

Bringing Justice to the Poor

Bottom-up Legal Development Cooperation

Abstract

In the last decade a bundle of ideas has been developed, best summarized as bottom-up approaches to legal development cooperation. The approaches share a common concern that legal interventions should benefit the poor, and that their needs and preferences should form the basis for interventions. To some extent the approaches are presented as new and alternative, and better than existing practices and the existing legal development paradigm in what has been labeled as “the rule of law orthodoxy”. This paper seeks to study the content of bottom-up approaches, looking at how they are defined, how they analyze problems they seek to solve and at the measures they propagate to reach such solutions. Second, the paper addresses why these approaches have emerged over the last decade analyzing changes in development approaches, studying the critiques about preceding legal interventions and looking at criticisms of the existing the Rule of Law paradigm. Third, the paper analyzes the merits of bottom-up approaches. Recognizing the many merits of these approaches, this paper concludes that they are not complete substitutes for the current rule of law paradigm or free of some of the same problems that have plagued existing legal development cooperation practices, so often criticized. As such they offer much to existing practices and the existing rule of law paradigm, but should be seen as additions and be incorporated into existing practices instead of fully replacing them.

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Introduction

In the early 1990s law regained an important role in the field of development cooperation, and international donor organizations strongly expanded programs to strengthen legislation and legal institutions in developing countries. They did so in order to promote economic growth, good governance and human rights protection. Over the years the concept of rule of law has been an overarching paradigm that gave normative direction to projects and project prioritization, as well as bridged the various legal processes, institutions, and the different goals that international legal interventions sought to affect.

In the last decade a bundle of ideas has been developed, best summarized as bottom-up approaches to legal development cooperation. These ideas contain concepts such as “access to justice”, “legal empowerment”, and recently some scholars even coined the term “microjustice”.¹ The approaches share a common concern that legal interventions should benefit the poor, and that their needs and preferences should form the basis for interventions. To some extent the approaches are presented as new and alternative, and better than existing practices and the existing legal development paradigm in what has been labeled as “the rule of law orthodoxy”². These ideas were developed simultaneously by

¹ Maurits Barendrecht and Patricia Van Nispen tot Sevenaer, "Microjustice," (2007), <http://www.microjustice.org/>.

² Frank K. Upham, "Mythmaking in the Rule of Law Orthodoxy," in *Promoting the Rule of Law Abroad, In Search of Knowledge*, ed. T. Carothers (Washington: Carnegie Endowment for International Peace, 2006). Stephen Golub, "A House Without Foundation," in *Promoting the Rule of Law Abroad, In search of knowledge*, ed. T. Carothers (Washington D.C.: Carnegie Endowment for International Peace, 2006). David M. Trubek, "The "Rule of Law" in Development Assistance," in *The New Law and Economic Development, A Critical Appraisal*, ed. D.

donor organizations and a small group of scholars, sometimes working for the donors. Main donors of influence are the UNDP, World Bank, Commission for Legal Empowerment of the Poor (CLEP), Ford Foundation, and the Asian Development Bank (ADB). In the last decade of scholarship on international legal interventions there has been some study of these approaches³, however such study was largely done by scholars who sought to promote them as alternatives for existing programs and by donor organizations who themselves engaged in projects based on their ideas.

While these ideas are slowly gaining ground and seem to become more and more dominant replacing existing approaches and practices, we still lack an objective view of their merits and challenges. This paper seeks to make such an analysis. It does so first of all by studying the content of bottom-up approaches, looking at how they are defined, how they analyze problems they seek to solve and at the measures they propagate to reach such solutions. Doing so the paper limits itself to two types of documents: first program overviews by the main donors involved and second studies outlining general approaches by scholars. Thus it does not address bottom-up approaches in practice in particular settings in particular countries. Second, the paper addresses why these approaches have emerged over the last decade analyzing changes in development approaches, studying the critiques about preceding legal interventions and looking at criticisms of the existing the Rule of Law paradigm. Third, the paper analyzes the merits of bottom-up approaches. It does so by analyzing whether these approaches are new and alternative, and whether they offer an a solution to the problems identified in the existing rule of law paradigm and legal development cooperation practices. The paper will argue that the bottom-up approaches, while not new, are an important addition to existing practices and may solve some of the problems signaled. However, many problems remain in the new approaches while new problems may develop. In addition, the approaches do not provide a good alternative for the Rule of Law framework, lacking its inherent normative function and comprehensiveness. The conclusion of this paper will look at the wider implications of the trend shift towards bottom up approaches, discussing the challenges trend-oriented thinking bring for successful legal development cooperation.

What are Bottom-up Approaches?

The bottom-up approaches have become known mainly under two names: "Access to Justice" and "Legal Empowerment"^{4, 5}. While there is much overlap, depending on the exact

M. Trubek and A. Santos (Cambridge: Cambridge University Press, 2006). 92 discussing changes in the World bank approach moving towards bottom-up ideas. Kerry Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social," in *The New Law and Economic Development, A Critical Appraisal*, ed. D. M. Trubek and A. Santos (Cambridge: Cambridge University Press, 2006). 220

³ Michael R. Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs " *IDS Working Paper*, no. 178 (2003). Stephen Golub, "Legal Empowerment: Impact and Implications for the Development Community and the World Bank," in *The World Bank Legal Review, Law, Equity, and Development, Volume 2*, ed. C. Sage and M. Woolcock (Washington: Martinus Nijhoff, 2006). Stephen Golub, "The Legal Empowerment Alternative," in *Promoting the Rule of Law Abroad, In Search of Knowledge*, ed. T. Carothers (Washington D.C.: Carnegie Endowment for International Peace, 2006), Stephen Golub and Kim McQuay, "Legal Empowerment: Advancing Good Governance and Poverty Reduction," in *Law and Policy Reform at the Asian Development Bank, 2001 Edition*, ed. Asian Development Bank (Manila: Asian Development Bank, 2001), Barendrecht and Van Nispen tot Sevenaer, "Microjustice."

⁴ There is a clear distinction in legal empowerment approaches that seek broadly to empower the poor through the use of law (as propagated by Golub, the Ford Foundation and ADB) and approaches that use the term legal empowerment to cover work done on formalizing informal property rights of the poor (as propagated by De

approach, the difference between the two is mainly that the former take access to justice itself as the main goal, and the latter see empowerment of the weak and poor as the main goal, seeing lack of power as the basic problem underlying poverty. There is no clear boundary between the two however, as legal empowerment may involve access to justice and access to justice may involve legal empowerment.⁶

Although there is much overlap in what the bottom-up approaches seek to accomplish and how they seek to do so, there are several different strands. A first example is UNDP's access to justice approach which summarizes its approach as "supporting justice and related systems so that they work for those who are poor and disadvantaged."⁷ UNDP writes that "access to justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts." The UNDP approach to access to justice explicitly recognizes that justice systems can be found both in the formal, state institutions, as well as in informal non-state normative systems. A similar type of bottom-up approach is the World Bank's "Justice for the Poor" programme. In its background document the Bank writes: "Justice for the Poor is an attempt by the World Bank to grapple with some of the theoretical and practical challenges of promoting justice sector reform in a number of countries in Africa and East Asia. Justice for the Poor reflects an understanding of the need for demand oriented, community driven approach to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized as women, youth, and ethnic minorities."⁸ A second category of bottom-up approaches uses the name "legal empowerment" or "legal empowerment of the poor". Under this name, two broad categories of approaches can be found. First approaches introduced by donors including Ford Foundation and the Asian Development Bank, and described primarily by Golub. Under this approach "legal empowerment is the use of legal services, often in combination with related development activities, to increase disadvantaged populations' control over their lives."⁹ Golub further writes that "it is both an alternative to the problematic, state-centric rule-of-law orthodoxy and a means for making rights-based development a reality using law to support broader socioeconomic development initiatives."¹⁰ A second type of legal empowerment is based on ideas of the Peruvian economists De Soto who argues that most property and businesses of the poor cannot be capitalized as they are regulated in informal (non-state) normative systems and excluded from participation in larger markets that require formal (state) recognition.¹¹ In response to his work the High Commission for Legal

Soto, CLEP, the World Bank and USAID. The latter approaches to legal empowerment will be discussed in the next section on legal pluralism and non-state justice.

⁵ Another name is Justice for the Poor adopted by the World Bank, which is also a bottom up approach. see <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,contentMDK:21172707~menuPK:3282963~pagePK:210058~piPK:210062~theSitePK:3282787,00.html>

⁶ UNDP, *Programming for Justice: Access for All* (Bangkok: United Nations Development Programme, 2005). 137-140, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction* (Manila: Asian Development Bank,, 2000). 9-12

⁷ UNDP, "Access to Justice, Practice Note," UNDP, http://europeandcis.undp.org/files/uploads/HR/mat%20PracticeNote_AccessToJustice.pdf. 3

⁸ World Bank, "Justice for the Poor Program," (2006), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JusticeforthePoorProgramOverview.doc>.

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⁹ Golub, "The Legal Empowerment Alternative." 161

¹⁰ Ibid.

¹¹ Hernando De Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere else* (London: Black Swan, 2000).

Empowerment of the Poor (CLEP) was founded which aims to “enable the poor to use law and the legal system to realize their full human potential.”¹² While the CLEP approach to legal empowerment shares much with the UNDP and World Bank approaches to access to justice and also shares many traits of Golub’s legal empowerment alternative, it has a different focus. CLEP’s work mainly uses enhanced access to justice and legal empowerment to attain the capitalization of the poor’s property rights and thus focuses mainly on the formalization of informal enterprises and land tenure arrangements.¹³ The most recent addition to the vocabulary of the bottom-up approaches has been Barendrecht and Van Nispen tot Sevenaer’s “microjustice”. With this term they indicate an approach aiming to “reinvent first world legal institutions to suit third world environments and budgets”, and to develop “paths to justice for the poor that are sustainable economically, in the sense that they are attractive to use for the poor and at the same time attractive to deliver for suppliers, without extensive subsidies by state or by donors.”¹⁴ The microjustice approach shares many characteristics with the access to justice approaches, seeking to take away barriers to justice and good dispute resolution. In its analysis of measures to be taken it is different and largely based on market principles looking mainly at costs and benefits of justice users and suppliers, seeking to overcome justice market failures in developing countries.¹⁵

Bottom-up approaches are said to be closely connected to poverty reduction efforts. UNDP for example writes: “Access to justice is closely linked to poverty reduction since being poor and marginalized means being deprived of choices, opportunities, access to basic resources and a voice in decision-making.” Anderson similarly holds that especially the poor have limited access to legal institutions and that a state of “lawlessness” adversely influences the poor.¹⁶ Furthermore Golub and the ADB argue that legal empowerment has helped advance poverty alleviation.¹⁷ Bottom-up approaches have first of all analyzed the obstacles the poor meet when seeking justice or what legal obstacles keep the poor out of power, either in the formal legal system, and for some also in other non-state normative systems. Different studies have had different analyses, however with a large overlap. When combined and structured, the main obstacles that the poor have when seeking justice, can largely be grouped in two. First are problems related to the justice institutions (both formal and informal) and second are problems related to the poor justice seeker him/herself.

An important obstacle the poor have when engaging with the legal system is related to (formal/informal) justice institutions.¹⁸ First are problems related to legislation and other norms in the formal and informal legal systems. One problem is that such norms may suffer from an anti-poor and gender bias.¹⁹ A well known example of this is De Soto’s thesis that

¹² CLEP, "Agreed Principles and Conceptual Framework,"

http://legalempowerment.undp.org/pdf/Agreed_principles_conceptual_framework.pdf.

¹³ Ibid.

¹⁴ Barendrecht and Van Nispen tot Sevenaer, "Microjustice."

¹⁵ Ibid.

¹⁶ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs". 1-3

¹⁷ Golub, "The Legal Empowerment Alternative." 163, 166-8, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 17-9

¹⁸ LIJSTJE van ADB invoegen zie Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 32-41

¹⁹ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs". UNDP, "Access to Justice, Practice Note." Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 39-40, Barendrecht and Van

state law fails to recognize the informal property rights of the poor.²⁰ In addition, studies note that access is difficult because of the excessive number of laws²¹. A third access problem caused by legislation mentioned in the studies consulted is the alien, foreign or formalistic language of the norms.²² Apart from legislation, bottom-up approaches also blame courts or other adjudicative and enforcement institutions for failing to provide the poor with access to justice. First of all, just as norms, judges and other government justice sector officials may suffer from an anti-poor and gender bias, studies hold.²³ Anderson further states that a lack of judicial independence is an obstacle to justice.²⁴ Other problems of justice institutions are their slowness²⁵, the costs of legal process²⁶, a lack of adequate information provision of legal norms and legal practice, and the geographical distance from the poor to the courts.²⁷ Malik stresses that access to justice is obstructed due to the impunity of law enforcement agents, governments and political parties, the absence of accountability of the legal profession and professional monitoring, combined with widespread corruption and abuse of power.²⁸ Proponents of bottom up approaches furthermore stress that the poor have trouble finding effective remedies against injustice due to a lack of effective enforcement of judgments.²⁹ They further find that the poor have limited access to justice due to a lack of legal aid systems or the availability of affordable legal representation taking up their cases.³⁰ Houtzager finally argues that a lack of alternative dispute resolution (ADR) systems further worsens the poor's ability to find justice.³¹

Other obstacles the poor have when encountering the law are problems related to the poor and weak justice seeker him/herself. Bottom-up approaches find that the poor's

Nispen tot Sevenaer, "Microjustice." 5, Grizelda Mayo-Anda, "Engaging and Empowering Communities," in *Comprehensive Legal and Judicial Development*, ed. R. V. Van Puymbroeck (Washington: World Bank, 2001). 71

²⁰ De Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere else*.

²¹ UNDP, "Access to Justice, Practice Note." Barendrecht and Van Nispen tot Sevenaer, "Microjustice." 11

²² Peter Houtzager, "'We Make the Law and the Law Makes Us': Some Ideas on a Law and Development Research Agenda," in *Making Law Matter, Rules, Rights and Security in the Lives of the Poor*, ed. R. C. Crook and P. Houtzager (Norwich: IDS Bulletin Volume 32 No. 1, 2001). 15, Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". Barendrecht and Van Nispen tot Sevenaer, "Microjustice." 6

²³ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". UNDP, "Access to Justice, Practice Note." Barendrecht and Van Nispen tot Sevenaer, "Microjustice." 5

²⁴ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ".

²⁵ Barendrecht and Van Nispen tot Sevenaer, "Microjustice.", Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". De Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere else*.

²⁶ Houtzager, "'We Make the Law and the Law Makes Us': Some Ideas on a Law and Development Research Agenda." 15 Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". UNDP, "Access to Justice, Practice Note." De Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere else*. Here some refer to work by Galanter. See M. Galanter, "Why the 'Haves' come out ahead: Speculations on the limits of Legal Change," *Law and Society* 9, no. 1 (1974).

²⁷ Martín Abregú, "Barricades or Obstacles, The Challenges of Access to Justice," in *Comprehensive Legal and Judicial Development*, ed. R. V. van Puymbroeck (Washington: World Bank, 2001). 60, Barendrecht and Van Nispen tot Sevenaer, "Microjustice."

²⁸ Shahdeen Malik, "Access to Justice, A Truncated View from Bangladesh," in *Comprehensive Legal and Judicial Development*, ed. R. V. Van Puymbroeck (Washington: World Bank, 2001).

²⁹ UNDP, "Access to Justice, Practice Note."

³⁰ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". UNDP, "Access to Justice, Practice Note." Barendrecht and Van Nispen tot Sevenaer, "Microjustice." 5

³¹ Houtzager, "'We Make the Law and the Law Makes Us': Some Ideas on a Law and Development Research Agenda." 15

difficulty in using the legal system are caused by the poor's particular characteristics. They find for example that their lack of financial capacity and lack of experience in dealing with formal justice institutions obstructs success in seeking legal redress.³² A related obstacle is the poor's limited legal awareness and knowledge of the law and their rights.³³ ADB in their discussion of legal empowerment work in Asia further find that economic dependency obstructs the poor and weak to enforce their rights and seek access against dominant employers, husbands or landlords.³⁴ Perception of legal institutions and initiating litigation may also be inhibiting as the perceived social stigma of using the law to seek justice is a negative factor.³⁵ In addition, poor people tend to distrust formal institutions and the law, often such distrust coincides with perceptions that getting justice in the legal system is difficult or impossible.³⁶ The poor are further inhibited in seeking justice in formal institutions due to the fact that many live in illegality in terms of housing, tax payment or registration and fear going to a formal court, or are barred to go there in the first place.³⁷

In their portrayal of these problems and of the direction solutions should work at, bottom-up approaches use a certain normative standard, to be used in setting priorities in projects and evaluating outcomes. An example of different approaches can be found when comparing Golub with UNDP and Anderson. The access to justice studies by UNDP and Anderson, take a list of basic human rights standards as their main normative framework. UNDP writes that the problems that are addressed should always be situated in a human rights context, in order to determine a basis of accountability that people can claim and other actors should strive to comply with.³⁸ Golub's legal empowerment approach is first and foremost based on the needs of the poor and on how they themselves prioritize such needs. Such needs and priorities therefore seem to be the normative basis in his work. Human rights play a role in such needs and priorities, as he states that "the realization of empowerment, freedom, and poverty alleviation typically equals enforcement of various human rights."³⁹ He further notes that the universality of human rights is key to the legal

³² Barendrecht and Van Nispen tot Sevenaer, "Microjustice.", UNDP, "Access to Justice, Practice Note.", Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". Anderson is here influenced by Galanter, "Why the "Haves" come out ahead: Speculations on the limits of Legal Change." And by M. Cappelletti and B. Garth, "Foreword," in *Access to Justice, Vol. III: Emerging Issues and Perspectives*, ed. M. Cappelletti and B. Garth (Alphen a/d Rijn: Sijthoff and Noordhoff, 1979).

³³ UNDP, "Access to Justice, Practice Note.", Barendrecht and Van Nispen tot Sevenaer, "Microjustice." 6, Abregú, "Barricades or Obstacles, The Challenges of Access to Justice."

³⁴ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 30-1 for this point see also Abregú, "Barricades or Obstacles, The Challenges of Access to Justice." 61.

³⁵ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 36 This point is commonly made in studies of use and enforcement of contracts in Western business communities, finding that such businesses rarely use formal contracts or turn to court to enforce contracts as it may upset their long term business relations. See S.F. Moore, "Law and Social Change: the semi-autonomous social field as an appropriate subject of study," *Law and Society Review* 7 (1973). S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28 (1963).

³⁶ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". H. Dick, "Why Law Reform Fails, Indonesia's Anti-Corruption Efforts," in *Law Reform in Developing and Transitional States*, ed. T. Lindsey (London & New York: Routledge, 2007). 54-5

³⁷ Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ". CLEP, "Agreed Principles and Conceptual Framework."

³⁸ UNDP, "Access to Justice, Practice Note." 20

³⁹ Golub, "The Legal Empowerment Alternative." 166

empowerment approach.⁴⁰ Golub states, however that while legal empowerment can be seen as a rights based approach to development, it is more than that as it is “about power even more than about law,”⁴¹ and may apart from rights training and poor people’s legal capacity building, also include non-legal measures such as community organizing and literacy training.⁴² In bottom-up approaches, international human rights standards thus play an important role. A question one can ask is whether such set normative basis that largely originates from Western inspired treaties matches the bottom-up character advocated and whether human rights and poverty relief truly match in practice.

Bottom-up approaches call for sets of reforms and interventions that are seen to improve either access problems or empowerment of the poor. While there are differences, there is also quite some overlap in the actual measures that are proposed under the bottom-up approaches. Most approaches incorporate efforts directed at enhancing legal awareness, especially through education and training of rights awareness, improving legal aid to the poor including legal clinics and public interests lawyers and paralegals, developing alternative dispute resolution mechanisms and supporting local existing dispute resolution institutions, and strengthening civil society in general and helping communities get stronger organization.⁴³ In most approaches such work should be done in a participatory manner, involving poor and weak stakeholders and based upon their needs and preferences.⁴⁴ In addition several authors call for “mainstreaming” the legal sector activities into other sectors of development work both in recipient countries as well as in donor institutions.⁴⁵ Bottom-up approaches further recognize the importance of non-state traditional normative and justice systems and the fact and argue for supporting these institutions as they are closer to the weak and poor.⁴⁶ Another principle recognized in several studies is that bottom-up approaches require time and tight project cycles and an overly large portfolio of programmes should be avoided.⁴⁷ Furthermore, the studies agree that work should as least as possible be based on existing models that are wholesale transplanted, and instead work with tailor made solutions that are as close to local realities as possible.⁴⁸ Finally studies pay attention to finding sufficient support for reforms to be sought and overcoming cooptation by vested interests.⁴⁹

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Ibid.

⁴³ UNDP, "Access to Justice, Practice Note.", Golub, "The Legal Empowerment Alternative.", Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*.

⁴⁴ Golub, "The Legal Empowerment Alternative." UNDP, "Access to Justice, Practice Note." 8-9, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 85

⁴⁵ UNDP, "Access to Justice, Practice Note." 8, Golub, "The Legal Empowerment Alternative." 170, 174-6, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 120-1

⁴⁶ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. 46-7, UNDP, *Programming for Justice: Access for All*. 97-105, Golub, "The Legal Empowerment Alternative." 164

⁴⁷ UNDP, "Access to Justice, Practice Note." 9, Golub, "The Legal Empowerment Alternative." 170

⁴⁸ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*, UNDP, "Access to Justice, Practice Note." 9, Golub, "The Legal Empowerment Alternative." 164

⁴⁹ UNDP, "Access to Justice, Practice Note." 17, Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China* (Manilla: ADB, 2000). 79-80

One main difference in the measures proposed in the bottom-up approaches⁵⁰ is whether state institutions should be targeted. Many bottom-up approaches seek to establish comprehensive reforms which incorporate both state and non-state community and civil society institutions.⁵¹ As such while advocating reforms directed at supporting NGOs and community based initiatives, studies by the UNDP, Anderson and the ADB, also seek judicial independence, court reform, making legislation more pro-poor and training law enforcement officials in human rights. Golub's "legal empowerment alternative", in contrast, largely advocates funding civil society. Golub writes: "The most successful and creative legal services for the poor across the globe generally are carried out by NGOs, often in partnership with community organizations, or occasionally by law school programmes that effectively function as NGOs."⁵² While not completely precluding a role for the state, Golub's approach to legal empowerment questions whether the state can do much good. To quote him again: "Despite the best intentions of many of such (state) personnel, various actors and factors, not least their co-workers, may block them from doing their jobs properly. Related considerations that frustrate government responsiveness to the poor's legal and other needs include inappropriate resource allocation, excessive bureaucracy, corruption, patronage, gender bias, and general resistance to change."⁵³ Golub's legal empowerment approach therefore does not focus on reforming state institutions, which it finds will merely benefit elites and not help the poor.

The microjustice approach by Barendrecht and Van Nispen tot Sevenaer is in some ways different from other bottom-up approaches. While it makes a problem analysis of obstacles the poor meet when seeking justice that is similar to others, it bases its solutions largely on innovations based on work by Prahalad and Hart about making profitable products for the poor.⁵⁴ Based on this work, the microjustice seeks to create innovative legal reforms that use internet technology to help the poor participate in norm formation, enhance their knowledge of rights and have better access to dispute resolution and setting up simpler procedures for criminal justice disputes, protection against property expropriation, neighbor disputes and employment disputes. In the authors' eyes, microjustice should be run as a small scale business that provides an effective and affordable service that is sufficiently profitable and thus enabling its sustainability.⁵⁵

It is interesting to note how the general measures and their underlying principles in these bottom-up approaches are translated into actual projects. The UNDP for example provides a list of examples of projects where it supported Access to Justice. In the list of projects mentioned it becomes clear that most projects concern the criminal justice sector, including the incorporation of international standards in national legislation, enhancing human rights awareness, strengthening public defense, human rights training for courts, a crime prevention plan, training in criminal investigation skills, human rights training in police and prisons, modernizing public prosecution, and supporting a civil society network for

⁵⁰ Here we refer to the broader legal empowerment approaches and not those mainly directed at formalization of property rights. For discussion of these, see next section.

⁵¹ Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction*. UNDP, *Programming for Justice: Access for All*. Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ".

⁵² Golub, "The Legal Empowerment Alternative." 168

⁵³ Ibid.

⁵⁴ C.K. Prahalad and S.L. Hart, *The Fortune at the Bottom of the Pyramid: Eradicating Poverty Through Profits* (Upper Saddle River, NJ: Wharton Publisher, 2004).

⁵⁵ Barendrecht and Van Nispen tot Sevenaer, "Microjustice."

oversight of military and police forces.⁵⁶ While these are undoubtedly important reforms that will benefit the rights of those apprehended by the criminal justice system, one can question whether these measures would be highest on the priorities of the (especially rural) poor and whether they actually lead to poverty alleviation. In addition one can wonder whether they are in accordance with other principles mentioned such as focusing also on non-state informal/traditional institutions, whether they are based on tailor-made locally based solutions, and finally what they do with vested interests.

Perhaps in response to criticism about a lack of effectiveness of the earlier legal reform programs, studies of alternatives to such programs have attempted to demonstrate their effectiveness in practice. Golub summarizes research carried out by him and other scholars.⁵⁷ This work was done for donors including the ADB, the World Bank and the Ford Foundation. He concludes that this body of work demonstrates that legal empowerment works for the poor. In his study carried for the ADB Golub writes that legal empowerment “helps to advance good governance and to reduce poverty in both substantial and subtle ways.”⁵⁸ Similarly Manning found in his study for the World Bank that NGOs have helped legal empowerment thus alleviating poverty, while the Ford sponsored study by McClymont and Golub finds “considerable positive impact on equitable and sustainable development, as well as on human rights, civic participation, and government accountability.” While most studies look at the impact that projects have had on communities, some have also looked at the impact of such programs on national level issues. Golub summarizes the literature stating that national impact was documented, “describing numerous instances in which legal empowerment has helped generate such macro-level reform.”⁵⁹ Here especially NGOs working at the grassroots level but also participating in nation level policy and lawmaking and using public interest litigation have been influential. Finally Golub summarizes quantitative data collected by donor organizations about the effect their legal empowerment projects have had on the lives of the poor, finding considerable improvements.⁶⁰ The data presented in the works of Golub and those cited by him should be used with caution. Such data has largely been gathered by donor institutions and those hired by them in order to evaluate the projects. While of course this is done in a manner that is as objective as possible, this may cause a positive bias to creep in. As Channell writes: “Reports are written primarily by people who are paid by those who receive the reports. The writer’s job is to provide information in such a way as to meet the client’s expectations. One of those expectations is implementation success that will justify ongoing or new funding...Thus, there are few reports detailing mistakes or failures. Where they exist, implementers know how to describe them as success.”⁶¹ All data presented about successes has been highly positive and has been written in close collaboration with donor organizations that funded projects and in part by consultants who now push for the proposed alternatives to be recognized and further implemented. It seems that in order to fully ascertain the data presented more study, by true

⁵⁶ UNDP, "Access to Justice, Practice Note."

⁵⁷ Daniel Manning, *The Role of Legal Services Organizations in Attacking Poverty* (Washington D.C.: World Bank, 1999). Mary McClymont and Stephen Golub, *Many Roads to Justice, The Law Related Work of the Ford Foundation Grantees Around the World* (Washington: Ford Foundation, 2000). Golub and McQuay, "Legal Empowerment: Advancing Good Governance and Poverty Reduction."

⁵⁸ Golub and McQuay, "Legal Empowerment: Advancing Good Governance and Poverty Reduction."

⁵⁹ Golub, "The Legal Empowerment Alternative." 181

⁶⁰ Ibid. 183

⁶¹ Wade Channell, "Lessons not Learned about Legal Reform," in *Promoting the Rule of Law Abroad, In search of knowledge*, ed. T. Carothers (Washington D.C.: Carnegie Endowment for International Peace, 2006). 154

independent scholars is necessary. In such study other methodological issues should also be addressed, such as finding ways to measure impact of the bottom-up approach without measuring the impact of large donors such as the World Bank or UNDP on local and national circumstances.

Why have Bottom-up Approaches become popular?

The rise of bottom-up approaches should be understood within wider developments in the field of international development cooperation, the role that law has played therein and the way that legal interventions have been commented on in recent years. Access to justice, legal empowerment and micro-justice are in many ways reactions against trends and practices of the past or the result of recent trend changes.

A first important cause for the popularity of bottom-up approaches lies in the changes in the concept of development itself the last decades have witnessed. Development has moved from economics to wider issues of development. The earliest and still dominant approach was to see development in economic terms of growth and income distribution. Since the 1970s with the basic needs approach and since the 1980s with the human development approach, development is seen as more than economic growth or income equality.⁶² Gesper writes: "The human development approach stresses the lack of adequate connection between levels of monetized activity and levels of well-being, and frequently unreliable or perverse links to well-being from economic growth."⁶³ Even the World Bank, which was a solid economic growth proponent, has incorporated social concerns in its development approach with the adoption of the Comprehensive Development Framework in 1999.⁶⁴ With the wider approaches, development became increasingly complex and contained more and more sometimes complementary but sometimes also contrasting goals. A second change in development thinking came with the move from macro-level nationwide thinking to thinking about development in terms of sub-national groups or individuals.⁶⁵ The original economic approach was largely macro-level oriented and was based on the idea that national economic growth can trickle down to all, including the poor. In contrast with these macro-level approaches to development, micro-level, grass-roots approaches have emerged since the 1970s. The basic needs approach, which started in the 1970s, takes the poor as basis and defines development as their needs. The ILO in 1976 for example outlined such needs in terms of personal consumption (food, shelter, and clothing), access to essential services (clean water, sanitation, education, transport and healthcare), access to paid employment, and qualitative needs (healthy and safe environment, ability to participate in decision-making).⁶⁶ Another individual approach that works bottom-up has been the rights based or the human rights based approach to development, in which development is framed

⁶² Katie Willis, *Theories and Practices of Development* (New York: Routledge, 2005).

⁶³ Des Gesper, "Human Rights, Human Needs, Human Development, Human Security, Relationships between four international 'human discourses'," (2007 (forthcoming)).

⁶⁴ Richard Cameron Blake, "The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development," *Yale Human Rights and Development Law Journal* 3 (2000), Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social." 203 Alvaro Santos, "The World Bank's Uses of the "Rule of Law" Promise," in *The New Law and Economic Development*, ed. D. M. Trubek and A. Santos (Cambridge: Cambridge University Press, 2006). 268 Santos, "The World Bank's Uses of the "Rule of Law" Promise." 275

⁶⁵ For an overview see Willis, *Theories and Practices of Development*.

⁶⁶ *Ibid.* 94

in terms of rights of the poor.⁶⁷ Sen, to name another example of a bottom-up framed approach to development, sees development as “a process of expanding the real freedoms that people enjoy”, thus also basing himself on the individual.⁶⁸ In general, development has increasingly become understood in terms of poverty eradication; and poverty is less understood to solely encompass lack of income, but also includes physical vulnerability and powerlessness within existing political and social structures.⁶⁹ It is within this switch from macro-economic growth to micro-level relief for the needs of the poor that the bottom-up approaches find their root. They resonate well with the latest development policy documents and help donors to argue why money should be spent on law in the first place: to help the poor at the bottom, as legal interventions are framed from their needs.

A second reason why approaches such as access to justice and legal empowerment have become increasingly influential is that they offer an alternative paradigm, now that the existing overarching paradigm behind legal interventions, rule of law, is increasingly under attack. Scholars have been critical of the emergence of the concept of the rule of law or the way it was operationalized within the field of law and development. Kennedy argues that the concept’s inherent broadness, vagueness and its assumed neutrality made it suitable to circumvent difficult political and economic choices.⁷⁰ He is critical as he finds that the rule of law because of its inherent broadness, vagueness and assumed neutrality, offers policymakers “a domain of expertise, a program of action, which obscures the need for distributional choices or for clarity about for clarity about how distributing things one way rather than another will in fact lead to development.”⁷¹ In his view rule of law has been a way to work on development, now that there is no clear agreement on how such development can be achieved.⁷² Donors, in his view, rather maintain a vague and general concept of rule of law to avoid difficult sensitive and practical questions when cooperating with recipient officials. Other scholars agree with him, finding that donors have purposefully kept the operationalization of the rule of law into specific projects limited.⁷³ Bergling summarizes views expressed by other scholars⁷⁴ that such vagueness may make the rule of law “conceptually overburdened when it is invoked for too many potentially opposed

⁶⁷ Paul Gready and Jonathan Ensor, "Introduction," in *Reinventing Development, Translating Rights-Based Approaches from Theory into Practice*, ed. P. Gready and J. Ensor (London: Zed Books, 2005).

⁶⁸ Amartya Sen, *Development as Freedom* (New York: Anchor Books, 1999). 3

⁶⁹ H. Bernstein, "Poverty and the Poor," in *Rural Livelihoods: crisis and responses*, ed. H. Bernstein, B. Crow, and H. Johnson (Oxford: Oxford University Press, 1992). Quoted through Anderson, "Access to justice and legal process : making legal institutions responsive to poor people in LDCs ".

⁷⁰ David Kennedy, "Laws and Developments," in *Law and Development, Facing Complexity in the 21st Century*, ed. J. Hatchard and A. Perry-Kessaris (London: Cavendish Publishing Limited, 2003). David Kennedy, "The "Rule of Law", Political Choices and Development Common Sense," in *The New Law and Economic Development, A Critical Appraisal*, ed. D. M. Trubek and A. Santos (Cambridge: Cambridge University Press, 2006).

⁷¹ Kennedy, "Laws and Developments." 19

⁷² Ibid. 19

⁷³ See for example T. Lindsey, "Legal Infrastructure and Governance Reform in Post-Crisis Asia, The Case of Indonesia," in *Law Reform in Developing and Transitional States*, ed. T. Lindsey (London & New York: Routledge, 2007). 10

⁷⁴ D. Clarke, "The many meanings of the rule of law," in *Law, Capitalism and Power in Asia*, ed. K. Jayasuriya (London: Routledge, 1999). K. Jayasuriya, "The Rule of Law and Governance in the Asian State," *Australian Journal of Asian Law* 1, no. 2 (1999). R. Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusions," in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.*, ed. R. Peerenboom (London and New York: Routledge, 2004).

reasons.”⁷⁵ The concepts vagueness and its inherent many meanings and different ends may make that some goals such as promoting certainty and establishing law and order stand opposed to protecting human rights. Thus he finds that promoting a rule of law aimed at economic development, may sustain authoritarian regimes without enhancing the protection of human rights.⁷⁶ Kleinfeld has further argued that the way how the concept of rule of law has mainly been operationalized in terms of reforms directed at certain institutions, has undermined the broader reforms necessary to achieve the ends that rule of law should achieve.⁷⁷ Another line of critique stresses that legal reform is based on a false model originating from an ideal-situation that also does not exist in the West.⁷⁸ Finally there is much critique arguing that legal reforms based on a concept of rule of law will be inherently top-down, state-centered, fostering legal elites, carrying a false pretense of political neutrality, creating more formalism and bureaucracy and questioning the impact such rule of law programs can have on poverty and enhancing development however framed.⁷⁹ Bottom-up approaches such as access to justice, legal empowerment and microjustice are ambitious as they implicitly and sometimes explicitly try to be alternatives for the rule of law paradigm, which as we have seen, has been found flawed by some scholars.

Closely connected to the critique about the concept of rule of law, there has been much criticism about the legal intervention practices that were pursued under its name. The bottom-up approaches are framed as ways to deal with such critique. A first, general point of critique is that law and development practice has been ineffective in creating development, especially if development is seen as supporting the poor and the weak.⁸⁰ Further many scholars find that law and development practice suffers from a lack of knowledge, emphasizing that legal reform can only work if it is based on sufficient knowledge of what law can do for development and how it could do so.⁸¹ Several authors first of all question that it is difficult to prove that law can aid development⁸², here the ambiguity of findings about the causality of law and economic development⁸³ and of rule of law and democracy⁸⁴

⁷⁵ Per Bergling, *Rule of law on the international agenda : international support to legal and judicial reform in international administration, transition and development co-operation* (Antwerpen: Intersentia, 2006). 18

⁷⁶ Ibid.

⁷⁷ Rachel Kleinfeld, "Competing Definitions of the Rule of Law," in *Promoting the Rule of Law Abroad, In Search of Knowledge*, ed. T. Carothers (Washington D.C.: Carnegie Endowment for International Peace, 2006).

⁷⁸ Upham, "Mythmaking in the Rule of Law Orthodoxy." Trubek, "The "Rule of Law" in Development Assistance." 87

⁷⁹ Golub, "A House Without Foundation."

⁸⁰Y. Dezelay and B. Garth, "The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars," in *Adapting Legal Cultures*, ed. D. Nelken and J. Feest (Oxford: Hart Publishing, 2001), Golub, "A House Without Foundation." 3-4, Tim Lindsey, "Preface," in *Legal Reform in Developing and Transitional States*, ed. T. Lindsey (London & New York: Routledge, 2007). Xix, Thomas Carothers, "The Rule of Law Revival," in *Promoting the Rule of Law Abroad, In Search of Knowledge*, ed. T. Carothers (Washington: Carnegie Endowment for International Peace, 2006). 11

⁸¹ Thomas Carothers, "The Problem of Knowledge," in *Promoting the Rule of Law Abroad, In search of knowledge*, ed. T. Carothers (Washington D.C.: Carnegie Endowment for International Peace, 2006). Golub, "A House Without Foundation." Trubek, "The "Rule of Law" in Development Assistance." 92

⁸² Golub, "A House Without Foundation.", Stephen Golub, "Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development," in *Human Rights and Development, Towards Mutual Reinforcement*, ed. P. Alston and M. Robinson (Oxford: Oxford University Press, 2005). Carothers, "The Rule of Law Revival."

⁸³ Golub, "Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development." 302, note 9. See also Carothers, "The Problem of Knowledge." 17, Richard E. Messick, "Judicial Reform and Economic Development : A Survey of the Issues," *The World Bank Research Observer* 14, no. 1 (1999). Katharina Pistor and Philip A. Wellons, "The Role of Law and Legal Institutions in

is interesting.⁸⁵ It should be noted that establishing causal relations between law and development or law and democratization is difficult, as is measuring such causal effects.⁸⁶ Others, still believing in the law's possible contribution to development, argue that more data is necessary about exactly what kind of legal reform leads to development. Carothers and Channell for instance hold that the process of how legal change is accomplished and what it does for development are not well understood.⁸⁷ Garth holds that practice has insufficiently used social science techniques and insights as a basis for legal reform.⁸⁸ Similarly, Seidman et al. hold that successful substantive law reform (legislation reforms) should be based on thorough social scientific research about the behavior of the various norm addressees involved.⁸⁹ Tamanaha has warned, however that in many developmental contexts, such research capacity may be limited and getting policymakers and lawmakers to research. A second point of critique concerns the top-down character of law reform projects, which makes that local contexts are not sufficiently considered or incorporated.⁹⁰ Faundez writes that "despite agreement on this point in practice, an analysis of the local context is rarely carried out."⁹¹ He finds this happens because Western experts tend to take the context for granted in their own jurisdiction.⁹² Similarly, Dick states that foreign experts "being confident of their expertise and good intentions, they are under no pressure to interrogate their own political and legal culture or to investigate in any depth that of the host country."⁹³ A combination of a lack of knowledge and top-down policy and implementation may lead to unforeseen results⁹⁴, sometimes even opposed to original aims and actually weakening local contexts,⁹⁵ authors warn. In international projects, such top-down operation method further runs the danger of ethnocentricity.⁹⁶ A third point of critique is that legal reform has been

Asian Economic Development 1960-95," *Paper Presented for the Asian Development Bank, Manila* (1998). Kevin E. Davis and Michael J. Trebilcock, "Legal Reforms and Development," *Third World Quarterly* 22, no. 1 (2001).

⁸⁴ Carothers, "The Problem of Knowledge." 18

⁸⁵ Another interesting observation is that law reform does itself not "reduce incidence of corruption", as Dick notes.

⁸⁶ Golub, "A House Without Foundation." 115

⁸⁷ Carothers, "The Problem of Knowledge." Channell, "Lessons not Learned about Legal Reform." 148-9

⁸⁸ B.G. Garth, "Rethinking the Processes and Criteria for Success," in *Comprehensive Legal and Judicial Development*, ed. R. V. Van Puymbroeck (Washington: World Bank, 2001).

⁸⁹ A. Seidman, R.B. Seidman, and N. Abeyeskere, *Legislative Drafting for Democratic Social Change, a manual for drafters* (The Hague: Kluwer Law International, 2001). R. Seidman and A. Seidman, "Using Reason and Experience to Draft Country-Specific Laws," in *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, ed. A. Seidman, R. B. Seidman, and T. Walde (London: Kluwer Law International, 1999).

⁹⁰ Dezelay and Garth, "The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars." 4-5, Golub, "A House Without Foundation.", Garth, "Rethinking the Processes and Criteria for Success." 24, Julio Faundez, "Legal Reform in Developing and Transitional Countries," in *Comprehensive Legal and Judicial Development*, ed. R. V. Van Puymbroeck (Washington: World Bank, 2001). Trubek, "The "Rule of Law" in Development Assistance." Scott Newton, "The Dialectics of Law and Development," in *The New Law and Economic Development, A Critical Appraisal*, ed. D. M. Trubek and A. Santos (Cambridge: Cambridge University Press, 2006). 194, Gary Goodpaster, "Law Reform in Developing Countries," in *Law Reform in Developing and Transitional States*, ed. T. Lindsey (London & New York: Routledge, 2007). 197

⁹¹ Faundez, "Legal Reform in Developing and Transitional Countries." 378

⁹² Ibid.

⁹³ Dick, "Why Law Reform Fails, Indonesia's Anti-Corruption Efforts." 60

⁹⁴ Garth, "Rethinking the Processes and Criteria for Success." 23

⁹⁵ Faundez, "Legal Reform in Developing and Transitional Countries." 380-1

⁹⁶ Garth, "Rethinking the Processes and Criteria for Success.", Scott Newton, "Law and Development, Law and Economic and the Fate of Legal Technical Assistance," in *Lawmaking for Development*, ed. J. M. Otto, J.

too state-centered and focused on courts and processes of lawmaking.⁹⁷ As a result, scholars such as for example Golub hold, the reforms will not reach the poor and thus do little to enhance their lives and may even strengthen existing bureaucratic elites.⁹⁸ State centered approaches furthermore lack effectiveness in contexts where non-state normative systems are important and where legal reform should address issues of legal pluralism.⁹⁹ Meanwhile, other scholars find that the state is not well positioned to help the poor and that more attention should be given to civil society.¹⁰⁰ One reason for the top-down character of legal reform programs is the necessity of some donors such as the World Bank and the Inter-American Development Bank to cooperate initially with their “natural counterparts”: central governments in the targeted countries.¹⁰¹ Scholars further warn that law and development practice is insufficiently aware of its inherent political nature and is politically naive. Part of this critique concerns the assumption that legal reform is mere “technical assistance”.¹⁰² Dick notes that “the fundamental issue in reform is not the consistency of law but how the state with all its ramifications exercises its immense powers and in whose interests.” He concludes that “the key to reform is therefore not law but politics.”¹⁰³ Dezelay and Garth note that law is at the core of power and this fact is central in analyzing the function of law in society.¹⁰⁴ Reforming law, even if it is only the law’s mere technicalities, is thus reforming power. Thus they state that “law cannot be considered merely a technology to be acquired off the shelf as the best or most efficient practice.”¹⁰⁵ Scholars find that law in fact is very close to power, and that law reform is influenced by different stakeholders contesting for power. Legal

Arnscheidt, and B. Van Rooij (Amsterdam: Amsterdam University Press, 2007 (Forthcoming)), Lindsey, "Legal Infrastructure and Governance Reform in Post-Crisis Asia, The Case of Indonesia." 28.

⁹⁷ Frans Von Benda-Beckman, "Legal Pluralism and Social Justice in Economic and Political Development," in *Making Law Matter, rules Rights and Security in the Lives of the Poor*, ed. R. C. Crook and P. Houtzager (Norwich: IDS Bulletin Volume 32 No. 1, 2001). L. Nader, "The Underside of Conflict Management - in Africa and Elsewhere," in *Making Law Matter, Rules, Rights and Security in the Lives of the Poor*, ed. R. C. Crook and P. Houtzager (Norwich: IDS Bulletin Volume 32 No. 1, 2001). Golub, "A House Without Foundation." G.R. Woodman, "Customary Law in Common Law Systems," in *Making Law Matter, rules Rights and Security in the Lives of the Poor*, ed. R. C. Crook and P. Houtzager (Norwich: IDS Bulletin Volume 32 No. 1, 2001). Richard C. Crook, "Editorial Introduction," in *Making Law Matter, Rules, Rights and Security in the Lives of the Poor*, ed. R. C. Crook and P. Houtzager (Norwich: IDS Bulletin Volume 32 No. 1, 2001). Carothers, "The Problem of Knowledge."

⁹⁸ Golub, "A House Without Foundation." 109, Veronica Taylor, "The Law Reform Olympics, Measuring the Effects of Law Reform in Transition Economies," in *Law Reform in Developing and Transitional States*, ed. T. Lindsey (New York: Routledge, 2007). 98

⁹⁹ Crook, "Editorial Introduction." Von Benda-Beckman, "Legal Pluralism and Social Justice in Economic and Political Development.", Frans Von Benda-Beckman, "The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice," in *The World Bank Legal Review, Law, Equity, and Development, Volume 2*, ed. C. Sage and M. Woolcock (Washington: Martinus Nijhoff, 2006). Woodman, "Customary Law in Common Law Systems." Nader, "The Underside of Conflict Management - in Africa and Elsewhere." Carothers, "The Problem of Knowledge."

¹⁰⁰ Golub, "A House Without Foundation." McClymont and Golub, *Many Roads to Justice, The Law Related Work of the For Foundation Grantees Around the World*.

¹⁰¹ Linn A. Hammergren, "International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers," in *Beyond Common Knowledge, Empirical Approaches to the Rule of Law*, ed. E. G. Jensen and E. Helland (Stanford, C.A.: Stanford University Press, 2003). 303

¹⁰² Newton, "Law and Development, Law and Economic and the Fate of Legal Technical Assistance."

¹⁰³ Dick, "Why Law Reform Fails, Indonesia's Anti-Corruption Efforts." 53 for a similar point see Goodpaster, "Law Reform in Developing Countries." 107

¹⁰⁴ Dezelay and Garth, "The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars."

¹⁰⁵ Ibid. 5

reform may thus strengthen the position of authoritarian elites, or be successfully opposed by them if it is against their interests.¹⁰⁶ In addition, Hammergren finds that the general disinterest or resistance of the general public may be an even more formidable obstacle to successful legal reform.¹⁰⁷ Such facts are not always recognized in law and development practice, scholars hold.¹⁰⁸ In close relation to this Golub summarizes a range of studies finding that under certain contexts of vested interests, lack of political will to reform and widespread corruption reform efforts directed at state institutions have proved to be fruitless.¹⁰⁹ Similarly, studies have found that when there is a lack of demand for law reform amongst elites such reform is likely to fail to deliver its goals, and instead other reforms that will help create such demand should be supported.¹¹⁰ Law and development has made great promises it cannot fulfill, some authors find. Given the immense complexities that social engineering through law entail¹¹¹ and the inherent limitations in terms of resources, knowledge and support, the expectations about what can be achieved through legal reform should be tempered. Related to this is the speed at which change is expected. Several authors hold that legal reform can only be successful if given sufficient time,¹¹² and warn against haste and impatience.¹¹³ The problem with time is that most law and development projects run on project cycles of a short period. In line with this, scholars further find that law and development suffers from internal problems related to the donor's bureaucracy.¹¹⁴ They find that donor pressure to spend money, the use of best practices, influence of common sense appeal, preferences for accountability and measurability and certain incentive structures, combined with the inherent complexity of improving rule of law in different types of settings have led to weak project preparation, use of existing knowledge and research, goal

¹⁰⁶ Carothers, "The Rule of Law Revival." 4, Carothers, "The Problem of Knowledge." 22, Golub, "A House Without Foundation." 112-3, Hammergren, "International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers." 297, Goodpaster, "Law Reform in Developing Countries." 107

¹⁰⁷ Linn A. Hammergren, *The Politics of Justice and Justice Reform in Latin America, The Peruvian Case in Comparative Perspective* (Boulder: Westview Press, 1998). 302

¹⁰⁸ Newton, "Law and Development, Law and Economic and the Fate of Legal Technical Assistance.", Upham, "Mythmaking in the Rule of Law Orthodoxy." 76, Hammergren, "International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers." 297-8

¹⁰⁹ Golub, "A House Without Foundation." 112-4, 116, 121

¹¹⁰ Goodpaster, "Law Reform in Developing Countries." 130-1, Jeffrey A. Clark, Patricia Armstrong, and Robert O. Varenik, "The Collapse of the World Bank's Judicial Reform Project in Peru," in *Law Reform in Developing and Transitional States*, ed. T. Lindsey (London & New York: Routledge, 2007). 172-3

¹¹¹ Houtzager, "'We Make the Law and the Law Makes Us': Some Ideas on a Law and Development Research Agenda." 14-5

¹¹² Bergling, *Rule of law on the international agenda : international support to legal and judicial reform in international administration, transition and development co-operation.* 45, Faundez, "Legal Reform in Developing and Transitional Countries." 372-3, Carothers, "The Rule of Law Revival." 12, Lindsey, "Legal Infrastructure and Governance Reform in Post-Crisis Asia, The Case of Indonesia." 29-30, Dick, "Why Law Reform Fails, Indonesia's Anti-Corruption Efforts." 48, Goodpaster, "Law Reform in Developing Countries." 107

¹¹³ Allott already complained about impatient policy makers in developing countries seeking to create large social changes through programmatic use of law. A. Allott, *The Limits of Law* (London: Butterworths, 1980).

¹¹⁴ E.G. Jensen, "The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses," in *Beyond Common Knowledge, Empirical Approaches to the Rule of Law*, ed. E. G. Jensen and T. C. Heller (Stanford, C.A.: Stanford University Press, 2003). Carothers, "The Problem of Knowledge." 25-7, Bergling, *Rule of law on the international agenda : international support to legal and judicial reform in international administration, transition and development co-operation.* 45-6, Channell, "Lessons not Learned about Legal Reform.", Golub, "A House Without Foundation." 128-131. Hammergren, "International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers." 292-3

displacement seeking accountability instead of effect, weak evaluations, and thus weak information about what works and what does not and thus continuation of deficient types of projects. A decade of scholarship thus presents a bleak view of law and development practice. Law and development lacks knowledge, is out of touch with local reality, does not understand the power relations it is embedded within and fails to reach the poor it aims to help. The bottom-up approaches offer hope amidst this critique, offering alternatives for flawed and obsolete interventions, so it seems.

Are Bottom-up Approaches good alternatives?

The bottom-up approaches thus seem to offer an alternative to the existing rule of law programs. The question is though whether the bottom-up approaches alternatives to the existing rule of law paradigm and legal reform practices. This leads to three questions, first are the approaches are truly new and alternative? Second, do the bottom-up approaches form a valid and workable alternative for the existing normative and comprehensive rule of law paradigm for legal interventions? Third, do bottom-up approaches effectively deal with the existing problems of past and existing approaches to legal interventions?

The answer to the first question whether the approaches are new, can be short: not really. Many of the reform measures that have been propagated in the legal empowerment and access to justice approaches seem to have had a longer history than now presented. While some may present such approaches as alternatives¹¹⁵, implying that they are new, in fact they are not. Law and development practice aiming to enhance access to justice and supporting legal aid, legal awareness programs, and court reform aimed at better access, have been developed at least since the 1970s.¹¹⁶ Internationally operating donor foundations such as the Ford Foundation and Novib have played an important role strengthening access to justice and working on legal empowerment from the 1970s onwards, while national governments in developing countries have themselves also looked at ways how to strengthen access to their justice institutions.¹¹⁷ In addition, Blake states that in reaction to critiques of the Law and Development Movement in the 1970s, an alternative “micro paradigm to law and development practice” emerged, which sought to developing law and legal resources for the poorest of the poor. He mentions organizations such as the International Center for Law in Development, the International Development Law Institute and the International Third World Legal Studies Association, as main micro law and development proponents founded in the early 1980s. In addition he mentions efforts including operations on human rights, land reform, environmental and natural resources, legal literacy, legal services, gender law, labor law, consumer law, and housing and tenant law, all carried out to by organizations seeking to aid the poor.¹¹⁸ Meanwhile, legal reform efforts targeting civil society continued in

¹¹⁵ Golub, "The Legal Empowerment Alternative."

¹¹⁶ For a good overview of the practices that have been early 1980s see Blake, "The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development." 169-70

¹¹⁷ An example is China's huge legal awareness program the *puja* legal dissemination campaigns. See Ronald J. Troyer, "Publicizing New Laws: The Public Legal Education Campaign," in *Social Control in The People's Republic of China*, ed. R. J. Troyer, J. P. Clark, and D. G. Royek (New York: Praeger, 1989). M. Exner, "Convergence of ideology and the law: the functions of the legal education campaign in building a Chinese legal system," *Issues and Studies*, no. August (1995).

¹¹⁸ Blake, "The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development." See also James C.N. Paul, "Foreword: Law and Development and Peter Slinn," in *Law and Development: Facing Complexity in the 21st Century*, ed. J. Hatchard and A. Perry-Kessaris (London: Cavendish Publishing Limited, 2003). x

the 1990s, such as for example USAID emphasis on working with NGOs in their Latin American legal reform projects under the Clinton administration.¹¹⁹ The academic study of access to justice outside of the field of law and development also has a longer history. Especially the series of volumes under the general editorship of Cappelletti in 1978 and 1979 have been very important, both in terms of their conceptual analysis and comparative data collection, including some studies of non-western countries. Especially noteworthy is Cappelletti and Garth's work, outlining the field of A2J at the time¹²⁰, based on a worldwide survey¹²¹, Johnson, outlining strategies for enhancing access¹²², Friedman's study which provides a framework of different access problems, origins of such problems and possible solutions¹²³, Trubek's article on advocacy¹²⁴, Koch's piece with anthropological approaches¹²⁵ and finally Bush's article on A2J in Africa and how to deal with pluralism.¹²⁶ Other important studies include Galanter's work on the US, arguing that the poor have worse access to justice due to lack in finance and litigation experience¹²⁷, and Felstiner et al.'s conceptualization of access to justice elements seeing them as a sequence of processes that enable justice seekers to find remedies for grievances.¹²⁸ Present studies of access to justice and legal empowerment only make limited reference to such existing work or to practice developed in the past. Of the older work mainly Galanter and Felstiner et al.'s work is used to a certain extent while the extensive and rich body of research under Cappelletti is largely ignored. In sum, although there are new ideas, some not tested and in a very initial phase, such as the approaches to microjustice, and the emphasis in bottom-up approaches is new, bottom-up approaches in general are not new. Work on strengthening legal aid, legal aid clinics and enhancing legal awareness has been carried out by international donors since the 1970s. Similarly we see that at the national level actors, both state and non-state have developed similar programs. It seems that the critique against existing legal reform projects, as discussed in the previous section, has been based on a limited portrayal of existing practices and is somewhat of a caricature. This seems in part to be done in order to argue a

¹¹⁹ Hamnergren, "International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers." 311

¹²⁰ M. Cappelletti and B. Garth, "Access to Justice: The Worldwide Movement to Make Rights Effective, A General Report," in *Access to Justice, Vol 1 A World Survey, Book 1*, ed. M. Cappelletti and B. Garth (Alphen a/d Rijn: Sijthoff and Noordhoff, 1978).

¹²¹ M. Cappelletti, "Access to Justice Project Questionnaire," in *Access to Justice, Vol I: A World Survey, Book 1*, ed. M. Cappelletti and B. Garth (Alphen a/d Rijn: Sijthoff and Noordhoff, 1978).

¹²² Earl Johnson, "Thinking About Access: A Preliminary Typology of Possible Strategies," in *Access to Justice, Vol. III: Emerging Issues and Perspectives, Book 1*, ed. M. Cappelletti and B. Garth (Alphen a/d Rijn: Sijthoff and Noordhoff, 1979).

¹²³ Lawrence M. Friedman, "Access to Justice: Social and Historical Context," in *Access to Justice, Vol II: Promising Institutions, Book 1*, ed. M. Cappelletti and J. Weisner (Alphen a/d Rijn: Sijthoff and Noordhoff, 1978).

¹²⁴ David M. Trubek, "Public Advocacy: Administrative Government and the Representation of Diffuse Interests," in *Access to Justice, Vol. III: Emerging Issues and Perspectives*, ed. M. Cappelletti and B. Garth (Alphen a/d Rijn: Sijthoff and Noordhoff, 1979).

¹²⁵ Klaus F. Koch, "Access to Justice: An Anthropological Perspective," in *Access to Justice, Vol IV: The Anthropological Perspective, Patterns of Conflict Management: Essays in the Ethnography of Law* ed. K. F. Koch (Alphen a/d Rijn: Sijthoff and Noordhoff, 1979).

¹²⁶ Robert A. Bush, "A Pluralistic Understanding of Access to Justice: Developments in Systems of Justice in African Nations," in *Access to Justice, Vol. III: Emerging Issues and Perspectives*, ed. M. Cappelletti and B. Garth (Alphen a/d Rijn: Sijthoff and Noordhoff, 1979).

¹²⁷ Galanter, "Why the 'Haves' come out ahead: Speculations on the limits of Legal Change."

¹²⁸ W. Felstiner, R. Abel, and A. Sarat, "The Emergence and Transformation of Disputes: naming, blaming, claiming," *Law and Society Review* 15 (1980-1981).

strong move away from law and development practices directed at the state or in cooperation with state institutions.

A second question is whether the bottom-up approaches are good alternatives for the overarching rule of law paradigm. In other words can we do away with rule of law with its flaws of being state centered, broad and vague. Some proponents of the legal empowerment alternative, especially Golub, would answer yes. They have been key in criticizing the rule of law based legal reforms and have coined the term “rule of law orthodoxy” for it, arguing that legal empowerment is a good alternative framework for rule of law.¹²⁹ The problem with Golub’s legal empowerment approach is that it lacks the comprehensiveness of rule of law, as it does not include work to be carried out on state actors, which do in the end influence the laws and the higher echelons of the justice sector that form the final justice guarantee if local dispute resolution mechanisms fail. While the access to justice approaches, especially those by UNDP are much broader and do include a variety of state and non-state actors, they also lack essential elements covered in the rule of law concept. The concept of rule of law covers a broad range of ends including legal equality, law and order, predictability and the protection of human rights.¹³⁰ Access to justice approaches, as framed by UNDP based on Felstiner et al’s framework, fail to cover important issues including law and order, predictability and the prevention of grievances. In addition the bottom-up paradigms may not serve the same normative function as rule of law. Rule of law is a central normative concept that addresses the meaningful restraints to governmental action. While its essence is clear its exact content is more obscure and can be defined differently in different settings and countries. This has made it useful to give broad normative direction while not becoming overly ethnocentric. The bottom-up approaches either fail to provide an overarching normative framework, or seek to find such framework in basic human rights treaties. While the normative elements in such treaties are important and connecting legal reform work to human rights holds many advantages¹³¹, human rights treaties may themselves in certain contexts and countries be viewed as Western products aimed against the national interests. This may especially apply to second and third generation human rights treaties containing social, political and group rights, especially important seen from the needs of the poor, but that are still contested even in the Western world. In sum, it seems that the new approaches have much to add to the existing framework of rule of law. They focus work on the poor and on the actual realities they face, they include strong ideas to change existing power relations and a strong normative view against injustice. However, they are no full alternative to rule of law as Golub argues, but rather we think should be combined with the existing paradigm. While much of the critique on the concept of rule of law is valid, and the alternatives may actually deal with some points of critique, it is a pity that with the increased critique rule of law itself has become circumspect. Quoting Bergling: “That the rule of law is controversial and insufficiently theorized thus not mean that the concept lacks utility. Rather its inherent qualities as a political declaration because its core elements, however defined, are minimum requirements of any decent society.”¹³²

The third question that needs to be answered is to what extent the bottom-up approaches tackle the problems noted in earlier legal reform efforts as portrayed in the

¹²⁹ Golub, "The Legal Empowerment Alternative."

¹³⁰ Kleinfeld, "Competing Definitions of the Rule of Law."

¹³¹ Gready and Ensor, "Introduction." Peter Uvin, *Human Rights and Development* (Bloomfield: Kumarian Press, 2004).

¹³² Bergling, *Rule of law on the international agenda : international support to legal and judicial reform in international administration, transition and development co-operation.*

literature. The approaches hold many important ideas. They make the poor central and try to base reforms on their practices, thus trying to bridge the gap between their needs and what the law has to offer. They are well aware of the political reality and the resistance that reforms may encounter and actually strive to change power relations. When studied closer it seems that the bottom-up approaches even though they offer ameliorations still suffer from some of the old problems. First of all, even though positive effects have been reported, the data it is based on, as mentioned is not sufficiently independent and suffers from methodological challenges, as any study about the causal relation between law and development, to be taken as presented. Thus the extent to which the bottom-up approaches help aid the poor is not entirely certain. For this more time needs to have elapsed and more research needs to be carried out by academics not working directly as evaluators employed by donors. Second, while there has been significant critique of the lack of knowledge used in existing legal development practices, no one has wondered what the knowledge base for the bottom-up approaches is. Although there is a large body of studies about access to justice and legal empowerment, especially from the late 1970s, this work is limitedly used in the design of the new approaches which as a result also stand on a thin knowledge base, using frameworks not coherently operationalized. A good example of the last is the way in which UNDP has reframed Felstiner et al's access to justice model in which access is seen as the process from grievance to remedy, which includes five elements, the last of which is the enforcement of judgments. Such enforcement thus indicates the execution of adjudicative decisions aimed to give remedies for grievances. However, in their explanation of this last element of their access to justice model, UNDP interprets enforcement in a different way discussing unjust practices as they may occur in criminal law enforcement. The UNDP access to justice framework thus incoherently mixes execution of judgments as an element from grievance to remedy with preventing injustice in criminal law enforcement.¹³³ Third, bottom-up approaches still contain some top-down elements: such as the human rights normative basis, the resultant focus (at least by the UNDP) on criminal justice projects that do not seem to originate from preferences of the (rural) poor, a blue-print model of reform measures to be taken, even though there is awareness for local variation, and the set belief that NGOs represent the poor especially in the approach favored by Golub, while many may be based in national capitals and may speak for the poor rather than truly represent them.¹³⁴ Jensen has argued that true representation is a fiction, as he states that "those who should reasonably be considered stakeholders are simply too numerous." While as such involving NGOs is important, and to some extent already done in existing programs, bottom-up approaches are probably not fully able to overcome the challenges of truly giving the poor a voice in legal reform. Fourth, bottom-up approaches are indeed less state-centered and less biased merely on court reform than the criticized older forms of law reforms. However, there is a danger that by over-focusing on civil society, as especially Golub does, that necessary elements in the state institutions may be neglected. Fifth, bottom-up approaches, in contrast with the critiqued forms of legal reform, do pay attention to the political nature of political reform and existing power structures, and to some extent aim to change such power structures. How this is exactly done in practice and with what effect remains unclear from the studies assessed here. If successful in changing existing power structures and empowering the weak, larger questions about what gives donors the right to change existing

¹³³ UNDP, "Access to Justice, Practice Note."

¹³⁴ Jensen, "The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses." 355-7

power structures, how to select those that may benefit from it, what limits there are to changing such power structures and what state sovereignty then means should be answered, which are not addressed. Sixth, the bottom-up approaches may also suffer from over-ambitiousness just as programs did in the past. When reading the studies and policy document the aims of these programs are far-reaching alleviating poverty, eradicating injustice and protecting human rights, while changing existing power structures, not only locally but also nationally. Such ambitions could easily lead to disappointment, just as happened with former legal reforms. There is awareness in the documents that the changes proposed take time, however whether specific measures taken actually are given such time largely depends on the bureaucratic framework of the donor institution, which does not seem changed. And this brings us to the seventh point of critique of former approaches: the bureaucratic obstacles within donor organizations and how these perpetuate failure. There is no indication that with the new approaches the fundamental functioning of donor organizations has changed. They remain driven for success, if possible easily measurable and detectable within limited timeframes, depending on a limited group of consultants and operating with a limited view of existing knowledge and caring more for repetition than innovation.¹³⁵

Conclusion

Bottom-up approaches to legal development cooperation are important and necessary. They direct focus on the poor and weak and address how vested powers can obstruct the interests of disenfranchised people. They offer ways to direct legal reform programs outside of the legal box and combine them with political measures such as advocacy, organization and participation. Access to justice and legal empowerment are thus essential, however they are not magic bullets. Recognizing the many merits of these approaches, this paper concludes that they are not complete substitutes for the current rule of law paradigm or free of some of the same problems that have plagued existing legal development cooperation practices, so often criticized. As such they offer much to existing practices and the existing rule of law paradigm, but should be seen as additions and be incorporated into existing practices instead of fully replacing them. Here our findings are similar to an earlier study of “the micro-paradigm to law and development” by Blake, arguing that while “micro-theory is a constructive, hopeful path for the disadvantaged...microdevelopment is not a panacea: many problems cannot be effectively addressed by grassroots techniques alone.”¹³⁶ While Golub has been strongly critical of the existing rule of law paradigm and the state-centered approaches to legal development cooperation, and he himself is a major proponent behind

¹³⁵ It is interesting to note that Hammergren makes a related point that a change towards collaborating with civil society and initiating advocacy and legal aid type work did not change issues of evaluation and accountability. She does so when discussing the limited impact the collaboration USAID's collaboration with NGOs had in the 1990s: “NGOs, much like the collaborating government agencies, were notorious for resisting monitoring and evaluation. USAID, lacking its partners' political connections, often found it easier to accept the argument that the others knew better and so should be allowed to follow their instincts, rather than having to defend their methods and document their progress.” Hammergren, "International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers." 311-3

¹³⁶ Blake, "The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development." 170-1

the “legal empowerment alternative”, even he recognizes the need to combine such approaches with existing rule of law based work on state institutions.¹³⁷

Law and development is a field of strong trends. Over the decades it has moved back and forth, from the Law and Development movement in the 1960s to its critique and downfall in the 1970s, to micro-approaches to law and development in the early 1980s, to law’s importance for markets in the early 1990s, to rule of law becoming a goal of development in the late 1990s, to the bottom-up approaches that have gained importance since 2000. Law and development is a field of trends just as development is one. One constant factor in both fields is a critical attitude to the past and present, combined with great hope for trends propagated for the future. The emergence of bottom up approaches in the last decade is a good example. On the one hand have these approaches developed amidst growing critique of existing programs, on the other the new approaches themselves are presented with great hope emphasizing their merits with little recognition of their possible limits. A possible explanation for the seeming contradiction between critique and hope is that the hope created by trend shifts offers possibilities to reinvigorate public support for programs that are inherently challenging and open to critique. Trend shifts thus belong to the field of law and development. Scholars should however be careful not to be overly drawn into such trends and continue to offer data that help inform policy makers to make the right choices to improve existing programs. For this more research about the effects of projects carried out under the bottom-up approaches is necessary, especially research carried out by independent scholars not doing so as evaluations for donors, neither mainly seeking to promote new paradigms.

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¹³⁷ Golub, "Less Law and Reform, More Politics and Enforcement: A Civil Society Approach to Integrating Rights and Development."

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