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### Inflationary Trends in Law and Development

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# INFLATIONARY TRENDS IN LAW AND DEVELOPMENT

BENJAMIN VAN ROOIJ AND PIP NICHOLSON\*

*This Article analyzes two seemingly contradictory trends in the study and practice of law and development. First, it looks at the ever-rising level of expectations and ambitions about what law can do for development. Second, it looks at the increasingly vocal criticism and frustration, both from inside and outside the field, that law often fails to achieve the desired developmental effects. This Article argues that there is a relationship between increasing ambition and lack of impact. More particularly, it suggests that increasing ambition produces limited impacts but that lack of impact, ironically, leads to recommendations to increase ambition. This Article concludes that this linked evolution originates first from forces outside of the law and development domain, such as increasing pressures on aid efficacy, shifts in developmental paradigms, and increased geopolitical pressures to bring law into post-conflict states and peace-building efforts. The relationship between ambition and lack of impact is also internal to the field, however. Scholars and practitioners operate cyclically, criticizing existing practices in order to launch new and often bolder developments. This Article calls for a break from these cycles, a return to basic interventions that seek to make incremental improvements in the functioning of law in the context of development, and a shift from lofty overarching paradigms that obscure and disappoint, rather than aid, development.*

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## INTRODUCTION

Today the field of Law and Development is resurgent. After its self-pronounced death in the early 1970s,<sup>1</sup> a simmering existence in the early 1980s,<sup>2</sup> and a gradual resurrection in the early 1990s,<sup>3</sup> especially with the World Bank's discovering of the rule of law as a vital element of its economic development work,<sup>4</sup> the last decade has seen a virtual explosion of projects and studies<sup>5</sup> concerning the improvement of law in developing countries. Some of this work calls itself "law and development,"<sup>6</sup> "law and economic development,"<sup>7</sup> or "law and economic growth."<sup>8</sup> Other terms

1. See David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 (providing the most influential criticism at the time of how law and development practice and studies were ineffective and a form of neocolonialism).

2. There are not many studies of law and development in that period. See, e.g., Antony Allott, *Development for What? – False Gods and Holy Writ*, 1984 THIRD WORLD LEGAL STUD. 1; G. W. Kanyeihamba, *The Rule of Law, Judicialism and Development*, 1984 THIRD WORLD LEGAL STUD. 100; James C.N. Paul, *Law and Development into the '90s: Using International Law to Impose Accountability to People on International Development Actors*, 1992 THIRD WORLD LEGAL STUD. 1.

3. See, for example, Robert B. Seidman, *The Fatal Race: Law-Making and the Implementation of Development Goals*, 1992 THIRD WORLD LEGAL STUD. 79 and Brian Z. Tamanaha, *Review Article: The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995) for the first signs of this.

4. Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 253, 269 (David M. Trubek & Alvaro Santos eds., 2006).

5. The body of work undertaken by donors, nongovernmental organizations, and consultants will, for ease of reference, be called "allied studies" throughout this Article.

6. See, e.g., LAW AND DEVELOPMENT: FACING COMPLEXITY IN THE 21ST CENTURY (John Hatchard & Amanda Perry-Kessaris eds., 2003).

7. See, e.g., THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 4.

8. See, e.g., Frank B. Cross, *Law and Economic Growth*, 80 TEX. L. REV. 1737 (2002).

used include “legal reform in developing countries,”<sup>9</sup> “legal technical assistance,”<sup>10</sup> “rule-of-law promotion,”<sup>11</sup> “legal empowerment” for the poor,<sup>12</sup> and enhancing “access to justice” for the poor.<sup>13</sup> This Article defines the field of Law and Development to encompass deliberate efforts to improve the functioning of law in developing and transitional nations (as well as studies on how to do so) and the ideas about law in relation to development that animate such work.<sup>14</sup>

This Article explains the ways in which law and development has increased expectations and ambitions even as criticisms and reviews have concurrently increased questions about the capacity of law and development initiatives to have their desired impact. This Article argues that there is a relationship between increasing ambition and lack of impact. It argues that increasing ambition produces limited impacts but that, ironically, lack of impact leads to recommendations to increase ambition. This Article concludes that this linked evolution originates first from forces outside of the law and development domain, such as increasing pressures on aid efficacy, shifts in the developmental paradigms, and an increased geopolitical push to bring law into post-conflict states and peace-building efforts. The relationship between ambition and lack of impact is also internal to the field, however. Scholars and practitioners operate cyclically, criticizing existing practices in order to launch new and often bolder developments. The field of law and development has expanded in terms of not only its levels of investment but also the number of people working in it and its geographical reach. The fundamental goals for law and development have also changed.

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9. See, e.g., LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES (Tim Lindsey ed., 2007).

10. See, e.g., Scott Newton, *The Dialectics of Law and Development*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 4, at 174, 188.

11. See, e.g., PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE (Thomas Carothers ed., 2006).

12. See, e.g., Stephen Golub, *The Legal Empowerment Alternative*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 11, at 161.

13. See, e.g., Michael R. Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs* (Inst. of Dev. Studies, Working Paper No. 178, 2003).

14. See John Ohnesorge, “Beijing Consensus” Anyone?, 104 NW. U. L. REV. COLLOQUY 257, 257 (2010) (defining the law and development field “to encompass the activities of legal assistance providers, as well as the ideas about law, and about development economics, that animate their work”); David M. Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL, *supra* note 4, at 1 (defining law and development as a body of ideas “about law and economic development that have been employed not just by academics but also by development practitioners responsible for allocating funds and designing projects”).

More specifically, this Article argues that since the resurrection of law and development in the 1990s, there have arisen seven core paradigms, each of which has expanded the field's ambitions: Neo-Institutional Development, Rights-Based Development, Rule of Law, Bottom-Up Justice, Customary Justice, State-Building, and Transitional Justice. This Article demonstrates that with the development of these paradigms, law and development has moved quickly from seeking to improve legal education, legal professionalism, and the quality of legislation to much loftier goals, such as enhancing macroeconomic growth, decreasing income inequality, providing basic human needs, building the rule of law, ensuring access to justice for all, empowering the disadvantaged, delivering post-conflict justice, and building peace and nations.

The changing conceptualization of development and the role of law in development has created a challenge for academics, policymakers, and practitioners, as ever more activities are being categorized as belonging to the field of law and development even though they actually have different meanings for different stakeholders. For some, law and development is chiefly about understanding the causal relationship between law and macroeconomic growth,<sup>15</sup> while for others it is about the actual reform of legal practices and their developmental impact.<sup>16</sup> The conceptualization also challenges those analyzing causality between law and the broadened scope of development, whether for evaluative or academic purposes.

While law and development has become increasingly ambitious, the field has increasingly sought to demonstrate impact. Practitioners and scholars have sought to demonstrate a causal relationship between law or legal reform and the formulated goals. This has caused an expansion of budgets for project evaluations or evaluative research. Moreover, it has led to the rapid increase in indicators that can be used to connect legal system reform to aspects of development, many of which have also been criticized.<sup>17</sup>

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15. See, e.g., KENNETH W. DAM, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006); Donald C. Clarke, *What Kind of Legal System is Necessary for Economic Development? The China Puzzle*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES*, *supra* note 9, at 65; Kevin E. Davis & Michael J. Trebilcock, *The Relationship Between Law and Development: Optimists Versus Skeptics*, 56 AM. J. COMP. L. 895 (2008); John K.M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT'L ECON. L. 219 (2007).

16. See, e.g., BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW (Erik G. Jensen & Thomas C. Heller eds., 2003); *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 4; *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE*, *supra* note 11.

17. See Linn Hammergren, *Indices, Indicators and Statistics: A View from the Project Side as to Their Utility and Pitfalls*, 3 HAGUE J. ON RULE L. 305 (2011).

As a result, law and development has set itself up for failure: expanding its ambition to extremely high levels, while concurrently increasing the demand for evidence that it can realize these ambitions in the face of criticism. Given the mismatch between ambition on the one hand and demonstrated impact and criticism on the other, the question arises: why has there not been a move toward humbler and more realizable goals?

This Article analyzes the development of ambition and impact both separately and in terms of the ways in which they interact. It demonstrates that there is a relationship, or “partial co-evolution,” between rising ambition and growing attention to and criticism of lack of impact. This Article finds that the loftier the ideals, the more is invested in measuring and demonstrating their implementation, which is accompanied by increasing worry about whether the goals will be achieved. This in turn stimulates the development of more evaluation and indicators, which, due to the difficulty of showing causality between the goals and the law, as well as the impossibility of implementing the goals, results in further doubts about and dissatisfaction with impact. This creates additional space for criticizing existing approaches and for propagating new alternatives and, ironically, generating even more ambitious approaches.

In short, the greater the ambition, the greater the impact analysis; the greater the impact analysis, the greater the criticism; and then again the greater the ambition. This Article argues that this “co-evolution” carries two consequences. First, it produces fads in law and development, which have followed one another in rapid succession, often without fully replacing the old practices. Second, it leads to limits on the space for the use of existing knowledge about the complexities of both developmental and legal processes.

Part I describes the rise in ambition. Part II details the increasing worry about and criticism of the impact of the new goals.

## I. INCREASING AMBITION IN LAW AND DEVELOPMENT PARADIGMS

The first American-led law and development movement occurred in the 1960s and early 1970s. Based on ideas borrowed from American legal realists, this movement sought to reform the legal systems of developing countries intent on constructing liberal states and spreading democracy.<sup>18</sup> In the early 1970s, the movement came to an abrupt end following fierce criticism by the scholars who had originally participated in its projects. One criticism alleged arrogance and unrealistic ambition: after all, a

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18. Trubek & Galanter, *supra* note 1, at 1063, 1073–74.

movement that seeks to change political and legal culture abroad while lacking sufficient theoretical underpinning and local knowledge is clearly overly ambitious.<sup>19</sup>

It is therefore all the more surprising to see the field resurgent less than two decades later. Further, this reincarnation is not humble but is rather law and development “on steroids,” seeking to effect many types of development through law and legal reform. It reaches far beyond the realm of the original American law and development movement. This rapid expansion of the field is best captured by analyzing the seven core paradigms that have emerged and that now inform law and development: Neo-Institutional Development, Rights-Based Development, Rule of Law, Bottom-Up Justice, Customary Justice, State-Building, and Transitional Justice.

#### A. Neo-institutional Development and Rights-Based Development

Development refocused on law in the 1980s when certain ideas about the role of institutions for economic growth emerged. With the rise of neoliberalism and its focus on markets, neo-institutional scholars saw legal institutions (most notably enforceable contracts and secure property rights) as key to fostering economic growth.<sup>20</sup> A market-friendly legal system that allows minimal interference from the state was seen as a prerequisite for economic growth.<sup>21</sup> These economic conceptions of the role of law entered the development field through ideas such as “good governance” and “the rule of law,” which at the time were defined primarily in terms of market facilitation.<sup>22</sup>

Meanwhile, the concept of development itself expanded and moved away from a singular focus on macroeconomic growth towards an emphasis on broader socioeconomic needs. Especially with the emergence of the “human development” approach in the 1980s, development came to mean more than economic growth or income equality.<sup>23</sup> For instance:

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19. See *id.* at 1090; Trubek & Santos, *supra* note 14, at 6.

20. See generally DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 3–10 (1990) (discussing the influence of societal institutions on economic change); Douglass C. North, *Institutions and Economic Growth: An Historical Introduction*, 17 *WORLD DEV.* 1319 (1989) (assessing the historical impact of institutions and institutional frameworks in the development of economies).

21. Santos, *supra* note 4, at 268.

22. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 4, at 74, 85.

23. KATIE WILLIS, THEORIES AND PRACTICES OF DEVELOPMENT 6–8 (2005); Des Gasper, *Human Rights, Human Needs, Human Development, Human Security: Relationships Between Four International “Human” Discourses* 19 (Inst. of Soc. Studies, Working Paper No. 20/07, 2007).

[The human development approach] stresses the lack of adequate connection between levels of monetised activity and levels of well-being: there are many other determinants of well-being, and frequently weak or unreliable or perverse links to well-being from economic growth.<sup>24</sup>

Even the World Bank, a strong proponent of economic growth, incorporated social concerns into its Comprehensive Development Framework in 1999.<sup>25</sup> The rise of the human rights movement offered yet another approach to development beyond that of macroeconomic growth, grounded in individualism and focusing on the rights of the poor,<sup>26</sup> under which development is “a process of expanding the real freedoms that people enjoy.”<sup>27</sup> Elemental to the concept of development as freedom is the emphasis on the physical security of persons, as well as a person’s “ability to secure and hold basic goods.”<sup>28</sup> Law became a key factor in securing the protection of rights and freedom through development. Moreover, the increasing momentum of the human rights movement and the recognition that the protection of internationally-recognized human rights required domestic legal reforms brought law and development back to the fore.<sup>29</sup>

Broadening development objectives and consequent changing expectations have resulted in ever greater ambition for the role of law in development as a way to increase macroeconomic growth and to decrease inequality, improve sustainable development, strengthen freedom and rights protection, and empower the disadvantaged across the globe.

## B. Rule of Law

In the 1990s, the “rule of law” emerged as a central concept in

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24. Gasper, *supra* note 23, at 19.

25. Kerry Rittich, *The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 4, at 203, 203–04; Santos, *supra* note 4, at 253, 268, 275.

26. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999) (placing the individual at the center of development and identifying individual freedoms as the most effective means for enhancing development and reducing poverty); Paul Gready & Jonathan Ensor, *Introduction*, in *REINVENTING DEVELOPMENT?: TRANSLATING RIGHTS-BASED APPROACHES FROM THEORY INTO PRACTICE* 1, 1–6 (Paul Gready & Jonathan Ensor eds., 2005) (summarizing the second revolution in human rights, during which these rights began to be seen as existing beyond narrow legalistic terms and also became part of a broader, “rights-based” approach to development).

27. SEN, *supra* note 26, at 3.

28. Gasper, *supra* note 23, at 21.

29. Trubek, *supra* note 22, at 84.



development.<sup>30</sup> The rule of law became so popular because it uniquely bridged the neo-institutional and human rights ideas that had dominated the development policies of Western and international donors in the early 1990s.<sup>31</sup> The rule of law became in particular a key concept of the World Bank's good governance agenda, which allowed the Bank to move beyond its original economic mandate into the area of substantial policy and politics.<sup>32</sup>

With the adoption of the rule of law as the major law and development paradigm, a complex and sometimes conflicting set of ambitious goals entered the field. Originally, the World Bank chiefly used a thin, trimmed down conceptualization of rule of law<sup>33</sup> that focused on procedure.<sup>34</sup> This conceptualization was based on the following tenets: there is a set of rules that are known in advance; the rules are in force; mechanisms exist to ensure the proper application of the rules, and any departure from the rules has to follow established procedures; conflicts in the application of the rules can be resolved through binding decisions of an independent judicial body; and there are procedures for amending rules that no longer serve their purpose.<sup>35</sup> In its 1994 approach, the United Nations Development Programme (UNDP), in contrast, used a "thicker" conceptualization that

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30. Thomas Carothers, *The Rule-of-Law Revival*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 11, at 3, 3 ("One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles.")

31. Trubek, *supra* note 22, at 84–85.

32. Santos, *supra* note 4, at 269–70.

33. Much contention exists, both in academia as well as among practitioners, about the definition of the "rule of law." Scholars distinguish between thick and thin conceptualizations of the rule of law. The thick conceptualization views the rule of law as necessarily comprising "certain universal moral principles, inherently liberal in character," such as freedom and equality. Thom Ringer, Note, *Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and Its Place in Development Theory and Practice*, 10 YALE HUM. RTS. & DEV. L.J. 178, 190 (2007) (footnote omitted). This conceptualization is also associated with constitutional protection of the rights to vote, to political equality, and to private property. CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 7 (2001); Ringer, *supra*, at 191. Critics of such a thick conceptualization argue that the rule of law "is not to be confused with democracy, justice, equality . . . human rights of any kind or respect for persons or for the dignity of man." JOSEPH RAZ, *The Rule of Law and Its Virtue*, in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY 210, 211 (2d ed. 2009). This criticism is ultimately based on the idea that "[i]f the rule of law means *everything*, does it still mean *anything*?" Ringer, *supra*, at 193. Scholars have, in response, developed a thin conceptualization of the rule of law, which stresses the predictability and rationality of rules, distilling out any moral content or preference about political institutions beyond the realm of law. *Id.* Critics of such attempts claim that this moral distillation is futile, as the thin conceptualization of the rule of law still contains moral choices about the kind of law and legal system that is best. *Id.* at 195 (citing MICHAEL NEUMANN, *THE RULE OF LAW: POLITICIZING ETHICS* 13–14 (2002)).

34. Santos, *supra* note 4, at 270.

35. *Id.*

incorporated political and civil human rights and elements of a constitutional democracy.<sup>36</sup>

The two conceptualizations subsequently converged, as exemplified by the World Bank's adoption of a broader approach to rights-based development and rule of law. For example, the Bank stated that "a well functioning legal and judicial system is critical both as an end in itself as well as a means to facilitate and leverage the achievement of other development objectives."<sup>37</sup> The Bank's current usage of the term "rule of law" includes different versions of the concept that "converge in a hodge-podge articulation."<sup>38</sup> One such usage highlights the rule of law's importance for securing the social dimension of development, which, from the 1990s onwards, was increasingly seen as crucial.<sup>39</sup> While originally the concept of the rule of law was seen as a means, through the protection of rights, to enhance the market and ensure that basic needs were met, it increasingly came to be seen as part of a wider concept of the development goal of good governance.<sup>40</sup>

The Rule of Law paradigm crucially expanded the field of law and development, as it offered an integrated and comprehensive paradigm to guide law and development efforts away from singular, project-like interventions towards a broader transformative agenda. Seeking to establish rule of law, whether as a means to development or as an end in itself and whether using "thin" or "thick" conceptualizations, necessarily entails a series of complex and multi-level interventions that are often based on legal normative goals, such as fundamentally changing the relationship between law and politics and institutionalizing professionalism and law enforcement. These goals are frequently implemented in a top-down manner and are largely developed in a different context from the one in which they are applied; they are thus not adapted to local conditions. Such expansion of the rule of law paradigm is highly ambitious, not least

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36. Ringer, *supra* note 33, at 192–93.

37. LEGAL VICE PRESIDENCY, THE WORLD BANK, INITIATIVES IN LEGAL AND JUDICIAL REFORM 5 (2004).

38. Santos, *supra* note 4, at 276.

39. See Rittich, *supra* note 25, at 203 (describing the incorporation of social concerns into "the mainstream agenda of market reform and economic development"); Santos, *supra* note 4, at 268 (detailing the World Bank's move, in response to criticism of its macroeconomic growth-focused structural adjustment programs, to make poverty reduction a central issue and to "focus on structural, social, and human concerns"). The rule of law was also regarded as critical in the fight against corruption, which the World Bank started in 1996. See Santos, *supra* note 4, at 273–75 ("In 1996, the [World] Bank announced its determination to begin projects aimed at fighting corruption . . .").

40. See Rittich, *supra* note 25, at 209–10 (noting that international financial institutions have started to promote "increasingly comprehensive notions of good governance in a globally integrated economy" and that in the light of this new focus, legal reform has become central).

because its different objectives can be inherently conflicting: for instance there can be tensions between the rule of law's goals of establishing law and order and binding the government to law.<sup>41</sup>

### C. Bottom-Up Justice

The increasing focus on the relief of micro-level poverty and rights-based development resulted in criticism of existing law and development programs for failing to focus on aspects of law that mattered directly in the lives of the poor and the weak.<sup>42</sup> Out of this criticism emerged the Bottom-Up Justice paradigm, which focuses on the legal needs of the poor and the disadvantaged. Using terms such as “access to justice,”<sup>43</sup> “justice for the poor,”<sup>44</sup> “justice for all,”<sup>45</sup> “legal empowerment,”<sup>46</sup> “legal empowerment of the poor,”<sup>47</sup> and “microjustice,”<sup>48</sup> proponents have sought to develop a range of legal interventions that will have a more direct effect on the development of marginalized people.

Major international development organizations such as the UNDP and the World Bank have made access to justice central to their law-related programming. The UNDP's access to justice approach, which “support[s] justice and related systems so that they work for those who are poor and

41. See Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 11, at 54 (discussing the multiple goals of the rule of law and their inherent conflicts).

42. See, e.g., Stephen Golub, *A House Without a Foundation*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 11, at 105; Frank Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 11, at 75 (arguing that law “cannot be detached from its social and political environment”).

43. See, e.g., UNITED NATIONS DEV. PROGRAMME, PRACTICE NOTE: ACCESS TO JUSTICE (2004), available at [http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf) [hereinafter ACCESS TO JUSTICE]; UNITED NATIONS DEV. PROGRAMME, PROGRAMMING FOR JUSTICE: ACCESS FOR ALL: A PRACTITIONER'S GUIDE TO A HUMAN RIGHTS-BASED APPROACH TO ACCESS TO JUSTICE (2005), available at [http://asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/democratic\\_governance/RBA-P-DG-2005-Programming-for-Justice.pdf](http://asia-pacific.undp.org/content/dam/rbap/docs/Research%20&%20Publications/democratic_governance/RBA-P-DG-2005-Programming-for-Justice.pdf); Anderson, *supra* note 13.

44. See, e.g., *Justice for the Poor*, WORLD BANK, <http://go.worldbank.org/ZRKELPETD0> (last updated Dec. 11, 2013).

45. See, e.g., *Justice for All*, ASIAN DEV. BANK (Jan. 31, 2009), <http://www.adb.org/features/justice-all>.

46. See, e.g., Lorenzo Cotula, *Legal Empowerment to Secure Land Rights – Defining the Concept*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA 7 (Lorenzo Cotula & Paul Mathieu eds., 2008); Golub, *supra* note 12.

47. See, e.g., 1 COMM'N ON LEGAL EMPOWERMENT OF THE POOR, MAKING THE LAW WORK FOR EVERYONE: REPORT OF THE COMMISSION ON LEGAL EMPOWERMENT OF THE POOR 3 (2008).

48. See, e.g., MAURITS BARENDRECHT & PATRICIA VAN NISPEN, MICROJUSTICE (Tilburg Law & Econ. Ctr., Discussion Paper 2008-010, 2008).

disadvantaged,”<sup>49</sup> is based in the idea that “access to justice is a basic human right as well as an indispensable means to combat poverty, prevent and resolve conflicts.”<sup>50</sup> The approach explicitly recognizes that justice systems can be found in both formal state institutions and informal non-state normative systems.<sup>51</sup> The World Bank’s “Justice for the Poor” program is similar:

Justice for the Poor (J4P) is an attempt by the World Bank to grapple with some of the theoretical and practical challenges of promoting justice sector reform in a number of countries in Africa (Kenya and Sierra Leone) and East Asia (Indonesia and Cambodia). J4P reflects an understanding of the need for demand-oriented, community-driven approach to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized such as women, youth and ethnic minorities.<sup>52</sup>

These two approaches augment the existing paradigm of the rule of law, thus expanding the scope of law and development efforts to address the needs of the poor.

A second category, “legal empowerment,” can be defined as “the use of legal services, often in combination with related development activities, to increase disadvantaged populations’ control over their lives.”<sup>53</sup> Legal empowerment offers an antidote to “the problematic, state-centric rule-of-law orthodoxy” and enables law to operate as a mechanism for instituting “broader socioeconomic development initiatives.”<sup>54</sup> Such empowerment occurs

when the poor, their supporters, or governments—employing legal and other means—create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization. Empowerment is a process, an end in itself, and a means of escaping poverty.<sup>55</sup>

Legal empowerment approaches thus take the ambition of Bottom-Up

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49. ACCESS TO JUSTICE, *supra* note 43, at 3 (emphasis omitted).

50. *Id.*

51. *Id.* at 8.

52. JUSTICE FOR THE POOR PROGRAM 1 (2006), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/J4POverviewDecember06.pdf>.

53. Golub, *supra* note 12, at 161.

54. *Id.*

55. JOHN W. BRUCE ET AL., LEGAL EMPOWERMENT OF THE POOR: FROM CONCEPTS TO ASSESSMENT 29 (2007), available at [http://pdf.usaid.gov/pdf\\_docs/PNADM500.pdf](http://pdf.usaid.gov/pdf_docs/PNADM500.pdf).

Justice a step further as they seek not only to adapt law in the broadest sense to the needs of the poor but also, through legal intervention, to empower the poor to have control over their lives and to capitalize on their informal properties.

Under this approach, law faces high expectations as a means to deal directly with poverty.<sup>56</sup> The poor have especially limited access to legal institutions, and a state of “lawlessness” has an adverse impact on them.<sup>57</sup> Nevertheless, legal empowerment has helped alleviate poverty.<sup>58</sup>

Bottom-Up Justice practitioners and scholars have conducted an in-depth analysis of the diverse problems and challenges that need to be overcome to promote justice and legal empowerment for the poor and the weak, leading to a comprehensive and ambitious agenda for law and development that in practice adds to the already lofty ambitions of rule of law building.<sup>59</sup> The particular challenges that this approach must overcome, including pervasive social and institutional practices such as corruption, gender bias, low legal awareness, lack of trust in formal institutions, and corruptive patron-client networks, are of the highest level of difficulty.<sup>60</sup>

Most Bottom-Up Justice efforts are at least partially directed at enhancing legal awareness through education and rights awareness training; improving legal aid to the poor through the provision of legal clinics, public interest lawyers, and paralegals; developing alternative dispute resolution (ADR) mechanisms; supporting local dispute resolution institutions that already exist; and strengthening civil society in general.<sup>61</sup> This approach is most likely to be successful if conducted in a participatory manner that involves poor and weak stakeholders. It should be based on their needs and preferences, although these are inevitably framed and interpreted by donors or their consultants,<sup>62</sup> whose perception of

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56. See ACCESS TO JUSTICE, *supra* note 43, at 4 (“Access to justice is a vital part of the UNDP mandate to reduce poverty and strengthen democratic governance. Within the broad context of justice reform, UNDP’s specific niche lies in supporting justice and related systems *so that they work for those who are poor and disadvantaged*.”).

57. Anderson, *supra* note 13, at 1–3.

58. See ASIAN DEV. BANK, LAW AND POLICY REFORM AT THE ASIAN DEVELOPMENT BANK 17–19 (2000) (reviewing the role of legal empowerment in reducing poverty in the Philippines and Bangladesh); Golub, *supra* note 12, at 163, 166–68.

59. See, e.g., Benjamin van Rooij, *Bringing Justice to the Poor, Bottom-up Legal Development Cooperation*, 4 HAGUE J. ON RULE L. 286 (2012) (discussing the rise of bottom-up approaches and questioning their innovativeness and feasibility).

60. *Id.*

61. ASIAN DEV. BANK, *supra* note 58, at 10–12; ACCESS TO JUSTICE, *supra* note 43, at 11–14; Golub, *supra* note 12, at 165.

62. ASIAN DEV. BANK, *supra* note 58, at 85; ACCESS TO JUSTICE, *supra* note 43, at 22; Golub,

stakeholder needs may diverge substantially from that of the stakeholders themselves.

The Bottom-Up Justice approaches suggest several methods for achieving their goals. For instance, several Bottom-Up Justice programs and studies call for “mainstreaming” legal sector activities: making them central to other sectors of development work, both in recipient countries as well as in donor institutions.<sup>63</sup> Further, several studies have shown that bottom-up approaches require time and that tight project cycles and an overly large portfolio of programs should therefore be avoided.<sup>64</sup> If possible, solutions should not be based on transplants of existing models but should rather be tailored to local realities.<sup>65</sup> Finally, it is important to garner sufficient support for planned reforms and to overcome capture and undue influence by vested interests.<sup>66</sup>

At face value, targeted interventions, such as legal awareness building, paralegal training, or development of ADR mechanisms, might seem less difficult than the broader agenda of building the rule of law. Even specific interventions can become highly complex, however, when tried over a larger scale and when faced with problems, such as corruption, social bias, and lack of trust, that are deeply embedded within sociopolitical structures and not easily changed. In addition, if Bottom-Up Justice is ultimately about empowerment and changing existing power asymmetries, a seemingly boundless aspirational agenda emerges. Moreover, there is a problem of scale with a bottom-up strategy. How does one work bottom-up but still reach sufficient populations within countries or regions? A true bottom-up approach requires large investments in gathering and incorporating local knowledge into locally adapted projects. This may limit the broader impact of such an approach, especially if it is to be achieved solely through a civil society that still needs to be built. Finally, many of the goals cannot be achieved without a reasonably well functioning state and legal apparatus. Continued efforts under the rule of law paradigm are thus required.

#### D. Customary Justice

Once the Bottom-Up Justice approach was established, scholars and

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*supra* note 12, at 167–68.

63. ASIAN DEV. BANK, *supra* note 58, at 120–21; ACCESS TO JUSTICE, *supra* note 43, at 10; Golub, *supra* note 12, at 170, 174–76.

64. UNITED NATIONS DEV. PROGRAMME, *supra* note 43, at 10–11; Golub, *supra* note 12, at 170.

65. ASIAN DEV. BANK, *supra* note 58, at 96; ACCESS TO JUSTICE, *supra* note 43, at 9; Golub, *supra* note 12, at 164.

66. ASIAN DEV. BANK, *supra* note 58, at 79–80; ACCESS TO JUSTICE, *supra* note 43, at 8.

practitioners realized that perhaps a focus on formal legal systems was too narrow. In the lives of marginalized people, state law plays only a minor role, while customary justice systems govern most social and economic issues and are thus crucial for pro-poor development. From this conclusion arose the fifth law and development paradigm, Customary Justice, with which law and development moved into the realm of non-state law and openly admitted the plurality of legal systems.

By the early 1990s, there was a recognition that customary justice systems could not be eradicated or ignored.<sup>67</sup> Non-state normative systems are important because of their proximity to the poor and other identifiable groups (for example, entrepreneurs in Vietnam)<sup>68</sup> and the fact that the world's poor most often live in settings regulated by customary law and traditional authorities.<sup>69</sup>

In some countries up to 80% of the population lives under non-state normative systems and has little contact with state law.<sup>70</sup> These figures are supported by estimates that customary law “governs the daily lives of more than three-quarters of the populations of most African countries”;<sup>71</sup> for instance, “up to 90 percent of cases in Nigeria are settled by customary courts.”<sup>72</sup> Further, such non-state law and governance institutions are much more accessible for the poor: geographically, linguistically, and culturally.<sup>73</sup> Moreover, in practice, customary law also influences the operation of and

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67. See, e.g., 1 COMM'N ON LEGAL EMPOWERMENT OF THE POOR, *supra* note 46, at 25 (arguing that most of the poor often resort to or have to resort to informal legal institutions); DEP'T FOR INT'L DEV., BRIEFING: NON-STATE JUSTICE AND SECURITY SYSTEMS 1 (2004), *available at* <http://www.gsdr.org/docs/open/SSAJ101.pdf>; ACCESS TO JUSTICE, *supra* note 43, at 8 (stating that the poor sometimes prefer traditional justice systems over formal ones); EWA WOJKOWSKA, DOING JUSTICE: HOW INFORMAL JUSTICE SYSTEMS CAN CONTRIBUTE 5 (2006), *available at* <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>.

68. See generally JOHN GILLESPIE, TRANSPLANTING COMMERCIAL LAW REFORM: DEVELOPING A “RULE OF LAW” IN VIETNAM (2006); Quan Hien Nguyen, Social Structures of Contracts: A Case Study of the Vietnamese Market (Mar. 2006) (unpublished Ph.D. thesis, University of Melbourne), *available at* <http://repository.unimelb.edu.au/10187/313>.

69. UNITED NATIONS DEV. PROGRAMME, *supra* note 43, at 101; Golub, *supra* note 42, at 116; Chidi Anselm Odinkalu, *Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa*, in 2 THE WORLD BANK LEGAL REVIEW: LAW, EQUITY, AND DEVELOPMENT 141 (Ana Palacio et al. eds., 2006); Gordon R. Woodman, *Customary Law in Common Law Systems*, IDS BULL., Jan. 2001, at 29.

70. WOJKOWSKA, *supra* note 67, at 12.

71. Odinkalu, *supra* note 69, at 143 (internal quotation marks omitted).

72. *Id.* at 144.

73. UNITED NATIONS DEV. PROGRAMME, *supra* note 43, at 100–02; THE WORLD BANK, VILLAGE JUSTICE IN INDONESIA: CASE STUDIES ON ACCESS TO JUSTICE, VILLAGE DEMOCRACY AND GOVERNANCE 27, 49 (2004).

affects reforms to the state legal system.<sup>74</sup> Finally, non-state conduct norms may provide a foundation for nascent commercial activity.<sup>75</sup> Informal networks play a vital role in enabling economic activities, both in developmental settings where state institutions for the enforcement of contracts are not in place and in modern economies in which some contend that informal arrangements “are the chief building blocks of sustainable economic relationships.”<sup>76</sup> All of this makes engaging with customary and other non-state law a necessary endeavor for law and development practitioners.<sup>77</sup>

Law and development reformers have identified several traits of non-state law that may stand in the way of development. Core issues include elite capture,<sup>78</sup> human rights protection (especially for women and marginalized members within the customary community),<sup>79</sup> and the lack of integration of non-state arrangements into wider capital markets.<sup>80</sup> The challenge, however, is to determine how to deal with these issues: how to influence the functioning of customary and non-state justice systems without undermining their accessibility and proximity, for example. Some propose to do so through legal aid, human rights dialogues with elders, and community-based programs that raise legal awareness,<sup>81</sup> but most have

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74. Laura Nader, *Promise or Plunder? A Past and Future Look at Law and Development*, in 2 THE WORLD BANK LEGAL REVIEW: LAW, EQUITY, AND DEVELOPMENT, *supra* note 69, at 87.

75. Nguyen, *supra* note 68, at 39 (arguing that relational business practices are “deeply embedded in the institutional matrix of the market” and that the negotiation of contracts does not take place in the shadow of the law).

76. Ethan Bueno de Mesquita & Matthew Stephenson, *Legal Institutions and Informal Networks*, 18 J. THEORETICAL POL. 40, 41 (2006).

77. Julio Faundez, *Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America*, in 2 THE WORLD BANK LEGAL REVIEW: LAW, EQUITY, AND DEVELOPMENT, *supra* note 69, at 113.

78. THE WORLD BANK, *supra* note 73, at 4; UNITED NATIONS DEV. PROGRAMME, *supra* note 43, at 101, 103.

79. UNITED NATIONS DEV. PROGRAMME, *supra* note 43, at 102–03; Ann Whitehead & Dzodzi Tsikata, *Policy Discourses on Women’s Land Rights in Sub-saharan Africa: The Implications of the Return to the Customary*, 3 J. AGRARIAN CHANGE 67, 102 (2003); Leila Chirayath et al., *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* 4 (Jul. 2005) (unpublished manuscript), available at [http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary\\_Law\\_and\\_Policy\\_Reform.pdf](http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf).

80. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 6–7 (2001) (arguing that the fact that the poor’s property is regulated by informal and customary institutions excludes them from access to capital markets and thus keeps them poor).

81. See Janine Ubink & Benjamin van Rooij, *Towards Customary Legal Empowerment: An Introduction*, in CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 7 (Janine Ubink ed., Int’l Dev. Law Org., *Legal and Governance Reform: Lessons Learned* No. 3, 2011), available at <https://lirias.kuleuven.be/bitstream/123456789/312000/1/CustomaryJustice3.pdf>.



sought, through more sweeping legal reforms, to integrate customary and non-state justice systems into the broader framework of state law, thus creating an external check on those systems.<sup>82</sup>

Successful integration is highly ambitious, as it entails finding a way to steer existing cultural and political practices that are embedded in local tradition, knowledge, and power relations and that are by their unwritten nature not accessible to outsiders. It also challenges state law, which must find a way to bridge two fundamentally different systems that may have different languages, procedures, substantive norms, and underlying sociopolitical historical contexts. This challenge has existed around the globe for centuries, as indigenous peoples have sought recognition for their laws in, for example, Australia, New Zealand, and Canada.<sup>83</sup> Codifying custom into state law can be difficult, as doing so may affect the fluidity, informality, and accessibility of norms<sup>84</sup> and also typically demands that choices between different versions of customary law, which may favor some while excluding others, be made.<sup>85</sup>

Incorporation of non-state adjudicative bodies into the state legal sector is also challenging, as it does not automatically improve the procedural fairness of such institutions or increase their effectiveness in protecting human rights and weak groups. Extra measures are necessary to legally oblige traditional authorities to respect human rights and to comply with certain procedures and also to make sure that justice seekers can challenge infringements of these rules—through appeals to state courts, the results of which are then enforced in the local community, for instance. Nevertheless, this integration may only have a limited effect on the problems involved in using non-state law for development.<sup>86</sup> Unless

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82. Several ways of integrating or combining state and non-state law—including full incorporation, limited incorporation, and coexistence—have been proposed. See WOJKOWSKA, *supra* note 67, at 25–29 (providing a useful overview of the different options and forms of such integration, or “linkages,” of state and non-state law). Under full incorporation the non-state law is “given a formal role within the formal state justice system.” *Id.* at 26. State law incorporates non-state law through, for instance, codification, a restatement of non-state norms, the incorporation of customary courts into the formal state structure, or the establishment of special branches of local courts to deal with customary cases. *Id.* at 25–29.

83. See generally P.G. MCHUGH, *ABORIGINAL SOCIETIES AND THE COMMON LAW: A HISTORY OF SOVEREIGNTY, STATUS, AND SELF-DETERMINATION* (2004).

84. Ubink & van Rooij, *supra* note 81, at 12.

85. Martin Chanock, *Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform*, 3 INT’L J.L. & FAM. 72 (1989).

86. Erman Rajagukguk, *Legal Pluralism and the Three-Cornered Case Study of Women’s Inheritance Rights Changing in Lombok*, in LEGITIMACY, LEGAL DEVELOPMENT AND CHANGE: LAW AND MODERNIZATION RECONSIDERED 213, 230 (David K. Linnan ed., 2012) (arguing that there is no coherent integration of *adat* laws and Islamic law relevant to women’s inheritance into the secular laws in Lombok).

customary norms have been codified, which is itself problematic, state judges may find it difficult to locate and apply the appropriate customary norm, especially if, for example, disputes arise as a result of large economic and social changes in the local community.<sup>87</sup> In some countries, such as Ghana, customary or traditional law judges rely largely on case law developed by state judges in earlier decisions.<sup>88</sup> Norms derived from case law, however, may not fit the “living” norms observed in the community.<sup>89</sup> Judges who do not use case law must rely on expert witnesses or assessors, who are allowed to define the appropriate norm from a body of fluid, sometimes contradictory, unwritten rules.<sup>90</sup> The integration of state and non-state law in state courts is thus highly difficult and can easily lead to situations in which either court decisions are divorced from local realities and thus have limited impact or courts strengthen existing elites, who tend to assume a dominant role in the provision of information about contested norms.<sup>91</sup>

With the rise of Customary Justice, law and development abandoned indirect methods of improving legal systems, such as encouraging the expansion of institutions and rights and enabling citizens to invoke such rights, and ambitiously sought to directly influence deeply set social norms and cultural practices without destroying their positive characteristics. Consequently, it had to contend with the immense complexities of unwritten legal systems that are fluid, contested, and deeply embedded in local power structures, cultural practices, and local knowledge. The emergent Customary Justice paradigm added yet another layer of ambition

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87. See Janine Ubink, *The Quest for Customary Law in African State Courts*, in THE FUTURE OF AFRICAN CUSTOMARY LAW 83, 91 (Jeanmarie Fenrich et al. eds., 2011) (discussing how customary norms became contested in Ghana when land value increased and chiefs and villagers had different ideas about who should reap the profits from this).

88. JANINE UBINK, IN THE LAND OF THE CHIEFS: CUSTOMARY LAW, LAND CONFLICTS, AND THE ROLE OF THE STATE IN PERI-URBAN GHANA 190 (2008).

89. *Id.* at 188.

90. Ubink, *supra* note 87, at 93. The complex nature of customary law itself also renders the discovery of the appropriate norms difficult, even with the assistance of reliable and knowledgeable witnesses and assessors. First and foremost, what methodology should be used for determining what constitutes “living law”? Is it, for instance, appropriate to simply ask traditional leaders or experts what the norm is? Or, alternatively, should assessors look, where possible, at which norms have been applied in previous conflicts? Or should they study which norms are in fact observed in everyday life? If one follows the legal anthropological literature, the latter two options would work best to find the actual “living law.” UBINK, *supra* note 88, at 219–20. They require, however, a great amount of time and effort. Customary norms have also increasingly become contested as a result of circumstances of “change, conflict and imposition; especially when the rights and duties of traditional authorities are part of the debate.” *Id.* In these cases, establishing which norm is used to solve disputes or is the observed norm in daily life is very difficult, if not impossible. *Id.*

91. Ubink & van Rooij, *supra* note 81, at 14.

to the paradigms discussed previously. Law and development became an endeavour to promote social and economic development in the broadest terms, build rule of law, enhance access to justice, empower the weak and the poor, and successfully improve the functioning of customary justice systems despite their tenets being contested.

#### E. Post-Conflict State-Building and Transitional Justice

Law and development further expanded its ambitions with the emergence of the Post-Conflict State-Building and Transitional Justice paradigms. These paradigms were developed during the 1990s as nations increasingly questioned what to do with countries that emerged from war or major internal conflicts.<sup>92</sup>

Law and building the rule of law in particular were considered crucial elements for stability and development. According to a consensus among international policymakers, the introduction of the rule of law should ideally be the basis for post-conflict reconstruction and democratization.<sup>93</sup> Bernard Kouchner, the senior UN official in Kosovo, famously stated that the single “most important lesson to be learned from Kosovo . . . is that peacekeeping missions need a judicial or a law-and-order ‘kit’ made up of trained police officers, judges and prosecutors, plus a set of potentially draconian security laws or regulations that are available upon their arrival.”<sup>94</sup> Similarly, Lord Ashdown, the High Representative for Bosnia and Herzegovina from 2002 to 2006, summarized his experience by stating that the focus of a peacekeeping mission must be on the rule of law rather than on democracy “[b]ecause without the former, the latter is soon undermined.”<sup>95</sup> The 2000 Brahimi panel report on UN peace operations also provided that “[t]hese missions’ tasks would have been much easier if a common United Nations Justice package had allowed them to apply an interim legal code to which mission personnel could have been pre-trained while the final answer to the ‘applicable law’ question was being worked out.”<sup>96</sup>

The original Rule of Law paradigm thus became part of a broader and

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92. They were also developed as nations were faced with generally fragile states that were not in a post-conflict period, a situation not discussed in detail here. See Francis Fukuyama, *The Imperative of State-Building*, 15 J. DEMOCRACY 17 (2004) (providing a general rationale for state-building).

93. David Chandler, *The Problems of “Nation-Building”: Imposing Bureaucratic “Rule from Above,”* 17 CAMBRIDGE REV. INT’L AFF. 577, 580 (2004).

94. Ash Ü. Bâli, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 454 (2005).

95. Chandler, *supra* note 93, at 579.

96. *Id.*

much stronger and better-funded Post-Conflict State-Building paradigm, which has grown rapidly as both the UN and the United States have expanded their roles as post-conflict administrators and peace-, state-, and nation-builders over the last two decades. Compared to prior UN missions that exercised executive power in West Guinea (1962–63), Cambodia (1992–93), and Eastern Slavonia (1996–98), the missions in Kosovo (1999–present)<sup>97</sup> and Timor-Leste (East Timor) (1999–present)<sup>98</sup> have exercised much broader powers and for the first time have become responsible for the full judicial power within these jurisdictions.<sup>99</sup>

Nation-building (the broader version of state-building that includes constructing a national identity and replacing existing institutions)<sup>100</sup> has become part of the war prevention agenda of the United States as that country has aggressively sought to reconstruct regimes that might pose it a threat.<sup>101</sup> Thus, the preventive wars in Iraq and Afghanistan marked a full-fledged effort at nation-building in which establishing the rule of law came to be seen as a central element.<sup>102</sup> The U.S. strategy of nation-building and conducting preventive wars seeks to make these countries more favorable and less threatening to U.S. security and economic interests.<sup>103</sup> The United States could not achieve these goals merely by toppling a regime, a state administration, and the administration of law; it had to assume responsibility for order and justice.<sup>104</sup>

Building states and nations requires building law, and law and development has become part and parcel of the most ambitious modern efforts at social transformation. Post-conflict rule of law projects are

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97. In Kosovo most law-related powers were assigned to the EULEX program in 2008. *Rule of Law Liaison Office*, UNITED NATIONS INTERIM ADMIN. MISSION KOS., <http://www.unmikonline.org/Pages/rollo.aspx> (last visited Sept. 3, 2012).

98. This was actually a consecutive series of missions, the last of which was mandated in 2006 following turmoil in Timor-Leste. *UNMIT Background*, UNITED NATIONS INTEGRATED MISSION IN TIMOR-LESTE, <http://www.un.org/en/peacekeeping/missions/past/unmit/background.shtml> (last visited Sept. 3, 2012).

99. Simon Chesterman, *Rough Justice: Establishing the Rule of Law in Post-Conflict Territories*, 20 OHIO ST. J. ON DISP. RESOL. 69, 70, 94 (2005).

100. Bâli, *supra* note 94, at 436.

101. Kevin Green, *Attacking Without Provocation; Maintaining a Subsequent Occupation; All for the Sake of Democratization: The Constitutionality and Wisdom of Preventive War and Post-Conflict Nation-Building*, 30 WASH. U. J.L. & POL'Y 509, 518–19 (2009); John J. Hamre & Gordon R. Sullivan, *Toward Postconflict Reconstruction*, WASH. Q., Autumn 2002, at 83, 85.

102. See Francis Fukuyama, *Nation-Building 101*, ATLANTIC MONTHLY, Jan./Feb. 2004, at 159 (“A lot now rides on our ability not just to win wars but to help create self-sustaining democratic political institutions and robust market-oriented economies . . .”).

103. Green, *supra* note 101, at 519.

104. SETH G. JONES ET AL., ESTABLISHING LAW AND ORDER AFTER CONFLICT xii (2005), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG374.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG374.pdf).

carried out in the most difficult areas, which have long histories of conflict, state failure, and limited knowledge of or familiarity with the rule of law as defined by Western organizations.<sup>105</sup> Additionally, as in Iraq and Afghanistan, the project developers are often part of the same organization that invaded and occupied the country and destroyed the political and legal institutions that are then restored and even improved according to Western liberal, constitutional, and democratic ideals, which have no local roots.<sup>106</sup> Further, reconstruction efforts may attract robust criticism, for example when they project Western rule of law into an Islamic law-based state.<sup>107</sup>

To successfully contribute to state- and nation-building in fragile and post-conflict contexts is one of law's most ambitious goals yet. This is especially true in a transnational exercise where one nation-state or international body occupies a foreign territory, wholly or partly suspending local sovereignty:

[D]epending on the conditions pertaining in the relevant territory prior to the intervention, nation-building may quite literally require the creation of a national identity, if no such preexisting shared identity unites the territory. External nation-builders must assume core state responsibilities, including the provision of security and the exercise of political authority for the duration of the intervention. At its most ambitious, external nation-building seeks to replace existing local institutions with new ones, often designed by foreign experts and imposed from above.<sup>108</sup>

Meanwhile, during the 1990s, a Transitional Justice paradigm emerged and has sought to combine justice with peace through diverse, multi-level approaches, including amnesty, criminal and customary justice tribunals, and truth and reconciliation commissions. An influential overview of transitional justice, developed by the UN in 2004, states that methods “may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual

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105. PER BERGLING, *RULE OF LAW ON THE INTERNATIONAL AGENDA: INTERNATIONAL SUPPORT TO LEGAL AND JUDICIAL REFORM IN INTERNATIONAL ADMINISTRATION, TRANSITION AND DEVELOPMENT CO-OPERATION* 39 (2006).

106. See Bâli, *supra* note 94, at 435–36 (describing, in the context of the U.S. and UK occupations of Iraq, the salient features of many nation-building efforts, including the creation of a national identity and the replacement of local institutions).

107. See, e.g., Tarak Abdallah, *Economy and Society: A Qur'anic Perspective*, in *LEGITIMACY, LEGAL DEVELOPMENT AND CHANGE: LAW AND MODERNIZATION RECONSIDERED*, *supra* note 86, at 137, 148; Cyndi Banks, Note, *Reconstructing Justice in Iraq: Promoting the Rule of Law in a Post-Conflict State*, 2 *HAGUE J. ON RULE L.* 155, 160 (2010).

108. Bâli, *supra* note 94, at 436.

prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”<sup>109</sup> Under the Transitional Justice paradigm, state and non-state law are to fulfill complex functions, including consolidating peace; ensuring remembrance of past atrocities; and ensuring restorative, retributive, and distributive justice, all in post-conflict contexts.<sup>110</sup> To bolster many transitional justice goals, truth commissions can “help establish the truth, provide redress for victims, ensure accountability for perpetrators, identify and stimulate reforms and preventative effects, promote reconciliation, and create formal distance with the past.”<sup>111</sup>

Transitional Justice has really taken off, as is evidenced by the expansion of truth commissions; local, regional, and international post-conflict tribunals; and increased financial support. According to one study, 5% of development aid to Rwanda and Guatemala between 1995 and 2005 was dedicated to supporting transitional justice projects.<sup>112</sup>

With the State-Building and Transitional Justice paradigms, law and development has moved into its most ambitious phase. The key challenge is finding ways to enable law to foster development in situations in which law has been non-existent or highly unjust and major supporting conditions, such as safety, a basic functioning of the state, and trust in state institutions, are lacking. As State-Building and Transitional Justice require Law and Progress, Rule of Law, Bottom-Up Justice, and Customary Justice to function together, all of the paradigms converge here, resulting in limitless ambition.

## II. QUESTIONS ABOUT AND CRITICISM OF THE IMPACT OF LAW AND DEVELOPMENT

After over sixty years of international developmental aid, there is doubt about the effectiveness of law and development.<sup>113</sup> Especially with

109. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 8, U.N. Doc. S/2004/616 (Aug. 23, 2004).

110. Wendy Lambourne, *Transitional Justice and Peacebuilding After Mass Violence*, 3 INT’L J. TRANSITIONAL JUST. 28, 37–45 (2009).

111. Max du Plessis & Jolyon Ford, *Transitional Justice: A Future Truth Commission for Zimbabwe?*, 58 INT’L & COMP. L.Q. 73, 85 (2009).

112. Roger Duthie, *Toward a Development-Sensitive Approach to Transitional Justice*, 2 INT’L J. TRANSITIONAL JUST. 292, 302 (2008).

113. See, e.g., Paul Clements et al., *Reducing World Poverty by Improving Evaluation of Development Aid*, 29 AM. J. EVALUATION 195, 195 (2008); Hristos Doucouliagos & Martin Paldam, *The Aid Effectiveness Literature: The Sad Results of 40 Years of Research*, 23 J. ECON. SURVS. 433, 433 (2009) (“The mix of casual evidence and the absence of a correlation between aid and growth have caused many to doubt the effectiveness of aid.”); William Easterly & Claudia R. Williamson, *Rhetoric*

the global economic downturn and the development of nationalist anti-aid politics in donor countries,<sup>114</sup> the lack of demonstrable impact could undermine continued aid spending and support. Donors, operators, and recipients are increasingly under pressure to demonstrate effectiveness.<sup>115</sup> Consequently, the aid community has paid more attention to defining, evaluating, and improving impact, agreeing on the need for indicators<sup>116</sup> if not on the best method of measuring impact. The 2005 Paris Declaration on Aid Effectiveness and the 2008 Accra Agenda for Action represent broad commitments to the impact of development aid.<sup>117</sup>

A new industry of evaluators, evaluation designers, and related academic scholars has arisen to address this key issue.<sup>118</sup> The Development Assistance Committee of the Organisation for Economic Co-operation and Development (OECD/DAC) has developed criteria for evaluation that most donors use as a common basis, despite differences in actual evaluation practices.<sup>119</sup> Aid impact evaluation has moved from a focus on outcomes and impacts at a project level to impact evaluation at policy, strategy, country, and regional levels.<sup>120</sup> At the same time, a whole range of indicators that can be used to study correlations of key variables (or their

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*Versus Reality: The Best and Worst of Aid Agency Practices*, 39 WORLD DEV. 1930, 1930 (2011) (“Despite the transfer of over \$4.6 trillion (measured in constant 2007 dollars) in gross official development assistance (ODA) to developing countries from 1960 through 2008, a substantial amount of the world remains in extreme poverty and stagnant growth.”); Elizabeth M. King & Jere R. Behrman, *Timing and Duration of Exposure in Evaluations of Social Programs*, 24 WORLD BANK RES. OBSERVER 55, 55 (2009).

114. This debate has played out in Australia, for example, where both conservative and Labor governments have reduced and delayed commitments to spend 0.5 % of GDP on foreign aid. David Wroe, *Coalition Takes Axe to Foreign Aid*, SYDNEY MORNING HERALD, Sept. 6, 2013, <http://www.smh.com.au/federal-politics/federal-election-2013/coalition-takes-axe-to-foreign-aid-20130905-2t89c.html>.

115. King & Behrman, *supra* note 113, at 55–56.

116. Juan Carlos Botero et al., *Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview*, 3 HAGUE J. ON RULE L. 153, 153 (2011).

117. Camille Cameron & Sally Low, *Aid-Effectiveness and Donor Coordination from Paris to Busan: A Cambodian Case Study*, LAW & DEV. REV., Dec. 2012, at 166, 170, 172–73 (describing the Paris Declaration as “an agreement to forge a ‘genuine partnership, with developing countries clearly in charge of their own development processes’” and noting that the Accra Agenda “calls for a focus shift from aid effectiveness to development outcomes”).

118. Hammergren, *supra* note 17, at 307.

119. MARTA FORESTI ET AL., OVERSEAS DEV. INST., SÉRIE NOTES MÉTHODOLOGIQUES NO. 1, A COMPARATIVE STUDY OF EVALUATION POLICIES AND PRACTICES IN DEVELOPMENT AGENCIES 8 (2007); see also Jim Parsons et al., *Justice Indicators for Post-conflict Settings: A Review*, 2 HAGUE J. ON RULE L. 203 (2010) (discussing more generally work on justice indicators, which is also developing apace).

120. FORESTI ET AL., *supra* note 119, at 8.

proxies) with various forms of development has emerged.<sup>121</sup> Law and development as an increasingly prominent part of the development field has not escaped the pressure to demonstrate its effectiveness:

Despite—or because of—the magnitude of the public and private funds being spent on rule of law promotion, its effectiveness continues to be questioned: by scholars, practitioners, donor and host country politicians and media.

Many donors have responded to this internal and external critique by investing heavily in mechanisms for monitoring and evaluating their projects and programs . . . .<sup>122</sup>

Thus the field of law and development has not just expanded its ambition but has also become increasingly worried about the impact of law on development. Ironically, this “industry” focus on indicators can itself delay or preclude local agencies from establishing their own evaluative processes.<sup>123</sup> The remainder of this section examines what is known about the impact of law and development in its ever-growing realms, analyzing the relationship between law and development generally, taking up the issues in the section on neo-institutional and rights-based development and then considering the other five core paradigms. It considers various criticisms of each paradigm, noting the ways in which such criticisms, in addition to the focus on measurement and impacts, have contributed to the escalating ambitions of the field.

#### A. Mixed Causalities Between Law and Economic Growth

There has been much scholarly interest in broadly establishing correlation or even causality between law and economic development. Evaluating this causal linkage produces mixed results but also fundamentally challenges scholars to find evidence for such causality. Generally this literature can be divided into optimists who argue that law stimulates economic growth and skeptics who do not find such a

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121. See, e.g., Elin Cohen et al., *Truth and Consequences in Rule of Law: Inferences, Attribution and Evaluation*, 3 HAGUE J. ON RULE L. 1 (2011); Amanda Perry-Kessaris, *Prepare Your Indicators: Economics Imperialism on the Shores of Law and Development*, 7 INT’L J.L. CONTEXT 401 (2011); Veronica Taylor, *The Law Reform Olympics: Measuring the Effects of Law Reform in Transition Economies*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES*, *supra* note 9, at 83; Stephanie E. Trapnell, *Actionable Governance Indicators: Turning Measurement into Reform*, 3 HAGUE J. ON RULE L. 317 (2011).

122. Cohen et al., *supra* note 121, at 107.

123. Hammergren, *supra* note 17, at 305.



relationship.<sup>124</sup>

Optimists argue that “[t]here is substantial evidence that some major legal rules and institutions (such as democracy, property rights, and certain government regulations) have a distinctly positive effect on growth”<sup>125</sup> or that there is indication of a “strong correlation between the ‘rule of law’ and economic growth”<sup>126</sup> (although correlation is not causation). Indeed, scholars who have examined the role of law and legal institutions in Asian economic development between 1960 and 1995 have found evidence to suggest that law did affect economic development, depending on how countries approached the role of markets in the economy, but they admit that establishing exact linkages between law and economic growth is not easy, as there is a complex interplay of a multitude of factors.<sup>127</sup> This relationship has also been positively reported in the legal origins and “Law and Finance” scholarship. An influential paper that launched the latter field argues that countries with a legal system rooted in the common law fare better in financial development than those with continental legal systems.<sup>128</sup>

Skeptics have been more doubtful about the causal link between legal institutions and economic growth.<sup>129</sup> For example, Kenneth Dam’s work on the “law-growth nexus” questions the core thesis of law and finance that the origins of a legal system determine financial performance and disputes the idea that legal origins theory holds value for understanding broader economic performance.<sup>130</sup> He argues that these fields of study fail to produce results that developing countries can use and that they oversimplify and ignore details that are vital to understanding how legal

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124. For an overview of this literature, *see generally* Davis & Trebilcock, *supra* note 15.

125. Cross, *supra* note 8, at 1738–39.

126. Katharina Pistor, *There Is No Single Field of Law and Development*, 104 NW. U. L. REV. COLLOQUY 168, 168 (2009).

127. KATHARINA PISTOR & PHILIP A. WELLONS, *THE ROLE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT: 1960–1995*, at 4–7 (1999).

128. *See* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998).

129. *See, e.g.*, Kevin E. Davis & Michael J. Trebilcock, *Legal Reforms and Development*, 22 THIRD WORLD Q. 21, 21 (2001) (“There is surprisingly little conclusive evidence that reforms in particular areas of law such as property law, contract law and human rights law have been effective in furthering development, however conceived.”); Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 132 (1999) (finding that little is known of the actual effects of judicial reform on economic performance and counseling that “in the absence of a better theoretical understanding of the impact of judicial reform, care is required in designing and implementing projects”); Pistor, *supra* note 126, at 169–70 (“[W]e lack a sound theoretical basis for explaining why the correlation between legal development and economic growth holds across some countries, but breaks down in others. . . . [W]e continue to know very little about the political economy of legal reforms and their distributional effects.”).

130. DAM, *supra* note 15, at 5.

institutions actually influence economic activity, contending that other factors, including microeconomic policy initiatives, impact legal reforms.<sup>131</sup> Some skeptics have suggested that a country's receptivity to a transplanted law is more determinative of the prospects of the transplant than whether the country has a civil or common law legal system.<sup>132</sup>

In the debate about law and economic growth, skeptics present East Asia as an important test case. Neo-institutional and legal origin studies have difficulty explaining the extraordinary economic performance of countries such as China, Japan, Taiwan, and South Korea. Some scholars debate whether China demonstrates that economic growth requires clear property rights or enforceable contracts,<sup>133</sup> whether it is an example of a country that has been able to do well economically even without formal, legally protected property rights,<sup>134</sup> or indeed whether Asian "success" stories such as China demonstrate the importance of informal, reputation-based institutions when state-provided rules "are unavailable or unenforced."<sup>135</sup>

Within the law and development literature of the last decade, there has been far less systematic study of the connection between law and the more broadly conceived approaches to development focusing on the individual and the poor that have become more influential. One such study examined the link between law and six theoretical perspectives on development but found no clear evidence of law's positive influence on development, however conceptualized.<sup>136</sup>

A large-brush approach is necessary to analyze the impact of law and certain kinds of legal arrangements on economic growth, but such an approach is problematic. Not only does it remain methodologically difficult to neatly filter the impact of law on economic growth from that of other contributory factors (whether natural, political, historical, or cultural), but the level of abstraction necessary to make general statements about the relationship between law and economic growth obscures vital details about particular kinds of legal arrangements. Attempts at understanding such

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131. *Id.* at 207.

132. See Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect*, 47 EUR. ECON. REV. 165, 167 (2003).

133. See Clarke, *supra* note 15, at 66.

134. See Frank K. Upham, *From Demsetz to Deng: Speculations on the Implications of Chinese Growth for Law and Development Theory*, 41 N.Y.U. J. INT'L L. & POL. 551, 554–55 (2008) (arguing that such rights may not be a necessary condition for economic growth but are vital for dealing with distributional issues once growth develops).

135. See Tom Ginsburg, *Does Law Matter for Economic Development? Evidence from East Asia*, 34 LAW & SOC'Y REV. 829, 834 (2000).

136. See Davis & Trebilcock, *supra* note 129.

details produce findings not easily generalized. In sum, disentangling the relationship between law and economic growth requires a level of detail combined with a level of cross-border historical data that is impossible to gather, analyze, and generalize. The inherent inconclusiveness of this body of work raises a number of questions. Can developing countries follow legal models of other more developed countries and hope, based on optimistic studies, that development will follow? Should legal work be abandoned because of the lack of categorical proof of any economic benefit? Is law only important for economic development?

These questions raise concerns over the effect that the increasing emphasis on impact (especially quantitatively measured impact in terms of economic growth) will have on the understanding and improvement of the complex functioning of law and legal reform within a broader notion of development. The studies discussed here simplify and obscure rather than explain. It is too easy to blame solely the normative, mathematical, and quantitative approaches and methodologies used in the broader evaluations.<sup>137</sup> It is more logical to look to the original ambitious goals that the field has adopted. By contending that law can create economic growth, the field has opened itself to the economists and mathematicians whose simplified indicators and contrasting findings may undermine the field's well-intended quest to improve the functioning of law in development.

#### B. Criticism of Rule of Law Interventions

Of all the law and development ambitions discussed here, the impact of the projects and programs seeking to advance the Rule of Law paradigm have received the strongest criticism. In the first decade of the twenty-first century, the field of law and development at times resembled the American Law and Development Movement of the 1970s, with scholars and practitioners alike arguing that the Rule of Law paradigm, or Rule of Law Orthodoxy as it became known,<sup>138</sup> had failed and should be replaced.<sup>139</sup> The discrepancy between the field's highly raised expectations and its disappointing results was ultimately blamed in part on its original ambitions.

Criticism centered chiefly on the wide range of activities that were undertaken to strengthen and build the rule of law in other countries. Three levels of reform can be distinguished: namely substantive legislative

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137. See Perry-Kessaris, *supra* note 121, at 417 (arguing that the development of indicators to measure law and development has been a form of economic imperialism that uses a simplistic normative, mathematical, and quantifying approach).

138. Upham, *supra* note 42, at 75.

139. Golub, *supra* note 12, at 161.

reform, institutional strengthening through training and financial support, and deeper institutional reform, such as the establishment of an independent judiciary, that relies “less on technical or institutional measures than on enlightened leadership and sweeping changes in the values and attitudes of those in power.”<sup>140</sup> A general criticism of rule of law-oriented legal reform is that, despite these activities, it has been ineffective in bringing about development, especially with respect to the poor and the disadvantaged.<sup>141</sup> Scholars have also emphasized that rule of law practice suffers from a lack of knowledge<sup>142</sup> and particularly a lack of recognition of the plurality of law, a concept which must be integrated into legal development.<sup>143</sup>

Several studies question the existence of proof that law can aid development,<sup>144</sup> recalling the ambiguity of the findings about the causality of law and development discussed above.<sup>145</sup> Others, still believing in the law’s capacity to contribute to development, argue that more data is needed to determine the kind of legal reform that leads to development<sup>146</sup> and that successful legislative reforms should be based on thorough social scientific research about the norms and contexts of the target of the reform.<sup>147</sup> In

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140. Carothers, *supra* note 30, at 8.

141. *See, e.g., id.* at 15 (summarizing the lack of knowledge that rule of law practitioners have and the obstacles to knowledge and learning that exist); Golub, *supra* note 42, at 131 (discussing the lack of applied research as a foundation for rule of law reforms).

142. *See, e.g.,* Thomas Carothers, *The Problem of Knowledge*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note, at 11; Golub, *supra* note 42, at 131.

143. *See, e.g.,* H. Patrick Glenn, *Sustainable Diversity in Law*, 3 HAGUE J. ON RULE L. 39, 56 (2011) (suggesting that “rule of laws” might form a better conceptual bedrock for activity in this area); Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, 3 HAGUE J. ON RULE L. 1, 13–16 (2011) (suggesting that legal pluralism both challenges and may offer potential support for rule of law activity).

144. *See e.g.,* Golub, *supra* note 42, at 109–10; Upham, *supra* note 42, at 80–82 (questioning whether economic growth always needs formal institutions and whether it cannot also flourish in an informal economic and legal setting).

145. *See supra* Part II.A.

146. *See, e.g.,* Carothers, *supra* note 142, at 25–27; Wade Channell, *Lessons Not Learned About Legal Reform*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE, *supra* note 11, at 137; Bryant G. Garth, *Rethinking the Processes and Criteria for Success*, in COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR A JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY 11, 12 (Rudolf V. Van Puymbroeck ed., 2001).

147. *See, e.g.,* PIP NICHOLSON, BORROWING COURT SYSTEMS: THE EXPERIENCE OF SOCIALIST VIETNAM 231–40 (2007); ANN SEIDMAN ET AL., LEGISLATIVE DRAFTING FOR DEMOCRATIC SOCIAL CHANGE: A MANUAL FOR DRAFTERS (2001); John Gillespie, *Developing a Decentred Analysis of Legal Transfers*, in EXAMINING PRACTICE, INTERROGATING THEORY: COMPARATIVE LEGAL STUDIES IN ASIA 25, 40–41 (Penelope (Pip) Nicholson & Sarah Biddulph eds., 2008) (arguing for the need to adopt a non-state centric focus when analyzing legal transfers and to use discourse analysis in such a study); Ann Seidman & Robert B. Seidman, *Using Reason and Experience to Draft Country-Specific Laws*, in MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION AND

many developmental contexts, however, such research capacity may be limited, and getting policymakers and lawmakers to sufficiently research the contexts of reform initiatives is unlikely.<sup>148</sup>

Criticism also suggests that the top-down character of rule of law reform projects does not sufficiently consider or incorporate local contexts.<sup>149</sup> This allegedly arises because Western experts tend to take the context of their own jurisdiction for granted<sup>150</sup> or because foreign experts, “[b]eing confident of their expertise and good intentions . . . are under no pressure to interrogate their own political and legal culture or to investigate in any depth that of the host country.”<sup>151</sup> A combination of lack of knowledge and top-down policy and implementation may lead to unforeseen results<sup>152</sup> that may even sometimes conflict with the original aims of reform and cause a deterioration of the local situation.<sup>153</sup> In international legal development projects, which are the subject matter of most scholarly studies, such top-down operational methods further run the risk of ethnocentricity.<sup>154</sup>

Legal scholars have also criticized rule of law reform as too state-centered and overly focused on courts and the processes of lawmaking because it predominantly examines the aid or reform of state institutions.<sup>155</sup> Some scholars maintain that, as a result, the reforms will not reach the

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GOOD GOVERNANCE 249 (Ann Seidman et al. eds., 1999).

148. NICHOLSON, *supra* note 147, at 237 (noting that academic sources about local legal systems often exist but are frequently not consulted); Brian Z. Tamanaha, *A Pragmatic Approach to Legislative Theory for Developing Countries*, in MAKING DEVELOPMENT WORK: LEGISLATIVE REFORM FOR INSTITUTIONAL TRANSFORMATION AND GOOD GOVERNANCE, *supra* note 147, at 145, 148, 150 (arguing that severe resource and time constraints preclude decent research).

149. See, e.g., YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES 4–5 (2002); Julio Faundez, *Legal Reform in Developing and Transitional Countries: Making Haste Slowly*, in COMPREHENSIVE LEGAL AND JUDICIAL DEVELOPMENT: TOWARD AN AGENDA FOR A JUST AND EQUITABLE SOCIETY IN THE 21ST CENTURY, *supra* note 146, at 369, 378; Golub, *supra* note 42, at 121 (criticizing rule of law reformers for not paying sufficient attention to how local obstacles, including corruption and local politics, undermine reform efforts).

150. Golub, *supra* note 42, at 127.

151. Howard Dick, *Why Law Reform Fails: Indonesia’s Anti-corruption Efforts*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES, *supra* note 9, at 42, 60.

152. Garth, *supra* note 146, at 23–24.

153. Faundez, *supra* note 149, at 380–81.

154. See Garth, *supra* note 146, at 23–24 (“The problem is the same one that comes from thinking that what is widely accepted in the United States is universally valid.”); Tim Lindsey, *Preface*, in LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES, *supra* note 9, at xix, xix–xx (emphasizing “the dangers that lie in an approach that ‘orientalises’ Asian societies”).

155. See, e.g., Carothers, *supra* note 142, at 21; Golub, *supra* note 42, at 105–06; Nader, *supra* note 74, at 92, 107; Franz von Benda-Beckmann, *Legal Pluralism and Social Justice in Economic and Political Development*, IDS BULL., Jan. 2001, at 46, 46; Woodman, *supra* note 69, at 28.

poor, thus doing little to enhance their lives, and may even strengthen the position of existing elites.<sup>156</sup> Skeptics further suggest that the state may not be well-positioned to help the poor and that more attention should be paid to civil society.<sup>157</sup>

Furthermore, state-centered approaches lack effectiveness in contexts in which non-state normative systems are important and in which legal reform should address issues of legal pluralism.<sup>158</sup> Some suggest that the adoption of a regulatory approach to law and development might enable a better understanding of the role of regulation in particular contexts and that this granular, decentered analysis of law will illuminate how best to develop it.<sup>159</sup> The regulatory theorists caution that there is high risk in dichotomizing state and non-state actors and that there is a real need to recognize institutional hybrids of state and non-state actors and to explore “their broader relationship to the fragmented and multiple legal order.”<sup>160</sup>

The top-down character of rule of law reform programs can be attributed in part to some donors, such as the World Bank and the U.S. Agency for International Development, necessarily cooperating predominantly with national governments in targeted countries.<sup>161</sup> As the legal systems in many developing states interact in complex ways with local, non-state justice systems as well, legal reform also requires engagement with those systems.<sup>162</sup> Such activity, however, requires international development agencies to acquire “a considerable amount of knowledge of the complex political arrangements underlying [non-state justice systems] and adjunct structures.”<sup>163</sup>

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156. See, e.g., Golub, *supra* note 42, at 109–10; Vivek Maru, *Access to Justice and Legal Empowerment: A Review of World Bank Practice*, 2 HAGUE J. ON RULE L. 259, 262–64 (2010); Taylor, *supra* note 121, at 98.

157. See, e.g., Golub, *supra* note 42, at 110.

158. Franz von Benda-Beckmann, *The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice*, in 2 WORLD BANK LEGAL REVIEW: LAW, EQUITY, AND DEVELOPMENT, *supra* note 69, at 63 (arguing that the existence of legal pluralism can also constrain “interventionist objectives and practices”).

159. See, e.g., Kanishka Jayasuriya, *Institutional Hybrids and the Rule of Law as a Regulatory Project*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE 145, 158 (Brian Z. Tamanaha et al. eds., 2012) (arguing that regulatory approaches might enable reformers to better understand regulatory dynamics and how to improve them in diverse locations).

160. Jayasuriya, *supra* note 159, at 157.

161. Linn Hammergren, *International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, *supra* note 16, at 290–91.

162. See von Benda-Beckmann, *supra* note 158, at 63–64 (“If local people keep their local law, exercise their own land rights, and go to traditional authorities for dispute management, it may have . . . to do with their reaction against state law and the social practices associated with it . . .”).

163. Julio Faundez, *Legal Pluralism and International Development Agencies: State Building or*

Scholars further warn that rule of law practice is insufficiently aware of or naïve about its inherently political nature.<sup>164</sup> Part of this criticism concerns the assumption that legal reform is mere “technical assistance,”<sup>165</sup> rendering reform efforts insufficiently attuned to underlying power structures and interests and inherently political questions and transformations.<sup>166</sup> Vested interests, lack of political will, widespread corruption, and lack of demand among elites can render reform efforts directed at state institutions fruitless.<sup>167</sup> General disinterest or resistance of the general public may be an even more formidable obstacle to successful legal reform.<sup>168</sup> These facts are not always recognized in rule of law reform practice.<sup>169</sup> As reforming law, even in a strictly technical sense, is

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*Legal Reform?*, 3 HAGUE J. ON RULE L. 18, 37 (2011).

164. See David Kennedy, *The “Rule of Law,” Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 4, at 95.

165. See, e.g., S. Newton, *Law and Development, Law and Economics and the Fate of Legal Technical Assistance*, in *LAWMAKING FOR DEVELOPMENT: EXPLORATIONS INTO THE THEORY AND PRACTICE OF INTERNATIONAL LEGISLATIVE PROJECTS* 23, 23 (J. Arnscheidt et al. eds., 2008).

166. See, e.g., DEZALAY & GARTH, *supra* note 149, at 5 (noting that law is at the core of power and that this centrality is crucial to analyses of the function of law in society); Dick, *supra* note 151, at 53 (“The fundamental issue in reform is not the consistency of law but how the state, with all its ramifications, exercises its immense powers and in whose interests.”); Gary Goodpaster, *Law Reform in Developing Countries*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES*, *supra* note 9, at 107 (claiming that reforms are not sufficiently attuned to issues of power and politics).

167. See Carothers, *supra* note 142, at 22 (noting that there has been little attempt to understand the “will” to reform, although it was identified some time ago); Golub, *supra* note 42, at 113, 116 (arguing that legal reform projects fail when there is no support from local institutions and that energy spent on court reform, instead of on local “rules of the game” that affect the poor, are worthless); Goodpaster, *supra* note 166, at 130–31 (arguing that donor efforts to create political will where it is lacking are likely ineffective and should instead be directed at changing and neutralizing incentive structures and creating demand for law); see also Goodpaster, *supra* note 166, at 107 (arguing that the success of reform depends on taking into account existing social, economic, and cultural incentive systems and adapting reform-generated incentives accordingly). For examples of failed legal reform due to elite intransigence, see LINN A. HAMMERGREN, *THE POLITICS OF JUSTICE AND JUSTICE REFORM IN LATIN AMERICA: THE PERUVIAN CASE IN COMPARATIVE PERSPECTIVE* 270–71, 278 (1998) (arguing that the largely failed Peruvian legal reforms attracted interest only from a small group of lawyers and noting that elite disinterest in reforms is as problematic as elite opposition to them); Daniel Adler & Sokbunthoeun So, *Toward Equity in Development When the Law Is Not the Law: Reflections on Legal Pluralism in Practice*, in *LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE*, *supra* note 159, at 83, 90 (arguing that the Cambodian land law reform experience, which tried to alter entrenched elite practices, was largely unsuccessful); Jeffrey A. Clark et al., *The Collapse of the World Bank’s Judicial Reform Project in Peru*, in *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES*, *supra* note 9, at 159, 172–73 (attributing the collapse of a large World Bank justice reform project in Peru to an indisputably clear case of executive disdain); Pip Nicholson & Sally Low, *Local Accounts of Rule of Law Aid: Implications for Donors*, 5 HAGUE J. ON RULE L. 1, 36, 41–42 (2013) (noting that the Vietnamese legal reform agenda is managed not by donors but by the Party-State and that many reforms bolster entrenched elites).

168. HAMMERGREN, *supra* note 167, at 302.

169. *Id.* at 270 (noting that reformers fail to appreciate that laws will not be implemented without

reforming power, reform efforts should adopt reforms that are favored by the local population.

Further, there is a base question of whether foreign (usually Western) powers and their donor agencies have the moral authority to impose idealized notions of the rule of law in those states in which law is differently conceived and valued.<sup>170</sup> Even if moral authority can be rationalized, where recipient country leadership is opposed to the ideological bases upon which rule of law projects are founded, prospects for the adoption of particular reforms are limited.<sup>171</sup> As noted in the discussion of the transplant effect above, unsupported rule of law reforms will founder.<sup>172</sup>

While all of these criticisms are more or less accurate, a final point of criticism is crucial: rule of law reform has made great promises it cannot fulfill. Given the immense complexities that social engineering through law entails<sup>173</sup> and its inherent resource, knowledge, and support limitations, expectations about the potential achievements of legal reform should be tempered.

Further, the speed at which change is expected to occur is frequently unrealistic.<sup>174</sup> Legal reform can only be successful if given sufficient time; haste and impatience are counterproductive. Most law and development projects, however, run on short project cycles.<sup>175</sup> Accordingly, law and

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local will and support); NICHOLSON, *supra* note 147, at 237 (arguing that Soviet legal aid to Vietnam also largely ignored local conditions); Newton, *supra* note 165, at 46 (advocating for research on costs, incentives, institutions, and impacts in order to determine how legal technical assistance might be relevant to a locality); Upham, *supra* note 42, at 76 (“Law . . . is seen as technology when it should be seen as sociology or politics.”).

170. See Pip Nicholson with Simon Pitt, *Official Discourses and Court-Oriented Legal Reform in Vietnam*, in *LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS* 202, 204 (John Gillespie & Pip Nicholson eds., 2012) (observing that viewing legal reform as mere technical assistance obscures the moral dimension of the reform).

171. For example, in Vietnam, donor-funded, court-oriented legal reform that is ideologically motivated has poor prospects of success where it challenges the Vietnamese leadership’s ideology. See Nicholson with Pitt, *supra* note 170, at 235–36 (describing the Vietnamese government’s control of reform); see also Rolf Knieper, *Pulls and Pushes of Legal Reform in Post-Communist States*, 2 *HAGUE J. ON RULE L.* 111, 125–26 (2010) (arguing that the export of the common law is doomed if it has neither roots nor local support and rejecting the legal origins thesis).

172. See *supra* note 132.

173. Peter P. Houtzager, “*We Make the Law and the Law Makes Us*”: *Some Ideas on a Law in Development Research Agenda*, 32 *IDS BULL.* 8, 14–15 (2001) (questioning how much law actually matters in the complexities of larger social outcomes and individual decision-making).

174. In Cambodia and Vietnam, for instance, local stakeholders involved in court-oriented legal reform declared that timelines imposed by donor agencies are unrealistic and too often damaging. Nicholson & Low, *supra* note 167, at 5.

175. Channell, *supra* note 146, at 141–42; see also ANTONY ALLOTT, *THE LIMITS OF LAW* 175 (1980) (complaining about impatient policymakers in developing countries who seek to create large



development also suffers from internal problems related to donor bureaucracy.<sup>176</sup> Pressure to spend money, the ongoing use of best practice models, demands for accountability, and the inherent complexity of legal reform in different settings have led to weak project preparation and the limited usage of existing knowledge and research.<sup>177</sup> All of this is exacerbated by weak evaluations of (and thus weak information about) the reforms that work and that do not and by the inability to translate lessons from failure into improvement for the future.<sup>178</sup>

High ambitions have set Rule of Law projects up for failure, as they are not matched to available means and to practical, political, and temporal constraints. It appears logical, given the increasing attention on impact, that the field move toward more realistic goals that can be defended, achieved, and evaluated. But this has not happened. On the contrary, the field has added further layers of ambition through the Bottom-Up Justice, Customary Justice, State-Building, and Transitional Justice paradigms.

### C. Evaluating Bottom-Up and Customary Justice

The impact of Bottom-Up and Customary Justice projects has not escaped scrutiny either. Compared to all other paradigms discussed, however, such attention has been mostly in the form of internal evaluation rather than scholarly analysis.<sup>179</sup>

Evaluative studies have identified a number of positive impacts of Bottom-Up projects.<sup>180</sup> Several studies have found that interventions under

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social changes through programmatic usage of law).

176. See Carothers, *supra* note 142, at 25–27 (noting that rule of law aid, despite existing for more than 30 years, still suffers from an acute lack of insight that has been perpetuated by aid organizations); Golub, *supra* note 42, at 128–31 (noting that “bureaucratic inertia” produces a lack of imagination and responsiveness to local needs and that donor structures produce biases, inflexible budgetary processes, lack of informed decision-making, and sectoral compartmentalization); Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, *supra* note 16, at 336, 350 (noting that lender incentives to loan as much money as possible leads them to lend to incompetent or corrupt countries where the aid is used less effectively).

177. Channell, *supra* note 146, at 150–57.

178. See *id.* at 154–56 (detailing the disincentives for carrying out thorough evaluations and learning from them).

179. *But see, e.g.*, Jayasuriya, *supra* note 159, at 157–58; Doug J. Porter, *Some Implications of the Application of Legal Pluralism to Development Practice*, in LEGAL PLURALISM AND DEVELOPMENT: SCHOLARS AND PRACTITIONERS IN DIALOGUE, *supra* note 159, at 162, 172 (both arguing that the dynamic of customary justice projects might be analyzed through a regulatory lens).

180. A collection of studies organized by the International Institute for Environment and Development and the United Nations Food and Agriculture Organization found positive results in typical bottom-up interventions involving paralegals, legal literacy, public interest litigation, legal clinics, and rights information centers. Rita H. Aciro-Lakor, *Land Rights Information Centres in*

these paradigms have improved legal knowledge, economic well-being, gender equality, land tenure security, and participation.<sup>181</sup> A study of a USAID-sponsored community court program in Bolivia by a former USAID executive noticed greater legal awareness and success in “addressing the legal needs of marginalized populations.”<sup>182</sup> A study of three projects funded by the World Bank Justice for the Poor program found that the development of “peace communities” in northern Kenya has become a popular and successful way to “define ground rules between different local [justice] systems.”<sup>183</sup> It also found that labor arbitration courts have steadily increased their case loads and have managed “to find for the most part, workable resolutions minimally acceptable to all parties” (especially impressive given the difficult local political context).<sup>184</sup> A UNDP-commissioned assessment of a project on legal empowerment

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*Uganda*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA, *supra* note 46, at 71, 72; Boubacar Ba, *Paralegals as Agents of Legal Empowerment in the Bankass Area of Mali*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA, *supra* note 46, at 45, 46; Lilian Laurin Barros, *Legal Clinics and Participatory Law-Making for Indigenous Peoples in the Republic of Congo*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA, *supra* note 46, at 119, 120–21; Yahya Kane, *Legal Literacy Training in the Thiès Region of Senegal*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA, *supra* note 46, at 83, 84; Simeon Koroma, *Paralegals and Community Oversight Boards in Sierra Leone*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA, *supra* note 46, at 77, 78–79; Ednah Mndeme, *Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania*, in LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA, *supra* note 46, at 93, 95–96. They conclude that these interventions have improved land tenure security in certain customary law settings. Aciro-Lakor, *supra*, at 74; Ba, *supra*, at 56–58; Barros, *supra*, at 122; Kane, *supra*, at 88; Koroma, *supra*, at 77; Mndeme, *supra*, at 96.

181. See Aciro-Lakor, *supra* note 180, at 74; Ba, *supra* note 180, at 58; Barros, *supra* note 180, at 122; Koroma, *supra* note 180, at 82.

182. Tiernan Mennen, *The Mystery of Legal Empowerment: Livelihoods and Community Justice in Bolivia*, in LEGAL EMPOWERMENT: PRACTITIONERS’ PERSPECTIVES 63, 70, 73 (Int’l Dev. Law Org., Legal and Governance Reform: Lessons Learned No. 2, Stephen Golub ed., 2010), available at [http://www.idlo.org/Documents/Legal\\_Empowerment\\_Practitioners\\_Perspectives\\_Book.pdf](http://www.idlo.org/Documents/Legal_Empowerment_Practitioners_Perspectives_Book.pdf).

183. Caroline Sage et al., *Taking the Rules of the Game Seriously: Mainstreaming Justice in Development: The World Bank’s Justice for the Poor Program 8* (World Bank Justice Reform Practice Grp., Justice & Development Working Paper No. 51845, 2009), available at <http://a4id.org/sites/default/files/Taking%20the%20Rules%20of%20the%20Game%20Seriously%20-%20Mainstreaming%20Justice%20in%20Development.pdf>.

184. *Id.* at 10 (internal quotation marks omitted). The co-founder and co-director of a World Bank-funded paralegal program in Sierra Leone declared that the Bank’s Justice for the Poor programs in Ecuador and Sierra Leone, and specifically the legal aid and paralegal projects, had a positive impact. Maru, *supra* note 156, at 265–67 (describing the “impressive rates of case resolution” in Ecuador as “a startling success,” claiming that the “respondents [in Sierra Leone] were overwhelmingly positive [about their experiences with the paralegals],” and praising the “effectiveness [of the paralegals] in resolving difficult disputes” and the “strong evidence that [the paralegal organization was] indeed empowering [its] clients, the paralegals themselves, and the community as a whole to claim their rights and pursue cases that had previously stagnated”).

through community radio noted that “[t]he project heightened awareness of rights and helped reduce tolerance of injustice” and concluded that “this experimental project has been a success worthy of replication and, importantly, of continuing support, with a possible view to incorporation into the UNDP agenda.”<sup>185</sup>

Customary Justice initiatives appear to have had positive impacts as well. A UNDP-commissioned study about worldwide Customary Justice interventions, such as legal awareness training through literacy courses, information groups, education campaigns, the publication of guidebooks on state and non-state laws, and traveling street theatre found that these have helped improve the position of vulnerable groups and have provided entry points for human rights in Bangladesh, Malawi, Timor-Leste, Indonesia, and Cambodia.<sup>186</sup> It further concluded that paralegals, lawyers’ networks, dispute clearinghouses and resolution panels, and ADR training have all improved legal aid in Sierra Leone, Thailand, East Timor, Puerto Rico, and Cambodia.<sup>187</sup> It noted finally that capacity development for informal justice actors in the areas of mediation and citizens’ rights works reasonably well in Burundi, Sierra Leone, East Timor, Rwanda, and Bangladesh.<sup>188</sup>

Customary Justice interventions face limits and challenges, however. Interventions are constrained by a number of factors, including a lack of paralegal capacity,<sup>189</sup> resistant local elites who fear a subversion of their power base,<sup>190</sup> donor dependency and a lack of sustainability,<sup>191</sup> a lack of confidence and trust in the community,<sup>192</sup> and “cut-throat antagonism” between weak and poor communities and powerful outside investors.<sup>193</sup> Additionally, limited numbers of representatives in newly established local organizations restrict the potential impact of such organizations.<sup>194</sup> Interventions also face difficulty training lay persons as paralegals, a

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185. USHA RAMANATHAN, THE ASIA-PACIFIC RIGHTS AND JUSTICE INITIATIVE: INDIA COUNTRY ASSESSMENT 7–8 (Andrea Davis ed., 2009), available at <http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dgttf/india-country-assessment-the-asia-pacific-rights-and-justice-initiative/IndiaA2JCountryAssessment.pdf>.

186. WOJKOWSKA, *supra* note 67, at 33–34.

187. *Id.* at 35–36.

188. *Id.* at 38–39.

189. Ba, *supra* note 180, at 50–58.

190. Aciro-Lakor, *supra* note 180, at 75; Ba, *supra* note 180, at 58–59.

191. Aciro-Lakor, *supra* note 180, at 71–77; Kane, *supra* note 180, at 90; Mndeme, *supra* note 180, at 97.

192. Barros, *supra* note 180, at 122; Mndeme, *supra* note 180, at 97.

193. Mndeme, *supra* note 180, at 97.

194. Sage et al., *supra* note 183, at 14.

prevalence of ceremony over capacity, gender quotas for adjudicators that undermine community cohesion, dissatisfaction among disputing parties over emphases on reconciliation, the perpetuation of the absence of formal institutions as informal dispute mechanisms are strengthened, and a lack of sustainability and local legitimacy.<sup>195</sup> Overall community progress has hinged much more on local sociopolitical factors, including the perceived external threat to local tenure security, leader capacities, group cohesion, and ongoing land conflicts.<sup>196</sup>

Challenges of scale exist also, as projects have hardly ever moved beyond small pilots. Scaling projects up to cover whole regions, especially when trying to do so sustainably and while maintaining independence from the government, is fraught with issues.<sup>197</sup> The UNDP's Access to Justice program in Cambodia only accomplished half of its goals—and even those took longer than expected—leaving its sustainability uncertain.<sup>198</sup> The program's positive impact “remains limited as the communes/districts covered by the project are few in relation to the national territory.”<sup>199</sup> The concept of legal empowerment as operationalized by the now-defunct Commission for Legal Empowerment for the Poor (CLEP) has been strongly criticized for overambition, inconsistencies in its conceptual framework of legal empowerment, an excessive focus on theories of legal exclusion, a failure to incorporate other factors responsible for injustice and poverty, inadequate attention to gender issues, applying a top-down approach even while advocating a bottom-up approach, and insufficient attention to the inherent political and power issues at play.<sup>200</sup>

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195. WOJKOWSKA, *supra* note 67, at 35, 38–39.

196. Rachael Knight, *The Community Land Tiling Initiative: An Investigation into Best Practices for the Protection of Customary Land Claims*, in WORKING WITH CUSTOMARY JUSTICE SYSTEMS: POST-CONFLICT AND FRAGILE STATES 145, 162 (Erica Harper ed., 2011).

197. Maru, *supra* note 156, at 269–70.

198. VELIBOR POPOVIĆ, THE ASIA-PACIFIC RIGHTS AND JUSTICE INITIATIVE: CAMBODIA COUNTRY ASSESSMENT 7 (Andrea Davis ed., 2009).

199. *Id.* at 13.

200. Dan Banik, *Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication*, 1 HAGUE J. ON RULE L. 117, 121–26 (2009) (criticizing the claimed linkages between the legal empowerment approach and both democracy and human rights for being not sufficiently validated and for weakening the conceptual underpinnings of the legal empowerment approach and faulting CLEP for failing to address a variety of legal issues that are important to poverty reduction, including education, violence against women, inequality, and social exclusion); Julio Faundez, *Empowering Workers in the Informal Economy*, 1 HAGUE J. ON RULE L. 156, 171–72 (2009) (arguing that a Peruvian case study reveals that legally empowering those in the informal economy requires economic, social and political strategies as well as legal reform); Matthew Stephens, *The Commission on Legal Empowerment of the Poor: A Opportunity Missed*, 1 HAGUE J. ON RULE L. 132, 134 (2009) (noting that one of the fundamental gaps in CLEP's work is its failure to address the challenges of policy and institutional change required to empower the poor despite its unique position).

There are several issues that require clarification before the legal community concludes that these projects have the impact sought and that they succeed where Rule of Law has failed. First is the definition of impact. Most of the studies discussed here have looked at the immediate impact of particular problems found in the local communities where a project was implemented. Scholars should instead ask whether individual impacts cumulatively result in a broader impact on empowerment, access to justice, minority rights protection, and capital integration. Impact can be understood in terms of its achievements or in the manner in which they were obtained. While the Bottom-up and Customary Justice paradigms stress a bottom-up approach based on local knowledge, the similarities in the approaches that have been tried across the world in different programs with diverse donors demonstrate that a top-down approach remains influential.

Second is the scale and sustainability of these programs. Most projects studied are relatively small-scale and pilot-like, and yet it is often assumed that their positive impacts can be a basis for broader interventions that cover larger areas for longer periods of time. Additionally, it is not clear whether the projects would have succeeded without significant donor support and a narrow geographical focus, that the success can be sustained without the donor, or that the project can be transplanted through a best practice-type approach.

Thirdly, there is a risk of concluding that projects achieved positive outcomes on the basis of the impacts of those projects. Measuring the impacts of Bottom-Up and Customary Justice interventions is highly challenging, as it requires establishing causality between a multitude of interventions and a variety of complex outcomes (empowerment, awareness, access to capital, etc.).<sup>201</sup> Few of the studies detail their research methods,<sup>202</sup> and even they merely state that surveys were used or provide no details on what type of data on outputs and impact was gathered

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201. See Sumaiya Khair, *Evaluating Legal Empowerment: Problems of Analysis and Measurement*, 1 HAGUE J. ON RULE L. 33, 36 (2009) (“It is indeed difficult to establish a causal link between specific legal actions and the resultant legal actions and the resultant development. One of the fundamental problems in assessing legal empowerment is that the characteristics and conduct that typify empowerment in one context may well have different implications in another.”); see also ADAM L. MASSER, MEASUREMENT METHODOLOGIES FOR LEGAL EMPOWERMENT OF THE POOR (United Nations Dev. Programme, Discussion Paper No. 6, 2009), available at <http://gaportal.org/sites/default/files/Measurement-Methodologies-for-Legal-Empowerment-of-the-Poor.pdf> (addressing issues surrounding the methodology of measuring legal empowerment).

202. *But see* Knight, *supra* note 196, at 157–58 (providing a clear methodology and comparison of groups at different levels of the intervention).

or the methods used to gather it.<sup>203</sup> Most studies merely describe the context and aims of a project and then discuss its results and challenges, only occasionally mentioning its failures.<sup>204</sup> This framing almost automatically leads to a positive portrayal of the intervention as the best way to solve a particular problem.<sup>205</sup> Some studies risk portraying initiatives as successes simply by describing their achieved outputs<sup>206</sup> or even worse by simply restating the aims that they sought to address.<sup>207</sup> Few studies systematically analyze in detail which conditions explain their positive or negative outcomes. Finally, and perhaps most worrisome, most impact studies discussed here were carried out by the people directly responsible for the conceptualization, funding, or execution of the project. While these studies were of course done in as objective of a manner as possible, a positive bias may nonetheless have arisen.<sup>208</sup> To fully ascertain the data presented, more study by independent scholars is necessary.

Some of the studies propose remedies to deal with the projects' limitations. Several are reiterations of the original bottom-up paradigm.<sup>209</sup> Some call for more research, a deeper empirical understanding of both

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203. See e.g., ERICA HARPER, CUSTOMARY JUSTICE: FROM PROGRAM DESIGN TO IMPACT EVALUATION (2011), available at <http://www.idlo.org/Publications/CustomaryJustice1.pdf>; WOJKOWSKA, *supra* note 67.

204. See e.g., Aciro-Lakor, *supra* note 180, at 74–75; Ba, *supra* note 180, at 59–60; Kane, *supra* note 180, at 88–91; Mndeme, *supra* note 180, at 96–97.

205. See, e.g., HARPER, *supra* note 203 (providing one of the broadest overviews of how to improve customary justice systems and summarizing what should be done under certain circumstances). While this study does list the challenges of the possible interventions, it ends each section only with an overview of “entry points” and “good practices,” without a clear summary of what should or should not be done under particular conditions. See *id.* at 52–55, 75–80, 90–95.

206. See, e.g., Mennen, *supra* note 182, at 9–13 (compiling plenty of data about activities and issues but leaving implicit the nexus between the program and the goal of enhancing access to justice for the poor). See Cohen et al., *supra* note 121, at 108 for further discussion of this problem.

207. See, e.g., ANA PATRICIA GRAÇA, THE ASIA PACIFIC RIGHTS AND JUSTICE INITIATIVE: REGIONAL ASSESSMENT 24 (Andrea Davis ed., 2009), available at <http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dgttf/regional-assessment-the-asia-pacific-rights-and-justice-initiative/UNDPRegionalBookfinal.pdf>; Sage et al., *supra* note 183, at 15 (reiterating principles and lessons rather than evaluating what works and what does not based on existing data).

208. See Channell, *supra* note 146, at 154 (“Reports are written primarily by people who are paid by those who receive the reports. The writer’s job is to provide information in such a way as to meet the client’s expectations. One of those expectations is implementation success that will justify ongoing or new funding. . . . Thus, there are few reports detailing mistakes or failures. Where they exist, implementers know how to describe them as successes.”).

209. See, e.g., GRAÇA, *supra* note 207, at 41, 48 (maintaining that “ownership is necessary” and that reformers should “forge closer links between traditional and formal justice”); Maru, *supra* note 156, at 280 (suggesting that reformers “be attentive to particularities of sociolegal context” and that “reforms have a greater chance of success when they grow out of local initiative”); Sage et al., *supra* note 183, at 16–17 (discussing “institutional reform as an ‘interim process’” and advocating “deep engagement with local contexts”).

interventions and their contexts,<sup>210</sup> and better and more independent evaluations.<sup>211</sup> Some studies concurrently advocate a combined bottom-up and broader state-centered strategy under the Rule of Law paradigm, stating that the two cannot be unlinked.<sup>212</sup>

When these recommendations are read together with the challenges listed in the Bottom-Up and Customary Justice literature, the ambition of these paradigms in practice is evident. How can Bottom-Up and Customary Justice paradigms operate together with the Rule of Law paradigm in a bottom-up manner? Furthermore, how can it be alleged that there will be broader impacts beyond pilot projects, with more resources invested in research and evaluation? And finally, how does any of this overcome structural resistance from local power asymmetries and lack of local support and capacity?

#### D. Questions About Post-Conflict State-Building

Rule of law promotion in the context of post-conflict state-building has elicited many critical questions.<sup>213</sup> Many of the problems mentioned in the literature on justice programs in the context of state-building resemble issues discussed by rule of law critics more generally. First is a lack of local knowledge and a mismatch between program goals and local conditions.<sup>214</sup> The lack of local knowledge in these types of foreign-

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210. See, e.g., ASIAN DEV. BANK, *supra* note 58, at 24 (noting the shortage of rigorous evaluation and research that can inform legal empowerment strategies and activities and of related efforts in such fields as governance and rule of law); *id.* at 124 (stressing the need to work with local experts to identify legal empowerment issues and constraints in a given country or working context); Maru, *supra* note 156, at 278-279 (reviewing calls by different experts in the field for more in-depth and sophisticated research); Sage et al., *supra* note 183, at 17-18 (arguing that governance and justice work should rely less on “tool kits” and “best practices” and more on local research capacity and highlighting the importance of deep engagement with local context to avoid the “common risk of importing assumptions about what should be, or jumping to an idealized end product”).

211. See, e.g., GRAÇA, *supra* note 207, at 47.

212. See, e.g., UNITED NATIONS DEV. PROGRAMME, ACCELERATING ACCESS TO JUSTICE FOR HUMAN DEVELOPMENT: A UNDP RULE OF LAW INITIATIVE 1 (2010), available at <http://www.unrol.org/files/RoL-A2J%20GP%20Annual%20Report%202010%20DGG%20BDP.pdf> (integrating rule of law building with access to justice).

213. See, e.g., Bruce Baker & Eric Scheye, *Access to Justice in a Post-conflict State: Donor-Supported Multidimensional Peacekeeping in Southern Sudan*, 16 INT’L PEACEKEEPING 171, 177 (2009) (“However assessed, it is clear that a state-centric justice system will take more than a generation to establish and even then will, most likely, be unsustainable. There is also little likelihood that the state system will provide much safety and justice to most southern Sudanese of the current generation.”).

214. See, e.g., Bâli, *supra* note 94, at 445 (stating that the American-backed rule of law projects “have relied on best practices compilations and a hodge-podge of local customs and traditions . . . . Patched together from a number of other contexts, but fundamentally informed by a conception of political and legal institutions appropriate for a Western-style liberal democracy, these projects have

dominated justice projects in post-conflict situations is similar to (but more extreme than) that in average law and development projects carried out in more stable contexts. The post-conflict context draws a particular type of foreign expert, who, because of the lower pay, higher risk, and shorter contracts, is more junior and has only a small amount of narrow work experience but who must face an often complex local situation, having very limited local knowledge and insufficient time to gain any, and operating in relative social seclusion.<sup>215</sup>

Second, echoing the Rule of Law critics, post-conflict justice sector reforms are too focused on building state institutions and pay insufficient attention to whether these are accessible and meet societal needs and to existing alternative non-state systems.<sup>216</sup> Citizens in post-conflict situations may deeply distrust police institutions and have trouble accessing newly constructed state courts (because of distance, cost, and unfamiliarity).<sup>217</sup> Consequently most citizens do not go to the police or state courts and resort to local, non-state forms of police and dispute management.<sup>218</sup> Thus, citizens do not necessarily need state-delivered justice; they might prefer improved local systems to expensive and inaccessible state systems.<sup>219</sup>

There are, however, also problems that are particular to the challenging conditions of post-conflict countries. First is a lack of basic security, which is a vital precondition for the functioning of justice institutions.<sup>220</sup> When public insecurity is pervasive, it is very difficult to develop respect for the law, let alone a law that has only recently been established by a foreign occupying power seen as responsible for the insecurity.<sup>221</sup> Additionally, especially in countries that have experienced long-term conflict and that have a fragile state government, there is very little capacity to staff the newly established justice institutions.<sup>222</sup> Apart

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little lasting impact or success in the local contexts in which they have operated.”).

215. Elena Baylis, *Tribunal-Hopping with the Post-conflict Justice Junkies*, 10 OR. REV. INT’L L. 361, 364–65, 373–76, 383–84, 386 (2008).

216. See, e.g., Baker & Scheye, *supra* note 213, at 171 (questioning assumptions about the need and acceptability of post-conflict rebuilding of the justice sector).

217. *Id.* at 177–79 (detailing how Southern Sudan citizens have deep distrust for the police and see little use for courts).

218. *Id.*

219. *Id.*

220. See Chesterman, *supra* note 99, at 83 (detailing the difficulties of administering justice in a challenging security environment).

221. Bâli, *supra* note 94, at 445.

222. See, e.g., Baker & Scheye, *supra* note 213, at 177 (depicting the problems faced by the development experts in Southern Sudan when judges could not communicate in English and proved to be trained predominantly in Sharia law); Chesterman, *supra* note 99, at 84–86 (discussing the difficulty



from human resources, rule of law efforts in post-conflict conditions are hampered by a lack of basic infrastructure and financial resources, as justice institutions often lack offices, phones, and sufficient salaries.<sup>223</sup> This leads to widely asked questions about the sustainability of justice reforms, especially when donor funds dry up.<sup>224</sup> Additionally, there are problems associated with competing donor agendas and with a lack of coordination—between agencies involved with police and those involved with the courts, for example—that are further exacerbated by the post-conflict context.<sup>225</sup>

Perhaps the trickiest and most important problem is legitimacy, which is particularly difficult to achieve during a foreign occupation following a war initiated by one of the occupiers, more so if the war was preventive. The U.S.-led invasion of Iraq is a recent example of this.<sup>226</sup> Many believe that the occupation was illegal under international law and thus lacked international and local legitimacy.<sup>227</sup> Nor was there a clear mandate under international law to build a nation and to introduce market liberalization as the United States has done.<sup>228</sup> Additionally, some argue that the United States took the wrong course of action in Iraq by dismantling the country's main state institutions during the first 13 months of occupation, which created widespread insecurity.<sup>229</sup> Such problems of legitimacy are

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of finding suitable judges in Timor-Leste after the UN tried to follow a locally-oriented approach to rule of law building).

223. Baker & Scheye, *supra* note 213, at 171–72, 176; Chesterman, *supra* note 99, at 86.

224. Baker & Scheye, *supra* note 213, at 176.

225. Banks, *supra* note 107, at 161–65.

226. Bâli, *supra* note 94, at 438 (“Having razed much of Iraq’s state infrastructure to the ground through bombing campaigns and de-Baathification purges, the U.S. occupation authority may not be regarded by most Iraqis as a benevolent power to which they are able to transfer the loyalty and commitment that would be required to instill a new political culture in Iraq.”).

227. Bâli, *supra* note 94, at 466 (“[T]he invasion and occupation of Iraq are widely seen as illegal under international law. . . . [T]he United States has consistently ignored the international law of belligerent occupation . . . [which] requires an occupying power to retain the status quo with respect to the legal and political system of the occupied territory, except where modifications are strictly necessary for reasons of security. . . . [T]he Bush administration made it clear from the outset that these requirements would not be observed and that an interim constitution would be put in place, designed precisely to transform the Iraqi legal and political system.”).

228. *Id.* at 439, 441 (“[T]he establishment of a market economy takes the U.S. reconstruction strategy in Iraq well beyond any internationally recognized legal authority.”).

229. *See id.* at 435 (characterizing the U.S. strategy as having “[w]asted the potential political capital of legitimacy that the United States (and the transitional Iraqi authorities) had initially enjoyed after the fall of the Baath regime, and [having] squandered a valuable opportunity to lay institutional foundations for the rule of law in Iraq.”). This echoes insights from UN missions in Kosovo and East Timor. *See* Hansjörg Strohmeyer, *Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor*, 95 AM. J. INT’L L. 46, 60 (2001) (“The United Nations’ most recent experiences in transitional administration demonstrate that justice, and law enforcement

compounded if the occupying force seeking to build rule of law exempts itself from the new law's jurisdiction. For instance, during the occupation, the United States afforded impunity to its military and civilian personnel, undermining its own nascent rule of law efforts on the ground.<sup>230</sup> All of this raises the question of whether the rule of law can be created under occupation, especially given the difficulty of developing respect for a law that lacks legitimacy.<sup>231</sup>

As with the rule of law, the ultimate problem of limited impact may be the high level of ambition of post-conflict state-building. Establishing the rule of law in the name of building a nation and a national identity in post-conflict situations is an unfeasible goal that requires long term "incremental, indigenous, socio-political" processes that, "if at all feasible, will have to be undertaken autonomously."<sup>232</sup>

Some authors have sought recommendations on how to deal with the many disappointments regarding the impact of post-conflict justice programs. A key recommendation is to combine state-centered rule of law building with efforts to engage with local systems and notions of justice still existent in fragile states.<sup>233</sup> The state could serve as a regulator of the parameters of justice and ensure the accountability of all justice institutions.<sup>234</sup> In addition, reforms would enhance "the voice of the users and recipients of justice and security services to enable them to be participants in the delivery of the service they receive."<sup>235</sup> This approach,

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more broadly, must be seen as effective from the first days of an operation. The inability to react swiftly to crime and public unrest, particularly in postconflict situations when criminal activity tends to increase, and the failure to detain and convict suspected criminals promptly and fairly, can quickly erode the public's confidence in the United Nations.").

230. Bâli, *supra* note 94, at 467–68.

231. Bâli, *supra* note 94, at 448; *see also* Chandler, *supra* note 93, at 577 (challenging, in the context of UN rule of law efforts in Bosnia, the idea that "the 'rule of law' can be imposed from outside," finding that external pressure is undermined by limited legitimacy); *id.* at 580 (questioning the international consensus for establishing the rule of law before establishing political processes and contending that such an approach inherently creates a rule of law that is external to the local politics and thus without legitimacy and impact).

232. Bâli, *supra* note 94, at 436–37 ("The ambition and breadth of such projects, frequently undertaken in the name of such laudable goals as democratization and liberalization, lie at the root of their failure.").

233. *See, e.g.,* Baker & Scheye, *supra* note 213, at 182 ("A positive step would be for the donor-supported multi-dimensional peacekeeping operations to look beyond its traditional western 'state-building' model . . . and actively support local justice networks . . . . Such a move would not diminish the role and function of the state . . . ."); Bâli, *supra* note 94, at 448 (contending that rule of law in post-conflict regions should build on local legal traditions, taking examples from the Arab world in the case of Iraq).

234. Baker & Scheye, *supra* note 213, at 182.

235. *Id.*

however, replicates the agenda of powerful colonialists, whereby soft or indirect support for legal change was used to foster demand for formal institutions that replicated those of the colonial administration.<sup>236</sup>

So here again, in response to the criticism of existing practices, highly thoughtful recommendations have been made that increase the level of ambition. Not only must law and development build state legal institutions in the most difficult of circumstances, but it must do so in a bottom-up manner and while enabling local justice providers.

#### E. Transitional Justice Challenges

The practice and impact of transitional justice has also received much scholarly attention. Most critics call for a more comprehensive approach to transitional justice that would clearly only enhance the level of ambition.

Some positive impacts have been reported. One empirical comparative study, using a database of transitional justice processes drawn from 150 countries over thirty years, measured the impact of three types of transitional justice: amnesties; prosecutions; and truth commissions on democratization, rule of law building, and ending violence.<sup>237</sup> The findings show that any transitional justice mechanism improves democracy more than none at all but that only trials and prosecutions have a positive impact on rule of law development.<sup>238</sup> Claims by advocates that transitional justice responses lead to peace and reconciliation appear at this point to represent hopes for a happy ending and not evidence-based politics on which the international community can count.<sup>239</sup>

Most other studies question whether transitional justice has the desired impact and can meet its broad goals.<sup>240</sup> Some have even found that some forms of transitional justice, especially amnesties, have a negative

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236. See Jayasuriya, *supra* note 159, at 158 (noting that support of customary law can risk “authoritarian possibilities” given their vulnerability to manipulation by colonialists and reformers alike); see also Porter, *supra* note 179, at 168–71 (noting that there can be an insidious use of legal pluralism by the “reformer” to manufacture calls for the reform that the reformer wishes to inject or effect).

237. See Tricia D. Olsen et al., *Does Transitional Justice Work? Latin America in Comparative Perspective*, GLOBAL STUD. REV., Fall 2009, <http://www.globality-gmu.net/archives/1789>.

238. *Id.*

239. *Id.*

240. See, e.g., Laurel E. Fletcher et al., *Context, Timing and the Dynamics of Transitional Justice: A Historical Perspective*, 31 HUM. RTS. Q. 163, 168–69 (2009) (“[T]here is little empirical data to support the common assumptions that underlie the utility either of criminal trials for alleged perpetrators or truth and truth/reconciliation commissions.”); Olsen et al., *supra* note 237 (summarizing data that indicates that singular post-conflict mechanisms do not work well and that only holistic approaches are effective for ensuring democracy and human right protection).

impact,<sup>241</sup> as they create popular dissatisfaction and anger when those responsible for past atrocities are not held legally accountable or when they receive only relatively minor punishments.<sup>242</sup> Transitional justice processes that focus on restoration without delivering retribution cannot get popular support from victims,<sup>243</sup> who complain that their own trouble making ends meet stands in stark contrast with the lavish amounts of money spent on trials and perpetrators.<sup>244</sup> Victims often care more for their own pressing socioeconomic needs, partly made worse by the impact of the atrocities, and thus for restitutive justice.<sup>245</sup> Sierra Leone interviewees “perceived excombatants as being in a better position to earn a living than amputees, who in many cases do not have shelter, let alone jobs and a means of meeting their basic needs.”<sup>246</sup> Victims’ geographical remoteness further undermines legitimacy, as victims are unable to attend trials or commission hearings, which are often held in major cities or even abroad.<sup>247</sup> Thus, transitional institutions’ key goal to counter the denial of past atrocities may be undermined, especially where the institutions lack broad legitimacy.<sup>248</sup>

Another key legitimacy issue is the unbalanced geopolitical nature of transitional justice interventions, which have predominantly focused on non-democratic states in the global south, with only limited attention to gross human rights violations in democratic Western contexts, such as the treatment of indigenous populations in Australia, Canada, and the United States.<sup>249</sup> Legitimate transitional justice seems extra difficult in the context

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241. Olsen et al., *supra* note 237.

242. See Lambourne, *supra* note 110, at 37–38 (interviewing individuals in Timor-Leste, Rwanda, and Cambodia and finding, for example, that the people of Cambodia petitioned the UN to establish an international tribunal).

243. *Id.* at 38.

244. *Id.* at 42 (“[A Cambodian] genocide survivor asked, ‘Why should the former Khmer Rouge live so freely and be received . . . in a five-star hotel? This makes a lot of people angry.’”).

245. *Id.* (“[T]he Tribunal was seen as not responding to the material needs of victims and witnesses (providing no compensation, restitution, healthcare or other financial assistance).”).

246. *Id.* at 43.

247. See *id.* at 40 (describing the remote location of the ICTR and the inability for most Rwandan victims and survivors to experience the proceedings).

248. Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 HUM. RTS. Q. 95, 108 (2008) (“Where the legitimacy of transitional justice institutions is successfully challenged, this undermines their impact in addressing denial [of past atrocities].”); see also Jamie Rowen, *Social Reality and Philosophical Ideals in Transitional Justice*, 7 CARDOZO PUB. L. POL’Y & ETHICS J. 93, 116 (2008) (noting that policymakers could fulfill a goal of transitional justice and reach more individuals by creating and contributing to the community).

249. See Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, 29 THIRD WORLD Q. 275, 280–81 (noting that, in Western democracies, there are also prevalent instances of systematic human rights abuses in which justice has been long denied and pointing out that by focusing

of foreign occupation.<sup>250</sup> The United States-organized trial for former Iraqi president Saddam Hussein is a prime example.<sup>251</sup> Problems included Hussein being denied access to a defense attorney during the first year of the trial, the murder of three defense attorneys during the trial, and the forced resignation of a biased judge.<sup>252</sup> Furthermore, the trial was organized at an undisclosed location at a U.S. military base on Iraqi soil, with unidentified judges, and the defendant was held incommunicado for months prior to trial, with no public access and limited access for journalists.<sup>253</sup> The trial raises the question of whether “justice” is even possible in the context of illegitimate and unjustified occupation.<sup>254</sup>

Meanwhile, many scholars criticize existing transitional justice practices for not going far enough, arguing that trials, truth commissions, and amnesties often fail to address the underlying socioeconomic and cultural causes of conflict and the broader grievances that citizens suffer in the post-conflict area.<sup>255</sup> Scholars claim, for instance, that transitional justice ignores the impact of conflict and of mass human rights violations on developmental inequalities and that existing inequalities continue or are made worse, even following a transitional justice intervention.<sup>256</sup> This has led many transitional justice reforms “to underrate the gendered and socioeconomic ramifications of violent conflict” and to be “heavily influenced by the international legalist paradigm, which focuses on generating elite and mass compliance with international humanitarian

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on non-Western developing countries, transitional justice “is vulnerable to the general challenge that critics raise against the supposed universalism of human rights”).

250. See M. Cherif Bassiouni, *Post-conflict Justice in Iraq: An Appraisal of the Iraq Special Tribunal*, 38 CORNELL INT’L L.J. 327, 359 (2005) (“No norm or precedents exist in international law for an occupying power, the legitimacy of which is in doubt, to establish an exceptional national criminal tribunal.”).

251. See Press Release, Amnesty Int’l, Iraq: Amnesty International Deplores Death Sentences in Saddam Hussein Trial (Nov. 5, 2006) (quoting Malcolm Smart), available at <http://www.amnesty.org/en/library/asset/MDE14/037/2006/en/0292f7f1-f9d1-11dd-b1b0-c961f7df9c35/mde140372006en.pdf> (“[Saddam Hussein’s] overthrow opened the opportunity to restore this basic right [to a fair trial] and, at the same time, to ensure, fairly, accountability for the crimes of the past. It is an opportunity missed . . . and made worse by the imposition of the death penalty.”); Bâli, *supra* note 94, at 432–33 (“[T]he absence of certain procedural protections and the imposition of the death penalty may undermine transitional justice in Iraq.”).

252. Bâli, *supra* note 94, at 432–33.

253. *Id.* at 432.

254. See Nagy, *supra* note 249, at 279.

255. *Id.* at 276 (“[P]redominant views [in transitional justice] construct human rights violations fairly narrowly to the exclusion of structural and gender-based violence.”).

256. See, e.g., *id.* at 280; RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR 151 (2002) (“[T]he prevalent liberal-democratic ideal . . . tends to favour freedom and liberty over equality.”).

norms.”<sup>257</sup>

Scholars also point to the historical nature of most proceedings, which pay too little attention to what is happening in the post-conflict era, when violence often persists or even increases.<sup>258</sup> The position of women and children in these post-conflict situations is particularly worrisome.<sup>259</sup> A fixation on the past also obscures post-conflict justice problems arising from foreign occupation, which can be detrimental to the legitimacy of transitional justice.<sup>260</sup> Justice issues that arise under military occupation simply do not fall under the scope of the transitional justice effort, which is directed at pre-occupation atrocities.<sup>261</sup>

As with other paradigms, scholars also criticize the limited local embedment and usage of local knowledge.<sup>262</sup> The legal framing predominant in transitional justice “at times is detrimentally abstracted from lived realities” and invites the implementation of “one size fits all, technocratic and decontextualized solutions” that are “[s]teeped in Western liberalism, and often located outside of the area where conflict occurred.”<sup>263</sup> Any solution proposed in response to such criticism only further pushes the level of ambition, just as with the other paradigms. Similar to the critics of the Rule of Law and State-Building paradigms, scholars call for placing extra priority on an understanding of the local context and an adaptation of interventions to it<sup>264</sup>: for instance, by using local courts and local customary justice institutions, which have better reach into the local community, instead of international tribunals or foreign-influenced and newly established domestic courts.<sup>265</sup>

Practitioners and scholars support a broadened concept of transitional justice that can, for instance, “integrat[e] social, economic and cultural

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257. Nagy, *supra* note 249, at 278 (internal quotation marks omitted).

258. See, e.g., *id.* at 280.

259. See *id.*; NAHLA VALJI, UNITED NATIONS DEV. FUND FOR WOMEN, A WINDOW OF OPPORTUNITY?: MAKING TRANSITIONAL JUSTICE WORK FOR WOMEN 2–3 (2010), available at [http://international-uj.com/pdf/0701\\_MakingTransitionalJusticeWorkForWomen\\_en.pdf](http://international-uj.com/pdf/0701_MakingTransitionalJusticeWorkForWomen_en.pdf) (arguing for the need to implement a gender-sensitive transitional justice agenda in order to preclude entrenching the violation of human rights and perpetuating the marginalization of women).

260. Nagy, *supra* note 249, at 280.

261. *Id.*

262. du Plessis & Ford, *supra* note 111, at 90 (“[E]very country situation is unique, ‘reconciliation’ in particular is something that needs to be defined within the specific cultural context, and so a number of more general cautions need to be expressed in approaching foreign models and comparative experience.”).

263. Nagy, *supra* note 249, at 275–76 (internal quotation marks omitted).

264. See, e.g., Fletcher et al., *supra* note 240, at 170.

265. See Rowen, *supra* note 248, at 117.

rights.”<sup>266</sup> More particularly, there is a call to connect previous experience to reform through using, where possible, local practices to shore up “accountability, acknowledgement, socioeconomic justice and political justice.”<sup>267</sup> Such an ambitious approach proposes addressing past abuses, while also seeking to cauterize them.<sup>268</sup> Techniques invoked include truth commissions and war crimes tribunals.<sup>269</sup> It is argued that such an integrated approach might forestall repeats of violence.<sup>270</sup> This goal, aspiring to engineer peace and redress, “implies long-term, sustainable processes embedded in society and adoption of psychological, political, economic, as well as legal, perspectives on justice.”<sup>271</sup> These ideals require legal processes to engineer peace and harmony.

If these suggestions are followed, Transitional Justice becomes Transformative Justice, based on the broadest notion of social, economic, political, and legal transformation following years or decades of gross human rights violations, war, state failure, and structural socioeconomic inequality.<sup>272</sup> Of course, in an ideal world in which law and development has omnipotent knowledge, power, and local legitimacy, these ideas would form a comprehensive agenda for change that tackles the interrelated problems. In reality, however, the expansion of the already highly ambitious transitional justice agenda just does not look feasible and might even undermine the original restorative and retributive functions of transitional justice institutions.<sup>273</sup> Other, down-to-earth voices point out that “transitional justice is a long-term process and that a state may only be adequately prepared years later to take on the challenge of adjudicating trials or exposing wrong-doing through a truth commission.”<sup>274</sup>

All of these suggestions mostly point again to a broadening of the already overburdened law and development paradigm.<sup>275</sup> Just as with Rule

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266. Duthie, *supra* note 112, at 303.

267. Lambourne, *supra* note 110, at 47.

268. See Rama Mani, Editorial, *Dilemmas of Expanding Transitional Justice, or Forging the Nexus Between Transitional Justice and Development*, 2 INT’L J. TRANSITIONAL JUST. 253, 259–60 (2008).

269. *Id.* at 258.

270. Lisa J. Laplante, *Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence Through a Human Rights Framework*, 2 INT’L J. TRANSITIONAL JUST. 331, 355 (2008).

271. Lambourne, *supra* note 110, at 28.

272. See *id.* at 45 (advocating for such a model).

273. Duthie, *supra* note 112, at 306–07 (“Attempts to address . . . development[] may unrealistically raise and then frustrate expectations of victims and society, or they may simply be a waste of time and resources.”).

274. Fletcher et al., *supra* note 240, at 219.

275. *But see id.* at 170 (stating that one should always first ask “what, whether, and when

of Law, Bottom-Up Justice, Customary Justice, and State-Building, critics of the impact of the Transitional Justice paradigm seek to improve it by broadening its scope and thus paradoxically creating an even higher level of ambition.

#### CONCLUSION: AMBITION VS. IMPACT

The consecutive expansion of law and development paradigms has produced a field that seeks to establish some of the most ambitious forms of social engineering, aiming not only to build a rule of law that can foster development but also to change unfavorable local practices that might undermine such development, doing so amid ethnic conflict and in failed states. Increasingly, there are questions about and criticism of its ability to achieve these lofty goals. Surprisingly, instead of lowering its ambitions, the field has only continued to add to them. Furthermore, the field consistently refuses to engage with the question of whether there is a moral rationale for the interference in local regimes by the concerned donor West.

There is not a simple response to these bedrock questions. Arguably, the answers vary by context and depend on the moral position taken by reformers to their initiatives. The recipients' demand for and experience of aid is consistently underexplored, however, despite the increased investment in measuring impacts.

The criticism that the law and development project is limited in its imagination to recasting old approaches and is incapable of moving beyond the politics of the West and its interests is not new.<sup>276</sup> More recently, some have argued that the development strategy of using "soft law" to shape or engineer local calls for or responses to legal reforms is reclaiming earlier strategies used by colonial masters.<sup>277</sup> It is also argued that the current conception of Law and Development involves the West constructing and using development as a strategy to entrench dependency, although the mission exhibits Christian faith-based zeal.<sup>278</sup> If these arguments are

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transitional justice interventions should be initiated"); Duthie, *supra* note 112, at 306–07 (warning against unfeasible transitional justice interventions, lest they get caught up in the development paradigm and in redistribution and socioeconomic rights issues).

276. Upendra Baxi, *The Colonialist Heritage*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 46 (Pierre Legrand & Roderick Munday eds., 2003) (arguing that the ways in which comparative law has been constructed serve to entrench Western worldviews and interests and noting that law and development's approach to legal reform is not dissimilar to that of myriad colonialists).

277. See Jayasuriya, *supra* note 159, at 158; Porter, *supra* note 179, at 168–71.

278. See JENNIFER L. BEARD, *THE POLITICAL ECONOMY OF DESIRE: INTERNATIONAL LAW, DEVELOPMENT AND THE NATION STATE* (2007) (arguing that the Western notion of development derives from early Christian notions of sin, salvation, and redemption and ought not to be assumed to emanate from imperialist traditions).



accepted, there is no space for law and development other than as a Western neo-colonial project.

Development as a tool of subjugation is also decried by scholars who criticize international law as a tool of oppression,<sup>279</sup> particularly for its role in entrenching global poverty. In particular, there is a robust criticism of international trade norms and practices.<sup>280</sup> While there is much rhetoric on the importance of consultation and the local ownership of aid,<sup>281</sup> the seven paradigms outlined above are almost without exception designed by outsiders and aspire to see a Western model of law made available to a broader community. The focus on impact has been at the cost of a focus on the “demand” side of law and development.<sup>282</sup> The politics of aid also manufactures and entrenches Western self-interest in the export of legal systems similar to those in donor countries.<sup>283</sup> This continues despite the vulnerability of such exports to criticism arising from the recent global financial crisis and despite the perceived shortcomings of the institutional legal matrices of the West.<sup>284</sup>

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279. See, e.g., Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 1–2 (1999).

280. See, e.g., SARAH JOSEPH, *BLAME IT ON THE WTO?: A HUMAN RIGHTS CRITIQUE* 141–80 (2011) (arguing that the WTO has entrenched poverty in developing states and shows no sign of adopting policies that might redress the imbalance of trade power between developed and developing states); SUNDHYA PAHUJA, *DECOLONISING INTERNATIONAL LAW: DEVELOPMENT, ECONOMIC GROWTH AND THE POLITICS OF UNIVERSALITY* 254–62 (2011) (arguing that decolonization produced the developmental nation-state, which has since become bound by Western states invoking international law, itself a postcolonial phenomenon); Anne Orford, *Beyond Harmonization: Trade, Human Rights, and the Economy of Sacrifice*, 18 LEIDEN J. INT'L L. 179, 197–98 (2005) (arguing that trade agreements demand the sacrifice of public values both in favor of the global market and as the price of inclusion in the community of believers).

281. See, e.g., Yasutami Shimomura & Izumi Ohno, *Introduction and Overview*, in TRUE OWNERSHIP AND POLICY AUTONOMY: MANAGING DONORS AND OWNING POLICIES 1, 2–9 (Izumi Ohno ed., 2005) (defining ownership to include the capacity to determine aid agendas locally); cf., Kweku Ampiah, *The Discourse of Local Ownership in Development: Rhapsodies About “Self-Help” in Japan’s Economic Assistance to Africa*, 32 JAPANESE STUD. 168, 179 (2012) (noting that “self-help” in Japan is “more an exhortation than a well-defined and coherent principle”).

282. John Gillespie & Pip Nicholson, *Taking the Interpretation of Legal Transfers Seriously: The Challenge for Law and Development*, in LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS, *supra* note 170, at 1, 6 (“Privileging the knowledge and strategies for reform from the West means less emphasis, if indeed any emphasis, is placed on the demands of aid recipients. The focus is squarely on the supply side of the aid equation.”).

283. See Frank Schimmelfennig, *A Comparison of the Rule of Law Promotion Policies of Major Western Powers*, in RULE OF LAW DYNAMICS: IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE 111, 113 (Michael Zürn et al. eds., 2013) (arguing that there are similarities in the rule of law promotion policies of the United States, the EU, the UK, France, and Germany, each of which embraces a top-down promotion of the rule of law with an emphasis on “formal and institutional aspects”).

284. See, e.g., David K. Linnan, *The New, New Legal Development Model*, in LEGITIMACY, LEGAL DEVELOPMENT AND CHANGE: LAW AND MODERNIZATION RECONSIDERED, *supra* note 86, at 21, 23–24

Other models of legal development have arisen in the last decade. The Japanese International Cooperation Agency, for example, advocates a much more locally-based and locally-developed system of legal assistance,<sup>285</sup> arguably eschewing the Washington consensus.<sup>286</sup> The role that China and Korea will play in the law and development domain over time is currently unclear, although interest has increased in their activities.

These criticisms exist independently of any criticism premised on impact and suggest that the sovereignty of nations, particularly those nations with worldviews (such as socialism or Islamic and other religious systems of law) that are different from those of Western donors, are marginalized or coopted.<sup>287</sup> These criticisms, which take international law and development and Western-style law and development as their focus, have merit. This Article, however, is more concerned with the emergence of a co-evolutionary pattern in law and development (ambition and criticism of impact) and calls for a return to a humbler and more locally-owned experience of law in development before anyone decries its very essence.

Effectively, by combining an ever-growing level of ambition with increased concern for impact, the field of law and development has become its own “straw man.” Simply by expanding its promises with each paradigm and with each expansion within each paradigm, the field has set itself up for more—ironically, self-inflicted—criticism. At times, the field seems to have reverted to its 1970s form, leaving scholars within the field “self-estranged” once again, being both key participants in and chief critics of the field.<sup>288</sup> The notable difference, however, is that this time the ambitious endeavor has not been stopped by the publication of a single critical paper<sup>289</sup> or even by the virtual tsunami of critical studies that have

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(“[P]olicy focus has been shifting toward an ill-defined “post-Washington Consensus,” understood more in opposition to neoclassical economics and Anglo-American capitalism post 2008 financial crisis, rather than articulating any clear policy stance.”).

285. Taro Morinaga, *Legal Technical Cooperation by Japan: Who We Are and What We Do*, ICD NEWS: LAW FOR DEVELOPMENT, Dec. 2010, at 1, 10, available at <http://www.moj.go.jp/content/000110665.pdf> (“[P]roviding support for legal and judicial reform means to support the efforts undertaken by developing countries to develop their legal and judicial systems” (internal quotation marks omitted)).

286. Knieper, *supra* note 171, at 114.

287. See, e.g., Nicholson & Low, *supra* note 167, at 19, 26 (reporting that actors in the legal development sector in Vietnam and Cambodia experienced a lack of donor respect for local sovereignty).

288. Trubek & Galanter, *supra* note 1, at 1062–64.

289. See Trubek & Santos, *supra* note 14 (describing the consequences for the original U.S. Law and Development movement following the publication of Trubek & Galanter’s paper on self-estrangement).

come out over the last decade or so. Quite the contrary, there has been an expansion rather than a retraction of law and development.

To understand this, it is first necessary to look at the relationship between the ambition and limited impact of law and development. Ambition and limited impact have acted as co-evolutionary factors. More ambition has created a demand for demonstrable impact, while mixed impact evaluations have created a space for scholars and practitioners to launch new ideas and concepts, which have in turn fostered additional ambition. Scholars and practitioners have played a double role, supporting and developing new paradigms while criticizing older ones. This has created a constant situation of self-estrangement, and yet ironically this self-estrangement has acted as a catalyst for further activity in the field.

The co-evolution of ambition and limited impact should be understood both externally and internally to the field of law and development. The expanded role for law in an expanded concept of development has placed the once-obscure field of law and development closer to the center of major national and international political debates, including those over state-building, peace-building, good governance, human rights protection, development cooperation, and economic growth. This means that law and development in particular and development more generally are no longer controlled by those inside them but are increasingly subject to external geopolitical forces. As such, those criticizing law and development's limited impact and even its high level of ambition are unable to counter the broader forces that sustain the paradigms and practices they seek to criticize. Thus there is growing ambition combined with growing criticism.

Furthermore, the players in the field of law and development have expanded exponentially over time. This merely adds to the pressures on the field and renders an implosion, as seen in the 1960s, much less likely. Today many major multilateral organizations are engaged in the field, either directly through projects or indirectly through loans.<sup>290</sup> In addition, there are now a host of bilateral donors actively engaged in rule of law, bottom-up justice, and customary justice activities.<sup>291</sup> These new players

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290. Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL*, *supra* note 4, at 253, 268; *Briefs: Loans and Technical Assistance*, ASIAN DEV. BANK, <http://www.adb.org/news/briefs> (last visited May 29, 2014).

291. See INTERNATIONAL COOPERATION DEPARTMENT, RESEARCH AND TRAINING INSTITUTE, MINISTRY OF JUSTICE, *TECHNICAL ASSISTANCE IN THE LEGAL FIELD 12-13* (2003) (on file with authors) (offering a list of JICA supported aid projects); HERBERT KÜPPER, *STRUCTURES OF JAPANESE AND GERMAN INTERNATIONAL LEGAL CO-OPERATION: WITH FORMERLY SOCIALIST COUNTRIES COMPARED* (Nagoya Univ. Ctr. for Asian Legal Exch., CALE Discussion Paper No. 5, 2011), *available at* [http://cale.law.nagoya-u.ac.jp/\\_userdata/DP%20No.%205.pdf](http://cale.law.nagoya-u.ac.jp/_userdata/DP%20No.%205.pdf); Nicholson with Pitt, *supra* note 170,

are involved across the full spectrum of activities.

As discussed above, many involved in law and development do not simply criticize but also offer suggestions or recommendations. Those recommendations introduce extra ambition into the already overburdened field by broadening existing paradigms and even introducing new ones, most notably Bottom-Up Justice and Customary Justice. Such recommendations are often based on criticism of existing approaches for their failure to tackle underlying socioeconomic and cultural structures. And following this analysis, scholars and practitioners thus propose to move from a formal institutional, legalistic orientation towards a local, bottom-up, informal, socioeconomic, and cultural orientation. While external political forces continually demand institutional approaches oriented towards building highly visible, macro-level, formal institutions, scholars and practitioners have learned time and again that it is vital to build upon existing local practices and knowledge. The combination of the two has created an ugly hybrid that contains the ambitions of both but is still largely driven by the top-down, quick-working practices of external politics. This in turn draws more internal criticism and is followed by another round of recommendations that raise expectations even further.

While, of course, most of the criticisms and suggestions discussed here are valid and highly important on their own, the overall picture is one of unbounded ambition and too limited understanding, from those both outside and inside the field, of the feasibility of law and development interventions.

Law and development must thus embrace realism, pragmatism, and humility. If the field continues as it does today, widespread cynicism or indeed despair will result. Improving the functioning of legal institutions in developing countries is a “worthy” endeavor that will continue regardless of doubt, criticism, or theoretical debate. Law and development can only be undertaken, however, with specific goals and targets in each collaboration or intervention; broad paradigms or approaches should be avoided. The political forces external to the field will keep some of the existing paradigms—most notably Rule of Law, State-Building, and Transitional Justice—in place for the time being. But scholars and

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at 209–19 (listing a range of bilateral donors involved in court-oriented legal reform in Vietnam). On the motivations that impact donor activity, see Alberto Alesina & David Dollar, *Who Gives Foreign Aid to Whom and Why?*, 5 J. ECON. GROWTH 33, 33–34 (2000) (arguing that politics and strategic concerns, rather than economic or policy concerns, explain the targets of donor aid); Peter J. Schraeder et al., *Clarifying the Foreign Aid Puzzle: A Comparison of American, Japanese, French, and Swedish Aid Flows*, 50 WORLD POL. 294, 319–23 (1998) (arguing that a host of factors, including ideological alignment and strategic and trade interests but not including humanitarian concerns, influenced Japanese, French, U.S., Swedish, and Canadian support for foreign aid to Africa during the 1980s).

practitioners should resist the temptation to put their efforts under these flags uncritically.

Law and development must not seek to improve the development of the world by building and expanding major paradigms or by claiming to be some magical panacea based on correlations of simplistic law and development indicators. Rather it must adopt a combination of patience, long-term commitment, and incrementalism, implementing interventions that have specific and feasible goals and whose impact is checked through randomized trials and in-depth fieldwork by independent scholars.<sup>292</sup>

Furthermore, and just as significantly, there is a need to empower the recipients of aid. The aid “monologue,”<sup>293</sup> driven and shaped by the West, needs to acknowledge the right of countries to determine their own reforms and to own them locally.<sup>294</sup> This may involve a return to technical assistance alone (albeit reimagined to admit contests of ideas),<sup>295</sup> enabling local stakeholders to debate the shape of their own reform trajectory.

Finally, just as Developmental Economics is arguably being transformed by the down-to-earth realism of Poor Economics,<sup>296</sup> perhaps Law and Development can turn into a pragmatic and empirically-driven Poor Justice that does not assume the supremacy of the West and its donors in development activities and that acknowledges the complex political and economic landscape into which it presumes to travel.

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292. See ABHIJIT V. BANERJEE & ESTHER DUFLO, *POOR ECONOMICS: A RADICAL RETHINKING OF THE WAY TO FIGHT GLOBAL POVERTY* 14–16 (2011) (arguing that randomized trials should be used to verify and refine developmental practices).

293. PAUL MUS, *LE DESTIN DE L'UNION FRANÇAISE: DE L'INDOCHINE A L'AFRIQUE* 53 (1954) (characterizing the colonial project as a monologue in which the colonial subjects are not engaged).

294. See Gillespie & Nicholson, *supra* note 282, at 6 (arguing that there is a focus on the supply side of law and development that marginalizes local recipients).

295. See Newton, *supra* note 165, at 29–30 (suggesting a critical approach to the role of law could feature in technical legal assistance).

296. See BANERJEE & DUFLO, *supra* note 292, at 14–16 (outlining the need for experimental approaches to development in economics).