes rule is founded on certain principles of law; it is a value laden concept which includes democratic values of liberty, equali-

that “Law” as a tool for development may serve well in the developed world because the relevant structures and features are available for Law to act as a tool for development; however, in the developing poor countries, there are no such features or structures. Thus, in developing countries Law cannot work as a tool for development, but as a facilitator in order to take into consideration the local needs. Law cannot serve as a tool for development in developing countries because it has already been packaged based on the legal system and climate of the developed world before it was transplanted, and the packaged Law was not meant to be altered (this was the failure of Law and Development Movement). However, as a facilitator, Law could be used with appropriate attention to the local culture, social, and economic needs of developing countries.

The paper critiques the current approach which sees Law as a tool or mechanism for development itself. It argues that Law and/or the Rule of Law should be more functional in the roles they play in the international development process, in order to improve the development stance of the third world countries, and in turn serve as one of the key ways to achieve peace and security in the global plane. In “order to make international development law agenda ‘functional’, the strategy would be to approach Law” from a new direction, that is, “as a ‘facilitator of development reform’, rather than as ‘a tool for development itself.’”<sup>10</sup> This approach “will help take into consideration indigenous needs and thereby remove disagreements over reform priorities and improve efficiency and accountability.”<sup>11</sup> This is a new direction that highlights the importance and necessity of “focusing the international system’s approach to Law as a ‘means to facilitate’ local empowerment, social cohesion, and justice – or as an approach to development consistent with the life choices and development goals of indigenous populations, rather than as it has generally appeared as an ‘end in itself.’”<sup>12</sup> Thus, it appears impractical and a mere academic exercise to suggest a general theory of law and development as presented in Lee’s work.<sup>13</sup> This is because empirical scholarly research suggests that no single theory is fit for analyzing the entire law and development issues and no unilateral approach is capable of achieving development reforms or more embracing ‘development goals’ in different societies with distinct and diverse social, cultural, and economic exigencies.<sup>14</sup>

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ty, justice, supremacy of the law, separation of powers, transparency and others. *See e.g.* Joseph Raz, *Legal Principles and the Limits of Law*, 81 YALE L. J. 823 (1972). This paper while, recognizing such distinction, will employ the concepts with the understanding and consideration that Rule of Law cannot thrive in a society where there is no Law in place. *Id.*

10. Ikejiaku, *supra* note 2.

11. *Id.*

12. *Id.*

13. *See* Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT’L L. J. 415, 417-18 (2017).

14. Von Christain Boulanger, *Law and Development as Practice and as Theory—From Self-Estrangement to Alienation?*, DAS BLOG DES BERLINER ARBEITSKREISES RECHTSWIRKLICHKEIT 1, 7-8 (2015). As a final note in his presentation, Boulanger clarifies that, it seems that it is necessary to revisit the vocabulary:

The paper is of the view that (international) law and development regime has a crucial role to play in order to achieve global well-being and facilitate the effort towards achieving global-peace and security. This is by focusing attention on the Role of Law and the formal legal system (that is the importance of the Rule of Law) in development process in the developing countries. In terms of methods and theoretical perspective, this paper uses the well-being and functionalist legal theoretical approaches, “interdisciplinary and critical-analytical approach within the framework of (international) law and development.”<sup>15</sup> It employs comparative and qualitative empirical evidence from developing and developed countries for its analysis. While the well-being and functionalist legal theoretical approaches will be used to analyze the proposed importance and functions of Law, which is centered on considering and improving indigenous needs; the interdisciplinary and critical-analytical perspective involve employing literature in the Legal, International Relations, Economics, and International Development fields. This will be critically analyzed within the framework of (international) law and development. The qualitative empirical evidence is employed by gathering relevant material from both developing and developed countries for an in-depth comparative analysis.

The structure of this paper is presented in five sections. Section 1 is the general introduction. Sections 2 looks at the complex issue of the relationship between the Rule of Law and economic development. Section 3 briefly introduces the Structural Functional and Well-Being legal theories used for analysis in section 4. Section 4 examines the approaches and directions of the Role of Law in economic development process. The summary and conclusion are in Section 5.

## II. THE RELATIONSHIP BETWEEN THE RULE OF LAW AND ECONOMIC DEVELOPMENT

The subject of Rule of Law is an age-long discourse,<sup>16</sup> but more recently the discussion on Rule of Law and economic development has prominently been fea-

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“Concepts like ‘import’, ‘export’, ‘transplant’ or ‘transfer’ are misleading, since they do not describe what is actually happening. What [they] are dealing with are transformations of normative orders, or ‘travelling models.’ Law is about stability of expectations, and this is a function that legal system must provide, regardless of their external appearance. The key is to check [not just] whether global models fit the local context, and meet the actual local needs.” *Id.*

However, this is where the problem lies; (different) global models must be approached to suit with local distinctiveness – this is the only way law could facilitate development process in the global south. *Id.*

15. Ikejiaku, *supra* note 2.

16. See M. THOMAS, RULE OF LAW IN WESTERN THOUGHT (World Bank Group, 2001). “Plato wrote one of the earliest surviving discussions. While convinced that the best form of government is rule by a benevolent dictator, Plato concedes that, as a practical matter, persons with the necessary leadership qualities are rare. Accordingly, he imagines a utopia that is governed not by a benevolent dictator, but by Nomos, the god of Law. In “The Politics,” Aristotle also considers whether it is better for a king to rule by discretion or according to law, and comes down firmly on the side of law; individuals are too often swayed by private passions. Christian philosophers, seeing the power to rule as a delegation from God, the Lawgiver, saw any kingly act contrary to “natural” law as an express violation of this delegation for which a monarch would surely be punished after death.” *Id.*

tured in the academic literature and professional practice.<sup>17</sup> There appears to be a close association between efficient Rule of Law and high growth, as well as between respect for the Rule of Law, justice, political stability, and sustainable development.<sup>18</sup> In his work, Faundez argues that constitutionalism seeks to reduce the stakes of politics by protecting liberty and human dignity.<sup>19</sup> In this respect, constitutionalism sets limits to the powers of the state and protects individual freedom, considering that the concept of constitutionalism is not far from the notion of the Rule of Law, as it provides the institutional foundation for the Rule of Law in the contemporary society to thrive.<sup>20</sup> While the similarities between constitutionalism and the Rule of Law may still raise some issues, there is clear suggestion that the protection of basic rights and liberties is an essential component of any democratic process and an essential feature of the Rule of Law.<sup>21</sup> It has been argued that distortion of the Rule of Law weakens the institutional foundation of economic growth, and results in legal and institutional frameworks of the State being crippled. This creates the single greatest obstacle to good governance and economic and social development.<sup>22</sup> The harmful effects of a weak legal system “are especially severe on the poor, who are hardest hit by economic decline” and “are the most reliant on the provision of basic needs and public services.”<sup>23</sup>

While there is available evidence to suggest how Law or the Rule of Law<sup>24</sup> interacts with development,<sup>25</sup> the greater debate centers on the approach and direc-

17. See e.g. Sonia E. Rolland, *Developing Country Coalitions at the WTO: In Search of Legal Support*, 48 HARV. INT’L L. J. 483 (2007); see also Matthew Stephenson, *Rule of Law as a Goal of Development Policy*, WORLD BANK RESEARCH (Mar. 6, 2019, 11:48 AM), <https://www.eldis.org/document/A37080>; see e.g. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95 (1998).

18. See G. Yash, *The Rule of Law, Legitimacy, and Governance*, 14 INT’L. J. OF THE SOC. OF L. 179 (1986); see generally Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L. J. 67 (2007).

19. Julio Faundez, *Law and Development Lives On 22* (Warwick Law School, Legal Studies Research Paper No 2011-12, 2011).

20. *Id.*

21. See *id.*

22. See Brian Ikejiaku, *The Relationship between Poverty, Conflict and Development*, 2 J. SUSTAINABLE DEV. 15, 15 (2009) [hereinafter *Poverty, Conflict and Development*].

23. *Id.*; See also *World Bank Finds Corruption is Costing Billions in Lost Development Power*, PROBE INT’L (Sept. 29, 2004), <https://journal.probeinternational.org/2004/09/29/world-bank-finds-corruption-is-costing-billions-in-lost-development-power/>.

24. *What is the Rule of Law?*, UNITED NATIONS, <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>. For the purpose of this paper, the Rule of Law incorporates the simple and direct U.N. definition and Lon Fuller’s eight (8) principles of legality which capture the essence of the Rule of Law. The U.N. defines it as

a principle of governance in which all persons, institutions and entities, public and private, including the [s]tate itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

*Id.* And Lon Fuller, in his much authoritative work, *The Morality of Law*, promulgates eight principles

tion of the Law, that is “how to go about it, rather than whether it has the potential to promote development.”<sup>26</sup> There is a wide assumption suggesting the Rule of Law is necessary for the growth of the economy— a very essential attribute of economic development, but the Rule of Law is a multidimensional concept that connotes various ranges of different components.<sup>27</sup> Contemporary legal and economic theory exposes the link between the Rule of Law with the economic growth and development.<sup>28</sup> It is fairly established in the “legal theory, there is a general view that the Rule of Law is essential to any modern legal system, but there is no single viewpoint in terms of determining its scope and content.”<sup>29</sup> Series of empirical research conducted show there have been considerable efforts to formulate suitable empirical assessment of the Rule of Law, covering the subjective indices and objective indicators; this suggests that there are two empirical assessments of the Rule of Law – the theoretical subjective and those using practical institutional & legal environment.<sup>30</sup> However, “the relative benefit of either type of indicator has

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of legality that capture the basic essence of the Rule of Law:

(i) laws must be of general application; (ii) laws must be widely promulgated or publicly accessible to ensure that citizens know what the law requires; (iii) laws should be prospective in application; (iv) laws must be clear and understandable; (v) laws must be non-contradictory; (vi) laws must not make demands that are beyond the powers of the parties affected; (vii) laws must be constant and not subject to frequent changes; and (viii) laws must reflect congruence between rules as announced and their actual administration and enforcement.

See LON L. FULLER, *THE MORALITY OF LAW*, 21 (New Haven: Yale Univ. Press rev. ed. 1969). Furthermore, the

World Justice Project has proposed a working definition of the rule of law that comprises four principles: (a) a system of self-government in which all persons, including the government, are accountable under the law (b) a system based on fair, publicized, broadly understood and stable laws (c) a fair, robust, and accessible legal process in which rights and responsibilities based in law are evenly enforced (d) diverse, competent, and independent lawyers and judges.

American Bar Association Division for Education, *What is the Rule of Law*, AMERICAN BAR ASSOCIATION, <https://www.americanbar.org/content/dam/aba/migrated/publiced/features/Part1DialogueROL.authcheckdam.pdf>.

25. AMARTYA SEN, *DEVELOPMENT AS FREEDOM 1* (Oxford Univ. Press 1999) (stating “development is about creating freedom for people and removing obstacles to greater freedom. Greater freedom enables people to choose their own destiny. Obstacles to freedom, and hence to development, include poverty, lack of economic opportunities, corruption, poor governance, lack of education and lack of health.”).

26. DR. NANDINI RAMANUJAM, *THE RULE OF LAW AND ECONOMIC DEVELOPMENT: A COMPARATIVE ANALYSIS OF APPROACHES TO ECONOMIC DEVELOPMENT ACROSS THE BRIC COUNTRIES 3* (McGill University).

27. *Id.* This ranges from the same law applicable to everybody, human rights including security of the person, and property rights, to separation of powers, checks and balances on the arms of government, combating of corruption, and accountability. See Stephen Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where are We?*, 39 *WORLD DEV.* 673, 673 (2011).

28. Katerina Kocavska, *Rule of Law – Condition for Economic Development (Republic of Macedonia)*, 11 *SEEU REV.* 183, 185 (2015).

29. *Id.* at 183.

30. While the subjective indices involve the theoretical evaluations of experts or citizens or those



been an ongoing point of controversy”;<sup>31</sup> while the subjective measure is prone to risk of bias, there is the tendency that the objective assessment may be irrelevant on how the institution works.<sup>32</sup> As subjects seeking assurance of protection from the Law, the Rule of Law “still implies the creation of [a] legal system that establishes public order.”<sup>33</sup> In this respect, “it suggests that the exercise of freedom of market and entrepreneurship, and the protection of ownership rights” are possible only if the natural and artificial persons acting on the market or property owners feel confident and safe in an entity.<sup>34</sup>

During the 1990s and 2000s, the notion that favorable economic development impacts on formal legal institutions was virtually accepted by many.<sup>35</sup> This is essentially as a result of the growing use of standard of measurement professing to determine the quality of the Rule of Law. The World Bank’s Rule of Law Index, compiled from many sources and stand-points on the operation of legal institutions, was employed to demonstrate that the nature of a country’s adherence to the tenets of the Rule of Law significantly correlates to the effects of its level of economic development.<sup>36</sup> For example, it was argued robustly that an “improvement in the Rule of Law score by one standard deviation (from levels prevailing in Ukraine in early 2000s) would,” as it was claimed, “lead to a fourfold increase in per [capita] income over the long term.”<sup>37</sup> However, this World Bank and other similar “initiatives came to be questioned as the expected relationship between” Rule of Law (or legal reform) and economic growth failed to yield positive result in a number of contexts.<sup>38</sup> A good illustration is China under Deng Xiaoping<sup>39</sup> – how should one reconcile China’s (economic) growth rate with its Rule of Law credentials? China has been ear-marked as the fastest growing economy and one of the most important in the world.<sup>40</sup> There is prediction by commentators that “China will surpass the size of the U.S. economy at some point in the second decade of this century” (in particular on purchasing power parity ‘PPP’, but not in per capita income level).<sup>41</sup> For example, China’s profile in manufacturing, particularly in labor intensive industries is an accepted “challenge to the manufacturing sectors of

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that make up aggregate measures; objective indicators are mapped out to capture features of the institutional and legal environment.

31. DR. NANDINI RAMANUJAM, *supra* note 26.

32. See Haggard et al., *The Rule of Law and Economic Development*, 11 ANN. REV. OF POL. SCI., 205, 208 (2008).

33. Kocevskaja, *supra* note 28, at 185.

34. *Id.*

35. Ding Chen & Simon Deakin, *On Heaven’s Lath: State, Rule of Law, and Economic Development 2* (Ctr. for Business Research, Working Paper, No. 464, 2014).

36. *Id.*

37. *Id.*

38. *Id.* at 3.

39. *Id.*

40. Kenneth W. Dam, *China As a Test Case: Is the Rule of Law Essential for Economic Growth?* 1 (John M. Olin Program in L. and Econ., Working Paper No. 275, 2006).

41. *Id.*

the most advanced economies.”<sup>42</sup> China is also growing beyond low wage manufacturing and has entered the high technology platform based on high-level research, and highly educated scientists and engineers that have performed in the area of “research and development activities from some of the world’s most accomplished high technology firms.”<sup>43</sup> This suggests “the coexistence of the two [may] mean that, contrary to the prevailing [academic] view, institutions are not important [elements], after all to economic growth.”<sup>44</sup> In fact, one group of scholars has gone far about reaching that conclusion; thus, “China is an important counter example to the findings in the law, institutions, finance, and growth literature: Neither its legal nor financial system is well developed by existing standards, yet it has one of the fastest growing economies.”<sup>45</sup> A tentative conclusion could be, at “least that legal institutions and the Rule of Law are not [particularly] important” to the extent as previously claimed.<sup>46</sup> The Chinese case provides a clearer picture and plausible support, just as Faundez suggests that the Rule of Law does not necessarily promotes economic development.<sup>47</sup>

However, while emphasizing the importance of Rule of Law to development process, Sen argues that development has to include a notion of Rule of Law or freedom, since “development is not only about economic growth, as measured by standard [of] indices such as GDP per capita.”<sup>48</sup> Rather, he views development as a broader process, which its aim is to enhance people’s capabilities.<sup>49</sup> Thus, according to Sen, scholars and development practitioners should take into account all the domains of social life, including economic, social, political and legal, since they all have a part on the development process.<sup>50</sup> In this context, various spheres of social life cannot be independently considered – “economic growth without social equity or economic re-distribution without effective political participation could hardly be

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42. *Id.*

43. *Id.* at 1-2.

44. *Id.* An important alternative route (from the Rule of Law) to achieving economic development is what is generally referred to as ‘phenomenon of economically benevolent dictatorships’ demonstrating that countries under dictators such as Chile under Augusto Pinochet (1973-1990) and South Korea under Park Chung Hee (1961-1979). In these countries “rapid economic development was based not on the basis of adherence to the Rule of Law but on the ability of non-democratic governments to create ‘non-excludable’ public goods for the benefit of the masses.” Chen, *supra* note 35; see also Joseph Y. S. Cheng, *China’s approach to BRICS*, 24 J. OF CONTEMP. CHINA 357 (2015).

45. Franklin Alan, Jun Qian, & Meijun Qian, *Law, Finance, and Economic Growth in China*, 77 J. OF FIN. ECON. 57, 57 (2005).

46. See Dam, *supra* note 40, at 2 (providing that one group of scholars, Allen, Qian and Qian (‘AQQ’), has gone far to reaching that conclusion.).

47. See generally GOOD GOVERNANCE AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES, (Julio Faundez, St. Martin’s Press) (1997).

48. SEN, *supra* note 25, at 1; see also Julio Faundez, *Rule of Law or Washington Consensus: The Evolution of the World Bank’s Approach to Legal and Judicial Reform*, in LAW IN THE PURSUIT OF DEVELOPMENT (A. Perry-Kesaris, Routledge, 2010).

49. SEN, *supra* note 25, at 4.

50. Amartya Sen, Address at World Bank Legal Conference: Role of Legal and Judicial Reform in Development (June 5, 2000).

regarded as making meaningful contribution to development.”<sup>51</sup> In Sen’s perspective, these different sectors are part of a single process, since each plays a relatively equal role in enhancing people’s capabilities.<sup>52</sup> Within Sen’s conceptualization, “even if it were established that Law did not contribute” one iota “to economic growth, Law’s central role in the process of development would not be questioned.”<sup>53</sup> Sen believes, however, that Law does make an important contribution both to economic growth and to other domains of social life.<sup>54</sup> Yet, he cautions that while Law’s contribution to economic growth is crucial, its role is not self-evident.<sup>55</sup> Because social life is complex, in order to understand the role of the Rule of Law in development, it is necessary to carefully investigate the causal interconnections between the economic, social, political and legal domains.<sup>56</sup>

The implication is that societies can still experience economic development with or without the Rule of Law depending on the culture, political leadership, and attitudinal belief of the indigenous population.

### III. LEGAL THEORETICAL APPROACH(ES)

It is helpful at this point to consider the applicable legal theoretical approach(es) that will assist in the examination and analysis. This paper uses the well-being and functionalist legal theories. While the functionalist legal theoretical approach helps to analyze the importance of making Law functional by considering the distinctiveness of any society the Law is meant to serve or regulate; the well-being theory helps us to understand the necessity of making the Law serve the needs of the indigenous people.

#### A. *The well-being theory*

The well-being theory<sup>57</sup> appears to have dominated the economic-analysis of Law movement in legal scholarship.<sup>58</sup> Well-being theory generally stipulates “that the enhancement of people’s well-being is a worthy goal for the State to pursue.”<sup>59</sup>

51. Federico Ortino, *Investment Treaties, Sustainable Development and Reasonableness Review: A Case Against Strict Proportionality Balancing*, 30 LEIDEN J. OF INT’L. L. 71, (2017).

52. Sen, *supra* note 50.

53. *Id.*

54. *Id.*

55. SEN, *supra* note 25, at 1.

56. Amartya Sen, *What is the Role of Judicial Reforms in the Development Process?*, 2 WORLD BANK LEGAL REV. 33, 33-51 (2006).

57. See THOMAS M. SCANLON, *WHAT WE OWE TO EACH OTHER* (1998). This paper is not interested in discussing the divergent theories of well-being including ‘mental state/experimental theories’ which state that well-being is wholly determined by individuals’ experiences, consciousness, or feelings. Daphna Lewinsohn-Zamir, *The Objectivity of Well Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003) (stating “desire or preference theory’ which holds “that a person’s well-being is determined by the extent to which her preferences are fulfilled.”); see JAMES GRIFFIN, *WELL-BEING: ITS MEANING, MEASUREMENT, AND MORAL IMPORTANCE* (1989).

58. E.g., EYAL ZAMIR & DORON TEICHMAN, *THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW* (Oxford University Press, 2014).

59. Lewinsohn-Zamir, *supra* note 57.

In order to achieve the enhancement of people's lives in any given society, the well-being theory needs not be rigid or elitist, but needs to "be sufficiently flexible to respect people's autonomy and allow many paths to achieving a good life."<sup>60</sup> It shows that "objectivity cannot be avoided even in [consideration of] seemingly subjective preferences" of well-being in any given society.<sup>61</sup>

The well-being theory further holds that "our desires are always directed toward some future state of affairs."<sup>62</sup> Humanity "may wish our preferences to be fulfilled because we anticipate that their fulfillment will improve our lives," but the problem is that most people are not allowed to make preferences. Even when they show or make preferences, their expected autonomy for preferences are not respected by those claiming to promote or enhancing people's lives.

Well-being as a legal theory is crucial both in theoretical analysis and practical implementation of the rights to development (including in modern legal reforms). This is because it uses legal requirements that are relevant and manifest for development reforms in the society such as the rule of law, substantive freedom of the people, social justice, equality, human rights, and empowerment. For example, "Amartya Sen's call for understanding development not only in terms of gross national product but also 'in terms of the substantive freedoms of people' that marked an important reframing of the legal and policy discourse around economic development" has as its 'ends' centered largely on well-being of the people.<sup>63</sup> The well-being theory helps us to understand that if legal reforms are fashioned in line to the uniqueness of the lives, values, and cultures of the indigenous people, they will be well-received and effective in the society.

### B. Structural functional legal theory

Using a legal standpoint, a functional "explanation in legal theory is an im-

60. *Id.*

61. *Id.* at 1673.

62. *Id.* at 1678.

63. Call for Papers, *2014 Biennial Research Conference: Reassessing International Economic Law and Development: New Challenges for Law and Policy*, American Society for International Law International Economic Law Interest Group (Nov. 13-15), [https://www.asil.org/sites/default/files/ILPOST/pdfs/20140424\\_EC\\_LAW.pdf](https://www.asil.org/sites/default/files/ILPOST/pdfs/20140424_EC_LAW.pdf). *Development as Freedom* weaves the most important strands of recent thinking on economic development, social justice, and human rights into a coherent vision of a better world. According to Sen, expansion of freedom is viewed, in this approach, both as the primary end and as the principal means of development. Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. *See* SEN, *supra* note 25, at 5.

The resulting Millennium Development Goals (MDGs) focused much academic research in this area towards a more comprehensive understanding of development, one that would recognize economic growth as intrinsically tied to such areas as: environmental sustainability; food security; the reduction of extreme poverty, hunger, and child mortality; access to health; and the promotion of education and gender equality.

*See* Address at College of Law Sutton Biennial Research Conference: Reassessing International Economic Law & Development - New Challenges for Law and Policy (2014).

portant and familiar legal concept in positive legal theory.”<sup>64</sup> This “emphasizes the idea of a functional explanation of a phenomenon or society.”<sup>65</sup> For example, when posed the key question of: “Why do legal rules have the form and content that they do, in fact, have?” a functionalist would answer with “the function of a rule can be part of a causal explanation of the content of the rule.”<sup>66</sup> When posed, “[w]hy does corporations law limit the liability of stockholders?” A functionalist answer might be that the rules are the way they are because they serve “the interest of the capitalist class, or that this is the rule because it is the efficient rule, and common Law selects for efficient rules.”<sup>67</sup>

Similar questions applicable to this analysis are: why have the problems bordering on the Role of Law and/or the role of the Rule of Law in development process continues to re-occur in developing countries of the global south? A simple answer from a functionalist perspective might be that legal reforms in developing countries do not take into consideration the distinctiveness of those countries. Several other researches “have applied a similar approach in the realm of Law and economic development; [r]eference is often made to Max Weber’s nineteenth-century work ‘Sociology of Law’, which ‘inquired into the casual relationship between particular features of Western Law and the development of capitalism’”.<sup>68</sup> In particular, Sen’s work also provides a helpful answer to the question that is relevant to functional aspect of law.<sup>69</sup> In line with the views of this paper, and the functionalist theory, that Law or the Rule of Law has been dysfunctional in the developing countries, as this paper intends to demonstrate.

#### IV. APPROACHES AND DIRECTIONS OF ROLE OF LAW IN ECONOMIC DEVELOPMENT PROCESS

It has generally appeared in the international development legal regime that Law has been approached as a tool for development itself.<sup>70</sup> In this sense, experts sometimes “assume that international development law is both distinctively placed and uniquely suited” as a mechanism for development “programmes and projects

64. Ikejiaku, *supra* note 2 (stating “[p]ositive legal theory attempts to explain and predict legal behaviour, especially the content of legal rules.”) *E.g.*, H.L.A. Hart, *Concept of Law*, 1963 DUKE L. J. 629, 629-70 (1963); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593-629 (1958); Lon. L. Fuller, *Positivism and Fidelity to Law*, 71 HARV. L. REV. 630, 630-72 (1958).

65. Ikejiaku, *supra* note 2.

66. John A. E. Pottow, Keynote Address at Commercial Law League of America Luncheon: Bankruptcy Supreme Court Round-Up: Is Functionalism Back? (Oct. 28-13, 2018 ); Lawrence Solum, *Lexicon: Functionalist Explanations in Legal Theory*, LEGAL THEORY BLOG (Jun 10, 2007, 3:04 PM), [https://lsolum.typepad.com/legaltheory/2007/06/legal\\_theory\\_le\\_1.html](https://lsolum.typepad.com/legaltheory/2007/06/legal_theory_le_1.html).

67. *Id.*; Ikejiaku, *supra* note 2.

68. Ikejiaku, *supra* note 2; *See* Kalidou Gadio, Keynote Address at 2010 Harvard African Law and Development Conference: Role of Law in the Development for the African Continent from a Development Agency Perspective (2010).

69. SEN, *supra* note 25, at 3.

70. *See* Shirley V. Scott, *International Law and Developing Countries*, in THE INT’L STUD. ENCYCLOPEDIA (Robert Denemark, Blackwell Publishing, 2010).

because a key function of Law may be to engineer, attain, or enhance the social and economic changes necessary to achieve the goals of development.”<sup>71</sup> Furthermore, “it is expected that Law will provide the infrastructural mechanism required for development, and that Law has the capacity to bring about the social, economic, and political changes needed,<sup>72</sup> including the necessary cultural attitudinal tenets conducive to development.”<sup>73</sup> When

Faundez<sup>74</sup> doubted whether the shift in attention from legal institutions to economic analysis would help avoid the problems of the earlier attempts at reforms [in developing countries]; his concern is that all the unanswered questions that lurked behind the “law and development movement.”<sup>75</sup>

One of his concerns about unanswered questions relates specifically to the Role of Law and the importance of Rule of Law in development process.<sup>76</sup> Faundez presented his argument by analyzing the different approaches of the law and development movement and that of the World Bank.<sup>77</sup> Even though, they appear similar, he argued that the context in which the Bank’s programs were being carried out was to a large extent different.<sup>78</sup> While the law and development movement premised that “the State ‘would initiate and promote the process of economic development’”, in contrast, the Bank perceived Law as “facilitating market transactions by defining property rights, guaranteeing the enforcement of contracts, and maintaining Law and order.”<sup>79</sup> Since the State is no longer the champion of social change, there is a smaller margin for error. However, Faundez, in his analysis, appeared to be uncertain that the faults of the development and law movement would not be repeated.<sup>80</sup> There was doubt whether the “shift in attention from legal institutions to economic analysis would thereby avoid the problems of the earlier attempts at reform.”<sup>81</sup> Faundez apprehension was “that all the unanswered questions that lurked behind the law and development movement – the Role of Law and the

71. Ikejiaku, *supra* note 2; Tom Ginsburg, *Does Law Matter for Economic Development?* 34 L. AND SOC’Y REV. 829, 837 (2000); Robert Allen Sedler, *Law Reform in the Emerging Nations of Sub-Saharan Africa: Social Change and the Development of the Modern Legal System*, 13 St. Louis U. L.J. 195, 199 (1968).

72. David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1067-68 (1974).

73. Ikejiaku, *supra* note 2; Jane Murungi, *The New Law and Economic Development by David M. Trubek & Alvaro Santos*, 46 OSGOODE HALL L.J. 685, 686 (2008).

74. Mashrood Badarin, *Law and Development in Africa: Towards a New Approach*, 1 NIALS J. OF L. & DEVELOPMENT 1-48 (2011).

75. *Id.* at 2.; Ikejiaku, *supra* note 2.

76. Badarin, *supra* note 74, at 39-40.

77. See generally Julio Faundez, *Legal technical assistance*, in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES 1, 12-14 (Julio Faundez, ed., 1997).

78. *Id.* at 12-13.

79. *Id.* at 13; See also WORLD BANK GROUP, *Law and Development Movement*, <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/LawandDevelopmentMovement.pdf>

80. WORLD BANK GROUP, *supra* note 79, at 12, 14.

81. WORLD BANK GROUP, *supra* note 79.

formal legal system in development, the relationship between Law and politics, and the relationships among democracy, authoritarianism, and development” – will continue to exist.<sup>82</sup> But, McAuslan and Thome had no doubts that the mistakes of the past, particularly those bordering on the “Role of Law and the formal legal system in development process,” would reoccur and no doubt this has continued to reoccur.<sup>83</sup> It is relevant to examine a few prominent approaches to the Role of Law in development process.

#### A. *Natural inherent approach*

One approach is that the international development community is promoting the Law that is legal and judicial reforms by relying on the belief that, besides their inherent efficacy, such reforms will help improve economic performance.<sup>84</sup> As argued, this belief in the efficacy of legal and judicial reforms to stimulate economic development is supported by a “growing body of research showing that economic development is strongly affected by the quality of institutions – including the quality of a nation’s legal institutions.”<sup>85</sup> However, while there is “the case for reforming legal institutions on economic grounds, it tells little about what institutions to reform” and how to engage in such institutional reform.<sup>86</sup> It is a very difficult task to measure the quality of legal institutions, but it is even more difficult to practically reconcile “the strength of the causal relationships between their quality and economic development, and virtually impossible” from the trends of events within the international system, “to sort out the complex and contingent relationship between the different components of real-world institutions,” particularly in the developing countries.<sup>87</sup> This is similar to what Haggard terms ‘the Rule of Law complex,’ – suggesting that the relationship between the efficient Law and economic development goes beyond ‘getting the Law right’, but rather how distinct entities may emerge from complex casual chains that include reciprocal institutions and political arrangements.<sup>88</sup>

#### B. *Internationalization / transplanting approach*

Another approach is the internationalization or transplanting approach of the

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82. *See Id.*

83. *Id.* (discussing Patrick McAuslan & Joseph R. Thome, *Law, Governance, and the Development of the Market: Practical Problems and Possible Solutions*, in GOOD GOVERNMENT AND LAW: LEGAL AND INSTITUTIONAL REFORM IN DEVELOPING COUNTRIES 1, 25-51 (Julio Faundez, ed., 1997)).

84. Aymo Brunettei & Beatrice Weder, *Political Credibility and Economic Growth in Less Developed Countries*, 5 CONST. POL. ECON. 23, 27 (1994).

85. YASH, *supra* note 18; WORLD BANK GROUP, *supra* note 79.

86. WORLD BANK GROUP, *supra* note 79.

87. *See generally* James Smith, *Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement*, 11 REV. OF INTL. POL. ECON. 542, 542-73 (2004); WORLD BANK GROUP, *supra* note 79.

88. Stephen Haggard & Lydia Tiede, *The Rule of Law and Economic Growth: Where Are We?*, 39 WORLD DEV. 673, 677 (2011).

Law and legal reform.<sup>89</sup> It can be put forward that virtually all Law reforms which have taken place in the developing countries appear as internationalized and/or transplanted rules.<sup>90</sup> This approach to Law or legal reform is built on three premises: one, that development demands a modern legal framework similar to that of the United States; two, that this should possess clear and predictable rules; and three, that it ought to be capable of being easily transplanted.<sup>91</sup> However, it appears that while this approach reflected on the lessons of the past, and had improved on a few mistakes of the law and development movement, the empirical research and trends of events in the developing world, in most cases, have proved the three assumptions weak.<sup>92</sup> For example, “[w]hile the massive importation of legal code allows countries to quickly overhaul their statutory Law in comparison to the time it took for these Laws to evolve in the exporting countries, available evidence from formerly socialist countries suggests that the enforcement of transplanted Law is often problematic.”<sup>93</sup>

Academic literature suggests that recent World Bank initiatives (about a shift to economic analysis of the law and development)<sup>94</sup> “have involved local lawyers from the beginning in studying the legal system and developing proposals for

89. John Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT'L & COMP. L. 637, 640 (2013).

90. The legal reforms in most African and Asian countries were not based or rooted on local uniqueness and indigenous needs, but rather patterned on those of the Western countries. For example, the rule or principles that everybody is equal before the law could hardly function in developing countries due to their level of development. This is where more than half of the populations live below the \$ 1.90 a day international poverty line. Development successes recorded in places like China and Singapore did not follow the Western tradition. This is also the case on reforms in the legal practice, where the dressing codes are complete transplant of the Western model. The wig and gown used in many countries like India, South Africa, Nigeria and other countries does not even suit their respective climate and practitioners' comfort. Also, is there any possibility in deciding on whether there is an acceptance of an offer (through post) in a contract and therefore a party binding, to apply the (postal) rule in *Adams v Lindsell* in developing countries, where most countries do not even have functional postal service system. *Adams v Lindsell [1818] 106 Eng. Rep. 250*.

91. David Trubek, *The 'Rule of Law' in Development Assistance, Past, Present, and Future*, in THE ROLE OF LAW IN DEVELOPMENT, PAST, PRESENT, AND FUTURE 1 (Yoshiharu Matsuura ed., 2005).

92. See generally PAUL COLLIER, THE BOTTOM BILLION: WHY THE POOREST COUNTRIES ARE FAILING (2007) (outlining the issues with the current law and development model). “Contemporary economic and political development experts tend to concur on the Herculean task facing International Development Law and acknowledge the enormous gravity of the hurdles. Similarly, the total collapse of the (much popular and once confident) “Washington Consensus” and the global financial crisis which began in the Western economies in 2007–2008 out of the subprime crisis in the USA has weakened the confidence of economic theorists. International Development Law pundits and development economists equally admit that they have no reliable knowledge about how to generate economic development.” Ikejiaku, *supra* note 2; See also Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT'L L. J. 209, 217 (2011).

93. Bernard Black, Reinier Kraakman & Anna Tarassove, *A Russian Privatization and Corporate Governance*, 52 STAN. L. REV. 1, 29 (1999).

94. See also Tom Ginsburg, *Does Law Matter for Economic Development?*, 34 LAW AND SOC'Y REV. 829, 837 (2000); *World Bank Group, supra* note 79.



change, or have trained local lawyers in the skills necessary for market reform.”<sup>95</sup> But there is criticism that, even if some of the past lessons on the weakness of law and development programs have been learned and improved on, “pressures to produce results quickly will work against the gradual and incremental approach to law reform warranted by our current state of knowledge about the relationship between law and development.”<sup>96</sup> This paper is of the position that in spite of the acclaimed lessons learned from the past weakness of the law and development movement, and addressing of such weakness; for example, through the involvement of local lawyers and training of the local lawyers. The weakness of the past on the Role of Law in the economic development process continues in the developing countries. This is because the local lawyers involved were trained on studying western legal system and skills on market reform patterned towards, and more beneficial to the western countries.

The new approach this paper proffers is to make international development law agenda more functional in the developing countries. From the functionalist theoretical viewpoint, the local lawyers and practitioners should be trained to learn international development legal reform from the context of indigenous exigencies and distinctiveness (that is the needs, stage of development, cultures, and value systems of the local people). According to the well-being theory, the Role of Law in this direction will be to facilitate local empowerment, social cohesion, and justice.

*C. Law as a facilitator of development process (the functional approach)*

Against this backdrop, it is the contention of this paper that there is a ‘vacuum or gap’ that Law supposes to fill in the global efforts towards actualization of good governance and socio-economic development in developing countries.<sup>97</sup> This no doubt has led to more legal scholarly works on the very importance of Law in this direction. Perry and Hatchard, arguing in this perspective, observe that “the ideas about development which fuel contemporary interest in the Law also seem to encourage the hope that Law could simplify development policy making, toning down its engagement with political and economic controversy.”<sup>98</sup> In response to

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95. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95-106 (1998); see also WORLD BANK GROUP, *supra* note 79.

96. THE FORD FOUND., MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF FORD FOUNDATION GRANTEES AROUND THE WORLD 58 (2000); see also WORLD BANK GROUP, *supra* note 79.

97. See Sachiko Morita & Durwood Zaelke, *Rule of Law, Good Governance, and Sustainable Development*, 3 J. ENVTL. PLAN. L. 378 (2007). The authors submit that while many factors play an important role in development and good governance that many donors are recognizing the importance of rule of law, by “actively supporting legal and judicial reforms, including judicial training, development of new laws and legal institutions, and capacity building.” Hamed Hanafi, *The Borderlines of Rule of Law, Good Governance and Sustainable Development: A Disclosure*, 1 AFR. J. OF L. & CRIMINOLOGY 117 (2011).

98. DAVID KENNEDY, LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY 17

the exploitative activities of some multinational companies (MNCs) and poor Corporate Social Responsibility (CSR) in poor developing countries, there were calls to both the international community and national governments of resource-rich developing countries – “To ensure that there is a balanced legal framework in place that recognizes the interests of the broader population. . .”<sup>99</sup> This is in line with both the functional and well-being theoretical approaches as presented in this paper. The functional theory subscribes that Law should be functional by considering the distinctiveness of developing countries in which it is expected to reform, and the well-being theory proposes the necessity of the Law to serve the needs for the welfare of the indigenous people.

From all indications, the new approach emphasizes that “attention to the Role of Law in development offers an opportunity to re-focus attention on the [indigenous] political choices and economic assumptions embedded in policy making” that favor the local populace.<sup>100</sup> There is a suggestion for the centrality of Law as a facilitator of development process when it was highlighted that more recent legal reforms throughout Latin America have focused on local necessities as a way to increase transparency in most institutions and nation building.<sup>101</sup> There is a common conjecture by many scholars that such reforms also improve good governance and by extension economic development.<sup>102</sup> Scholars have argued that “for the Law to be effective it must be meaningful” and functional in the societal context in which it is applied, “so citizens have an incentive to use the Law and to demand for institutions that work to enforce and develop the Law.”<sup>103</sup> Furthermore, “[a] legal reform strategy should aim at improving legality by carefully choosing legal rules whose meaning can be understood”<sup>104</sup> in the context of local needs and which purpose will be “appreciated by domestic Law makers, Law enforcers, and economic agents, who are the final consumers of these rules.”<sup>105</sup> This is “a crucial condition for improving the overall effectiveness of legal institutions, which over time, will foster economic development.”<sup>106</sup> Tamaharan’s work lends credence to the position of this paper that legal reform should be pursued based on the needs of the local people.<sup>107</sup> He argued that legal development (not law and development) projects without enjoying an artificial boost derived from money and pressure from

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(Amanda Perry-Kessaris & John Hatchard eds., 2002).

99. See ANNE LINDSAY & GERALDINE McDONALD, *UNEARTH JUSTICE* 61 (Catholic Agency for Overseas Development ed., 2006).

100. KENNEDY, *supra* note 98; Ikejiaku, *supra* note 2.

101. See Linn Hammergren, *Latin American Experience with Rule of Law Reforms and Applicability of Nation Building Efforts*, 38 *CASE W. RES. J. INT'L L.* 63, 66-68 (2006).

102. See Lydia Brashear Tiede, *Legal Reform and Good Governance: Assessing Rights and Economic Development in Chile*, 34 *L. & POL'Y*, 237, 238 (2012).

103. Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *Economic Development, Legality, and the Transplant Effect 2* (Working Paper No. 410, 2003).

104. *Id.*

105. MARY GORRETH NANTONGO, *IMPACT OF LEGAL REFORM ON SUSTAINABLE LAND MANAGEMENT IN TIGRAY, ETHIOPIA* (Norwegian University of Life Sciences) (2011).

106. *Id.*

107. See Tamahana, *supra* note 92.

externality, must gather “sufficient local support from influential players to prevail in local socio-political contests over reform.”<sup>108</sup> Local agendas and priorities need be engaged.<sup>109</sup> These potential “projects would be designed, run, and implemented by people who understand the situation, who know what is possible and understand what compromises must be made, and who have long term relationships— social and political capital— to draw on in the course of implementation.”<sup>110</sup> While “none of this assures the success of legal development initiatives, because legal development in every country is uneven, this consummately of local process of legal reform avoids several of the key flaws that now plagues law and development projects.”<sup>111</sup>

In most African countries for example, the legal reforms on anti-corruption Laws have not been effective over the past five decades (50 years).<sup>112</sup> This weak legal framework on anti-corruption has provided a fertile ground on which corruption at all levels, particularly political corruption, thrive. Within this period, “the magnitude of corruption in most African countries, to say the least is alarming, terrific, and disheartening. Corruption by political leaders has been identified as one of the major causes of poverty” and constraint to development, particularly in Africa due to the magnitude.<sup>113</sup> The “incidence of corruption remains one of the greatest challenges” and impediments to “democracy in the continent as virtually all democratic experiments are associated with reports of hyper-corrupt practices.”<sup>114</sup> The embezzlement of public funds by unscrupulous leaders of most African countries leads to poverty, high debts, and other socio-economic associated problems” that retard development.<sup>115</sup> For example, “focusing exclusively on the top leadership, Transparency International estimates that Mobutu in Zaire and Abacha in Nigeria may have embezzled up to US \$5 billion each.<sup>116</sup> The Global Witness reports, “several current leaders in Africa are plundering their own treasuries.”<sup>117</sup> Including, “former Angola’s President Jose Eduardo dos Santos, who it says keeps large sum in bank accounts abroad, and Equatorial Guinean President Teodoro Obiang, who calls oil revenue a ‘state secret’.”<sup>118</sup> Furthermore, “the Mwai Kibaki government in Kenya, which ousted President Arap Moi in an election in 2003, investigated embezzlement to the tune of \$1 billion by former officials, and the notorious ‘African Big Man’ the late President Eyadema of Togo was seen as very

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108. *Id.* at 242.

109. *Id.*

110. *Id.*

111. *Id.*

112. Poverty, Conflict and Development, *supra* note 22.

113. *Id.* at 19.

114. See ROBERT SEIDMAN, PUMZO MBANA & HANSON HU LI, AFRICA’S CHALLENGES: USING LAW FOR GOOD GOVERNANCE AND DEVELOPMENT (2006).

115. The Relationship between Poverty, Conflict and Development, *supra* note 22.

116. *Id.*

117. *Id.*

118. *Id.*

corrupt.”<sup>119</sup> There have also been corruption charges including ongoing against African political leaders, their officials and “families who used embezzled funds to buy homes in France”.<sup>120</sup> These were “Gabon’s President Omar Bongo, Republic of Congo President Denis Sassou Nguesso, Burkina Faso President Blaise Compaore, President Teodoro Obiang Ngeuma of Equatorial Guinea, and Angolan President Jose Eduardo dos Santos.”<sup>121</sup> Others are Nigeria political office holders who have been identified as corrupt,<sup>122</sup> and in spite of the current campaign against corruption in Nigeria by the Buhari-led government, little or no successful prosecution of corrupt political officials has been recorded. This is because of the weak legal frameworks and institutions in place in Nigeria, as well as clueless leadership style of Buhari.

The ineffective and weak legal frameworks in place in most African countries make it quite easy for corrupt funds to be stashed or siphoned overseas to foreign accounts. The “aim of the Rule of Law promotion more often than not was to transform local economies to better serve the interest of global investors, rather than improve the living standards of the local population.”<sup>123</sup> This is coupled with sophisticated technology set up by the Western world that facilitates the transfer of corrupt funds overseas. The “United Nations Office on Drug and Crime notes that

119. *Id.*; Rami Azami, *Profligacy, Corruption and Debt*, DAILY TIMES (PAKISTAN) (February 10, 2005), <https://journal.probeinternational.org/2005/02/10/profligacy-corruption-and-debt/>.

120. Property, Conflict and Development *supra* note 22.

121. *Id.*; International Herald Tribune, *French Prosecutors Probe Embezzled Accusations Against African Leaders* (Dec. 1, 2008), <http://www.iht.com/bin/print.php?id=6211623>.

122. Some of the list of the alleged corrupt Nigerian politicians are as follows: Senate President Bukola Sariki, Rt. Hon Yakubu Dogara, Governor Aminu Tambuwal, Governor Lalong, Governor Abdullahi Umar Ganduje, Governor Nasir El-Rufai, Governor Samuel Ortom, Governor Ishaku Darius, Governor Rochas Okorocha, Governor Bindo Jibrilla, Minister for Transportation, Rotimi Amaechi, Minister for Mines and Mineral Resources, Kayode Fayemi, Minister for Labour, Chris Ngige, PDP Chairman, Uche Secondus, PDP ex-Financial Secretary, Olisah Metuh, Raymond Dokpesi, Dudafa Waripamo-Owei, Robert Azibaola, Saminu Turaki, Timipre Sylva, Murtala Nyako, Senator Bello Tukur, Senator Hunkuyi, Senator AbdulAzeez Ibrahim, Senator Adamu Aliero, Senator Danjuma Goje, Senator Abdullahi Adamu, Senator Joshua Dariye, Orji Uzor Kalu, Babachir Lawal, Aliyu Wammako, Sullivan Chime, Rabiu Kwankwaso, Abdullahi Adamu, Abubakar Mohammed, Bello Hayatu, Sen. AbdulAzeez Nyako, Senator Alkali Mohammed, Dr. Aliyu Modibbo, Senator Andy Uba, Senator Nazif, Senator Magnus Abe, Dakuku Peterside, Senator Silas Zwingima, Se. Binta Massi, Mal. Nuhu Ribadu, Dr. Idi Hong, Murtala Nyako, Jummai Al-Hassan, George Akume, Aminu Masari, Gali Na’abba, Barnabas Gemade, Audu Ogbe, COAS Dambazau, Oserheimen Osunbo, Masiliu Obanikoro, Adam Oshiomhole, Jim Nwobodo, Atiku Bagudu, Governor Ahmed Abdulfatah, Abubakar Sani Bello, Usman Saidu Nasamu Dakingari, Senator Lokobiri, Chinweke Mbadinuju Bada, Gbenga Bada. *These 66 Nigerian politicians have been listed as corrupt by the ruling and opposition parties*, BUSINESS INSIDER (Apr. 4, 2018), <https://www.pulse.ng/bi/politics/these-66-nigerian-politician-have-been-listed-as-corrupt-id8204890.html>. As well as corrupt ex-oil minister Diezani Alison Madueke (and so many others); Yomi Kazeem, *The most fascinating details in United States’ fifty-four page case against Nigeria’s corrupt ex-oil minister*, QUARTZ AFRICA (July 18 2017), <https://qz.com/africa/1032997/nigeria-oil-corruption-diezani-madueke-and-kola-alukos-one57-manhattan-condo-luxury-yachts-and-ferrari-racing/amp/>.

123. Boulanger, *supra* note 14; KOLAWOLE OLANIYA, CORRUPTION AND HUMAN RIGHTS LAW IN AFRICA (2016).

siphoning off funds by wealthy elites is doubly problematic in Africa.”<sup>124</sup> It argues “that by distorting the Rule of Law and weakening the institutional foundation of economic growth corruption is the single greatest obstacle to economic and social development” in Africa.<sup>125</sup>

On another angle, Hernando de Soto, in his works ‘the Mystery of Capital’ rightly rationalized that ‘Capital’ is a legal institution; and made us to see reasons that everything in a market is built on the foundations of norms and mapped out regulations.<sup>126</sup> From a well-being perspective, the more these norms and regulations are streamlined to suit indigenous needs, the more efficient and active the Law becomes.<sup>127</sup> A good illustration is an event titled: “The Rule of Law in Afghanistan,” which was organized in 2013 – what was known in Germany as ‘Rechtskultren’ program of the Forum Transregionale Studien.<sup>128</sup> The event “had invited the head of a Rule-of-Law promotion project of the GIZ, the leading German agency for development cooperation, called ‘Strengthening Administrative Education in Afghanistan’”.<sup>129</sup> The project aimed at a more efficient public administration by helping to establish basic and advanced training for senior-level public service staff in Afghanistan.<sup>130</sup> Two Fellows of the Rechtskultren program were also invited to comment on the presentation of the project.<sup>131</sup> The project, which was (maybe naively) meant to show as an example of “encounter between theory and practice,” however ended up (maybe predictably) in a show-case of the “abyss that separates the two world” (developed and developing) about how the notion of legal reform works in theory and in practice.<sup>132</sup> The “motivation of representative of the GIZ sent to Afghanistan with a mission to implement a project with pre-defined goals was to present successes of the project and to ask for scholarly advice about how to address the very specific difficulties and failures encountered so far.”<sup>133</sup> The representative “was open to criticism, but not in a position to change the fundamental structure of the project” with pre-defined goals (that is ‘*transplanted*’).<sup>134</sup> In contrast, “the scholars criticized the underlying assumptions of development projects in general and this specific intervention in Afghanistan in particular.”<sup>135</sup> Scholars “questioned based on their own empirical research in Afghanistan, basic concepts used in the project description and presentation, such as ‘corruption’ or the ‘rule of law’”.<sup>136</sup> Scholars pointed to the damage that was

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124. Poverty, Conflict and Development, *supra* note 22.

125. *Id.* at 81.

126. HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

127. *Id.*

128. Boulanger, *supra* note 14.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

done by the presence of Western experts on the ground [in Afghanistan], such as surge of prices for food or rent.<sup>137</sup> Or by the artificial economy that was created by the demands of these experts for interpreters, drivers or bodyguards,<sup>138</sup> which were destined to collapse once the experts left – in this sense the reform project was not designed based on indigenous needs.<sup>139</sup> In this direction, it agrees with the argument that the “aim of Rule of Law promotion more often than not was to transform local economies to better serve the interest of global investors, rather than improve the living standards of the local population.” This direction is not functional and does not serve the interest of the indigenous populations – it is therefore against the stipulations of the functional and well-being theoretical approaches as presented in this paper. Equally, this is not the proposition of the new approach that this paper proffers; rather the new approach of seeing Law as a facilitator will help take into consideration indigenous needs and distinctiveness, “thereby remove disagreements over reform priorities and improve efficiency and accountability.”<sup>140</sup>

Thus, the focus on Law as a development policy directed to suit the distinctiveness of a particular local community, “shares a great deal with other efforts to replace political and economic thinking with a general appeal to technical expertise and ideas about best practice,”<sup>141</sup> which serves the interests of the indigenous people as an aid or facilitator to both economic and political approach to development.<sup>142</sup>

#### V. SUMMARY AND CONCLUSION

This paper examines the approaches to the Role of Law and the importance of Rule of Law in economic development process. It criticizes the current approach which sees Law as a ‘tool or mechanism for development itself’ – that is as an ‘end in itself’. The central argument of the paper is that the Role of Law and the role of the Rule of Law in development process has to be reconfigured away from the notional transfer of Western institutions to developing countries, and is expected to be located in the specific needs and culture of these countries.

The paper finds that even though there appears to be a close correlation between efficient Rule of Law and economic growth – a very essential attribute of economic development, and between respect for the Rule of Law, justice, political stability, and sustainable development. However, because the Rule of Law is a multidimensional concept that connotes wide-ranging different attributes that are very difficult to measure the implication is that societies are capable of experiencing economic development with or without the Rule of Law depending on the cul-

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137. *Id.*

138. *Id.*

139. *Id.*

140. Ikejiaku, *supra* note 2.

141. Murungi, *supra* note 73.

142. Jan-Erik Lane, *Good Governance: The Two Meanings of “Rule of Law”* 1 INT’L J. POL. AND GOOD GOVERNANCE 1 (2010).

ture, political leadership, and attitudinal belief of the indigenous population. A good example as presented in this paper is the case of China under Deng Xiaoping, in spite of its poor credentials on the Rule of Law.

The paper in assessing the approaches to the Role of Law finds that both the international transplanting and natural inherent approaches used by the international development community for promoting the Law in the form of legal and judicial reforms have made reasonable progress. However, the bottom line is that such progress recorded in transforming local economies is aimed towards serving the interests of global investors or the western countries that champion such legal reforms. The position of this paper is that, this direction from the functionalist point of view is not functional because it does not serve the interests and well-being of the indigenous populations.

In conclusion, the paper proffers for a new approach “in order to make the international development law agenda ‘functional’; [t]he strategy would be to approach Law as a ‘facilitator of development reform,’ rather than as ‘a tool for development itself.’”<sup>143</sup> This approach of seeing Law as a facilitator will equally help take into consideration indigenous needs and distinctiveness, “thereby remov[ing] disagreements over reform priorities and improve efficiency and accountability.”<sup>144</sup> This is a new direction which highlights the importance or necessity of “focusing the international system’s approach to Law as a ‘means to facilitate’ local empowerment, social cohesion, and justice that is, as an approach to development consistent with the life choices and development goals of indigenous populations, rather than as it has generally appeared as an ‘end in itself’.”<sup>145</sup>

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143. Ikejiaku, *supra* note 2.

144. *Id.*

145. *Id.*









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