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Access to Justice and Legal Empowerment as Vehicles of Poverty Alleviation: Governance Challenges to Linking Legal Structures to Social Change

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1. Introduction

The establishment of the Commission on the Legal Empowerment of the Poor by the United Nations Development Programme (UNDP) in 2005 marked an important milestone in the long history of public interest lawyering. The continued application of a public interest law framework from a Western domestic context to the developing countries of the global South was noteworthy, indicating that there was still life in what many have viewed as a spent idea. At the same time, this development was also surprising for precisely the same reason. The public interest law framework, despite being conceptualized for a number of decades in the United States as a mechanism to provide access to justice for poor and vulnerable members of society, has delivered very little in the way of concrete improvements to their living conditions. In the face of economic decline – periods of recession in the 1970s, 1990s, and again in the current era – along with a growing neo-liberal policy consensus, public interest lawyering has largely failed to lift people out of poverty. Moreover, it has also failed as a strategy of last resort to resist policy initiatives reversing many welfare state initiatives that have benefited the poor. In this context, it is surprising that "legal empowerment" is now increasingly seen as the road forward for alleviating poverty in the global South. While the Commission ceased to exist as an independent organization after producing its final report, its findings continue to be a key part of the UNDP's initiative on Legal Empowerment of the Poor. Given the intractability of poverty in the West, where a well-developed network of public interest lawyers have been toiling for decades, how can law operate as a tool of empowerment in developing countries, where problems of poverty and exclusion are, if anything, more complex than in the industrialized West?

The legal empowerment framework in the global South is the latest in a series of "rule of law" initiatives that have been advanced as development strategies. To a large extent, these initiatives have echoed public interest lawyering in the West. This parallel is particularly evident in discussions of access to justice, which is considered one of the key pillars legal empowerment of the poor. At the end of the day, however, the framework remains constrained by a particularly narrow conception of the rule of law, the role of lawyers, and the nature of the relationship between law and governance that limits its utility as a framework for development.

This paper is divided into three sections. The first section will briefly canvass rule of law and access to justice initiatives, exploring the importance of legal empowerment within a development context. Particular emphasis will be placed on the human rights dimension of legal empowerment, and its focus on poverty reduction. Parallels with the Western experience will be drawn. The second section of the paper will examine more closely the concept of access to justice within the legal empowerment framework. The argument will be developed that, despite the promise of a human rights framework, the current practice in this area has failed to transcend the "rule of law orthodoxy" (Golub) that predates it. Instead, it remains rooted in a particular understanding of law and lawyering that is especially problematic given the problems of development in the global South. In particular, I will argue that this framework underestimates the "interconnectedness" (Tamanaha) of law and mischaracterizes the role of the state and the nature of the problems faced by the poor in the global South. In effect, by transforming what are

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fundamentally problems of class, power, and governance into problems of law, it narrows the range of potential solutions, and absolves states and elites of responsibility for poverty and development. The final section of the paper explores alternative conceptions of law and governance that recognize the interconnectedness of law with other social conditions. In this way they acknowledge the critical importance of law, while at the same time creating space for development strategies that are open and democratic, and which do not privilege conceptions of law that may not be appropriate for the social and economic challenges faced by developing countries.

2. Access to Justice and Legal Empowerment

The Commission on Legal Empowerment of the Poor was established in 2005, and while it is beyond the scope of this paper to review all of the Commission's recommendations, its establishment represented an important shift in the conceptualization of the relationship between law, politics and development. Much has been written on the work of the Commission, and on the legal empowerment agenda in general. (Banik 2008, 2009, 2011; Barendrecht and de Langen 2008, Golub 2003, 2009; Palacio 2006) In particular, as others have argued, the legal empowerment framework endorsed by the Commission is rooted in a human rights conception of law. In this context, law is understood as an enabling vehicle through which the capacity of the poor and vulnerable to make choices, and to take positive steps to better their situation, is enhanced. (Balik 2009; Golub 2003; Barendrecht and de Langen 2008) The nature of laws and legal institutions, however, is fundamentally contradictory. On the one hand, they offer the promise of equality, rights, and freedom. On the other hand, they are also frequently conservative in nature, supporting and reinforcing economic and political institutions that reproduce inequality. In this way, law can be both a force for social change and justice and a structure of social control. The legal empowerment framework, by deliberately centering legal reforms around the goal of poverty reduction, and by focusing on access to justice for the most vulnerable, attempts to resolve this contradiction in favour of creating social change.

As Stephen Golub and others have argued, the adoption of a legal empowerment framework represented a shift in approach. Previous attempts to link law with development had approached the question from what was understood as a fairly narrow "rule of law" focus. (Golub 2003, Barendrecht and de Langen 2008; Davis and Trebilcock 2008) The relationship between law and development is inherently problematic, however, in that it presupposes a causal connection between law, which is itself fragmentary and characterized by a variety of forms, and various development objectives. The underlying assumption is that the development of a functioning legal system, based on a Western conception of the rule of law, is a necessary precondition for economic (capitalist) development. The predominance of lawyers and legal scholars, who frequently lack development experience, involved in third world "rule of law" projects, ensured the predominance of a Western understanding of law. (Tamanaha 2009, p. 30; Banik 2009, p. 118) More generally, common law conceptions of the rule of law greatly informed the project.

Rule of law projects have developed along a particular trajectory from formalistic and narrow, to more progressive and substantive. In all cases, however, a commitment to increasing access to legal institutions and the quality of "justice" delivered by those institutions has underpinned the approach. In the earliest projects, the emphasis was on improving the quality and competency of the judiciary and the legal profession through training for judges and improved legal

education for lawyers. The goal was to establish a functioning, independent judiciary staffed by legal professionals that would operate in a neutral and unbiased fashion. The assumption was that the establishment of an independent judiciary would improve access by increasing people's willingness to make use of the courts. This would, in turn, generate a body of law that would support economic development and the establishment of better functioning markets. In effect, if the judicial institutions were fixed, the common law principles of judge-made law would operate to establish the self-regulating modalities of capitalist economic transactions. Of course, the task of establishing a cohort of independent and unbiased judges and courts proved more complex than assumed. Despite a host of education and training programs, many developing countries still lack a truly independent and unbiased judiciary. The result, of course, is that for many people in these countries the courts continue to be viewed with distrust and suspicion. (Tamanaha 2009)

In light of the failure of many rule of law projects in this area, subsequent efforts shifted from reforming the institutions of the judicial process to addressing more substantive aspects of the rule of law. Attention was focused on the need to develop a body of functioning and effective commercial law, particularly throughout the 1980s and 1990s after the Washington Consensus. (Tamanaha 2009, p. 14) This emphasis fit well with the priorities of the international financial community, and global financial institutions like the World Bank and the IMF. The development of a stable and predictable body of commercial law in developing countries was wholly consistent with trade liberalization, austerity packages, and global neo-liberalism.

By the first decade of the 21st century, however, these measures were increasingly under fire. Global protest movements linked the concerns of developing countries and activists in the West over globalization and neo-liberal trade policies. The demonstrations in Seattle, Quebec City, and Madrid during the 1990s put pressure on international financial institutions to emphasize democracy and governance, in addition to trade and markets, as a route to securing greater legitimacy. The legal empowerment framework fit well with this renewed concern about governance and democratic institutions. It combined the interest in developing fair and accessible legal processes with a new emphasis on rights and poverty. At the same time, it could be squared easily with the neo-liberal interest in capitalist market development. The notion of empowerment fit well with the idea that integrating the poor into capitalist economies could alleviate poverty. The rule of law could serve as the vehicle for achieving this.

These contradictory streams of thought were evident in the Commission on Legal Empowerment, particularly in its early days. When launched in 2005, the Commission was comprised of representatives from Denmark, Finland, Iceland, Norway, Sweden, Canada, Egypt, Guatemala, Tanzania, and the United Kingdom, although each commissioner participated in an independent and individual capacity. While the initial representation on the Commission was overwhelming Western and European, over time commissioners were added from a number of developing countries. The final membership of the commission included:

- Fazle Hasan Abed, Founder and Chairperson, BRAC, Bangladesh
- Lloyd Axworthy, former Minister of Foreign Affairs for Canada
- Fernando Cardoso, former President of Brazil
- Shirin Ebadi, Nobel Peace Prize Laureate, Iran
- Ashraf Ghani, Dean of Kabul University and former Minister of Finance for Afghanistan

- Prince Hassan bin Talal, President of the Club of Rome
- Muhammad Medhat, Hassanein, former Minister of Finance for Egypt
- Hilde Frafjord Johnson, Deputy Executive Director, UNICEF
- Anthony Kennedy, Associate Justice, United States Supreme Court
- Allan Larsson, former Minister of Finance for Sweden
- Clotilde Aniouvi Medegan Nougbode, President of the High Court of Benin
- Benjamin Mkapa, former President of the United Republic of Tanzania
- Mike Moore, former Prime Minister of New Zealand, former Diretor General of the World Trade Organization
- Milinda Moragoda, Minister of Tourism, Sri Lanka
- Syed Tanwir H. Naqvi, former Chairman of the National Reconstruction Bureau of Pakistan
- Mary Robinson, former President of Ireland and former UN High Commissioner of Human Rights
- Arjun Sengupta, Chairman of the National Commission for Enterprises in the Unorganized Sector of India
- Lindiwe Sisulu, Minister of Housing, Republic of South Africa
- Lawrence Summers, former U.S. Secretary of Treasury
- Erna Witoelar, UN Special Ambassador for MDGs in Asia and the Pacific
- Ernesto Zedillo, former President of Mexico
- Gordon Brown, former Chancellor of the Exchequer for the United Kingdom (left the Commission upon becoming Prime Minister)

While the Commission did have representation from some NGOs, overall, it remained a very elite-based organization, with a significant number of former presidents, prime ministers, and cabinet ministers from a variety of Western and developing nations. The Commission operated in cooperation with the UNDP and the UN Economic Commission for Europe.

The appointment of economist Hernando de Soto, along with former U.S. Secretary of State Madeleine Albright, as Commission co-chairs suggested that the Commission might take a fairly orthodox and conventional neo-liberal approach. De Soto, in particular, was well known for his views on the importance of entrenching property rights as a vehicle for development. (de Soto 2001) Norwegian NGOs, for example, wrote a critical evaluation of the Commission's early mandate and expressed specific concerns about de Soto's involvement and influence over the direction of the Commission's work. (Reflections on the Commission 2005) The Commission's initial position seemed to echo de Soto's neo-liberalism. In particular, it clearly took the position that legal empowerment would be oriented towards codifying and formalizing individual rights, particularly in the economic sphere, with the aim of moving individuals out of informal economies and into formal capitalist labour markets. In this view, the formalization of property rights through the rule of law would turn unproductive assets into productive ones, thereby lifting the poor and vulnerable out of conditions of poverty. The link between the rule of law and poverty was thereby made manifest. As the Commission put it:

> Four billion people around the world are robbed of the chance to better their lives and climb out of poverty because they are excluded from the rule of law .... It is not the

> absence of assets or lack of work that holds them back, but the fact that the assets and work are insecure, unprotected, and far less productive than they might be. (Commission 2008, p. 1-2)

The scope of the Commission's work, however, quickly expanded into four pillars. Property rights, while still significant, were supplemented by a broader concern with access to justice and the rule of law, business rights, and labour rights. In addition, an overarching concern with more grass roots, bottom up, and pro-poor approaches was evident in the Commission's final report. Unlike earlier approaches to rule of law questions, customary and informal sources of law were recognized as legitimate, and potentially as important, if not more so, than formal legal institutions. This was a particularly important concession, given estimates that up to 80% of all disputes in the developing world are dealt with through these mechanisms. (Tamanaha 2009, p. 12)

The intention behind legal empowerment, then, expanded beyond the simple codification of property rights to a process of "systematic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors" in relation to both state and market. (Banick 2009, p. 120; Commission 2008, p 2). Despite this conceptual expansion, however, the overwhelming emphasis of the Commission remained on establishing the legal underpinnings of a functioning capitalist market. The three anchors to this strategy were the creation of property rights, business rights, and employment rights. In this way, to echo Hernando de Soto, insecure assets would be regularized and integrated into a formal legal framework. The key to achieving these objectives, however, was through access to justice, which, rhetorically at least, was conceived of as being broader and more participatory than previous rule of law programs.

While the rhetorical emphasis on legal empowerment was new, neither the approach of the Commission, nor the ideas underpinning that approach, could be considered particularly novel. Such ideas had been well-explored in the context of western community development. The notion that the poor should be empowered to utilize the law was one of the central themes of community-based organizations during the 1970s' War on Poverty in the United States. Democratic, bottom-up, and community-driven processes by which the poor could utilize the law to overcome their exclusion from both markets and governance were commonplace. Test cases, community based legal clinics, sympathetic lawyers engaged in "public interest lawyering," "rebellious lawyering," "critical lawyering," and more generally, the practice of poverty law, were all actively debated and explored as vehicles for engaging law as a tool of social change and poverty alleviation. (Alfieri 1987-88, 1991; White 1987-88; Sarat and Scheingold 1998; Buchanan and Trubek 1991-92; Lopez 1992) While such efforts continue, the problem of scaling up local and grassroots initiatives in order to effect broader-scale transformations remains unsolved. (Rosenberg 1991)

The concept of access to justice underpins all of these approaches. Notions of access to justice are inherently problematic in that there is no clear definition of what constitutes either access or justice. Nevertheless, it is generally agreed that access to justice, if it is to be meaningful, must involve individuals a) recognizing and understanding their legal entitlements, and b) having realistic access to some institutional setting for the adjudication and remedying of disputes over those entitlements. In effect, the question of access to justice is frequently reduced to an assessment of the accessibility of lawyers and courts to potential claimants. It asks whether or not there are

systemic barriers to access, such as cost, the distribution of lawyers, bureaucratic obstacles to filing claims, or even corruption and graft that might make people hesitant or distrustful of the courts. Ironically, once conceptualized in this fashion, the concern over access to justice tends to cycle back towards conventional "rule of law" concerns: namely, the training and education of legal personnel, the establishment of a fair and independent judiciary, the proper functioning of judicial institutions, and the availability of legal aid to help indigent parties. What the legal empowerment model has added is a greater concern over public legal education, ensuring that people know their rights and legal entitlements, and recognition that alternative, customary forms of law can play a role in providing "justice."

The overwhelming western understanding of access to justice that informed the Commission's work is reflected in the composition of the Working Group on Access to Justice and the Rule of Law. This working group was made up overwhelmingly of Western and European lawyers. Chaired by Lloyd Axworthy of Canada, the members of the working group included only one representative from a developing country, Clotilde Medegan Nougbode, the President of the High Court of Benin. The vast majority of the group were Western lawyers, and included Christina Beibesheimer, the Chief Counsel of the World Bank's Justice Reform Practice Group, Richard Messick, the Co-Director of the World Bank's Law and Justice Group, and Wendy Patten, the Director of Research and Program Development for the American Bar Association.

Access to justice, therefore, tends to remain linked to conventional rule of law issues. The UNDP's Access to Justice Practice Note, for example, describes in great detail a range of possible programs and "best practices." In many respects, these hardly seem novel or innovative, emphasizing legal education, legal aid, and adjudication. The Practice Note acknowledges the need to link access to justice initiatives with other development practices, and the need to be aware and respectful of traditional and customary systems of law. Nevertheless, it also concludes that "a strong and impartial **judiciary** is a cornerstone of access to justice" (emphasis in the original) and that programming in this area must include improvements in the area of "judicial appointments, judicial management and internal administration, skills, infrastructure and equipment, and professional and ethical standards." (UNDP Practice Note 2004, p. 13) In a similar vein, the UN Secretary General, in his report on legal empowerment to the General Assembly, operationalized access to justice in the following terms:

> Measures to improve access to justice should focus on developing low-cost delivery models, taking into account the cost of legal services and legal remedies, capacity and willingness of the poor to pay for such services, congestions in the court system, the incentives of the judiciary and law enforcement agencies and the efficacy of informal and alternative dispute resolution mechanisms. (United Nations, Report of the Secretary General 2009, p. 7)

Once implemented on the ground, the radical departure said to be encompassed by the "legal empowerment" framework is actually fairly conventional.

This fact remains somewhat puzzling, particularly given the overwhelming failure of many rule of law and access to justice initiatives. Even those projects focused on relatively narrow reform of formal legal institutions have failed to produce significant results. At best, the results of such projects are considered meager and disappointing. (Golub 2006; Piron 2006). Brian Tamahana has observed that throughout the literature on this subject there is a strong "current of disappointment"

in the results of such initiatives. (Tamanaha 2009, p. 3). Yet despite this disappointment, millions of dollars continue to be poured into access to justice and rule of law projects. The World Bank, for example, has shifted its priorities away from the funding of infrastructure programs towards these sorts of projects, so that roughly half of the Bank's total lending now goes to human development and law and institutional reform programming. (Tamanaha 2009, quoting the General Counsel of the World Bank, p. 17). While undoubtedly this funding does contribute to the improvement of legal systems at a certain level, the overall impact of this spending has been small. Kevin Davis and Michael Trebilcock, in a trenchant critique, argue that:

> Over the past two decades or so, Western nations and private donors have poured billions of dollars into rule of law reform in Latin America, sub-Saharan Africa, Central and Eastern Europe and Asia. In other words, in the poorest countries of the world, billions of dollars that could be devoted to projects such as vaccination programs, primary school education, and water and sanitation facilities are instead being put into the pockets of lawyers. (Davis and Trebilcock 2008, p. 896)

In this context, the legal empowerment agenda is very much a continuation of a long trajectory of legal reforms. Moreover, despite the record of failure, there continues to be tremendous support for these programs, as well as the continued belief that they are critically important for economic development, despite a host of contradictory examples. (Tamanaha 2009, p. 19). James Wolfensohn, former President of the World Bank, has said that there is a significant correlation between improvements in the rule of law and the income of nations, literacy, and infant mortality, while another World Bank report concluded that enhancing the rule of law is the most important means to increase wealth. (Tamanaha pp. 17- 18). The legal empowerment agenda reflects the Western world's continued endorsement of, and commitment to, rule of law programming, albeit cloaked in more progressive language.

3. Contradictions of Access to Justice and the Rule of Law

The continued popularity of access to justice and rule of law as a development strategies owes a great deal to the contradictions inherent in conceptions of law and rights. The development of law and legal institutions can be seen as both an end and a means. On the one hand, it is understood as a means to economic development, and more recently as a means to enhance democracy, good governance, and poverty reduction. It is, in the legal empowerment framework, both the route out of poverty and the vehicle by which people's capacity to engage in the market, as well as in political life, can be enhanced. At the same time, the formalization and codification of people's rights, along with improvements to their ability to enforce those rights, is inherently viewed as beneficial and a "good" in and of itself. This has much to do with the Western view of individuals as rights bearers. Citizenship itself is defined by a "bundle of rights" that people carry as they move through various economic, political and social dimensions of their life. The enhancement of rights, therefore, is a *de facto* good because it enhances an individual's own sense of personhood. Rights, and consequently access to institutions through which rights are expressed and articulated, is a goal and objective that is worthy and important in its own right. Ends and means are deeply interconnected and it is difficult to separate one from the other in terms of the underlying rationale for rule of law and access to justice programs.

This absence of clarity, and the conflation of ends and means, however, explains the power and appeal of law in a development context. It also, perhaps unwittingly, permits law to provide an explanation for the failure of development initiatives to significantly address poverty in the global South and a continued rationale for more investment in access to justice programs. If the expansion of law and legal processes is a necessary precondition for economic development, then the failure of development programs rests not with the programs themselves, but with the failure to adequately develop those preconditions. In a global context, then, the explanation for the failure of international and globalized trade policies – including IMF and World Bank imposed austerity measures – to significantly improve economic conditions in many developing countries is not the result of anything inherently wrong with those policies, but rather in the inadequacy of the underpinning legal framework. Similarly, local development projects, whether they be small scale agricultural programs, infrastructure development, bio-fuel developments, or micro-credit schemes, can be conceptualized as limited and unlikely to produce significant results in the absence of the development of "proper" and appropriate legal underpinnings.

As already discussed, however, access to justice programming has generally failed to significantly improve the penetration of formal institutions of judicial decision-making or to increase the willingness and/or ability of individuals to access those institutions. Furthermore, the failure to significantly expand access to justice for the poor has not been confined to developing countries. If one measured the success of such programs by the degree to which the poor and vulnerable have access to legal services, most Western countries would also be considered resounding failures. Legal aid programs, for example, despite having operated in most Western countries since the 1960s and 1970s, continue to provide only residual coverage, largely for more serious criminal law matters. There are huge gaps in coverage of legal aid, particularly in those areas of law that most affect individuals living in poverty. Many people in Western democracies also fail to recognize the legal dimensions of issues that confront them. Even if they do, they are unwilling or unable to pursue remedies. (Rhode 2004) Discussions of access to justice in the West, then, mirror those discussions in the global South. If the problem of access to justice is largely unresolved in relation to the poor in advanced industrial countries, one might very well be skeptical of the ability of such programs to provide meaningful results in developing countries, where issues of class, power, exclusion, race, and governance are more problematic and difficult to grapple with.

Nevertheless, the logic of access to justice programs provides an answer to this quandary. Since these programs have not yet delivered on access to justice, the explanation for the failure of development becomes self-evident. Law has not yet been sufficiently established as the basis for social and economic relations, and therefore continued investment is both required and justified. At the same time, since no one will argue that improving legal aid systems, developing public legal education campaigns, or improving the professional quality of judges and lawyers is a bad thing, access to justice and rule of law programming fits well with the increased concern of international financial institutions with governance questions in the developing world more broadly.

At the heart of this approach, however, is a particularly Western understanding of both law and development. (On the link between Western conceptions of law and development see Pahuja 2007) This reflects the overwhelming dominance of lawyers from Western countries in the design and delivery of access to justice programming in developing countries. As discussed above, access to justice is a problematic term, presupposing that what constitutes both access and justice can be easily discerned. As a result, the concerns of access to justice are fundamentally informed by our conception of the rule of law. This term is frequently contested, and there are a variety of different

meanings attributed to it (Santos 2006); nevertheless, I would argue that there is coherence to the concept of rule of law that underpins the legal profession's approach to legal empowerment.

For lawyers, the rule of law is most often associated with A.V. Dicey's understanding of the centrality of law and the role of courts within British (common law) constitutionalism. Dicey's formulation of the rule of law posits that the law applies equally to all individuals, regardless of their position in society. Most importantly, the rule of law operates as a limit on state power, providing that state officials have no special power or authority except that which is explicitly granted by law. The second principle, usually given less attention in considerations of Dicey's work, emphasizes that the ordinary courts of the land should arbitrate disputes about the law. It is to the courts that individuals should take their grievances over intrusions into their personal rights. Applied to the question of legal empowerment, Dicey's principle thus places access to justice, and in particular access to the courts, at the center of the analysis.

Underpinning this view of the rule of law is the notion that law operates as a negative check on the abuse of power. It is the vehicle by which "rights-bearing" citizens can enforce their autonomy and their self-capacity. The rule of law, then, is at the heart of legal liberalism and its understanding of both societal and state-citizen relations. This version of the rule of law sees individuals as responsible for the enforcement of their rights and entitlements, and law as the instrument used to achieve this goal. From Dicey's perspective, the main threat to individual interests was the state. He viewed the rule of law as a vehicle by which the "collectivist" tendencies of state expansion could be resisted. At the same time, the significance of power relations between citizens are minimized in this framework, as law acts as a neutral and impartial arbiter of competing claims. This understanding of the rule of law has been characterized as a "red light" theory, in that the rule of law operates as a negative check on the exercise of state power, while preserving individual autonomy. (Harlow and Rawlings 1984)

Within a rule of law framework, then, law and legal institutions are understood as operating independently from both state and society. Law stands outside these processes, and this distance enables it to play the role of both a neutral arbiter and a negative constraint on state power. This has the effect of establishing a series of conceptual dichotomies with which we are familiar: law and development, law and the economy, law and democracy, law and governance. In each of these, law stands separate and apart from the other, but at the same time causally connected. One can recast these dichotomies within the terms of access to justice. For each, the dichotomous option – development, economic growth, democracy, good governance – is the objective of justice, while access to law and legal institutional is the vehicle for achieving that goal. Law in this framework operates as an independent variable, defined by its separateness, while also exerting a causal affect on the achievement of justice. Legal empowerment, then, becomes a route to both economic and democratic development. The trick is simply one of correct institutional design combined with proper routes of access.

Brian Tamanaha has forcefully argued that the failure of access to justice and rule of law programs is related to the interconnectedness of law. (Tamanaha 2009, p. 5) Law and legal institutions permeate a host of social, economic, and political processes. At the same time, however, those processes also permeate the law. If workers are subjected to dangerous workplace conditions, is the problem one of law, one of class relations within the workplace, or one of state governance and the failings of health and safety inspectors (or the absence of them) to effectively do their job? In fact, a complex web of economic, social and governance questions are at play. Moreover, the complexity of this situation is exacerbated by the global dynamics that so greatly affect the

development prospects (as well as the prospects for the development of law and governance capacity) of developing countries. The role of Western corporations and international financial institutions provides a context in which many domestic policies and practices unfold.

The problem with the "red light" version of the rule of law, however, is precisely that it denies this interconnectedness. It presupposes that law stands outside political, social and economic processes, rather than within a complex and interconnected system defined by these processes. This view ignores the complexity of social and economic relations in favour of a fairly one-dimensional (and very Western) conception of law. Law, however, does not stand apart; rather, it is deeply embedded within these structures. This interconnection needs to be interrogated, and cannot be assumed to be neutral.

Law, then, is not simply a set of institutions. Rather, it is a set of relationships and power structures that permeate society. One cannot simply improve the quality of judges or lawyers, or access to them, and expect that these changes will produce increases in democracy, economic growth, stability, less crime, or a host of other results that are often attributed to improvements in law. Law is part of a complex governance framework that involves courts, state actors, bureaucratic agencies, functionaries, the police, local officials, members of the public, local community leaders, and religious officials. All of these groups are characterized by a multiplicity of intersecting and overlapping relationships, including class, race, ethnicity, and sex. Law is only a part of this scenario. In this context the causal relationships are not unidirectional, or even easily discernable. There is a multiplicity of access points into what is essentially a circle of causation. In this context, law is simply one point of access. It is not the only one, nor necessarily the best one.

By conceptualizing law as a series of dichotomous and unidirectional relationships with various "development objectives", however, the legal empowerment approach runs the risk of ignoring important factors that are critical to understanding development issues. The focus on law and legal institutions transforms question of class, race, power, and governance from political issues to issues of law. More importantly, this transformation leads to a belief that these questions can be dealt with through courts and domestic legal institutions, rather than through political processes. This is problematic for a number of reasons.

First, such an approach confines the consideration of poverty in developing countries to an analysis at the domestic level. The problem of poverty, once reduced to a problem of law, becomes an issue to be solved through institutional and procedural developments at the level of the nation-state. Integrating individuals and groups into a framework of domestic legal norms is seen as the route out of poverty. This minimizes the significance of global actors, and in particular the role of international financial institutions, as well as Western nations and corporations, in understanding poverty and development. The impact of colonialism, conflict, and economic and political imperialism cannot simply be ignored or discounted when attempting to confront development issues.

Second, this approach also fails to recognize internal domestic power relations. Expecting lawyers, judges, corporate elites, and many government officials to participate in the empowerment of the poorest and the most vulnerable of society is highly unrealistic. Indeed, it is the poor's experience with these very groups that makes local and customary forms of dispute resolution so attractive. The formal institutions of the state, including the courts and the legal profession, are

viewed with suspicion and distrust, precisely because they reflect highly differentiated class politics, which are often overlaid with issues of ethnicity, race, and religion.

This leads to the third difficulty. The legal empowerment approach leaves the responsibility for addressing issues of poverty, exclusion and exploitation to those individuals who are least able to address them -- namely, the poor themselves. The whole premise behind legal empowerment is that the poor should be in a position to utilize the law to claim and enforce their rights. By doing so, improvements to the functioning of the economy will be secured, and the condition of the poor will be improved. This assumption is highly problematic. Even assuming that law can address poverty, it places the cost of poverty alleviation on those least able to afford it. For example, the claims that those living in poverty might make are often not worth the time, expense, and effort to bring forward to institutions and structures which are seen as complex, mystifying, and frequently hostile. The rule of law and access to justice will do little to address many of the day-to-day problems faced by the poor. Even in Western countries with higher levels of education and economic development, there is considerable difficulty in getting individuals living in poverty to actually take cases forward.

If we accept that it is unreasonable to expect poor people to take cases forward, then it becomes clear that legal empowerment conflates issues of governance with issues of law. Property rights and employment rights both provide excellent examples of this conflation. Even if property rights of the poor are recognized, the individual value of their property may be marginal at best, such as in urban and inner city contexts, where people often live in slums and squalid conditions. In this context, speaking of property rights is virtually meaningless, and there is very little the legal system will or can do to prevent property being seized or expropriated, either by the state or by other private actors. Following the basic principles of property law, the most that can be expected is a remedy providing compensation for the value lost, which would likely be marginal. What is required, in this situation, is not necessarily access to the courts, but rather governance schemes that manage property entitlements in a fair and equitable fashion, recognizing and acknowledging a variety of land holding and land utilization practices. Courts and law are simply one of many possible governance mechanisms.

A similar argument can be made in the case of employment rights. If a worker is subject to potentially unsafe working conditions, or has not received all the pay he or she is entitled to, it is perhaps unrealistic to expect that individual to seek redress either through courts or other dispute resolution mechanisms. This is particularly the case in non-unionized workplaces, where employment is particularly insecure and precarious. Even if the individual had access to a dispute resolution mechanism, they would likely be very hesitant to take a case forward, on the basis that it might put their employment in jeopardy. Again, other governance structures, including state monitoring through employment standards inspectors, or even greater support for unionization (which ensures that employers follow the internal rule of law for the company) would provide alternative governance models.

4. Moving beyond the Rule of Law: Access to Justice and Renewing Governance

The rule of law/access to justice approach, then, reduces a complex series of economic and social problems into a fairly simplistic understanding of social relationships. In doing so, it places responsibility for the "solution" to development issues squarely on the shoulders of those who are least able to affect change. Social change is rarely, if ever, brought about through cases or

litigation, as decades of public interest litigation in the West have demonstrated. While individual cases may be significant, their cumulative impact often has more to do with social and political mobilization than it does with legal institutions and judicial decisions. (Sheldrick 2004)

In most instances the rule of law operates effectively in Western countries, not because of access to justice and comprehensive legal aid programs, but rather because most people do not need to avail themselves of institutional redress. For most citizens the rule of law and access to justice are residual categories. They exist as a last resort; beyond the purchase of a house or the drafting of basic legal documents such as a will, the vast majority of people living in industrialized countries never need to access legal institutions. If they did, they might very well find that their own access to "justice" is severely constrained. One recent study, for example, argues that access to justice for middle income families is being increasingly eroded and is no longer only a problem for the poor. (Rhode 2003-04, p. 397)

The rule of law in Western countries can function in this residual fashion because it is supported by the existence of what Almond and Verba would have called a civic culture (Almond and Verba 1963), combined with a developed system of governance. In this sense, while law might have been a critical component of the development of Western economic systems, their development was also dependent on a number of other societal and political elements which cannot easily be replicated.

We need to consider alternative conceptions of law to move beyond the limits of the current debates. The "red light" conceptualization of the rule of law is not the only possible conception. Scholars have debated and contested the meaning of the rule of law, and attempted to develop more radical conceptions. The goal of many of these efforts has been to transcend the view embedded in Dicey's belief that the law and the state stand in opposition to each other. So-called "green light" theories of the rule of law (see Harlow and Rawlings 1984; see also Hancher and Ruete 1985) advocate that the law be organized so as to promote an efficient and effective model of government, rather than seeking to limit it. In other words, law should serve and enable the state in the development and implementation of policies and services, rather than operating as a negative constraint. Such an approach would subordinate law to public administration, principles of governance, and political accountability. One can readily see the attraction of this approach in the developing world, where issues of governance are critical to the development of infrastructure and social services.

Of course, it is one thing to assert the importance of principles of governance over law. It is, however, a very different thing to actually establish effective systems of public administration. Indeed, in many developing countries the establishment of functioning public bureaucracies and effective systems of administration has proven as difficult as the creation of legal institutions and the fostering of the rule of law. The problems of corruption, lack of expertise and training, and inadequate funding have plagued both projects. More fundamentally, however, both projects have attempted to transplant Western ideas of law and administration into contexts where their successful application is difficult and problematic.

It is in this context that the legal empowerment agenda offers a promising road forward. In particular, the openness of the framework to alternative conceptions of law, including customary and traditional legal structures, is encouraging. It is necessary, however, to combine this pluralistic approach to law with governance structures that also are open and support a plurality of

administrative needs and forms. Recognizing customary dispute resolution mechanisms is important, but the public bureaucracy and state authorities (as well as other civil society actors) must also recognize those decisions, as well as the conceptions of social and property relations that underpin customary legal principles. In this respect the legal empowerment framework has much in common with the work of many development practitioners and scholars, whose work emphasizes grassroots, bottom up development strategies that empower and enable communities. This parallels the Commission's own work, which, despite the elite make up of the Commission, involved a relatively grassroots approach and involved a series of community based, local consultations. Far too often, however, rule of law and access to justice programs, dominated by Western lawyers and the legal profession, operate in isolation from broader development projects and currents of thought. Much could be learned by increasing the collaboration between practitioners who share the same objectives.

One current of thought which could be particularly fruitful to future explorations of this subject is the growing field of indigenous studies in both law and governance. In Western countries such as Canada and the United States, as well as throughout the global South, indigenous legal studies and a concern with indigenous forms of governance are proving to be a rich and fertile ground for exploring alternatives to western legal and administrative traditions. Moreover, the principles being developed for alternative indigenous conceptions of the rule of law necessarily operate within a framework that attempts to overcome a history of colonization and imperialism. Consequently, they can potentially overcome the dichotomizing nature of Western rule of law principles, linking state, society, and community within a development paradigm, while at the same time incorporating an anti-colonial framework that resists Western discourses and the effects of global power inequities.

In this context, the related work of such scholars as Jesse Ribot and Nancy Peluso (2003), who have attempted to develop a theory of access that differentiates concepts of access from concepts of property might prove useful. They have argued that access needs to be understood as a bundle of powers, rather than the more western understanding of a bundle of rights. This conception of access, understood as the ability to derive benefits from things, fits nicely with the understanding of governance that I have attempted to develop in this paper. It links access, rights, and capacity in a way that is richer than traditional rule of law approaches and provides a conceptual framework that is supportive of the claims by many indigenous people for more genuine structures of autonomy.

One of the difficulties of applying any Western framework is that it often involves a one size fits all solution that ignores the tremendous variation across the global South. While it is beyond the scope of this paper to explore these trajectories in detail, future research in this area should focus less on operationalizing access to justice in an idealized "rule of law" context, and more on the potentialities represented by alternative approaches that are genuinely local, community driven, and tied to real development objectives through more concrete and diverse practices.

References

Alfieri, Anthony. 1987-88. "The Antinomies of Poverty Law and a Theory of Dialogic Empowerment" Review of Law and Social Change 16, 659-712.

Almond, Gabriel and Verba, Sydney. 1963. The Civic Culture: Political Attitudes and Democracy in Five Nations. Princeton: Princeton University Press.

Alfieri, Anthony. 1991. "Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative" Yale Law Journal 100, 2107-2147.

Banik, Dan (ed.). 2008. *Rights and Legal Empowerment in Eradicating Poverty*. London: Ashgate.

Banik, Dan. 2009. "Legal Empowerment as a Conceptual and Operational Tool in Poverty Eradication" Hague Journal on the rule of Law, 1: 117-131.

Banik, Dan. 2011. *The Legal Empowerment Agenda: Poverty, Labour and the Informal Economy in Africa*. London: Ashgate.

Barendrecht, J.M. and de Langen, M. "Legal Empowerment of the Poor: Innovating Access to Justice" in *The State of Access: Success and Failure of Democracies to Create Opportunities*. Washington D.C. Brookings Institution Press.

Buchanan, Ruth and Trubek, Louise. (1991-92) "Resistances and Possibilities: A Critical and Practical Look at Public Interest Lawyering" New York University Review of Law and Social Change. 19, 687-720.

Commission on Legal Empowerment of the Poor. 2008. *Making the Law Work for Everyone*. Vol. 1. New York: United Nations Development Program.

Davis, Kevin and Trebilcock, Michael. 2008. "The Relationship between Law and Development: Optimists versus Skeptics" American Journal of Comparative Law 56, 895-946.

de Soto, Hernando. 2001. The Mystery of Capitalism: Why Capitalism Triumphs in the West and Fails Everywhere Else. London: Black Swan.

Golub, Stephen. 2003. *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Working paper no. 41. Rule of Law Series. Washington DC: Carnegie Endowment for International Peace.

Golub, Stephen, 2006. "A House without a Foundation" in Thomas Carothers (ed) *Promoting the Rule of Law Abroad*. (Washington: Carnegie Endowment).

Golub, Stephen. 2009. "The Commission on Legal Empowerment of the Poor: One Big Step Forward and a Few Steps Back for Development Policy" Hague Journal on the rule of Law, 1: 101-116.

Hancher, Leigh and Ruete, Matthias. 1985. "Forever Amber?" The Modern Law Review 48, 236-343.

Harlow, Carol and Rawlings, Richard. 1984. Law and Administration. London: Weidenfeld and Nicolson.

Lopez, Gerlad. 1992. *Rebellious Lawyering: One Chicano's vision of Progressive Law Practice*. Boulder: Westview.

Pahuja, Sundhya. 2007. "Beheading the Hydra: Legal Positivism and Development" Law Social Justice and Global Development Journal, 10: http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2007_1/pahuja.

Piron, Laure-Helene. 2006. "Time to Learn, time to Act in Africa" in Thomas Carothers (ed) *Promoting the Rule of Law Abroad*. (Washington: Carnegie Endowment).

Reflections on the Commission. "Norwegian NGO Statement on the High-level Commission on the Legal Empowerment of the Poor" www.landrightswatch.net (accessed on July 23, 2009).

Rhode, Deborah. 2003-2004. Access to Justice: Connecting Principles to Practice. Georgetown Journal of Legal Ethics 17, 369-422.

Ribot, Jesse and Peluso, Nancy. 2003. "A Theory of Access" Rural Sociology, 68(2) 153-181.

Rosenberg, Gerald. 1991. *The Hollow Hope: Can Court's Bring about Social Change?* Chicago: University of Chicago Press.

Santos, Alvaro. 2006. "The World Bank's Uses of the 'Rule of Law' Promise in Economic Development" in David Trubek and Alvaro Santos (eds) The New Law and Economic Development: A Critical Appraisal. New York: Cambridge University Press.

Sarat, Austin and Scheingold, Stuart. 1998. *Cause Lawyering: Political Commitments and Professional Responsibilities*. New York: Oxford University Press.

Sheldrick, Byron. 2004. *Perils and Possibilities: Social Activism and the Law* Halifax: Fernwood Press.

Tamanaha, Brian. 2009. "The Primacy of Society and the Failures of Law and Development" St. John's University School of Law Legal Studies Research Paper Series, available at: http://ssrn.com/abstract=1406999

United Nations Development Program, 2004. Access to Justice, Practice Note. New York: United Nations. Available at:

http://www.snap-undp.org/lepknowledgebank/Public%20Document%20Library/UNDP%20Access%20to%20Justice%20Practice%20Note.pdf

United Nations, Report of the Secretary General. 2009. Legal Empowerment of the Poor and Eradication of Poverty. New York: United Nations. Available at http://www.un.org/esa/socdev/documents/reports/Legal%20empowerment%20of%20the%20poor.pdf

White, Lucie. 1987-1988. "Mobilization on the Margins of the Lawsuit: Making Space for the Clients to Speak" Review of Law and Social Change 16, 535-564.