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Law, Lawyers and Sustainable Development: Reflections of a Fellow Traveler

Muna Ndulo

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At the national level, the rule of law is necessary to create an environment for providing sustainable livelihoods and eradicating poverty. Poverty often stems from disempowerment, exclusion and discrimination. The rule of law fosters development through strengthening the voices of individuals and communities, by providing access to justice, ensuring due process and establishing remedies for the violation of rights. Security of livelihoods, shelter, tenure and contracts can enable and empower the poor to defend themselves against violations of their rights. Legal empowerment goes beyond the provision of legal remedies and supports better economic opportunities. In order for the rule of law to further sustainable development outcomes, it must ensure protection for all human rights, including, economic, social and cultural rights and the right to development. The role of law and lawyers in Africa is seen here as to help the development process by understanding the social and economic matrix in which legal norms are essentially a super structure, and making the lawyers expert knowledge to bear on this process in order to make the norms more functional to the development process.

1. Introduction

Since I joined academia several decades ago, I have had great interest in how we can use law to advance the living conditions of all people. This took me to study law and development under the late Professor Seidman at the University of Wisconsin in the USA. I have been struck by the enormous challenges that face developing countries and in particular African countries in the area of development. As a lawyer, I have always looked for ways in which as a profession we can contribute and respond to the enormous challenges of sustainable development. There is widespread support for the view that law has an important role to play in promoting development (Seidman 1984; Ocran 1984) . The critical limitations of globalization and increasing inequality, despite human advancement in science, technology, and culture has further drawn attention to the role of law in sustainable development.

United Nations member states have emphasized the important role of law in development. In the Declaration of the High Level Meeting of the Rule of Law, member states noted that and I quote: *“the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law at the national and international levels is essential for sustainable and inclusive economic growth, sustainable development, the*

eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law.” (UN, 2012) They therefore called for consideration of that interrelationship in the post-2015 international development agenda. At the international level, the body of international instruments, including those concerning international trade and finance, climate change and protection of the environment and the right to development, establishes internationally agreed upon standards, which support sustainable development (UN 2018).

At the national level, the rule of law is necessary to create an environment for providing sustainable livelihoods and eradicating poverty. Poverty often stems from disempowerment, exclusion and discrimination. The rule of law fosters development through strengthening the voices of individuals and communities, by providing access to justice, ensuring due process and establishing remedies for the violation of rights. Security of livelihoods, shelter, tenure and contracts can enable and empower the poor to defend themselves against violations of their rights. Legal empowerment goes beyond the provision of legal remedies and supports better economic opportunities. In order for the rule of law to further sustainable development outcomes, it must ensure protection for all human rights, including, economic, social and cultural rights and the right to development. While the “rule by law” may provide a legal framework, contractual certainty and dispute resolution mechanisms that support economic growth and development, it is only the rule of law, consistent with international human rights, which can provide for development that is also inclusive and sustainable.

As highlighted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of no-recurrence, “recent experience demonstrates that narrow development efforts that exclude justice and rights considerations fail to achieve sustainable human development” (UNHR, 2013) (/A/68/345 para.64). The United Nations General Assembly has highlighted, inter alia, the importance of access to justice for all, and in this regard encouraged the strengthening and improvement of the administration of justice, and emphasized that respect for the rule of law, property rights, and the pursuit of appropriate policy and regulatory frameworks encourage business formation, including entrepreneurship, and contribute to poverty eradication.

There also exists a strong relationship between the law, land tenure and the effective management of other natural resources such as land. For instance, improved security of tenure for land and property can make a critical contribution to ensuring social and economic progress in rural and urban settings, supporting poverty reduction and furthering gender equality and peace and security (Freudenberger & Miller 2010). Land tenure, including a range of tenure appropriate to local conditions and needs, such as community property rights and the protection of resource commons, creates certainty about what can be done with land or property and its use can increase economic opportunities and benefits

through investment, improving health, financial stability and personal safety. More broadly, ensuring the rule of law in the exploitation of natural resources is essential to ensuring inclusive and sustainable economic growth and development, and in respecting, protecting and fulfilling the human rights of persons. Sustainably and transparently managed natural resources can be the engine for economic well-being and a basis for stable and peaceful societies. Resources such as transboundary water resources require a high degree of cooperation among sharing countries and appropriate legal frameworks to support sustainable management. Proper management of natural resources, in accordance with the rule of law is also a key factor in peace and security, highlighting the interconnectedness of the three pillars of the United Nation system: peace, security and development (OHCHR 2018). The risk of violent conflict is elevated when the exploitation of natural resources causes environmental damage and loss of livelihoods, or when benefits are unequally distributed.

2. Historical Background

As Yong –Shik Lee points out in his article entitled ‘General Theory of Law and Development’, the idea that law is relevant to economic development and social progress is not new (Lee 2017). Adam Smith stated in his Lectures on Jurisprudence that “the imperfection of the law and the uncertainty in its application” was a factor that retarded commerce (Meek; Raphael & Stein 1978). Max Weber, a lauded sociologist and philosopher of the late nineteenth and the early twentieth century, explained the importance of rational law in the economy and society (Trubek 1972). Friedrich Hayek, another prominent philosopher and economist, of the twentieth century, also discussed relevant legal concepts to support liberty as the cornerstone of wealth and growth (Caldwell 2003). The term “law and Development” emerged and gained significance after the Second World War when a group of western scholars, private foundations, and aid agencies in developed countries made efforts to adopt laws and legal practices from developed countries particularly the United States, in order to assist in the economic and social progress of developing countries. These efforts were influenced by the modernization theory advanced in the 1950s and the 1960s by scholars such as Walt Rostow who argued that the modernization of the third world would be accomplished by the diffusion of capital, institutions, and values from the developed world (Jacobs 2015). The modernization approach has had its implications in sometimes disparate ways for the wellbeing and livelihood of the developing world.

Notably, the first Law and Development efforts were not successful due to difficulty in implementing laws and legal practices, including reform of legal education, in developing countries where key socioeconomic conditions, which were essential to their successful implementation, did not exist and their absence had been overlooked or ignored. In many ways the failure of the law and development movement in the 1970s was a lesson in the futility of engaging in legal transplants that are not context driven and which are based on

the supposed inherent superiority of Western culture and institutions (Trubek 2016; Burg 1977).

Law and development was resuscitated in the 1980s and the 1990s after the fall of the Soviet bloc, with the proliferation of neoliberal law reform projects that sought to reduce state intervention in the economy by promoting the privatization and deregulation of the economy (Lee 2017). The market was portrayed as the answer to the ills of society. The outcome of the second law and development movement was mixed at best, failing to result in successful development for most of the developing world. Moreover, some of these reforms caused serious economic difficulties for large populations, as demonstrated by the devastating economic outcome in many developing countries especially in Africa. Many of the 1980s law and development projects again failed because they repeated the mistakes of the first wave of law development projects. They continued to be ideological and to be premised on the superiority of the western system of governance and economic ideology reinforced by the collapse of the Soviet Union. They were not holistic in their approach. They were not based on sustainable and inclusive development. Issues of human rights, peace and security, and equitable distribution of resources were ignored. They excluded justice and rights. One remarkable thing about the literature of the above periods is that it was exclusively written by western scholars, except for one or two Africans notably Tawia Ocran (Ocran 1984). It was western scholars prescribing what should be happening in Africa. No surprise that it engaged in transplants devoid of context. This decontextualization of legal and structural systems is also seen in policy implementation and incentives for the participation of states in the global economy as regulated by the IMF and World Bank.

The current approach to law and development includes values of rights, justice, inclusiveness, human dignity and environmental justice. For example, the United Nations initiated global efforts to eradicate poverty in this period, such as the Millennium Development Goals, and the Sustainable Development Goals include the rule of law among its targets (UN 2015). The rule of law has thus become a development objective and not just a means to achieve development—contrary to its earlier perception.

3. Why Law is an Instrument for Change

Why do we argue that law is an instrument of change? It is necessary to discuss why law and development. The reason is that Law has unique characteristics which can be used as an instrument of change (Seidman 1984). Law may provide orderly change. The promulgation of law is a deliberate process which enables the pros and cons of a policy and the methods for its implementation to be considered and debated. . Paul Freund in a 1953 lecture at Washington University argued that the most important legal method is that of translating into institutions the ideals and purposes of a society (Schroeder 2009). Yash Ghai in his article, 'The Role of Law in the Transition of Societies', has argued that the publication of the

law is an effective way to communicate the government's policy (Ghai 1991). And the relative precision of the language makes clear the ambit of the policy, thus providing a tolerable degree of clarity and certainty.

These virtues are particularly important when the market is expected to be an important instrument of development. They promote transparency and accountability. The rules for interpreting the law enables a policy to be applied uniformly across the country and facilitate a wide delegation of authority, thereby making it particularly appropriate for public bureaucracies. Even in non-democratic regimes, laws command a measure of popular allegiance. It legitimizes public policy and highlights its obligatoriness or otherwise. This obligatoriness can be seen in tax policies, capital flows, tariffs and other market measures that may enhance the wellbeing of citizens.

Moreover, the support of the international community and agencies (important for most developing countries) is easier to secure if the government's actions can be shown to be based on lawful principles and authority. In multi-ethnic or multi-religious states, law may be the only instrument to develop the country, consolidate national values, coordinate different groups, and integrate the economy. So, governments view law as an instrument of governance. At the same time, the general principles of law for the exercise of public power as well as the independence of judiciary restrict the abuse of power and secure protections for citizens. The emphasis on law tends to engender habits of the lawful exercise of power and the consciousness of rights and enhanced prospects of fair administration.

4. The Challenges for African Lawyers

In some respects, the challenges that confront African lawyers and scholars in the law and development discourse are common to both developed and developing societies: in the western world, communities have either mobilized themselves to commence or accelerate their development or, in a situation of social erosion, to marshal resources to protect and conserve values already accumulated. The promise of this mobilization is improvement of the people's lives. In other respects, the challenges are different.

In most African countries, there is a big gap between the country's economic and social conditions and the minimum aspirations, values, and objectives of the people (Gower 1967). In traditional society the economies were basically peasant, and political organizations tended to be simple and small. Colonial rule attempted to permanently subordinate the African population to a distant exploiting power. This led to a disintegration of local forms of government and local law. It also led to urbanization, a recognized modernizing factor. There were great movements of people back and forth between the rural areas and the cities, and one of the consequences of this is the retrojection of values of the urban experience into the rural areas. It is inevitable that conflict should arise due to the constant interaction

between people subject to different laws. What has emerged is some kind of different understanding and approaches to grappling with modernity.

Colonialism and Apartheid left a legacy of deep economic and social problems in Africa. An indicator of Africa's plight is that its participation in world trade remains insignificant (Ndulo 2008). In comparison to other regions of the world, Africa's participation in world trade leaves much to be desired. Over the past three decades, Africa's meager portion of world trade fluctuated. Whereas in 1980 Africa's trade represented about 6% of world trade, it declined in the late 1990s and fell to 2% in 1998. Recently, this trade has been reversing as Africa's GDP growth averaged between 5% and 6% from 2002 to 2008 and foreign direct investment grew from \$9 billion to \$40 billion in 2011 (Ndulo 2008). Although progress has been made and Africa's participation in world trade is increasing, its share remains the smallest of any region in the world. Similarly, foreign direct investment remains a small fraction of global FDI flows. While the structure of most developing countries' exports has shifted to manufacturing (about 70%), in the case of Africa, that figure is closer to 30%, a mere 10% increase over the two decades from 1980 to 2000 (Ndulo 2008). Farming dominates the economies of African states with the balance going to extractive industries. Of course, there are differences between countries in terms of challenges and levels of development.

Against this background, what then should be the role of the lawyers in Africa? I believe that the lawyers in Africa have two major challenges. These are the reform and modernization of the law, and the use of law to aid the development process. The present state of the law itself creates a need for imaginative lawyers. The legal system, as currently structured, was developed to serve communities divided on ethnic and racial grounds (Purdy 1984). The African lawyer must not only be competent to administer and operate the law as it now is, but must be equipped and willing to reform it. There is need to adapt the law to meet present day needs and to unify its substantive provisions and its machinery to ensure that it serves the interests of all the people. There is further need to develop legal, administrative and political institutions to serve all the people. There is need to simplify systems of land law and its administration to ensure equitable access to land by all groups in society and provide security of tenure.

The second responsibility of a lawyer in Africa is, in my view, to help and participate in the development effort. To do this effectively he or she must understand the relationship between law, development and society. He or she should have a view on the strategy for economic development and not regard himself or herself as a mere trespasser in other peoples' domains. Issues of development are not only the domain of the politicians, economists, public administration experts, industrialists, agriculturalists, but are fields in which African lawyers must work.

No major social change can occur in a society where there is no parallel change of some kind in its laws. As the late Professor Lon Fuller observed, "lawyers have a central role to play in the ordering of society (Summers 1984)." The kinds of laws that are written will to some degree or another determine the sorts of social change that will take place. Law is the instrument through which goals are adopted, implemented and reviewed. It is lawyers who must plan and draft the complex institutional arrangements required of the welfare state and the regulatory state and developmental state. Of equal, if not greater importance, lawyers in private practice are the architects of countless sophisticated and highly varied arrangements that facilitate private ordering. What sort of rules are most likely to facilitate rapid development? What sort of law enforcing agencies are required to guarantee security without which development cannot take place? And what kind of sanctions will best serve the process? (Ocran 1984) All these are questions African lawyers must live with and attempt to resolve. It is the policymaker's job to determine policies, but it is a lawyer's responsibility to help the policymakers determine whether the rules adopted will bring the latter's objective to fruition. With this in mind, the lawyer must actively encourage regulations that will enhance social and economic development and actively participate in development plans.

The role of lawyers has not always been appreciated. In history, the laity, it seems, has always appreciated the need for clergy, doctors, engineers and many other professions but not for lawyers. In fact, extreme measures against lawyers and the legal profession have sometimes been taken. For example, the legal profession was abolished after both the French and the Russian revolutions. Historically, in England a lawyer developed a skill to sell (Brooks 1998). He or she was a great convenience to the wealthy landlords who were constantly involved in litigation and found it troublesome to appear in person. He or she was also used by other moneyed bodies. His or her orientation was therefore favourable to the wealthy class hence attracting the marxist criticism of law as an instrument of the ruling classes and the condemnation of lawyers as simply mercenaries of the propertied classes.

Of course, this is far from the truth. Even in the England of those times, a lawyer was concerned with the individual needs of the community. Over the years, lawyers have served their communities well. They have given practical advice, often to individual clients, with few resources to pursue their legal claims. They have traditionally "nursed clients" and their families through a myriad of problems and concerns, which were not always of a legal nature. They have foregone untold amounts of money in "legal aid." Often, they were not thanked for their services, yet continued to make a major contribution to the profession despite this.

But in the context of the challenges facing Africa, involvement in litigation alone is no longer sufficient. The principle of legality needs to be extended to the discharge of services and the regulation of economic processes in the context of a developing country. A lawyer must actively participate in shaping plans of economic development. A lawyer's participation may

avoid the unwarranted overriding of private interests by the politician. The lawyer brings reason to bear in the creation of rules, process, and institutions; in determining the proper applicability of rules; in facilitating the sound functioning processes and the healthy maintenance of institutions, and in various activities of legal reform. The lawyer will help in determining beforehand the course of future developments and calculating their probable effects and future risks. As long ago as 1962, a Congress of Jurists held in Brazil observed that:

In a changing and inter-dependent world, lawyers should give guidance in the creation of new legal concepts, institutions and techniques to enable man to meet the challenge and the dangers of the times and to realise the aspirations of all people. The lawyer should not content himself with the conduct of his practice and the administration of justice. He cannot remain a stranger to important developments in economic and social affairs if he is to fulfil his vocation as a lawyer. He should take an active part in the process of change. He will do this by inspiring and promoting economic development and social justice. The skill and knowledge of lawyers are not to be employed solely for the benefits of clients, but should be regarded as held in trust for society (ICJ 1962).

The acquisition of insights into the development process will be the beginning and not the end of a lawyer's task in Africa. Ultimately, the lawyer must concern himself or herself with the translation of government policy into a legal framework, and to contribute as far as he or she can to its successful implementation. This is a concern which goes beyond mechanical legal drafting and into institution building. This in turn requires an awareness of the perimeters or limitations of law as a technique of social control and a study of the kinds of considerations that will augment the efficacy of laws.

This poses a great challenge to the average lawyer anywhere in the world. The main concern of the practicing lawyer, engaged in litigation, is to predict the result of litigation, whereas the task of the lawyer concerned with institution building is to predict whether a specific piece of legislation will attain its intended objectives. A lawyer concerned with institution building will want to see the law providing the moral and legal basis of development. This it does in part merely by being or becoming a formal system. Such a system provides and assumes a way of looking at society as a whole. Social relations come to be seen as amenable to control, and the entire civil order is ultimately viewed as a creature of law and artifact of human desire. The growth of a formal legal system, therefore, is inextricably associated with the rationalization of man's understanding of society that is at the core of development. It is essential to development that African legal systems furnish general organizational constructs which make efficient public or private entrepreneurial activity possible.

The law can further contribute by conferring impersonality, legitimacy and to some extent, stability on the political structure of the nation state. This strengthening of the state is an important indirect contribution of the legal order to the development process because the

state provides at once; (a) a national market; (b) a centralized source of general decision making and long-range planning; and (c) a more impersonal and less restrictive centre of social gravity than the primary group.

A formal system is indispensable to the growth and workings of an industrial economy not only as a source of tools for reaching certain economic objectives but as a framework for economic life. Industrial economies call for (a) the availability of formal arrangements, whether private (e.g. contractual) or public (e.g. regulatory) which permit the ordering of economic regulations; and (b) predictability of the enforcement of such arrangements and of the interpretations which will be given to them, or, at least of the factors which will enter into that interpretation.

The impersonal process of the legal systems can accommodate the enactment of substantive policy measures that are instruments in furthering development. Thus, through specific substantive provisions, the legal order may seek to encourage capital formation, spur productivity, induce rational decision-making and facilitate the conformance of private resource allocation to publicly planned objectives. These substantive policies embedded in the law will vary according to the nature of the particular socio-economic situation confronted by the legal decision-makers and their objectives and interests. The essential point, however, is the establishment of a process of framing, interpreting and changing law that will be able to serve development needs.

5. Legal Education

In order for the legal profession to be responsive to the needs of development, legal education must be responsive to those needs and equip the lawyer with the necessary skills to enable him or her to play his or her role in the development process (Ndulo 2002) . Lawyers must be trained in such a way that they are able to appreciate the importance of community goals and how to clarify them. They should be able to relate the legal institutions, as well as social and political institutions, to the general and specific premises of development and reconstruction.

To be able to do this, a lawyer requires a sufficiently general and broad-based education to enable him or her to adapt successfully to new and different situations as his or her career develops and he or she gains adequate knowledge of the more important branches of the law and its principles, the ability to handle facts, both analytically and synthetically, and to apply the law to situations of fact. He or she needs the capacity to work, not only with clients, but with experts in different disciplines(Twining 2001; Twining 1966; Kent R. 1999). He or she must also have the professional skills and techniques which are essential to practice, a grasp of the ethics of the profession, a critical approach to existing law, an appreciation of its social

consequences, and an interest in, and positive attitude toward, appropriate development and change.

Traditional legal education does not usually impart all the skills necessary to discharge the legal function I have described as necessary to meet the challenges of development (Dayal 184). It remains largely oriented towards producing legal technicians rather than legal craftsmen. It does not train students to appreciate the importance of community goals and how to clarify them. There is need, however, to make legal education more broadly based. Every effort should be made to ensure that lawyers have some degree of sophistication in non-legal disciplines such as economics and other social sciences.

When addressing one's mind to the question of legal education one is faced with the problem of method and scope. On the one hand, there is urgency felt to provide training in the technique of the law and on the other, there is the question of degree to which attention should be given to the purposes of the law by way of training in social sciences. Law, being involved in every social relation, is in some sense an element of every social science, just as every social science is in some sense an element of law. It is wrong for the law teacher or student not to take a broad interest in the social issues. Good law is that which goes to the root of the matter. Lawmakers must understand the nature of the society for which the law is being made.

This is really a call for the lawyers in Africa to be more than legal mechanics, and understand the society in which they work and in which they can help to remold.

Changes to legal education to respond to the needs of the practicing profession and society are not new in history. Courses like administrative law were developed in the in the 1940s to provide students with an understanding of the role of administrative agencies as governmental activity grew and became central in many kinds of practice. Many law schools, beginning in the 1970s, introduced environmental law as a subject warranting separate treatment. The study of international commercial arbitration, international investment law, financial markets, technology and the law, human rights and many other subjects responded to the needs of the time. What has changed is the rapid pace at which the changes driven by technological advances and globalization of the world economy are happening.

There is also a need to promote systematic legal research in the many legal problems already mentioned and not least among which should be added the establishment of viable institutions to resolve the various political and social conflicts that pervade parts of Africa. Africa is in need of highly trained, broad minded and courageous lawyers to cope with the many challenges that confront it. Its township and squatter residents are impatient for improvement in their material well-being. Development anywhere in the world is, in a broad sense, a revolutionary process implying fundamental changes in society. *But, however,*

revolutionary the process of development may be, it is nonetheless a process that is intimately related to the legal structure of society. Institutions which are central to the wellbeing of people, freedom of the mind, ownership, trade, human rights and dignity are all dependent on a structure of law.

Conclusion

In conclusion, I would like to emphasize that the role of law and lawyers in Africa is seen here as to help the development process by understanding the social and economic matrix in which legal norms are essentially a super structure, and making the lawyers expert knowledge to bear on this process in order to make the norms more functional to the development process. It is also a necessary component of good governance. Governments are organized around institutions that are engaged in the delivery of goods and services and ensuring government accountability. Without effective and responsive institutions that are undergirded by sustained legal structures and behavioral norms that guide the actions of decision- makers governance and all its attributes will not be sustainable.

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