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In the Beginning was the Law... an Intellectual Odyssey

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In the Beginning was the Law... An Intellectual Odyssey

©Patrick McAuslan*

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* Professor of Law, Law School, Birkbeck College, University of London; p.mcauslan@law.bbk.ac.uk. Write in haste; repent at leisure. When I was invited to this conference I asked when papers were needed by. I was told at that point – October, 2003 – it was not envisaged that papers would be required in advance. I relaxed. Early in 2004, I was told, as we all were, that papers were required by 16 March. Panic. Consequently this paper has been written rather hastily and has not benefited from either friendly (or hostile) fire. I look forward to critical comment and hopefully thereafter an improved version. Draft only; not to be quoted or reproduced without the author’s permission.

Introduction

Law and Development did not start in the 1960s when American legal scholars discovered the developing world nor did it end in the 1970s when, starved of funds to pursue their endeavours, many of those same scholars declared that law and development was dead¹. If we are to write about the future of law and development we must first be clear about its scope, its past and its present. We must first answer the questions: What is it? What are we? Where are we? How did we get here? Only then can we answer the question: Where should we go?

Is there such a distinctive phenomenon in practice as ‘law and development’? Isn’t all law directed towards some kind of development in the sense that new law – judicial decisions, legislation, administrative directives – change the existing law and so is a development from that existing law and in changing the existing law, change, in howsoever slight a degree, the economy and society of which the law is a part. The changes in the law governing corporations in the USA in the wake of Enron is a clear example of the use of law to attempt to change, for the better, corporate behaviour. The forthcoming Planning and Compensation Act in the UK billed as the most fundamental change to the system of town and country planning since the modern system was introduced in 1947 is specifically designed to bring about fundamental changes in administrative and political behaviour and planning culture in relation to land development. It is for our purposes immaterial whether these two legislative reforms will be ‘successful’ however that notion is measured; the point is that in two mature Western liberal democracies (sort of) professional politicians, administrators and legislators have a very strong belief in the efficacy of law reform as a way to bring about change for the better or...development.

If then there is a distinctive phenomenon of L&D as it has been used for 40 years in scholarly literature the two words ‘law’ and ‘development’ or rather the combined words ‘lawanddevelopment’ are being used in a special sense. They are not just referring to the use of legislation – and it is nearly always legislation – in order to achieve certain specific economic or social ends. The fundamental characteristic of L&D as an approach to law making and writing about law making has been its *external imposition* both in respect of law and of development. The law which is designed to bring about development is for the most part a law based on one designed

¹ For a good short summary of the American ethnocentric position on the rise and fall of the law and development movement, Amy L. Chua, Markets, *Democracy and Ethnicity: Towards a New Paradigm for Law and Development*, 108 Yale LJ, 1, at pp. 11 – 13, (1998)

and used in countries in the North and the development which is to take place is development in countries in the South and the aim of that development is to make those countries in the South more like countries in the North so as to facilitate economic and social interaction a.k.a. exploitation between North and South. It is significant that legal developments in Eastern and Central Europe in the post-communist era are not seen or written about as L&D while legal developments in new Central Asian states are. European states are very definitely Us; Central Asian states are very definitely the Other and L&D is about Us and the Other.

I have suggested that the law in L&D is nearly always legislation of Northern provenance as opposed to legislation of Southern provenance or judicial decisions or customary law – the latter being very definitely the law of the Other. But what is development or rather, what is the meaning of ‘development’ in the phrase ‘law and development’; how have the L&D community perceived and used the term ‘development’? There is not the space here nor do I have the competence to essay a survey of the various meanings of development which have been part of the currency of the development industry for the past 40 years but clearly some meaning must be ascribed to it for any kind of analysis and survey of the field of L&D to be undertaken.²

The meaning of development

Rather than attempting my own classification, I am content to make use of Leftwich’s pellucid survey.³ He first of all sets out the “antecedents of the development idea” and suggests that:

² Rather surprisingly, L&D writers appear to shy away from addressing this issue. The ILC’s Report *Law and Development: The Future of Law and Development Research*, (ILC, New York 1972) ignored it. Chua, supra, note 1 in a very comprehensive article does not consider the matter. Siedman’s two path-breaking books did not: R. Seidman, *The State, Law and Development* (Croom Helm, 1978) and A. Seidman and R. Seidman, *State and Law in the Development Process*, (Macmillan, 1994). To take just two recent multi-authored works containing a of 41 papers covering a very wide range of topics on law and development which did not consider the matter: J. Faundez, M.E. Footer, and J.J. Norton, (eds) *Governance, Development and Globalization*, (Blackstone, London, 2000); C. Antons, (eds) *Law and Development in East and South East Asia*, RoutledgeCurzon, 2003). K. de Feyter, *World Development Law* (Intersenta, Antwerp, 2001) has a first chapter ‘Defining Development’ but it is limited in the author’s words to analysing “the current concept of development as endorsed by the United Nations”, i.e. it is concerned with the *international legal* meaning of development which although useful is too narrow for purposes of this paper. One of the few L&D writers who have addressed this issue is F.G. Snyder, *Law and Development in the Light of Dependency Theory*, (1980) 14 *Law and Society Review*, 723.

³ A. Leftwich, *States of Development: On the Primacy of Politics in Development*, (Polity, Cambridge, 2000), chaps 2 and 3.

most major understandings of development can be located within one or more of the following broad approaches:

- development as historical progress
- development as the exploitation of natural resources
- development as the planned promotion of economic and (sometimes) social and political advancement)
- development as a condition
- development as a process
- development as structural change
- development as modernization
- Marxism and development as an increase in the forces of production⁴

He goes on to note that the colonial enterprise has always focused in practice on the second of the above approaches even though the rhetoric of empire came ultimately to include the notion of the welfare of the colonised in its objectives.⁵ Included as part of the justification for empire however was development as structural change and as modernisation and “preoccupations with growth, modernization and structural change were the tributaries that fed the dominant orthodoxy about the meaning and purpose of development in the developing world in the immediate post-war world.”⁶

From the 1960s onwards, however these dominant conceptions of development began to be undermined. The notion of social development began to be developed and found its “most substantial institutional expression in existing and newly established UN institutions...such as the UNDP (set up in 1965).”⁷ Other ideas rapidly emerged:

- ‘another development’ which called for transformations of socio-economic and political structures both within states and at the international level⁸;
- development as the satisfaction of basic human needs (BHN)⁹ which focused on basic goods for family consumption; basic services, participation in decision making; the fulfilment of basic human rights and productive employment;

⁴ Op. cit., p.17.

⁵ He makes the interesting point that whereas the British Colonial Development Act 1929 has as its objectives “aiding and developing agriculture and industry in certain colonies, the Colonial Development and Welfare Act 1940 which replaced that Act “sought to make provision for ‘promoting the development of colonies, protectorates, protected states and mandated territories *and the welfare of their peoples* (emphasis added). Similar thinking was found in France. But the idea that development was about contributing to the welfare or social development of colonial people was a weak impulse.” (p.20). He notes that the World Bank’s Articles of Agreement in 1945 concentrated solely on encouraging the development of productive facilities and resources in less developed countries.

⁶ Op. cit., p. 40.

⁷ Op. cit., p. 43. what follows is based on op. cit. chap.2.

⁸ Dag Hammarskjöld Foundation, *What Now? The Dag Hammarskjöld Report on Development and International Cooperation Prepared on the Occasion of the Seventh Special Session of the UN General Assembly*, (Uppsala, 1975).

⁹ International Labour Organisation, *Employment, Growth and Basic Needs*, (Geneva, 1976)

- development as freedom and expansion of choice¹⁰; starting as a way of bringing together social development and BHN development this quickly expanded into concerns with political freedom, human rights, democratisation and good governance;
- sustainable development.¹¹

While these have all been influential, Leftwich makes the point that it has been the World Bank as the major player in the public process of ‘development’ since the 1950s that has had most influence on the meaning and the practice of development. Initially it focused solely on economic growth but took on social development in the 70s while still seeing the core of development as being economic growth. The sea change came in the 1980s when the neo-liberal agenda was adopted by the Bank:

Specifically, these [neo-liberal ideas] entailed the bundle of ideas that economic freedom, free markets, private-sector initiatives and the cutting away of regulations would provide the conditions and incentives for unleashing entrepreneurial energies...This thinking about development re-asserted ‘the primacy of economic growth’ rather than social development or the elimination of poverty and hence explicitly rejected the ideas of the 1960s and 1970s which saw a key role for the state in planning, redistribution and the provision of basic needs.¹²

By the 1990s however the Bank had re-discovered both a more comprehensive approach to development and that the state had a role in development: “the state is central to economic and social development, not as a direct provider of growth but as a partner, catalyst, and facilitator.”¹³ From there it has been a short step to an increasing focus on good government and effective judicial and legal systems as key determinants of the structural, social and human prerequisites for development.¹⁴

Which of the many notions of development have been adopted by the dominant external voices and actors in the L&D community? Given that the majority of the external community came into L&D as purveyors of formal law either via legal

¹⁰ Leftwich, op. cit. singles out the beginning of the publication of the UNDP’s *Human Development Reports* in 1990 and the work of Amartya Sen as being seminal to this approach to development. See Sen’s *Development as Freedom*, (Oxford UP, 1999) quoted by Leftwich for the encapsulation of his (Sen’s) ideas.

¹¹ UN Conference on Environment and Development, *Agenda 21*, (UN, New York, 1992)

¹² Leftwich, op. cit. p.49

¹³ World Bank, *World Development Report*, (Washington, D.C., 1997) p.1

¹⁴ J.Wolfensohn, *A proposal for a comprehensive development framework*, (World Bank, 1999).

education or via advice as consultants or both and that the content and structures of debates on L&D were set in the 1960s and have not really altered since then, I would argue that we have never got much beyond the 1960s “dominant orthodoxy” of growth, structural change and modernisation and even now, when we are concerned with good government, human rights and the rule of law, our context is still structural change and modernisation. Yes, we believe in BHN, in sustainable development, in development as freedom but for us this will be brought about by the careful crafting and drafting of the appropriate laws, development of the appropriate institutions for the application of the laws and the handling of disputes, and the propagation, via teaching and writing, of the appropriate legal skills and techniques and all these are, by and large, present in the North and need to be transplanted to the South. To the extent that they are in the South, they are utilised by Northernised Southerners.

The imperial origins of law and development

L&D has always been ‘what we can do for them’ or ‘what they must do at our bidding/command’ in order to become ‘modern’. When a country develops its law in a particular way on the basis of its own policies and ideologies that is not usually seen as L&D; that’s just law or at best law reform. When the Seidmans have a programme of legal drafting in China¹⁵, or McAuslan drafts a land law for Tanzania¹⁶ that’s L&D; when the Chinese have had a major programme since the late 1980s of more or less rewriting their land law to facilitate a land market, that’s just land law reform and when the Tanzanians rewrote parts of their land law after independence in the 1960s to facilitate economic and social development via increased state control and ownership of land, that was seen from outside the country as not-L&D. L&D is an external phenomenon; law reform is an internal phenomenon.

Seen in this light, L&D is synonymous with the use of law to further external legal inputs into societies and that is a somewhat imperial enterprise. Empire goes back a very long way. Consider the following quotations; the first on the City Planning Ordinances of the Laws of the Indies; the second on the development of English law in India and the last two, on the development of English law in Africa:

¹⁵ Ann Seidman and Robert Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project* 44 Am. J. Int. L. 1. (1996) See too the same authors; *Assessing a Bill in Terms of the Public Interest: the Legislator’s role in the Law Making Process* 1 The World Bank Legal Review: Law and Justice for Development, 207. (2003)

¹⁶ Patrick McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development*, (Ashgate, 2003) Chap. 11

On 13 July 1573, Philip II issued a comprehensive compilation expanding and incorporating the previous decrees of Ferdinand and Charles V. What emerged was a set of 148 Ordinances dealing with every aspect of site selection, city planning and political organisation; in fact, the most complete set of instructions ever issued to serve as a guideline for the founding and building of towns in the Americas...Philip's compilation reinforced the unilateral objectives of conquest, emphasised the urban character of Spanish colonisation and specified clearly the physical and organisational arrangements that were to be developed in the new cities of America...as Violich has pointed out, 'then as now, cities were focal points of the decision-making process; therefore controlling them in a social sense was the first step to economic and political continuity for those in power.'¹⁷

In fact, British trade, expanding British legal control and Indian loyalty to the British empire were widely understood by colonial administrators as closely intertwined. Establishing legal authority would make commerce possible; commerce would in turn solidify colonial rule...In 1860 Indian law was codified and the role for Hindu and Muslim law restricted...The British used the law quite purposefully as a vehicle for the creation of conditions they viewed as essential to Company profits and later, capitalist enterprise – most conspicuously at first a market in land...¹⁸

In Britain's crown colonies – Freetown, Gambia, the Gold Coast and Lagos – metropolitan legal jurisdiction was extended in various ways. In the Niger delta, courts of equity were established in the 1850s to hear property cases, with jurisdiction over not just Europeans but also Africans involved in property transactions within British-controlled territory. This and similar moves to extend jurisdiction to include some Africans were associated with the transition from slave trading to trade in other commodities (*sic*)...¹⁹

On the civil side [of the law] the African's inexperience of all the contractual relations, involved in commercial transactions based on money economy have made him a stranger to the legal methods in which a modern individualistic society has expressed its needs. How far is it possible to adjust European conceptions of law and justice to these conditions of mind...It depends on the extent to which administrations are determined to impress their own conceptions of behaviour on Africa...it would not be in the interests of Africa to refrain from making that gradual advance towards individualisation of property in land which may lead to improvement in production.²⁰

¹⁷ Axel I. Mundigo and Dora P. Crouch, *The City Planning Ordinances of the Laws of Indies Revisited*, 48 *Town Planning Review*, 247 at pp. 248, 259. (1977) The authors draw attention to the fact that these Ordinances were heavily dependent on Roman principles of city planning and that "the objectives of conquest and empire expansion of the Romans and of the sixteenth century Spaniards were very similar" .p. 259. what the Spanish (and the authors) call an Ordinance, we would call a section of clause of an Act of Parliament or a Law.

¹⁸ Lauren Benton, *Law and Colonial Cultures*, (Cambridge 2002), pp.151 – 152.

¹⁹ *op. cit.*, p.156

²⁰ Hailey, (Lord) *An African Survey*, (Oxford 1938) pp. 295 – 96.

Clearly, this paper cannot trace the growth of L&D through successive empires over the last 500 or so years. The point of these quotations then is twofold. First to make the point, often overlooked in writing on L&D, that L&D has a long tradition going back into colonial times which cannot be ignored and second that if I concentrate on what I know best in L&D – land issues – that too is based on the same tradition – seizing control of the land and reshaping the land laws to suit the needs of the dominant power is the essence of the colonial and has continued to be an important component of the external L&D input into the Other. Nowadays too, reforming land tenure is hailed as providing one of the building blocks of the rule of law²¹.

Earlier on I made the point that L&D did not die when interest and funding for it declined in the US in the 1970s. It is a peculiarly myopic – some might say American hegemonic – view to assume that once US interest ceases in a subject, the subject itself ceases to exist. Once we extend the time-span of L&D backwards to the colonial period, we must also extend the time/space-span to include the actions of the independent countries themselves in using law to bring about development. L&D in other words should not be seen just as what we have done for or to the Other; it must embrace what the Other have done for themselves.

L&D, far from being a somewhat esoteric sub-sub-discipline of the sub-discipline of law and society, is in fact what happens on a daily basis in legal practice amongst 4 billion or so people all over the world except in Europe, North America and probably Japan. To put the matter in graphic terms, L&D is not just about US attempts to introduce securities exchange legislation into Outer Mongolia²² – the inputs of the external producers of L&D; its about Mongolian reactions to those attempts – the inputs of the internal consumers of L&D *and* about Mongolian attempts to reform its customary land tenure and systems of the settlement of disputes there anent – the Mongolian state as producer and the Mongolian people as consumers of L&D.

One way to make sense of the large canvas which is claimed for L&D is to attempt a classification of the phases or ages of L&D since the onset of European empire seen from the point of view of the external producers and the internal consumers. The

²¹ P. L. Delville, *Rural land tenure renewable natural resources and development in Africa*, (Ministère des Affaires étrangères – Coopération et Francophonie, Paris, 1998) p. 115.

²² Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 *Univ of Penn Jo Int Law*, 179, at pp 180 – 81 (1999) for a blackly amusing anecdote on this.

following table is my attempt at such a classification based largely on the literature of L&D and of scholars of empire and development²³:

²³ I only discovered Jensen's classification of the waves of Rule-of-Law reform when well into this paper when I read his paper *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, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003 Stanford UP) pp. 336 – 381 at pp. 345 – 348. The book came into the library of the Institute of Advanced Legal Studies at the University of London on 19 February 2004.

THE EVOLUTION OF LAW AND DEVELOPMENT

PERCEPTIONS → PHASES ↓	PRODUCERS (EXTERNAL)	CONSUMERS (INTERNAL)
Empire 15th – mid 20th century	<p>Law in the acquisition of empire. The use of force to acquire and maintain empire. State creation; law and order; acquisition of land and its productive use; development of legal systems to facilitate European commerce.</p>	<p>Law in the acquisition of empire. State destruction; breakdown of legal order; disruption of commerce; land seizure; unequal application of the law; colonies as ‘undeveloped estates’; slavery and forced labour. The use of force to resist and overthrow empire.</p>
The 40s and 50s	<p>The decades of benign colonialism. Use of law at both national and international levels to provide for the orderly transfer of power to new independent states; and to create rudiments of welfare state: education; health care</p>	<p>The decades of ‘hanging on’. Using national and international law as a tool to prolong colonialism by purporting to confer rights and responsibilities while ensuring effective power resided in the metropolises.</p>
The 60s	<p>The decade of optimism. Law and development as part of the process of throwing off the shackles of colonialism and building a new polity; development of legal education and research; ‘modern’ laws from the metropolises introduced to provide for a ‘modern’ society and state.</p>	<p>The decade of nationalism. Law was used to reassert the national identity, national concerns; repatriate national assets and a national approach to exercising political and economic power via autochthonous constitutions, home-grown political systems and parastatal authorities.</p>
The 70s	<p>The decade of disillusion. Law and development ‘doesn’t work’; new democratic structures and practices do not spring up overnight; transplants don’t work.</p>	<p>The decade of consolidation. National legal systems were developed, operated and written about by home-grown lawyers. National legal solutions to national problems were developed and brought into operation.</p>
The 80s	<p>The decade of neglect but transition. IFIs and donors did not see law as a particularly important tool for development. Academics had better things to do than work in a field where there was a paucity of funding. New approaches began to enter the field.</p>	<p>The limits of legal radicalism. Law was ignored in the increasingly lawless competition for power and access to resources or used as a weapon in the struggle. Official state law had less and less relevance to the lives of the citizen.</p>
The 90s	<p>The decade of (re)-discovery. Perhaps law is important as a tool for the development of markets, the key to ‘real’ development and as an input to good governance; re-thinking transplants – perhaps they do work if the conditions are right.</p>	<p>The decade of challenge. Pressures both internal and external, mount to change the structure of the state, political and economic systems and rethink the role of law in these developments. Constitutional and economic reforms via law.</p>
The 00s	<p>The decade of (re)-colonisation. The importation of Western law as the key to economic growth and entry into the global market place. The World Bank seeks to extend its empire by appropriating holistic legal system and ‘rule of law’ reform. Law used to justify colonial re-occupation, new imposed constitutions, market-led land reform. New states recognised, elites and resources appropriated.</p>	<p>The decade of (re)-colonisation. The imposition of Western law as a key to re-assert political and economic control over developing countries; IFIs and donors require national legal reforms. International law used to justify colonial occupation, regime change, semi-imposed constitutions; foreign acquisition of national resources. New states as a colonial tool? Back to the future?</p>

I turn now to try and flesh out this summary classification by reference to practice on the ground. How has this worked in practice? How has law been used by producers and consumers to assert or repel the five centuries of law and development. As noted above, many of my examples will come from the development of laws about land, both because this is where my own experience has been but also because, as will be shown, laws and policies about land have been a touchstone through the ages for the use of L&D.

Empire: mid 15th century – mid 20th century

I have very little practical experience of the use of law in making, retaining and containing the British empire. But there are enough accounts of the role of law in European empires – either first hand or based on considerable study – for one to be able to come to a considered judgement on this matter. It should occasion no surprise that it is the French sociologist of colonialism René Maunier²⁴ that provides a conceptual overview of the revolutionary effect of the introduction of French law on overseas law – an effect which I would argue can be generalised to all European empires:

The act of passing *from oral to written law* was a revolution in the form of law. It passed from traditional to regulational law, from customary to legislative law...The act of passing *from secret to open law*, from concealed to public law was another revolution...The act of passing *from parental to national law* is a third and the most fundamental revolution...The great fact of French rule is that there is now a common, territorial, universal law valid for all, weighing on all, a national law in the fullest sense, which has nothing to do with kinship, nothing to do with religious faith, nothing to do with the complex of interwoven bonds which used to create groups in the colonies...The act of passing *from ritual to secular law* is an act closely akin to the preceding...The act of passing *from communal to private law*, from collective to personal law is the fifth and last of these legal revolutions...On the legal plane, the French may be said to have created the individual...Keeping our minds still on the methods of French action we may sum up all these phenomena as marking progress *from the obscure to the precise*...in

²⁴ René Maunier, *The Sociology of Colonies*, first published in France in 1932: English edition is in two volumes, edited and translated by E. O. Lorimer, (1949, London, Routledge and Kegan Paul). The quotation is from Vol. II, pp. 713 – 715. The whole of Volume II is on The Progress of Law. Maunier also draws attention to the policy of the colonising powers to abrogate customary law usually directly except the English “who as we know are very chary of interfering with local customs [and] had to take indirect steps – a thing they are fond of...” (p.504). Maunier here is applying Tönnies’s theories of the development of law and society from *gemeinschaft* to *gesellschaft* in his *Community and Association* (1887) to the evolution of law in the colonies, a theory which in many respects was also espoused by Maine in his *Ancient Law* (1861). For those wishing to go further back in investigating the use of law by the rulers of empires, S.N. Eisenstadt, *The Political Systems of Empires*, (1969, Toronto, the Free Press), pp. 137 – 140.

doing this, the French are founding the *State* in the Roman and French sense...*Order, records, taxes*: these are the aspects of the State...

And it was a state very different for the most part from those conquered by the colonial powers. Indeed, it is clear that Maunier did not accord the title of 'state' to any of the countries in the vast areas of the world which France and other European powers acquired during the 19th century. No more did the Spanish and Portuguese in America nor the British in Africa though we had a more ambivalent relationship with 'states' in the Indian sub-continent.

Maunier explains how law was used to establish a state recognisable to European thinking 'overseas'. Abernethy²⁵ provides a theory of why with particular reference to the exploitation of land. He advances the explore-control-utilise syndrome to explain European empire-building. I will concentrate on the latter two components of the syndrome:

Empire builders wanted to possess distant places and people. Possession might result from subduing others through force but it was perceived as more than sheer coercive superiority. It had a legal and normative dimension as well, linked to deeply engrained notions of property. The European state which ensured private property rights in its domestic domain, felt itself entitled to exercise collective property rights abroad....

The link between control and utilization was expressed in British colonial secretary Joseph Chamberlain's oft-cited reference to the world's tropical areas as "undeveloped estates". Implicit in this phrase is the view that humans enjoy the privilege but also bear the moral responsibility of turning the potential of their physical surroundings into something useful to themselves and others...

From phase 1 onward, this argument was advanced by settlers to justify seizing land from indigenous occupants, expelling "useless" non-European peoples and forcibly mobilizing their labour. "That which lies common and hath never been replenished or subdued is free to any that possess and improve it" These words by the Puritan leader John Winthrop summarized the doctrine of *vacuum domicilium* according to which undeveloped land occupied by people could be deemed unoccupied, hence rightfully seized.

The use of law by European empire builders to facilitate development thus emphasised the creation of the state, the seizure of land, and the development of a

²⁵ David B. Abernethy, *The Dynamics of Global Dominance: European Overseas Empires 1415 – 1980*, (Yale UP 2000) pp. 185 – 188. Phase 1 is a period of expansion of empire from 1415 – 1733. He quotes comments by Eliot, the British High Commissioner in the East African Protectorate, (later Kenya) from 1901 – 1904 about taking land from the Maasai as an equivalent example from Phase 3, 1824 – 1912, another period of expansion of empire. See C. Eliot, *The East African Protectorate*, (Edward Arnold, 1905) p. 104.

legal system which facilitated the exploitation of land and labour. The use of law in relation to land may briefly be commented on. There were in essence three elements to the legalisation and juridification of land seizure. First, there was the legalisation of the power of seizure of territory. In what Abernathy refers to as phase 1 of European empire, there was a tendency to equate the seizure of territory with the seizure of land and in neither case was it thought necessary to provide a legal justification: as the quotation from Winthrop shows, seizure of both was based on ethical rather than legal grounds in the first British empire. In the case of the Spanish and Portuguese empires however, the papal bulls which authorised the Spanish and Portuguese monarchs to claim overseas possessions provided a veneer of supranational legal authority to the later seizures of land.

By the time phase 3 expansion got under way however (and it is the use of law in phase 3 expansion that has the most direct linkages to L&D), international law had to be addressed with respect to this first matter. The Berlin Act of 1885 providing for the partition of Africa by European powers is the most notorious example of international law being used to provide a legal veneer to the acquisition of territory, a precondition to the acquisition of land within the territory, but in relation to Africa²⁶ and other parts of the world acquired during phase 3 empire, agreements and treaties between European powers recognising each other's spheres of influence were a constant during the 19th century and provided an equivalent international legal basis for acquisition.

The second element is the use of law to provide the backing to seize land. In phase 1 empires, as noted above, religion and morality was considered sufficient justification. By phase 3, law was being added to the equation. On the national front, and confining myself to the British position, both legal theory and law had caught up with the facts. Legal theory provided from very early on that "if there be a new and uninhabited land found by British subjects, as the law is the birthright of every subject, so wherever they go they carry their law with them"²⁷ 'Uninhabited' must be understood as a term of art: it did not mean empty of people but empty of 'civilised' people who recognised private property rights in land. Even when it became perfectly obvious that there were people on the land who regarded themselves as having rights in the land, this was disregarded: it was as Reynolds has put it in relation to Australia: "the theory of an

²⁶ E. Hertslet, *The Map of Africa by Treaty*, 3rd edn., 3 vols., London 1909.

²⁷ A ruling of the Privy Council (the body that from the late 17th century administered colonies) in 1722. Quoted in Veronica Strang, *Not so Black and White: The Effects of Aboriginal Law on Australian Legislation* in A. Abramson and D. Theodossopoulos, *Land, Law and Environment, Mythical Land, Legal Boundaries*, (Pluto Press, London, 2000) at footnote 1 p.113.

uninhabited continent was just too convenient to surrender lightly.”²⁸ So British settlers could acquire rights in seized land in a colony – freehold estates – by virtue of the law they carried with them.

British colonial constitutional law addressed the fact of colonial power the same way as British colonial missionaries addressed women in the colonies: they both had to be clothed in layers of material so as to hide their nakedness, disguise their true form and ensure that the proprieties were observed. The law distinguished between different types of dependencies²⁹. Settlements could be authorised or unauthorised. With respect to colonies, these were either conquered or ceded. Both however were British territory. The very peculiar British colonial phenomenon of the protectorate could be either a protected state or a protectorate; neither were British territory and both came into being as a result of a ‘treaty’ or agreement between an indigenous³⁰ ruler and the British government, the difference between them being basically the degree of formal authority left with the indigenous ruler; that is, did the senior colonial official in the country tell the ruler what he, the ruler, had to do so that formally, government was carried on in the ruler’s name or did he act as if there were no ruler that needed to be consulted or told anything. Different Acts of Parliament applied to the exercise of imperial powers in colonies and protectorates. With protectorates, the British government could pretend that it was only in someone else’s country for their own good.

In colonies the legal problem of land was really no more than asserting some imperial right to legislate on land seized by settlers and to ensure that in the event of any conflict with legislation enacted by a colonial legislature, imperial legislation prevailed. In protectorates, the legal problem was more complex. The theory of protectorates was that no more power was taken than was necessary to ensure law and order– the old form of the ‘rule of law’ syndrome. But there were protectorates where

²⁸ H. Reynolds, *The Law of the Land*, (Penguin, Victoria, 1987). p.32. A forceful politico-legal analysis of this approach was vouchsafed in the decision of the Judicial Committee of the Privy Council in *In re Southern Rhodesia* [1919] AC 211: “The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions of the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law, and then to transmute it into the substance of transferable rights of property as we know them.” at pp. 233 – 34.

²⁹ For a useful summary of the law, K. Roberts-Wray, *The Authority of the United Kingdom in Dependent Territories* in J.N.D. Anderson (ed) *Changing Law in Developing Countries* (G. Allen & Unwin, London 1963, pp. 11 – 28. The author had been the Legal Adviser to the Colonial Office.

³⁰ I use the word ‘indigenous’ here as meaning the living descendants of those persons who inhabited lands before the coming of empire and the arrival of settlers. I am not concerned to distinguish between indigenous peoples within a particular country as to who may have arrived there first prior to the coming of empire.

it was clear that there was land that was ‘unoccupied’ (in the sense in which colonies were found to be ‘uninhabited’) and that the country was suitable for European occupation. If the agreement which gave rise to the protectorate did not include a power to deal with “waste and unoccupied land” however, it was legally difficult to allocate land to settlers. Lawyers in the British government were equal to the task thus presented to them and came up with an opinion in 1899 that the right to deal with land in a protectorate “accrued to Her Majesty by virtue of her right to the Protectorate” since protection in these circumstances involved control over all lands not appropriated either by the sovereign or by individuals.³¹ The hypocrisy of the law equalled the hypocrisy of the moral position espoused by Winthrop and others in phase 1: the protection involved in a protectorate was the protection of the indigenous inhabitants of the protectorate from the outside world; apparently this could be best achieved by enabling their lands to be seized from them³².

The third element in the development of a predatory land law was the creation of a land law within the dependency which effectively marginalised the indigenous inhabitants and made it virtually impossible for them to hold on to their land with a secure tenure. This was achieved by, on the one hand, the development of a land law modelled on the land law of the imperial power which applied to freehold land (and its equivalent in other European empires) and on the other, the vesting of land governed by indigenous law in the colonial government – Crown land in British dependencies – which could be disposed of by the colonial government with minimal formality and less compensation since the theory behind this was that the colonial government was merely succeeding to the radical title to land of the indigenous rulers and the subjects of those rulers had no security of tenure as they had no recognisable private rights in the land they occupied.

This period however in which virtually all new states were founded on the basis of force or fraud – military conquest or so called agreements and treaties with ‘native’ rulers which enabled the ‘peaceful’ acquisition of territory and access to rights to land – wound down also with the use of force – this time by the colonised to throw off the

³¹ F.O. 7356 as quoted and summarised in Y.P. Ghai and J.P.W.B. McAuslan, *Public Law and Political Change in Kenya*, (Oxford UP, 1970), at p. 26.

³² How this worked in practice in Kenya – then the East Africa Protectorate – for which dependency the opinion was originally written may be judged by the case of *Ol le Njogo v A-G of the East African Protectorate* (1914) 5 E.A.L.R 70 – the infamous Masai case. See too the statement of the British High Commissioner read out in public after the conquest of Sokoto in Northern Nigeria in 1905: “The Government will in future hold the rights in land which the Fulani took by conquest from the people and if the Government requires land, it will take it for any purpose..” Quoted in M. Mortimore, *History and evolution of land tenure and administration in West Africa*, (IIED, London 1997), p.6.

colonial yoke: Indonesia and Vietnam being the two most conspicuous examples, and within the British empire, Kenya and Cyprus being the best (or worst) examples.

The decade of benign colonialism v the decade of ‘hanging on’: the 40s and 50s

I have suggested in the table that the last decade or so of colonialism was a phase of benign colonialism when colonial powers used the law for what L&D writers would recognise as being for developmental purposes – constitutional developments and national economic and social development through governmental action.³³ There was in fact an overlap with the ending of the long phase of empire as the Second World War gave rise to different reactions by the different empires: the Dutch and French tried to reclaim their Asian empires whereas the British reluctantly but peaceably gave up theirs. In the British case, the use of the law was to transfer sovereignty and governance powers to former dependencies; in the case of Ceylon, as it then was, the law was also used to create a constitutional framework for the exercise of these new sovereign powers thus foreshadowing a major use of law in the period of decolonisation over the following two decades but this was not so in the other Asian dependencies.

Economic and social development via law was typified by British developments. First, Colonial Development and Welfare Acts (which had started on a very modest scale in 1929) between 1945 and 1960 made approximately £220m available for development on the basis of “co-ordinated development programmes for a number of years”. Development included infrastructure and social services. Two preconditions for development aid was that “the country concerned was itself devoting an adequate part of its resources to investment designed to contribute to the sterling area’s balance of payments and was ready to make a sufficient contribution towards the particular scheme in question.”³⁴ Second, 1948 saw the establishment of the Colonial Development Corporation, a public corporation set up for the purpose of assisting in the development of dependent countries through the provision of loans or by making equity investments.³⁵ This development in turn sparked off parallel developments in dependencies of which the Uganda Development Corporation established as early as

³³ “ In Africa, the system of law introduced by the European Powers (sic) is passing beyond the rudimentary purpose of maintaining law and order, and it has already entered a more extended phase requiring the promulgation of a wide range of enactment designed to effect improvement in the economic and social conditions of the country.” Hailey (Lord), *An African Survey*, (1957, Oxford, Oxford UP), p. 592.

³⁴ H.J.P. Arnold, *Aid for Developing Countries*, (The Bodley Head, London, 1962) p. 71

³⁵ M. Cowen, *Early Years of the CDC: British State Enterprise Overseas during Late Colonialism*, 83 *African Affairs*, (1984) p. 63.

1952 is probably the best known and provided a model for the development of similar public development corporations in other Anglophone countries in Africa³⁶. Asian ex-British dependencies too used the model of the British public corporation for their programmes of state-directed economic and social development.³⁷

But if the use of law to facilitate economic and social development saw a congruence between the coloniser and the colonised at least in the British empire, constitutional development to advance political development did not. From the perspective of the colonised, there was either obduracy on constitutional development which sparked off armed struggles for independence – Cyprus and Kenya – or at the least internal violence – Zambia, Malawi, Malaysia – or constitutional ‘developments’ which seemed designed to give power with one hand but keep it back with the other. This period was one which from the constitutional perspective was one of the non-stop production of ever more fanciful constitutions and constitutional arrangements (most often, federations doomed from the outset), often devised with the aim of preventing a particular group of people from obtaining the power which their numerical strength entitled them to in simplistic democratic terms – virtually all African dependencies where there were European settlers howsoever minuscule the number³⁸, British Guiana (now Guyana) – at the behest of the USA – and Zanzibar being the best known examples.

Turning to land issues, this period saw the introduction of policies and laws to match that were to have a profound and lasting effect on land management from then on. During the period of the phase 3 empire, it had become progressively more possible in many dependencies for the indigenous peoples to acquire land under the imposed (a.k.a. received) law of the colonial power. This had occurred either by specific agreement or legislation – the mailo lands acquired by Baganda chiefs in Uganda

³⁶ H.F. Morris and J.S. Read, *Uganda: The Development of its Laws and Constitution* (Stevens and Sons, London, 1966) pp. 165 – 67 for an overview of the law as it was then.

Ghana established some public corporations in the 1940s but “they were constituted as limited liability companies rather than public corporations on the standard British model.” Only in the 1950s were the Industrial Development Corporation and the Agricultural Development Corporation transformed into CDC-like corporations with “some of the provisions in the new IDC charter taken verbatim from the CDC charter.” Robert C. Pozen, *Legal Choices for State Enterprises in the Third World*, (New York UP, 1976) pp. 8,9.

³⁷ The World Bank too was sold on such public corporations and produced a users’ primer about them: S. Boskey, *Problems and Practices of Development Banks*, (1959, Baltimore, The John Hopkins Press).

³⁸ A personal reminiscence: I recall hearing the late Julius Nyerere for many years President of Tanzania speaking in Oxford in 1958 explaining that he must be the only person ever to have won every seat in a contested election and finish up as leader of the opposition as the colonial government could, under the then ‘multi-racial’ constitution, nominate sufficient members to the legislature to obtain a majority.

being a good example of this³⁹; or by what in effect was custom and practice stimulated by economic and social pressures on land occupancy sanctioned by judicial decision – the development of land ownership in some Anglophone West African countries occurred in this way⁴⁰ – or by formally acquiring land through the market as, for instance, took place in Malaysia and other countries in Asia.

In the 1950s however, again focusing on the British empire, as colonialism began to wind down, the decision was taken to make a deliberate attempt to privatise and individualise land tenure, principally in African dependencies but also in many of the Caribbean islands where there was legal individual ownership of land but a lack of secure tenure owing to the lack of clear boundaries and informal methods of dealing with land. The best known example of this policy comes from Kenya and its programme of land adjudication and registration which commenced in the mid 1950s but it is often forgotten that the policy impetus for this was the report of the East Africa Royal Commission in 1955⁴¹ which covered Tanganyika (as it then was) and Uganda as well as Kenya and had a profound influence on British colonial development policy generally. It recommended that:

Policy concerning the tenure and disposition of land should aim at the individualisation of land ownership and mobility in the transfer of land which, without ignoring existing property rights, will enable access to land for economic use

Land tenure law cannot simply be left to evolve under the impact of modern influences. A lead must be given by governments to meet the requirements of the progressive elements of society by applying a more satisfactory land tenure law.

...exclusive individual ownership of land must be registered...

Individual rights of land ownership should be confirmed by a process of adjudication and registration...

Undesirable social and economic consequences may arise from the free negotiability of land titles. Government should have the power to impose restrictions when it is clearly in the general interests of the country to do so.

The whole chapter on The Tenure and Disposition of Land of which the above are extracts of the summary of the conclusions of the chapter is couched in this vein. A clearer statement of the role of governments to use the law to bring about fundamental economic and social development would be hard to find. Not only did it influence

³⁹ H. West, *Land Policy in Buganda*, (1972, Cambridge, Cambridge UP).

⁴⁰ E.g. Ghana: K. Firman-Sellers, *The Transformation of Property Rights in the Gold Coast*, (1996, Cambridge, Cambridge UP).

⁴¹ Cmd. 9475, (HMSO, London 1955). The quotations are from pp. 428 – 29.

British Government policy; it clearly too influenced World Bank policy⁴² and set in train policies and legal developments to support them which have lasted to this day.

I would argue then that while from the point of view of the consumers of colonial L&D, this phase of L&D appeared as if law was being used to prolong the colonial presence, and prevent the exercise of power by the indigenous population, from the point of view of the producers, law was being used to lay the foundations of a modern social democratic but market-orientated state. For the consumers, all that mattered was acquiring political power – recall Nkrumah’s words: *seek ye first the political kingdom and all else shall be added unto you* – and the use of the law first and foremost was to acquire that power. For the producers who had the political power, the use of the law was to bring about social and economic change – the classic L&D position.

The decade of optimism v the decade of nationalism: the 60s.

L&D in the narrow US sense of what we, goodwilled outsiders free from the taint of colonialism, did and do to and for them, bright-eyed and bushy-tailed independent states, free at last, or in the case of states in Latin America, equal partners in an Alliance for Progress with their benign neighbour in the North, got under way in the 1960s:

Bliss was it in that dawn to be alive
But to be young was very heaven⁴³

Even those of us from the old colonial powers set out with high hopes. A major thrust of the L&D movement in the 60s from the producers’ side – even from those of us who were not aware that we were part of the movement – was legal education. In discussing this aspect of the L&D I shall perforce confine myself principally to countries within the Commonwealth. With the exception of the Indian sub-continent, where legal education goes back to the mid-nineteenth century, certainly within the old empire and new Commonwealth, legal education (and lawyers) had been kept at

⁴² Its two reports on *The Economic Development of Tanganyika* (1961) and *The Economic Development of Uganda* (1962) (such reports were a *rite de passage* of newly independent states in the 1960s) both referred approvingly to the report and recommended that individualisation of land tenure along the lines recommended in the report be adopted in both countries. See too the immensely influential World Bank *Land Reform Policy Paper* (Washington D.C. 1975) which argued for the replacement of customary tenure with individualisation of land tenure on the basis of modern statute law and for two examples of the execution of such a policy, the massive land administration and title registration project funded by the Bank in Indonesia in the 1990s and the on-going titling project in Cambodia.

⁴³ W. Wordsworth, *French Revolution, as it appeared to Enthusiasts* (1809).

bay by colonial governments. No law schools were established in any of the new universities which were created by the British government in the colonies from 1945 onwards and few government scholarships were available for those wishing to study law abroad during that same period.

This is not to say that there were not indigenous lawyers in newly independent countries but almost without exception, they had obtained their legal education by coming to England and studying at the Inns of Court to be barristers, and paying their own way in doing so. That there had been a long tradition of this may be gauged by the fact that the legal profession was well established in Ghana (in colonial times, the Gold Coast) by the 1930s with lawyers playing key roles in nationalist movements and being appointed to the bench well before independence in 1957, in Nigeria ditto and to a lesser extent in Malaysia also from the 1940s onwards⁴⁴. It was the rapidity of the process of decolonisation in Africa which led the British government to reverse its position on the necessity (if not desirability) of legal education and the presence of lawyers in African states which had either become or were about to become independent and appoint in October 1960 the Committee on Legal Education for Students from Africa⁴⁵, known from the time of its appointment as the Denning Committee on legal education for Africa after its chairman and driving force, Lord Denning. Without histrionics or any theorising – this was after all a committee composed entirely of English lawyers – legal education for students from Africa and the needs for the future were discussed and conclusions arrived at in 29 pages. 10½ of those pages discussed possible improvements in legal education in the Inns of Court and 9½ the case for legal education at many different levels up to and including the establishment of university law schools in Africa. The nearest the Committee came to any sort of credo was in the following statements:

The great need in most of the territories is to train up Africans to take their proper part in the administration of justice. One territory after another is gaining independence or looking forward to it. On the transfer of power the territories will not only need legislators and administrators. They will also need judges and

⁴⁴ C.J Dias, R. Luckham, D.O. Lynch and J.C.N. Paul (eds) *Lawyers in the Third World: Comparative and Developmental Perspectives*, (Uppsala, 1981) especially the papers by Luckham on the legal profession in Ghana and by K.C. Machado and R. Said on the legal profession in Malaysia.

⁴⁵ *Report of the Committee on Legal Education for Students from Africa*, Cmnd. 1255 (HMSO, London 1961). There were 21 members on the Committee, a roll-call of the English legal establishment. Only 3 members were academics and only one, E.R. Dew, did not have some prestigious initials after his name. He must have been a solicitor. No lawyers from the Scottish legal profession were on the Committee. Scottish Law Schools however played a major role in the development of legal education in Botswana, Lesotho and Swaziland as Scots law is or was thought to be closer to the Roman-Dutch law applied in those countries.

lawyers. And these should, so far as possible, be fairly representative of the community as a whole...⁴⁶

When money is short, the question is: What priority should be given to a faculty of law? Hitherto priority seems to have been given to medicine, arts and science. We would suggest that, in future, when it is a question of competing priorities, legal education should rank very high: because upon it the territories depend for their future judges and magistrates.

Despite or perhaps because of the absence of hyperbole, this report had a very major impact on the development of the industry of law not only in Anglophone Africa but in other parts of the Commonwealth as well. If one were to try and compile a list of the ten most influential inputs into L&D in its formative era, the Denning Report – dry, factual, totally lacking in imagination or indeed any overt conception of the socio-legal implications of what it was proposing – could lay claim to be in the top three. During the 1960s, law schools modelled for the most part on British law schools were established throughout Anglophone Africa, Malaysia, Singapore and the Caribbean. By the end of the 1960s, the products of these law schools were beginning to advance into their legal professions, establish traditions of legal scholarship and writing and have from that time on been a major influence on the development of law in their respective countries.

There is no doubt that those who were involved in the early years of legal education in these countries did think they were making a significant and worthwhile contribution to the development of law and after a short while to law and development. The great Wolfgang Friedman developed one of the first overtly L&D courses on law and economic development in Dar es Salaam, Tanzania in 1965⁴⁷. The same law school hosted the seminal African Conference on Local Courts and Customary Law in 1963, one of the first pan-African meetings of Ministers of Justice, judges and lawyers which charted the way forward towards the development of unified legal and judicial systems in African states. Examples of similar developments could be instanced from other newly founded centres of legal education

⁴⁶ Op. cit. paras, 7, 54. This ringing affirmation of a representative legal profession is rather spoiled by the fact that the word 'woman' only appears once in the whole report as a kind of parenthesis in paragraph 4 which otherwise constantly refers to 'men' and 'man'. But then there were no women on the Committee. In some respects however the Committee was ahead of its time. The notion of a representative judiciary has only in the last few years reached the political agenda in the UK which at the beginning of 2004 saw the first woman reach the British equivalent of the Supreme Court – appointed as a Law Lord (sic) to House of Lords. She is one of such 12 judges. Her promotion from the Court of Appeal meant that there were only 2 women out of 37 judges in that court. The only ethnic minority judges in the superior courts in the UK are white South Africans and members of the Jewish community.

⁴⁷ W. Friedman, *The Role of Law and the Functions of Lawyers in Developing Countries*, 17 Vanderbilt L.R. 181 (1963), one of the earliest articles on this subject in an American law review.

throughout the former colonial dependencies. However, as a teachers and scholars, I think it fair to say that one accepted the state as one found it and set about trying to educate and train lawyers to work within the state system albeit trying to make it work better and more in the interests of all and not just the elites as had been the position in colonial times. The fact of indigenous legal education might have been novel and in some cases perhaps even threatening⁴⁸; the exercise in practice was not.

In their public pronouncements however, those who were ‘in at the creation’ made clear their commitment to and belief in the positive role law could and should play in the development of new states as the following quotations show:

In its social setting the law must do three things at the same time. In the first place it must reflect the values of the society it serves – it must be firmly planted in the soil if it is not to be largely irrelevant to the lives of the people and thus ignored...

However the law cannot content itself merely with accommodating social changes after they have occurred. It must take account of the fact of change. A second function of law in society therefore must be to help in the creation of conditions, so far as this is possible, in which desirable social developments can the more readily take place.

...In a period of such fundamental changes and accelerated development perhaps the law must assume a more positive role in some spheres, must seek to influence the direction of development even if with only marginal effect. In this guise the machinery of the law is used to effect socially desirable policy objectives⁴⁹.

Burnett Harvey of the University of Michigan Law School played a major role in the development of legal education and scholarship in Africa during this decade and indeed into the 1970s. I do not know whether he would have seen himself as a card-carrying member of L&D movement but both in his work as an educator and as a scholar, he articulated many of its values:

⁴⁸ A good example of this was the tension between the (overwhelmingly non-indigenous) legal profession in Kenya and the law faculty in Dar es Salaam whose mandate covered the three East African countries of Kenya, Tanzania and Uganda. The Kenyan Attorney-General and the legal profession did not like the idea of academic law and graduates of the Dar es Salaam law faculty entering the legal profession in Kenya. I recall being told by one leader of the Kenyan profession in 1963 that graduates from Dar es Salaam would probably find a niche as lower order gofers (he didn't use that word but the intent was plain) in law firms which would continue to take on as 'lawyers' products of the English bar and solicitors. The A-G, himself a product of the English bar, was suspicious of anything Tanzanian.

⁴⁹ G.F.A. Sawyerr *Note in ibid (ed) East African Law and Social Change*, (East African Institute of Social and Cultural Affairs, Dar es Salaam, 1966) pp. 7 – 9. Aki Sawyerr later became the Vice-Chancellor of the University of Ghana.

Legal research in the almost virgin systems of the emergent nations seemed to offer the prospect that scholarship could make an immediate, practical contribution to solving pressing problems and meeting urgent needs. Such utility, while surely not the hallmark of valid scholarship, should not be rejected as unworthy of scholarly concern...

...The materials of the law – constitutions, statutes, legislative enactments, judicial decisions and administrative orders – reflect the struggles of competing values for expression and realization. It is for this reason that the study of law can provide significant insights into the structure and processes of the society as a whole, into the wellsprings of social change which lie outside the technically defined domains of the law⁵⁰.

Even in those countries in Latin America which had well established law schools going back further in time than virtually all law schools in the UK, the 1960s saw changes take place⁵¹. In some countries legal education became more of a full-time occupation. Exchange programmes with and study in US law schools became much more common and through these developments, a slow change in the nature of the legal education enterprise got under way.

The importance of focusing on legal education and scholarship is to make the obvious but not sufficiently emphasised point that what the 1960s witnessed in many parts of the developing world was *arrival of law and lawyers* as a distinct and independent social force in the countries concerned and even where there was already a legal profession, its rebirth, if that is not too grand a word, either through the arrival of law faculties and home-grown lawyers or of more lawyers with some comparative legal experience and knowledge, as an active player in the development of an independent polity. This was the major and irreversible L&D input into the developing world. In the future, whatever the roles which these lawyers assumed, however the external producers of L&D regarded L&D and their roles in its production, the presence and work of indigenous lawyers and legal educators where once there were none or very few or with very lowly status changed for ever the internal role of law in development and set in train the development of an internal scholarship on L&D.

⁵⁰ W. Burnett Harvey, *Law and Social Change in Ghana*, (Princeton UP, 1966), pp. viii, 347. Harvey was the first Dean of the Faculty of Law in the University of Ghana. He was thrown out of Ghana by the government in February 1964. He later taught in the Law Faculty of the University of Nairobi where he produced *An Introduction to the Legal System in East Africa*, (East African Literature Bureau, 1975) a collection of materials which 30 years on has no published equal in Anglophone Africa for their breadth and vision.

⁵¹ For one example, R. Perez Perdomo, *Jurists in Venezuelan History*, in C.J. Dias et al op. cit, footnote 25, pp. 76 – 89.

Even in the 1960s, and, I would argue, at least as an indirect consequence of the use of law by the departing colonial powers in the preceding era, the 1960s were a period when new polities used law as a positive tool of national development. Just as a new constitution gave birth to a new nation (or so it appeared in many countries rather than the other way round as had occurred in India and Indonesia for instance) so new laws were used to give birth to new social and economic trajectories in the new nations. Three matters may be noted. In Africa, Ghana led the way in reorganising and creating a plethora of public corporations on the UK and USA/Tennessee Valley Authority model as its chosen vehicle for economic development⁵². In Asia, India had done the same. All over Anglophone Africa, the legal and judicial systems were reformed to abolish the dual system of courts – one system for Africans, one for non-Africans – and to provide for a unified system of courts, applicable to all⁵³. In some countries, a programme of the codification of customary law as a prelude to its becoming part of the national law of the state commenced⁵⁴.

Land law received its share of attention. Probably the most far reaching and revolutionary land law reform was that introduced by Indonesia, the Basic Agrarian Law of 1960 which abolished the old colonial dual system of land law going back well into the 19th century, and created a unified modern land law of Indonesia based on adat law but with the State succeeding to the role of traditional authorities⁵⁵. As far reaching as a matter of law reform although not as a matter of revolutionary social reform was the enactment by Malaysia of the National Land Code in 1965 whose objectives as described by the Minister in introducing the Bill into Parliament were:

...two fold –

- (1) it established a uniform clear-cut system of land tenure and dealing, in place of a confusion of systems, and
- (2) it incorporated all those new provisions required to adopt that system to the social and economic changes of half a century or more.⁵⁶

⁵² Pozen, op. cit. footnote 20.

⁵³ W.T. McClain, *Recent Changes in African Local Courts and Customary Law*, 10 Howard Law Journal, 187 (1964).

⁵⁴ For rather different views on the benefits of this, see W.L. Twining, *The Place of Customary Law in the National Legal Systems of East Africa*, (Law School, University of Chicago, 1963) and E. Cotran, *The Place and Future of Customary Law in East Africa*, in *East African Law Today*, (British Institute of International and Comparative Law, London, 1966).

⁵⁵ S. Gautama, *Indonesian Business Law*, (Bandung 1995) pp. 119 – 248 for a useful overview of Indonesian land law and its evolution.

⁵⁶ *Proceedings of the Dewan Negara*, 9 August 1965, p. 158, quoted in J. Sihombing, *Land Law from 1928 to 1966 in the Federated Malay States* in A. Ibrahim and J. Sihombing (eds) *The Centenary of the Torrens System in Malaysia*, (Malayan Law Journal, Kuala Lumpur, 1989), p. 43.

Arguably Tanzania was not far behind Indonesia in fundamental land reform via law. During the 1960s, it used the law to abolish freehold tenure, provide for land redistribution from absentee owners to occupiers, and drastically reduce the scope of landlord/tenant relations in customary tenure⁵⁷. Kenya went the other way, and enacted laws to speed up the process of land consolidation, adjudication and individualisation of tenure on the basis of the recommendations of a Committee of Inquiry into the existing programme of consolidation and registration while also introducing increased central control of land dealings and land use⁵⁸. Malawi and Zambia too enacted legislation to increase the powers of the state over land, Zambia going the way of Tanzania in this regard while Malawi moved in Kenya's direction of land adjudication.

The two contrasting approaches to land tenure reform and the use of the law to provide the foundations of it in the 1960s – the one, state control and the nationalisation or repatriation of land rights, the other state facilitation and regulation of private ownership of land – heralded the battleground over land reform and the role of law therein, fighting over which continues to this day. But the apparent contrast also conceals an underlying commonality of intention: to substitute for a multiplicity of land laws derived from custom and tradition and owing their legitimacy to the people, one national land law derived from and owing its legitimacy to the authority of the state. Uniformity v plurality too has remained a battleground for law reformers and L&D theorists and in this case, it is a battleground which has a long colonial history and not just over land law⁵⁹. So on this matter there was continuity with the colonial period.

It could be argued that the decade of the 60s saw the external and the internal approaches to L&D pointing in the same direction. Optimism and nationalism were then seen as two sides of the same coin. Where external funders came in, they came in not to impose their own agendas but to assist the new nations realise their own via law reform. Furthermore, there was a congruence between the external and the internal approaches that law reform was a key to development.

⁵⁷ P. McAuslan, *Control of Land and Agricultural Development in Kenya and Tanzania*, in Sawyerr, op. cit, footnote 31, pp. 172 – 257; R.W. James, *Land Tenure and Policy in Tanzania*, (EALB, 1971).

⁵⁸ *Report of a Mission on Land Consolidation and Registration in Kenya 1965 – 66*. The mission consisted of 3 British and 3 Kenyan members (of which 2 were British officials working in Kenya) fielded by the British Government as part of its aid to agricultural development in Kenya. See also, A. Munro, *Land Law in Kenya*, in T. Hutchison et al, *Africa and Law*, (University of Wisconsin Press, 1968) pp. 75 – 103.

⁵⁹ For a general discussion of this in the context of Indian law, see G. Rankin, *Background to Indian Law*, (Cambridge UP 1946).

The decade of disillusion v the decade of consolidation: the 70s.

The decade of the 70s saw a sharp divergence of both opinion and approach to L&D. The external producers became disillusioned; the internal consumers assumed the role of primary producers. There is no need for a predominantly American audience to rehearse the predominantly American arguments about the death of L&D which characterised this decade of writing about L&D in American law journals. It is probably more important to provide an alternative external perspective to this decade.

At the heart of the 70s critique of L&D was liberal legalism. It is still fashionable to decry the liberal legalism with which L&D missionaries set out on their journeys into the unknown in the 60s as being naïve and ethnocentric but it is permissible to cast some slight doubt on so sweeping a generalisation. Three factors may be mentioned. First, it is easy to forget that for many peoples all over the world, the advent of independence, a written constitution, popularly elected legislatures, independent judiciaries, the rule of law and social and economic reforms brought about through legal mechanisms were a major advance on the previous systems of governance to which they had been subjected⁶⁰. At a time when liberal legalism is being subjected to an unremitting attack from governments in countries that have hitherto prided themselves as being the home of the ideas, concepts and practices which add up to liberal legalism, it may perhaps be a little easier to understand the attractions of these principles, however imperfectly realised in practice, when one does not have them. Liberal legalism as it was used in the 1960s was not a set of ideas or prescriptions forced upon unwilling recipients; it was seen for the most part as a necessary foundation of democratic governance and as a perfectly proper benchmark to use to criticise the authoritarianism which was becoming manifest in many countries in the developing world in the late 60s, throughout the 70s and beyond.

Second, the notion of the ‘rule of law’ as an aspect of liberal legalism is one that comes under increasing attack today on the grounds that it has been hijacked by the World Bank and other johnny-cum-latelys who have clambered aboard the L&D bandwagon. I will avert to this later but it is worth highlighting how it was seen and valued by leading lawyers and others in the developing world in the early L&D decades. This comment by Telford Georges, the Trinidadian Chief Justice of Tanzania in the 60s is not untypical:

⁶⁰ For Africa, see C. Young, *The African Colonial State in Comparative Perspective*, (Yale UP, 1994).

I do not conceive of the rule of law as meaning nothing more than the regulation of the affairs of society by a set of rules which are fixed and certain...This is a purely mechanistic approach...The rules themselves must be such as are designed to promote what are, I venture to say universally considered to be worthwhile human values – the freedom of the individual in its widest sense...and in as far as any society does not strive for the attainment of these ends for all its citizens, irrespective of race, colour or creed, I would not agree that it seeks to regulate its affairs in accordance with the rule of law⁶¹.

This attitude to liberal legalism was not unique then nor, it is worth noting, is it now when it is reference to such ideals as were highlighted by Georges that form the foundation of appeals for support to pro-democracy movements and the introduction or re-introduction of the rule of law in countries such as Guatemala, Myanmar and Zimbabwe.

Third, American disillusionment with L&D as a tool to bring about equitable social and economic development must be seen as a part of the general turning away from support for democracy and equity in the developing world by successive US governments from the mid 1960s onwards as they preferred subservient and authoritarian client states such as Congo, Indonesia, Brazil, Iran, which supported them in their Cold War postures to states with at least some semblance of democracy and independence in thought and action⁶². Military regimes are not noted for their interest in doing things in a lawful manner and military regimes became in a very short space of time in the 60s and thereafter the predominant form of government in the developing world, albeit some of them tried to transmogrify themselves into civilian regimes by swapping their uniforms for a lounge suit or civilian robes.

Fourth, the naivety of early protagonists of L&D and of the funders of L&D research and action was not, in my view, so much their failure to realise that laws which operate well in one social milieu might not operate either so well or in the same way in another and very different social milieu (on that issue, even 30 odd years on, there is still vigorous debate on the effectiveness of legal transplants) as their assumption that there would be observable and measurable benefits from law reform (of whatever kind) in a very short space of time. This is a perennial problem with donors and IFIs;

⁶¹ T. Georges, *The Rule of Law in Tanzania*, in R.W. James and F.M. Kassum, (eds) *Law and its Administration in a One Party State: Selected speeches of Telford Georges* (EALB, 1973), p.46. President Nyerere had much the same view of the role of law in society. See his Dag Hammarskjöld Memorial Lecture in 1964, *The Courage of Reconciliation* in J.K. Nyerere, *Freedom and Unity*, (Oxford UP, 1966), pp.266 – 285.

⁶² The UK was little better. In Africa it preferred Amin's Uganda to Tanzania in the 1970s and continued support for apartheid South Africa until President Mandela was released in 1990.

they have to show ‘results’ and results have to be something that can be weighed and measured; so many more children in primary schools from funding free primary education; so many miles of road built or repaired from funding a road building programme; so many more hectares of land planted with coffee or tea or whatever from assistance to agricultural development and so on (or so many hectares of drugs not planted).

But legal development, apart from the number of laws enacted, is not susceptible to that kind of measurement. It may be that there was too ready an assumption that the promulgation of a new constitution which heralded a new independent state was both evidence in itself, and a forecast, of the future close and immediate connection between law reform and change. It may however take years before any sensible conclusions can be arrived at on the plusses and minuses of any particular legal input into social or economic development and considerable acumen to distinguish the effects of legal as opposed to social, economic, political, scientific etc inputs into and outputs from a particular trajectory of development. It is no accident that by far the most detailed and thought-provoking work on the impact of law on economic development is a survey of 35 years of legal inputs into economic development, and that was the result of “a collaborative, interdisciplinary, multinational research effort”⁶³ – all elements which early work on L&D conspicuously lacked. So one might suggest that the disillusionists gave up too soon.

Fifth, it is, I suppose, a tribute to the writings of the disillusionists in the 70s that it has been their analysis and critique that have structured the course of L&D in the US since then. It is therefore worth making the point that, quite apart from the fact that action, thinking and writing on L&D continued in the South despite the obituaries being written about it in the US, L&D as a subject of study and research continued in the North, even in the US where there have been noted scholars that never gave in to despair. Jim Paul and Bob Seidman spring to mind and it is I think no accident that they entered the field via work in Africa, principally legal education in Africa, which as I have already suggested set in train ineradicable changes for the better in new states in Africa. Bob Seidman in particular continued not merely to write about L&D but practice it in the field by working in a succession of law schools in Anglophone Africa.⁶⁴ On the basis of my own experience I would hazard the guess that like me, being there, working with lawyers and administrators faced with the daily challenges of creating and applying law and legal techniques to what must have seemed

⁶³ K. Pistor and P.A. Wellons, *The Role of Law and Legal Institutions in Asian Economic Development 1960 – 1995*, (Oxford UP, 1999), p.vii.

⁶⁴ His pathbreaking *The State, Law and Development* (Croom Helm, London) was published in 1978.

insurmountable economic and social problems, fuelled his commitment to both L&D as a worthwhile intellectual endeavour but also, and in some ways more important, as a worthwhile practical exercise working with lawyers and administrators who were committed, however naively in the view of some, to making a difference through law.

Sixth, it is the case that IFIs, USAID and some other donors did ‘go off’ law as a relevant developmental input in the 70s. But here too, there has been far too much stress laid on what the World Bank did or did not do and what USAID did and did not do. UN agencies did not ‘go off’ law. Concentrating once again on my particular field, the 70s saw two major UN conferences, the United Nations Conference on the Human Environment in Stockholm in 1972 and the United Nations Conference on Human Settlements in Vancouver in 1976. The first conference led to the creation of UNEP in 1976, the second to UNCHS (Habitat) (now renamed as UN-Habitat) in 1978. UNEP very early on adopted a twin-track policy of bringing nations together to agree on treaties at the international level to create an international environmental law and at the national level, of setting in place a programme to assist countries that wanted the assistance to develop their national environmental laws. UN-Habitat did not have any similar policies or programmes but responded promptly to requests for assistance in the matter of creating or revising national urban planning, housing and building laws. In this respect they were building on the work of the UN Centre for Housing Building and Planning which had, in very adverse circumstances, been fielding missions on these matters for some 15 years⁶⁵. FAO too continued to offer its services to countries wanting advice and assistance on legal inputs into tenure reform.

The UN’s assistance on the legal front is the appropriate way into the internal consumer’s perspective on L&D in the 70s. Far from abandoning law as an input to development, this decade was one of continued commitment to the use of law in development and a consolidation of much that had been started in the 1960s. Law schools continued to be founded. The products of the law schools founded in the early 1960s began to make their mark as judges, legislators, legal scholars, legal practitioners and administrators. Several states in the Commonwealth, following the British lead as all too often happened, established statutory Law Reform Commissions with the remit to keep all the law of the country under review and bring forward proposals for its reform and revision.

There was no let up on the land law front. If the 1960s opened with the revolutionary Basic Agrarian Law of Indonesia, this decade closed with the equally revolutionary

⁶⁵ C. Abrams, *Man’s Struggle for Shelter in an Urbanizing World*, (MIT, 1966) pp. 91 – 94.

Land Law enacted by the People's Assembly in Mozambique in 1979. No better explanation of this law is to be found than that by Albie Sachs, then working in Mozambique:

In many countries that have been independent for decades we do not witness the transfer of land from the colonialists to the hands of the people. In most cases reforms occur that tend to adapt colonial law and customary law to the new situation in which a national bourgeoisie replaces a colonial bourgeoisie. For us the recovery of the land is integral to the process of the Mozambique revolution. Because of this it can never signify the mere substitution of names on property titles nor the return to forms of appropriation and usage peculiar to feudal tradition...

In essence the principles of the *Land Law*...synthesized the experience of generations of poor and dispossessed Mozambicans in their struggle to regain the land. If the object of land law is normally to legitimate possession by conquest, the new Mozambican law set out to legitimate repossession by revolution...

The argument of imposed law versus traditional law must be regarded as a false one in the light of revolutionary law. The basic themes of the new *Land Law* came from the peasantry themselves, at a time of intense struggle against both foreign domination and indigenous power structures. The *Land Law* emphasises that the people do not simply inherit law, or submit to law imposed on them from the outside. They create law, and become themselves the instruments for the implementation of the new norms which they have evolved...

Lawyers need by no means be silent amid the roar of revolution. On the contrary, they have an important role to fulfil, not as opponents of change but as activists for progress, helping to clarify and apply the new norms in a way which facilitates the desired transformations, that eliminates arbitrariness and that defines in clear and understandable terms the rights and duties of citizens...⁶⁶

We may regard these comments as slightly ott and certainly the *Land Law* did not live up to Sachs's panegyric – if for no other reason, the South African backed Renamo insurgency saw to that – but Sachs's own commitment lives on as, to take just the land and housing areas, the *Grootboom*⁶⁷ and *Richtersveld*⁶⁸ decisions in the South

⁶⁶ A. Sachs and G.H. Welch, *Liberating the Law: Creating Popular Justice in Mozambique*, (Zed Books, London, 1990), pp. 31, 37, 44, 45. This chapter was first given as a paper in the Institute of African Studies, Harvard University in 1980. Albie Sachs is now a Justice of the Constitutional Court in South Africa.

⁶⁷ *Government of the Republic of South Africa and others v Grootboom and others*, 2000 (11) BCLR 1169 (CC). A shortened version appears in *The World Bank Legal Review: Law and Justice for Development*, Vol. 1 (2003) pp. 541 – 570.

⁶⁸ *Alexkor Ltd and The Government of the Republic of South Africa v The Richtersveld Community*, Constitutional Court of South Africa, case CCT19/03 decided 14 October 2003.

African Constitutional Court show. And with all due respect to Bob Seidman's work on legal drafting, does not the statement of the lawyer's role in revolutionary times perfectly sum up what the good draftsman should aim for at all times? Here then is another lawyer who, by continuing to work at the sharp end of L&D, has kept the faith.

Mozambique was not the only country to use law to essay fundamental land reform. Notwithstanding the horrors of Idi Amin's regime in Uganda in the 70s, some interesting laws and policies were introduced during that period⁶⁹. None more so than the Land Reform Decree, 1975 which attempted to deal with the perennial problem of mailo land – freehold land granted to Baganda chiefs without regard to the pre-existing customary tenurial relationship between the chiefs and the occupants of the land by the Buganda Agreement in 1900 between the British and Buganda governments which set in train constant (and continuing to this day) conflict between tenants and landlords over rights to occupy and use the land⁷⁰ – by abolishing the tenure and converting all land in Uganda into public land held from the State on, at most, 99 year leases.

There are not wanting those in Uganda (not, it has to be said, many Baganda) who argue that the Land Reform Decree was the best effort ever made to grapple with the colonial legacy of fraught land relations since it represented a root and branch attempt to get rid of the poisoned chalice of private landlord/tenant relations in Buganda and in the 'Lost Counties'⁷¹ and impose a uniform system of land administration throughout the country. It was not to be: a combination of four more years of Amin, a period of Presidential instability for 18 months then the regime known as Obote II, generally reckoned to be at least as bloodthirsty as Amin's, until it was overthrown in 1986, destroyed any possibility of the new law being applied.

⁶⁹ A very fine Ugandan civil servant, Frank Gasasira (who kept going in Uganda in the 70s trying to hold things together until he was forced to flee for his life in 1978) told me in 1980 that the administration had managed by sleight of hand to *increase* spending on primary education during Amin's misrule.

⁷⁰ H. West, *op. cit.*, footnote 39; E.S. Haydon, *Law and Justice in Buganda*, (Butterworths, London 1960) Chap. 8.

⁷¹ The 'Lost Counties' refer to parts of the Kingdom of Bunyoro captured by the Kingdom of Buganda while fighting the Banyoro in leagues with the British towards the end of the 19th century. The British transferred parts of Bunyoro to Buganda by the Buganda Agreement of 1900. The Banyoro have never accepted the legitimacy of this transfer. It remained and remains a sore on the body politic of Uganda. See Morris and Read, *op. cit.* footnote 20, at pp. 74, 75, 79, 80, 82 and 83.

In West Africa, Nigeria too went down the route of public ownership of land by the Land Use Decree of 1978 promulgated by the military regime of General Obasanjo⁷². Until that time, Nigeria had had two systems of land tenure operative in the country; in the South a dual system of ‘modern’ Western land tenure and customary tenure with land being able to move between the two systems; in the North, a paternalist system with all land under the control of the government with the government empowered to make grants of rights of occupancy to individuals and regulate the manner and form of their dealing with those rights. After a series of reports of committees in the early to mid 70s on the problems of the land tenure system, the then military government opted for a new national system based on that operative in the north of the country. The new policies were described thus:

The policy adopted was one of trusteeship which embraced many of the essential principles of the Northern Nigeria Land Tenure Law [of 1962 which was a modernised version of the colonial Land and Native Rights Ordinance of 1916].

Trusteeship policy, however, differs from the paternalistic one in its *essential objects*. Whilst paternalism aimed at securing for members of ethnic groups the use and occupation of land, and permitted discriminatory conduct against members of other ethnic groups, “trusteeship” aims at securing the implementation of fundamental objectives of national policies and proscribes discrimination in land matters. The methods of achieving these objectives were by vesting all land comprised in the state, other than federal lands, in the military government of the state in trust to be administered for the use and common benefit of *all Nigerians* and by establishing uniform *national principles*.⁷³ (italics in the original).

The Decree was promulgated by a military government. It has survived two new constitutions, two civilian governments and four military regimes. At the same time as it is held up as an example of a national land law, it is widely circumvented in practice. In the North, traditional rulers still exercise considerable authority over land allocation, albeit in an ‘informal’ de facto mode. In the South, a land market, with or without official sanction still operates. State governors have enormous powers over land; many of them are unable to resist the temptation to encash those powers.

A final example comes from Southern Africa: Lesotho. After the application of strong donor pressure led by the World Bank, Lesotho finally enacted the Land Act 1979.

⁷² Uniquely among Nigerian military rulers, he relinquished office voluntarily to a civilian regime in 1979, retired from the scene, was later convicted of treason and incarcerated by a later military regime, but came back and won the election as the civilian President who replaced the military regime in 1999.

⁷³ R.W. James, *Nigerian Land Use Act: policy and principles*, (University of Ife Press, 1987), p. 27.

Land in Lesotho had always been vested in the King in trust for the Basotho Nation and the Land Act did not alter that fundamental position. The law was designed to remove allocation and management powers over customary tenure from the chiefs as delegates of the King and vest them in elected bodies as delegates of an elected government (sort of⁷⁴) on the basis of nationally set principles and standards. It created a new system of leasehold tenure which ostensibly anyone could move into from customary tenure but since that form of tenure was unknown to the Basotho, was widely seen as a means to facilitate foreign – a.k.a. South African – acquisition of urban land and the best agricultural land for commercial agriculture. The Act was dead in the water from the time it was enacted; the King opposed it and used his not inconsiderable informal powers to subvert it.⁷⁵

It was not only in Africa that land law was reformed. Radical land law reform took place in India with the Urban Land (Ceiling and Regulation) Act 1976 which sought to impose a ceiling on holdings of urban land and to empower the government to acquire urban land held in excess of the ceiling. The aim in the analysis of a sympathetic commentator was to prevent the concentration of urban land in the hands of a few people and to bring about the equitable distribution of land in urban areas for the common good. The reality in the words of the same commentator was as follows:

The hastily enacted legislation bristles with anomalies, seeks to impose irksome restrictions on the ownership and transfer of property, fixes an unimaginative arbitrary ceiling, all clothed, in intricate official jargon and

⁷⁴ The government which enacted the Land Act had acquired power in 1970 after refusing to accept its defeat in the general election of that year; suspending the Constitution in January, imprisoning its political opponents and proceeding thereafter to rule, first with no legislature, then from 1973 with one nominated by itself. The British Government, after tut-tutting about the coup and suspending aid, resumed aid in June and thereafter donors piled into Lesotho. Ferguson lists 27 countries and 72 other bodies – NGOs, UN agencies, the World Bank, the EU etc – as donors during the period 1975 – 1984. Ferguson comments: “In 1979, Lesotho received some \$64 million in “official development assistance” according to the World Bank or about \$49 for every man, woman and child in the country...the purpose of this aid is ostensibly to alleviate poverty, to increase economic output and to reduce “dependence” on South Africa...Yet if all observers of Lesotho’s “development” agree on one thing, it is that “the history of development projects in Lesotho is one of almost unremitting failure to achieve their objectives.” ” J. Ferguson, *The Anti-Politics Machine: “Development, Depoliticization and Bureaucratic Power in Lesotho*, (University of Minnesota Press, Minneapolis, 1994), p.7

⁷⁵ When working in Lesotho in the late 80s, I came across an end-of-mission report by a British official seconded by the British Government to work with the Government of Lesotho on implementing the Land Act. In it, he noted that there was never any commitment by the Government of Lesotho to make the Act work as it was regarded as foisted on to Lesotho by the World Bank as the price for aid to agricultural development.

The King, with whom I was at Oxford University in the 1950s, became a student of mine in the 1980s doing a Master’s degree focusing on land law. Chiefs, many of whom were related to the King, more or less took their line on the Land Act from the King. Early drafts of his thesis were vitriolic attacks on the Land Act and the government of the day. He never finished the thesis. He died in a (genuine) car crash in the mountains in Lesotho in 2001. His son, (with a Master’s degree in law) succeeded him.

confusing and contradictory provisions that have provoked wide controversy. Lawyers and jurists who have sought to interpret the key sections find themselves as much at sea as the lay citizens, the official clarifications offer little help and less solace. The elaborate complicated form that has to be filled in by the helpless urban property owners is the last straw on his back.⁷⁶

Several common themes come through very clearly both in these examples and in the ones referred to in the previous section of this paper. The first is that just as with the establishment of empire, the government of a new nation focused on the importance of reorganising the management of and rights in land. Sovereignty over land conferred power to determine rights to land. The second theme follows from the first: the essential need for a *national* solution to the land question; that any national solution must start from the principle that the state or the nation must have a major or the primary role in determining what land is to be used for and what rights in the land and for how long should the individual be permitted. It followed then that the radical title to land should be vested in the state and held by the state on behalf of the people; a top down centralised bureaucratic response to the perceived problem. This too was very much a continuation of the imperial imperative.

The third theme is that this transformation could only be achieved by using the law to bring it about and that even where governments themselves had a distinctly shaky relationship to legitimacy based on law, they opted to use law to provide the 'proper' basis for this transformation. Law was seen then as the essential mechanism to bring about fundamental social and economic change via changes in land relations. From the perspective being adopted here, it is of less importance that in virtually all the cases discussed here, the end result of vesting land and powers of allocation of, regulation of transactions in and use of, land in governments did not lead either to rapid economic development or social equity in land holdership than that these steps were taken by governments in the South using law and legal techniques, usually using national lawyers increasingly trained in the states concerned or in other states in the South, and this at a time when the world was being informed that L&D was dead.

The fourth theme follows on from this. Attempts to bring about fundamental change by law were undertaken by governments and commented on often critically by legal and other scholars *in the countries concerned*. A critical national L&D literature was

⁷⁶ G. Bhargava, *Socio-Economic and Legal Implications of Urban Land Ceiling and Regulation*, abhinav publications, New Delhi, 1983), p.3

being developed alongside attempts to utilise law in the service of development in the South. This too was largely ignored then and has continued to be largely ignored.⁷⁷

I first became involved in L&D as a practitioner/consultant (as opposed as a teacher) in this decade when I acted as a UN consultant advising on and drafting urban planning laws in Tanzania and Nigeria and housing and environmental laws in Tanzania. I worked in urban development corporations, the Capital Development Authority in Tanzania developing legal frameworks for the planning and building of the new capital of Dodoma and the Kano Urban Development Corporation in Nigeria revising that state's town and country planning laws. I wrote up my experiences a few years later and will summarise them here⁷⁸. The first point worth making is that the planning laws I was asked to review or work with in both countries were the British colonial models enacted in Tanzania in 1957 and in Nigeria 1946 which in essence had been left untouched since the independence of both countries in, respectively, 1961 and 1960. The reason for this was broadly the same as the reason for the top-down approach to land tenure reform: the laws accorded perfectly well with the views and attitudes of the ruling elite, both civil and military, which in this respect was not too different from those of colonial power. There was a very clear appreciation, on the part of the authorities, that urban planning was about power over land and that this was too important to be handed over to bodies over whom governments might not have complete control; i.e. local authorities or to involve the people via any sort of participation. Tenure reform in both countries, as we have seen, replicated the colonial model.

A more fundamental issue that I attempted to address was what might be called the legal liberalism question: does law on the Western legal liberalism model have any constructive role to play in urban development? The arguments against can be put at two levels. The cynical level was put to me by a planning consultant in Dodoma, Tanzania. 'Why bother?' he said, 'Does it really matter whether the agency [in the instant case the Capital Development Authority] obeys the law or not? Wouldn't everything go on as "normal" if they didn't bother?' It would be hypocritical to pretend that this sort of attitude is unique; it is widespread among officials and

⁷⁷ Just to give one example, Amy Chua's article – footnote 1 – has 642 footnotes, most of them containing references to other works. Perhaps 5% are to papers, articles, books published in the South and written by scholars in the South. The article looks at ethnic tensions in the South with special reference to South Africa, Kazakhstan and Vietnam.

⁷⁸ P. McAuslan, *Bringing the Law Back In: Essays in Land, Law and Development*, (Ashgate, Aldershot, 2003) Chap.7. The chapter is a revised version of two papers, the first one of which contains reflections on some of my work and was first given at a conference on aspects of law and rural development (sic) in 1987.

consultants not least because it is grounded in reality. Certainly, when I arrived, the CDA was pretty careless about the law.

Similarly in Kano, a master plan was published in 1966 and successive urban development authorities had attempted to implement it, yet none of the formal legal steps necessary to publicise the plan, consider objections to it, and approve it, thus giving it a legal status, and legal backing to enforcement action, had been taken. No legal challenge has been mounted to any enforcement action. As it was put to me by the Chairman of the Kano Urban Development Board (KUDB), authority and power rather than law was what counted in Kano.

The other level of argument is in a sense an alternative development argument. This argument says in general terms that the law impedes the efforts of ordinary people to house themselves, to obtain an income, to get access to potable water, electricity and other urban services and thereby to survive and better themselves in an urban environment. Law turns homesteaders into squatters, self-build houses into 'slums' and 'nuisances' which must be demolished; petty traders into criminals and job seekers into vagrants. The less the law and lawyers have to do with uncontrolled urban settlement and the informal urban economy, the more chance persons in those sectors have of survival and development. again my experience both then and later supports that argument.

What answers then can be made to these legitimate and powerful criticisms of the role of law in urban development? there are three answers. First, A general answer is that government in accordance with the law is likely to be fairer, more respected, more effective in the long run than government in defiance or in disregard for the law; both at the humble level of urban planning and at more elevated levels of governance in general by e.g. military rulers across the globe one can point to evidence of that. Within government then, law can provide a measure of certainty and support for particular policies and programmes, and institutions whose job it is to execute them.

Second is the question of government *v* the people An example would be a law that confers powers on government, and rights on the people, such as a law permitting compulsory acquisition of land subject to the payment of compensation. Governments are more likely to know their powers than people their rights, and this will result in an unequal application of the law. That may be so but the solution to this is not to decry a legal input into urban or any other sort of development, but to argue for and propose a law which moves the machinery of government just a few steps away from its existing authoritarian stance. The contrast between the official

treatment of squatters in Karachi and in virtually any Indian city, reinforces that point: India is a country which, whatever its imperfections, is ruled by law and in which courts can be, and are effective in halting government action against squatters; the famous case of *Olga Tellis v Bombay Municipal Council* in 1986 well illustrates that. Pakistan has been for too long ruled by military force and the courts have no effective role in the control of such force. Again, in Africa, contrast the role of law in protecting squatters as demonstrated in *Grootbloom* and the lack of any legal restraint on the military regime in Nigeria when it implemented a major and crude slum clearance programme in Lagos. Law then can be a handle to be used in the struggle for a more humane or reasonable government, and for more humane and reasonable administration of programmes of urban development.

A third reason concerns the repatriation of decision-making. There is a great deal written about the deleterious effect that international – usually western orientated – consultants, planners and administrators can have on national priorities in respect of urban development.⁷⁹ The decision to use foreign planning consultants to produce a master plan for an urban area has the inevitable effect of passing decision-making not just on the making of the plan but on its detailed implementation over to those consultants, ignoring or bypassing the national statutory procedures for plan making, approval and implementation. In Dodoma, for instance in the early years of the capital development programme, the master planners did most of their work in Toronto, their headquarters, and provided both in the plan and in their consultancy contract that no changes could take place in the plan without their being involved. The effect of this was that when some of their more far-fetched ideas were seen to be impractical by planners on the spot, a memorandum suggesting changes would be compiled and sent to Toronto; a pause would ensue until the reply came back defending the sanctity of the plan down to the last eight-lane highway. The reply would be addressed to the Director-General of CDA bypassing all normal procedures, and hinting that criticisms of the plan were motivated by malice and ignorance. The reply was accepted, and the plan left untouched – and unimplemented. Re-asserting the need for law and providing an appropriate legal framework for decision-making can go some way towards national and legal decision-making. Yes, the decisions may be skewed in favour of one ethnic group or the decision-makers and their relatives or the wealthy elite, but so was decision-making abroad – in favour of the overseas consultants and their families.

⁷⁹ A. Hai, *The Third World view; planning consultancy in the developing world*, (3 Third World Planning Review, pp. 133 – 140, 1981).

I have dwelt at some length on these two cases since in retrospect they shaped my work in the field from then on. Faced with the lack of law or a lack of respect for the law, the aim was to find allies to assert the liberal values of the law and to try and shape any new laws to move the bureaucracy, still heavily influenced by colonial attitudes that the people's role was to obey bureaucratic orders not challenge them and assert legal rights, to understand and accept that their job would be made easier if it was seen as a partnership with the people, a partnership in which all parties would gain from complying with a fair law. So as with my (and I have argued, legal educators generally) role in legal education in the 60s, so in this decade; I was, broadly, accepting the existing state structures and configurations of power which, as North's explanation of path dependency⁸⁰ has showed us, we should have anticipated were a continuation of colonial configurations and was concerned only to try and make small incremental changes at the margins.

The decade of neglect but transition v the limits of legal radicalism⁸¹: the 80s.

There can be little doubt that the 80s were the low point for L&D in general. From the external producers' perspective, with the exception of UN agencies, assistance to law reform in the South was a no-go area for IFIs and donors from the North. Those American academics who had written the obituary of L&D in the 70s, moved on to other more intellectually and financially rewarding fields.

Neglect refers to the general North American perspective on L&D during this decade, embracing the IFIs domiciled in the US and the US intellectual input into L&D work. From the wider foreign policy perspective, the 80s was the decade when maximum attention was paid to prosecuting the Cold War so that decisions about inputs into the South were viewed very much from that perspective. There is no need to go into details since I assume that these are well known to this audience but overall US support was provided not for law and development but for war and the destruction of development.⁸² Indifference to or neglect of L&D indeed might be too polite a word

⁸⁰ D. C. North, *Institutions, Institutional Change and Economic Performance*, (Cambridge UP, 1990), Chap.11.

⁸¹ Taken from the title of a book: I. Shivji (ed) *The Limits of Legal Radicalism* (Faculty of Law, Dar es Salaam, 1986) with authors who taught at Dar es Salaam reflecting on their time there 25 years on from its establishment.

⁸² To take just the example of Southern Africa's conflicts and destabilisation which the US played a pivotal role in fomenting and supporting and the UK did little or nothing to try to stop, the World Bank quotes UN studies and figures showing that quantifiable costs approached 25 to 40% of GDP annually, (much more in Angola and Mozambique) 5 to 7 million people were forced to flee their homes and land, and "the loss of lives and human potential defies quantification, human suffering, the deaths of hundreds of thousands of people, the rise in infant and child mortality, the stunted potential from famine and malnutrition and in some cases the virtual disintegration of education and health

to use to characterise these policies: in turning a blind eye to or in some case fuelling corruption, lawlessness and abuse of power by dictators, these policies mightily contributed to the defects of governance which two decades on, ‘new law and development’ (NLD) is in the forefront of trying to ‘correct’.

From a developmentalist perspective, the 80s were the decade when:

The role of the state in development came under heavy fire as the new liberalism in economic and political affairs gained ascendancy in western capitals and hence in the international institutions. It was time to roll back the state and let the free play of market forces generate the energies which would get development moving again.⁸³

The corollary of such a perspective was that since the law had been used to confer powers on the state in the preceding two developmental decades, the last thing that was needed now was more law: what was needed was less law; less regulation strangling free markets; less controls over land use and land transactions; less legalised opportunities for rent-seeking behaviour. The structural adjustment programmes that dominated IFI ‘assistance’ to countries in the South in the 80s did not at that time feature any concern about good governance or legal and judicial system reform; one certainly did not need any L&D assistance to dismantle inefficient legal superstructures.

Yet it would be a misperception to think of the 80s as a decade when there was no external interest in law as an input into development even if it was not an overtly or explicitly L&D input. On the intellectual front, while there was a falling away of mainstream US legal journals carrying articles on L&D, two journals based in the US revamped themselves to adopt a more explicitly L&D focus. Third World Legal Studies was founded in 1982 as the annual publication of the Third World Legal Studies Association (INTWORLSA) a body that had reconstituted itself from the African Law Association in America (AALA). The annual publication was explicitly designed to

respond to the needs of growing numbers of lawyers, *particularly those in the third world* (italics added) who are becoming more engaged, -- not only as teachers and scholars but as activists – in “law and development” work which seeks social justice for people who are poor and oppressed...We hope that

services have immeasurably set back the development in Southern Africa.” World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth*, (Washington, D.C. 1989) p. 23, Box 1.1

⁸³ Leftwich, op. cit, footnote 3, p. 47. Not all ‘western capitals’ shared this view.

Third World Legal Studies can help to provide a kind of legal literature which is needed in both intellectual and operational settings.⁸⁴

The second such journal makeover was the Journal of Legal Pluralism that too had transmogrified itself from an Africa only journal – African Law Studies. This journal too had a more European flavour to it⁸⁵ and it is these two factors – the greater impact that legal scholars from the South and based sometimes in the South – often not as worsening economic circumstances or political persecution or worse had driven them out – and mainland European legal scholars began to have on L&D writing that requires one to acknowledge this as a decade of transition as well as of neglect.

Another important transitional factor was that the 80s saw more input into L&D of disciplines other than law and lawyers. On the intellectual front, the space vacated by legal academics particularly in the US began to be filled by legal anthropologists. Legal anthropology had been a discipline investigating customary and traditional law in the field and attempting to make an impact on the practice of law in colonies in Africa and the South Pacific long before lawyers discovered the field.⁸⁶ Goodhart's view that the jurist's "cavalier treatment of early law" can be ascribed to that law's inability to fit into the Austinian definition of law as command and the lack of evidence as understood by jurists about early law, i.e. case records⁸⁷, may have some truth in it but whatever the reason, the early pioneers of L&D did not regard legal anthropologists as being part of the movement⁸⁸ – a position entirely consistent with

⁸⁴ M.L. Marasinghe, *Introducing Third World Legal Studies*, (INTWORLSA, New York, 1982), p.iii. The editorial board was composed entirely of persons in N American law schools, albeit two members were from the South, one of whom was the editor; the international board of advisor editors was composed of four members from the South, two from Europe and one from Australia. This was the first time that international journal recognition within the legal fraternity had been given to the South so extensively.

⁸⁵ At the point of transmogrification in 1982, the journal had an editor based in The Netherlands, 2 of the 3 Associate Editors were based in Europe and 16 of the 25 Editorial Advisory Board were based outside of the US.

⁸⁶ Virtually all early legal anthropologists in British African dependencies were in the employ of the colonial government and would not have been allowed to undertake research in any other guise. The titles of some of the early classics betray their provenance: G.G. Brown and A. McD. B. Hutt, *Anthropology in Action: an Experiment in the Iringa District of the Iringa Province Tanganyika Territory* (Oxford UP 1935); I.Schapera, *A Handbook of Tswana Law and Custom*, (Oxford UP, 1938, 2nd ed, 1955) – a work still in use in the courts of Botswana.

⁸⁷ A.L. Goodhart, *Foreword* in M. Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia*, (Manchester UP, 1955), pp. xiii – xvii.

⁸⁸ Professor Laura Nader was on the 17 person ILC's Research Advisory Committee (of which 16 persons were men and 14 persons were lawyers with 7 male legal special consultants – the Denning Committee of the L&D world) which produced *Law and Development: the Future of Law and Development Research* (ILC and Scandinavian Institute of African Studies, Uppsala, 1974) but it must be said (and I speak as a member of the drafting sub-committee which produced the report) that the discipline of legal anthropology played no part in our deliberations at all. Twining was always aware of the importance of the input of anthropologists into the development of law and discussed this in his

the modernisation perspective adopted by L&D. But the work of scholars such as Moore⁸⁹, Roberts⁹⁰ and Charnock⁹¹, to name only those writing about law in Africa in the 70s and 80s made it increasingly difficult for L&D a branch of legal scholarship committed to multi-disciplinarity to ignore the contribution of legal anthropology to L&D and legal anthropologists themselves began to see their contribution as being at the least quasi-L&D.⁹² Their contribution enriched and continues to enrich L&D.

On the practical front too, IFIs and, for the most part, donors saw little need to become involved in law reform in the South. One exception was USAID which began its commitment to justice reform in Latin America in the 1980s. Although focusing on human rights and criminal justice, “over the years, USAID has adopted a code-driven reform model, organised around the drafting and implementation of new criminal procedure codes.” Other activities were included “but the new laws created a special impetus and real deadlines: once the laws went into effect, things had to change.”⁹³ That somewhat optimistic comment is rather at odds with the later comment that

“in the early 1980s, when USAID introduced the initiative in Central America, local interest and demand were limited; the agency itself had little idea of what it intended to do...judicial reform lacked a significant constituency within USAID. It continued to be seen by those making resource allocations as a less worthy competitor for scarce funding...The idea that working with courts and legal frameworks would advance development goals was not readily accepted.”⁹⁴

In a sense then, this was an exception that proved the rule: a small programme facing both financial and agency-ideological opposition adopting the same old approach which had been castigated by the disillusionists in the previous decade.

Chicago lectures, op. cit. footnote 49, but I’m not sure that even he would regard himself as more than a semi-detached member of the L&D movement.

⁸⁹ S.F. Moore, *Social Facts and Fabrications: ‘Customary’ Law on Kilimanjaro, 1880 – 1980*, (Cambridge UP, 1986).

⁹⁰ S. Roberts, *Order and Dispute*, (Penguin, Harmondsworth, 1979). Roberts followed in the colonial tradition of being involved in ‘practical’ work by producing a ‘restatement’ of parts of the customary law of Botswana as a member of the Restatement of African Law Project of the School of Oriental and African Studies: see *A Restatement of the Kgatla Law of Domestic Relations* (SOAS, London, 1970).

⁹¹ M. Charnock, *Law, Custom and Social Order: the Colonial Experience in Malawi and Zambia*, (Cambridge UP, 1985 – reprinted by Heinemann, 1998).

⁹² F. von Benda-Beckmann, *Scape-Goat and Magic Charm: Law in Development Theory and Practice*, (1989, 28 Journal of Legal Pluralism) 129.

⁹³ L. Hammergren, *International Assistance to Latin American Justice Programs*, in E.G. Jensen and T.C Heller, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford UP, 2003), p. 295. The whole paper is a splendid and somewhat irreverent insider’s view of the subject matter.

⁹⁴ Op. cit., pp. 307 – 08.

UN agencies did not have such a jaundiced view of the role of law as other donors and IFIs and by the end of the decade this alternative view was beginning to have an impact on IFIs and donors. I will quote my own experience here with the usual caveats about drawing too general conclusions from a wilderness of single instances. During the 1980s, I was involved in several exercises in law reform and law review in Africa, Asia and the Caribbean, mainly working for UN-Habitat in the field of urban planning law. The variety of missions that I undertook give some indication of the role that law at least in this area was thought able to play.

The missions I undertook were of three broad types. The first was in response to requests for legal inputs into urban and national planning as part of general programmes to develop and implement city or national or physical development plans – Zanzibar in 1982, Madras (now Chennai) in 1983, (a British Government funded project), Maldives in 1983, Malawi in 1984, Trinidad and Tobago in 1986 – 88 – or part of an exercise to rewrite law and administration in connection with spatial planning in the light of a political transformation set in train by a successful guerrilla war leading to independence – Zimbabwe in 1981. The second type was a more narrowly focused on the perceived need for some legal input to provide the necessary powers to control developmental pressures – Turks and Caicos Island, in 1984, British Virgin Islands in 1989 – British colonies but oddly the missions were UN-Habitat ones, or to spur development as in Uganda in 1980. The third type was to review and comment on existing laws, either a specific law – town and country planning in Calcutta in 1983 – or a whole corpus of law as with a Swedeforest (an offshoot of SIDA) mission to review the law on land use and environmental management in Lesotho in 1989. In all countries there was existing town and country planning law, based for the most part on the Colonial Office model of the late 40s/early 50s (which in turn was an amalgam of the English 1932 and 1947 town and country planning Acts), except in Zimbabwe which had introduced a model based *in words* on the reformed English town and country planning law of 1968 while *in practice* still adhering to the rigid racial zoning of the 40s law.

The countries and governments involved covered the whole spectrum of governments in the South: colonies; full democracies in India and Trinidad and Tobago; fledgling democracies as in Zimbabwe; authoritarian regimes of various hues: Malawi and Zanzibar both ruthless with political opponents, Maldives less so; military rule as in Lesotho and a country just emerging from military rule as in Uganda. Yet while all were apparently united in their belief that a legal input into development was

necessary, and that this legal input was to be a top-down governmental input, there were different emphases on the appropriate legal input.

Indian planners in Madras were aware of the limits of law; they could not contemplate a situation where they would need a battalion of troops to enforce the law. Trinidadian planners were concerned that my draft law might not have sufficient enforcement powers in it and did not specifically state that one of the principal purposes of town and country planning was to ensure the “orderly” development of the island; they looked with envy at Barbados where people seemed more willing to obey the planning laws.⁹⁵ In Uganda too, the criticism of my law on the creation of an urban development corporation was that there were too few criminal penalties in the law making it difficult to enforce. In Maldives, the Attorney-General was concerned that my law was too detailed; less law, more power was his preferred approach. In Zimbabwe, the chief planner at first rejected my report on possible reforms to the planning laws of that country on the grounds that I was biased and that the planning law were entirely ‘objective’ and a-political, a view shared by the President of the Administrative Court.⁹⁶ In Malawi, there was a fairly non-committal acceptance of my draft law which did introduce some participation and due process into the planning system which was run in an efficient and ‘colonial’ manner.⁹⁷

The three missions to Calcutta, Turks and Caicos and British Virgin Islands were particularly instructive. In Calcutta, the mission was to advise the Urban

⁹⁵ I recall two car trips. The first in Port of Spain with the two senior planners from the Town and Country Planning Department of the government pointing out all the illegal development in the main commercial area of the city which should be demolished – there was apparently little worth preserving in their eyes. The second in Barbados, I country I was visiting for the first time, where the taxi-driver taking me from the airport quite spontaneously began to tell me about the importance of applying for permission under the town and country planning laws to build a house before one commenced building. On Trinidad and Tobago, R.K. Home, *Transferring British planning law to the colonies: The case of the 1938 Trinidad Town and Regional Planning Ordinance*, (1993, 15 Third World Planning Review (TWPR), 397). That law was replaced by the Town and Country Planning Ordinance 1960, drafted by Desmond Heap, the doyen of English planning lawyers who used to get quite upset at any suggestion that any town and country planning law other than a close approximation to English law should be introduced into any ex-British dependency. On comments on my work, J.M. Glenn and J.M. Wolfe, *The growth of the informal sector and regularisation of spontaneous development: lessons from the Caribbean for planning law reform*, (1996, 18 TWPR 59).

⁹⁶ While in Zimbabwe, I had given a talk in the Law Faculty on the ideologies of town and county planning law and how it had been used to bolster racially separate urban development. This talk had been reported back to the chief planner by a crony of his in the Faculty (both were unreconstructed white ‘Rhodesians’). He was taken through my report page by page by Frank Gasasira, the Ugandan team leader who asked him to point out the politically biased sections. He was unable to and so accepted the report second time around. UNDP/UNCHS, *A Spatial Planning System for Zimbabwe* (Salisbury (Harare, 1982), Part III, *Planning Legislation*, pp. 149 – 240.

⁹⁷ Town and Country Planning Act, No. 26 of 1988; H. McClintock, *Widening the Role of Physical Planning in Africa: The Experience of the National Physical Development Plan in Malawi*, (1993) 14 TWPR 75.

Development Authority on the ‘proper’ meaning of the phrase “other material considerations” in the new town and country planning law. The phrase had been taken from the English planning law and the assumption behind our visit – I was with a very senior ex-planner and ex-chief executive from English local government – was that the meaning of the term in English planning law should be transplanted in Calcutta. We explained as delicately as we could – we had after all been brought a long way and treated very well – that the English meaning of the term was irrelevant to the circumstances of Calcutta which had to develop its own meaning. “Ah, Professor,” I was told by a very senior IAS official “in India, we have your followed your planning law mistake by mistake.” Has there ever been a more succinct summary of the problems of L&D?

In the Turks and Caicos Islands, I tried to draft an original law for a small island administration. The Attorney-General, a British official who had previously been the senior legal officer in a London local authority⁹⁸ was concerned that the law should not be too different from English planning law. His reason was that he was under constant pressure from lawyers from the US representing clients who wanted to build in the islands and were adept at finding loopholes in every law designed to control such building. He would be in a much stronger position if he could quote English judicial precedents on the meaning of the local planning law if the words in that local law were to be exactly the same as those in the English planning law. It was an argument that was difficult to counter.⁹⁹

The British Virgin Islands are small in size and population but they presented a major challenge to any person attempting to introduce changes to the land laws.¹⁰⁰ “Without land, a person is not a man” it was put to me and given the history of slavery in the Caribbean, such a sentiment is easy to understand. Having land meant having the right to do with the land what one wanted; planning laws attempted to interfere with that right. Thus while the principle of having a law to regulate and control the (largely American) pressures for development was accepted, the implications of it – that some people might not be able to use their land as they saw fit – were more difficult to accept and sell to the population. In particular, Maurer notes that there has been constant criticism of ‘foreign laws’ and ‘exotic plants’(outside experts and outside

⁹⁸ Involved in his earlier incarnation in the famous English case of *Anns v Merton London Borough Council* [1978] A.C. 728, on the duty of a local authority to take reasonable care to ensure that a builder complied with building by-laws.

⁹⁹ Physical Planning Ordinance, 1989; D.E.E. Pollard, *The Environmental Laws of the Commonwealth Caribbean*, (Caribbean Law Institute, University of the West Indies, 1992), pp. 312 – 316.

¹⁰⁰ B. Maurer, *Recharting the Caribbean: Land, Law and Citizenship in the British Virgin Islands*, (Michigan UP, 2000) for a truly excellent study of the whole subject.

legal draftsmen) which is, perhaps oddly, directed not so much at the content of the laws as of their origin:

In authoring their “own” laws, British Virgin Islanders demonstrate to themselves their ability to be “authors”, to write from a coherent, unified and unique subject position, to authorize a “nation” – to be subjects of (legislative, national) history.¹⁰¹

Working with governments at this time exposed me to the full gamut of official attitudes to regulatory law and its role in development. The common thread was that of realism; a law must be useable but also advance the policies of government. There was a belief in the efficacy of official law and a general reluctance to accept any claim of legitimacy or right of those who were not complying with the official law – squatters, unauthorised developers etc. In Trinidad and Tobago, this went so far as to regard those planners who had left the Town Planning Department and set up as private planners and then espoused the cause of informal settlements via the Sou Sou movement as being ‘traitors’.¹⁰² There was, I would also claim with the advantage of hindsight, an implicit acceptance of the modernisation approach to development; development meant demolishing old out-of-date buildings and rebuilding the cities with shopping malls, high-rise buildings, multi-lane paved highways; planning law was a key tool to achieve that.¹⁰³ The officials I worked with had nearly all spent time in the North or the developed South¹⁰⁴ and that was their point of reference. We were on the same wavelength and it was a completely different one to the majority of the people in the country concerned. The realism required of the law was then an unreal realism: the laws to be applied were alien to the culture of those to whom they were to be applied.

¹⁰¹ Op. cit., p. 247. The references to exotic plants is from Eric Williams, scholar of the Caribbean and former Prime Minister of Trinidad and Tobago.

¹⁰² J. Matthews, R.P Labossiere and J.M. Wolfe, Squatter Regularisation: Problems and Prospects, (1993) 15 *TWPR* 249.

¹⁰³ Of all the places I worked in during the 1980s, and have since revisited, only the Maldives has been transformed along those lines (less the multi-lane highways). The changes in Male’ between 1985 and 2001 have been quite astonishing; paved roads, high-rise buildings, large mosques, many more shops and cars have replaced the rather sleepy down-at-heel single storey buildings and pedestrian-pulled hard carts town which used to exist. No thanks to the planning law I drafted though: that remains a report in the files. There has been massive European and Asian investment in the Maldives over the last two decades with little concern about the absence of a ‘modern’ legal system – it really is medieval – but practically no US investment because of the worries about the lack of a ‘modern’ legal system.

¹⁰⁴ Planners in Trinidad and Tobago tended to spend time working in the US and studying in the UK. All the lawyers had studied in the UK. The point of reference for the chief planner in the Maldives was Singapore. In India, as noted, the legal point of reference was the English town and country planning laws. The two British colonies in the Caribbean were quite content to remain as such.

From an internal perspective, the title of Shivji's book sums up the decade not just for Africa but, I would argue, more generally. The radical agenda of the South had attempted to carve a new way forward for development – political independence was to be matched by economic independence, colonial social conservatism replaced by fundamental and radical social change. The law was to be the medium through which these transformations were to be brought about. As was recounted in the survey of the two periods of the 60s and the 70s, the law was used very vigorously to set in place not merely new autochthonous constitutions and political systems but new economic and social policies and programmes. With respect to land we have seen that the predominant thrust of land law reforms was in the direction of increased government ownership and control of land tenure and land use.

By the end of the 1980s, at least so far as most states in Africa and some states in Asia and the Caribbean were concerned, these policies had not been successful. In some cases they had been disastrous. The influential and widely accepted (including by many African commentators) World Bank Report: *Sub-Saharan Africa: From Crisis to Sustainable Growth* published in 1989 summed up the position in Africa:

Africa's generally poor performance during the past 10 years has been reflected in weak growth in the productive sectors, poor export performance, mounting debt, deteriorating social conditions, environmental degradation and the increasing decay of institutional capacity...

In many African countries, the administrations, judiciaries and educational institutions are now mere shadows of their former selves. This widespread institutional decay is symbolised by the poor physical condition of once world-class institutions such as the University of Legon in Ghana and Makerere University in Uganda, [and] by the breakdown of judicial systems in a number of countries...

Equally worrying is the widespread impression of political decline. Corruption, oppression and nepotism are increasingly evident. These are hardly unique to Africa but they may have been exacerbated by development strategies that concentrated power and resources in government bureaucracies without countervailing measures to ensure public accountability or political consensus. On the one hand, in several countries the neglect of due process has robbed institutions of their legitimacy and credibility. On the other hand, the proliferation of administrative regulations like licensing, controls, and quotas has encouraged corruption and set the individual against the system.

Sometimes the military have deposed unpopular regimes. But often this has led to more, not less, state violence and lawlessness...

...A combination of administrative bottlenecks, unauthorised "fees" and "commissions"...imposed costs on businesses that have progressively undermined their international competitiveness. The gradual breakdown of

judicial systems in many countries left foreign investors doubtful that contracts could be enforced...Authoritarian governments hostile to grassroots and nongovernmental organisations have alienated much of the public. As a result economic activity has shifted increasingly to the informal sector. Too frequently ordinary people see government as the source not the solution to their problems.¹⁰⁵

This analysis of institutional decline and decay could apply equally to some Asian states which in economic terms were far outperforming virtually all states in Africa. Consider this analysis of Indonesian institutional decay in the late 80s by an Indonesian scholar:

Despite the resumption of rapid growth in the late 1980s, several commentators, including academic economists, began to voice concern about threats not only to long-term growth but also to the cherished national goal of establishing a 'just and prosperous society (*masyarakat adil dan makmur*). These issues were interrelated and included the burgeoning corruption at all levels of the government bureaucracy, collusive relationships between political powerholders and their business cronies and the proliferation of policy generated barriers to domestic competition. The 'KKN' (*korupsi, kolusi, nepotisme*) practices as they later became known, distorted market incentives by rewarding 'rent-seeking' rather than productive entrepreneurial activities.¹⁰⁶

Legal radicalism although for the most part home-grown (though just as there were external proponents of legal liberalism on hand to educate, advise and assist, so too were there external proponents of legal radicalism on hand to do the same) had apparently led to the same dead-end as had legal liberalism though not for exactly the same reasons: with legal liberalism, there was a too ready assumption that the checks and balances of a liberal constitutional order could be transposed to a developmental state in a hurry to overcome 'poverty, ignorance and disease'; with legal radicalism, an over-enthusiastic espousal of law as a tool of change had invested too great an array of powers in government with not enough attention paid to devising appropriate checks and balances; the legal baby was thrown out with the liberal bathwater.

¹⁰⁵ Report, cit, pp. 18, 22, 30.

¹⁰⁶ Thee Kian Wie, *The Soeharto era and after: stability, development and crisis 1966 – 2000*, in H.Dick, V.J.H. Houben, J.T. Lindbad and Thee Kian Wie, *The Emergence of a National Economy: An Economic History of Indonesia 1800 – 2000*, (Allen and Unwin, Crows Nest, NSW, 2000), p. 213. Both this and the World Bank quotation seem to be derived from Myrdal's notion of the soft state which had been put forward in 1970 as an explanation of India's failures to match Chinese rates of economic growth and had then been adopted by Hyden in 1985 as the explanation for African states's inability to develop. G. Myrdal, *The 'soft state' in undeveloped countries*, in P. Streeten, (ed) *Unfashionable Economics: Essays in Honour of Lord Balogh*, (Weidenfeld and Nicholson, London, 1970); pp. 227 – 243; G Hyden, *No Shortcuts to Progress: African Development Management in Historical Perspective*, (Heinemann, London, 1985).

This issue needs to be elaborated in more depth. My argument is that starting in the 1970s but picking up and becoming the norm in the 1980s, the form and content of the legal procedures whereby powers were to be exercised changed in many countries; unfettered discretion was enhanced; limits on discretion were fewer and in practice, the law was widely disregarded on a day-to-day basis. Legal radicalism appeared to see nothing wrong with this. No better witness to this can be put forward than Yash Ghai, without any question *the* doyen of lawyers working at the coal-face of, and writing about, L&D in the world today:

Legal radicals in Dar es Salaam were not revolutionised by their experiences of the law. Nor did they attempt to use the law for progressive causes. In fact few of them had practised law; or worked in the administration...indeed there was no serious concern with law. The law was seen as a battleground and its potential for supporting progressive initiatives denied...and the sooner it was abolished the better.

I had difficulties with this analysis on theoretical as well as practical grounds...The practical difficulty was that while the radical lawyers were denouncing law as a tool of oppression, and asking for its abolition, the reality seemed to be that the government was frequently disregarding the law...The government cared neither for the ideology nor the practice of legality. The President was ordering hundreds of undergraduates to be sent down and hundreds of farmers to be detained without any lawful authority; and his example in the violation of the law was followed by numerous others at all levels of government and party...

My experience seemed to point to the problems when the fidelity to the law weakens – the arrogance of power, the corruption of public life, the insecurity of the disadvantaged.¹⁰⁷

It was this disregard of the law which fed into the type of legislation that concentrated on conferring powers on Ministers and the bureaucracy and ignored process. The exercise started at the top with the dismantling of constitutional safeguards and the conversion of constitutions into tools for the aggrandisement of power.¹⁰⁸ This

¹⁰⁷ Y.P. Ghai, *Legal Radicalism, Professionalism and Social Action: Reflections on Teaching Law in Dar es Salaam*, p. 26 in I.G. Shivji, op. cit. footnote 62. Contrast with this view of reality, the keynote address of the Vice-Chancellor of the University of Dar es Salaam at a conference on Human Rights in a One Party State: P. Msekwa, *The doctrine of the one party state in relation to human rights and the rule of law*, in International Commission of Jurists, *Human Rights in a One Party State*, (Search Press, London, 1976), p.21. Contrast too my rather over optimistic analysis of administrative law in *Administrative procedures, administrative law and public participation in a one-party state*, p.88. There would be general agreement that mainland Tanzania was one of the more liberal and legal one party states. After he had ceased to be President, Nyerere admitted that his villagisation policy had been carried out in a lawless manner and some compensation was paid to peasants who had suffered thereby.

¹⁰⁸ Y.P. Ghai, op. cit. footnote 66, p.32.

approach to legislation was accentuated when military regimes were in power when constitutions were dispensed with or at best were made subject to a superior military ordering.¹⁰⁹ There were two reasons for this. First the military were, generally, uninterested in legal niceties and it would have been a brave government lawyer who pointed out that it was not in accordance with legal proprieties for a particular law to be couched in language that seemed to provide no limits to the exercise of powers. Second, there were usually no mechanisms for draft laws to be scrutinised before they were promulgated.¹¹⁰ A further contributory factor to using statute law as legalised power grabbing, common to civilian and military regimes alike, was that there was a general reluctance to use the courts to challenge exercises of governmental powers; an equal reluctance on the part of the courts to entertain any such challenges that were mounted; and a further reluctance on the part of governments to pay much attention to any decisions that went against them.

As good an example of this trend towards replacing laws which relied on persuasion by ones which relied on compulsion as can be found comes from Tanzania.¹¹¹ Starting in the mid 70s but continuing into the 80s until the retirement of President Nyerere, coercion was used to force peasants into the villagisation programme in “Operation Sogezza” (Operation Push) without any legal backing for such actions. In addition, peasants were required by law to grow certain crops and those who failed to comply were punished by imprisonment. Many prosecutions and convictions were recorded throughout the country. There were many examples too of party officials exercising powers quite outside the law with peasants having no redress. Not until the 1990s was it politically possible to bring actions in the courts to try and right the wrongs of the 70s and 80s.¹¹²

Similar laws were enacted to deal with urban “loiterers”. Let Tripp tell the tale of Human Resources Deployment Act, 1983:

¹⁰⁹ for a brief note on this: Y.P. Ghai, *Coups, and Constitutional Doctrines: the Role of Courts*, 58, *The Political Quarterly*, 308 (1987).

¹¹⁰ The Government draftsman in Lesotho in the 1980s when the military were in power told me that she was frequently ordered to produce a draft law overnight and the nature of the order and the giver of the order were such that failure to comply was not an option.

¹¹¹ D.V. Williams, *State Coercion against Peasant Farmers: The Tanzanian Case*, (1982, 20 *Jo. Leg. Pl.*) p. 95. Williams makes the point that there had been a considerable amount of legal coercion of the peasantry during colonial times so the independent government had some precedents to call on. See too, I. Shivji, *Not yet democracy: reforming land tenure in Tanzania*, (HAKIARDHI, Dar es Salaam, 1998), chap. 2; and *Report of the Presidential Commission of Inquiry into Land Matters* (Bohusläningens Boktryckeri, Uddevalla, Sweden, 1994), p.45.

¹¹² *Attorney-General v Akonaay and others* (1995) LRC 399. J.A. Widner, *Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa*, (Norton, New York, 2001) pp. 367 – 375.

Under this Act, also known as Nguvu Kazi, those who could not produce identification were to be resettled in the countryside. In the Dar es Salaam region all unlicensed, self-employed people, including fish-sellers, shoe repairmen and tailors were considered idle and disorderly and treated like loiterers...Even an employed person found walking the streets during working hours could be charged with “engaged in a frolic of his own at a time he is supposed to be engaged in activities connected to or relating to the business of his employment”...

But it quickly became clear that the campaign was a failure. No sooner were truckloads of people dropped off in rural areas than most of them returned to the city to resume their small scale enterprises. The illegal trade in identification papers boomed so that virtually anyone could come up with some form of documentation...¹¹³

In Tanzania there was a veneer of legalism to the use of coercion. This was not always the case in other countries. Indonesia provided an example of force being used without regard to the law. The notorious transmigration programme involved seizure of land, displacement or forcible assimilation of local people and the setting aside of community land rights in the name of development. No or inadequate compensation was paid when land was appropriated, the official line being that traditional owners had voluntarily contributed their land to the transmigration project. In the case of some projects, the new settlers obtained no rights to land and in the *Perkebunan Inti Rakyat* (PIR) schemes, existing land owners had found themselves in the position that they had to pay for land they already owned and would only be able to obtain a title under the Basic Agrarian Law if they had shown themselves to be “satisfactory labourers” an unknown and undocumented criteria.¹¹⁴

What the Tanzanian examples show is the clash between the official law and reality – the reality of the daily lives of the peasants and of the workers in the informal urban economy. Within that economy, as much research has demonstrated, there is a legal system, often aping, as it were, the formal legal system. Contracts are made and enforced; property and land is bought and sold but the official system takes no account of these transactions or activities. When people who claimed to have rights to e.g. land under the unofficial system attempted to exert those rights in the official

¹¹³ A.M. Tripp, *Changing the Rules: The Politics of Liberalisation and the Urban Informal Economy in Tanzania*, (California UP, 1997) pp. 141 – 42. Tripp notes first, that there were colonial laws still on the statute book which allowed such activity in Tanzania and second that similar campaigns were waged in other countries in Africa during this period with the military regime in Ghana dynamiting the central market in Accra to drive away the informal traders.

¹¹⁴ SKEPHI and R. Kiddell-Monroe, *Indonesia: Land Rights and Development* in M. Colchester and L. Lohmann, *The Struggle for Land and the Fate of the Forests*, (World Rainforest Movement, Penang, 1995), pp. 228 – 263.

system, they were turned away as squatters¹¹⁵; only the Indian Supreme Court in this period seemed willing to recognise that the poor had rights which should be recognised.

Precisely because the informal legal system was unofficial and ‘illegal’, there was little attempt by lawyers or legal reformers to consider whether lessons could be learned from such systems which could be applied to the formal system; that is, whether the poor were using an informal system out of necessity rather than choice, not deliberately wishing to act in an illegal manner. The attitude of the Tanzanian President who compared ‘loiterers’ with economic saboteurs and racketeers “whom the nation has just declared war on”¹¹⁶ was a not uncommon one in the governments of the South. Nor was there any interest at this time in the developing legal system reform programmes to grapple with the informal legal systems.

It was not until the very end of this decade that a new perspective was provided. De Soto published *The Other Path* in 1989.¹¹⁷ This study of the informal urban economy of Peru was not the first such study to have been undertaken but it spelt out in some detail the costs and benefits of using informal and formal legal systems and the need to tackle the problem of inappropriate formal legal systems which drove people into the informal system. In a way which law reform commissions did not, it quantified the costs of the over-bureaucratised formal economy and the costs to the national economy of not having a good law which protected contracts and property rights of the poor. Whatever its academic shortcomings, *The Other Path* proved enormously influential in directing attention to the importance of law in development and the need to “adapt the law to reality [rather] than to try to change everyone’s attitudes, for the law is the most useful and deliberate instrument of change available to people.”¹¹⁸

The decade of re-discovery v the decade of challenge: the 90s

The picture of the world of law in the service of development by the end of the 1980s was a far cry from the 60s and early 70s. The 80s are referred to as the ‘Lost Decade’ of development certainly as regards Africa but the same could be said of L&D. In one area of the world – Asia – however, the 80s had seen the continuance of rapid

¹¹⁵ See the interesting study by the Consumers’ Association of Penang: R. Kanniah and M. Raman, *People’s Access to the Legal System: a Grassroots Perspective*, (CAP, Penang, 1986) and the decision of the Malaysian Federal Court in *Sidek bin Haji Muhammed and 461 Others v Government of the State of Perak and Others* (1982 MLJ 312).

¹¹⁶ Tripp, op. cit., footnote 113, p. 141.

¹¹⁷ H. de Soto, *The Other Path*, (1989, London, I.B.Tauris).

¹¹⁸ *ibid*, p.187.

economic growth but also a significant shift in the legal framework for this development. This shift is of the first importance in understanding the trajectory of L&D worldwide from the 90s onwards so some space must be devoted to it and the work that explained and analysed it – Pistor and Wellons’s seminal work.¹¹⁹ Although I assume that participants are familiar with the work, I will provide a brief summary here as it forms an integral part of my paper.

Pistor and Wellons report on a major collaborative research effort sponsored and funded by the Asian Development Bank into the role which legal systems played in six Asian economies during a 35 year period of dynamic growth from 1960 to 1995¹²⁰. The study is, as the authors say, the first of its kind in trying to investigate the interaction between legal and economic change on a comparative basis. Within the confines of this paper, only the bare bones of this important study can be set out:

Law played an important role in Asia’s remarkable economic growth during the second half of the twentieth century. The results [of the research set out in the book] suggest that far from being irrelevant, law made an important contribution to Asia’s economic development and was most effective when it was congruent with economic policies...Overall we suggest that law and legal institutions tended to converge among the six economies and with the institutions of the West with economic development...

The study focuses on the period from 1960 to 1995. Taking 1960 as a starting point for our analysis is well justified when comparing economic growth rates before and after 1960...

In contrast, legal development in the six economies would not, by itself, justify starting our analysis in 1960. Legal modernization long predates the period of dynamic growth and development. Nineteenth century Western imperialism brought Western law to Asia by way of colonization or through the comprehensive adoption of Western law by economies trying to protect their legal sovereignty against Western powers. India and Malaysia came under colonial rule. Japan modernized its legal system in the late nineteenth century using continental European, in particular German law, as a model. Japan transferred this law to Korea and the island of Taiwan when they came under its rule. China used various models to modernize its legal system in the first decades of the twentieth century, with particular emphasis on the Japanese/German models. When the PRC embarked on a renewed legal reform effort after 1978, it further diversified and copied from various economies with different legal systems...

Historical circumstances prevents us from simply relating legal modernization to growth and development. We must content ourselves with an analysis of the use of the existing legal framework as well as legal changes in the period when economic development took off.

¹¹⁹ Op. cit. footnote 58.

¹²⁰ The six countries were China, India, Japan, Republic of Korea, Malaysia and Taipei, China.

By the early 1960s, all the economies but the PRC had comprehensive legal systems in place which encompassed both public and private law...

Despite the absence of major formal law reform in most economies, the legal systems changed significantly between 1960 and 1995. This change cannot be captured by focusing only on the enactment or amendment of major codes. Legal change over the 35 years was less visible because it often took place at the level of administrative rule making or practice rather than the enactment of new major codes. However, these changes had important implications for the functioning of the laws that were already on the books.

To capture these shifts, we define law as a complex set of rules and institutions. It consists not only of formal law enshrined in the constitutions, statutes or precedents, but includes the legal practices that may or may not follow the formal rules. To capture change in the legal system, we distinguish two dimensions of legal systems, allocative and procedural. The *allocative dimension* determines whether the power to make decisions over the allocation of resources is vested in the state or is left to the market. The *procedural dimension* reflects whether decisions are primarily rule based or discretionary...

When economic policies changed and provided greater scope for market activities, as they did in most economies around 1980, market-based law became more important. We found that throughout the 1980s market-allocative law gained ground against state-allocative law in five of the six economies...

The trend away from state-allocative law that occurred in most economies around 1980, in Japan about a decade earlier, was accompanied by greater emphasis on rule-based as opposed to discretionary laws and legal processes. Legal recourse against state acts was expanded or permitted for the first time...

This trend in the 1980s appears to mark a signal change in the Asian legal tradition. State control has for centuries been a hallmark of the legal tradition in East Asia and India...The remarkable act is the state's choice after 1980 to withdraw gradually from managing economic activity. This change has been accompanied by greater emphasis on rule-based procedures, State officials were made increasingly accountable to the law by limiting their discretionary power and vesting non-state agents with the right to judicial review of administrative acts.

Law and legal institutions in Asia changed in response to economic policies. When economic policies were introduced that gave nonstate actors a greater role in making allocative decisions, the law and its role in Asian economies became increasingly similar to the West. Not only substantive laws, but also legal processes and institutions responded to these changes, even though the process of convergence with respect to the latter was much slower...

None of this suggests that Asia has already converged with the West in its legal arrangements or that it will do so in the near future. The comparative analysis of different legal systems in Asia has revealed remarkable differences even between Asian legal systems. One may argue that in some ways these differences have become even more apparent during the process of socioeconomic transformation. As countries go through a similar development process, county-specific factors that shape the path of socioeconomic development are being revealed. In this

diversity, Asia's growth experience largely resembles the different paths of economic and institutional change taken historically in the West, where substantial differences in legal systems and the structure of economies remain to this day...

A key finding of this research project therefore is that law and legal institutions should not be viewed as technical tools that once adopted will produce the desired outcome...This finding cautions against the blind transplantation of legal institutions without due consideration for the relevant economic framework within which they shall operate. It also suggests that law reform projects should be assessed not in isolation, but within a broader context of economic policies. Finally this conclusion calls for a closer interaction between policymakers and legal reformers as well as between policy and legal advisers in designing legal reform projects.¹²¹

These programmes of economic and legal reform were essentially internal exercises. There may have been external advice and some transplants during the process but the driving force for change was internal rather than imposed from the outside. I would like to suggest that these reforms were one of the key influences in the resurrection of the practice of L&D in the 90s. In the late 80s and early 90s, the East Asian miracle of 'developmental states' was held out as the model for successful development¹²². The academic studies that were undertaken of the secrets of these states and their development did not specifically mention the role of law so that the Pistor and Wellons study was providing a valuable addition to the fund of knowledge about what contributes to successful development.

It is however significant both that the ADB funded the Pistor and Wellons study and that the World Bank study *The East Asian Miracle* published in 1993 did, albeit briefly, refer to the East Asian states being more successful in creating a legal and regulatory environment conducive for private sector development¹²³. This was coupled with the importance of building a reputable civil service and developing institutions which facilitated communication and cooperation between the public and private sectors "whereby rent-sharing rules can be made transparent and whereby each participant can be assured of a share of rents."¹²⁴ Transparency, probity, rules which facilitate the operation of the private sector – these are the key determinants of the push for good governance which have been the driving force behind the renewed interest and faith in the efficacy of legal reform which became a characteristic of the external input into L&D in the 90s. There was then a reversal of the age old format of

¹²¹ Op. cit., pp. 1 – 7; 18 – 19; 285 –286.

¹²² Two key publications here were R. Wade, *Governing the Market*, (Princeton UP, 1990) and E. F. Vogel, *The Four Little Dragons: The Spread of Industrialization in East Asia* (Harvard UP, 1991)

¹²³ *The East Asian Miracle: Economic Growth and Public Policy* (Oxford UP, New York, 1993) p. 180.

¹²⁴ Op. cit., p.181.

Northern input into Southern legal reforms: good governance in the developing world has at least in part been driven by Southern legal reforms, albeit mediated and subtly changed through Northern IFIs and donors before being passed on.

There were however other factors at work which were pushing IFIs, donors and the developing world in the direction of a much greater emphasis on the role of law in development. A key term here that came into vogue as the 1990s dawned is 'enablement' – a neo-liberal concept which aimed to capture the restructuring of the relations between the state and civil society. In order however to make sense of enablement, it needs to be broken down into three parts – market enablement; political enablement and community enablement. In making this distinction, I follow the framework developed by *The Challenge of Sustainable Cities*¹²⁵. From a legal perspective, the first two elements of enablement are important.

Market enablement involves the withdrawal of the state from the provision of many goods and services; i.e., in the urban sector, housing and utility services, the provision of which should be privatised. It involves deregulation, particularly of the market for land and of the use of land since attempts to regulate and control land supply and use via state bureaucracies stifle initiatives, limits competition, increases costs and contributes to corruption. Governments should be confined to facilitating and promoting the formal and informal business sectors and markets and monitoring their performance; legal, institutional and financial arrangements should be put in place to achieve this. Governments should contract with the private sector via competitive tendering for the provision of goods and services, rather than supply them themselves.

Political enablement involves the transformation of the structure and functions of central and local government, the relations between them and their relations with the market and the community. It is achieved through decentralisation at both political and administrative levels, democratisation, managerial and institutional reforms, the use of NGOs for governance functions, particularly in the delivery of services and the adoption of enablement strategies towards the market for urban goods and services as already outlined. But there is more to it. The reasons for political enablement are similar to market enablement; centralised governments are inefficient, inequitable,

¹²⁵ R. Burgess, M. Carmona and T. Kolstee, *The Challenge of Sustainable Cities* (Zed Books, London, 1997). Theo Kolstee was the head of the Urban Poverty Alleviation Sector Programme, Ministry of Development Co-operation, The Netherlands. The book was the product of a conference held in Rotterdam in 1994 as part of the world-wide preparations for Habitat II, the UN City Summit held in Istanbul in June 1996.

prone to rent-seeking behaviour, proliferate overlapping agencies and lack accountability. Equally however local governments are also inefficient, unaccountable, and lack financial resources and discipline so political enablement is also directed to rolling back the local state. Powers are to be decentralised but they would also be restructured to emphasise the enablement approach.

The connection between enablement and legal reform came about from two directions which impacted on the market and governance aspects of enablement. The market breakthrough came from the collapse of the command economies in Central and Eastern Europe and in the CIS; the governance breakthrough came from the internal and external pressures on governments in Africa to democratise themselves. In the first case, it quickly became apparent that the whole legal edifice of the command economy erected by communist regimes had to be replaced by...a legal edifice of a market economy. Policy guidelines were not enough; they had to be backed up by what market economists and World Bank personnel had hitherto taken for granted – law; so law reform began to feature very strongly in all programmes of external aid in what are referred to as the Transitional Countries.

In the second case, the drive towards democratisation in Africa often took the form of new constitutions, the introduction of Bills of Rights into existing constitutions, reform of electoral laws to facilitate multi-party political activity and elections and the introduction of new or more effective means of redress of grievances against unlawful government action. To this must be added the impact of structural adjustment to African economies; whereas at first, the thrust of external pressure to reform economies was to remove constraints on the operation of the market, i.e., remove, *inter alia*, legal constraints, by a transference of experience from the Transitional Countries, it soon became apparent that structural adjustment would entail legal reforms as well. Furthermore, this would not just be narrow legal reforms to improve the operation of the market; it would need to be wholesale reforms to the judicial and legal systems.

Just as market reform has had a substantial legal reform component, so governance reform has developed a very broad law input, but one which has, as aid agencies have become more involved in law reform in the course of the 90s, become somewhat detached from its internal political drive. Governance law reform under these external pressures has taken on the hue of market-led law reform; governance law reform has been as much about the protection of property rights and the enforcement of contracts as about the protection of human rights and access to justice for the poor – this again

indicating the connection between law reform and economic development. The World Bank in its publication *Governance: The World Bank's Experience* made clear this connection when it explained that

A legal framework for development...means a structure of rules and laws which provide for clarity, predictability and stability for the private sector, which are impartially and fairly applied to all, and which provide the basis for conflict resolution through an independent judicial system.¹²⁶

I turn once again to my own experiences to illustrate the development of the external inputs into L&D during the 90s. In the early 90s I was working in UN-Habitat, travelling the world as a UN official managing an international programme and dispensing advice on land issues; in the latter half once again as a consultant but in an environment changed quite distinctly from the earlier decades. In the last year of the decade I worked again full-time as an aid official in Uganda advising on the implementation of the Land Act, 1998 which I had helped draft.¹²⁷

Although I was employed as a consultant on legal aspects of urban planning by Habitat almost from its very beginning, I and others employed as legal consultants were so as a response by Habitat and its predecessor, the UN Centre for Housing, Building and Planning to government requests. Law was not a discipline which found a place in UN-Habitat. Even when, in the research phase of the Urban Management Programme, a joint Habitat/World Bank/UNDP initiative¹²⁸, law featured in the programme's land management component¹²⁹, it had no immediate impact on policy.

¹²⁶ World Bank, *Governance: The World Bank's Experience* (1994, Washington D.C. World Bank). The quotation comes from Leftwich's summary of the paper: Leftwich, op. cit. footnote 3, p.121.

¹²⁷ P. McAuslan, op. cit, footnote 73, chaps. 12 and 13 for an account of my adventures in that role.

¹²⁸ The UMP commenced in 1986 with the research phase led by the World Bank predominating until 1992. It then moved into the advice and guidance phase with UN-Habitat leading. R. Stren, "Urban management" in *development assistance: An elusive concept*. (1993, Cities Vol. 10), pp. 125 – 138; E. Wegelin, *Everything you always wanted to know about the Urban Management Programme (but were afraid to ask)*, (1994 Habitat International Vol. 18), pp. 127 – 237; P. McAuslan, *The Making of the Urban Management Programme: Memoirs of a Mendicant Bureaucrat*, (Urban Studies, 1997 Vol. 34), pp. 1705 – 1727. Stren was a key actor in the UMP and the driving force and editor of the 4 volume work *Urban Research in the Developing World* published by the Centre for Urban and Community Studies at the University of Toronto in the mid 90s; I was the Land Management Adviser 1990 – 93 and Co-ordinator 1992 – 93; Wegelin succeeded me as Co-ordinator until 1996. The UMP has now been folded into technical co-operation programmes of UN-Habitat but retains a distinctive persona.

¹²⁹ P. McAuslan, *Institutional/Legal Arrangements for the Improved Administration of Land Development*, (1992, Regional Development Dialogue, Vol. 13, pp. 14 – 32. The article was first written as a contribution to the land management component of the UMP in 1989. A much longer version entitled *Institutional/Legal Options for Administration of Land Development* was published as a Background Paper by the UMP in 1991 and was used in C. Farvacque and P. McAuslan, *Reforming Urban Land Policies and Institutions in Developing Countries*, UMP Policy Paper No. 5 (World Bank, Washington D.C. 1992) which was not an overtly legal paper.

Keynote urban policy documents produced by the World Bank¹³⁰ and UNDP¹³¹ in the early 90s made no reference to the role of law in the implementation of recommended policies. Indeed, if anything there was a certain antipathy to law; law was seen as synonymous with regulation, control and too much government and the early approaches to what became the philosophy and strategy of enablement was hostile to any ‘interference’ as it was seen then, to the market. Even the notion of ‘governance’ was frowned upon as being ‘political’ and therefore off limits for the Programme to become involved in.¹³²

By 1996, there was a significant turnaround in UN-Habitat. In June of that year, the UN City Summit took place and out of it came the Istanbul Declaration and the Habitat Agenda¹³³, the latter being devoted to a Global Plan of Action (GPA) for delivering adequate shelter for all and sustainable human settlements. What was very striking about the GPA was the stress laid on the central role of law in its implementation, particularly at the national level. In paragraph after paragraph stress was laid on the need to review existing laws on land tenure, land transactions, housing and urban planning, and develop simpler more user-friendly laws, providing equal access to land for women, taking account of the needs of the urban poor and providing specific opportunities for access to justice via legal aid and assistance.¹³⁴ From that time onwards, I have always made use of and quoted the stipulations in the GPA when arguing for or suggesting legal policy prescriptions or drafting new laws on land issues. Government officials are reluctant to ignore the principles and ideas in the GPA (which they all signed up to) and my strike record has been better in the 90s than in other decades.

In the 1990s, the content of my work changed. I was involved more in land tenure issues than in land planning issues. Just as there had been a resurgence of interest in L&D, so too there was a resurgence of interest in land reform and land law reform amongst IFIs, donors and recipients of aid. There were various strands to this interest.

¹³⁰ *Urban Policy and Economic Development: An Agenda for the 1990s*, (World Bank, Washington D.C. 1991).

¹³¹ *Cities, People and Poverty: Urban Development Cooperation for the 1990s* (UNDP, New York, 1991).

¹³² The UMP had an annual meeting when all the donors and senior programme officials and some senior urban officials from the South came together in a two day talk-fest. I introduced the idea of a half-day workshop with outsiders introducing some intellectual theme to the assembled officials. For the July 1992 meeting, I suggested Governance as the theme. This was vetoed by the World Bank Co-ordinator as it was ‘political’ and the Bank could not become involved in politics. Unknown to both of us, the Bank had published its first paper with the word ‘Governance’ in the title in June of that year: *Governance and Development* (World Bank, Washington D.C. 1992)

¹³³ *The Istanbul Declaration and the Habitat Agenda*, UN-Habitat, Nairobi, 1996).

¹³⁴ In a very detailed index to the above document, there are over 220 references to law, legislation, regulation, by-laws, access to justice, rights.

Generally, part of the neo-liberal, structural adjustment, market enablement agenda zeroed in on land and the need to free it from government controls so that it could be obtained by those who would put it to its highest and best use – especially foreign investors. More specifically, one of the keys to rapid economic growth amongst East Asia countries to which attention had been drawn by several commentators including the World Bank was successful land reform in Japan, Taipei China and Korea which “helped lay the foundation of the rapid shared growth that has continued to elude the Philippines” owing in part to the failure of land reform programmes there.¹³⁵ The World Bank became particularly committed to land reform. The Habitat Agenda and the GPA played a role here too giving a social democratic slant to the imperatives of the globalisation of land law reform in a market direction.¹³⁶

There was another important change too in the nature of the work I became involved in. During the 70 and 80s, my work on revising and writing new town and country planning laws had generally been part of a UN-Habitat project to develop a new national physical plan or urban plan or some such; there was a team of consultants working in the project and the new law was a part of the total outputs of the project. Although one was working with local counterparts, the work had an external feel about it: the total package of plans, land use policies and laws was developed by the UN team with local counterparts and local agencies being reactive. In the 90s and thereafter, there were many more occasions when the fundamentals of policy or law were developed internally by the government concerned and my role was to adapt and develop land laws to implement those fundamentals. Two examples may be given in some detail as they are also good illustrations of the internal politics of law making which any analysis of the real world of L&D now has to grapple with.

I was involved in the drafting of two major land laws which gave the legal backing to significant land reform policies in Tanzania and Uganda.¹³⁷ In Tanzania, a Presidential Commission on Land Matters was appointed in early 1991 and reported in late 1992. The report was a major analysis and critique of existing policies, practices and laws and recommended a thorough revision of the whole system with considerably devolution to villages which would be given much greater powers over ‘their’ land. It also called for an overhaul of many of the land laws; the removal of land management powers from the Ministry of Lands and, by a majority of 5 to 4, the

¹³⁵ World Bank, op. cit., footnote 114, p. 169.

¹³⁶ P. McAuslan, *‘From Greenland’s Icy Mountains, From India’s Coral Strand’: The Globalisation of Land Markets and its Impact on National Land Law*, (unpublished conference paper; Law and Development Conference, Cumberland Lodge, Great Windsor Park, 2001).

¹³⁷ McAuslan, op. cit., footnote 73; chap. 11 for Tanzania and footnote 117 for Uganda refs.

creation of an independent Land Commission in which all land would be vested and which would manage land on behalf of the nation.

The Commission's appointment was very much resented by the Ministry of Lands which considered that it was the chief policy adviser on land to the government.¹³⁸ After the Commission reported, there was a period of two and a half years while the struggle raged as to what would ultimately emerge as the government's new land policy. The 'jewel in the crown' of the Commission's report was the independent Land Commission; that was rejected, much to the chagrin of the chairman of the Commission, but many of the other recommendations were accepted together with the key recommendation of the World Bank driven policy process that it be accepted that a land market existed in Tanzania and should be officially recognised and legislated for. A new National Land Policy was approved by Parliament in June 1995 and at the request of the Ministry of Lands, the British Government financed my involvement in the drafting of the necessary laws to enable the new policies to be implemented.¹³⁹

I worked with a four person team of Tanzanian lawyers throughout the drafting process which also embraced two national workshops to consider the draft law. After I submitted my draft in November 1996, the processes of consultation by the government went on until the Bills – my draft had been sensibly split into two Bills

¹³⁸ I was invited to give evidence to the Commission in early 1992. At the time I was working for UN-Habitat and was involved in a project in Dar es Salaam which in turn involved working with the Ministry. The Commission was located at one end of a corridor in the Ministry; the Minister and the Permanent Secretary at the other end. There was no contact between the two ends of the corridor. I acted as a kind of go-between; telling the PS what the Commission was doing and vice versa. The Ministry set up its own in-house commission to review land policies (which had close contact with the World Bank) and it was made clear to me that whatever the Presidential Commission recommended, the Ministry would intervene and only allow the recommendations to go forward to government with its own comments attached. Later in 1992, UN-Habitat organised, on behalf of the Ministry, a public consultation process on land policies. The Commission was invited to come and give a preview of its thinking. The invitation was declined: a *Presidential* Commission could not attend a meeting organised by or on behalf of a mere Ministry. In the event, two members of the Commission attended as observers and said nothing throughout.

¹³⁹ This detail is inserted since the chairman of the Commission whom I had kept fully informed of my likely involvement in the drafting process and how it had come about from the time I paid a preliminary visit to Tanzania in November 1995 to discuss the modalities of the work began to put it about in writing as well as by word of mouth that I was being hired by the World Bank to do the World Bank's bidding at enormous expense to the Tanzanian taxpayer. He was ultimately persuaded by various publishers to confine his criticisms of my work to what I had done. See Shivji, footnote 105; and *Contradictory perspectives on rights and justice in the context of land tenure reform in Tanzania* in M. Mamdani,(ed) *Beyond Rights Talk and Culture Talk*, (2000, David Phillips Publishers (Pty) Claremont, SA), pp. 37 – 60. It must be said with no little regret that Shivji's animus against my being involved in drafting the Land Act and the Village Land Act seems to have hindered his moving on from criticising the Bill which was drafted in 1996 to discussing the Acts which were enacted in early 1999 and their implementation which began in 2001. On implementation see, L. Alden Wily, *Community-based land tenure management: questions and answers about Tanzania's new Village Land Act, 1999* (2003, International Institute for Environment and Development, London); and Z. S. Gondwe, *Manual of Transfers of Rights of Occupancy* (2001, Mkuki na Nyota Publishers, Dar es Salaam)

and had undergone some changes– went to Parliament in October 1998 and were enacted in February 1999. During their passage through Parliament, they were further amended. A further two years elapsed while regulations and forms were drafted – I was involved in that process too together with a Tanzanian counterpart – and an important omission to the two laws was enacted.¹⁴⁰

In Uganda, the background to the Land Act 1998 shows how internal political inputs trumped external economic inputs. From the early 1980s, the World Bank had been pressing successive Ugandan governments to replace the Land Reform Decree, 1975 with a law which adopted freehold tenure as the basic tenure system and admitted a free market in land. Report after report was produced and Bill after Bill was drafted but nothing came to the legislature. Then a Constitutional Commission was appointed in 1992. The Commission sat for almost two years, touring the country widely to obtain views on the most appropriate form of constitution for Uganda. Its report together with a draft constitution was then subjected to a further detailed scrutiny by a Constituent Assembly elected for the purpose. Land was a major issue both before the Commission and in the Constituent Assembly. The Constitution had a detailed chapter on land setting out what amounted to a new land policy: it provided that persons could own land on any one of four legal bases: customary; freehold; mailo; and leasehold and provided further for the decentralisation of land management, for local systems of title registration and for specialist dispute settlement bodies.

These provisions were little short of revolutionary. The conferring of rights of ownership on persons occupying land under customary tenure meant that such persons were no longer customary tenants on public land, subject to the whims of officials willing to grant that land to whomsoever they saw fit. Given that under the Land Reform Decree, all land in Uganda was previously public land and even under the Public Lands Acts and their predecessor Crown Lands Ordinances, all customarily occupied lands were public lands, the effect of this provision was virtually to eliminate public land as a category of land in Uganda. The tillers of the land became the owners of the land able to influence any public management of it by the devolution of management to District Land Boards and Parish Councils.

¹⁴⁰ The draft law had provided for a dedicated system of land courts as the national land policy had recommended. The Government preferred to develop new District Land and Housing Tribunals which would merge existing Customary Land Tribunals and Rent Tribunals and at the last minute changed the Land Bill. Unfortunately apart from vesting *exclusive* jurisdiction in these new bodies, the relevant Part of the Land Act, 1999 was silent on them. They were not established by the Act; their composition was not set out; nor were their powers and duties; or the appellate structure. There was then a great hole in the law. The problem was specifically drawn to the attention of the Ministry in April, 2000, but not until the Land Courts Act, 2001 was the gap in the law filled.

The Land Act was designed to put the flesh on the bare bones of the constitutional principles. A first draft was published in September 1997 and so strongly criticised that it was withdrawn and another draft published in March 1998. I was invited to participate in a workshop on the Bill organised by a Uganda NGO for Parliamentarians in late April – the date was put back by a month to accommodate the visit of President Clinton to Uganda – which was designed to sensitise MPs and launch a public debate on the Bill. I was asked to consider whether the Bill as drafted was workable and provided adequately for accountability. My answer was that it was not possible to say because the draft Bill was too vague, had too many open-ended provisions that left it unclear who was to do what and with what effect, had provisions that were virtually meaningless or did not appear to comply with the Constitution, and did not provide adequate certainty for the rights being granted to the citizen. For my sins I was invited to become involved in redrafting the Bill.¹⁴¹ I gave evidence to a special Parliamentary select committee on the Bill and what was needed to improve the draft. I worked closely with officials in the Ministry of Lands and the Chief Parliamentary Draftsman and between us we put together a revised draft which was acceptable to both government and Parliament – in Uganda, Parliament is much more like the US Congress than the British Parliament in terms of its independence from the executive – and the Bill was passed at the end of June, 1998.¹⁴²

The processes of law making could not have been more different to those I was involved in some 15 to 20 years ago both in those two countries and elsewhere. Then there was no internal policy framework to work to; no counterparts to work with as a part of a team; no public debate on legislative proposals; nor any real parliamentary debate on Bills. Then legislative land law reform was a wholly external process; in the 1990s it had become an internal process to which I was privileged to contribute. The laws that were finally put on the statute book had been through a political process in which national policies had been developed which did not just follow donor and IFI pressures; they were not universally approved¹⁴³ – what policy and law is anywhere – but their legitimacy was much greater than when they were externally driven. They

¹⁴¹ At the conference the Minister (a former student of mine) asked me if I would come and assist in a redraft. I replied that he would have to talk to the UK Government DFID representative on that. He then got up and announced that DFID had agreed that I should return to help with the redraft. DFID graciously agreed to this shotgun arrangement.

¹⁴² S. Coldham, *Land Reform and Customary Rights*, (2000, 44 Jo. of Afr. Law) 64.

¹⁴³ When in Uganda, I was invited by the former Attorney-General of Uganda (and a former colleague of mine in the Law Faculty in Dar es Salaam) to have a drink with him at his club. The club turned out to be the Uganda Freemasons Club and I was invited to reconsider those provisions of the Land Bill which gave tenants rights against their landlords in mailo land in Buganda – the former A-G was a Baganda. I declined.

aimed too not just to update colonial laws as with town and country planning but to change economic, social and administrative behaviour and culture. They were in a sense and unknowingly adopting the de Soto approach to law reform: adapting law to the reality of land holding and land markets rather than continuing to try and ignore how people were in fact using their land.

In the land law reform area then, although there were broad external pressures to reform land policies and laws to facilitate the operation of a market for land, there was, by the 90s, at least in some countries sufficient internal confidence and competence to ensure that national concerns predominated in legal developments. Even where no action was taken on recommendations for legal reforms, it was made quite plain that it was national considerations which determined that course of (non-) action. In Bangladesh for instance in 1999, I was advising on the reform of urban land laws with a view to assisting the urban poor to access land. At a workshop to consider the recommendations of my report¹⁴⁴, while urban NGOs and some lawyers supported the call for reform, a senior official opined that the urban poor would resist reform as they welcomed being exploited; laws which facilitated their being exploited also allowed them to exploit each other. No action followed the report – doubtless to the great relief of the urban poor.

The 1990s saw not just a resurgence of L&D both in practice and in academia (and in funding) but also an expansion of its scope. This was the decade when the World Bank moved into high gear with its legal and judicial system reform programme. As already noted, legal and judicial system reform had been operative in Latin America from the 1980s with USAID taking the lead but in the 90s, the World Bank entered the fray on all fronts, dragging many donors with it. The point has been made that:

By the late 1990s, approximately seventy-eight per cent of all conditionalities imposed by the international financial institutions in loan agreements and structural adjustment programmes were aimed at legal reform and the propagation of ‘the rule of law’.¹⁴⁵

¹⁴⁴ McAuslan, op. cit., footnote 73, chap. 10. No action followed an FAO mission to Swaziland in 1997 to make recommendations on and draft a law to provide for programmes of land settlement. But this was again for wholly internal political reasons. There are effectively two governments in Swaziland; the men in suits with whom aid agencies and consultants deal, and the men in skirts (traditional garb) who surround and advise the king who is the executive head of the government. Control over land is the basis of kingly and chiefly power and no law which interfered with that power was going to go anywhere. FAO overestimated the power of the men in suits.

¹⁴⁵ H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000, Cambridge, Cambridge UP), p. 66.

Tanzania was the first African country to get the treatment in 1994 when the Bank and no less than five donors – Canada, Denmark, The Netherlands, Norway and the United Kingdom – piled in to prepare a series of reports on all aspects of the legal and judicial system.¹⁴⁶ The recommendations ranged from the ridiculous – that Tanzania should build, with donor support, a huge Court of Appeal building similar to that in Israel and Australia to emphasise the importance of the rule of law – to the mundane – that law reports should be published.¹⁴⁷ The final report had a shopping list of 658 recommendations but no prioritisation. Ten years on, many of the same donors were prepared to fund another such study, so little had been achieved by the first. Indeed, it was not at all clear that the institutional memory of the relevant donors could recall their first inputs.¹⁴⁸

Legal and judicial system reform as a component of governance reform, now generally referred to as rule-of-law reform, creates both opportunities and challenges for governments and L&D, both external and internal. To date, the record has been at best mixed. It would be presumptuous for me to try and better, in a few sentences, the analysis and conclusions contained in the Jensen and Heller volume¹⁴⁹. Two quotations from that volume however show that in many respects, L&D in practice has not moved very far in 40 odd years:

Another characteristic unique to the area of judicial reform arises in what one critic [Gawande¹⁵⁰] calls the antiscientific bias in the legal culture...Three characteristics – the absence of microeconomic diagnostics, the rejection of experimental methods, and a reliance on advocacy – may well explain the lack of progress in using experience to build and improve common strategies objectively. Charges fly back and forth about the impact of reforms, but what passes as evidence is short on rigor and long on anecdotes, illustrative statistics and speculation [*mea culpa!*]...

¹⁴⁶ That Tanzania was the first up was entirely fortuitous. The Bank official backstopping Tanzania was a person who had grown up in Tanzania in the late 60s where her father was working on civil service reform. She had attended University of Wisconsin Law School with a Tanzanian who later became Attorney-General. The World Bank was going to fund a project to assist Tanzania to upgrade its financial institutions. The World Bank official encouraged the A-G to put forward a project to upgrade legal institutions to piggyback on to the financial project. He duly did so and the project came through. Thus was the Financial Institutions and Legal Management Upgrading Project (FILMUP) born.

¹⁴⁷ This recommendation was acted on. The former – a proposal of a UK team headed by an eminent QC – was not. I was part of a team funded by NORAD to review administrative law.

¹⁴⁸ The terms of reference for the study that a Canadian consultancy was contemplating bidding for made no reference to FILMUP.

¹⁴⁹ Op. cit., footnote 23.

¹⁵⁰ A. Gawande, Under suspicion, *New Yorker*, Jan.8 2000, pp. 50 – 53.

What needs to be done is obvious. Both donors and national counterparts have to become more serious about articulating their strategies, specifying their working hypotheses and evaluating program results.¹⁵¹

Most rule-of-law programs do not seriously consider why the link between laws and legal institutions, on the one hand, and the normative behaviour of judges and lawyers (and the public), on the other is so weak. Part of the answer, we would argue, has to do with incentives. Because they focus on substantive law reform and various training efforts, rule-of-law projects generally pay very little attention to incentive structures and, hence, to the larger political economy of institutional reform.¹⁵²

The language may be different but the criticisms are the same as those made more than 30 years ago: too many assumptions are being made that what works for ‘us’ will work for ‘them’; too little attention is being paid to evaluative research; too little attention is being paid to the real world of the law in the Other. Despite the lack of clear focus in these projects, the authors do bring out very clear differences between the approach of the World Bank and the approach of USAID and other aid agencies and IFIs. USAID’s focus has been and remains on human rights and criminal justice. DFID which was later into the field than USAID has also focused on criminal justice but has moved now into the broader area of access to justice focusing generally on a fair and equitable legal system which is prepared to embrace customary justice systems.¹⁵³ The World Bank however, “because of restrictions on its political involvement...focuses instead on commercial and civil justice reform”¹⁵⁴ and has as its main potential client for its programmes, foreign investors.

A major new study lends support to the above criticisms of lack of attention to evaluative research and calls into question one of the fundamental basis for legal system reform.¹⁵⁵ The study is concerned to determine how the dominant theory about foreign investors and legal systems can be tested as a contribution to more effective and useful legal system reform:

The dominant theory...proposes that foreign investors are attracted to states with ‘effective’ legal systems – that is those that are efficient and predictable, imposing relatively low transaction costs on investors; and that they avoid states with ‘ineffective’ legal systems – that is, those which are inefficient and unpredictable,

¹⁵¹ L. Hambergren, op. cit. footnote 89, pp. 320 – 21.

¹⁵² E.G. Jensen *The Rule of Law and Judicial Reform* in Jensen and Heller, op. cit., footnote 23, p.361.

¹⁵³ DFID, *Justice and Poverty Reduction*, (2000, London).

¹⁵⁴ Hambergren, op. cit, footnote 89, p. 298.

¹⁵⁵ A. Perry-Kessaris, *Finding and facing facts about legal systems and foreign direct investment in South Asia*, (2003, 23 Legal Studies 649).

imposing relatively high transaction costs on investors...The analysis focuses on...India, Pakistan and Bangladesh as these are the only countries in the region that are covered by all the World Bank data sets... [which the author considers in her paper].

It is clear that many points, fundamental and fine, about the relationship between legal systems and FDI remain to be explored. We have a neat, intellectually appealing theory. It is a shame that we do not have the facts to test it, let alone support it...

Facts can be hard to find...

Facts can also be hard to face. For what it is worth, the 'facts' set out in this paper seem to indicate that there is room for variety and even more room for failure, in the pursuit of FDI through legal reform. There may not be a uniquely effective legal system for all occasions and even if there were, it might be difficult to identify. This may be hard for policy-makers to face for a number of reasons. First, the idea that effective legal systems can be identified with mathematical rigour satisfies the policy-maker's need for visible targets; and provides the hope of fulfilling the need for visible change...Secondly, the idea that there is one model for an effective legal system satisfies the economist's desire for generalisable theories: design one, sell it often. Finally, and neo-imperialistic conspiracy theories aside, the idea that Western legal systems are the most effective satisfies the need (whether internal or external) for the World Bank to introduce the importance of notions such as democracy, without being accused of stepping into the forbidden territory of politics.¹⁵⁶

The two authors quoted from the Jensen and Heller book noted and bemoaned the lack of empirical work to support rule-of-law projects. The importance of this study is that it has examined the empirical work that has been undertaken under the auspices of the World Bank and has found it wanting. It also pinpoints the dangers of the kind of work that Hammergren at least seems to want – microeconomic diagnostics, and the dangers of holistic legal system reform which is now seems to feature in virtually all donor aid programmes.

There are two more concerns that may be noted about holistic legal system or rule-of-law reform programmes. It is not just that they are repeating the mistakes of the early L&D programmes in Latin America; it is that the World Bank programmes are, as Pery -Kessaris points out, trying to develop a 'one size fits all' model of legal system and in so doing are going 'back to the future' with a vengeance, and this when there is a wealth of literature to indicate the fallacy of so doing. Very instructive here are the two editions of Lord Hailey's *An African Survey*¹⁵⁷. In the first edition, in the chapter discussing the Administration of Justice, the author notes that his "general outline of

¹⁵⁶ Ibid, pp. 651 – 52; 687 – 89.

¹⁵⁷ 1st edition 1938; 2nd edition 1957; both Oxford UP.

what may be described as the ‘colonial’ court system would hold good for the greater part of British colonial Africa” and the same applied to the French system of *justice française* and *justice indigène* with the latter being the sole agency for the administration of justice to Africans and based on a European rather than an African model.¹⁵⁸ There was then a standard model of the colonial legal system.

In the second edition, some twenty years on, the same chapter commences with a brief summary of the evolution of Indian law in colonial times where the point was made that when, in the 19th century, legal reforms began to be introduced into India, “the Administration preferred to issue local regulations suited to Indian conditions, rather than to reproduce in India the forms of English law” with the author going on to draw the moral that with the scope of legislation “passing beyond the rudimentary purpose of maintaining order...to effecting improvement in the economic and social conditions of the country” it would be necessary to have regard to African conceptions of justice and “begin by inquiring how far we can use them as part of the foundation on which new African institutions can be built up.”¹⁵⁹ So by the end of the colonial system in Africa in the late 50s, the lessons of the British in India a century or more earlier were beginning to be applied when law reform was being considered. If there were still any doubt in the matter, the Pistor and Wellons study should have set them at rest; common principles may have taken from Western legal systems but they were adapted in practice to the particular circumstances of the countries concerned.

Not content with such an approach, the Bank seems to be trying to apply its own brand of imperialism not just to the specific projects it is funding but to the whole field of legal system reform. Consider this modest claim for the collection of papers from a conference held in Washington in June 2000, advanced by the Acting Chief Counsel, Legal and Judicial Reform, at the Bank, Maria Dakolias:

While similar conferences have been held before, they have tended to have a more limited regional or thematic focus. We believe this was the first time a truly global symposium united practitioners and experts in legal and judicial development in its multiple forms and in the broadest cross-disciplinary sense.¹⁶⁰

¹⁵⁸ 1st ed; pp. 286, 290 – 91.

¹⁵⁹ 2nd ed; pp. 588; 592 – 93. On English law in India, see too C.G Rankin, *Background to Indian Law*, (Cambridge, Cambridge UP, 1946): “before the beginning of the nineteenth century, it was the accepted view of the Indian Administrators [that is English administrators in India] that the law of England was not suitable to Bengal.” (p.3). It can with some justice be remarked that the mid 50s was little late in the day to “begin an inquiry” into African conceptions of justice and how they might inform colonial legislation.

¹⁶⁰ R.V. Van Puymbroeck, *Comprehensive Legal and Judicial Development. Towards an Agenda for a Just and Equitable Society in the 21st Century* (2001, Washington D.C. World Bank). Not that the claim

So much for over 40 years of conferences, workshops, symposia, on the themes of law and development.

The re-discovery of law by IFIs and donors in the 90s is like the ‘discovery’ of America, Asia and Africa by Europeans in 15th to 19th centuries: it was always there; it was just that ‘we’ hadn’t noticed it and when we did notice it, it was some time before we realised just how extensive it was.¹⁶¹ The re-discovery, as has been noted, had, at least for some intrepid explorers, another similar characteristic to the earlier explorers: a disinclination to accept that the many of the rules found there were worth very much. Unlike the colonised of yore, however, the current governments and peoples of the South have been able and willing to take on the challenges posed by the agendas of North. I have already noted how at least in the countries I worked in during the 90s – a not wholly untypical sample – while there may have been external pressures for land reform, the configurations of that reform – the policies which were arrived at (or not arrived at) and the laws which followed the policies – reflected the internal political dynamics of the countries concerned and not the external concerns of IFIs and donors.

So it was too with law reforms designed to re-establish competitive party politics, protection of human rights, and other aspects of good governance. In Anglophone Africa, there is little doubt but that the South African constitutional reforms of the early 90s culminating in the Constitution of 1996 has had a major influence on constitutional developments in the continent. As has been pointed out by Klug¹⁶², although the climate for the kind of constitution which was finally agreed upon in

is in fact correct in its own terms. The conference was not global but covered the world within the de facto lending mandate of the World Bank – the world of developing and transitional economies. The collection consists of 24 papers: 7 dealt with African issues – 5 sub-Saharan and 2 North African; 4 with Asian issues, 4 with Latin America issues, 2 with Transitional Country issues; and 7 with general cross-cutting themes. Case-studies from the developed OECD world were totally absent from the ‘global’ symposium, although like Banquo, they were the ghost at the feast, since implicit in the whole collection is the underlying message that the way to legal and judicial salvation is to be more like ‘us’. Its unfortunate for the World Bank that since 9/11, ‘we’ seem to be on the way to becoming more like ‘them’ or what we assume ‘they’ used to be like – ‘forget the rule of law, justice, independent judiciaries, and all that nonsense, just get the bastards any way you can’. Many papers written by (or more likely for) senior judges and government figures which feature prominently in the collection are bland, platitudinous and could not possibly offend any government., . It is an unworthy thought and one which would, no doubt, be strenuously denied by the Bank but it seems unlikely that this common characteristic happened by chance. Much more likely was it that the papers selected and edited for publication were chosen precisely because they had that characteristic; none of them could possibly offend the Bank’s partners, a.k.a. client governments.

¹⁶¹ A Ugandan colleague of mine (see footnote 135) once told me that he had ‘discovered’ Denmark as he was the first African to visit that country. It seems a fair point.

¹⁶² Op, cit, footnote 138, Chap. 3.

South Africa was influenced by the globalisation of the rule of law, the exact terms of the constitution were the product of South African inputs. So too with Uganda's constitution in 1996 and Nigeria's in 1999. Changes too to the African Charter on Human and People's Rights reflected as much internal African political dynamics as external pressures.

In Asia too, while global pressures no doubt contributed to constitutional and rule-of-law reforms, the specific developments which took place reflected local internal needs and pressures even if this meant delay in or withdrawal of financial assistance from IFIs. I witnessed this at first hand in Indonesia in 2002.

With the collapse of the centralised authoritarian Soeharto regime in 1998, there were strong demands for greater regional autonomy as an aspect of the democratisation of government. A Regional Autonomy Act was enacted in 1999¹⁶³ which provided for extensive decentralisation of powers to around 300 sub-provincial regions (District Regions and City Regions) which were to be autonomous. Amongst the functions which became "mandatory" for regions to handle was land affairs (undefined). Until the passage of that Act, land management had been centralised in the National Land Agency (BPN) and administered in accordance with the principles of the Basic Agrarian Law (BAL).

BAL is of fundamental importance in two ways: for what it is and for what it says. What is meant by the first point is that BAL has, in a sense, taken on a life of its own: it has risen above what it says – its content – and its formal legal status – a Law enacted by the national legislature – and has taken on an iconic status as a part of the fundamental basis of the nation – it helps define and cement the Unitary State of Indonesia as proclaimed in the Constitution of 1945. BAL has become not just the policy but a policy which cannot be changed. This is particularly evident at the present time in relation to the decentralisation of governmental functions over land in pursuance of Law 22/99.

The fundamental principle of BAL is the abolition of the dualistic system of land law prevalent in colonial times and its replacement with a land law providing for a single system of rights based on *adat* law, but an *adat* law modified by principles introduced by BAL. At the risk of some over-simplification, one way of putting it is to think in terms of the State replacing the traditional institutions which managed land under *adat* law. *Adat* law recognises that individuals within the local community can have rights

¹⁶³ No. 22 of 1999.

to occupy and use land potentially in perpetuity but these rights remain subject to overriding community interests, and some land within the jurisdiction of the traditional authorities is reserved for communal use. So too now at the level of the State. The State has a right, or more accurately, a duty of control over all land in the national interest. This duty of control is distinct and separate from ownership of the land; it derives from the sovereignty of the State over the territory of Indonesia.

Since 1998, when decentralisation has been official government policy and there has been much legislation to provide for it, the national land management agency, BPN has fought against decentralisation of land administration to the point that the World Bank has made it clear that no new land administration project will be sanctioned (and a proposed project was a \$70 million one) until this issue is resolved. With government as a whole having second thoughts about the destabilising effects (as it sees it) of decentralisation, it would not be beyond possibility that BPN will win its fight to rein in decentralisation of land administration and the Bank will either have to accept that or forgo its ability to continue to try and influence the evolution of land management in the direction of individualised registered land titles. BAL will not be rewritten.

It is not just actions that we need to have regard to. One of the most striking and pleasing developments in the scholarship of L&D in the 90s has been the very rapid growth of L&D work by scholars from the South, often now writing in the law journals of the North. There have always been outstanding legal scholars from the South writing on L&D themes – Baxi, Ghai, Shivji from the Anglophone world spring to mind – who, like Bob Marley and Freddy Mercury¹⁶⁴, came from the South, were based in the South and became truly international stars in a Northern dominated industry. But the 90s have seen these stars joined by others who have a distinctive voice and viewpoint, not always sympathetic to the increasingly dominant rule-of-law market-orientated ideology of Northern L&D scholarship and reform. It might be invidious to single out any particular author but in the context of this paper and its argument, I would draw attention to Chibundu's¹⁶⁵ critique of current trends in L&D thinking and practice:

One of the more remarkable features of the current debate over the role of law in development is the persistence of a positivistic description of law. Ignoring many of the most useful insights about law in the last three decades, positivist adherents

¹⁶⁴ Just in case there are some who don't know; Freddy Mercury of Queen came from Zanzibar.

¹⁶⁵ Chibundu, M.O. (1997) *Law in Development: On Tapping, Gourding, and Serving Palm Wine*, *Case Western Reserve Journal of International Law*, Vol. 29(2), pp. 167 – 261, at pp. 216 – 229.

continue to present law in terms of governments prescribing appropriate rules to regulate title and transference of interests in property; the provision of functioning institutional processes and mechanisms by which disputes may be resolved; the existence of an efficient bureaucracy to entertain and process requests; and the provision of the assurance of transparency in the conduct of all these functions. For each one of these elements of law, one can usually point to a model illustration from a Western developed society...

The instrumentalist approach to the study of law and development is underpinned by an assumption of a unilinear relationship between law and development in general and law and economic development in particular... The purported relationship of law to development is however no more than surmise. Stripped to its essence, it is a culturally determined argument for policies likely to encourage participation by investors from Western Europe and North America in the economies of the Southern countries...

Now that the globe seems to be marching to one drum beat, that of the free enterprise capitalist system, it follows that the legal institutions and practices that have fostered and sustained the triumph of the capitalist mode of production...are best suited for other societies, appropriately modified at the margins to account for the particular foibles of those societies. Not surprisingly then, the apostles, priests and lay missionaries of law, as typically understood and practiced in the industrialized countries, have fanned out to all corners of the globe, preaching the gospel of clear individual title to property rights, a functioning judicial system to adjudicate such rights...judicial review of administrative and legislative action...and a minimalist approach to regulation by the state. Although often clothed in the garb of international law, the scripture is simply one of a particularized global standard to be implemented *within* national territories.

The central point about law and development is that economics and political science are part of the same cultural environment within which persons and institutions interact. Both seek an expansive understanding of those interactions, and similarly attempt to shape those interactions. The starting point of reference must be that the study of reflexive influences of law on development, the impact of individuals on institutions, the engagements of the state with society, and society with the state, are not likely to be of much use unless they are undertaken within the living cultural settings of the society under study.

Ultimately, the particular day-to-day existence of people, their struggles for scarce resources, the availability and abundance of social distractions, and the internecine quest for power and dominance, motivate and channel the structure and principles of a legal order, as well as socio-economic and political development. It is these considerations that ought to dictate the nature and direction of future inquiries into law and development.

It may be argued that this approach is not particularly original and that, published in an American law journal, it will have limited impact on either scholarship or practice in the South. It is however symptomatic of more critical thinking amongst legal scholars of the South (and similar articles can be found in law journals of the South) which will help provide the intellectual support for the national internal responses to the challenges posed by the external Northern rediscovery of L&D. There is, as has been noted by many legal¹⁶⁶ and other¹⁶⁷ scholars great pressure for the globalisation of law reform – the homogenisation of diverse national laws into a common standard form which is in practice an Anglo-American form – civil law seems to be losing out here – but my experience, limited though it has been, and the sceptical scholarship of Chibundu and his colleagues suggests that there may be sufficient confidence in the internal L&D communities to ensure that national interests are properly catered for even when external pressures are applied.

The decade(s) (?) of recolonisation: the 00s

If the 90s were the decade when law as an important input into development was rediscovered, the 00s may be the decade when colonisation re-appears as an important driving force behind ‘development’ and development in turn is seen much more crudely as modernisation. Let me make quite clear what I mean by colonisation. It can take various forms. At its worst and most overt, it is the conquest and forcible occupation of another country under colour of international law on the grounds that that other country has ‘failed’ and is incapable of managing itself; or its management offends the accepted norms of international law; or it poses a threat to the international community. Alternatively, as with protected states of old, forcible occupation by conquest may be averted by an ‘agreement’ to be, in effect, supervised by a colonial power or powers and again as with the old League of Nations/UN system of mandates and trusteeships¹⁶⁸, the UN may be brought in to give a veneer of respectability to the whole exercise.

Sometimes, the exercise is beneficent: there can be few people outside Indonesia (and not a few inside) that do not think that the process whereby East Timor became independent was wholly justifiable. (It was in any event, to undo a flagrantly illegal colonial occupation of an independent country). Effective armed intervention of a

¹⁶⁶ A good collection of papers is in M. Likosky, (ed), *Transnational Legal Processes: Globalisation and Power Disparities* (2002, London, Butterworths).

¹⁶⁷ S. Sassens, *Losing Control, Sovereignty in an Age of Globalisation* (1996, New York, Columbia UP), especially chap.1.

¹⁶⁸ Anghie, A. (2000), 'Time Present and Time Past: Globalization, International Financial Institutions and the Third World', *New York University Journal of International Law and Politics*, Vol. 32, pp. 243.

fairly modest scale has greatly assisted Sierra Leone to recover from complete collapse. Without armed intervention in some of the states that used to make up the former Yugoslavia, there would have been much worse killing than in fact occurred. Sometimes, there is general consensus that there should have been armed intervention and a follow up period of supervised administration – Rwanda is a case in point – or more effective armed intervention – Liberia, and, for some commentators, Afghanistan to combat warlordism. There have been situations where some kind of armed intervention or at least international quasi-armed intervention has been sought but denied – Palestinian requests for international assistance to combat the illegal Israeli occupation and destruction of Palestine is the most obvious example of that.

The exercise can however be contested both within the international community and more important within the country concerned: Iraq is the obvious example here. One wonders too whether the restoration of civil order in Haiti under a government acceptable to the US which orchestrated the downfall of the Aristide government will proceed entirely peacefully and the latest flare-up in Kosovo shows that any possible solution there – independence, autonomy, partition, integration – will be contested on the ground and may therefore lead to further armed intervention and/or international occupation and supervision.

A more politically correct description of the kind of practices I see as old fashioned colonialism is to use the term ‘failed states’ to describe the occupied/supervised entities so that the term ‘international assistance’ can then be used to describe the activities of the occupiers/supervisors. ‘Failed states’, by focusing on the ‘facts’ ex post neatly avoids any investigation of who or what caused the failure ex ante in the first place. It also has two other ‘external’ advantages. First, a state that has ‘failed’ has done so because of the failures of the people managing or rather mismanaging the state: they can therefore be pushed aside and allow others to take over; either external administrators and e.g. lawyers or internal people who owe their position, status and power (such as it is allowed to be) to the external powers; Mr Karzai, the ‘Mayor of Kabul’¹⁶⁹ is an example of that. Second, a failed state needs to be rebuilt from top to bottom: enter the international community with, inter alia, rule-of-law programmes, governance programmes, market-orientated law reform programmes as essential parts of an all-singing-and-dancing programme of state capacity building. Just as in the era of European empires so brilliantly analysed by Abernathy¹⁷⁰, so now: law is seen as a

¹⁶⁹ I take this term from the similarly derisive term used by Somalis to describe the scope of the power of the last days of the dictator Siad Barre in early 1991: the Mayor of Mogadishu.

¹⁷⁰ Op. cit, footnote 25.

central pillar in the creation of new states which conform to the international community's notion of what a state is and how it should be governed.¹⁷¹

For the L&D community, is there not a cruel dilemma: do we participate in nation building exercises when to do so is necessarily to accept, at least implicitly, the ideology of colonialism which has facilitated our opportunity to so participate; or do we decline to participate and watch others, perhaps less attuned to the intricacies and delicacies of legal interventionism and more committed to serving the interests of the colonial powers plunge in, make fools of themselves (or so we will write later) and leave a legal mess behind? Perhaps the dilemma is more apparent than real: to assist in East Timor (as I have done on the margins) is not to condone the illegal invasion and occupation of Iraq. Arguably, to become involved in land reform efforts in Afghanistan (as at the time of writing I may be invited to become involved in) which many authoritative persons see as a key to the re-establishment of a viable peaceful society in that country¹⁷² is to try and assist in repairing the damage done by more than two decades of externally directed armed intervention and civil war, notwithstanding that one will be making an external intervention at the behest of a UN agency rather than the Government of Afghanistan.

Rather than inventing another term, let us, notwithstanding its limitations, use the term 'failed states' as a superficially objective term in order to explore not whether the L&D community should become involved in such states but on what basis and according to what principles. What should we be aiming to achieve in our intervention, whether it is at the grand level of constitution-making and or at the more humble levels of land reform and criminal justice reform? Is there, even, or especially, in an era of the re-assertion of the ideologies that might is right and colonialism is justifiable a place for an alternative perspective that the L&D community should both argue for and apply in the field? Two recent lines of argument suggest a way forward. The first comes from the Nobel Prizewinner in economics, Amartya Sen:

It is important to give simultaneous recognition to the centrality of individual freedom *and* to the force of social influences on the extent and reach of individual freedom. To counter the problems that we face, we have to see individual freedom as a social commitment...

Expansion of freedom is viewed, in this approach, as both the primary end and as the principal means of development. Development consists of the removal of

¹⁷¹ As to which, World Bank, *Building Institutions for Markets: World Development Report 2002*, (Washington D.C. World Bank, 2002), especially Part III.

¹⁷² L. Alden Wily, *Land Rights in Crisis: Restoring Tenure Security in Afghanistan*, (2003, Kabul, Afghanistan Research and Evaluation Unit).

various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency. The removal of substantial unfreedoms, it is argued here, is *constitutive* of development...The intrinsic importance of human freedom, in general, as the pre-eminent objective of development is strongly supplemented by the instrumental effectiveness of freedoms of particular kinds to promote freedoms of other kinds...

This work outlines the need for an integrated analysis of economic, social and political activities, involving a variety of institutions and many interactive agencies. It concentrates particularly on the roles and interconnections between certain crucial instrumental freedoms, including *economic opportunities, political freedoms, social facilities, transparency guarantees, and protective security*. Societal arrangements, involving many institutions (the state, the market, the legal system, political parties, the media, public interest groups and public discussion forums, among others) are investigated in terms of their contribution to enhancing and guaranteeing the substantive freedoms of individuals, seen as active agents of change, rather than as passive recipients of dispensed benefits.¹⁷³

The second is from an original perspective on the ‘norm of democratic governance’ which is ‘emerging’ in international law and which in the view of some international legal scholars ‘would require ‘democratic countries [to] do everything possible to promote democracy in the world’ including military intervention.¹⁷⁴ Marks considers that the sceptics of this claim for the existence of a new norm are right to warn that the risk of neo-imperialism looms large (events since she wrote this show the correctness of this view):

On the other hand, I do not accept the conclusion drawn by some, that the attempt to secure explicit international legal support for democratic agendas should therefore be dropped. I think the proponents of the norm are right to bring democracy into the vocabulary of international law...

My concern is with the implications of the claim that an emerging norm of democratic governance should now be recognised...my concern is with the relation between that claim and prevailing power. I seek to consider the democratic norm in terms of its potentials both for sustaining relations of domination and for transforming them.

I do not share the view...that democracy is a Western form of government, with little pertinence in other parts of the world, and hence little place in international law...as Claude Ake remarks, ‘[t]here is no part of the world where democracy is not relevant, if only as an emancipatory project.’ The reference here...is to the basic democratic ideas of popular self-government and political equality...

¹⁷³ A. Sen, *Development as Freedom*, (1999, Oxford, Oxford UP), pp. xii, xiii.

¹⁷⁴ S. Marks, *The Riddle of all Constitutions* (2000, Oxford, Oxford UP), p. 1. The passages in quotations are from T. Carothers, Empirical Perspectives on the Emerging Norm of Democracy in International Law, *Proceedings of the American Society of International Law*, (1992), 261.

Insofar as democracy offers a powerful argument against domination, the critique of ideology affirms the importance of holding onto that argument. This translates into a claim that the democratic ideals of self-rule and political equality must not be wasted. ‘Realism’ must not be allowed to corrode them; statism must not be allowed to confine them; scepticism must not be allowed to overwhelm them...[They] must not be reduced to any particular set of institutions and practices. Instead they must be permitted to retain their character as tools for criticizing actuality and orienting change.

International law should not seek to establish democracy as the *solution* to the question of constitutions. But neither should it balk at the prospect of asserting democracy’s universal significance.¹⁷⁵

Starting from different perspectives and concerned with different ends, there is a striking similarity in the arguments put forward here. Development is about expanding political as well as economic freedoms and should be people-centred. Democracy too should be seen as being about the expansion of freedom and equality and likewise, as a consequence, people-centred. The state and the law should not be a vehicle of domination either in the national or in the international sphere. It should enable and facilitate people-centred development.

Such an approach to development and law – international and national – is incompatible with colonialism; or with rule-of-law programmes which seek to focus solely on investor-friendly legal systems; or with “the restructuring of the legal functions of the state [which] serves to aggravate existing inequalities and social exclusion” and “reflect the more general features and effects of the neo-liberal state: the privatisation of state functions, increased inequalities and a reduced institutional capacity to intervene in society to address those inequalities.”¹⁷⁶; or with the kind of unregulated market-centred land law reforms geared to the individualisation of tenure which the World Bank continues to urge on countries and from the latest evidence, is again gearing up to impose on countries.

On the other hand, such an approach would not rule out external inputs into national programmes of L&D which involved working with local counterparts, developing legal system reform packages that put access to justice for the poor at the centre of the programme, ensuring that equity was as central to land law reform packages as efficiency and that constitution-making and the development of local government

¹⁷⁵ Ibid, pp. 1,2, 4; 149 – 151. The quotation from Ake is from C. Ake, *Devaluing Democracy*, in L. Diamond and M.F. Plattner (eds), *Capitalism, Socialism and Democracy Revisited* (Baltimore, MD: John Hopkins Press, 1983) p.26.

¹⁷⁶ R. Sieder, *Legal Globalisation and Human Rights: Constructing the ‘Rule of Law’ in Post-Conflict Guatemala*, (London, *DESTIN Research Seminar Series*, LSE, 18 Feb 2004), p.13.

emphasised participation and rights for the people and accountability and control of governmental powers. These may be old-fashioned examples of legal liberalism but, to adapt Claude Ake's aphorism, there is no part of the world where the principles of legal liberalism are not relevant, if only as an emancipatory project.

Let me give one last example from my own work. During 2003, I was in Somaliland on a UN-Habitat project working with the Mayor and councillors of Hargeisa to develop a new local government law for the city.¹⁷⁷ For most people, and certainly I would suspect most Americans, the 'S' word is the very definition of a failed state and one that, having spurned the beneficent intervention of the US marines in the early 1990s, deserves little support or sympathy now. But Somaliland is not Somalia. A brief introduction to the country and its developmental trajectory to the present is in order.¹⁷⁸

Somaliland became a British protectorate in 1887. It was never particularly well regarded by the British nor did it benefit from much development assistance during its dependency. Law and order – the first concern of a colonial power – were not fully established until the early 1920s¹⁷⁹.

Somaliland was granted its independence by Britain on 26 June 1960. Five days later, it voluntarily and, at the time enthusiastically, voted to merge its independence with the newly created Somali Republic which came into being on 1 July 1960¹⁸⁰. After a promising beginning, the Republic of Somalia succumbed to a military coup in 1969 and one of the most ruthless and vicious dictators to emerge in Africa took control of Somalia – Siad Barre. Despite (or perhaps because of) his record of tyranny, of demonstrating that he was a 'strong ruler', he received large amounts of aid from the USA, happy that in the late 1970s, he fell out with his former paymaster, the USSR,

¹⁷⁷ The EU, to its great credit, provides the bulk of the aid to the geographical area of Somalia and disburses it through other agencies such as UN-Habitat. Neither the EU nor the UN recognise Somaliland but their officials deal with reality on the ground. So does the British Government. On my first mission in July 2003, the first person I met in Hargeisa was an official from the British High Commission, whom I happened to know, who was in Hargeisa with two senior officials from the Immigration Service in the UK to negotiate with officials in the (non-existent) government of Somaliland on a programme for the involuntary repatriation of Somalilander refugees and others from the UK to Somaliland. This sounds pretty drastic but it must be conceded that there is a heavy two-way traffic between the UK and Somaliland (Daallo Airlines, a Somaliland airline based in Djibouti and using at least from Dubai, Ilyushin-18 planes, flies from London Gatwick to Hargeisa via Djibouti) with refugees going out to Somaliland for their holidays and on business.

¹⁷⁸ The information for this very potted history is taken from Ioan Lewis's magisterial *A Modern History of the Somali; Nation and State in the Horn of Africa*, 4th edn, London and Hargeisa, 2002.

¹⁷⁹ Jardine, D. (1923) *The Mad Mullah of Somaliland*, London. In those days, any one who opposed colonial rule was regarded as mad; nowadays, they are regarded and treated as terrorists.

¹⁸⁰ Cotran, E. (1963) Legal Problems Arising out of the Formation of the Somali Republic, *International and Comparative Law Quarterly*, Vol. 12, pp. 1010 – 1026.

over his war with Ethiopia. Eventually, the Somalis rose up against Barre and taking the lead in this in the late 1980s were the Somalis from the North-West, the old Somaliland, who had become increasingly disenchanted with the discrimination practiced against them by Southern Somali dominated governments.

The reaction of Barre towards the Northern Somalis was immediate and horrendous. He set out to slaughter as many of them as possible and destroy their towns. Hargeisa, the largest town in the North-West was bombed by Barre's air force based in Hargeisa and shelled by his army. Enormous destruction and loss of life took place. Over 50,000 people lost their lives; countless others were injured and lost their homes and all their possessions. Eventually the people triumphed; Barre and his forces were expelled from the North-West and at the beginning of 1991, Barre was chased away from Somalia.

The people of the North-West had had enough. In May, 1991, at a conference of the Somaliland Communities at Burao, they reaffirmed their independence with effect from 18th May.¹⁸¹ From that time onwards, Somaliland has regarded itself as an independent state and the citizens of that state have set about the process of rebuilding their state and nation. Without any recognition from any other state in the world community, and relying overwhelmingly on their own resources, principally in the form of remittances from the diaspora of Somalianders which now amount of some \$450 million a year, they are doing a remarkable job.

It has not been easy. For the first few years, warlords both within Somaliland and from outside were a constant threat. But the government persevered. Gunmen have been disarmed. Now only the police in Hargeisa carry weapons. Peace and security have been restored throughout the land. Only a border dispute with Puntland – another unrecognized breakaway state in the North-East of Somalia – threatens the peace. As one statistic of the astonishing transformation which has been brought about, 14 years ago at the height of the civil war and general lawlessness, Hargeisa shrank to around 10,000 inhabitants. Today it has a population of over half a million and while there is much poverty, there is little crime in the city.

A constitution has been adopted which provides for a President, a two chamber Parliament, a Bill of Rights and an independent judiciary. The first President was

¹⁸¹ The referendum that confirmed this declaration produced a larger majority for independence than that held in East Timor. It was declared by international observers (including some unofficial ones from the USA) to be free and fair. See generally, I. Jhazbhay, *Somaliland: Africa's best kept secret; A challenge to the international community?* (2003) 12 *African Security Review*, 77.

Mohamed Egal, the leader of Somaliland at independence in 1960. When he died in 2002, it was widely assumed both within and outwith Somaliland that conflict would break out over the succession. It did not. By the evening of the day of Egal's death, Somaliland had a new President; the Vice-President was elevated. Presidential elections were held the following year and when the result was disputed by the opposition who had lost by a mere 80 votes in a nation-wide poll, the matter was resolved peaceably by the elders. Local governments have been re-established, local elections held, services are beginning to be provided to the people and local taxes collected. Disputes are being settled peaceably.

Colonial Somaliland was part of the common law system. Appeals from the Somaliland High Court went to the Court of Appeal for East Africa which also exercised appellate jurisdiction in Kenya, Tanganyika (as it was until 1964), Uganda and Zanzibar. When Somaliland joined up with Somalia, a major exercise in 'legal integration' commenced managed by an Italian team¹⁸². It would not be entirely unfair to say that the integration consisted in large part of the application of Italianate codes to Somaliland. The Penal Code for instance was drafted by an Italian lawyer in the early 1960s and was applied throughout independent Somalia: it was and is (in theory it still applies) a magnificent intellectual feat of no practical utility. Some of the old colonial statute law continued to apply in Somaliland but during the Barre era was slowly replaced by laws which owed little to specifically Italian influence.

There was a conscious and deliberate campaign by Barre to wipe out and destroy the legal heritage of Somaliland. All the old British colonial collections of Somaliland statute laws were destroyed, the law reports in the High Court were looted and vanished. There are now no collections of any laws of any kind in Hargeisa¹⁸³. Nor are there any persons with drafting skills. But this has not prevented Somaliland from basing their development on law.

What is clearly happening is that Somaliland is slowly and inevitably some false starts – the laws on local government I was asked to comment on had had built into them several flash points of conflict between central and local government, between mayor and councillors and between councillors and officers which was partly a product of

¹⁸² Contini, P. (1969) *The Somali Republic: an Experiment in Legal Integration*, London.

¹⁸³ My informants were the Minister of Justice and the Dean of the Faculty of Law at the new University of Hargeisa. I was not able to visit any libraries or other places where some old laws might still exist. One of the officials in the City Council with whom I was working produced the Town Planning Ordinance of 1947 (Cap. 83 of The Laws of the Somaliland Protectorate, 1950 edition) which I was told was still, in theory, in force. It was this official who had a prized copy of the English language version of the Penal Code.

the universal ambivalence which central governments have over decentralising power to local governments and partly just a badly drafted law¹⁸⁴ – creating a new autochthonous legal system, geared to meeting its own needs and principles.

The absence of international legal assistance is, paradoxically, helping in the development of a truly national legal system, tailored to national needs. Nowhere is this more the case than with dispute settlement. Disputes are handed almost exclusively by customary principles and/or ADR. Yet it must be emphasized that this is a society with a high level of commerce both national and international; with a banking and money transfer system capable of handling many millions of dollars of transactions having international elements and ramifications. Clearly the system works and must be based to a large degree on trust and honour, the foundation of any system of law.

Could it not be suggested that unlike the formal legal systems of so many states in Africa, the evolution of a legal system which derives its fundamentals and direction from the culture and locally driven needs and decisions of the society in which the law is to apply are a more likely guarantee of ‘law and order’ i.e. acceptance of the need to observe and comply with the law, and so of development than the ambitious programmes of legal system reform now being mounted by the World Bank and many donors.

The people I met and worked with – councillors, officials, lawyers – were concerned to create and work under a law which they could understand and which would have resonance with the residents of the city: they had experienced the reverse and did not want a repeat. Far from there being a ‘failed state’ a ‘black hole’ in the Horn of Africa, there are people in Somaliland committed to building a state governed by law, willing to work with external assistance but not in any way dependent on it and determined to pursue their own way in a largely hostile world. Commentators have said that Somaliland is a ‘challenge’ to the international community; it is in many respects a threat for if it can succeed on its own and with minimal aid and this example begins to be followed by other countries in the South, where is the leverage over development and rule-of-law reform which the international community attempts to exert over so many countries. No wonder there is resistance to the recognition of a

¹⁸⁴ My mission involved drafting a City of Hargeisa Law. I used models from several other Anglophone African countries. My draft was discussed at a workshop in December, 2003. The workshop included senior officials from the Ministry of Interior – the Ministry with responsibility for local government. There was unanimity that I had written into the draft too much power for the Minister to intervene in the affairs of the city council.

state which complies with every traditional formal requirement for recognition of a state in international law – a defined territory (the old British Somaliland Protectorate); a government with the monopoly of force within the state; and the support of the people.

Conclusions

My conclusions on this overlong paper are very tentative. They need more reflection than I have had time to give them. I will state them baldly. First, L&D has a long lineage; it is as old as empire. Law was a key tool in establishing colonies; in creating colonial governments; in the dispossession of the aboriginal inhabitants of the countries so acquired of their freedoms, their rights to labour as and when they saw fit; and of their land and other possessions. What was L&D to invaders was D&L – destruction and lawlessness – to invadees.

Given the history of L&D, the remarkable aspect of the post 1960s evolution is not the re-discovery of law by IFIs and donors in the 1990s, but their dismissal of it for almost 25 years from the 70s to the early 90s. How did they think their prescriptions for developing countries were going to be implemented if not by law? It is perhaps an extraordinary backhanded tribute to the School of the Death of L&D that their arguments, though completely wrong, was so influential in practice.

The post-European empire evolution of L&D – post 1960 – can only be properly understood if it viewed through external Northern ‘Us’ and internal Southern ‘Other’ prisms. While there have been overlaps and interconnections between the two, their perspectives have been different; closest in the 1960s, they are now at the beginning of the 21st century, arguably at their furthest apart as the North re-asserts empire – domination via outright occupation or protectorate status or through globalisation – as its *raison d’être* for legal reforms in the South and the South presses the claims of autochthony in its response.

That said, it would be wrong to see the North and the South as two monolithic blocks. There have always been scholars and practitioners of L&D in the North who have seen their role not as latter-day empire builders but as co-workers and co-scholars with colleagues in the South working to develop viable, legitimate legal systems and bodies of law to further development which expand freedoms and remove unfreedoms (to use Sen’s terminology) for all. Conversely, there are many in the political and legal aristocracies of the South that are quite content to accept the dictates of IFIs and

donors on legal system and other aspects of law reforms and turn these to their advantage.

Liberal legalism as a set of principles has received an unfair press over the years. It was criticised as providing the justification for some pretty back-handed attempts at L&D inspired law reforms in the South in the 60s. This is to miss the essential worth of a body of principles that can provide the legal frameworks for both the “process aspect” (processes of decision making) and the “opportunity aspect” (opportunities to achieve valued outcomes) of freedom which is or should be the organising principle of development.¹⁸⁵ Ake has stated: “There is no undemocratic country I know of where democratic struggles are not being waged.”¹⁸⁶ Are there likewise any authoritarian countries where liberal legal principles a.k.a. the rule of law are not being fought for? Consider this inspiring comment by a South African non-lawyer who lived in a state where liberal legal principles were conspicuous by their absence:

There cannot be authentic democratisation and hence development without adherence to, and respect for the rule of law. The law permeates every facet of society, it is the glue that holds the apparatus of the state together and the latter accountable to the people. Without it, lawlessness and corruption become endemic and taint the cultural fabric of society. Only just and impartial institutions steeped in the rule of law can revive a civic culture and turn victims, non-believers and pessimists into CITIZENS.¹⁸⁷

It is this vision that both scholars and practitioners of L&D should aspire to in their work.

Working in the field, advising governments and drafting policies and laws is challenging, exciting, in a way humbling and usually very enjoyable.¹⁸⁸ But looking back over 40 years of L&D and notwithstanding being able to point to several fairly

¹⁸⁵ Sen, *op. cit.*, footnote 173, pp. 291, 297 – 98.

¹⁸⁶ Ake, *op. cit.*, footnote 175.

¹⁸⁷ M. Ramphele, *Perceptions of the Rule of Law in Transitional Societies* in R.V. Van Puymbroeck, *op. cit.*, footnote 160, p. 434. Dr Ramphele is Managing Director of the World Bank. She was previously Vice Chancellor of the University of Cape Town. A legal qualification is one of the few qualifications she does not have.

¹⁸⁸ Not always. I was on a World Bank mission to the Maldives in 2002 to advise on the reform of land and housing policies and laws. I was given a terrible ticking off at a meeting by the Attorney-General in January 2002 for what he saw as my essentially negative critique of the content and drafting of the Land Bill which was then before the Majlis. It was not pleasant. Only afterwards did I learn that his brother had drafted the Bill and the content was very much the work of the A-G himself – a lawyer with degrees from both Moscow and Canada. He got his revenge. The Bill had languished before the Majlis for 5 years before the arrival of our mission in January for a month’s work. By the time we arrived for our second visit in September, he had persuaded the Majlis to pass the Bill so we were presented with a *fait accompli*.

substantial Acts of Parliament which I drafted being on statute books dotted around the world, I would not consider that work as being my most influential, most long-lasting or providing the most positive good for the countries I have worked in. The most worthwhile L&D work I have done was the first work I did: helping establish the Faculty of Law of the University of Dar es Salaam and so laying the foundations for the establishment of an indigenous legal profession using that term in its widest sense of lawyers in all walks of life, and an indigenous legal culture in several countries in East and Central Africa.

I would wholeheartedly endorse the many contributors of the Jensen and Heller volume who “have long argued that more resources should be committed to legal education.”¹⁸⁹ As I noted earlier the arrival of law and lawyers as a distinct and independent social force in many developing countries in the 1960s was the major, irreversible and beneficial L&D input into the developing world. Where they already existed as in India or Chile¹⁹⁰ the impact of reforms in legal education has had an equally beneficial effect on the quality and orientation of the legal profession. The values of liberal legalism, of the rule of law as espoused by Mamphela Ramphele and many others in the South are much more likely to become embedded in society through the legal educational process than through any other process of legal system reform.

Support for legal education is not high profile; is not going to produce quick results and might be difficult at first sight to reconcile with a commitment to support legal system reform to benefit the poor. One could however, argue that it’s the one L&D input that brings together the external and the internal perspectives of L&D and the one such input that is highly unlikely to fail: in every society there are some lawyers who are concerned with justice, with freedoms and with advancing the rule of law. If it does nothing else as a community, the L&D community should make it its business to argue the case for support for legal education in the South and especially in ‘failed states’ so as to develop as rapidly as possible that critical mass of national legal skills and knowledge that is the only sure way to build up a national legal culture and so in turn create the undergirding for a legitimate, effective and just national legal system.

¹⁸⁹ Jensen, *op. cit.* in Jensen and Heller, *op. cit.*, p.360. I would also endorse Jensen’s encomium of the National Law School of India University in Bangalore that it is “as transformative an investment in legal systems reform as any in India.” p.360.

¹⁹⁰ C.P. González, *Economic and Political Aspects of Judicial Reform: The Chilean Case* in Jensen and Heller, *op. cit.*, p. 220.