

## Avatars of Rule of Law and Access to Justice Some Asian Aspects



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### INTRODUCTION

The Asia-Pacific region is amongst the most diverse in the world.<sup>1</sup> The variety of legal systems in the region is immense. Apart from long-standing traditional and/or religious institutions of justice, which continue to survive, most of Asia-Pacific has been under the yoke of colonial powers. Consequently, official or state-sanctioned legal systems in the region carry legacies of the Common Law and Civil Law (in its French, Dutch, Portuguese, and Spanish variants). As both these legal families have a functional similarity in the importance they give to individualism, liberalism, and personal rights, they can be called western law, and, in the context of Asia, colonial law. Some Asian countries (notably China, Lao PDR, North Korea, Vietnam) have adopted 'socialist law', and some other Islamic countries (Afghanistan, Bangladesh, Brunei, Maldives, Malaysia, Pakistan, Indonesia, and the province of Aceh.) have *shariah* law in force, alongside provisions drawn from western law in the state legal system.<sup>2</sup> Legal pluralism is a prominent feature of all Asian

<sup>1</sup> The regional classification adopted by the United Nations Development Programme places 48 countries and territories in the Asia-Pacific region, excluding Central Asian and Arab region countries.

<sup>2</sup> *Shariah* in Arabic is literally 'the path to the watering hole' and is based on the documented traditions and teachings of the Prophet Muhammad and on

legal systems, with traditional and customary institutions persisting alongside western law and hybrids of different systems. A comparative study of six countries (People's Republic of China, India, Japan, Malaysia, Republic of Korea, and Taipei, China) of the role of law in economic development found that differences in legal systems between Asia and the West have diminished, particularly in the substance of the law, and such differences that remain are similar to those that remain in the West in their legal systems and the structure of their economies.<sup>3</sup>

This is an essay that expresses an optimism of will in the face of pessimism of analysis about prospects for advancement of an appropriate form of the rule of law and access to justice to people who now bear the burdens of burgeoning inequality, discrimination, and multiple injustices. The optimism is based on the opportunity that a combination of two powerful sets of ideas offers for bringing justice to those who suffer injustices on a daily basis. These two ideas are human rights and human development. The pessimism is posited on the constraints endemic in the ruling idea of the age—neoliberalism. Forces that favour liberalization, privatization, and globalization can be inimical to initiatives that seek to persuade states to make dispensation of justice to people and the protection and promotion of human rights the first charge on their budgets. The pessimism is also grounded on the possibility that the military and money-power might well postpone the time when the powerful ideas of human rights and human development replace the ruling orthodoxy of neoliberalism.

This essay is structured somewhat historically. It regards the advent of western law through colonialism as the first avatar, which brought into the governance of developing countries a particular conception of the rule of law. It explains how that conception of the rule of law served colonial purposes of exploitation and discrimination by being formally positivist and instrumentalist. It next focuses on the period of decolonization and the historic articulation

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custom. There is an emphasis on social justice, fair distribution of wealth, and practical compassion, apart from the more familiar prescriptions of punishments for criminal offences, some of which reflect norms prevalent when the faith was founded.

<sup>3</sup> Katharina Pistor and Philip A. Wellons, 'The Role of Law and Legal Institutions' in *Asian Economic Development, 1960-1995* (Manila: Oxford University Press and Asian Development Bank, 1998).

of human rights, and describes how human rights have given substantive content to a conception of the rule of law that embodies respect for human dignity and human rights principles. It then discusses a phase of high optimism associated with 'liberal legalism', when well-meaning people sincerely believed that the export of western legal principles and institutions could create humane and prosperous societies in countries emerging from colonialism, which eventually ended in disillusionment. The next section focuses on the positive and negative aspects of a period when ideas of state-led transformation of societies held sway, labeled here as 'legal radicalism', and the disillusionment that these radical ideas produced in their turn. It next describes the powerful hold of neoliberalism over important international institutions that have development and poverty-reduction as their primary objectives. The reaction to the consequences of 'structural adjustment' and the genesis of the idea of human development is next discussed. The conjoining of human development and human rights in the human rights-based approach to development is then presented, more as a vision of possibilities, than as experience with empirical results. Finally, in conclusion, the UN conception of the role of the rule of law is elaborated, with the hope, more than an expectation, that an avatar of the human rights-based approach to human development can succeed in securing the means and ends of justice.<sup>4</sup>

#### AVATAR OF WESTERN LAW THROUGH COLONIALISM

The colonial antecedents of legal systems in Asia severely stack up the odds against achieving access to justice for poor and otherwise disadvantaged people, decades after the end of colonial rule. The legal systems established by colonial powers were designed to hold down the colonies and the 'natives' and development meant exploitation of the natural resources of colonized countries. It is often claimed that the rule of law is a valuable legacy of western colonial powers to Asian countries. This is an ahistorical view that regards the rule of law as a set of autonomous norms and institutions exported from the west to the east, which their recipients could either cherish or squander. Colonial legal institutions followed conquests and were designed to bolster colonial power, authority, and order.

<sup>4</sup> *Avatâra* in Sanskrit means 'descent' and typically refers to ten avatars of the Hindu God Vishnu taken to restore *dharma* or righteousness on earth.

The law was subservient to the colonial state and the rhetoric of the rule of law was intended for consumption by people in the capitals of the colonial powers, not to legitimize colonial rule in the eyes of their subjects. By its very nature, the colonial state ruled out the strict autonomy of law and separation of law and politics, which is now regarded as a characteristic of the liberal legal order. The dominant posture of the colonial state was inevitably repressive.

Colonial legal institutions were always subordinate to political power dictated from their respective metropolitan capitals, and lacking a consensual basis within the colonies, colonial authority rested on the coercive power of the state. Colonial regimes introduced the notion of legality, but the rules were always accommodated to political expediency.<sup>5</sup> Colonialism gave the legal systems established by the state pre-eminent monopoly authority in respective countries, so that even though customary and traditional institutions of dispute resolution were permitted, the final arbiter of justice was always the state.

The conception of the rule of law in the colonial era was *formal* and *instrumentalist*. In the formal sense it means that all those whom the law addresses should know what they are meant to do and should be able to do what is required by law. Some of the conditions mentioned in the literature, which a rule of law system, in the formal sense, should fulfill are generality, publicity, prospectivity, non-contradictory, stability, congruence, conformability, and clarity.<sup>6</sup> South Africa under *apartheid* had a formal and instrumentalist rule of law system and whether its laws were fair, just or democratic are not germane to this particular conception of the rule of law.<sup>7</sup> It is

<sup>5</sup> For instance, the British Raj introduced the law on mortgage, but when the city merchants, who had loaned money to profligate landowners (*zamindars*), moved to seize land pledged as collateral, the Raj created an institution called 'Court of Wards' to take over the mortgaged land, ostensibly to make it profitable again so that the loan could be eventually repaid. The *zamindars*, of course, were the mainstay of the British Raj who could not be alienated, even though the development of commerce motivated enactment of the law on mortgage.

<sup>6</sup> A classic citation for the formal features of a rule of law system is Lon L. Fuller, *The Morality of Law* (Yale University Press, 1969 revised edition), pp. 33–94.

<sup>7</sup> A prominent exponent of this conception of the rule of law was my tutor at Balliol College, Joseph Raz, who maintained that the rule of law 'is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.' Joseph Raz, 'The Rule of Law and its Virtue', *Law Quarterly Review*, 93 (195), 1977, p.196.

understandable why colonial regimes instituted a rule of law system that could accommodate discriminatory laws and serve the instrumental purposes of advancing commercial interests of colonial powers, safeguarding revenues from their colonial possessions and retaining control over land.<sup>8</sup> In Indonesia, for instance, the Agrarian Law of 1870 stipulated that the state had an ownership interest in all lands (*staat domein*) that were obtained from the imposition of *domein verklaring*. Europeans and foreigners from the East were entitled to *eigendom* (property rights) on land, while indigenous peoples were only given *agrarisch eigendom* (primary customary usage rights). The doctrine of *vacuum domicilium* was advanced as a justification for seizing land, deemed to be undeveloped and hence unoccupied, even though it was in the possession and care of people who were conveniently regarded as savages.<sup>9</sup> Land has remained a key element in the discourses on rule of law, access to justice, and development, from the colonial era till the present day in Indonesia.

In India in the 1980s, inspired by Jeremy Bentham, British utilitarians codified common law principles and enacted the Penal Code, Civil Procedure Code, Criminal Procedure Code, and formalized the law of contract.<sup>10</sup> With respect to personal laws related to marriage, adoption, inheritance of property, etc., the British assumed that they must necessarily derive legitimacy, not from the differing variety of customs in different parts of the country, but from some authoritative interpretation of fundamental religious texts.<sup>11</sup>

<sup>8</sup>For a more detailed account of colonial purposes served by legal institutions, see Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400-1900* (Cambridge University Press, 2002).

<sup>9</sup>The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organisation that their usages and conceptions of rights and duties are not to be reconciled with the institutions of the legal ideas of civilised society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law, and then to transmute it into the substance of transferable rights of property as we know them." Judicial Committee of the Privy Council, *In Re Southern Rhodesia* (1919) AC 211, pp. 233–4.

<sup>10</sup> See Eric Stokes, *The English Utilitarians and India* (Oxford: Clarendon Press, 1959).

<sup>11</sup> Traditionally in India, the ruler's duty or *rajadharmā* was not to resolve disputes in accordance with any of the ruler's prescriptive laws, but to achieve justice by resorting to Dharma depending on the customs and duties of individuals involved in particular disputes. The intrinsic nature of traditional

So they commissioned scholars to translate texts and published a text which judges could use<sup>12</sup> and so dispense with the need to consult pundits.<sup>13</sup> This led to serious distortions in the application of personal laws. Hindu and Islamic jurisprudence are more holistic in their respective perspectives on issues to be considered important in the settlement of disputes, whereas western law is more restrictive about what it regards as strictly *legal* issues having a bearing on disputes. Europeans were treated differently under the law from natives. The conclusion reached by Martin Chanock in his masterly survey of colonial law in British East and Central Africa applies equally to Asia: 'The colonial period provided no foundation for the use of law by citizens in defense of their rights.' It simply produced 'individualization without rights and bureaucratization without the rule of law.'<sup>14</sup>

The western law legacy that a legal system should have a single source of authority has made it difficult to empower non-state legal institutions with final authority, or even to grant them equal standing with state law. Non-state institutions may better reflect indigenous norms and values and thus be more meaningful to people in dispensation of justice. Among the persistent challenges in improving access to justice in countries with rich traditions of indigenous dispute-settlement institutions is the fundamental one of overcoming the monopoly of the state, not over forms of violence, but over law and justice.

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Hindu law did not privilege the state as the maker of laws. This was a very different system of law from standard models of the West.

<sup>12</sup> This resulted in *A code of Gentoo laws, or, Ordinations of the pundits*, translated from Persian by Nathaniel Brassey Halhed, and published in London in 1776.

<sup>13</sup> In a letter written in 1785, William Jones (judge in the Supreme Court of Bengal) wrote: 'I am proceeding slowly, but surely in the study of Sanskrit, for I can no longer bear to be at the mercy of our pundits, who dole out Hindu Law as they please, and make it at reasonable rates when they cannot find it readymade.' *The Letters of Sir William Jones*, 2 volumes, edited by Garland Cannon (Oxford: The Clarendon Press, 1970), p. 683. William Jones translated the *Manusmriti* (Code of Manu) from Sanskrit to English and published it in Calcutta in 1794. The India Office in London projected this work as the authority on Hindu jurisprudence, even though it never governed the actual practices of Hindu communities in pre-British India.

<sup>14</sup> Martin Chanock, 'The Law Market: The Legal Encounter in British East and Central Africa' in W.J. Mommsen and J.A. De Moor (ed.), *European Expansion and Law* (Oxford: Berg, 1992), pp. 279–306, at p. 304.

## AVATAR OF HUMAN RIGHTS

When the United Nations was established in 1945, a third of the world's population was living in colonies and territories that were not self-governed. The UN Charter (chapter 11, articles 73 and 74) set out the principles, including self-determination, that have guided decolonization efforts. In December 1960, the UN adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (resolution 1514-XV), affirming that alien subjugation, domination, and exploitation of peoples constitutes a violation of fundamental human rights. The end of the World War was also the beginning of the end of the colonial empires in Asia. The nationalist movement in India, led by Mahatma Gandhi, forced Britain to recognize that it had little choice but to prepare itself for the transfer of power. The Government of India Act of 1935 set the mould in which the Constitution of independent India was fashioned between 1947 and 1949.<sup>15</sup> In August 1945, Indonesian nationalist leaders, Sukarno and Hatta, proclaimed independence, but the formal recognition of independence by the Dutch came some years later after considerable bloodshed and bitter wars fought on the archipelago by Indonesian nationalists and the Allied forces, immediately after the surrender of Japan's occupation forces, and the Dutch who had re-entered Indonesia. Likewise, the French did not give up on Vietnam till after further bloodshed, following the Viet Minh declaration of independence in September 1949, which ended in 1954 when Vietnam was divided into North and South Vietnam as also happened with Korea.

By far the most significant event, which influenced the contents of constitutions of many of the newly-independent states has been the adoption of the Universal Declaration of Human Rights by the UN General Assembly on 10 December 1948. The Declaration affirmed that the 'inherent dignity and the equal and inalienable rights of all members of the human family is the foundation of

<sup>15</sup> The most accessible account of the framing of India's constitution (thanks to Oxford University Press' policy of reprinting 'classics') remains Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Oxford: The Clarendon Press, 1966). 'Red' Austin, with initial encouragement and support from the Ford Foundation, and other institutions, wrote a second richly informative and readable book, *Working a Democratic Constitution: The Indian Experience*, (New Delhi: Oxford University Press, 1999).

freedom, justice and peace in the world'. It let the world know that everyone has rights to freedom and equality, life and security, nationality, representation, education, work, family, and freedom of thought, expression and belief. Article 10 of the declaration provided a universal basis for access to justice: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' The Universal Declaration of Human Rights also influenced a significant change in the conception of the rule of law, introducing substantive elements that differentiate it from the formal, instrumental conception that was dominant in the colonial era.

In January 1959, a congress of the International Commission of Jurists, inaugurated by India's Prime Minister, Jawaharlal Nehru, redefined the conception of the Rule of Law. The Delhi Declaration on rule of law in a Free Society recognized that:

Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.<sup>16</sup>

Lucien G. Weeramantry summed up the Delhi Congress' contribution of three new elements to the concept of the rule of law:

First, that the individual is possessed of certain rights and freedoms and that he is entitled to protection of these rights and freedoms by the State; second, that there is an absolute need for an independent judiciary and bar as well as for effective machinery for the protection of fundamental rights and freedoms; and third, that the establishment of social, economic and cultural conditions would permit men to live in dignity and to fulfil their legitimate aspirations.<sup>17</sup>

<sup>16</sup> International Commission of Jurists, New Delhi, India, 5-10 January, 1959. Accessed at: [http://www.icj.org/article.php3?id\\_article=3088&id\\_rubrique=11&lang=en&print=true](http://www.icj.org/article.php3?id_article=3088&id_rubrique=11&lang=en&print=true)

<sup>17</sup> Lucian G. Weeramantry, *International Commission of Jurists: The Pioneering Years* (Kluwer Law International, 2000), p. 53.



None of constitutions of newly-independent Asian countries have attempted reversions to pre-colonial ideas of law and state. All of them opted for continuity with colonial legal systems. But many of these constitutions have been embellished with ideas inspired by the Universal Declaration of Human Rights.<sup>18</sup> The alien character of western legal systems in Asian countries continues to pose pathologies in institutions of justice.<sup>19</sup> Nevertheless, the enrichment of the formal and instrumentalist conception of the rule of law with the normative principles of human rights and freedoms has opened up avenues for improved access to justice in the post-colonial period. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), adopted in 1966 and brought into force from 1976, have been ratified by most, but not all, Asian countries, further enriching the normative basis for the rule of law and access to justice in those countries.<sup>20</sup>

The United States has not ratified the ICESCR (though it voted for it in 1966, and President Carter signed it in 1977). United States ratified the ICCPR after entering several reservations and declaring that its articles were not 'self-executing'. The division of human rights into two covenants reflects the Cold War ideological lines between the West and the Communist regimes at that time. The former insisted that human rights should only include those rights that give people freedom from state interference (negative liberties) and

<sup>18</sup> See Marc Galanter, 'The Aborted Restoration of 'Indigenous' Law in India', *Comparative Studies in Society and History* 14: 53–70 (1972).

<sup>19</sup> Oliver Mendelsohn, 'The Pathology of the Indian Legal System', *Modern Asian Studies*, 15 (823), noted: 'The proceedings are extraordinarily dilatory and comparatively expensive; a single issue is often fragmented into a multitude of court actions; execution of judgements is haphazard; the lawyers frequently seem both incompetent and unethical; false witness is commonplace; and the probity of judges is habitually suspect. Above all, the courts are unable to bring about a settlement of the disputes that give rise to litigation.'

<sup>20</sup> As of July 2007, Asia-Pacific countries that are not yet state parties to the ICCPR are Bhutan, Brunei, China, Fiji, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Pakistan, Palau, Papua New Guinea, Samoa, Singapore, Tonga, and Vanuatu. China and Nauru have signed the treaty but have not yet ratified it. The ICESCR has not been ratified by Bhutan, Brunei, Fiji, Kiribati, Malaysia, Marshall Islands, Micronesia, Myanmar, Palau, Papua New Guinea, Samoa, Singapore, Tonga, and Tuvalu. Pakistan has signed this treaty, but has not ratified it.

could not include positive rights of the kind that are included in the ICESCR, and the latter opted for priority to be given to economic and social rights.<sup>21</sup>

The human rights avatar has been an abiding source of inspiration for the human rights-based approach to all development programmes in general and to initiatives intended to improve access to justice in particular.

#### AVATAR OF LIBERAL LEGALISM

United States' foreign policy during the decades of the 50's and 60's provided the impetus to the 'law and development' movement initiated by American scholars and lawyers fanning out to developing countries and bringing with them the vision of 'liberal legalism'. US foreign policy aimed to encourage development along capitalist, liberal-democratic lines and forestall the appeal of communist or socialist ideologies in countries characterized by severe social and economic inequalities. Liberal legalism could also be called 'legal orientalism' because it was the product of an uncritical and unquestioned assumption of western superiority.<sup>22</sup>

Legal development assistance provided by the United States government and also private philanthropies like the Ford Foundation was intended to protect civil and political liberties, encourage participation of people in decisions that mattered to them, and 'modernize' developing countries. 'Liberal legalism' (the expression was coined by two leading scholars of the law and development

<sup>21</sup> In 1993, the UN World Conference on Human Rights set to rest the Cold War ideologies by insisting that Universal Declaration of Human Rights constitutes a common standard of achievement. Article 5 of the Declaration states:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

<sup>22</sup> In what has become a classic, Edward Said, *Orientalism* (New York: Vintage Books, 1979), describes how the self-image of the West as superior was created with reference to the oriental 'Other' that lacked what the west possessed.

movement, Marc Galanter and David Trubek)<sup>23</sup> took law and legal institutions of the West as the ideal model for promoting the values of freedom, participation, and human well-being and sought to bring legal education, laws, and institutions in developing countries into conformity with western law. By the mid-seventies, disillusionment had set in and leading American scholars were ready to declare the law and development movement dead (ironically, an ethnocentrism is evident even in the declaration that the law and development was dead).

At the time when Trubek and Galanter published their critique of liberal legalism, a staff member of the Ford Foundation had initiated a study of the law and development movement in Latin America, which resulted in the publication of a devastatingly hard-hitting book titled 'Legal Imperialism'.<sup>24</sup> This study documents the negative consequences of liberal legalism. The instrumentalist view of law enabled dictators and power elites in Latin America to increase their suppression of poverty-stricken people. Increased formalization of the legal process increased the costs of protest, deflecting impulses for positive change. The legal profession proved to be an ally of conservative forces, enabling the 'haves' to come out 'ahead'.<sup>25</sup> The sense of self-estrangement of law and development scholar-activists was genuine. Hopes of promoting fundamental freedoms and liberal democracy through law reforms and institutional changes were also sincere.

A positive, sincere spirit of inquiry with the motive of progress also characterized the Florence project on access to justice.<sup>26</sup> This

<sup>23</sup> David Trubek and Marc Galanter, 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', *Wisconsin Law Review* (1974).

<sup>24</sup> James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison, WI: University of Wisconsin Press, 1980).

<sup>25</sup> See Marc Galanter, 'Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change', *Law and Society Review*, 9(1), 1974.

<sup>26</sup> The general editor of the mammoth Florence Access to Project was Mauro Cappelletti. The project resulted in the following publications: Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (vol.1, 2 books, 1978); Mauro Cappelletti and John Weisner (eds), *Promising Institutions* (vol. II, 2 books, 1978 and 1979); *Emerging Issues and Perspectives* (vol. III, 1979); *The Anthropological Perspective: Patterns of Conflict Management: Essays in the Ethnography of Law* (Alphen aan den Rijn, Netherlands and Milan: Sijthoff/Giuffrè vol. IV, 1979). These were followed by Bryant Garth, *Neighbourhood Law*

project identified three 'waves' in the development and evolution of access to justice. The 'first wave' of access to justice, which emerged in the post-war period, was legal aid. The 'second wave' was the representation of 'diffuse interests'. This included class actions and public interest litigation and the emergence of public interest centres. The third wave goes beyond case-centered advocacy. It represents a broader panoply of less adversarial and less complex approaches, including changes in forms of procedure, changes in the structure of courts, or the creation of new types of courts, the use of paraprofessionals, and changes in the substantive law itself.

The third wave of access to justice contains a clear expression of the idea that legal strategies are not enough to solve the access to justice problems of the poor. There is greater emphasis on multi-disciplinary approaches to access to justice problems in which the justice system develops partnerships with other institutional sectors such as health care and social services. The third wave entails developing partnerships between the justice system and community groups, drawing on the resources of communities and affected groups to better define the nature of justice problems and to develop more durable solutions to them. Access to justice thus becomes an important part of the shift towards a more citizen-centered and community-focused justice system. Clearly, the 'third wave' holistic approaches to access to justice are more consonant with development as they focus on the 'little injustices' experienced by poor people for which there is little redressal available through formal justice systems. In many parts of the world the earlier waves of access to justice are still awash. Adversarial and litigious approaches of the traditional justice system remain important. They are only very slowly being combined with 'holistic' approaches, recognizing restorative justice approaches in criminal justice and various forms of alternative dispute resolution in civil justice.

#### AVATAR OF RADICAL LEGALISM

For scholars in the Marxist tradition ('dependency' theorists belong to this tradition), the role of law was always secondary to that played

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*Firms for the Poor* (Alphen aan den Rijn, Netherlands, Sijthoff and Noordhoff, 1980); and Mauro Cappelletti (ed.), *Access to Justice and the Welfare State* (Firenze, Italy: European University Institute, 1981).

by the forces and relations of production in the economic realm. The failure of liberal legal transplants to take root and 'mirror' western liberal democratic societies in the South was cause for neither disillusionment nor surprise. The dependency school of law and development does not accord autonomy, *a la* liberal legalism, to law and expects the state and ruling classes to use the law to serve instrumental purposes. However, functionalism, the fulcrum of explanation Marxist theory, eliminates purposive actors and purposes are present as only as predicates without subjects.<sup>27</sup> In contrast to Marxist ideology, which regards law and state as part of the 'superstructure' determined by the 'economic base', Marx's own concrete and empirical analysis of contract law, the factory acts, and laws related to the transformation of pre-capitalist production, serves to demonstrate that fundamental changes in production and class relations can be brought about through law.<sup>28</sup> The possibility of empirical analysis of the extent to which the law is created and moulded by the capitalist class and production relations, and the extent to which the law can change production relations and privilege the weak makes it possible to take a more pragmatic and less ideological approach to law and development.<sup>29</sup> Scholars and activists in the South were disposed to adopt this stance, motivated by an optimism of will to surmount the pessimism of their analysis.

In the development language of the Cold War era, First World countries, especially United States, turned away from supporting the law and development movement, preferring to prop up (for strategic, geo-political reasons) military and authoritarian regimes in developing countries. But in Third World countries innovativeness in ideas about development, rule of law and access to justice, and an

<sup>27</sup> See F.G. Snyder, 'Law and Development in the Light of Dependency Theory', *Law and Society Review*, 14(723), 1980, provides an excellent overview and critique of this literature.

<sup>28</sup> See G. Young, 'Marx on Bourgeois Law' in S. Spitzer (ed.), *Research in Law and Sociology*, vol. 2, pp. 133–67.

<sup>29</sup> The pragmatic stance is evident in James C.N. Paul & Clarence J. Dias, 'State-Managed Development: A Legal Critique', in Anthony Carty (ed.), *Law and Development* (New York: New York University Press, 1992), p. 279. They note that while the law can be used to create state monopolies over land and natural resources on which the poor are dependent for their livelihoods, 'law may be differently used in order to promote self-reliant participation and more equitable allocation of resources.'

optimism of will about the role of law in development persisted despite First World pessimism about prospects for recreating developing countries into its own image.

In many Third World countries (countries of the South, in post-Cold War development language), national scholars and practitioners (more numerous than international actors, even at the height of the law and development movement) strived to put the law to active, purposeful use with symbolic and instrumental consequences for poor and disadvantaged people. Indeed, it is possible that the respite from international interest and support served to create the space for developing countries to fashion their own devices to make the law serve the needs of development.

India witnessed a great deal of creative jurisprudence seventies onwards, resulting in refashioning constitutional law into a 'weapon of the weak', giving them access to courts (but not necessarily to justice), which had hitherto been monopolized by 'men with long purses'.<sup>30</sup> The editors of a recent comparative study of courts as an institutional voice for the poor have noted (citations omitted):

The case of India is undoubtedly exemplary in this respect. As we know, when judges encountered difficulties in assuming jurisdiction over—what they believed were—socially relevant cases, they invented the epistolary jurisdiction, which allowed virtually everyone to have access to court. When they encountered problems in finding the evidence they needed, they created special commissions of inquiry. When they did not find adequate remedies in the traditional legal repertoire, they created new ones. And when they feared that their orders would not be properly enforced over time, they created monitoring agencies in charge of enforcing their orders.<sup>31</sup>

<sup>30</sup> Ironically, while the Supreme Court of India found the courage to become activist in its attempts to aid the exploited and the needy only after the state of emergency was lifted in 1977, during that emergency interregnum, India's parliament added to the constitution's Directive Principles of State Policy a new principle: *Equal justice and free legal aid—The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.* (Article 39A).

<sup>31</sup> 'Courts, Rights and Social Transformation: Concluding Reflections' in Roberto Gargella, Pilar Domingo, and Theunis Roux (eds), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* (, U.K: Ashgate, 2006), p.

Upendra Baxi, in a magisterial critique of judicial activism in India, points out that when Indian judges came up with the conundrum of justifying judicial review of duly enacted amendments to the constitution, they adverted to the history of the Weimar Constitution, and judges in Pakistan resorted to a creative synthesis of Hans Kelsen and the *shariah*, to evolve an extraordinary multi-cultural jurisprudence in order strike down a law that banned the participation of political parties in general elections. And he adds:

Justices of the North are not so cosmopolitan; they do not regard the South as capable of providing exemplarship in constitutional interpretation. The same hold true for Juristic Theory of a John Rawls, Jurgen Habermas, or Ronald Dworkin, who develop, by manifest or implied intent, global prescriptive theories of concerning the judicial role. The anglophile, or more 'progressively' Eurocentric, South leaders of the Bar, Bench and academia remain enamoured of this grand narrative tradition, under which judicial activism in the South (exemplified most by India) presents itself as a deviant case. Our notions of what judges may, and ought, to perform are thus liable to be held within the dominant North juristic traditions (citations omitted).<sup>32</sup>

Unlike the era of law and development support, when the Ford Foundation was proactive in extending support to law departments in the Delhi and Benares universities and the Indian Law Institute in the 1980s the Foundation's programme was reactive.<sup>33</sup> Significant advances had already been made by civil society groups in the country in taking advantage of avenues opened up by the judiciary to seek justice for their constituent groups. The Ford Foundation's

268. For a more detailed account of the India case in the same volume, see R. Sudarshan, 'Courts and Social Transformation in India', chap. 7.

<sup>32</sup> See 'The Avatars of Indian Judicial Activism: Explorations in the Geographies of [In]justice', in S. K. Verma and Kusum Kumar (eds), *Fifty Years Of The Supreme Court of India: Its Grasp and Reach*, (New Delhi: Oxford University Press, 2003), pp. 156–209, at p. 168. Baxi singles out Justices V.R. Krishna Iyer, P.N. Bhagwati, O. Chinappa Reddy, and D.A. Desai as the 'foundational judicial actor' without whom social action litigation could not have come into existence.

<sup>33</sup> India was not covered in the appraisal of the Ford Foundation's justice-support programmes in Mary McClymont and Stephen Golub (eds), *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World* (New York: Ford Foundation, 2000), pp. 297–313.

Human Rights and Social Justice Programme, inaugurated in 1982, provided support to selected civil society organizations to develop further their demonstrated capacity to protect the rights of groups that they served.<sup>34</sup> The government did not encourage international aid to programmes related to the rule of law and access to justice throughout the eighties and nineties. India's Foreign Contributions Regulation Act, 1976 bars political parties, journalists, and media organizations from receiving foreign donations and prescribes prior permission of the government for grants restricted to cultural, economic, educational, religious or social programmes.

On the advice of key Indian activists interested in public interest law (consistently called 'social action litigation'), the Ford Foundation proposed support for the Public Interest Legal Support and Research Centre (PILSARC) in April 1987. The initial intention was to commence a 'public interest bar' in India, drawing upon the idealism and energy of young lawyers who would want to take up public interest causes instead of entering into private practice. The government turned down the proposal. Justice V.R. Krishna Iyer insisted that in order to ensure that justice is not denied to any citizen by reason of economic or other disabilities, the government should supplement meagre allocations with foreign contributions of the kind that it readily accepted for other development purposes. The proposed grant was eventually approved only in 1992 and it enabled PILSARC to undertake several strategic interventions, through fruitful partnership with social action groups, particularly those that had constituencies of highly vulnerable and exploited tribal communities. However, the objective of creating a cadre of public interest lawyers, who would not run the risk of conflict of interest on account of their representation of powerful private clients, remains unrealized.

India may never develop an institution like the Legal Resources Centre in South Africa, an independent, client-based, non-profit

<sup>34</sup> Several of the civil society groups, and some individuals, listed by Baxi (supra, n. 26) as 'Actors, Constituencies' (at pp.173-5) were supported by the Ford Foundation, including AWARE, Hyderabad (its training centre, Bhagawatipuram, was named in honour of Justice P.N. Bhagwati), Banwasi Sewa Ashram, Mirzapur, U.P., Consumer Action Group, Chennai, Consumer Education and Research Centre, Ahmedabad, People's Council for Social Justice, Ernakulam (founded by Justice V.R. Krishna Iyer), SOCO Trust, Madurai, SPARC (in association with Mahila Milan and National Slum-dwellers' Federation), Mumbai.



public interest law clinic, which uses law as an instrument of justice. This is partly because only those lawyers who also have powerful private and political clients are taken seriously by judges, even in cases involving the rights of the poor and disadvantaged. Consequently, the same lawyers who defend politicians reputed to be corrupt, and multinational corporations (such as Union Carbide, whose Bhopal pesticide plant gas leak in 1984 brought death and suffering to thousands), are called upon to defend the rights of impoverished and exploited groups. It does call for some optimism of will to expect that India's elites, including leading members of its Bar, will retain and nourish constitutional faith in the possibility of access to justice for all people.<sup>35</sup>

The literature on the rule of law and access to justice does less than justice to some of these achievements in the South, unmediated by international assistance from the North. If Indian judges and lawyers had been guided by the views of their counterparts in western common law courts, they would not have ventured to judicially enforce a set of 'Directive Principles', explicitly declared by the constitution to be 'non-justiciable'.<sup>36</sup>

Civil society groups, lawyers, judges, and scholar-activists in many Third World countries have made innovative advances. These are inadequately documented, and they happened when the North's interest in rule of law and access to justice in the South was at its lowest. In his thoughtful reflections on developments in the sixties and seventies, Issa Shivji noted:<sup>37</sup>

<sup>35</sup> Charles R. Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (Chicago: The University of Chicago Press, 1998) noted (p. 95): 'Indian interest group system is fragmented, the legal profession consists primarily of lawyers working individually, not collectively, and the availability of resources for noneconomic appellate litigation is limited'.

<sup>36</sup> Louise Arbour, UN High Commissioner for Human Rights, remarked: 'Certainly in legal theory I've never been persuaded that there's any reason to be so distant from the enforceability and justifiability of economic and social rights, and yet there are not a lot of Western courts that are willing to seriously engage on these issues.' Interview with Frances Williams, *Financial Times*, London, 8 January 2008, accessed at [http://www.ft.com/cms/s/0/720d1cc2-b6f3-11dc-aa38-0000779fd2ac.html?nclick\\_check=1](http://www.ft.com/cms/s/0/720d1cc2-b6f3-11dc-aa38-0000779fd2ac.html?nclick_check=1)

<sup>37</sup> I. Shivji, 'Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law', *Law, Social Justice & Global Development Journal*, vol. 1, 2003, <http://elj.warwick.ac.uk/global/issue/2003-1/shivji.html>

Some of us who adopted more radical approaches, albeit still within Western traditions, did not perhaps subscribe wholly to Thompson's thesis that the rule of law was an 'unqualified good'<sup>38</sup>. Yet we, too, saw in bourgeois law and legality, space for struggle to advance the social project of human liberation and emancipation. Law, we argued, was a terrain of struggle; that rule of law, while expressing and reinforcing the rule of the bourgeoisie, did also represent the achievement of the working classes; that even though bourgeois democracy was a limited class project, it was an advance over authoritarian orders and ought to be defended. The legal discourse, whether liberal or radical, thus remained rooted in Western values, exalting the Law's Empire . . . The sixties and seventies saw an upsurge in interdisciplinary approaches to law. We crafted new courses like 'law and development', read theories of imperialism and demonstrated against the war in Vietnam. Imperialism was on the defensive.

The avatar of legal radicalism, on the whole, failed to fulfil its emancipatory and liberating mission. It was aligned to economic policies that increased the discretionary powers of government rulers in developing countries. This meant that the law was called upon not to impose limits on the powers of rulers, but to proliferate administrative regulations, licenses, permits, controls, and quotas. The 'soft state' syndrome, which Gunnar Myrdal famously elucidated in his classic work, *Asian Drama*,<sup>39</sup> entailed disrespect for the rule of law. Officials could circumvent rules and regulations at their discretion and apply them inconsistently. It entailed collusion between politicians and civil servants and corruption. Governments became the source of, not the solution to, people's problems. In Indonesia, this phenomenon is alliteratively alluded to as KKN—*Korupsi, Kolusi, Nepotisme*.

<sup>38</sup> This is a reference to E.P. Thompson's famous repudiation of the Marxist historical materialist view of law as 'superstructure. In *Whigs and Hunters: Origins of the Black Act* (New York: Pantheon, 1975), at the very end of a brilliant Marxist critique of the Black Act (which extended the death penalty to rebellious acts such as deer-stealing, tree cutting, and burning by agrarian rebels, whose traditional legal rights to hunt and forage on common lands had been curtailed by enclosure laws), Thompson wrote (p. 226): 'the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.' And he added (p. 265–66): 'If the (rule of law) rhetoric was a mask, it was a mask which Gandhi and Nehru were to borrow, at the head of a million supporters.'

<sup>39</sup> *Asian Drama: An Inquiry into the Poverty of Nations*, A Twentieth Century Fund Study (New York; Pantheon, 1968).

Disillusionment with legal radicalism was poignantly put by Yash Ghai:

The practical difficulty was that while the radical lawyers were denouncing law as a tool of oppression, and asking for its abolition, the reality seemed to be that the government was frequently disregarding the law . . . My experience seemed to point to the problems when the fidelity to the law weakens—the arrogance of power, the corruption of public life, the insecurity of the disadvantaged.<sup>40</sup>

Yash Ghai went on to point out that constitutions in Africa were manipulated for the aggrandizement of power.<sup>41</sup>

Despite disappointment with developments in developing countries, in the international arena the spirit of legal radicalism espoused by developing countries remained an inspiration for the adoption by the UN of the Declaration on the Right to Development in 1986.<sup>42</sup> The preamble to the declaration reflected the radicalism of the seventies and the role of Third World intellectuals such as Samir Amir and Raúl Prebisch. It referred to:

the elimination of the massive and flagrant violations of the human rights of the peoples and individuals affected by situations such as those resulting from colonialism, neo-colonialism, apartheid, all forms of racism and racial discrimination, foreign domination and occupation, aggression and threats against national sovereignty, national unity and territorial integrity and threats of war.

<sup>40</sup> Yash Ghai, 'Legal Radicalism, Professionalism and Social Action: Reflections on Law Teaching in Dar es Salaam' in I. Shivji (ed.), *Limits of Legal Radicalism: Reflections on Teaching Law at the University of Dar es Salaam* (University of Dar es Salaam Press, 1986), p. 26.

<sup>41</sup> In India, Prime Minister Indira Gandhi amended the constitution during the 1975-77 emergency era to remain in power. The Supreme Court of India, at that time, upheld the suspension of *habeas corpus* and fundamental rights guaranteed in the constitution. At a time when in other parts of the world military rulers simply threw constitutions into the dustbin, India's adherence to the constitution and law, even during the emergency era, is noteworthy. For a fascinating account of this period India's constitutional history, see Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow: Eastern Book Company, 1980).

<sup>42</sup> The Declaration on the Right to Development was adopted by the United Nations General Assembly, resolution 4/128 on 4 December 1986. <http://www.unhchr.ch/html/menu3/b/74.htm>

The process of adoption of the Right to Development was long delayed because the North associated it with the Declaration for the Establishment of a New International Economic Order (NIEO), which was adopted by the UN General Assembly in 1974. The charter associated with the NIEO sought restitution for the economic and social costs of colonialism, racial discrimination, and foreign domination, and met with insurmountable opposition. The NIEO was dropped and dismissed as not new, not international, not economic, and not even an order.

Fortunately the Right to Development has survived. In 1993, it received new impetus when the declaration, adopted with United States support at the Second UN World Conference on Human Rights in Vienna, recognized that 'the right to development, as established in the Declaration on the Right to Development, (is) a universal and inalienable right and an integral part of fundamental human rights.'<sup>43</sup> The challenge of operationalizing the emancipatory potential of human rights, including the Right to Development, and live up to the expectations and promises of the 1993 UN Conference on Human Rights remains.

#### AVATAR OF NEO-LIBERALISM

During the years when the liberal legalism was well manifested and when Cappelletti edited the last volume in the monumental series, significantly titled *Access to Justice and the Welfare State*, there was much optimism in the West about the potential of the welfare state to provide for the basic needs of people (education, health, and shelter) through redistributive policies and more democratic participation, accompanied by a strong emphasis on the public sector's responsibility to promote access to justice. All this changed quite dramatically with the Thatcher-Reagan revolution. Neo-liberal policies, inaugurated by prime minister Thatcher in Great Britain and imported to the United States by President Reagan, were based

<sup>43</sup> Vienna Declaration and Programme of Action, adopted by the UN World Conference on Human Rights, 25 June 1993. [www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En/](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En/) Article I of the Right to Development states: *The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in and contribute to and enjoy economic, social, cultural, and political development in which all human rights and fundamental freedoms can be fully realized.*

on the belief that the welfare state (once considered the apogee of achievement of the West) was unsustainable and wastefully expensive. Resources were sought to be saved by privatizing welfare services. Public funding for legal aid schemes evaporated, and instead, a phenomenon of 'litigation explosion' was manufactured to encourage privatization of dispute settlement and 'bargaining in the shadow of the law'.<sup>44</sup> Limiting access to law courts, as much as possible, in order to control costs of the alleged litigation explosion, became a major concern of policy-makers in the United States and other western countries. Putting up barriers to access to courts, promoting alternative dispute resolution (ADR) with or without the involvement of courts, encouraging out-of-court settlements, manipulating incentives in favour of privatizing dispute settlement, etc, are some of the strategies adopted to further limit what was already inadequate public expenditure for delivery of justice. The influence wielded by the powerful nations over the Bretton Woods institutions resulted in the export of the neo-liberal, market-oriented ideology to developing countries.

The eighties were years of the World Bank's 'structural adjustment' programmes (SAP), launched during the debt crisis that confronted most developing countries, following the failure of statist policies. It was the time to roll back the state and let market forces have free play. Structural adjustment lending by the bank was intended as an exceptional modality to address balance of payments crisis in the late 1970s, but these types of loans, stipulating policy conditionalities, steadily increased in the 1980s. The bank believed that because state-controlled, closed economies failed, it should insist that countries dependent on it for assistance should adopt market-friendly policies and ensure that its legal institutions give incentives for private and foreign investment, favourable to export-led growth. SAP had two major components: (a) macroeconomic stabilization as a short-term measure that was to be carried out together with (b) structural reform measures, which were of long-term and fundamental nature.

<sup>44</sup> Marc Galanter, in 'The Day After the Litigation Explosion', *Maryland Law Review*, 46(3), 1986, noted: 'It has become commonplace that the United States is the most litigious nation on earth, indeed in human history, and that excessive resort to law marks America's moral decline and portends painful political and economic consequences. A phalanx of mournful and indignant commentators concur that America is in the throes of a litigation crisis requiring urgent attention from policymakers.'

The International Monetary Fund (IMF) was given the task of implementing the first component through its Structural Adjustment Facility (SAF) and Enhanced Structural Adjustment Facility (ESAF), whilst the structural reform programme was underwritten by Structural Adjustment Loans (SALs) and Sectoral Adjustment Loans (SECALs) under the aegis of the bank. Although the specifics of conditionality varied among the countries concerned, the core elements were: opening domestic markets to imports, in the interests of improved efficiency, through tariff reductions and removal of import controls; integrating national economies into the global economy with the specific aim of increasing exports by way of exchange rate devaluation that favoured export industries and removal of controls on foreign direct investment; restricting domestic consumption by moving toward free market pricing; policy measures including not only reducing 'overvalued' exchange rates, but also deregulation of food and energy prices and elimination of food price subsidies; divesting state resources in favour of the private sector through privatization and contracting out of services; reducing state expenditure (with the exception of military expenditure) through devolution of responsibilities to local communities and cost recovery for formerly public services that were not actually privatized; and reorientation of social and economic policy toward attracting private, primarily foreign, investment. The World Bank's interest in the role of law, and the rule of law, during this period remained purely instrumental. *Investor* confidence that legal institutions would protect their interests was paramount, rather than *public* confidence in legal institutions.

In 1987, the United Nations Children's Fund (UNICEF) published an influential study entitled: 'Adjustment with a Human Face'.<sup>45</sup> The survey drew upon ten country case studies and on the UNICEF experience to illustrate the severity of the impact of the debt crisis and structural adjustment policies. It underscored the fact that policies to protect the vulnerable can, and must, become part of the national planning even, when the economy is in crisis. The Bretton Woods institutions' reliance on market forces came under attack on the ground that markets were more prone to benefit the relatively stronger sections of society, resulting in further marginalization of the poor. An effective state, and not a minimalist state, was felt to be

<sup>45</sup> Giovanni Andrea Cornia, Richard Jolly, and Frances Stewart (eds), *Adjustment with a Human Face: Protecting the Vulnerable and Promoting Growth* (Oxford: Clarendon Press, 1987, volumes 1 and 2).

the solution. This assessment also came to be shared, at least in part, by the bank and the fund.

The World Bank took the view that structural reforms were an insufficient (albeit necessary) condition for poverty alleviation. Therefore, it opted to emphasize more inclusive growth, and this meant it that more attention would be given to social protection, good governance, and the role of an effective state in addressing needs unmet by the private sector. It acknowledged that development is a complex process that is not simply a function of financial resources being available. It expanded its non-lending technical services to address knowledge and capacity gaps in developing countries and engage in advocacy for legal and institutional reforms. The World Bank also noted that democratic principles had taken root in many countries and societies had become more open. Consequently, it regarded itself as able to encourage consultation and participation to strengthen the people's voice and to promote national ownership of development efforts.

All these shifts in policy premises of the World Bank called for some creative interpretation of its Articles of Agreement, which stipulate that it should be concerned only with 'considerations of economy and efficiency and without regard to political or other non-economic influences or considerations (Article IV, section 5b)'. Furthermore, Article IV (section 10) prohibited political activity and concerns with the political character of borrowing countries, and Article V (section 5c) barred borrowing countries from attempting to influence the bank's decisions. Similar restrictions applied to the concessional lending arm of the World Bank Group, the International Development Association (IDA). The bank assumes that references to 'governance' as distinct from 'government' would serve to emphasize its interest in administrative and managerial matters, as opposed to political matters that could be associated with 'government'.<sup>46</sup>

With these shifts in policies, the World Bank's conception of the rule of law departed from the purely procedural dimensions that were emphasized by Joseph Raz.<sup>47</sup> It now had to include features

<sup>46</sup> The World Bank's focus on 'governance' can be dated to just after the publication of its report, *Sub-Saharan Africa From Crisis to Sustainable Growth, A Long-term Perspective Study* (Washington D.C.: The World Bank, 1989). This report called for fundamental changes in priorities of African governments and development partners.

<sup>47</sup> See *supra* n. 6.

that accorded with its expanded interest in governance involving market-friendly policies. The conception congenial to the bank's ideology and agenda is that of Hayek who regarded limiting the scope of government interference in the affairs of the public as the primary requirement for freedom. According to him,

'under the rule of law the private citizen and his property are not an object of administration by the government, not a means to be used for its Purpose. It is only when the administration interferes with the private sphere of the citizen that the problem of discretion becomes relevant to us; and the principle of the rule of law, in effect, means that the administrative authorities should have no discretionary powers in this respect.'<sup>48</sup>

This conception of the rule of law calls for judicial review of legislation and executive action for compliance with *substantive* due process, going beyond *procedural* due process.<sup>49</sup>

Ten years after its report on Africa, calling for a focus on 'governance', the World Bank President, James Wolfenson unveiled the Comprehensive Development Programme Framework (CDF). This set out 'a holistic approach to the structural, social and human aspects of development.' Structural aspects included 'good and clean government', a social safety-net programme, a well-organized and supervised financial system. And it also included an 'effective legal and justice system', with the following justification:

Without the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract, labor, bankruptcy, commercial codes, personal rights laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.<sup>50</sup>

<sup>48</sup> Friedrich Hayek, *The Constitution of Liberty* (1978), p. 212.

<sup>49</sup> On this view, the decisions of the US Supreme Court, striking down New Deal legislation, which interfered with the freedom of contract by stipulating statutory hours of work and making special provisions for women workers, would be regarded as a requirement of the rule of the law.

<sup>50</sup> James D. Wolfenson, Memo dated 21 January 1999, to the Board, Management and Staff of the World Bank Group, pp. 10–11. <http://siteresources.worldbank.org/CDF/Resources/cdf.pdf>



The CDF view provided an unprecedented justification, notwithstanding the restrictions on international financial institutions to limit their role to purely economic development, to expand the portfolio of development assistance and provide increasing amounts of aid for legal reforms and access to justice projects in developing countries. The Asian Development Bank also adopted a similar approach. More than a billion US dollars have been disbursed for rule of law and access to justice projects by the international financial institutions (IFIs) since 1995.<sup>51</sup> As to the impact of this assistance, no firm conclusions can be drawn as yet, and the available literature points to deficiencies in knowledge on the part of those responsible for designing projects related to legislative and institutional reforms, promotion of transparency and the right to information, training of lawyers, judges, prosecutors, and other government officials, and capacity-building to undertake legal and justice sector reforms.<sup>52</sup>

#### AVATAR OF HUMAN DEVELOPMENT

The United Nations Development Programme (UNDP) has also been involved in supporting rule of law and access to justice projects in

<sup>51</sup> 'Since neither the ADB nor other IFIs (to the best of my knowledge) have been subjected to an independent and systematic evaluation of our law and development initiatives, we do not have a clear idea about, in a general sense, what works, when, where and under what conditions.' Arthur M. Mitchell, ADB General Counsel, 'Are Development Lawyers Subversives?', Remarks at Annual General Meeting of the London Forum for International Economic Law and Development, Queen Mary College, University of London, 22–23 May 2003. <http://www.adb.org/Documents/Speeches/2003/sp2003025.asp>

<sup>52</sup> Among the critics, Thomas Carothers classified rule-of-law reform projects into three types: the first type concentrates on drafting and enacting substantive law, especially commercial law; the second type focuses on strengthening of law-related institutions to make them more competent, efficient, and accountable; and the third type of legal reform aims at increasing government's compliance with law. He noted that the rule-of-law projects have concentrated on the first and second type, with objectives that are more easily attained than the third type, which aims at real changes in the behaviour of governments and citizens. He considers the last to be 'the hardest, slowest kind of assistance.' He concluded that on the whole rule-of-law aid 'affected the most important elements of the problem least'. Thomas Carothers, 'The Rule of Law Revival' *Foreign Affairs*, 77 (2), 1998, pp. 95–106.

See also Richard Messick, 'Judicial Reform and Economic Development: A Survey of the Issues', *The World Bank Research Observer*, 14(117), February 1999,

developing countries for more than a decade. The development philosophy of UNDP has been shaped by the concept of human development, articulated in the 1990 Human Development Report.<sup>53</sup> The founder of the annual series of human development reports, Mahbub ul Haq, defined the concept in these words:

The basic purpose of development is to enlarge people's choices. In principle, these choices can be infinite and can change over time. People often value achievements that do not show up at all, or not immediately, in income or growth figures: greater access to knowledge, better nutrition and health services, more secure livelihoods, security against crime and physical violence, satisfying leisure hours, political and cultural freedoms and sense of participation in community activities. The objective of development is to create an enabling environment for people to enjoy long, healthy and creative lives.<sup>54</sup>

The *human* development concept evolved in response to frustrations with the failures of *economic* development strategies of the IFIs in the 1980s. There was growing evidence that the benefits of economic growth, driven by market forces, did not 'trickle down' to the poor. The human costs of Structural Adjustment Programmes were serious. And even in countries with strong economic growth social ills were mounting.

Underlying the human development concept is the 'capability approach' enunciated by Amartya Sen. The first sentence in Amartya Sen's book, *Inequality Re-examined*, is: 'A person's capability to achieve functionings that he or she has reason to value provides a general approach to the evaluation of social arrangements, and this yields a particular way of viewing the assessment of equality and inequality.'<sup>55</sup> The first sentence in *Development as Freedom* is: 'Development can be seen, it is argued here, as a process of expanding the real freedoms that people enjoy.'<sup>56</sup> The interconnection between the goal of advancing

<http://www1.worldbank.org/publicsector/legal/Research%20Observer%20Paper.doc>;

<sup>53</sup> UNDP *Human Development Report 1990* (New York: Oxford University Press, 1990).

<sup>54</sup> Quoted in the website of the UNDP Human Development Report Office: <http://hdr.undp.org/en/humandev/>

<sup>55</sup> Oxford: Clarendon Press, 1992, p. 5.

<sup>56</sup> New York: Alfred A. Knopf, 1999, p. 3.

people's capabilities and society's obligation to create conditions in which those capabilities can be used by people, and the freedoms that people have, as human rights, provides the underpinning for UNDP interest in supporting projects on access to justice.

The 2000 Human Development Report focused on human rights.<sup>57</sup> It begins with the proposition:<sup>58</sup> 'Human rights and human development share a common vision and a common purpose—to secure the freedom, well-being, and dignity of all people everywhere', and affirms: 'When human development and human rights advance together, they reinforce one another—expanding people's capabilities and protecting their rights and fundamental freedoms.'<sup>59</sup> Furthermore, the report asserts: 'Human development and human rights are close enough in motivation and concern to be compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully. Thinking has traditionally focused on the outcomes of various kinds of social arrangements.'<sup>60</sup> The tools developed by the human development approach (e.g., setting targets and indicators for achievement of the Millennium Development Goals by 2015) are not sensitive to *how* development outcomes are to be brought about. The human rights approach can provide tools that amplify the process or the *how* of human development, and human development analysis can make the notion of 'progressive realization of human rights' more meaningful by enabling decisions that need to be made regarding the allocation of scarce resources for competing claims.

Related to this is a conception of the rule of law that is different from the formal and instrumentalist conception (a conception that provides no basis for differentiating 'good' laws from 'bad' laws, provided the laws have been enacted according to constitutional procedures). The conception of the rule of law that would be consistent with the emphasis on both human rights and human development would be the 'dynamic concept' enunciated by the 1959 New Delhi Congress of the International Commission of Jurists, described above.<sup>61</sup>

<sup>57</sup> UNDP *Human Development Report 2000* (New York: Oxford University Press, 2000).

<sup>58</sup> *Ibid.*, p. 20.

<sup>59</sup> *Ibid.*, p. 21.

<sup>60</sup> *Ibid.*, p. 38.

<sup>61</sup> *Supra* n. 13.

Amartya Sen describes this conception of the rule of law as a part of the 'integrated view of development which has been well championed by my dear, deceased friend Mahbub ul Haq in his pioneering and masterly exploration of the concept of 'human development.'<sup>62</sup> Sen would agree with E.P. Thompson that the Rule of Law is an 'unqualified human good' only because of its 'effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims'.<sup>63</sup> This means that no instrumental purpose needs to be served by development programmes for legal and judicial reforms that strengthen the rule of law. Such programmes are justifiable in themselves. This conception of the rule of law is a constitutive part of an integrated understanding of the concept of human development. Sen says:

(L)egal development is constitutively involved in the development process, and conceptual integrity requires that we see legal development as crucial for the development process itself . . . That is, even if legal development were not to contribute one iota to economic development (I am not saying that is the case, but even if this were, counterfactually, true), even then legal and judicial reform would be a critical part of the development process.<sup>64</sup>

Assessing the impact of human development and the associated conception of rule of law, as well as the human agency-led approach to access to justice that it encompasses, it would be fair to claim that human development has provided a new way of looking at development—broadening choices, strengthening human capabilities, and identifying the enabling environment needed for people to use their capabilities creatively and in full measure. Even though the human development reports are independent and not the official policy documents of UNDP, the approach is very much embedded in UNDP, especially in those countries where national human development reports have persuaded governments to adopt policies

<sup>62</sup> Amartya Sen, 'What is the Role of Legal and Judicial Reform in the Development Process?', Keynote Address given at the first World Bank Conference on Comprehensive Legal and Judicial Development, Washington D.C., 5 June 2000. Accessed at: <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf>

<sup>63</sup> *Supra* n. 38.

<sup>64</sup> *Ibid.*, p. 10.

and programmes consistent with recommendations they contain. Developments in the World Bank and the ADB where recognition is accorded to human development is a telling testament to the power of this particular avatar.

#### HUMAN DEVELOPMENT, HUMAN RIGHTS AND NEO-LIBERALISM: A MEDLEY OF AVATARS

It is noteworthy that a conceptualization of the rule of law as a *constitutive* part of human development, and not something that is merely *instrumental* for a successful development process (market-friendly, assurance on enforceability of contracts), was articulated by Amartya Sen in a keynote address to a *World Bank* conference. The human development and human capabilities approach, elaborated in UNDP human development reports from 1990, has begun to challenge the orthodoxies of neo-liberalism. The World Bank has established a 'Justice for the Poor (J4P)' programme devoted to developing an approach to access to justice from the perspective of poor and marginalized people, grounded in social and cultural contexts, and according importance to human rights claims for equitable justice systems.<sup>65</sup> In the J4P perspective, development is acknowledged to be essentially contested with endemic conflict over the distribution of power and resources. ADB, similarly, has focused on legal empowerment by support projects intended 'to overcome the combination of constraints that prevent the disadvantaged from accessing the legal system and participating in governance, and which thereby limit the success of poverty reduction efforts.'

ADB defines 'legal empowerment' as both a *process* and as a *goal*:

As a process, it involves the use of law to increase disadvantaged populations' control over their lives through a combination of education and action. Such control may relate to such priorities as basic security, livelihood, access to essential resources, and participation in public decision-making processes. It reflects the increased knowledge, capacity, and confidence of the disadvantaged, and the enhancement of their ability to work together to advance common development objectives. As a goal, legal empowerment refers to the actual achievement by the disadvantaged

<sup>65</sup> <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAW/JUSTICE/EXTJUSFORPOOR/0,,menuPK:3282947~pagePK:149018~piPK:149093~theSitePK:3282787,00.html>

of increased control over their lives through the use of law. The distinction is important, because the process of legal empowerment can proceed even if the goal has yet to be achieved.<sup>66</sup>

The international financial institutions have been adept at adopting those avatars of access to justice that are generally appealing, especially in the context of mounting injustices faced by the poor and otherwise disadvantaged people, while neo-liberal policies that are at the heart of globalization still hold sway. All of the prevailing resource-allocation mechanisms in the IFIs still favour the 'one-size-fits-all' policy solutions, and the hold of neo-liberal policies that are believed be able to deliver predictable, readily-measurable results in a short time frame is still very strong.

In 2003, for instance, the ADB reported that its priorities were to shape new laws for a market economy (with projects in China, Lao PDR, Mongolia, Nepal, and Pakistan). Enabling borrowing countries to capture benefits from international trade was another priority. Support to borrowing countries to combat money-laundering has been another priority. Strengthening the enabling environment for economic growth (support neo-liberal, pro-market, welfare-sceptical policies) remains its overarching priority. The ADB USD 350 million support to Pakistan's Access to Justice Programme was initially concerned with core reforms in legal and judicial institutions and was expanded to include reforms targeting the police, the prosecution service, the legal profession, and legal education, citizens' legal empowerment, and the enactment of a freedom of information law. It also helped establish family courts, grievance procedures, and ombudsman systems. However, in the absence of a proper form of constitutional government, and the antagonism between the President and several members of the senior judiciary, and the Bar, public confidence in the judicial system is bound to remain low.<sup>67</sup> Another instance, indicative of the preoccupation of

<sup>66</sup> *Law And Policy Reform At the Asian Development Bank: An Overview of ADB's Law and Policy Reform Activities in 2000; Legal Empowerment: Advancing Good Governance and Poverty Reduction*, Part II, ADB, Manila, 2001. [http://www.dgroups.org/groups/worldbank/J4P/docs/Complete\\_lpr\\_2001.pdf?ois=no](http://www.dgroups.org/groups/worldbank/J4P/docs/Complete_lpr_2001.pdf?ois=no)

The co-authors of Part II of this report are Stephen Golub and Kim McQuay.  
<sup>67</sup> See the remarks of Eveline Fischer, Deputy General Counsel, ADB, 'Lessons Learned from Judicial Reform: The ADB Experience' (2006). <http://www.asianlii.org/asia/other/ADBLPres/2006/6.html>

the financial institutions with legal reforms as an instrumentality to encourage investment, rather than empowerment of the poor, is the World Bank's project, 'Cambodia Trade Facilitation and Competitiveness'. This project has a legal transparency component financing This component finances a website in the Khmer language to make readily available to the public the final judgments of all cases in the Supreme Court and in the Court of Appeal and electronic publication of all Cambodian laws, related regulations, and draft legislation in the commercial law field. The anticipated objective is that such transparency and predictability of judgments will reduce risks associated with private domestic and foreign investment.<sup>68</sup>

It is important to underline the elements that distinguish the UN approach from that of the international financial institutions, when we encounter a medley of avatars, all at the same time. It would be only fair to make the claim that the UN has been ahead of the curve by being multi-disciplinary, rather than economistic, and by emphasizing human development (UNDP) and the human rights-based approach to development (UN Development Group). The record of the UN with respect to the goals that it set has been reasonably good.

Richard Jolly reported, on the basis of the findings from the UN History Project, that out of fifty goals, four or five have been largely achieved; the majority have been considerably achieved; and three or four have been largely failures, or achieved by only a handful of countries. He added that the 0.7% target for aid and the more detailed targets for aid to the least-developed countries fall in the category of achieved only by a handful of countries—Norway, Sweden, Denmark, the Netherlands, and in recent years Luxembourg.<sup>69</sup> It should also be noted that among those goals whose achievement 'slipped badly' are the goals for aid and for special support of the

<sup>68</sup> See World Bank Project Information Document, approved in June 2005. [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/05/22/000104615\\_20050525090538/Rendered/PDF/Project0Inform1ppraisal0Stage10CTFC.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/05/22/000104615_20050525090538/Rendered/PDF/Project0Inform1ppraisal0Stage10CTFC.pdf)

<sup>69</sup> Richard Jolly, Keynote Address to Human Development and Capability Association (HDCA) 2007 Conference, New York, 20 September 2007. For contrasts between human development and neoliberalism, see Richard Jolly, 'Human development and neo-liberalism' in S. Fukuda-Parr and S. Kumar (eds), *Readings in Human Development: Concepts, Measures, and Policies for a Development Paradigm* (New York: Oxford University Press, 2004), pp. 82–92.

least-developed countries, goals which have been a direct responsibility of the developed countries. The only Millennium Development Goals lacking any agreed quantitative and time-bound targets are those for aid and other support by the industrial countries in the areas of trade, debt relief, and technology.<sup>70</sup>

In the medley of avatars presently manifested in the policy pronouncements of the United Nations and the international financial institutions, human development and human rights are the two compatible ones, and neo-liberalism, still the presiding deity of the international financial institutions, is the odd one out. Only the first two can be embodied into the human rights-based approach to human development, with attendant implications for access to justice and real, not rhetorical, legal empowerment of the weak and vulnerable.

#### THE HUMAN RIGHTS-BASED APPROACH TO ACCESS TO JUSTICE

In 1997, UN the Secretary-General called on all entities of the UN system to mainstream human rights into their various activities and programmes within the framework of their respective mandates. Since then, a number of UN agencies have adopted a human rights-based approach to their development cooperation and have gained experiences in its operationalization. But each agency had its own interpretation of approach and how it should be operationalized. At an Interagency Workshop on a Human Rights-Based Approach in the context of UN reform, UN agencies arrived at a Common Understanding, in May 2003.<sup>71</sup> The Common Understanding they reached was, first, that all programmes of development co-operation, policies, and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments. A set of

<sup>70</sup> Richard Jolly in his HDCA address said: 'The World Bank and the IMF have opposed or ignored UN goals over most of their existence. Indeed, they only shifted from almost 50 years of opposition to goals in 1996, after OECD—the developed countries club— issued their report, Reshaping the World Economy. This contained much of what became the MDGs and with the blessing of the OECD the Bank joined in.'

<sup>71</sup> [http://www.undp.org/governance/docs/HR\\_Guides\\_Common\\_Understanding.pdf](http://www.undp.org/governance/docs/HR_Guides_Common_Understanding.pdf)



programme activities that only incidentally contributes to the realization of human rights does not necessarily constitute a human rights-based approach to programming. In a human rights-based approach to programming and development cooperation, the aim of all activities is to contribute directly to the realization of one or several human rights. Second, human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process, including assessment and analysis, programme planning and design (including setting of goals, objectives, and strategies), and implementation, monitoring, and evaluation. Among these human rights principles are: universality and inalienability; indivisibility; inter-dependence and inter-relatedness; non-discrimination and equality; participation and inclusion; and accountability and the rule of law. And finally, development cooperation contributes to the development of the capacities of 'duty-bearers' to meet their obligations and/or of 'rights-holders' to claim their rights. The workshop elaborated on some key implications of the human rights-based approach:

The following elements are necessary, specific, and unique to a human rights-based approach:

- a) Assessment and analysis in order to identify the human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers as well as the immediate, underlying, and structural causes of the non-realization of rights.
- b) Programmes assess the capacity of rights-holders to claim their rights, and of duty-bearers to fulfil their obligations. They then develop strategies to build these capacities.
- c) Programmes monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- d) Programming is informed by the recommendations of international human rights bodies and mechanisms. Other elements of good programming practices that are also essential under a HRBA, include:
  1. People are recognized as key actors in their own development, rather than passive recipients of commodities and services.
  2. Participation is both a means and a goal.
  3. Strategies are empowering, not disempowering.

4. Both outcomes and processes are monitored and evaluated.
5. Analysis includes all stakeholders.
6. Programmes focus on marginalized, disadvantaged, and excluded groups.
7. The development process is locally owned.
8. Programmes aim to reduce disparity.
9. Both top-down and bottom-up approaches are used in synergy.
10. Situation analysis is used to identify immediate, underlying, and basic causes of development problems.
11. Measurable goals and targets are important in programming.
12. Strategic partnerships are developed and sustained.
13. Programmes support accountability to all stakeholders.

Despite this Common Understanding, arrived at in 2003, it would be premature to claim that UNDP is following the 'human rights-based approach' in all of its development programmes, including those that it classifies under the service line 'Justice and Human Rights'. Cautionary comments on misuse of the term 'rights' can be found in a study that examines the claims of several bilateral aid agencies, and contrasts the World Bank with UNICEF and UNDP in their respective understandings of 'rights-based' approach to development programmes.<sup>72</sup> On the occasion of the 50th Anniversary of the Universal Declaration of Human Rights, the World Bank declared:

The Bank contributes directly to the fulfillment of many rights articulated in the Universal Declaration. Through its support of primary education, health care and nutrition, sanitation, housing, and the environment, the Bank has helped hundreds of millions of people attain crucial economic and social rights. In other areas, the Bank's contributions are necessarily less direct, but perhaps equally significant. By helping to fight corruption, improve transparency and accountability in governance, strengthen judicial systems, and modernize financial sectors, the Bank contributes to building environments in which people are better able to pursue a broader range of human rights.<sup>73</sup>

<sup>72</sup> Celestine Nyamu-Musembi and Andrea Cornwall, 'What is the 'rights-based approach' all about?', IDS Working Paper 234, Institute of Development Studies, University of Sussex, Brighton, 2004, accessed at <http://www.ids.ac.uk/ids/bookshop/wp/wp234.pdf>

<sup>73</sup> *Development and Human Rights: The Role of the World Bank*, World Bank, Washington D.C, 1998.

The language of human rights as used here risks being devalued into fashionable jargon and rhetoric. All development programmes that ostensibly seek to address poverty and social or economic development could make the claim that they are following a 'human rights approach' to development. If this were permissible, then *any* development programme that produced some desirable outcomes for people could be regarded as advancing *some* human right or the other. At that rate, all development agencies could say, as does Monsieur Jourdain in Moliere's play, *The Bourgeois Gentleman*, that they had been 'speaking in prose without knowing it'!<sup>74</sup>

The Institute of Development Studies' (IDS) working paper points out that UN agencies charged with the implementation of economic, social, and cultural rights were not persuaded by the World Bank's claims. The UN Committee on Economic, Social and Cultural Rights has called upon the World Bank to make good its proclaimed commitment to economic, social, and cultural rights by incorporating them explicitly in its dealings with borrower countries, and thus help in the identification of country-specific benchmarks for achieving these rights. The committee has also called upon the bank to develop appropriate remedies for rights violations resulting from bank-funded projects.<sup>75</sup>

The IDS working paper provides a more detailed illustration of misleading usage of the term 'rights' in a joint agreement between the World Bank and Netherlands for financing water projects. The objective of a 'water rights system' in this agreement is described as 'stimulating the use of rights-based systems for the allocation of water in World Bank assisted projects (through market mechanisms)'. The authors of the study remark:

What is being called a 'rights-based' system is basically no more than a system of tradable permits in water. Although the system is justified in terms of giving secure water rights to less powerful groups such as farmers, the talk of 'allowing water to move from lower to higher value uses' and

<sup>74</sup> An Adaptation of the Moliere play by Timothy Mooney, <http://moliere-in-english.com/bourgeois.html>

<sup>75</sup> United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, 'Globalization and Economic, Social and Cultural Rights', Statement issued on 11 May 1998, accessed at [www.unhcr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/0fad637e6f7a89d580256738003eef9a?OpenDocument&Highlight=0,globalization](http://www.unhcr.ch/tbs/doc.nsf/385c2add1632f4a8c12565a9004dc311/0fad637e6f7a89d580256738003eef9a?OpenDocument&Highlight=0,globalization).

therefore 'increasing efficient use' suggests that the emphasis is on profitable use of water, rather than ensuring adequate supply for all, and the system is therefore likely to favour large commercial users. Poor people could instead end up being more vulnerable, through transfers coerced by desperate circumstances. More importantly, there is no reference to the need to first secure a minimum level of entitlement that should be available to all before the proposed market mechanisms are considered, if at all.<sup>76</sup>

With reference to UNDP, the same study observes:

We have not been able to find application of this rights assessment formula to any specific country programme. Clearly a deliberate attempt is being made to systematize and 'plan' for rights in the same way that one would plan for any development project . . . The available information suggests that UNDP has done less to integrate a rights focus into its programmes on poverty eradication and sustainable human development. In the view of one development professional who worked with the UNDP in the past, this is partly explained by the fact that UNDP operates a country office model, and each country office has a degree of autonomy. It has therefore proved quite difficult to get the various country representatives to agree to a common programme of action in re-orienting their human development work to incorporate a rights-based approach. In terms of organisational politics it is much easier to start new programmes in the new area of democratic governance and the strengthening of human rights institutions.<sup>77</sup>

Even though UNDP, after Mark Malloch Brown came to head it as Administrator, has been emphasizing its role in support of policy-making (with grassroots projects support meant for learning lessons that can inform policy advice), its policy influence, relative to the IFIs is limited.<sup>78</sup> Nevertheless, there remains a significant role for the UN at the policy table in most countries, especially when the Resident Coordinator/UNDP Resident Representative engages in advocacy on behalf of the UN System that has operations in the countries concerned. The United Nations Development Framework (UNDAF),

<sup>76</sup> Supra n. . 72, p. 26.

<sup>77</sup> Ibid., p. 20

<sup>78</sup> For a good overview of the history of UNDP, and the evolution of its development strategies, see Craig Murphy, *The United Nations Development Programme: A Better Way?*, (Cambridge University Press, 2006).

supported by the United Nations Development Group (UNDG),<sup>79</sup> provides the means for more serious focus on human development and human rights. There remain hurdles, not easy to surmount, that go to the heart of the 'rights-based approach' to development programming. The human rights-based approach entails a change in power relations. In the context of many developing countries, pre-colonial and colonial history has served to entrench the power of some sections of the population over others. Celestine Nyamu-Musembi and Andrea Cornwall in the IDS study note in conclusion to their survey:

Ultimately, however it is operationalised, a rights-based approach would mean little if it has no potential to achieve a positive transformation of power relations among the various development actors. Thus, however any agency articulates its vision for a rights-based approach, it must be interrogated for the extent to which it enables those whose lives are affected the most to articulate their priorities and claim genuine accountability from development agencies, and also the extent to which the agencies become critically self-aware and address inherent power inequalities in their interaction with those people.<sup>80</sup>

UN agencies work with governments, and their country programmes are tailored to support national development goals and priorities. They are also committed to the principle that development programmes should not be 'donor-driven' and that national authorities should be in the 'driving seat'. The only means at their disposal to overcome inherent limitations to their potential as external actors to transform power relations are advocacy and efforts to sensitize national policy-makers and create spaces for dialogue with representatives of disadvantaged groups in the population. To do this, though, the staff in these agencies should themselves be 'critically self-aware' that a human rights-based approach to development is right, morally or legally, and that it can also serve

<sup>79</sup> The UNDG 'founding members' are the four funds and programmes that report directly to the Secretary General: UNICEF, UNFPA, WFP, and UNDP. The High Commissioner for Human Rights is an Ex-Officio member of the Executive Committee. Executive Committee focuses on reforming the work methods of the funds and programmes and manages the mechanisms of the UNDG. It is chaired by the UNDP Administrator. The full UNDG membership has grown to 28 UN agencies, including the World Bank, and five observers.

<sup>80</sup> *Supra*, n. 72.

the *instrumental* purpose of leading to more sustainable human development outcomes.

In order to develop the required critical self-awareness, the staff working on human rights and access to justice in UNDP initially produced a 'practice note' in 2004 that identified strategies for UNDP support to access to justice, particularly for the poor and otherwise disadvantaged people, with special focus on women, children, minorities, and persons living with HIV/AIDS and disabilities.<sup>81</sup> The first regional network of Rights and Justice practitioners was created in the Asia region for the purpose of producing toolkits and promoting systematic knowledge-sharing. This network encourages practitioners to share their experience and lessons in developing access to justice programmes. Members of this network worked collectively to produce a guide on a human rights-based approach for practitioners working on access to justice programmes.<sup>82</sup>

Access to justice is defined by UNDP as 'people's ability to seek and obtain justice remedies respectful of human rights, using formal or traditional justice systems.' This definition identifies justice with remedies, not simply with services; it distinguishes demand and supply sides of justice, consistent with the human rights framework of claims and obligations; it emphasizes that quality of justice obtained is respectful of human rights; and, it recognizes that in developing countries most people use traditional justice mechanisms. A 'human rights-based approach' is defined by the Asia-Pacific Rights and Justice Initiative as '*a framework for pursuing human development that is normatively based on, and operationally directed to, the development of capacities to realise human rights.*' The focus of the Asia-Pacific initiative is on putting disadvantaged people in the forefront, even though this can be done only by advocacy and persuading governments in developing countries that it is the only consistent way of combining human development with human rights.

In contrast to the approach of the IFIs, which is still dominated by the neo-liberal globalization paradigm, which influences their rule

<sup>81</sup> UNDP, *Access to Justice Practice Note* (2004) can be accessed at: [http://www.undp.org/governance/docs/Justice\\_PN\\_En.pdf](http://www.undp.org/governance/docs/Justice_PN_En.pdf)

<sup>82</sup> UNDP, Asia-Pacific Rights and Justice Initiative, Bangkok, *Programming for Justice: Access for All: A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005). This guide can be accessed at: <http://regionalcentre.bangkok.undp.or.th/practices/governance/a2j/docs/ProgrammingForJustice-AccessForAll.pdf>

of law programmes to focus on minimizing political risks to investors, transactions costs, and stimulating investment for economic growth, the UNDP access to justice initiative is intended to help people protect themselves against abuses from those with more power, hold political leaders accountable, and resolve conflicts, individual or collective, without resorting to violence. In practical terms, the application of the human rights-based approach improves the quality of assessment and analysis of problems faced by the poor and otherwise disadvantaged people; it enables development programmes to be shaped by perspectives of the people who are intended to benefit; it requires reaching out to civil society groups and others, not normally included in development programmes; and it brings in the hitherto missing, but crucial, element of accountability. This approach sheds light on the conflictive dimensions of development and empowering processes more generally, and provides a concrete guidance on how to cope with risks associated with the process of transformation in power relations. Bangladesh, India, Indonesia, Sri Lanka, and the Philippines have access to justice projects that have been influenced by the UNDP Asia-Pacific Rights and Justice Initiative. But it is too early to assess the results and impact of these projects, though qualitative differences in the *design* and the process of formulating these projects, in comparison with other development projects, can be documented.<sup>83</sup>

## CONCLUSION

The rule of law *dharma* has evolved from a conception of positive law that was purely formal and instrumentalist, through more substantive conceptions of the kind that have favoured substantive due process and the freedom of contract, to a constitutive conception embodying human rights. The UN Secretary-General defined the rich conception of the rule of law in 2004 in the following words:<sup>84</sup>

<sup>83</sup> Stephen Golub has documented the strengths of the empowerment approach adopted in Indonesia's project that went into operation in 2007, in close collaboration with the World Bank's Justice for the Poor initiative in that country. See the chapter (?) in this book, *Improving Access to Justice Efforts: UNDP's Legal Empowerment and Assistance for the Disadvantaged Project in Indonesia*

<sup>84</sup> *The rule of law and transitional justice in conflict and post-conflict societies*. Report of the Secretary-General, UN Security Council (S/2004/616) 23 August

The rule of law is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

Elaborating on UN assistance based on international norms and standards, the Secretary-General noted:

The normative foundation for our work in advancing the rule of law is the Charter of the United Nations itself, together with the four pillars of the modern international legal system: international human rights law; international humanitarian law; international criminal law; and international refugee law. This includes the wealth of United Nations human rights and criminal justice standards developed in the last half-century. These represent universally applicable standards adopted under the auspices of the United Nations and must therefore serve as the normative basis for all United Nations activities in support of justice and the rule of law.

United Nations norms and standards have been developed and adopted by countries across the globe and have been accommodated by the full range of legal systems of Member States, whether based in common law, civil law, Islamic law, or other legal traditions. As such, these norms and standards bring a legitimacy that cannot be said to attach to exported national models which, all too often, reflect more the individual interests or experience of donors and assistance providers than they do the best interests or legal development needs of host countries.<sup>85</sup>

Colonial experience has shown that legal transplants may well take root, but will not flourish well, and that the legal system in any country has to be rich in indigenous genes. Knowledge of history, culture, and social practices is important, especially for external

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2004, p. 4, para 6. <http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>

<sup>85</sup> *Ibid.*, p. 5, paras 5 and 6.



agencies that seek to create new capacity in post-conflict situations, or develop existing capacity in the justice sectors in other situations. Many UN Agencies, including the UNDP, are learning that national ownership is crucial if reforms in governance structures are to be successful and sustainable. UNDP has embarked upon a process of informing its decisions on what to support, and how to support, with knowledge garnered from practitioners in the field, many of them national officers who have the sensitivity and nous to judge what will work and what will fail. It would be ironic that just as the principal development arm of the United Nations is equipping itself to act with greater knowledge and flexibility to adapt its support to different contexts and circumstances, the role of the UN as a whole in rebuilding states and societies is diminished and old imperialistic patterns of imposing institutions should gain ascendancy. There are at least two good reasons for the UN to have a greater role in supporting the rule of law and access to justice in an era of inevitable intervention. The first is the legitimacy of international human rights norms and standards. The second is that the development agencies of the UN are now better equipped to adapt their policies and programmes to the specific requirements of different cultures and contexts, unlike the economic policy prescriptions that have emanated from the Bretton Woods institutions.

It is in the nature of avatars that they will keep recurring, and it is also the case that all avatars are the same (manifestations of western law, even though human rights norms can be found in non-western legal cultures). When the Commission on Legal Empowerment of the Poor publishes its report in 2008, we may witness another avatar of rule of law and access to justice in development.<sup>86</sup> Issa Shivji is tired of all these avatars:

The moral rehabilitation of imperialism was first and foremost ideological which in turn was constructed on neo-liberal economic precepts—'free'

<sup>86</sup> The Commission on Legal Empowerment of the Poor claims to be the first global initiative to focus specifically on the link between exclusion, poverty, and law. It is co-chaired by Madeleine Albright, former U.S. Secretary of State, and Hernando de Soto, founder of the Institute for Liberty and Democracy, Peru and author of *The Other Path: The Economic Answer to Terrorism* (New York: Perseus Books, 1989) and *The Mystery of Capital* (US: Basic Books, 2000). The main message in *The Other Path* is 'adapt the law to reality rather than to try to change everyone's attitudes, for the law is the most useful and deliberate instrument of change available to people.'

market, privatisation, liberalisation, etc—the so-called Washington consensus. Human rights, NGOs, good governance, multiparty democracy, and rule of law were all rolled together with privatisation and liberalisation, never mind that they were utterly incompatible.

He awaits an avatar of an altogether new deity:

We are on the threshold of reconstructing a new civilisation, a more universal, a more humane, civilisation. And that cannot be done without defeating and destroying imperialism on all fronts. On the legal front, we have to re-think law and its future rather than simply talk in terms of re-making it. I do not know how, but I do know how not. We cannot continue to accept the value-system underlying the Anglo-American law as unproblematic. The very premises of law need to be interrogated. We cannot continue accepting the Western civilisation's claim to universality. Its universalization owes much to the argument of force rather than the force of argument. We have to rediscover other civilisations and weave together a new tapestry borrowing from different cultures and peoples.<sup>87</sup>

In the current era of globalization, that is, in the 19th-century era of colonialism, we will have to live with avatars of western law, which, like the avatars of Vishnu, are meant to establish a different *dharma*, suited to the times, depending on the interplay of the power of money and military might, on the one hand, and the power of ideas, on the other. The UN rests its faith in the power of the ideas that it has propagated—human rights, human development, gender equality, and human security, and hopes that the combination of the first three will yield human security and justice for all.

<sup>87</sup> Supra, fn. 34, 'Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law', p. ?