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# Bringing Justice to the Poor, Bottom-up Legal Development Cooperation

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In the last decade bottom-up approaches to legal development cooperation have become increasingly popular. Examples are reform ideas and programmes using concepts such as 'access to justice' and 'legal empowerment.' These approaches share a common concern that legal interventions should benefit the poor, and that their needs and preferences should form the basis for legal reforms. Proponents argue that these approaches are important alternatives to ineffective pre-existing legal reform practices which were based on 'the rule of law orthodoxy.' This paper critically discusses the content, context and merits of such bottom-up approaches. It concludes that while these approaches offer advantages, they should not substitute but complement pre-existing legal development cooperation practices and the rule of law paradigm on which they are based. The emergence of these new approaches shows how much legal development cooperation is a field of trends, where doubts about their effectiveness force legal reformers to regularly shift from one paradigm to the next, enthusiastically applauding the seemingly new, while sacrificing the caricaturized old.

## Introduction

In the early 1990s, law regained an important role in the field of development cooperation. International donor organizations strongly expanded programmes 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 the rule of law has been an overarching paradigm that gave normative direction to projects and project prioritization, and

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that has bridged the various legal processes, institutions, and the different goals that international legal interventions sought to affect.[1]

In the last decade, legal development cooperation gradually moved in a different direction, as a new bundle of ideas developed, best summarized as bottom-up approaches to legal development cooperation, which focused on the end-users of justice systems, rather than on the institutions that make up such systems. These ideas contain concepts such as 'access to justice', 'legal empowerment', and recently some scholars have even coined the term 'microjustice'.[2] These approaches share a common concern that legal interventions should directly or specifically benefit the poor, rather than trickling down to possibly help them through systemic, institutional reforms 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 which have jointly been labelled as 'the rule of law orthodoxy.'[3] The new approaches have been developed simultaneously by donor organizations and a small group of scholars, sometimes working for the donors. Influential donors include the UNDP, the World Bank, the Commission for Legal Empowerment of the Poor (CLEP), the Ford Foundation, the UK Department for International Development (DfID), and the Asian Development Bank (ADB). In the last decade of scholarship on international legal interventions there has been some study of these approaches.[4] However, until recently such studies were often carried out by scholars who sought to promote them as alternatives to existing programmes

[1] Thomas Carothers, 'The Rule of Law Revival', in: 77(2) *Foreign Affairs* (1998); Thomas Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* 2006; David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development, a Critical Appraisal* 2006; E.G. Jensen and T.C. Heller (eds.), *Beyond Common Knowledge, Empirical Approaches to the Rule of Law* 2003; Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-Operation* 2006; B.Z. Tamanaha, 'The Lessons of Law and Development Studies, Review Article', in: 89 *The American Journal of International Law* (1995).

[2] Maurits Barendrecht and Patricia Van Nispen tot Sevenaer, 'Microjustice', (2007), <www.microjustice.org/>.

[3] Frank K. Upham, 'Mythmaking in the Rule of Law Orthodoxy', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* 2006. Stephen Golub, 'A House without Foundation', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* 2006. David M. Trubek, 'The "Rule of Law" in Development Assistance', in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development, a Critical Appraisal* 2006 at p. 92, discussing changes in the World Bank's approach moving towards bottom-up ideas. Kerry Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social', in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development, a Critical Appraisal* 2006, p. 220.

[4] 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',

and by donor organizations which themselves engaged in projects based on their ideas.

While these ideas are slowly gaining ground, we still lack a comprehensive and objective view of their merits and challenges. This paper seeks to offer such a view. First of all, it does so by studying the content of bottom-up approaches, looking at how they are defined and how they analyze the problems they seek to solve, as well as at the measures they propagate to reach such solutions. Here, the paper is limited to two types of documents: (1) programme overviews by the main donors involved, and (2) studies outlining general approaches by scholars. Second, this paper addresses why these approaches have emerged over the last decade, analyzing changes in development approaches, studying the critiques of preceding legal interventions and looking at the criticisms of the existing rule of law paradigm. Third, the paper analyzes the merits of bottom-up approaches. It does so by first analyzing the effects of bottom-up approaches on increasing access to justice and legal empowerment. It does so, secondly, by providing a more general analysis as to whether these approaches are new and alternative, and whether they offer a solution to the problems identified in the existing rule of law paradigm and legal development cooperation practices. This paper will argue that the bottom-up approaches, while not new, are an important addition to existing practices and may solve some of the diagnosed problems. However, many problems with the new approaches remain, while new challenges will 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 that trend-oriented thinking brings for successful legal development cooperation.

## What Are Bottom-up Approaches?

The bottom-up approaches have become known mainly under two names: 'Access to Justice' [5] and 'Legal Empowerment'.[6] While there is a great deal of overlap,

in Caroline Sage and Michael Woolcock (eds.), *The World Bank Legal Review, Law, Equity, and Development, Vol. 2* 2006.

[5] 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 carried out on formalizing the informal property rights of the poor (as propagated by De 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.

[6] 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/

depending on the exact approach, the difference between the two is mainly that the former considers access to justice itself to be the main goal, and the latter considers the empowerment of the weak and the poor to be 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.[7]

*Definitions*

Although there is a great deal of 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 UNDP summarizes as 'supporting justice and related systems so that they work for those who are poor and disadvantaged.'[8] 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.[9]

A second category of bottom-up approaches uses the name 'legal empowerment' or 'legal empowerment of the poor.' Under this notion, two broad categories of approaches can be discerned. The first category of legal empowerment approaches was introduced by donors including the Ford Foundation and the Asian Development Bank, and described primarily by Golub. Here 'legal empowerment is the use of legal services, often in combination with related development activities,

EXTJUSFORPOOR/0,,contentMDK:21172707~menuPK:3282963~pagePK:210058~piPK:210062~theSitePK:3282787,00.html>.

[7] UNDP, *Programming for Justice: Access for All* 2005, pp. 137-140, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank, Legal Empowerment: Advancing Good Governance and Poverty Reduction* 2000, pp. 9-12.

[8] UNDP, 'Access to Justice, Practice Note', UNDP, <http://europeandcis.undp.org/files/uploads/HR/mat%20PracticeNote_AccessToJustice.pdf>, p. 3.

[9] World Bank, 'Justice for the Poor Program', (2006), <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/JusticeforthePoorProgramOverview.doc.>, p. 1.

to increase disadvantaged populations' control over their lives.'[10] 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.'[11] In 2010, Golub concisely defined legal empowerment as 'the use of law to specifically strengthen the disadvantaged.'[12] He explains that 'the use of law' does not merely refer to legislation and court decisions but a broad spectrum of laws, regulations, contracts and customary or religious justice systems; 'specifically' expresses the focus on the disadvantaged; 'strengthen' is the empowerment feature, which he sees as 'increasing people control over their lives'; while 'disadvantaged' includes the poor generally, but also specific marginalized groups or individuals 'afflicted by discrimination or other injustices.'[13] In a report for USAID, John Bruce et al. similarly write that

> Legal empowerment of the poor occurs when the poor, their supporters, or governments – employing legal and other means – create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization. Empowerment is a process, an end in itself, and a means of escaping poverty.[14]

The second category of legal empowerment approaches is based on ideas of the Peruvian economist 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 are excluded from participation in larger markets that require formal (state) recognition.[15] In response to his work, the High Commission for Legal 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.'[16] 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.[17]

[10] Golub, 'The Legal Empowerment Alternative', at p. 161.

[11] Golub, 'The Legal Empowerment Alternative'.

[12] Stephen Golub, 'What Is Legal Empowerment, an Introduction', in Stephen Golub (ed.), *Legal Empowerment: Practitioners' Perspectives* 2010, p. 13.

[13] Stephen Golub, 'What Is Legal Empowerment'.

[14] John W. Bruce et al., *Legal Empowerment of the Poor: From Concepts to Assessment* 2007.

[15] Hernando De Soto, *The Mystery of Capital, Why Capitalism Triumphs in the West and Fails Everywhere Else* 2000.

[16] CLEP, 'Agreed Principles and Conceptual Framework', <http://legalempowerment.undp.org/pdf/Agreed_principles_conceptual_framework.pdf>.

[17] Ibid.

*Common goals and problem analyses*

Bottom-up approaches are said to be closely connected to poverty reduction efforts. UNDP for example states that

> Access to justice is a vital part of the UNDP mandate to reduce poverty and strengthen democratic governance. Within the broad context of justice reform, UNDP's specific niche lies in supporting justice and related systems *so that they work for those who are poor and disadvantaged*.[18]

Anderson similarly holds that especially the poor have limited access to legal institutions and that a state of 'lawlessness' adversely influences the poor.[19] Furthermore, Golub and the ADB argue that legal empowerment has helped advance poverty alleviation.[20]

Bottom-up approaches share a common analysis of the obstacles that the poor meet when seeking justice or of what legal obstacles there are in keeping the poor out of power. They do so by looking at the state legal system, and sometimes also at other non-state normative systems. Different studies have provided different analyses, however with one large overlap. When combined and structured, the main obstacles that the poor face when seeking justice or empowerment through legal means can largely be organized in two groups: (1) problems/obstacles related to the justice supply side (including norms and institutions, both formal and informal), and (2) problems/obstacles related to the poor justice seeker him/herself.

Proponents of bottom-up approaches blame justice suppliers for failing to benefit the poor. It all starts with the norms which are thought to have an anti-poor bias, in content as well as in their alien, formal and complex form. A well known example of this is De Soto's thesis that state law fails to recognize the informal property rights of the poor.[21] Problems in the norms are exacerbated by justice institutions which suffer from a similar anti-poor bias[22] and a lack of independence from elites.[23] The poor face an even more daunting task, bottom-up proponents hold, because of the slowness of legal procedures,[24] the costs of legal

[18] UNDP, 'Access to Justice, Practice Note'.

[19] Anderson, 'Access to Justice and Legal Process', at pp. 1-3.

[20] Golub, 'The Legal Empowerment Alternative', at pp. 163, 166-168, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*', at pp. 17-19.

[21] De Soto, *The Mystery of Capital.*

[22] Anderson, 'Access to Justice and Legal Process'. UNDP, 'Access to Justice, Practice Note', at p. 5

[23] Anderson, 'Access to Justice and Legal Process'.

[24] Barendrecht and Van Nispen tot Sevenaer, 'Microjustice'; Anderson, 'Access to Justice and Legal Process', De Soto, *The Mystery of Capital.*

process,[25] a lack of adequate information provision of legal norms and legal practice, and the geographical distance to the courts.[26] Widespread corruption and abuse of power combined with a limited accountability of the legal profession and professional monitoring are other important negative factors.[27] Proponents of bottom-up approaches furthermore stress that the poor have problems in finding effective remedies against injustice due to a lack of effective enforcement of judgments.[28] They further find that the poor have difficulty in using justice institutions because of a lack of legal aid systems or the availability of affordable legal representation to take up their cases,[29] as well as the limited development of alternative dispute resolution (ADR) systems. [30]

Bottom-up proponents also blame the poor's particular characteristics for undermining their ability to make effective use of justice institutions. They find, for example, that the poor's lack of financial capacity and experience in dealing with formal justice institutions obstructs success in seeking legal redress.[31] A related obstacle is the poor's limited legal awareness and knowledge of the law and their rights.[32] ADB in its discussion of legal empowerment work in Asia further finds that economic dependency obstructs the poor and the weak in enforcing their rights and seeking access against dominant employers, husbands or landlords.[33] The poor's perception of legal institutions and of initiating litigation can be

[25] Peter Houtzager, 'We Make the Law and the Law Makes Us': Some Ideas on a Law and Development Research Agenda', in: Richard C. Crook and Peter Houtzager (eds.), *Making Law Matter, Rules, Rights and Security in the Lives of the Poor*, in: 32(1) *IDS Bulletin* (2001), p. 15, Anderson, 'Access to Justice and Legal Process', UNDP, 'Access to Justice, Practice Note', De Soto, *The Mystery of Capital*. Here some refer to work by Galanter. See M. Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change', in: 9(1) *Law and Society* (1974).

[26] Martín Abregú, 'Barricades or Obstacles, the Challenges of Access to Justice', in Rudolph V. van Puymbroeck (ed.), *Comprehensive Legal and Judicial Development*, 2001, p. 60, Barendrecht and Van Nispen tot Sevenaer, 'Microjustice'.

[27] Shahdeen Malik, 'Access to Justice, a Truncated View from Bangladesh', in Rudolph V. Van Puymbroeck (ed.), *Comprehensive Legal and Judicial Development* 2001.

[28] UNDP, 'Access to Justice, Practice Note'.

[29] Anderson, 'Access to Justice and Legal Process', UNDP, 'Access to Justice, Practice Note', Barendrecht and Van Nispen tot Sevenaer, 'Microjustice', at p. 5>

[30] Houtzager, 'We Make the Law and the Law Makes Us', at p. 15.

[31] Barendrecht and Van Nispen tot Sevenaer, 'Microjustice'; UNDP, 'Access to Justice, Practice Note'; Anderson, 'Access to Justice and Legal Process'. Anderson is here influenced by Galanter, 'Why the "Haves" Come out Ahead', and by M. Cappelletti and B. Garth, 'Foreword', in M. Cappelletti and B. Garth (eds.), *Access to Justice, Vol. III: Emerging Issues and Perspectives* 1979.

[32] UNDP, 'Access to Justice, Practice Note', Barendrecht and Van Nispen tot Sevenaer, 'Microjustice', at p. 6, Abregú, 'Barricades or Obstacles'.

[33] Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, at pp. 30-31. For this point see also Abregú, 'Barricades or Obstacles', at p. 61.

inhibiting because of the perceived social stigma of using the law to seek justice.[34] In addition, poor people are believed to distrust formal institutions and the law; often such distrust coincides with the perception that achieving justice through the legal system is difficult or impossible.[35] The poor are further inhibited in seeking redress for injustices in formal institutions due to the fact that many live in illegality in terms of housing, tax payment or registration and a fear of going to a formal court, or are barred from doing so in the first place.[36]

*Common solutions*

Bottom-up approaches call for sets of reforms and interventions to improve access to justice or the (legal) 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. Generally, bottom-up approaches incorporate efforts directed at enhancing legal awareness, especially through providing education and training in rights awareness, and through improving legal aid to the poor. This includes legal aid clinics and legal assistance by public interest lawyers and paralegals. This stimulates the development alternative dispute resolution mechanisms and supports local existing dispute resolution institutions. It also strengthens civil society in general and helps communities to obtain stronger organization.[37] Most bottom-up approaches advocate a participatory manner of work in performing the discussed legal awareness and legal aid improvement efforts. [38] In addition, several authors call for 'mainstreaming' legal sector activities into other sectors of development work, both in recipient countries as well as in donor institutions.[39]

[34] Anderson, 'Access to Justice and Legal Process', Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, at p. 36. This point is commonly made in studies on the use and enforcement of contracts in Western business communities, finding that such businesses rarely use formal contracts or resort to the courts 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', in: 7 *Law and Society Review* (1973). S. Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study', in: 28 *American Sociological Review* (1963).

[35] Anderson, 'Access to Justice and Legal Process', H. Dick, 'Why Law Reform Fails, Indonesia's Anti-Corruption Efforts', in T. Lindsey (ed.), *Law Reform in Developing and Transitional States* 2007, pp. 54-55.

[36] Anderson, 'Access to Justice and Legal Process', CLEP, 'Agreed Principles and Conceptual Framework'.

[37] UNDP, 'Access to Justice, Practice Note', Golub, 'The Legal Empowerment Alternative', Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*.

[38] Golub, 'The Legal Empowerment Alternative', UNDP, 'Access to Justice, Practice Note', pp. 8-9, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, at p. 85.

[39] UNDP, 'Access to Justice, Practice Note', at p. 8, Golub, 'The Legal Empowerment Alternative', at pp. 170, 174-176, Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, at pp. 120-121.

Bottom-up approaches further recognize the importance of non-state traditional normative and justice systems and argue for supporting these institutions as they are closer to the weak and the poor.[40] Another principle recognized in several studies is that bottom-up approaches require time and that tight project cycles and an overly large portfolio of programmes should be avoided.[41] Furthermore, most studies agree that work should be based less on existing models that are simply transplanted, and instead work with tailor-made solutions that are as close to local realities as possible.[42] Finally, studies pay attention to finding sufficient support for reforms to overcome cooptation by vested interests and powerful elites.[43]

*Normative standards*

In their portrayal of these problems and of the direction that the solutions should be aimed at, bottom-up approaches apply varying normative standards, which are to be used for 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.'[44] Golub's legal empowerment approach, however, 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.'[45] 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,'[46] and may, apart from rights training and poor people's legal capacity build-

[40] Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, at pp. 46-47, UNDP, *Programming for Justice: Access for All*, at pp. 97-105, Golub, 'The Legal Empowerment Alternative', at p. 164.

[41] UNDP, 'Access to Justice, Practice Note', at p. 9, Golub, 'The Legal Empowerment Alternative', at p. 170.

[42] Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*; UNDP, 'Access to Justice, Practice Note', at p. 9, Golub, 'The Legal Empowerment Alternative', at p. 164.

[43] UNDP, 'Access to Justice, Practice Note', at p. 17, Asian Development Bank, *Reform of Environmental and Land Legislation in the People's Republic of China* 2000, at pp. 79-80.

[44] UNDP, *Programming for Justice: Access for All*, p. 20.

[45] Golub, 'The Legal Empowerment Alternative', at p. 166.

[46] Golub, 'The Legal Empowerment Alternative'.

ing, also include non-legal measures such as the organization of community and literacy training.[47] In bottom-up approaches, international human rights standards can thus play an important role. A question which one can ask is whether such a preset normative basis that largely originates from Western-inspired treaties matches the bottom-up characterized approaches which are being advocated and whether human rights and poverty relief truly match in practice.

*The role of the state*

One main differing variable in the measures proposed in the bottom-up approaches[48] 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.[49] 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 and court reform, by 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.[50]

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.[51]

Golub's legal empowerment approach therefore does not focus on reforming state institutions, as it argues that such reform efforts all too often prove unproductive or even counterproductive by virtue of, at most, benefiting elites and not helping the poor.

[47] Golub, 'The Legal Empowerment Alternative'.

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

[49] Asian Development Bank, *Law and Policy Reform at the Asian Development Bank*, UNDP, *Programming for Justice: Access for All*. Anderson, 'Access to Justice and Legal Process'.

[50] Golub, 'The Legal Empowerment Alternative', at p. 168.

[51] Golub, 'The Legal Empowerment Alternative'.

## Why Are Bottom-up Approaches Emerging?

The rise of bottom-up approaches should be understood within the context of wide-ranging developments in the field of international development cooperation, the role of law in those developments, and the way that legal interventions have been commented upon 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.

### *The concept of development: towards social development, individual development and broad poverty reduction*

A first important reason for the popularity of bottom-up approaches lies in the changes in the concept of 'development' in the last decades. Development has moved from economics to wider-ranging aspects of development. First, development was evaluated in terms of economic growth and income distribution. Since the 1970s, with the *basic needs* approach, and since the 1980s, with the *human development* approach, development is regarded as a more comprehensive concept than being based on economic growth or income equality alone.[52] Gasper 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.'[53] Even the World Bank, which was a solid economic growth perspective proponent, has incorporated social concerns in its development approach with the adoption of the Comprehensive Development Framework in 1999.[54] With this broader perspective, development became increasingly complex and progressively contained complementary but sometimes also contrasting goals.

A second change in the development perspective came with the move from macro-level nationwide thinking to thinking about development in terms of subnational groups or individuals.[55] The original economic perspective was largely

[52] Katie Willis, *Theories and Practices of Development* 2005.

[53] Des Gasper, 'Human Rights, Human Needs, Human Development, Human Security', Paper Presented at the Conference on 'Ethics, Human Rights and Development', organised by Nfu – Norwegian Research Association for Development, University of Oslo, Oslo, September 2006', (2006).

[54] Richard Cameron Blake, 'The World Bank's Draft Comprehensive Development Framework and the Micro-Paradigm of Law and Development', in: 3 *Yale Human Rights and Development Law Journal* (2000); Rittich, 'The Future of Law and Development', at p. 203, Alvaro Santos, 'The World Bank's Uses of the "Rule of Law" Promise', in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development* 2006, p. 268, Santos, 'The World Bank's Uses of The "Rule of Law" Promise', at p. 275.

[55] For an overview see Willis, *Theories and Practices of Development*.

macro-level oriented and was based on the idea that national economic growth can trickle down to all, including the poor. In contrast with this macro-level orientation of development, micro-level grassroots approaches emerged since the 1970s. The *basic needs* approach, which started in the 1970s, takes the poor as its fundamental starting point and defines development as addressing their needs. In 1976, the ILO, 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 (a healthy and safe environment, the ability to participate in decision-making).[56] Another approach that works bottom-up has been the rights-based or the human rights-based approach to development, in which development is framed in terms of the rights of the poor.[57] Sen's *development as freedom*, 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 his approach on the individual.[58]

A change that encompasses both the broader non-economic approach to development as well as the bottom-up conceptualization is that development has increasingly become understood in terms of poverty eradication; and poverty is less understood to solely encompass a lack of income, but also includes physical vulnerability and powerlessness within existing political and social structures.[59]

Bottom-up approaches to legal development cooperation originate from within this switch from macro-economic growth to micro-level relief of the needs of the poor. 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 tailored to their needs.

### *Critique of the rule of law concept as an overarching paradigm for legal reform*

A second reason why bottom-up 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, the rule of law, is increasingly being criticized. 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

[56] Willis, *Theories and Practices of Development*, at p. 94.

[57] Paul Gready and Jonathan Ensor, 'Introduction', in Paul Gready and Jonathan Ensor (eds.), *Reinventing Development, Translating Rights-Based Approaches from Theory into Practice* 2005.

[58] Amartya Sen, *Development as Freedom* 1999, p. 3.

[59] H. Bernstein, 'Poverty and the Poor', in H. Bernstein et al. (eds.), *Rural Livelihoods: Crisis and Responses* 1992. Quoted through Anderson, 'Access to Justice and Legal Process'.

difficult political and economic choices.[60] 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 how distributing this one way rather than another will in fact lead to development.'[61] In his view the 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.[62] Donors, he argues, rather maintain a vague and general concept of the rule of law to avoid difficult sensitive and practical questions when cooperating with recipient officials.

Other scholars agree with Kennedy, finding that donors have purposefully kept the operationalization of the rule of law in specific projects limited.[63] Bergling summarizes views expressed by other scholars[64] that such vagueness may make the rule of law 'conceptually overburdened when it is invoked for too many potentially opposed reasons.'[65] The concept's vagueness and its inherent many meanings and different ends may result in some goals, such as promoting certainty and establishing law and order, being opposed to the protection of 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.[66] Kleinfeld has further argued that the way the concept of the rule of law has been operationalized in terms of reforms directed at certain institutions has undermined the broader reforms necessary to achieve the ends that the rule of law should achieve.[67]

[60] David Kennedy, 'Laws and Developments', in John Hatchard and Amanda Perry-Kessaris (eds.), *Law and Development, Facing Complexity in the 21st Century* 2003. David Kennedy, 'The "Rule of Law", Political Choices and Development Common Sense', in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development, a Critical Appraisal* 2006.

[61] Kennedy, 'Laws and Developments', at p. 19.

[62] Kennedy, 'Laws and Developments', at p. 19.

[63] See for example T. Lindsey, 'Legal Infrastructure and Governance Reform in Post-Crisis Asia, the Case of Indonesia', in T. Lindsey (ed.), *Law Reform in Developing and Transitional States* 2007, p. 10.

[64] D. Clarke, 'The Many Meanings of the Rule of Law', in K. Jayasuriya (ed.), *Law, Capitalism and Power in Asia* 1999. K. Jayasuriya, 'The Rule of Law and Governance in the Asian State', in: 1(2) *Australian Journal of Asian Law* (1999). R. Peerenboom, 'Varieties of Rule of Law: An Introduction and Provisional Conclusions', in R. Peerenboom (ed.), *Asian Discources of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France and the U.S.* 2004.

[65] Bergling, *Rule of Law on the International Agenda*, at p. 18.

[66] Bergling, *Rule of Law on the International Agenda*.

[67] Rachel Kleinfeld, 'Competing Definitions of the Rule of Law', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* 2006.

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.[68] Finally, there is much criticism arguing that legal reforms based on a rule of law concept will be inherently top-down, state-centred, fostering legal elites, carrying a false pretense of political neutrality, creating more formalism and bureaucracy and questioning the impact that such rule of law programmes can have on poverty and enhancing development whichever way they are framed.[69] Implicitly and sometimes explicitly, bottom-up approaches, such as access to justice and legal empowerment, are attempts to constitute alternatives for the flawed rule of law paradigm.

*Critique of legal development cooperation practices*

Closely connected to the critique about the concept of the 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 attempts to deal with such critique.

A first, general point of critique is that legal development cooperation practice has been ineffective in creating development, especially if development is seen as supporting the poor and the weak.[70] Further, many scholars find that legal development projects suffer 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.[71] Several authors first of all believe that it is difficult to prove that law can aid development.[72] Here the ambiguity of findings about the causality of law and economic development[73] and of the rule of law and

[68] Upham, 'Mythmaking in the Rule of Law Orthodoxy', Trubek, 'The "Rule of Law" in Development Assistance', at p. 87.

[69] Golub, 'A House without Foundation'.

[70] Y. Dezelay and B. Garth, 'The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars', in D. Nelken and J. Feest (eds.), *Adapting Legal Cultures* 2001; Golub, 'A House without Foundation', at pp. 3-4, Tim Lindsey, 'Preface', in Tim Lindsey (ed.), *Legal Reform in Developing and Transitional States* 2007, at p. xix, Thomas Carothers, 'The Rule of Law Revival', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* 2006, p. 11.

[71] Thomas Carothers, 'The Problem of Knowledge', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* 2006. Golub, 'A House without Foundation', Trubek, 'The "Rule of Law" in Development Assistance', at p. 92.

[72] 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 Philip Alston and Mary Robinson (eds.), *Human Rights and Development, Towards Mutual Reinforcement* 2005. Carothers, 'The Rule of Law Revival'.

[73] Golub, 'Less Law and Reform, More Politics and Enforcement', at p. 302, note 9. See also Carothers, 'The Problem of Knowledge', at p. 17, Richard E. Messick, 'Judicial Reform and Economic Development: A Survey of the Issues', in: 14(1) *The World Bank Research Observer* (1999). Katharina Pistor and Philip A. Wellons, 'The Role of Law and Legal Institutiuons in Asian Eco-

democracy[74] is interesting.[75] It should be noted that establishing causal relations between law and development or law and democratization is difficult, as is measuring such causal effects.[76]

Second, others, still believing in the law's possible contribution to development, argue that more data are necessary about exactly what kind of legal reform leads to development. Carothers and Channell for instance hold that the processes of how legal change is accomplished and what it does for development are not well/sufficiently understood.[77] Garth holds that practice has inadequately used social science techniques and insights as a basis for legal reform.[78] Similarly, Seidman et al. hold that successful substantive law reform (legislation reforms) should be based on thorough social scientific research about the behaviour of the various norm addressees involved.[79] Tamanaha has warned, however, that in many developmental contexts, such research capacity may be limited and that getting policymakers and lawmakers to engage in research may prove to be unfeasible.

A third point of critique concerns the top-down character of law reform projects, which means that local contexts are not sufficiently considered or incorporated.[80] Faundez writes that 'despite agreement on this point in practice, an analysis of the local context is rarely carried out.'[81] He finds that this happens because Western

nomic Development 1960-95', Paper Presented for the Asian Development Bank, Manilla (1998). Kevin E. Davis and Michael J. Trebilcock, 'Legal Reforms and Development', in: 22(1) *Third World Quarterly* (2001).

[74] Carothers, 'The Problem of Knowledge', at p. 18.

[75] Another interesting observation is that law reform does not itself 'reduce incidence of corruption', as Dick notes.

[76] Golub, 'A House without Foundation', at p. 115.

[77] Carothers, 'The Problem of Knowledge', Wade Channell, 'Lessons Not Learned about Legal Reform', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad, in Search of Knowledge* 2006, p. 148-149.

[78] B.G. Garth, 'Rethinking the Processes and Criteria for Success', in Rudolph V. Van Puymbroeck (ed.), *Comprehensive Legal and Judicial Development* 2001.

[79] A. Seidman et al., *Legislative Drafting for Democratic Social Change, a Manual for Drafters* 2001. R. Seidman and A. Seidman, 'Using Reason and Experience to Draft Country-Specific Laws', in A. Seidman et al. (eds.), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* 1999.

[80] Dezelay and Garth, 'The Import and Export of Law and Legal Institutions', at pp. 4-5, Golub, 'A House without Foundation', Garth, 'Rethinking the Processes and Criteria for Success', at p. 24, Julio Faundez, 'Legal Reform in Developing and Transitional Countries', in Rudolph V. Van Puymbroeck (ed.), *Comprehensive Legal and Judicial Development* 2001. Trubek, 'The "Rule of Law" in Development Assistance'. Scott Newton, 'The Dialectics of Law and Development', in David M. Trubek and Alvaro Santos (eds.), *The New Law and Economic Development, a Critical Appraisal* 2006, p. 194, Gary Goodpaster, 'Law Reform in Developing Countries', in T. Lindsey (ed.), *Law Reform in Developing and Transitional States* 2007, p. 197.

[81] Faundez, 'Legal Reform in Developing and Transitional Countries', at p. 378.

experts tend to take the context for granted in their own jurisdiction.[82] 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.'[83] A combination of a lack of knowledge and top-down policy and implementation may lead to unforeseen results,[84] sometimes even opposed to the original aims and actually weakening local contexts,[85] authors warn. In international projects, such top-down operation methods further run the danger of ethnocentricity. [86]

A fourth point of critique is that legal reform has been too state-centred and has focused on the courts and lawmaking processes.[87] As a result, scholars such as Golub, for example, hold that legal implementation and enforcement can be even more important than legal reform per se; that legal empowerment offers crucially important paths toward effecting legal implementation; and that without such paths reforms will not reach the poor, and will thus do little to enhance their lives, and may even strengthen existing bureaucratic elites.[88] State-centred approaches furthermore lack effectiveness in contexts where non-state normative systems are important and where legal reform should address issues of legal pluralism.[89] Meanwhile, other scholars find that the state is not well positioned to help the poor and

[82] Faundez, 'Legal Reform in Developing and Transitional Countries'.

[83] Dick, 'Why Law Reform Fails', at p. 60.

[84] Garth, 'Rethinking the Processes and Criteria for Success', at p. 23.

[85] Faundez, 'Legal Reform in Developing and Transitional Countries', at pp. 380-381.

[86] Garth, 'Rethinking the Processes and Criteria for Success', Scott Newton, 'Law and Development, Law and Economic and the Fate of Legal Technical Assistance', in J.M. Otto (ed.), 2007, Lindsey, 'Legal Infrastructure and Governance Reform in Post-Crisis Asia', at p. 28.

[87] Franz Von Benda-Beckman, 'Legal Pluralism and Social Justice in Economic and Political Development', in Richard C. Crook and Peter Houtzager (eds.), *Making Law Matter, Rules Rights and Security in the Lives of the Poor*, in: 32(1) *IDS Bulletin* (2001). L. Nader, 'The Underside of Conflict Management – in Africa and Elsewhere', in Richard C. Crook and Peter Houtzager (eds.), *Making Law Matter, Rules, Rights and Security in the Lives of the Poor*, in: 32(1) *IDS Bulletin* (2001). Golub, 'A House without Foundation', G.R. Woodman, 'Customary Law in Common Law Systems', in Richard C. Crook and Peter Houtzager (eds.), *Making Law Matter, Rules Rights and Security in the Lives of the Poor*, in: 32(1) *IDS Bulletin Volume* (2001). Richard C. Crook, 'Editorial Introduction', in Richard C. Crook and Peter Houtzager (eds.), *Making Law Matter, Rules Rights and Security in the Lives of the Poor*, in: 32(1) *IDS Bulletin Volume* (2001). Carothers, 'The Problem of Knowledge'.

[88] Golub, 'A House without Foundation', at p. 109, Veronica Taylor, 'The Law Reform Olympics, Measuring the Effects of Law Reform in Transition Economies', in Tim Lindsey (ed.), *Law Reform in Developing and Transitional States* 2007, p. 98.

[89] Crook, 'Editorial Introduction'. Von Benda-Beckman, 'Legal Pluralism and Social Justice in Economic and Political Development'; Franz Von Benda-Beckman, 'The Mutiple Edges of Law: Dealing with Legal Pluralism in Development Practice', in Caroline Sage and Michael Woolcock (eds.), *The World Bank Legal Review, Law, Equity, and Development, Volume 2* 2006. Woodman, 'Customary Law in Common Law Systems'. Nader, 'The Underside of Conflict Management'. Carothers, 'The Problem of Knowledge'.

that more attention should be given to civil society.[90] One reason for the top-down character of legal reform programmes is the necessity for 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.[91]

Fifth, scholars further warn that legal development cooperation practice is insufficiently aware of its inherent political nature and is politically naive. Part of this critique concerns the assumption that legal reform is merely 'technical assistance.'[92] 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 [it does so].' He concludes that 'the key to reform is therefore not law but politics.'[93] Dezelay and Garth note that law is at the core of power and that this fact is central in analyzing the function of law in society.[94] Reforming law, even if it is only the law's mere technicalities, is thus a matter of reforming power. Therefore, they state that 'law cannot be considered merely a technology to be acquired off the shelf as the best or most efficient practice.'[95] Similar to Dezelay and Garth, several scholars believe that law in fact is very close to power, and that law reform is influenced by different stakeholders contesting for power. Legal reform may thus strengthen the position of authoritarian elites, or be successfully opposed by them if it is against their interests.[96] 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.[97] Such facts are not always recognized in law and development practice, some scholars hold.[98] In close relation to this, Golub summarizes a range of studies concluding that in certain contexts of vested interests, of a lack of political will to reform as well as

[90] Golub, 'A House without Foundation'. Mary McClymont and Stephen Golub, *Many Roads to Justice, the Law Related Work of the for Foundation Grantees around the World* 2000.

[91] Linn A. Hammergren, 'International Assistance to Latin American Justice Programs: Towards an Agenda for Reforming the Reformers', in E.G. Jensen and Eric Helland (eds.), *Beyond Common Knowledge, Empirical Approaches to the Rule of Law* 2003, p. 303.

[92] Newton, 'Law and Development, Law and Economic'.

[93] Dick, 'Why Law Reform Fails', at p. 53, for a similar point see Goodpaster, 'Law Reform in Developing Countries', at p. 107.

[94] Dezelay and Garth, 'The Import and Export of Law and Legal Institutions'.

[95] Dezelay and Garth, 'The Import and Export of Law and Legal Institutions', at p. 5.

[96] Carothers, 'The Rule of Law Revival', at p. 4, Carothers, 'The Problem of Knowledge', at p. 22, Golub, 'A House without Foundation', at pp. 112-113, Hammergren, 'International Assistance to Latin American Justice Programs', at p. 297, Goodpaster, 'Law Reform in Developing Countries', at p. 107.

[97] Linn A. Hammergren, *The Politics of Justice and Justice Reform in Latin America, the Peruvian Case in Comparative Perspective* 1998, p. 302.

[98] Newton, 'Law and Development, Law and Economic', Upham, 'Mythmaking in the Rule of Law Orthodoxy', at p. 76, Hammergren, 'International Assistance to Latin American Justice Programs', at pp. 297-298.

of widespread corruption, reform efforts directed at state institutions have proved to be fruitless.[99] 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.[100]

Sixth, some authors believe that legal development projects have made great promises that they cannot fulfil. Given the immense complexities that social engineering through law entails[101] and the inherent limitations in terms of resources, knowledge and support, the expectations about what can be achieved through legal reform should be tempered, such scholars find. Here the speed at which change is expected is crucial. Several authors hold that legal reform can only be successful if given sufficient time,[102] and therefore they warn against haste and impatience.[103] However, the problem with time is that most law and development projects run on project cycles of a short period.

Seventh, scholars further find that legal development cooperation projects suffer from internal problems related to the donor's bureaucracy.[104] They find that donor pressure to spend money, the use of best practices, the influence of a common sense appeal, preferences for accountability and measurability and certain incentive structures, combined with the inherent complexity of improving the rule of law in different types of settings have led to weak project preparation, a limited use of existing knowledge and research, goal displacement seeking accountability instead of effect, weak evaluations, and thus ultimately weak information about what works and what does not and thus a continuation of deficient types of projects.

Suffice it to say that scholarship presents a bleak view of legal development cooperation practice: It (a) lacks knowledge, (b) is out of touch with local reality, (c) does not understand the power relations it is embedded in, and (d) fails to

[99] Golub, 'A House without Foundation', at pp. 112-114, 116, 121.

[100] Goodpaster, 'Law Reform in Developing Countries', at pp. 130-131, Jeffrey A. Clark et al., 'The Collapse of the World Bank's Judicial Reform Project in Peru', in T. Lindsey (ed.), *Law Reform in Developing and Transitional States* 2007, at pp. 172-173.

[101] Houtzager, "We Make the Law and the Law Makes Us', pp. 14-15.

[102] Bergling, *Rule of Law on the International Agenda*, at p. 45, Faundez, 'Legal Reform in Developing and Transitional Countries', pp. 372-373, Carothers, 'The Rule of Law Revival', at p. 12, Lindsey, 'Legal Infrastructure and Governance Reform in Post-Crisis Asia', at pp. 29-30, Dick, 'Why Law Reform Fails, Indonesia's Anti-Corruption Efforts', at p. 48, Goodpaster, 'Law Reform in Developing Countries', at p. 107.

[103] Allott already complained about impatient policy makers in developing countries seeking to create large social changes through the programmatic use of law. A. Allott, *The Limits of Law* 1980.

[104] E.G. Jensen, 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses', in E.G. Jensen and T.C. Heller (eds.), *Beyond Common Knowledge, Empirical Approaches to the Rule of Law* 2003. Carothers, 'The Problem of Knowledge', at pp. 25-27, Bergling, *Rule of Law on the International Agenda*, at pp. 45-46, Channell, 'Lessons Not Learned about Legal Reform', Golub, 'A House without Foundation', at pp. 128-131. Hammergren, 'International Assistance to Latin American Justice Programs', at pp. 292-293.

reach the poor it aims to help. The bottom-up approaches offer hope amidst the summarized critiques, by giving alternatives for flawed and obsolete interventions, so it seems.

## The Effects of Bottom-up Approaches

One of the bottom-up proponents' core critiques of the preceding rule of law state-centred justice interventions was their lack of effectiveness, especially for the poor and the weak. So, how have bottom-up approach projects fared in terms of enhancing access to justice and legal empowerment? Luckily, there has recently been quite some study and evaluation of the impact of bottom-up projects. Unfortunately, it is of varying quality and presents mixed results.

Evaluations and studies have, at face value, identified a number of positive impacts from bottom-up projects. An early study by the ADB shows that bottom-up interventions improved legal knowledge, economic well-being, gender equality, land tenure security, and participation.[105] A study by a former USAID executive on a USAID-sponsored community court programme in Bolivia finds an increase in legal awareness and success in 'addressing the legal needs of marginalized populations.'[106] A study carried out by senior programme staff and consultants of three projects funded by the World Bank Justice for the Poor programme, shows that the development of so-called 'peace communities' in northern Kenya have become a popular and successful way to 'define ground rules between different local [justice] systems.'[107] It further shows some successful accomplishments/achievements, especially given the difficult local political context in which labour arbitration courts need to operate, while steadily having increased their case load and managing 'to find for the most part workable resolutions minimally acceptable to all parties.'[108] A collection of studies organized by the IIED and the FAO similarly shows the positive results of typical bottom-up interventions such as an increased number of paralegals, the improvement of legal literacy as well as providing public interest litigation, legal clinics, and rights information centres.[109] They

[105] Asian Development Bank, *Law and Policy Reform at the Asian Development Bank in 2001, Legal Empowerment: Advancing Good Governance and Poverty Reduction* 2001, pp. 127-133

[106] T. Mennen, 'The Mystery of Legal Empowerment: Livelihoods and Community Justice in Bolivia', in Stephen Golub (ed.), *Legal Empowerment: Practitioners' Perspectives* 2010, pp. 70 and 73.

[107] C. Sage et al., *Taking the Rules of the Game Seriously: Mainstreaming Justice in Development: The World Bank's Justice for the Poor Program* 2009, p. 25.

[108] C. Sage et al., *Taking the Rules of the Game Seriously*, at p. 27.

[109] Rita H. Aciro-Lakor, 'Land Rights Information Centers in Uganda', in *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* 2008; Boubacar Ba, 'Paralegals as Agents of Legal Empowerment in the Banass Area of Mali', in Lorenzo Cotula and Paul Mathieu (eds.), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* 2008; Lilian Laurin

find that these interventions have improved land tenure under customary settings.[110] A UNDP-commissioned assessment of legal empowerment, which was aimed to be improved through a community radio project, shows that 'the project heightened awareness of rights and helped reduce tolerance of injustice,' and concludes that 'this experimental project has been a success, worthy of replication and importantly, of continuing support, with a possible view of incorporation into the UNDP agenda.'[111] Maru, who co-founded and co-directed a World Bank-paid paralegal programme in Sierra Leone, discusses the Bank's Justice for the Poor programmes and finds a positive impact of both legal aid and paralegal projects, finding 'impressive rates of case resolution', 'a startling success' (both in Ecuador),[112] 'respondents were overwhelmingly positive [about their experiences with the paralegals],' praising 'effectiveness [of the paralegals] in resolving difficult disputes,' and 'strong evidence that Timap's [the funded paralegal organization] were indeed empowering their clients, the paralegals themselves, and the community as a whole to claim their rights and pursue cases that had previously stagnated' (both in Sierra Leone).[113] Another example is a UNDP-commissioned study about worldwide Customary Justice interventions such as legal awareness training through literacy courses, information groups, education campaigns, the publication of guidebooks on state and non-state laws and travelling street theatre. It finds that these methods have helped improve the position of vulnerable groups and provide entry points for human rights in Bangladesh, Malawi, East Timor, Indonesia and Cambodia.[114] It further states that legal aid was improved through paralegals,

Barros, 'Legal Clinics and Participatory Law-Making for Indigenous Peoples in the Republic of Congo', in Lorenzo Cotula and Paul Mathieu (eds.), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* 2008; Yahya Kane, 'Legal Literacy Training in the Thiès Region in Senegal', in Lorenzo Cotula and Paul Mathieu (eds.), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* 2008; Simeon Koroma, 'Paralegals and Community Oversight Boards in Sierra Leone', in Lorenzo Cotula and Paul Mathieu (eds.), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* 2008; Ednah Mndeme, 'Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania', in Lorenzo Cotula and Paul Mathieu (eds.), *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* 2008.

[110] Aciro-Lakor, 'Land Rights Information Centers in Uganda'; Ba, 'Paralegals as Agents of Legal Empowerment in the Banass Area of Mali'; Barros, 'Legal Clinics and Participatory Law-Making for Indigenous Peoples in the Republic of Congo'; Kane, 'Legal Literacy Training in the Thiès Region in Senegal'; Mndeme, 'Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania'.

[111] Usha Ramanthan, *India Country Assessment, the Asia-Pacific Rights and Justice Initiative* 2009, pp. 7-8.

[112] V. Maru, 'Access to Justice and Legal Empowerment: A Review of World Bank Practice', in: 2 *Hague Journal on Rule of Law* (2010), at pp. 265-266.

[113] V. Maru, 'Access to Justice and Legal Empowerment', at p. 267.

[114] Ewa Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* 2006, p. 33.

lawyers' networks, dispute clearing houses, dispute resolution panels and ADR training in Sierra Leone, Thailand, East Timor, Puerto Rico and Cambodia. It also found that the capacity development of informal justice actors, working in the realm of customary and non-state law, by means of providing mediation services and improving citizens' rights, worked reasonably well in Burundi, Sierra Leone, East Timor, Rwanda and Bangladesh.

Some of the reports also summarize the limits and challenges. The IIED/FAO-commissioned papers about legal empowerment are very frank about the challenges. They stress that interventions are restrained by a number of factors including a lack of capacity amongst paralegals,[115] resistant local elites who fear an undermining of their power base,[116] donor dependency and a lack of sustainability,[117] a lack of confidence and trust by the (local) community,[118] and 'cut-throat antagonism' between weak and poor communities and powerful outside investors.[119] The World Bank study on its own Justice for the Poor interventions notes challenges in terms of limited representatives in the newly established local organizations.[120] The UNDP-commissioned study on customary justice notes the challenges, including the difficulty to train lay persons as paralegals, a prevalence of ceremony over capacity, gender quotas for adjudicators which can undermine community cohesion, and the fact that disputing parties sometimes remain dissatisfied with the emphasis on reconciliation during the process. Moreover, the strengthening of informal dispute mechanisms perpetuates the absence of formal institutions, and newly-built capacity appears to lack sustainability and local legitimacy.[121] Commissioned by the IDLO, a study by Knight shows that while paralegals have had a positive effect on community land titling programmes, overall community progress hinged much more on broader local socio-political factors including the perceived external threat to local tenure security, leader ca-

[115] Ba, 'Paralegals as Agents of Legal Empowerment in the Banass Area of Mali', at pp. 50-58.

[116] Aciro-Lakor, 'Land Rights Information Centers in Uganda', at p. 75; Ba, 'Paralegals as Agents of Legal Empowerment in the Banass Area of Mali', at pp. 58-59.

[117] Mndeme, 'Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania', at p. 97; Aciro-Lakor, 'Land Rights Information Centers in Uganda', at pp. 71-77; Kane, 'Legal Literacy Training in the Thiès Region in Senegal', at p. 90.

[118] Mndeme, 'Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania', at p. 97; Barros, 'Legal Clinics and Participatory Law-Making for Indigenous Peoples in the Republic of Congo', at p. 122.

[119] Mndeme, 'Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania', at p. 97.

[120] Sage et al., *Taking the Rules of the Game Seriously: Mainstreaming Justice in Development*, at p. 25.

[121] Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute*, at pp. 38-39.

pacities, group cohesion, as well as ongoing land conflicts.[122] Maru, discussing the World Bank Justice for the Poor programme that also funded his former paralegal organization, finds challenges especially in terms of making support work at a larger scale and making such support sustainable once donors end their contribution. He further warns that maintaining independence from the government is difficult.[123] Popovic, in his evaluation report for the UNDP Cambodian access to justice programme, finds that only two out of four outputs were initiated, and that it required much more time than expected and sustainability could not be ascertained.[124] Moreover, he states that the reported positive impact 'remains limited as the communes/districts covered by the project are few in relation to the national territory.'[125] Meanwhile at the conceptual level, the concept of legal empowerment as operationalized by CLEP came in for fierce criticism: over-ambitiousness, inconsistencies in the conceptual framework of legal empowerment, an excessive focus on De Soto's theories about legal exclusion, a failure to incorporate other legal and non-legal factors responsible for injustice and poverty, inadequate attention to gender issues, a top-down approach even while bottom-up is preached, and insufficient attention to the inherent political and power issues at play.[126]

In reading the reports and studies on the bottom-up interventions one obtains a mixed picture, which in most reports inclines to the positive side. Can we therefore conclude that these projects do have the intended impact? And can we even say that they have succeed where the rule of law approach has failed? Before we can do so, there are a few issues that require some discussion.

The first issue is the definition of impact. Most of the studies discussed here have looked at the immediate impact on particular problems found in the local communities where the project was carried out. A first question is whether the separately observed impacts (of the various reports) jointly combine into the broader impact sought by the paradigms in terms of empowerment, access to

[122] R. Knight, 'The Community Land Titling Initiative: An Investigation into Best Practices for the Protection of Customary Land Claims', in Erica Harper (ed.), *Working with Customary Justice Systems: Post-Conflict and Fragile States* 2011, p. 161.

[123] Maru, 'Access to Justice and Legal Empowerment', at pp. 269-270.

[124] Velibor Popovic, *Cambodia Country Assessment, the Asia-Pacific Rights and Justice Initiative* 2009, p. 7.

[125] Popovic, *Cambodia Country Assessment*, at p. 13.

[126] Stephen Golub, 'The Commision for Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy and Practice', in: 1(1) *Hague Journal on the Rule of Law* (2009), p. 103; Dan Banik, 'Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication', in: 1(1) *Hague Journal on the Rule of Law* (2009); Matthew Stephens, 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed', in: 1(1) *Hague Journal on the Rule of Law* (2009); Julio Faundez, 'Empowering Workers in the Informal Economy', in: 1(1) *Hague Journal on the Rule of Law* (2009); Dan Banik (ed.), *Rights and Legal Empowerment in Eradicating Poverty* 2008, p. 20.

justice, minority rights protection, and broader capital integration. Moreover, one can ask questions about the scale and sustainability of the impact. Most projects studied are of a relatively smaller scale, of a pilot-like nature, and it is often assumed that observed positive impacts could serve as a model for a broader intervention. It is not clear whether the projects would have worked in the first place without significant support from a major donor, and a clear focus in a certain locality. Neither is it clear whether the success can be sustained without the donor's involvement, or that it can be transplanted, through a best-practice type approach. Finally, we could define impact not just in terms of the achieved results, but also in terms of the manner in which the results were achieved. While bottom-up approaches stress interventions based on local knowledge, variation, and needs, the usage of terms such as 'programme guides', 'best practices' and 'entry points', evidences an attempt to guide and steer and thus to unify what should have been locally-driven approaches. Just as the top-down approaches have a problem in trickling down, bottom-up approaches have a problem in scaling upwards and the main donors, in order to manage larger funds and create broader impact, have to revert to top-down management practices, but now applied to localized practices.

The second issue is the method of measuring impact and the portrayal of success and failure into conclusions. Few of the studies provide a detailed report of their research methods,[127] and whether surveys or other methods were used or which types of data were gathered to discuss outputs and impact. Most studies are framed as a description of the context of the project and its aims, and as a discussion of its results and challenges and, only occasionally, of its failures. This framing almost automatically leads to a positive portrayal of the intervention, which is (thereupon) regarded as the best way to solve the problem at hand. A good example is the IDLO-commissioned study by Harper,[128] which provides one of the broadest overviews of how to improve customary justice systems, mostly through bottom-up interventions. While this study does list the challenges in the possible interventions, it ends each section only with an overview of 'entry points' and 'good practices', and generally[129] not with a clear summary of what should or should not be done under particular circumstances.[130] Measuring the impact of the bottom-up and customary justice interventions is highly challenging, as it requires establishing a causal link between the various interventions on the one

[127] With the notable exception of Knight, 'The Community Land Titling Initiative: An Investigation into Best Practices for the Protection of Customary Land Claims'.

[128] E. Harper and International Development Law Organization, *Customary Justice: From Program Design to Impact Evaluation* 2011.

[129] An exception is p. 91, Harper and International Development Law Organization. *Customary Justice: From Program Design to Impact Evaluation* 2011.

[130] Harper and International Development Law Organization. *Customary Justice: From Program Design to Impact Evaluation* 2011.

hand, and the various desired and complex outcomes (empowerment, legal awareness, human rights protection, etc.) on the other. As Khair writes

> It is indeed difficult to establish a causal link between specific legal actions and the resultant legal actions and the resultant development. One of the fundamental problems in assessing legal empowerment is that the characteristics and conduct that typify empowerment in one context may well have different implications in another.[131]

Only the IDLO-commissioned study by Knight provides a more scientific and balanced approach to measuring impact, with a clear methodology and a comparison of groups with different levels of intervention.[132] Some of the other studies portray initiatives as success, simply by describing outputs,[133] or (even worse) by simply restating the aims that they seek to address.[134] There are also studies that end by concluding and explaining a certain success, even though there is a clear indication within the study that success was only limited and that a more toned-down conclusion is warranted.[135] Few studies, with the exception of Knight's study,[136] provide a detailed and systematic analysis of which conditions explain the outcomes, both positive and negative. Finally, and perhaps most worrisome, is that most impact studies discussed here were carried out by people who were directly responsible for the conceptualization, funding, or execution of the project. While these studies are of course carried out in a manner that is intended to be as objective as possible, a conceivable positive bias may nonetheless creep in. As Channell writes in the context of the rule of law paradigm,

> 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

[131] Sumaiya Khair, 'Evaluating Legal Empowerment: Problems of Analysis and Measurement', in: 1(1) *Hague Journal on the Rule of Law* (2009), p. 36. For a paper that also addresses methodology issues of measuring legal empowerment, see Adam L. Masser, 'Measurement Methodologies for Legal Empowerment of the Poor', UNDP Discussion Paper Poverty Practice (2008), <http://ssrn.com/abstract=1370406>.

[132] Knight, 'The Community Land Titling Initiative'.

[133] See for instance Mennen, 'The Mystery of Legal Empowerment', at pp. 70-72. This problem is discussed in more detail by E. Cohen et al., 'Truth and Consequences in Rule of Law: Inferences, Attribution and Evaluation', Working Paper, <http://ssrn.com/abstract=1757977> (2011).

[134] See for instance Sage et al., *Taking the Rules of the Game Seriously*, at p. 26 Ana Patricia Graca, *The Asia Pacific Rights and Justice Initiatiave, Regional Assessment* 2009, p. 24.

[135] See for instance Sage et al., *Taking the Rules of the Game Seriously*, at p. 27.

[136] Knight, 'The Community Land Titling Initiative'.

> or failures. Where they exist, implementers know how to describe them as success.[137]

It seems that in order to fully ascertain the presented data (and obtain better/superior objective project evaluations), more study by independent scholars is necessary.

## Are Bottom-up Approaches Good Alternatives?

While bottom-up approaches seem to offer an alternative to the existing rule of law programmes, the question is how good the bottom-up approaches are as alternatives to the existing rule of law paradigm and legal reform practices. This leads to three questions. First, are the approaches truly new and different? Second, do the bottom-up approaches form a valid and workable alternative for the existing normative and comprehensive rule of law paradigm-based approaches for legal interventions? Third, do bottom-up approaches effectively deal with the problems of past and existing approaches to legal interventions, which the bottom-up proponents so much criticize?

### *Bottom-up approaches are not as innovative as presented*

The answer to the first question as to 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. While some may present such approaches as alternatives,[138] implying that they are new, in fact they are not. Law and development practice aiming to improve access to justice and supporting legal aid, legal awareness programmes, and court reform aimed at better access have been developed at least since the 1970s.[139] Internationally operating donor foundations such as the Ford Foundation and Novib have played an important role by strengthening access to justice and working on legal empowerment since the 1970s, while national governments in developing countries have themselves also looked at ways of how to strengthen access to their justice institutions.[140] In addition, Blake states that in reaction to the critiques of the Law

[137] Wade Channell, 'Lessons Not Learned about Legal Reform', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* 2006, p. 154.

[138] Golub, 'The Legal Empowerment Alternative'.

[139] For a good overview of the practices that have been in existence since the early 1980s, see Blake, 'The World Bank's Draft Comprehensive Development Framework', at pp. 169-170.

[140] An example is China's huge legal awareness programme, the *pufa* legal dissemination campaigns. See Ronald J. Troyer, 'Publicizing New Laws: The Public Legal Education Campaign', in Ronald J. Troyer et al. (eds.), *Social Control in the People's Republic of China* 1989. M. Exner,

and Development Movement in the 1970s, an alternative 'micro paradigm to law and development practice' emerged, which sought to develop law and legal resources for the poorest of the poor.[141] 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 the main micro law and development proponents founded in the early 1980s. In addition, he discusses efforts including operations concerning human rights, land reform, environmental and natural resources, legal literacy, legal services, gender law, labour law, consumer law, and housing and tenancy law, which were all carried out by organizations seeking to aid the poor.[142] Meanwhile, legal reform efforts targeting civil society continued in the 1990s, such as, for example, by USAID's emphasis on working with NGOs in their Latin American legal reform projects under the Clinton administration.[143]

The academic study of access to justice outside 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 access to justice at the time[144] based on a worldwide survey,[145] as well as Johnson's work, outlining strategies for enhancing access,[146] Friedman's study which provides a framework of different access problems, the origins of such problems and possible solutions,[147] Trubek's article on advocacy,[148] Koch's piece

'Convergence of Ideology and the Law: The Functions of the Legal Education Campaign in Building a Chinese Legal System', in: *Issues and Studies* (August 1995).

[141] Blake, 'The World Bank's Draft Comprehensive Development Framework'.

[142] Blake, 'The World Bank's Draft Comprehensive Development Framework'. See also James C.N. Paul, 'Foreword: Law and Development and Peter Slinn', in John Hatchard and Amanda Perry-Kessaris (eds.), *Law and Development: Facing Complexity in the 21st Century* 2003, p. x.

[143] Hammergren, 'International Assistance to Latin American Justice Programs', at p. 311.

[144] M. Cappelletti and B. Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective, a General Report', in M. Cappelletti and B. Garth (eds.), *Access to Justice, Vol 1 a World Survey, Book 1* 1978.

[145] M. Cappelletti, 'Access to Justice Project Questionnaire', in M. Cappelletti and B. Garth (eds.), *Access to Justice, Vol I: A World Survey, Book 1* 1978.

[146] Earl Johnson, 'Thinking about Access: A Preliminary Typology of Possible Strategies', in M. Cappelletti and B. Garth (eds.), *Access to Justice, Vol. III: Emerging Issues and Perspectives, Book 1* 1979.

[147] Lawrence M. Friedman, 'Access to Justice: Social and Historical Context', in M. Cappelletti and John Weisner (eds.), *Access to Justice, Vol II: Promising Institutions, Book 1* 1978.

[148] David M. Trubek, 'Public Advocacy: Administrative Government and the Representation of Diffuse Interests', in M. Cappelletti and B. Garth (eds.), *Access to Justice, Vol. III: Emerging Issues and Perspectives* 1979.

with anthropological approaches[149] and finally Bush's article on access to justice in Africa and how to deal with pluralism.[150] Other important studies include: Galanter's work on the US, arguing that the poor have worse access to justice due to a lack of financial means and litigation experience,[151] 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.[152] Present studies on access to justice and legal empowerment scantly refer to such existing work or to practice developed in the past. Of the older works, 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, 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, both state and non-state actors have developed similar programmes. It seems that the criticisms aimed at existing legal reform projects, as discussed in the previous section, have been based on a limited portrayal of existing practices and entail something of a caricature. This partly seems to be done in order to argue a strong move away from law and development practices directed at the state or in cooperation with state institutions.

### *A replacement for the rule of law paradigm?*

A second question is whether the bottom-up approaches are good alternatives to the overarching rule of law paradigm. In other words, can we dispense with the rule of law and its flaws of being state-centred, broad and vague? Some proponents of the legal empowerment 'alternative', especially Golub, would answer *yes* to this question. They have played an important role in criticizing the rule of law-based legal reforms and have coined the term 'the rule of law orthodoxy' for it, arguing that legal empowerment is a good alternative for integrating law and development approaches.[153] However, the rule of law remains an important paradigm for legal reform programmes and it should not be replaced by the concepts of, or normative frameworks used in, the bottom-up approaches.

[149] Klaus F. Koch, 'Access to Justice: An Anthropological Perspective' in Klaus F. Koch (ed.), *Access to Justice, Vol IV: The Anthropological Perspective, Patterns of Conflict Management: Essays in the Ethnography of Law* 1979.

[150] Robert A. Bush, 'A Pluralistic Understanding of Access to Justice: Developments in Systems of Justice in African Nations', in M. Cappelletti and B. Garth (eds.), *Access to Justice, Vol. III: Emerging Issues and Perspectives* 1979.

[151] Galanter, 'Why the "Haves" Come out Ahead'.

[152] W. Felstiner et al., 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming', in: 15 *Law and Society Review* (1980-1981).

[153] Golub, 'The Legal Empowerment Alternative'.

A first problem which arises when discarding the rule of law concept is that of possible replacements offering less comprehensive guidance to overall legal reform. Golub's legal empowerment approach, for instance, lacks the comprehensiveness of the rule of law, as it does not include work to be carried out on state actors, which ultimately do 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 which are covered by the rule of law concept. The rule of law concept covers a broad range of elements including legal equality, law and order, predictability and the protection of human rights.[154] Access to justice approaches, such as those 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.

A second problem which arises when the rule of law concept is discarded is that the bottom-up paradigms may not provide the same normative guidance as the rule of law. It is most problematic that many bottom-up approaches fail to provide an overarching normative framework. Lacking such a framework, practitioners may face difficult questions about what can be considered a just outcome of the reforms and the targeted legal processes, or how to select groups for empowerment. In other words, how the preparation, execution and evaluation of legal reform projects are to be defined as successful or unsuccessful becomes a difficult question lacking an overarching framework for normative guidance.

Some bottom-up approaches discard the rule of law concept in favour of a normative human rights framework, referring to norms in international treaties.[155] Using human rights as a normative basis and guidance for legal development cooperation offers the advantage of using an extensive set of clearly defined standards that legal systems should meet. Disadvantaged groups can easily resort to such clearly defined rights, especially with their increasing international influence.[156] However, human rights offer a more restrictive framework for legal reform than the rule of law. First, the realization of human rights often requires a change in the legal system and its social and political contexts which many human rights approaches, because of their focus on international norms instead of local reforms, fail to articulate and stimulate. The rule of law concept offers a better agenda of comprehensive reforms, as most of its conceptions, as used in international legal

[154] Kleinfeld, 'Competing Definitions of the Rule of Law'.

[155] It should be noted that there can be an overlap in these two normative frameworks as many conceptions of the rule of law include substantive elements based on human rights, while certain human rights directly address aspects of the legal system such as, for instance, due process elements.

[156] Gready and Ensor, 'Introduction'. Peter Uvin, *Human Rights and Development* 2004.

cooperation, cover the functioning and improvement of elements of the legal system within its social and political contexts. Moreover, the rule of law can include norms based on human rights, depending on the type of rule of law conception used. Second, human rights have a history of political use in international relations, while the rule of law has retained a more technical status.[157] The political nature of human rights-based approaches is one of their strengths as it can help create the necessary support for change. However, it is also their weakness, as it can make international legal development cooperation reforms which are based on these approaches easy targets for nationalist discourses claiming human rights imperialism and legal ethnocentrism. Third, prioritizing human rights has been difficult as such rights are deemed to be absolute and inviolable.[158] Important questions remain about what to do when the political will or resources are lacking to strive for full rights protection, or how to act when rights are conflicting and rights protection is a zero-sum game.[159] In addition, the prioritization of human rights in the international arena, if it is attempted, is done rather on the basis of international consensus about the definition of core rights than on the basis of what is most needed in order to achieve poverty eradication and human development. In comparison with human rights, the rule of law concept used in international legal development cooperation is more pragmatic as there has been constant thought about trade-offs between its elements, the prioritization and sequencing of related reforms, as well as its linkages with different approaches to development.[160]

*Bottom-up approaches face the same challenges as the older programmes which they criticize*

The third issue that needs to be answered to evaluate the bottom-up approaches as an alternative for the rule of law paradigm is the question of to what extent the

[157] Such a technical status is of course also a fiction, as we addressed above and the rule of law concept may hide many political choices. What we mean here is that the rule of law has become less prominently an object that is used in political debate in international relations where one country uses it to criticize another.

[158] Some authors have written about how international human rights are, could, and should be adapted to different local conditions. See for instance E. Brems, *Human Rights: Universality and Diversity* 2003; A.A. An-Na'im, *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law* 1990; Sally Engle Merry, *Human Rights and Gender Violence, Translating International Law into Local Justice* 2006.

[159] Des Gasper, 'Human Rights, Human Needs, Human Development, Human Security, Relationships between Four International "Human Discources"', Garnet Working Paper 2007, no. 20/07 (2007).

[160] Jensen, 'The Rule of Law and Judicial Reform'. Bergling, *Rule of Law on the International Agenda*; Santos, 'The World Bank's Uses of The "Rule of Law" Promise'; Taylor, 'The Law Reform Olympics, Measuring the Effects of Law Reform in Transition Economies'; Clarke, 'The Many Meanings of the Rule of Law'; Kleinfeld, 'Competing Definitions of the Rule of Law'.

bottom-up approaches tackle the problems noted in earlier legal reform efforts as portrayed in the literature. The proponents of bottom-up approaches have many important ideas. They make the poor the central focus point, thus trying to bridge the gap between the poor's 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. Upon closer study, it seems that even though the bottom-up approaches offer ameliorations, they still suffer from some of the old problems.

First, as discussed, even though positive effects have been reported, the data on which these reports are based cannot be considered sufficiently independent and objective, and suffer from methodological challenges. Thus, while there is an indication that the new approaches have had positive results, the extent to which the bottom-up approaches help to aid the poor is not entirely certain. In order to achieve this kind of evaluation and overview, more time needs to elapse and more research needs to be carried out by academics not working as evaluators who are directly employed by donors.

Second, while there has been significant critique of the lack of knowledge used in existing legal development practices, few have wondered what the knowledge base for bottom-up approaches actually comprises. Although a large body of studies exists on access to justice and legal empowerment, especially from the late 1970s, this work is scantly used in the design of new approaches, which as a result also rely on a weak knowledge base. Moreover, when existing knowledge and conceptualization is used, it is not always done so with good care. A good example of incoherent operationalization 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 provide remedies for grievances. However, in its explanation of this last element of its access to justice model, UNDP interprets enforcement in a different way, by discussing unjust practices as they may occur in criminal law enforcement. The UNDP access to justice framework thus confuses the execution of judgments as an element from grievance to remedy, as originally operationalized by Felstiner et al., with preventing injustice in criminal law enforcement.[161]

Third, bottom-up approaches still contain some top-down elements: such as the human rights normative basis, the resulting focus (at least by the UNDP) on criminal justice projects that do not seem to originate from preferences of the (rural) poor, a blueprint model of types of reform measures to be taken, even though there is awareness of local variations, and the set belief that NGOs represent the poor especially in the approach favoured by Golub, while many may be

[161] UNDP, 'Access to Justice, Practice Note'.

based in national capitals and may speak for the poor rather than truly represent them.[162] Jensen has argued that true representation is a fiction, as he states that 'those who should reasonably be considered stakeholders are simply too numerous.'[163] While involving NGOs is important, and to some extent already done in existing programmes, it remains questionable whether bottom-up approaches can truly give the poor a voice in legal reform as the approaches seek to do.

Fourth, bottom-up approaches are indeed less state-centred 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 Golub especially does, necessary elements in the state institutions may be neglected.

Fifth, bottom-up approaches, in contrast to the criticised forms of legal development approaches, do pay attention to existing power structures and the political nature of domestic legal reform in international legal development cooperation, 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 unaddressed questions about what gives donors the right to help change existing power structures, how to select those that may benefit therefrom, what limits there are to changing such power structures and what are the implications for state sovereignty, should be answered.

Sixth, the bottom-up approaches may also suffer from over-ambitiousness just as programmes did in the past. When reading the studies and policy documents, the aims of these programmes are far-reaching: alleviation of poverty, eradication of injustice and protection of 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. Awareness is expressed in the documents that the proposed changes take time. However, whether specifically taken measures are actually given such time largely depends on the bureaucratic framework of the donor institution, which seems unchanged. Moreover, a close reading of the existing studies about impact, as presented above, shows that, so far, results are mixed at best and that the high level of ambition can easily lead to disappointment, just as it did following the rule of law paradigm.

Finally, this brings us to the seventh point of the 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

[162] Jensen, 'The Rule of Law and Judicial Reform', at pp. 355-357.
[163] Jensen, 'The Rule of Law and Judicial Reform', at p. 357.

on a limited group of consultants and operating with a restricted view of existing knowledge and caring more about repetition than innovation.[164]

## Conclusion

Bottom-up approaches to legal development cooperation are important and necessary. They directly focus on the poor and the weak and address how vested powers can obstruct the interests of disenfranchised people. They offer ways to direct legal reform programmes outside of the legal box and combine them with political measures such as advocacy, organization and participation. Also when compared to the preceding rule of law paradigm, the new approaches at least show some impact and success in achieving their highly challenging goals of empowering the disadvantaged and improving justice for the poor. Access to justice and legal empowerment are essential; however, they are not magic bullets. They still face some of the same structural obstacles as earlier legal development cooperation approaches. Moreover, bottom-up approaches can only achieve their full potential if they are combined with proper broader institutional reforms and are aligned with a neutral and comprehensive normative framework. Therefore, recognizing the many merits of these approaches, this paper warns that it would be a mistake to view bottom-up approaches as substitutes for or alternatives to the current rule of law paradigm, as it would be a mistake to see top-down institutional reforms as a sole approach to enhance justice and development for the disadvantaged. Bottom-up approaches should be seen as additional methods and be carried out alongside existing practices instead of fully replacing them. They should also be seen as an integrated critique of institution-oriented legal development cooperation practice that serves to improve the many failings of the top-down oriented rule of law approaches and hopefully develop into an integrated top-down and bottom-up strategy that combines both. Here our findings are similar to an earlier study on '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

[164] 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 that 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', at pp. 311-313.

grassroots techniques alone.'[165] Even Golub, who has been strongly critical of the existing rule of law paradigm and the state-centred approaches to legal development cooperation, and who is a major proponent of the 'legal empowerment alternative,' admits in one of his papers the need to combine such approaches with existing rule of law-based work on state institutions – albeit only under certain circumstances.[166]

Law and development is a field of strong trends. Over the decades it has moved back and forth, from the blossoming of the Law and Development movement in the 1960s to its criticism 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 the rule of law becoming a development goal 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 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, these approaches have developed amidst growing critique of existing programmes. On the other hand, 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 programmes that are inherently challenging and open to criticism. Trend shifts are therefore an integral part of the field of law and development. However, scholars should be careful not to be overly drawn into such trends and should continue to offer data that help inform policy makers to make the right choices to improve existing programmes. In order to do so, more research on the effects of projects carried out under the bottom-up approaches is required, and especially research carried out by independent scholars not doing so in the context of donor-commissioned evaluations, and neither for the purpose of seeking to promote new paradigms.

[165] Blake, 'The World Bank's Draft Comprehensive Development Framework', at pp. 170-171.
[166] Golub, 'Less Law and Reform, More Politics and Enforcement'.