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"Unpacking and Addressing Legal Pluralism in Commonwealth Africa-Towards Enhancing Theoretical Methods of Rule of Law Reform for Holistic Development"

Elizabeth Bakibinga-Gaswaga [*]

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[*] Currently, Legal Adviser (Rule of Law) Commonwealth Secretariat. Previously practised as Legal Officer with the United Nations Department of Peacekeeping Operations and Principal Legislative Counsel at the Parliament of Uganda, with 20 years' experience in legal, legislative and policy analysis work as well as a trainer, presenter, rapporteur and resource person in rule of law capacity building programmes worldwide. The views expressed here are those of the author and do not necessarily reflect those of the Commonwealth Secretariat or any other organisation.

Unpacking and Addressing Legal Pluralism in Commonwealth Africa-Towards enhancing theoretical methods of Rule of Law reform for holistic development

Elizabeth Bakibinga-Gaswaga

Agenda 2030 for Sustainable Development has brought rule of law to the forefront in the quest for sustainable development and placed emphasis on Africa and the developing world. In all attempts to ensure that law enables sustainable development, it is critical to address the mismanagement of legal pluralism in Commonwealth member countries in Africa, illustrated in the conflict of legal systems and the stagnation or slow evolution of institutions of governance in the aftermath of colonialism and independence as well as the present day approach based on the economics-oriented/institutional approach (the Washington Consensus) and other approaches to rule of law reform and development have resulted in the status quo in Africa where the role of law and legal systems in enabling sustainable development is not explicitly evident. The law is not applied consciously for development and the direct role of legal practitioners in development is undermined. An understanding of the impact of colonialism and post-colonial legal systems and the impact of the Washington Consensus and the influence of inter-governmental organisations and international non-governmental actors in providing rule of law reform assistance and the methodology through which the technical assistance for law and development has been based to date is critical to developing new theoretical methods/approaches to rule of law and development.

Key words: Rule of law, Agenda 2030, Commonwealth Africa, law and development, jurisprudence of development, institutional framework, legal pluralism

1. Introduction

It is an indisputable fact that despite the numerous development and law reform projects that have been undertaken on the Africa continent, many African countries are yet to achieve successful economic development. A pivotal aspect to note is that, from the outset, the evolution of African legal systems did not tally with the structure of the African family as the basic unit of the State and state formation was not gradual but imposed. Needless to say, the structure of the typical African family did not necessarily fit western standards at the time. One of the prevailing limitations to the success of rule of law technical assistance has been poor project design which does not take into account the multiplicity of legal systems or sub-systems, resulting in incoherence of approaches. Development in African countries is hindered by chaotic legal systems, since colonialism, which constitute a mixture of English, French, and African laws, written in English or French, resulting in failure by the masses to understand and accept the law.[1] Also, the law has not been successfully combined with other means to effect desirable development.[2]

Whereas in developed countries, one single system exists and is effectively enforced, in Commonwealth Africa,[3] like in many fragile states and developing countries,[4] there is incoherence of legal systems; multiple systems work side-by-side, each weakly enforced, and often operating in contradiction with each other and creating a unified and robust system of law is one of the biggest challenges these countries face.[5] One of the lasting legacies of colonialism is the institutional framework that was set up and which to date holds Commonwealth Africa in collective captivity of 'inherited' State systems- not home-grown institutions but based on the Western model.[6] With a weak and fragmented legal basis/system, rule of law institutions do not have a firm foundation on which to anchor their launch pads to deliver mandates. A number of questions remain unanswered. What were the standards for the development of the legal system? Where the standards of the English system applicable to Commonwealth Africa? Colonial legal systems and procedures still prevail- which procedures and systems, in some instances, are not entirely relevant to the status quo.

Additionally, weak governance and institutional capacities were considered to be significant challenges to progress on the then Millennium Development Goals (MDGs).[7] O. Monteiro discusses the special circumstances of Africa, and its capacity to successfully achieve the MDGs, by examining the way in which Africa's colonial heritage has impacted upon the definition of the state and the resultant complexities created in terms of establishing the

[1] I. Ayua; 'Law and Development in Africa,' *International Journal on World Peace*, vol. 3, no. 1, 1986, pp. 71–81. https://www.jstor.org/stable/20750989?seq=1#page_scan_tab_contents. Accessed on 17/01/2017.
[2] I. Ayua; *supra* at note 1.
[3] This paper covers Commonwealth member countries that where under the British sphere of influence, namely; Botswana, Cameroon, Ghana, Kenya, Lesotho, Malawi, Mauritius, Namibia, Nigeria, Seychelles, Sierra Leone, South Africa, Swaziland, Uganda, United Republic of Tanzania and Zambia. Mozambique and Rwanda, though presently members of Commonwealth Africa, are therefore excluded.
[4] S. Kaplan; Strengthening the Rule of Law in Developing Countries; http://www.fragilestates.org/2012/06/17/rule-of-law-developing-countries/
[5] S. Kaplan (2012), *supra* at note 4.
[6] A. Adu Boahen (ed.); UNESCO General History of Africa, Vol. VII, Abridged Edition: Africa Under Colonial Domination 1880-1935
[7] UNDP; SDGs and Parliaments, http://www.undp.org/content/dam/brussels/docs/Fast%20Facts%20-%20SDGs%20and%20Parliaments.pdf

institutional infrastructure necessary for developing the capacity required to achieve the MDGs.[8]

In order to create a legal system that enables coherence and unity of direction, one needs to examine the multiplicity of legal systems and address the limitations the incoherence poses to the quest for holistic development. The contributions of African jurists often ignored in western academic discourse[9] and have not been acknowledged as a contribution to African jurisprudence, also ignored at a wider level,[10]will have to be taken into account if the targets of SDG 16[11] are to be met. Examination of the salient points, benefits and limitations of the respective law and development theories and approaches, namely; the legal anthropology, law and economics, comparative law, evolutionary approach, utilitarian approach, social change approach, intentional approach modernisation, dependency and the neo-institutional economics/Washington Consensus (as an interdisciplinary enterprise that extends the neoclassical theory) theories are critical to advising on the best options for building capacity of rule of law institutions in Commonwealth Africa.[12] It is critical to note that while policy makers and legal as well as institutional reformers have grappled with the process of development reforms using different theoretical foundations, most of the theories and concepts have proved ineffective over time.[13]

Initiatives to address the incoherence in the legal systems in Commonwealth Africa will have to examine pre-colonial, colonial and post-colonial legal systems, question approaches to rule of law technical assistance while factoring in the adequacy of legal education, the fitness for purpose of legal and judicial procedures and institutional frameworks with the purpose of initiating and encouraging long term systemic reforms of the legal system to deliver as one in enabling the 2030 development agenda.

Additionally, inherited systems are examined for fitness and capability for the particular purpose for which they were developed and continue to do so. This will bring into focus the relevance of design and architecture as well as construction/fabrication and application of rule of law institutions and interventions. The approach to delivering rule of law technical assistance should be double-pronged, seeking to improve on the business as usual approach of rule of law institutions, while initiating an exercise to lay bare Commonwealth Africa's

[8] United Nations Department of Economic and Social Affairs; Implementing the Millennium Development Goals: Challenges and Responses for Public Administration Contribution of the United Nations Committee of Experts on Public Administration, https://publicadministration.un.org/publications/content/PDFs/E-Library%20Archives/2007%20Implementing%20MDGs_Challenges%20and%20Responses%20for%20Public%20Admin.pdf

[9] See S. Newton; 'The Dialectics of Law and Development.' in: D. M. Trubek and A. Santos, (eds.), The New Law and Economic Development: A Critical Appraisal. Cambridge University Press, pp. 174-202. http://iglp.law.harvard.edu/uncategorized/dr-scott-newton-newton-scott-2006-the-dialectics-of-law-and-development-in-trubek-d-m-and-santos-a-eds-the-new-law-and-economic-development-a-critical-appraisal-cambridge-unive/ Accessed on 17/01/2017.

[10] See W. Idowu; "Against the skeptical argument and the absence thesis: African jurisprudence and the challenge of positivist historiography". *The Journal of Philosophy, Science & Law*, 6:34–49. 2006.

[11] Transforming our World: The 2030 Agenda for Sustainable Development (UNGA Resolution A/RES/70/1, 25 September 2015) (2030 Agenda).

[12] For a summary discussion of the theories and approaches, see B. Chimpango; The Development of African Capital Markets-A legal and institutional approach, pp28-33. Also available at http://irep.ntu.ac.uk/id/eprint/39/1/220689_Boniface.Chimpango%2520-%25202015%2520.pdf

[13] Chimpango B.K; supra at note 12. p.33

legal systems-examining their fitness for purpose in light of the needs and characteristics of the society they seek or intend to serve.

2. Governance in pre-colonial Africa

Contrary to some views that pre-colonial African societies had no form of governance and were state-less, increasingly proof has emerged that this was not the case. Historical records on the legal systems in pre-colonial Commonwealth Africa, reveal divergent results on the state of play, across different societies, characterized by a variant of predominant arrangements, namely a majority of communalistic homogenous societies; settled versus migratory societies, and cultivators versus pastoralists. Examples from Commonwealth Africa, namely the kingdoms of Ashanti, Mutapa and Buganda, show that at the dawn of European colonialism, some forms of central governance had developed.

2.1 Kingdom of Ashanti

The kingdom of Ashanti, founded by Asantehene (King) Osei Tutu in the late 17th century, which later became part of modern day Ghana, was a theocracy- it invoked religious rather than secular legal postulates. God (Nyame) was the legislator and anti-social acts were sins against the ancestors, for which sanctions had to be imposed by the Asantehene as the administrator of justice at the risk of impeachment.[14] The most common penalty was banishment or imprisonment and the death penalty was available but seldom imposed. During court proceedings, self-representation was the practice, any member of the community could conduct cross examination and special witnesses could be called to testify. Sworn testimony of a sole witness was admissible, although trial by fetish (sasswood) was also practiced in cases with no witnesses for example sorcery and adultery.

2.2 Kingdom of Mutapa

The Mutapa kingdom (1450-1917) covered present day Zimbabwe, South Africa, Lesotho, Swaziland, Mozambique, Namibia, Botswana and Zambia-an amalgamation of tribute paying States.[15] There was an efficient judicial system perfected by MweneMutapa Neshangwe Munembire. Provincial chiefs resolved disputes and solved problems within delegated authority. Judges held court every year at Mutiusinazita/Mbire. All important matters were referred to the king, who was overall ruler and owner of the conquered lands, was the chief judge as well as the final court of appeal.

2.3 Kingdom of Buganda

All authority was vested in the king (the Kabaka) and he delegated as desired.[16] Buganda had a great variety of judicial tribunals connected in a pyramidal structure so that appeal lay from minor chiefs through the great chiefs, to the Katikiro (the Katikiro in Buganda was the commoner/non-aristocrat equivalent to a King as in the case of a German Chancellor as opposed to a Prime Minister in the Westminster model) and the final appeal to the Kabaka.[17]

[14] See A. Boahen; Topics in West African History, Paperback – March, 1966
[15] http://www.revision.co.zw/political-organisation-of-the-mutapa-state/#
[16] E.S. Haydon; Law and Justice in Buganda, Butterworths African Law Series No. 2 1960, London. p.5.
[17] E.S. Haydon, supra at note 15. pp.11-17.

The Katikiro was in charge of the kingdom's administrative affairs and there was a chief justice (Mulamuzi).

It is evident that early contacts with Islam and Christianity had an impact on the evolution of governance and legal systems in Africa, envisioned by A. Mazrui as Africa's triple heritage - a product resulting from three major influences: an indigenous heritage borne out of time and climate change; the heritage of Eurocentric capitalism forced on Africans by European colonialism-coupled with Christianity; and the spread of Islam by both jihad and evangelism.[18] The triple heritage is significant in explaining the legal pluralism evident on the continent today.

3. The impact of colonialism and post-colonial legal systems

The introduction of what A. Mazrui refers to as 'Eurocentric capitalism' into Africa marked the beginning of the advent of the English legal system into the British sphere of influence (colonies, protectorates and dependencies). From the 1660s, the British influence grew in Africa, commencing with the establishment of the Royal African Company and the construction of Fort James in Gambia in 1663. The progression from management by profit-seeking company court of directors operating under the authority of royal charter[19] to formal declarations of direct administration, usually supported by Orders-in-Council,[20] saw the imprint in indelible ink of English law or components thereof into Commonwealth Africa's legal system, which influence remains dominant to date. With establishment of state structures, face to face formal dispute resolution as previously done through decentralized frameworks within the extended family network became untenable and was gradually eradicated.

The introduction of English law run contrary to Montesquieu's view that laws should be adapted to the particular social, economic, political and ideological conditions that prevail in the actual polity for which they are meant.[21] F. Lugard's views on the regulation of 'natives' in societies which had not yet evolved to an acceptable standard of ability to manage or control their own affairs, drawing parallels with observations made concerning the African-American population in the United States of America[22] and R. Kipling's[23] denouncement of colonized peoples as being 'half devil, half child,' are indicative of the rationale behind the omnibus importation of English law and the legal system, albeit not in its entirety. For instance, there was no emphasis on human rights of the governed or the doctrine of separation of powers as the district administrative officer executed the functions of the three branches of government, maintaining law and order and also working as ex-officio magistrate. [24] Later,

[18] A. Mazrui; The Africans: A Triple Heritage, 1986 Paperback, Little Brown & Co

[19] Also see J. Jaffe; Ironies of Colonial Governance-Law, Custom and Justice in Colonial India,

[20] Namely the *Foreign Jurisdictions Acts 1843-90, Zanzibar Orders in Council 1866 and 1884, Africa Order in Council,*[20]*East Africa Order in Council 1897, West Africa Act, 1821,*[20] *Uganda Order in Council* and later on the *Independence Orders in Council and Independence Acts*

[21] M. Rosenfeld; Law, Justice, Democracy, and the Clash of Cultures: A Pluralist Account,

[22] F. Lugard; The Dual Mandate. Also see Morris and Read, Legal Essays, The Framework of Indirect Rule in East Africa p.13.

[23] R. Kipling, 'The White Man's Burden', https://genius.com/Rudyard-kipling-the-white-mans-burden-annotated

[24] See Morris and Read, Legal Essays ***East*** African Legal History. Also see R. Seidman on the exclusion of human and political rights.

the District Commissioner took over, leading to the development of the Judiciary and other rule of law institutions under the colonial governments and their evolution to date.

These views propagated the assumption that the societies colonized were political and legislative deserts that had to be taken care of through European domination. A critique of the system observed the controversies over the techniques of colonial administration-colonial officers and judicial officers were not working in a vacuum and the system sought to shatter the economic base of traditional society, yet working through local collaborators to retain the old social and cultural superstructure.[25] The demands of the colonial system had the effect of distorting the functions of and weakening the socio-political structures already in existence and weakening basic African institutions.[26] The court system was developed or reinforced according to African needs as perceived by the Europeans.[27] Africa was seen as the one continent in which colonialism would last for a very long duration, and colonial methods were all designed to accommodate European interests and intentions, ensuring African adjustment to European objectives.[28] Consequently, to date, legal systems of Commonwealth African countries are substantially based on the English common law and the resultant institutional framework such as the higher courts of judicature have been retained.[29]

The drafting formula for the law applicable was relatively similar. To date, there is considerable uniformity across the board regarding the clause on the law applicable, with a few variations. Details of the law applicable in Commonwealth Africa were listed in the respective Independence Orders in Council, Interpretation Acts and or Judicature Acts and in some instances, some of the laws of the UK are still applicable.[30] Courts are required to exercise their jurisdiction,

> "subject to the Constitution, in conformity with the written law, and insofar as the written law (including certain Acts of Parliament of the United Kingdom) does not extend or apply, in conformity with—the common law and the doctrines of equity and the statutes of general application in force in England so far only as the circumstances of the territory and its inhabitants permit and subject to such qualifications as those circumstances may render necessary; African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law; and any established and current custom or usage; in conformity with the principles of justice, equity and good conscience., etc.).

Multicultural plurality results from interaction between modern law and traditional law. The repugnancy clause was adopted, the test of which was on British standards and not of the colonized societies.[31] There are a number of conceptual and practical difficulties in the

[25] R. Martin; Review Indirect Rule and the search for Justice: Essays in East African Legal History by H.F. Morris and J.S. Read; The Journal of Modern African Studies, Vol 12 No.2 June 1974 pp 321-323.
[26] A. Boahen; Africa under Colonial Domination 1880-1935, UNESCO, p. 144.
[27] Ibid. p. 148.
[28] Ibid. p.151.
[29] Jadesola Lokulo-Sodipe, Oluwatoyin Akintola, Clement Adebamowo; Legal Basis for Research Ethics Governance in Nigeria, http://elearning.trree.org/mod/page/view.php?id=142
[30] See Ss. 14 & 47 Judicature Act, Uganda; Uganda Independence Order in Council 1962; S. 33 Judicature Act Kenya; Judicature and Application of Laws Act Cap 358; S. 45(1) of the Interpretation Act; Judicature and Application of Laws Act Cap 358, and S. 45(1) of the Interpretation Act Tanzania; Article 11 of the 1992 Ghana Constitution; S. 45 (1) of the Interpretation Act Nigeria and Ss.10, 11, 12, and 15 Southern Cameroons High Court Law (SCHL), 1955 http://asq.africa.ufl.edu/files/Volume-15-Issue-2-Kiye.pdf. Also see Eugene Cotran; Recent changes in the Uganda Legal system, Journal of African Law Vol. 6 No. 3 (Autumn 1962) pp 210-215.
[31] Also see Muradu Abdo , Addis Ababa University, Faculty of Law & Gebreyesus Abegaz , Mekelle University, Faculty of Law, Customary law, https://chilot.files.wordpress.com/2011/06/customary-law.pdf

enforcement of customary law by the statutory courts. The test of repugnancy was not very clear and has resulted in difficulties in application of customary law, through a clash between African and western standards. The imposition of social and therefore legal norms has continued to present a crisis of contextual relevance premised in a clash of African and western standards.

Interpretation or determination of repugnancy was left to the discretion of the administrator of justice. The judicial officer made the determination on what was suitable/applicable to the local circumstances. The case of *R v Amkeyo,* in which marriage contracted amongst the 'natives' was referred to as 'wife purchase,' 'a primitive relic of a barbaric past,'[32] sheds some light on the attitude of some of the judicial officers towards the customs in the British sphere of influence. This also sheds light on the attitude of some of the judicial officers who were dismissive of local customary practices.[33] Was this an application of the repugnancy or incompatibility test or merely a lack of recognition of a customary practice? Customary law and marriages were only recognized as such after independence, and in some cases, recognition was accorded as an act of defiance against colonialism. Constitutional courts have assumed the role today of determining 'repugnancy,' albeit under a different nomenclature- to determine that the customary practice in question is not repugnant to justice and morality or inconsistent with any written law. Lack of clear standards in determining repugnancy and this has led to uncertainty in the application of customary law and the duality tests have led to a divergence between the customary law recognized by the court and that recognized in society.

Post-colonial legislative and legal developments show maintenance of law as received, with some incremental reforms made due to necessity imposed by policy reforms, social revolutions such as the situation in Tanzania with the adoption of Ujamaa (socialism that embraced freedom, equality and unity for self-reliance),[34] Kwame Nkrumah's agenda for "social revolution", Leopold Sedhar Senghor's "negritude" and Kenneth Kaunda's "Zambian humanism," Uganda's short lived experiment with socialism in the 'Move to the Left' and the early days of the National Resistance Movement regime[35] and the influence of development partners which will be discussed later.

4. Challenges to the legal system

In a legal environment in which cultural and religious tenets also work with state-imposed laws to impact on lives, issues of complementarity and contradiction arise.[36]The legal system was, and in some instances continues to be plagued by numerous challenges arising from the nature and characteristics of the community and some of the legal procedures, a number of which are highlighted here to illustrate the magnitude of the problem.

4.1 Family structure and value systems

[32] Morris and Read, p. 211.
[33] R v Amkeyo (1917) 7 EALR 14
[34] B. Ibhawoh & J. Dibua; Deconstructing Ujamaa: The Legacy of Julius Nyerere in the Quest for Social and Economic Development in Africa, Afr. j. polit. set. (2003), Vol 8 No. 1. Also available at http://pdfproc.lib.msu.edu/?file=/DMC/African%20Journals/pdfs/political%20science/volume8n1/ajps008001004.pdf
[35] See J. Mugaju; Uganda's Age of Reforms - A Critical Overview (CTA - Fountain Publishers, 1999.)
[36] Chiongson; Legal Pluralism, Development and Gender Equality

The communities in Commonwealth Africa were and still are largely collective and communalistic, with large family sizes including the extended family and in which an individual draws their identity from the clan and the tribe. This family structure still brings about challenges in the administration of justice due to incompatibility with the super-imposed state-structure. In cases where cooperation by a witness is critical to successful prosecution but the reach and strength of the threatening criminal group is so powerful that extraordinary measures are required to ensure the witness's safety, resettlement of the witness under a new identity (re-imagined paradigms of identity construction that lead to anguish and powerlessness) in a new, undisclosed place of residence in the same country or even abroad may be the only viable alternative.[37] In such situations, a potential witness may be reluctant to testify for fear of having to uproot themselves from their usual dwellings or places of abode including the cherished ancestral home or lands and also taking into account the likelihood of exposing their extended family to harm which renders the success of such measures unlikely.

On the other hand, the concept of family as previously known in Africa is increasingly morphing and this has significant impact on administration of justice and the rule of law in general. The family as a unit of production, consumption, reproduction and accumulation has been profoundly impacted by the economic downturns that transformed the environment; multiple constraints posed by the HIV/AIDS scourge, forces of globalisation, competing strains, economic fragility, debilitating poverty, poor governance and civil conflicts.[38] Evolution from corporate kinship and extended families towards nucleus households has impacted on many socio-economic and political arrangements. There is a prevalence of child-headed/grandmother-headed households, single parenthood, migration and displacement of populations both of which reduce the homogeneity of societies. Previously, as examples from Buganda reflect, foreigners were welcomed on condition that they embraced Kiganda culture and integrated themselves in the society but were still not permitted to inherit property through the clan or communal system.[39] Increasingly, the possibility to adopt children by people who are not part of the extended family, including by foreigners, through intercountry adoptions, is changing many aspects of the definition of the family and puts in question the relevance of the extended family and clan system.

Conflicts between modern and traditional values and structures are still rife and social adaptation that seeks to draw new solutions from traditional resources does not meet all needs and best practices.[40] For example, the practice of polygyny (multiple wives and children), previously utilised to provide an essential labour service in rural agricultural production, has also lost pride of place as families face financial challenges due to the need to pay for access to educational, medical and other services. Additionally, engagement in commercial production or small businesses rather than rural agriculture reduces the relevance of multiple wives and children.

4.2 Corporate kinship

[37] UNODC; https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf

[38] B. Bigombe and G. M. Khadiagala; Major Trends affecting families in Sub-Saharan Africa. Also available at http://www.un.org/esa/socdev/family/Publications/mtbigombe.pdf .

[39] E. S. Haydon, Law and Justice in Buganda, Law and justice in Buganda, London: Butterworths, 1960

[40] Tom Goodfellow & Stefan Lindemann; The clash of institutions: traditional authority, conflict and the failure of 'hybridity' in Buganda, Commonwealth & Comparative Politics Vol. 51, Iss. 1,2013

While founder entrepreneurs are usually recognised as the glue that holds family business together, [41] corporate kinship in Africa compromises appreciation of corporate legal personality as defined in English law.[42] Concepts such as succession planning, which is the ultimate test of continuity of a family business are alien to African culture. Family members, at times, affect the running of family businesses and their interference may also result in succession disputes following the demise of the principle founder of the business. This has been identified as a major reason for why family businesses in Africa usually do not survive the demise of their original sponsor or promoter due to failure to make the generational leap. The culture of 'our property,' 'our children,' 'our wife, 'etc. still exists and may perpetuate unnecessary conflict and family feuds characterised by wife-inheritance, child custody and property disputes, inter alia. It is important to note though that the bonds of corporate kinship are beginning to loosen up due to evolution of the society and external influences referred to above. In a race to elect a member of parliament, constituents were presented with a number of options, among whom two candidates were related by affinity.[43] Ordinarily in Africa this would be considered unacceptable as relationships with in-laws are highly revered.[44]

4.3 Property and succession

Additionally, with increased industrialisation and urbanisation, real estate property is acquired through purchase on the open market and not through succession, which affects inheritance practices. Claims to a deceased person's property, purely on the basis of kinship can easily be challenged as the property is no longer communal and may be subjected to foreclosure by banks in case of unfulfilled mortgage payments. At another level, the commercialisation of undertaking services with the licensing of funeral homes, a role previously reserved for the extended family and local community undertaking services would not be provided if the community shunned an individual or family on the basis of anti-social behaviour, has reduced the influence the wider community has on the individual or family.

Sharing matrimonial property through the court system, is rendered difficult due to challenges arising with establishment of the time at which cohabitation and other presumptions of marriage, for the jurisdictions that have such presumptions, commenced or even the date when marriage was contracted or when the parties separated in the absence of registration, which severely impacts on the work of decision makers during settlement of property disputes, in the course of which the 'relevant date' is very significant.

4.4 Customary law-the test of rule of law in Africa

First, colonialism resulted in a permanent shift of political power and authority from traditional leaders who were the rule makers thus affecting the promulgation of customary

[41] See the Economist; Family Businesses-Passing on the crown Nov 2004. Also see M. Lubatkin, W. Schulze, Y. Ling and R. Dino; A Behavioral Economic Framing of Agency Problems at Family Firms, Journal of Organisational Behavior.

[42] Salomon v A Salomon & Co Ltd [1896] UKHL 1, [1897] AC 22 and later cases that define corporate legal personality.

[43] Daily Monitor 1/02/2016 'It is a family affair as in-laws battle for Ntungamo Municipality', http://www.monitor.co.ug/SpecialReports/Elections/It-s-a-family-affair-as-in-laws-battle-for-Ntungamo/859108-3056736-vv90ptz/index.html

[44]Also see Marriage and the Family in Africa: Position Papers, April 1988, http://www.cormacburke.or.ke/node/288

law. [45] Secondly, laws and institutions are dynamic and evolving tools of social communication and interwoven with and reflective of group and individuals' identities yet with increased voluntary and forced migration, group identities are changing regularly. It is easier to apply customary law in homogenous societies but not in the multicultural societies today, in which, as a result of demarcation of colonial boundaries that traversed nations and tribal territory, voluntary or forced migration of people around the world, the final make-up of a community renders the application of customary law untenable in dispute resolution. Also, the nature of customary law mostly dependent upon the homogeneity of the group in question, juxtaposed with the tenets of rule of law[46] leads to complications in applying customary law in the formal justice system.

4.5 English-the language of the court

For ease of colonial administration, English was adopted as the official language, and this continues to date in most, if not all Commonwealth Africa countries which also have high rates of illiteracy. The whole apparatus of criminal procedure was quite beyond the comprehension of an accused who was un-educated, normally unrepresented by counsel and almost certainly ignorant of the law of the court.[47] Costs of interpretation in courts, including the delays occasioned and burdens placed on court clerks to multitask as interpreters, albeit with no training for this kind of responsibility and may therefore slow down the conduct of proceedings. Use of local languages instead of English as the language of the court has been proposed but in a heterogeneous society, this is quite challenging.[48]A recommendation was made at a Justice Law and Order Sector workshop in Uganda for local languages to be used in consideration of the cost effectiveness and ease of communication this option is considered to offer. However, this option is limited as civil servants and judicial officers serve countrywide and in a multi-lingual society it would be difficult regardless of their fluency in the different languages. Also in case of appeals, the court record would have to be translated for the appellate court to consider.

4.6 Ubuntu-the greater good

Relationships in many parts of Africa are premised in the principle of *Ubuntu*, humaneness/humanity towards others which is rooted in organicist and collectivist ideology. Needless to say, measures such as injunctions, equitable remedies traditionally given when a wrong cannot be effectively remedied by an award of monetary nature, when imposed on projects for community good, collective self or public interest would be frowned upon and condemned by the general public as being in contravention of *Ubuntu*. Such measures, just like free markets and modern contract law, were historically linked to the advent of the ideology of individualism bound to the emergence of modern western civilisation.[49] The same applies to the appropriation of vast chunks of land by individuals who then evict the tenants or squatters from the land. Would African legal systems as they existed in the past

[45] A. Boahen, supra, p.338.
[46] 'Laws be publicly promulgated, equally enforced and independently adjudicated, and consistent with international human rights norms and standards and the legal system have measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' https://www.un.org/ruleoflaw/what-is-the-rule-of-law/
[47] Morris and Read (eds); English Law in East Africa: A Hardy plant in an Alien Soil. p.87
[48]Felix Basiime Uganda- Court asked to use local languages 16 February 2009 New Vision
[49] M. Rosenfen, supra; p.24

impose injunctions? Would the current practice of applying for counter-injunctions help in ensuring that development continues without hindrance? Some argue that in the case of Buganda, the King's powers were limited to those of trustee (Ssabataka) in relation to land as opposed to landlord and he would have to consult the clans' heads (Abataka) before making a decision on land matters except those related to the aristocrats.

4.7 Privacy in a communal society

The concept of privacy, premised in a communalistic approach to life, in which there is a high prevalence of data myopia, in Africa differs from that in the west. There appears to be a general lack of awareness of information as property, which presents a similar challenge in the protection of traditional knowledge, trade secrets and other intellectual property. Regulating privacy may be perceived as heavy-handedness on the part of government. Contrary to this, is the culture of silence surrounding incidents of sexual and gender based violence which frustrates the administration of justice for want of prosecution and reluctance of testify, among others.[50]

4.8 Prohibited degree of kinship

Another area of confusion is that concerning the conflict between the traditional definition of family along the clan and bloodlines and the prohibited degree of kinship - a degree of consanguinity (blood-relatedness) between persons that results in certain actions between them becoming illegal[51]as established by statutory law. The definition or delimitation of consanguinity was yet another example in which British standards were imposed. The definition did not take into account certain cultural practices that were deemed acceptable in some societies as marriages. For example, marriages between matrilineal cousins were listed as unacceptable or illegal in the table of consanguinity and affinity that was attached to the marriage laws, etc. This undermined the force of the law as members of society openly contracted marriages in violation of these provisions of the law. The force of law is weakened as the law remains on the statute book, unenforceable.

4.9 Court vacations

Presently, in a number of Commonwealth Africa countries, courts face case backlogs, amongst other challenges, yet courts continue to take vacations which were necessary when colonial judges returned to England for the summer break. It is pertinent to question whether having synchronised court vacations on the court's calendar is still relevant and if so, to what use these vacations can best be put in order to benefit the stakeholders. Jallow states that opposition to curtailment of the court vacation by the Judiciary and the Bar in Gambia was on the basis of tradition and the need for a sufficient break.[52]

5. Rule of law technical assistance- the Doctrinal and methodological background

[50] See Gabriel Amoateng-Boahen; The "Culture of Silence" Contributes to Perpetuating Domestic Violence: A Case Study of Family Life in The BrongAhafo Region of Ghana.
[51] Also see Consanguineous Marriage, Kinship Ecology, and Market Transition by Mary K. Shenk, Mary C. Towner, Emily A. Voss, and Nurul Alam http://www.journals.uchicago.edu/doi/pdfplus/10.1086/685712
[52] Hassan B. Jallow; Journey to Justice, October 2012

Following the above discussion, it is clear that there are different methodologies and doctrinal bases to the development of legal systems and the provision of rule of law technical assistance to countries in Commonwealth Africa. This is illustrated in the following: developing policy and legislation for Africa from England without the direct involvement of the governed population (received and applied law); the influence of development partners and their reform strategies; the effect of internal policy reforms and social revolutions at national level as seen in Tanzania's introduction of socialism and Uganda's brief adoption of a socialist approach to governance shortly after the National Resistance Movement seized power (post-colonial legal developments).

In the 1990s, while the Washington Consensus,[53] a set of 10 economic policy prescriptions reform package[54] promoted for crisis-wracked developing countries by the International Monetary Fund, World Bank and US Treasury Department (Washington based financial institutions), was thought to have informed the theory of change behind rule of law technical assistance which resulted in a focus on markets, further critique indicates that institution building was missing, for example strengthening rule of law institutions. This was a strongly market-based approach (market fundamentalism/neo-liberalism) which, from the rule of law perspective emphasized legal security for property rights and the ease of doing business. The Washington Consensus was criticized for its generic approach that did not cater for the interests of all countries contrary to the notion that strategies are expected to work best if they are specifically designed to the circumstances of the individual countries.[55] The legacy of the Washington Consensus approach is still evident in countries where the national development plan emphasizes improvement of rule of law to promote foreign direct investment, promoting deregulation and strengthening the Commercial Courts and not focus on the rule of law in its entirety.

It has been argued that the relevance of the Washington Consensus lies in the criticism that it did not make reference to strong institutions and the post-Washington Consensus discussion which made the case for strong institutions. The recognition that strong institutions are needed to make good policies effective, has to a great extent benefitted developing countries as developing partners shifted approaches to include capacity building and institutional support in rule of law programming.

The United Nation's system approach to rule of law technical assistance is based on international norms and standards; takes into account of the political context and the unique country context; advances human rights and gender justice; ensures national ownership; supports national reform constituencies; ensures a coherent and comprehensive strategic

[53] J. Williamson; The Washington Consensus as a Policy Prescription for Development, Institute for International Economics, 2004

[54] Fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP; Redirection of public spending from subsidies ("especially indiscriminate subsidies") toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment; Tax reform, broadening the tax base and adopting moderate marginal tax rates; Interest rates that are market determined and positive (but moderate) in real terms; Competitive exchange rates; Trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions (licensing, etc.); any trade protection to be provided by low and relatively uniform tariffs; Liberalization of inward foreign direct investment; Privatization of state enterprises; Deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions; and Legal security for property rights.

[55] J. E. Stiglitz; The Post Washington Consensus Consensus, http://intldept.uoregon.edu/wp-content/uploads/2015/03/Yarris-Joya-5.1.15-Brown-Bag-Article.pdf

approach; and engages effective coordination and partnerships.[56] UN rule of law assistance is based normatively on the Charter, international law, and the host of UN treaties, declarations, guidelines and bodies of principles developed in furtherance of
national societies and an international order based on the rule of law.[57]

At the national level, the work of the UN on rule of law is based operationally on technical assistance and capacity-building carried out for the benefit of Member States, at their request and/or as mandated by the Security Council, and in accordance with their national policies, priorities and plans. This enables the UN to respond to the needs of countries in a flexible manner, eschewing one-size-fits-all formulas and the importation of foreign models, and instead, to base our support on national assessments, local needs and aspirations, and broad participation. The World Bank's theory of change on governance and law has evolved to embrace the policy effectiveness chain through which policy effectiveness is understood not only from a technical perspective, but takes into account the process through actors bargain about the design and implementation of policies, within a specific institutional setting.[58] The consistency and continuity of policies over time (commitment), the alignment of beliefs and preferences (coordination), as well as the voluntary compliance and absence of free riding (cooperation) are key institutional functions that influence the effectiveness of policies. The five steps in the new approach include: definition of the development objective; identification of the underlying functional problem (commitment, coordination, cooperation); identification of the relevant entry point(s) for reform (incentives, preferences/beliefs, contestability); identification of the best mechanism for intervention (menu of policies and laws); and identification of key stakeholders needed to build a coalition for implementation (elites, citizens, international partners).[59] This approach has been challenged for focusing on the formal side of the spectrum, on laws and policies and not addressing social norms and individual behaviours, consciousness and capabilities as well as failing to identify blockers of change.[60]

6. The jurisprudence of development in Africa

The introduction of law in Commonwealth Africa was mainly for purposes of supporting the police power of the colonial state. Focus was on the application of the law as a tool for enforcement of order and other aspects that would facilitate the smooth running of the colonial state such as taxation and, control of disease to promote public health, etc. The approach that aimed at promoting the interests of the British Empire was carried forward to the post-colonial State.

The jurisprudence of development in Africa has not been developed yet Africa remains at the epicenter of the development crisis and remains scattered and needs to be consolidated. It is important not to mix up with the right to development or environmental law with law and development which is the application of law (commercial laws, contract, human rights law,

[56] Guidance Note of the Secretary-General- UN Approach to Rule of Law Assistance https://www.un.org/ruleoflaw/files/RoL%20Guidance%20Note%20UN%20Approach%20FINAL.pdf
[57] Ibid.
[58] http://www.worldbank.org/en/publication/wdr2017
[59] http://siteresources.worldbank.org/INTLAWJUSTINST/214578-1391192925997/23626694/Just_Development_Issue_7_FINAL.pdf
[60] OXFAM; http://oxfamblogs.org/fp2p/please-help-sharpen-up-the-world-banks-theory-of-change-on-governance-and-law/

environmental law, civil and criminal law) to foster development through the administration of justice, development of legal frameworks and strengthening of rule of law institutions.[61] There has been more scholarly work done in the areas of environmental law, human rights or the right to development and not much else on the theory or philosophy of law and development.

Additionally, the approach to judicial intervention and administration of justice generally, shows a focus on the rights of the parties and the need to promote law and order and not on development per se. The question is whether this focus stems from the fact that administration of justice is grounded in the Bill of rights in most national constitutions, which emphasize principles of natural justice and the right to fair trial, inter alia. Prosecution focuses on asserting the police power of the State, while administration of justice focuses on the rights of the victim and the interests of the State. Contracts are enforced from the point of view of promoting parties' rights and justice as a concept, but not sustainable development.

The inclusion of rule of law as a development goal brings rule of law actors and institutions to the forefront of governance of the development process by providing legal frameworks that enable development and meeting the targets of SDG 16.[62] Rule of law institutions will be expected to provide equal access to justice; determine and not defer claims concerning development; upholding the rule of law; tasking and forcing all stakeholders to take development seriously; explaining and upholding the fundamental values underpinning the law; promoting development values and putting a price on them; assisting the progressive and principled development of law and policy that promote development; and to make reasoned and evidence-based decisions.[63]

Having highlighted some of the outstanding challenges to rule of law work in Africa, it is time to take a closer look at the relevance of the system as it stands.

7. Relevance of existing legal systems in Commonwealth Africa

To make a statement on the relevance of the existing legal systems in Commonwealth Africa, one needs to review the procedures or processes or ways for interpreting and enforcing the law; the elaboration of rights and responsibilities in a variety of ways; and assess the set of laws of a country, procedures, dispute resolution mechanisms and institutional structures. While the system was helpful in providing guidance on many aspects of administration of justice, some remain inadequate and need to be re-examined and corrected if Commonwealth Africa states are to make gains in promoting rule of law and meeting the targets set in Agenda 2030.

[61]William Idowu, supra

[62]SDG 16-Reduce all forms of violence and related death rates; End abuse, exploitation, trafficking and all forms of violence against and torture of children; Promote the rule of law and ensure equal access to justice for all; Reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime; Substantially reduce corruption and bribery in all their forms; Develop effective, accountable and transparent institutions at all levels; Ensure responsive, inclusive, participatory and representative decision-making at all levels; Provide legal identity for all, including birth registration; Ensure public access to information and protect fundamental freedoms; Building capacity to prevent violence and combat terrorism and crime; Promote and enforce non-discriminatory laws and policies for sustainable development.

[63]Brian J. Preston; The Contribution of the Courts in Tackling Climate Change. J Environmental Law 2016; 28 (1): 11-17. doi: 10.1093/jel/eqw004

The legal system in Commonwealth Africa is predominantly English common law, civil law (for Commonwealth Africa countries that were formerly not British colonies or those that were not part of the British colonial empire but joined the Commonwealth for example Mauritius, Seychelles, Cameroon and Mozambique, and Rwanda, respectively), religious law and customs applied by the courts on the basis of traditional practices, also referred to as customary law. This regime would be in addition to a written or oral constitution, primary legislation (statutes) enacted by legislative bodies, subsidiary legislation (bylaws) made by person or bodies authorized by the primary legislation to do so, and principles or practices of religious,[64] Roman,[65] or other code of law as the case may be in each respective jurisdiction.

A question on relevance of the legal system should examine how well measures and arrangements fulfil the needs and aspirations of the people on the basis of standards set. It is expected that the legal system would be fit for purpose- good enough to do the job it was designed to do; addressing local customs, languages, cultures, religions and social arrangements that are not mainstream. Challenges would arise in the conceptualisation of the architectural design which did not take into account the diversity amongst the governed populace. Post-independence states in Commonwealth Africa were not and are not in position to demand for 'refunds'/'replacements' from the designers of the inherited system as consumer protection law guarantees buyers in other circumstances but need, on their own notion, to take remedial action to revisit the system to ensure that the legal system meets expectations, meets the required standards, is of sufficient quality, is good enough, and so on and not to remain in collective captivity of inherited institutions and procedures.

8. Legal education: Its nature and impact on development

Initially, the legal professionals required for the smooth administration of justice where drawn from Britain and from India. Lay magistrates and clerks were recruited to work in the lower courts, etc. The push for self-determination following the World War II contributed to the increased focus on the quality of legal education in the British colonies and the capacity of legal professionals to manage affairs in their countries after independence. Lord Denning played an important role in the establishment and development of legal education and lawyers' training in Africa from the late 1950s onwards.[66] In post-colonial Commonwealth Africa, emphasis was placed on practical approaches through pupillage to acquire the characteristics of English practitioners and less on formal legal education.

Due to the emphasis placed on law and order and enforcement of the police power of the State, Commonwealth Africa was provided with barristers and not solicitors as the main focus was on enforcement and State power, with a barrister mainly to defend people in court or represent the State[67] and not on law for development. Training for solicitors, mainly to perform legal work outside court to advise clients, undertake negotiations and draft legal documents, would have provided a lot more input in the evolution of law and development but this was not the case.

[64]Religious law refers to ethical and moral codes taught by religious traditions.
[65] South Africa applies aspects of Roman-Dutch law.
[66]'Mind with Mind and Spirit with Spirit': Lord Denning and African Legal Education. Available from: https://www.researchgate.net/publication/228242328_%27Mind_with_Mind_and_Spirit_with_Spirit%27_Lord_Denning_and_African_Legal_Education [accessed Jun 12, 2017].
[67] S. Manteaw; Legal education in Africa: What type of Lawyer does Africa Need? McGeorge School- solicitor more than Barrister

In the early post-independence era, governments sought to increase the capacity of legal practitioners which led to the commissioning of studies. The Lockwood Report on High Education in East Africa, recommended the establishment of a Faculty of Law at Dar es Salaam in 1961.The Lockwood Working Party faced a gargantuan task of constructing a higher education model acceptable to the various interest groups in East Africa and in London, with Britain determined to maintain its influence over the region in terms of intellectual and ideological indoctrination and to have allies in the emerging neocolonial relations between Britain and the East African nations.[68]

D. Nabudere's critique [69] on the relevance of the law as taught in post-colonial Commonwealth Africa is very relevant in light of its timing, his position at the epicenter of the introduction of legal education in East Africa and his understanding of the importance of context when designing the curriculum and methodology for legal education. Nabudere elucidates the impact of the US' neo-colonial tendencies and the agenda promoted by the *Law* and Society Movement. In his words, "*What came to influence the teaching of law in East Africa also sprung from these wider conditions of the post-war period in which, as we have already noted, the US became an active power in the promotion of western culture."*[70] Similar views were made by David M. Trubek, who considered the Law and Society Movement and the 'Law and Development' Movement as "a sort of export branch of imperial legal culture."[71]

It is critical to note that in the 1960s legal academics from the US sought to find out how the received laws and codes into these countries from Europe could be used for development and "progress" of Third World societies but not to address the limitations of the inherited legal systems. The Americans seized the opportunity through the Staffing of African Institutions for Legal Education and Research (SAILER), the American Program for Cooperation in Africa Legal Education and Research and other agencies sponsored by the state were all active in pushing the programme to promote their approach to legal education in Africa, while undermining the British textbook, precedents and nutshell approaches. The approach did not take into account the relevance of indigenous legal systems in fostering development and progress, instead seeking to focus on the received laws and practices. They sought to make the societies to conform to the new legal regime. Systemic reforms would have needed much more than substituting English law with American systems and approaches but this was not a priority.[72]

The "modernisation" theory was used at the principle political instrument of US imperialism in the Third World countries[73] as well as stem the tide of communist onslaught from the East. The economic counterpart of the modernization theory was "development" theory.[74]Africa

[68]Michael Mwenda Kithinji; From Colonial Elitism to Moi's Populism: The Policies and Politics of University Education in Kenya, 1949-2002 https://etd.ohiolink.edu/rws_etd/document/get/bgsu1242362264/inline

[69] D. Nabudere; Law, The Social Sciences and the Crisis of Relevance: A Personal Account https://ke.boell.org/sites/default/files/social_scientistsdaninabudere_publication.pdf

[70] Ibid.

[71]D. Trubek; "Back to the Future: The Short Happy History Life of the Law and Society Movement" in Freeman, M.D.A [1994]: Lloyd's Introduction to Jurisprudence, Sixth Edition, Sweet & Maxwell, London.

[72]Mabirizi, D. [1986]: Some Aspects of Makerere's Legal Education Development" in Third World Legal Studies –1986, special Issues on Teaching Law and Development, International Third World Legal Studies Association and the Valparaiso University Law School, Canada. P.64.

[73]D. Nabudere, supra.

[74]W. W. Rostow in his Stages of Growth: An Anti-Communist Manifesto [1960].

was the new battleground on which to fight the spread and influence of communism. The 'Law in Development' approach was well intended but poorly designed and premised in flawed notions of treating non-conformity to western norms as a problem. At least, current UN rule of law definitions have received some form of universal endorsement and can be balanced out with the argument for 'good enough' governance.

The imported methodology was inadequate. The drive for "massive institutional change" should have involved an overhaul of the legal system in total and not merely the laws. Some aspects of poverty and vulnerability lay beyond the reach of inherited institutions. Institutional Legislative Theory and Methodology (ILTAM)[75] was a good investigative methodology but it required additional support to yield better results especially in bringing about the massive institutional change of institutions inherited from the colonial era.

The view that teaching law and development required students to be exposed to a body of knowledge as well as develop capacity to make practical investigations into concrete problems, including the design and drafting of relevant laws was valid to a point. Emphasis on legislative research and drafting was relevant given translation of policy into law is one of the most effective tools for enabling or fostering development. The challenge that followed was that common practice at the First Parliamentary Counsel's office was premised on legal transplants from across the Commonwealth and not on the conduct of extensive legislative research outside the drafting instructions provided. This put to waste a good methodology.

It was anticipated that with the introduction of the social sciences disciplines in the 'law-in-development' approaches, lawyers were in addition to be taught a 'variety of frameworks that makes research possible", methodologies for conceptualising problems, simple systems models of analysis of decisions making institutions, as well as economic concepts in which a combination would be made of text materials, lectures and case studies.[76]

The 'law-in-development' movement had by the mid-1970s succeeded in producing a radical point of view as to the role of law in society that resulted in the Dar-es-Salaam approach- a Marxist-Leninist understanding of law and state in teaching of Law. The Dar-es-Salaam approach involved an understanding of the philosophical, ideological and historical roots of law and the state for a proper placement of the post-colonial order in a wider global context. Within the (new) Jurisprudence framework, law, the state institution and their historical evolution, the relation to social class formations, struggles, social revolutions, major social and legal reforms, etc, would be probed in earnest. [77]

The Gower report on Legal Education in Uganda made the case for contextual relevance of legal education by making recommendations that legal subjects be taught in terms of political and social history, and their social and economic environment had an approach similar to the Dar-es-Salaam school. [78] The resultant Government White Paper broadly accepted this

[75] A. Seidman and R. Seidman; ILTAM: Drafting Evidence-Based Legislation For Democratic Social Change, http://www.bu.edu/law/journals-archive/bulr/volume89n2/documents/seidman_000.pdf

[76] Nabudere

[77] J. Kanywanyi; "The Struggle to Decolonise and Demystify University Education: Dar es Salaam's 25 Years' Experience Focussed on the Faculty of Law (October 1961-October1986]", Mimeo Paper Presented at a seminar to Commemorate 25 years of the Faculty of Law, held at Nkrumah Hall, 20-25 October 1986 (Revised 1989)

[78] Legal Education in Uganda – A Report to the Attorney-General by Gower, L.C.B. et al: December, 1968 - January, 1969.

approach and the proposed tentative syllabus, which embodied an element of law-in development approach with topics such as Modern African History and Politics, current socio-economic problems, social and political change in Uganda and methods of economic and political change, spelt out was incorporated but never implemented partly due to political changes during the subsequent period.[79]

In order to prepare legal practitioners who are better equipped to practice law with development as an end, adequacy of legal education to support the practice of law is something to take into account.

9. The influence of development partners as providers of rule of law reform technical assistance

Since the attainment of independence in Commonwealth Africa and the launch of the Law and Development Movement in the US, rule of law technical assistance has been availed by development partners, both intergovernmental organisations and international non-governmental organisations and other partners, each with a different approach and methodology or drawing lessons from the experiences of other organisations.

As a result of the breakdown of civil administrative structures in the face of political instability, civil strife and other challenges, following independence, in some Commonwealth Africa countries, the role of the State in providing public services was diminished which resulted in an increase of direct operations of non-governmental and other actors in that space. These non-State actors emerged after a total collapse in some States' superstructure and infrastructure that made both development partners and non-state actors entry possible. Development partners, due to the absence or limited presence of the State in providing essential services such as education and health as well as development in general, have increasingly been involved in directly influencing or indirectly determining the policy formulation and development agenda, approaches and solutions to problems in developing countries. This influence arises from their capacity to mobilise funds and access other resources, which power some of the developing countries' state actors do not wield.

Development partners continue to provide rule of Law technical assistance which ranges from support to legal reforms by funding lobbying, capacity building activities and the recruitment of consultants, assistance with legal aid and public defender services. For instance, support in developing the strategies and tools to assist legislatures in performing their duties by United States Agency for International Development (USAID), saw the heightened influence of the American approach to governance in terms of increasing oversight over the Executive branch, introduction of in-house legislative counsel in parliaments, establishment of parliamentary research and budget offices, introduction of a legislative bill tracking system, promotion of stakeholder engagement including with Civil Society Organizations, among others.[80] Assistance has been provided in Uganda, South Africa, Ghana, Mozambique, Namibia, Nigeria and Malawi, to help legislators learn skills in the lawmaking function, conducting training and orientation programs, assisting with the

[79] D. W. Nabudere, supra.
[80] USAID; USAID's Experience Strengthening Legislatures http://pdf.usaid.gov/pdf_docs/pnach308.pdf

establishment of effective committees, promoting access to information and research, and improving bill-drafting capabilities. [81]

Another example is the Rule of Law Expertise (ROLE) programme which works to strengthen the rule of law in developing countries through supporting the provision of *pro bono* legal and judicial expertise,[82] approaches programming through a focus on poverty alleviation. In ROLE's perspective, poverty is not only a lack of food, basic services, jobs and assets, but also a lack of dignity, voice, power, justice and security and cannot be reduced without checks on the use of public authority, law and order, protection of human rights and adequate redress within DFID's 27 priority countries.[83]ROLE assists applicants to articulate their needs and designing interventions that are country-led, demand-led and developmentally relevant and sourcing high quality, legal specialists from the UK government and its related agencies, and the UK legal and judicial sector to contribute to rule of law development activity.[84]

The International Development Law Organization (IDLO) has dedicated its activities to the promotion of the rule of law, with a joint focus on the promotion of rule of law and development by empowering people and communities to claim their rights, and providing governments with the know-how to realize them.[85] The activities include support to emerging economies and middle-income countries to strengthen their legal capacity and rule of law framework for sustainable development and economic opportunity but IDLO has not conducted an overhaul of a legal system. Presently, IDLO is on a mission to chart the road ahead in how the rule of law promotes sustainable development and make the case that without access to justice and the rule of law, development cannot flourish, investment will not take root, the planet cannot survive, the poor cannot overcome poverty, women cannot fight discrimination and become agents of their own destiny.[86]

All these interventions by organizations providing technical assistance have an impact on the understanding of rule of law and the evolution of institutions in the recipient country in the form of -institutional set up, legal and legislative drafting styles and policy development strategies and frameworks. As a result of the contributions made by development partners, standards of policy making, statutory writing and governance processes have evolved. The influence of external legislative consultants and increased uptake of model laws have impacted on drafting protocols and styles. Access to power by the projects' chiefs of party opened the door to civil society organisations to political power and gave both development partners and advocacy groups lobbying power to influence legal and legislative reforms due

[81] Ibid.
[82]Rule of Law Expertise http://www.roleuk.org.uk/
[83]Rule of Law Expertise (ROLE) welcomes applications for UK legal and judicial technical assistance from the following countries: Afghanistan, Bangladesh, Burma, Democratic Republic of Congo, Ethiopia, Ghana, Kenya, Kyrgyzstan, Liberia, Malawi, Mozambique, Nepal, Nigeria, Occupied Palestinian Territories, Pakistan, Rwanda, Sierra Leone, Somalia, South Africa, Sudan, South Sudan, Tajikistan, Tanzania, Uganda, Yemen, Zambia and Zimbabwe.
[84] ROLE's work includes peer to peer mentoring; scoping and supporting justice-related problems and solutions; reviewing draft legislation and constitutional text; designing and delivering legal, judicial and skills trainings; developing manuals to enhance awareness and implementation of laws and legal processes; and sharing experience and international insight with key change agents
[85]IDLO; http://www.idlo.int/what-we-do/rule-law/post-2015
[86] IDLO; The Rule Of Law and the 2030 Agenda: The Road Ahead Background Note for Interactive Debate Meeting of the Assembly of Parties November 23-24, 2015 https://www.idlo.int/system/files/event-documents/AP2015-6.1-Background-note-2030-interactive-debate-IDLO2015Assembly.pdf

to access to power and power changers. The effect of international rule of law technical assistance, especially that which has an element of legislative support, cannot be ignored for the reason that it touches at the very heart of governance and impacts on the evolution of legal systems, yet again adding additional ingredients to an already mixed pot of legal subsystems.

10. Commonwealth Secretariat's Rule of Law Technical Assistance

The approach of the Commonwealth Secretariat is relevant to this discussion because of the significant role the Secretariat plays as a thought leader in development and in providing rule of law technical assistance to its 52 member countries, most especially the developing countries and small States. Technical assistance provided by the Commonwealth Secretariat emanates from mandates set by, Commonwealth Heads of Governments (CHOGM) and Law Ministers to strengthen rule of law, effective administration of justice and best practice in the Commonwealth which is driven by trends and priorities at the global level. The Commonwealth member countries may request the Secretariat assists with strengthening rule of law institutions, develop laws, and enhance the capacity of officials; developing and promoting best practice on various thematic areas of law in the form of toolkits, guidelines, manuals and model laws; supporting law reform,; promoting procedural and cross-cutting issues in the administration of justice.[87]

The Commonwealth Secretariat has not developed a universal theory or approach to technical assistance, however the fundamental practice is based on receipt of requests from member countries for technical assistance; following which scoping exercises are conducted and the way forward charted. In some cases, good practices tested for best fit are introduced elsewhere through the promotion of adaptation at country level of model laws and toolkits. There is no information on the record, to date, which shows that the Secretariat has provided support for the overhaul of an entire legal system. Technical assistance is mainly provided to strengthen capacity and address legal frameworks vis a vis developing rule of law development methodologies and making significant changes at strategic levels, outside the mandates of CHOGM and the recommendations of ministerial meetings. The member country is required to spell out the details of the assistance sought, including a project definition and context.

11. New approach

Following the discussion above, on the limitations of other approaches, such as the Law and development movement; and the Washington Consensus) as well as evolution of the state of the Jurisprudence of Development in Africa, the time is ripe to make proposals and approaches that will increase the probability of countries in Commonwealth Africa, meeting the targets of the SDGs and governance beyond which any institution working with Commonwealth African countries could consider.

The proposed approach seeks to draw lessons from past initiatives, emphasizing advantages of methodological approaches- keeping what has worked while at the same time addressing

[87] Such as: witness protection, international cooperation on criminal matters, judicial independence, effective court administration, legislative drafting and law reforms; placing and mentoring rule of law officials in equivalent agencies and brokering of twinning programmes between national rule of law institutions in the Commonwealthhttp://thecommonwealth.org/our-work/rule-law#sthash.CYwGnUhr.dpuf

the limitations presented by the various schools, methods, approaches and theories. These were not homegrown solutions nor did the architects attempt to question whether they were completely relevant in their totality. The approaches sought to achieve conformity with western societal norms. Going forward, one model and two theoretical approaches are assessed in light of this quest.

11.1 Theoretical framework

Since legal pluralism, law and development and rule of law are contested concepts both in theory and practice,[88] there is definitely a great need to develop an African jurisprudence of development that takes into account local body polity, culture, multiplicity of legal systems and alternative means of arbitration and dispute resolution. Using models that seek to increase benefits and limit shortcomings in addressing challenges in applying the law to foster holistic development in Commonwealth Africa increases chances for success.

For the last fifty years or so much legal and social science research has focused on replicating models and frameworks that provide "shortcuts" to development and these have often failed. However, a recent trend is realized from both the developed and developing countries is that proposed models and frameworks should consider local context, cognizant of historical and socio-cultural factors. Three theories or models are elicited to state the case for "doings things differently", and these include the Problem Driven Iterative Model, Critical Theory and the Theory of Change.

On the basis of PDIA, the critical theory and the theory of change, the new approach is proposed to address the three aspects of agents, organizations and systematic challenges presented by a pluralistic legal system which allows countries/communities to address: current legal system; institutional frameworks; legal pluralism and how to deal with it during the legislative process and also understand the difference and think through the application of legislative measures to address challenges that arise in a pluralistic society; legal education- its fitness for purpose; and socio-economic and political realities.

11.1.1 Applying the Problem Driven Iterative Adaptation Model

The Problem-Driven Iterative Adaptation (PDIA) is recommended as a viable option that enables stakeholders at the country and local level to question planned interventions and inform the process of identifying solutions with perspectives from their mandates and levels of engagement. The PDIA framework was developed to redress the occasional tried, tested and failed development initiatives. It is premised on four elements of approach: what drives action; planning for action; feedback loops; and plans for scaling up and diffusion of learning.[89]

This model is adapted to institutional reforms in the context of the relevance of rule of Law and Development as linchpins to attainment of the Sustainable Development Goals of Agenda 2030. It is already in application by a number of development actors, for example the

[88]Tamanaha, B. Z. (2013) 'The Rule of Law and Legal Pluralism in Development,' in Tamanaha et al. (2013). Tamanaha, B.Z., Sage, C. and Woolcock, M. (eds) (2013) Legal Pluralism and Development: Scholars and Practitioners in Dialogue. Cambridge: Cambridge University Press. Also see Brian Z. Tamanaha, Law as a Means to an End: Threat to the Rule of Law ch. 6, 7 (2006).187 and Domingo, P. Rule of law, politics and development. The politics of rule of law reform, 2016. Overseas Development Institute. ISSN: 2052-7209

[89]Building State Capability; https://bsc.cid.harvard.edu/about

Democratic Governance Facility (established by Austria, Denmark, Ireland, the Netherlands, Norway, Sweden, the United Kingdom and the European Union), supports state and non-state partners to strengthen democratisation, protect human rights, improve access to justice and enhance accountability in Uganda) which does not implement programmes directly but supports local partners who are selected based on the PDIA approach.[90]

PDIA seeks to address the limitations to institutional reform- where *governments and organizations pretend to reform by changing what policies or organizations look like rather than what they actually do* **(emphasis added)**.[91] This is a departure from many Rule of Law technical assistance approaches which have altered institutions, laws, and policies but have tolerated a continuation of doing business as usual and have not registered any improvements in performance and outcomes. Projects that are undertaken need to result in outcomes that **demonstrate improvements in performance both at an effective and efficient level.**

The homespun solutions will have to take into account the impact of legal pluralism on governance and development in culturally and politically diverse societies and address the failings presented by how the legal system evolved since colonial times and following the attainment of independence. The advantage of PDIA is that it is locally problem driven, *a process of muddling* through, based on incessant feedback and working with several institutions on any intervention in cross-institutional approaches.[92]

PDIA, based on four core principles,

a) Focuses on solving locally nominated and defined problems in performance (as opposed to transplanting pre-conceived and packaged ―best practice solutions).
b) Seeks to create an authorizing environment 'for decision-making that encourages positive deviance 'and experimentation (as opposed to designing projects and programmes and then requiring agents to implement them exactly as designed).
c) It embeds this experimentation in tight feedback loops that facilitate rapid experiential learning (as opposed to enduring long lag times in learning from ex post ―evaluation).
d) It actively engages broad sets of agents to ensure that reforms are viable, legitimate, relevant and supportable (as opposed to a narrow set of external experts promoting the ―top down diffusion of innovation).[93]

The history of tried and failed development initiatives including in the governance and rule of law fields, especially in Africa, makes the case for consideration of alternative approaches, including the problem driven iterative model,[94] proposed to address the legal pluralism problematic in quest for a sustainable intersection between law and development in

[90] Democratic Governance Facility; Partnership Approach Paper, August 2012, https://www.dgf.ug/policies/dgf-partnership-approach

[91] Matt Andrews, Lant Pritchett and Michael Woolcock; Escaping Capability Traps Through Problem Driven Iterative Adaptation (PDIA), https://www.hks.harvard.edu/content/download/70633/1255342/version/2/file/240_Andrews%2C+Pritchett%2C+Woolcock_BeyondCapabilityTraps_PDIA_FINAL.pdf

[92] Building State Capability; https://bsc.cid.harvard.edu/about

[93] Ibid.

[94] Matt Andrews, Lant Pritchett, Michael Woolcock. Escaping Capability Traps through Problem Driven Iterative Adaptation (PDIA). CID Working Paper No. 240. June 2012. Center for International Development at Harvard University

Commonwealth Africa countries and attainment of the targets of the SDGs of Agenda 2030 and beyond.

Sustainable legal reforms to promote Agenda 2030 and SDG 16 will involve three social levels. These include *agents*, at the front line and in leadership positions, whose behaviours shape the collective approach to problem-solving; *organizations* inhabited by agents; and the *environment* or *ecosystem* of organizations.[95]

Agents are frontline rule of law workers who decide between merely complying with rules or undertaking positive performance-driven actions towards meeting key performance indicators in their work plans and contributing to fulfilment of their organisational mandates, objectives and goals. The latter would require spelling out clearly the laws and procedures that are not working in the current context using the law to enable development and thus proposing law reforms and legal system overhaul incrementally. Judicial officers, prosecutors and legislators are in position to identify laws and practices that are not fit for purpose or that are in contradiction with what works for example policy and legal provisions on gender based violence vis a vis societal practices. African jurists have a role to play in developing an African jurisprudence of development which would better articulate the critical building blocks necessary for developing the theory or philosophy of law or legal system better suited to enable sustainable development in Commonwealth Africa.

Leaders and managers of rule of law institutions choose between using their positions to pursue narrow private or organizational gain or to create new public value within and through the organizations they run, in this case, to promote the use of rule of law as an enabler of sustainable development and also promote the attainment of targets set for advancing the objectives of SDG 16.

Organizations in this scenario constitute of rule of law institutions in accordance with constitutional and legislative mandates, manage how and from whence they derive the legitimacy needed to survive and thrive, balancing identical or corresponding pressures to comply with external expectations of stakeholders of what they should look like and the challenge of demonstrating performance regardless of appearance. Courts, parliaments, offices of Public Prosecutors or Corrections institutions will have to focus on outcomes regardless of their configuration.

At the ecosystem or systemic level, there are several stakeholders such as central or local governments as policy makers, development partners, ethnic and tribal tendencies, religious and population structures, local populations and individuals that determine implicit and explicit ways of evaluating change and novelty. Systems could reward compliance with fixed agendas of what is considered appropriate and right practice at one extreme, or look to the simple demonstration of improved functionality at another. A second tension also plays out at this systemic level, affecting the space created for novelty: closed systems constrain novelty and innovation and do not allow new approaches to emerge, while open systems facilitate novelty. This could include consideration of a business-as-usual approach or the promotion of innovation and discovery for improving business processes. At systemic level, one expects general moves to overhaul the system to uproot what is not working and if done in a bottom-up approach with feedback from agents, leaders and organisations, should see innovations at

[95] Pritchett, L., Woolcock, M., & Andrews, M. (2010). Capability Traps? The Mechanisms of Persistent Implementation Failure, Working Paper No. 234. Washington, DC: Center for Global Development.

the highest levels of governance, under the guidance of the doctrine of separation of powers as enshrined in the Commonwealth Latimer House Principles.

There are four interventions required for law and development interventions to work out in a PDIA context:

I. ***Solutions in local context***

Interventions that aim to solve particular legal problems in local contexts, some of which are sub-national, religious and ethnic, are necessary. There is need to address law reform in a balanced manner that is contextual rather than all-encompassing, omnibus and haphazard. These interventions need to meet a fitness for purpose test for the problem they seek to solve. Observations have been made that law reform in England and Wales has not taken place as desired and that both common law and statute law needed a fundamental overhaul, which was a consequence of their historic and incremental development which have to a greater extent been systematised or rationalised.[96]The law reform process is a timely activity which reviews the law as is and makes the case of what it should be. This is an opportunity to address the limitations in law and procedural aspects for example fragmented laws; unconstitutional laws and culture evolves; hazardous procedures for example non-victim friendly procedures, etc. All in all, law reform allows re-examination of law applicable and revitalizes the legal system.

Consideration should be given to measures that increase trust in law enforcement agencies. The administration of justice should be done in such a way as to ensure access to dispute resolution in a manner that is timely and cost-effective through more local courts and consideration of mobile courts. This is good for business people, investors and vulnerable populations who need justice to be brought closer to them. Non-custodial sentences would also serve to reduce congestion in prisons and reduce the cost of administration of justice to the economy while community service would directly impact on a given society.

Developing solutions in a local context may require the development community to adopt horizontal social cohesion[97] instead of continuing to rely and focus interventions structured around vertical social cohesion.[98] Horizontal social cohesion, which in southern sub-Saharan Africa manifests in *Ubuntu*, inter alia, focuses on the strength of the "social glue" that ties people to each other on the assumption that feelings of togetherness matter more both to the wellbeing of individuals and to the long-term health of a society.

II ***Creation of an authorizing environment***

The creation of an authorizing environment that facilitates positive deviance (change from business as usual) and experimentation is the second recommended intervention. This involves testing out alternative approaches in law schools, law training institutions, private practitioners, law societies, judiciary and prosecution offices on what works and not.

[96] Speech by the Lord Chief Justice: Law Reform Now in 21st Century Britain – Brexit and Beyond 27 June 2017 |Speeches|Lord Thomas, https://www.judiciary.gov.uk/announcements/speech-by-the-lord-chief-justice-law-reform-now-in-21st-century-britain-brexit-and-beyond/

[97]Looks at how strong is the "social glue" that ties people to each other on the assumption that feelings of togetherness matter more both to the wellbeing of individuals and to the long-term health of a society.

[98]Looks at levels of inequity on the assumption that substantial differences in income are both inherently unfair and damaging to the wellbeing of societies.

Legal education and training for rule of law practitioners should be reviewed to ensure that the curriculum meets the present day challenges and needs of the people in the given societies from the perspective of law as an enabler of development. A. Kumar, recommends legal awareness to empower people to demand justice, accountability and effective remedies at all levels.[99]

Increasing access to justice is one of the ways in which an enabling environment is created. Mobile courts are instrumental to bringing justice closer to the people who need it for example in camps of the internally displaced persons or refugees. Popular versions of the law increase awareness of the law and ease enforcement as the addressees are better placed to appreciate what is expected of them when the law is put within reach physically and simplified.

Participatory governance practices which see an expansion of legislative consultations leads to increased input from stakeholders and promotes change as stakeholders are able to see what works and what does not.

While it is acknowledged that performance in rule of law is difficult to measure, it is still important to identify some forms of monitoring and evaluation, permitting evaluation and measurement of performance; regular and periodic reviews of how the rule of law sector is performing either through the budget cycle or even through stakeholder engagement should assist in improving performance.

III ***Learning and Feedback***

The third intervention involves active, ongoing and experiential learning and the iterative feedback of lessons into new solutions.

Regulatory Impact Assessment should be spreads across the public sector to assess the impact of legislative measures and to aid determination of effectiveness of policy options.

Law revision is a costly exercise and maintenance of the Statute Book may not be a priority in some jurisdictions. This brings about many problems with a major challenge that even lawyers do not know the statutory law or cannot tell with certainty whether a statute or a particular section of a statute is in force. An example from Ghana reveals that successive governments have been concerned about the difficulty of tracking and locating the laws of Ghana. Until recently when a digest of published laws, Legislative Watch. Accra: Sozo Law Consult, 1997-2002, was launched, the response was piece-meal, by passing legislation to identify laws that should be repealed or revoked.[100]

IV ***Viable and Sustainable Reforms***

Lastly, engaging broad sets of agents to ensure that reforms are viable, legitimate and relevant that is, politically supportable and practically implementable, is yet another intervention. This includes subjecting proposals for reforms to a sustainability test. **S**ince

[99] A. Kumar; Legal Literacy: Cornerstone for A True Democracy, GRIN Verlag, 22 Nov 2013. Also see http://www.grin.com/en/e-book/264802/legal-literacy-cornerstone-for-a-true-democracy

[100] V. Essien; Researching Ghanaian Law, http://www.nyulawglobal.org/globalex/Ghana.html

September 2015, world leaders, including parliamentarians have helped shape the SDGs.[101] All State institutions are expected to take part in implementing the SDGs at national and international levels. Country ownership, government accountability and national policy will be essential to ensure that the new set of objectives is attained. Parliaments, under the general guidance of the Inter Parliamentary Union are at the forefront of these imperatives, because they play a critical role in meeting those requirements through their lawmaking, budgeting, and oversight functions.[102]

Sustainability plans for the capacity built include, at the level of national development planning, SDGs being integrated in national policy documents. A process that lines up policy objectives with the development agenda and political will and support ensures necessary ownership and the sustainability of the overall reforms. As a result of the realignment, sector planning must be theoretically linked to resources allocation. Sub-sector policies mapped and supported by a strategic framework that in general is in line with the SDGs.

To ensure that interventions are not personalized but are inculcated into the processes of rule of law institutions and reflected in the workflow, institutionalization is an important concept to be planned for. The process should be ingrained in the way the work is performed and there is a system-wide commitment and consistency to performing the process of delivering rule of law technical assistance regardless of staff or management turnover. This requires provision of adequate resources and infrastructure and a culture of knowledge management to ensure that reflective learning is part of the process and change management.

Continuing Legal Education for rule of law actors should be built into the plan to ensure that legal education continues to be relevant to the economies in which legal practitioners ply their trade.

Continuous monitoring enables rule of law project developers and managers to see a continuous stream of near real-time snapshots of the state of performance. This gives organizations near real-time visibility into their contribution to meeting targets set under the SDGs.

Overall, the four interventions should seek to address the State capacity (individual and institutional levels) and examine the architectural design of the legal system as the framework around which public governance revolves. If the legal system remains inadequate, policy and legal interventions to foster development will not yield the results expected or desired.

11.2 Critical Theory

Critical theory is an approach that studies society in a dialectical[103] approach to analyzing law in terms of domination, exploitation, and ideologies. It is a normative approach that is based on the judgment that domination of western-oriented legal systems and world views have not worked and will not work. Critical theory as a social theory oriented toward critiquing and changing society as a whole, in contrast to traditional theory oriented only to understanding

[101] UNDP, Facts- SDGs and Parliaments, http://www.undp.org/content/dam/brussels/docs/Fast%20Facts%20-%20SDGs%20and%20Parliaments.pdf

[102] IPU; IPU SDG Self-Assessment Checklist. http://www.ipu.org/pdf/publications/sdg-toolkit-e.pdf. Also see SDGs and the Role of Parliaments, https://www.agora-parl.org/resources/aoe/sdgs-and-role-parliaments

[103] Christian Fuchs. Critical Theory, University of Westminister, UK.

or explaining it aims to dig beneath the surface of social life and uncover the assumptions that keep one from a full and true understanding of how the world works.

In light of legal pluralism in Commonwealth Africa, there are communities, cultures and entities in Africa suppressed by the institutional rule of law that was and is supplanted from Western models to fit into an African context. This calls for reimagining the rule of law in light of legal pluralism. The essence is that of reimagining rule of law as a broadly social-cultural phenomenon rather than a narrowly construed legal-institutional arrangement,[104] that looks beyond law as a mode of governance to law in the everyday lives of subjects (opening the frame around how this law is 'rule' rather than the 'law' that is seen to rule'). It seeks to create a sense of ownership of the rule of law framework. The core of critical theory in reference to rule of law and law's pluralism is to support legal and local institutions in Commonwealth Africa with technical support to develop their own jurisprudence of development as the courts of law consciously apply the law to foster development.

The application of critical theory is pertinent in three different ways as regards to legal reform:[105]

- to demonstrate the ambiguity and possible preferential outcomes of supposedly impartial and rigid legal doctrines.
- to consider and publicize historical, social, economic and psychological results of legal decisions including through obiter dicta, law reporting and elaboration on ratio decidendi or legal reasoning.
- to demystify legal analysis and legal culture in order to impose transparency on legal processes so that they earn the general support of socially responsible citizens ownership of law by the people.

11.3 Theory of Change for law and development in Commonwealth Africa

One of the theoretical approaches to the transition recommended above is the theory of change. The theory of change in the context of rule of law and development reflects the underlying process and pathways through which the hoped for socio-ecological change (in knowledge, behaviour, attitudes or practices, at the individual, interpersonal, institutional, community or societal level) in the development and application of African jurisprudence is expected to occur.

The theory of change generically defines long-term goals and then maps backward to identify necessary preconditions. [106] It demonstrates the critical pathway achievement; requires underlying assumptions to be detailed out in a way that they can be tested and measured; and puts the emphasis first on what the organization wants to achieve (outcomes for development) rather than on what the organization is doing (activities), therefore distinguishing between development outcomes and activities. In the context of Commonwealth Africa, the hypothesis of the theory of change would be:

[104]Chalmers, Shane. Legal pluralism and the rule of law. www.iisj.net/en/master
[105] Also see R. Cotterrell; Law, Culture and Society-Legal Ideas in the Mirror of Social Theory, Routledge Taylor & Francis Group
[106] P. Brest; The Power of Theories of Change, https://ssir.org/articles/entry/the_power_of_theories_of_change

A locally developed African jurisprudence of development, cognizant of societal diversity, will lead to improved rule of law, strengthened results and impact in Africa in meeting the targets of SDG 16.

The overarching application of this theory of change is to support local communities, law institutions and development actors through technical support to arrive at an appropriate home-grown African jurisprudence of development that balances between internationally recognized and local rule of law norms. The model for theory of change in relation to *Legal Pluralism and Effective Governance for Development in Africa* to meet the targets of SDG 16 would be in descending order of achievement to cover underpinning factors and drivers of change; strategies and tactics; measures and approaches; intermediate outcomes and higher level outcomes as follows:

i. Underpinning factors and drivers of change

These include political will by the government, availability of funding, governance and accountability mechanisms, participation of the legal fraternity, cultural institutions and communities, religious institutions, support from the UN and other international development partners etc. At this level, awareness raising and mobilisation are key to moving drivers of change to take action. Taking the example set in the Commonwealth Latimer House Principles on the Three Branches of Government, the development of civil society organizations and professional associations in encouraging and promoting the deepening of the rule of law and application thereof, would mobilise more stakeholders in actively driving change.

Legal awareness or public legal education, which empowers individuals regarding issues involving the law and the justice system and its interconnectedness to development. This may involve activities to promote consciousness of legal culture, participation in the formation of laws and the rule of law. Laws exist as part of a larger organizational ecosystem in which the interests of the organization as well as those of the actors become inextricably linked to the ways in which they are enacted thus the need for awareness. Understanding the nature of the law and defining policy making and institutional frameworks around it should provide prospects of change through law and development.

The need for a paradigm shift to consciously use the law to bring about holistic development. the conscious use of the law for development remains outstanding. If this occurs, it is expected to contribute to and encourage the expansion of 'African jurisprudence,' a study of general theoretical questions about the nature of laws and legal systems of development in Africa.

Rule of law actors should provide leadership in law and legal systems reform as they engage on daily basis with issues of the law and development. They are best placed to identify loopholes, strong points, weaknesses and limitations, reports on which would form the basis of proposals for law and legal systems reform. An example in point is that the judiciary is in position to provide leadership in escalating proposals for legislative reform, within the limits of the doctrine of separation of powers with guidance from the Commonwealth Latimer House Principles. Judicial activism is another vehicle through which existing vacuums in legal frameworks can be addressed so as to bring to the attention of lawmakers and law reform agencies areas in which work needs to be done, with the accompanying caveats to ensure that the judiciary does not assume full legislative powers.

ii. Strategies and Tactics

The strategies and tactics include harnessing political will, mobilising governmental-cultural-religious coordination, funding, capacity and capacity development, systems and procedures, accountability mechanisms. The strategies for rule of law actors include fit-for-purpose capacity building which can be attained through re-evaluation of the curriculum for legal education and promoting development-relevant continuing legal education as well as legal education reforms, Additionally, measuring performance in light of SDG 16 targets helps one ascertain how well they are doing towards meeting key performance indicators.

The adequacy of rule of law practices such as viable witness protection arrangements help promote the legitimacy of rule of law, protections and interventions in a society. The ability of a witness to give testimony in a judicial setting or to cooperate with law enforcement investigations without fear of intimidation or reprisal is essential to maintaining the rule of law. [107] Increasingly, countries are enacting legislation or adopting policies to protect witnesses whose cooperation with law enforcement authorities or testimony in a court of law would endanger their lives or those of their families. Protection may be as simple as providing a police escort to the courtroom, offering temporary residence in a safe house or using modern communications technology (such as videoconferencing) for testimony.

iii. Measures and approaches

This means that there should be a shared view among stakeholders, shared local metrics and indicators for assessment, joint planning and coordination, and work force capacity and motivation it involves agreement on performance indicators, commitment to reforming laws and the legal systems to make them relevant to the context in which are applicable. Presently there is global agreement on indicators and UN Member States are being encouraged to make adjustments that suit national level requirements and arrangements.

As an example, The World Bank's 2017 World Development Report "Governance and the Law," encourages its readers to rethink governance for development by ruminating not only about the form of institutions, but also about their functions; not only about capacity-building, but also about power asymmetries; and not only about the rule of law, but also about the role of law.[108] This paradigm shift requires a change in programmatic approach from capacity-driven models as the default option when designing interventions on the part of rule of law development partners. It is important to acknowledge the complex political and social settings, in which individuals, corporate entities and the state interact on daily basis and the resultant power balances which the rule of law seeks to regulate.

Limitations of the justice system- case backlog, legal jargon, misunderstanding of bail, costly legal procedures, mob justice (remains the highest cause of homicide in a number of countries in Commonwealth Africa) etc. and are evidence of the limitations of the justice system and need to be tackled to make the justice system more attractive and responsive to the needs of users. This includes strengthening rule of law institutions to promote their

[107] UNODC; Good Practices for the Protection of Witnesses in Criminal Proceedings involving Organised Crime, https://www.unodc.org/documents/organized-crime/Witness-protection-manual-Feb08.pdf.

[108] World Development Report 2017; Governance and the Law http://www.worldbank.org/en/publication/wdr2017

efficiency in meeting targets of the SDGs means making rule of law institutions more accessible by having well-functioning and accessible courts, made more efficient by implementing electronic filing platforms; better management of hearing dates; and better support to victims and other court users.

iv. Intermediate outcomes

It is anticipated that intermediate outcomes such as functioning as a system for greater relevance, strategic positioning and results and impact; and integrated and coherent delivery of key priority functions in the post-2015 era: policy and normative support; capacity development, leveraging and convening role, integrated development and humanitarian support will be achieved when the interventions are better thought out and structured around a credible theoretical framework. This calls for commitment at the highest levels of government and the involvement of the three branches of government, drawing in the media and non-governmental as well as civil society organisations as highlighted in the Commonwealth Latimer House Principles.

v. Higher level outcomes

At the highest level, when the targets of SDG 16 are met, it is anticipated that outcomes such as increased government and societal satisfaction; and increased pride and satisfaction of legal fraternity, sense of common community and societal identity. The ultimate goal of conscious use of law to support development are some of the higher level outcomes

12. Conclusion

From the above discussion, one can draw a conclusion that progressing to plan and deliver rule of law technical assistance without the guidance of a theoretical framework is not the best way to proceed. A well-thought out theoretical framework should be one that enables providers of rule of law technical assistance to develop strategies and deliver assistance in a way that takes into account the capability limitations and in this case, also address the limited fitness-of-purpose of the legal system (the tools available to the rule of law practitioners at national level) which is premised partly, in failure to design a suitable legally pluralistic system or even a rule of law system that responds adequately to needs in a society that is characterised by legal pluralism.

Designing a system that works requires addressing all the challenges identified. This will require actions towards law reform so as to increase the opportunity to address challenges presently faced by communities both, human and corporate. The viability of applying relevant customary law in courts but ensuring that human rights are secure and the vulnerable are not abused should be examined. Localisation or decentralisation of the administration of justice to the extent possible should make justice accessible at the lowest administrative level and to as many people as possible.;

Efforts must be placed on ensuring that the reforms do not permit perpetuation of capability traps which see countries and development partners get trapped in a cycle of reforms that fail to enhance capability through reproduction of particular external solutions considered best practice 'in dominant agendas, employment of pre-determined linear processes that inform tight monitoring of inputs and compliance to the plan, and are driven from the top down,

assuming that implementation largely happens by edict.[109] For example, going forward, legal officers in ministries, departments and agencies should have the policy and legislative research competencies that R. Seidman emphasized; Embracing an approach to development that emphasizes horizontal social cohesion may provide some guidance on how to better plan rule of law technical assistance to formerly colonised African countries. Having country-led and developmentally relevant approaches should increase the contextual relevance of technical assistance.

While this paper has not provided solutions as to the best theory for ensuring that rule of law technical assistance provides best value for money and fitness of purpose, it has provided a foundation for a discussion that should address the challenges at the root of the rule of law system in Commonwealth Africa by proposing consideration to do development differently.

[109]Matt Andrews, Lant Pritchett, and Michael Woolcock, supra