

**The World Bank Legal Review**  
**Law, Equity, and Development**

**Volume 2**

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*The World Bank Legal Review: Law, Equity, and Development*, volume 2, is a publication for policy makers and their advisers, attorneys, and other professionals engaged in the field of international development. It offers a combination of legal scholarship, lessons from experience, legal developments, and recent research on the many ways in which the application of law and the improvement of justice systems promote poverty reduction, economic development, and the rule of law.

In keeping with the theme of the *World Development Report 2006: Equity and Development*, and following the success of the World Bank Group's Legal Forum on "Law, Equity, and Development" in December 2005, volume 2 of *The World Bank Legal Review* focuses on issues of equity and development. The volume draws together some of the key ideas of the Legal Forum, including articles by many of its distinguished participants, and explores the role of equity in the development process, highlighting how legal and regulatory frameworks and equitable justice systems can do much to level the playing field in the political, economic, and sociocultural domains, as well as how they can reinforce existing inequalities. Consistent with the interdisciplinary nature of this endeavor, *Law, Equity, and Development* contains work by academics and practitioners in law, criminal justice, economics, social development, cultural studies, and anthropology.

**The World Bank Legal Review**  
**Law, Equity, and Development**

**Volume 2**



**THE WORLD BANK**

MARTINUS  
**NIJHOFF**  
PUBLISHERS

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1818 H Street, NW  
Washington, DC 20433, USA

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Cite as: World Bank Legal. Rev.

ISBN 90-04-15561-9 / 978-90-04-15561-9 (hardcover)  
0-8213-6831-1 / 978-0-8213-6831-2 (paperback)

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**The World Bank Legal Review**  
**Law, Equity, and Development**  
**Volume 2**

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“Human Rights and the World Bank: Practice, Politics, and Law” by David Kinley was previously published in *Human Rights and Development: Challenges for Governance Reform in Asia*, C. Raj Kumar and D. K. Kristava, editors (Hong Kong: LexisNexis, forthcoming 2006). Reprinted with the permission of LexisNexis.

“Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts” by Roberto Daniño was previously published in *Human Rights and Development: Towards Mutual Reinforcement*, Phillip Alston and Mary Robinson, editors (Oxford: Oxford University Press, 2005). Reprinted with the permission of Oxford University Press.

“The World Bank’s Policy on Physical Cultural Resources” by Charles Di Leva, although not the appendix thereto, was previously published in *Art and Cultural Heritage: Law, Policy, and Practice*, Barbara T. Hoffman, editor (New York: University of Cambridge Press, 2006). Reprinted with the permission of University of Cambridge Press.

“One Species, One Planet: Environmental Justice and Sustainable Development” by Dan Magraw and Owen Lynch was previously published (October 2002) by the Centre for International Environmental Law, a non-profit organization with offices in Washington, DC, USA, and Geneva, Switzerland. Reprinted with the permission of CIEL.

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## FOREWORD

ANA PALACIO

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Discussions about equity are as pervasive as they are compelling. As lawyers, we are familiar with the concept of equity and its central place in the legal traditions of the world. Equity, frequently championed and less frequently realized, is an important, if not a fundamental, aspect of justice, intrinsically as well as instrumentally. That observation certainly creates a moral imperative, but it does nothing to clarify what it is that must be delivered and how to go about doing it. Without more, it is mere aspiration. The term “equity” is notoriously indefinite, carrying with it the disparate nuances of various professional lexicons. If equity is to have meaning in development work, and in the work that development lawyers do, then its content must be clearly articulated.

That task is now even more pressing. Increasingly, there is a greater focus on equity in the development agenda. This comes with the recognition of inequities between and within countries and the important relationship between equity and economic growth. The *World Development Report 2006* argues that equity and growth are complementary. Increasing “equity,” the report finds, directly contributes to increased efficiency and growth. If poverty is to be fought, then there needs to be a level playing field that empowers the poor.

The *World Development Report 2006* defines equity in terms of two principles: *equal opportunities*, which argues that the measurement of individual achievement should be determined by merit rather than predetermined circumstances, and the *avoidance of deprivation of outcomes*, particularly in such essential areas as food, health, and education.

Articulating equity in such a way carries with it this important implication: it enfranchises the poor so that they become actors in the development process, rather than mere beneficiaries. As the President of the World Bank observed in July 2006, “What most poor people want are not handouts, but opportunities.” Development expands the choices people have so that they can lead lives of value.

But the challenge is how to deliver equity. “Equity” must be something more than the amorphous catchphrase of development practitioners, a cloudy “feel-good” concept that obfuscates development goals, not clarifies them. It is one thing to call

for equity, and another thing entirely to give that concept content and seek concrete programs of action. As students of civil procedure, lawyers have an important role to play in that process.

Prompted by these insights, the Legal Vice Presidency organized a forum on *Law, Equity, and Development* in December 2005. The forum sought to give some definite form to the concept of equity: how do development policies take account of equity in determining priorities and approaches; and what role can and should lawyers have in moving forward this agenda? Without a fully articulated notion of how law promotes equity for the poor, we cannot hope to deliver what are surely the most basic of human demands: security and opportunity.

That demands a broad discussion across disciplines. To enhance the dialogue between lawyers and other development practitioners, and to identify key strategies for building more equitable and accountable legal frameworks and systems, the forum included sessions by academics and practitioners, as well as representatives from multilateral development banks, bilateral donors, partner countries, and civil society organizations. *Law, Equity, and Development* looks to provide a framework for equity that is both clear and tangible.

We must also consider equity in its broadest sense. The contributions to the forum were diverse, but necessarily so. It is not enough if we talk glibly of “equity” in development and proceed to consider law as a discrete and abstract discipline. Law encompasses not only the legal system proper, but the political, social, and economic institutions which give form to law, and which formally and informally condition rights and responsibilities. The promise of equity is hollow if it speaks only to formal legal institutions. It must also address other significant barriers to development—access to justice, governance reform, financial sector legal reform, environmental justice, and human rights.

Volume 2 of *The World Bank Legal Review* draws together many of the key speakers of that forum. Like the forum, it explores equity in its broadest sense, but it does so in a way that “grounds” the promise of equity in defined outcomes. This is a timely and important work directed to the needs of government policy makers and their advisors, attorneys, and other professionals committed to realizing that promise.

# INTRODUCTION

## RULES SYSTEMS AND THE DEVELOPMENT PROCESS

CAROLINE SAGE AND MICHAEL WOOLCOCK

### Opening Remarks

This volume has its origins in themes raised in the World Bank's *World Development Report 2006: Equity and Development*<sup>1</sup> and a subsequent conference hosted by the World Bank Legal Vice Presidency in November 2005, which aimed to develop further some of the legal themes explored in the report.<sup>2</sup> The report's two main messages are that development outcomes of all kinds are more likely to be sustainable and of greater benefit to the poor when opportunities are made equally available to all (irrespective of "morally irrelevant"<sup>3</sup> characteristics such as gender, ethnicity, religion, and nationality) and when social policies aim to prevent absolute deprivation. The report also identifies "inequality traps"<sup>4</sup> as one of the primary mechanisms that undermine such policies—that is, unequal outcomes for a particular group in one generation in, for example, education, health, and employment, can establish a vicious circle whereby these outcomes consolidate (even institutionalize) circumstances that make it increasingly likely

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<sup>1</sup> World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank and Oxford University Press, 2005).

<sup>2</sup> We are grateful to Milena Stefanova and Danielle Malek for their extraordinary organizational and editorial assistance, respectively, and to all those involved in the "Justice for the Poor" research projects in Indonesia, Cambodia, Sierra Leone, and Kenya for their innovation, courage, and persistence in bringing to the World Bank new ways of thinking about and engaging in local judicial reform.

<sup>3</sup> This phrase comes from John Romer, *Equality of Opportunity* (Cambridge, MA: Harvard University Press, 1998).

<sup>4</sup> The concept of "inequality traps" was invoked to complement the more familiar notion of "poverty traps." See, most recently, Samuel Bowles, Steven Durlauf, and Karla Hoff, eds., *Poverty Traps* (Princeton, NJ: Princeton University Press, 2006).

that subsequent generations of this group will have fewer opportunities to secure access to education, health and employment. The cycle is then repeated for future generations. How to “break” inequality traps of this nature was thus identified as a major policy issue by the report.

The rules system that sustains an inequality trap is a constituent element of such traps. Rules systems range from “informal” social norms regarding female education (e.g., girls should leave school early to prepare for marriage and motherhood) to “formal” laws pertaining to inheritance (e.g., wives get nothing if their husbands die), property rights (i.e., only the rich possess them), and human rights (i.e., few are enforced, even when a government has signed an international declaration supporting them). At the same time, even the most putatively “equitable” rules systems can contribute to inequality traps when they are implemented in a slow, discriminatory, and corrupt manner. In many countries, the prevalence of multiple and potentially competing rules systems, together with the absence of any coherent mechanism for either reconciling them or determining which system has jurisdiction over which domain, has also perpetuated inequities. Concomitantly, multiple rules systems have created conditions ripe for serious conflict.

A central set of questions for development policy, then, turns on identifying strategies for breaking inequality traps generally, and in particular, improving the coherence, accessibility, capacity, and accountability of the legal and rule-based systems that underpin them. The importance of these issues, in whole or part, have long been recognized by various elements of the development community,<sup>5</sup> but their articulation in the flagship report of the World Bank has given them a renewed profile and prominence, providing a timely opportunity to further explore their implications, both within the Bank and beyond. To this end, the 2005 Legal Forum on Law, Equity, and Development, hosted by the World Bank’s Legal Vice Presidency, aimed to expand on a number of the legal aspects of these issues. This volume presents some of the best papers from that conference,<sup>6</sup> arranged in an order that, we hope, lends them a collective coherence.

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<sup>5</sup> See Caroline Mary Sage and Michael Woolcock, “Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries,” in Anis Dani and Arjan de Han, eds., *Inclusive States: Social Policy and Structural Inequalities* (New York: Palgrave Macmillan, forthcoming).

<sup>6</sup> The speech by Amartya Sen was not presented at the conference, but was given at a World Bank conference in June 2000. It is included here because it had not been previously

In seeking to incorporate an explicitly legal dimension into policy discussions of equity and development, we (and the *World Development Report* team more broadly) were very conscious that many others have gone before us. For the World Bank, however, much of the antecedent scholarly research and corresponding policy initiatives on these matters was largely unknown,<sup>7</sup> primarily because for most of the Bank's history, legal activity has been confined either to overseeing contract negotiations between client countries and the Bank or providing technical assistance for the development of legal frameworks (e.g., constitutions and commercial codes). For all but the most recent General Counsels of the World Bank, the Bank's articles of association have been conservatively interpreted to mean that the Bank has neither the mandate nor the comparative advantage to address issues such as domestic political ("governance") concerns, criminal justice, human rights, or customary law. To be sure, these types of issues remain properly contentious, and there is no guarantee that the Bank's greater willingness to engage with them makes constructive outcomes more likely (although obviously we believe it can and should). Indeed, having wrestled for many years within the Bank on precisely these issues, we are more aware than most of the real limits faced by a large "high-modernist" bureaucracy seeking to address issues that necessarily and inherently entail crafting non-standardized, context-specific solutions, given that the weight of prevailing organizational imperatives press in precisely the opposite direction (i.e., towards identifying best practices, tool kits, and other standardized or technocratic responses).<sup>8</sup>

Despite these concessions, by virtue of where the present authors choose to work, we clearly believe that the World Bank (and the development community more broadly) can engage in legal reform issues in a broader and more effective

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published, and because it speaks directly to the themes covered in the December 2005 conference.

<sup>7</sup> An important exception in this regard is Richard Messick, "Judicial Reform and Economic Development: A Review of the Issues," *World Bank Research Observer* 14, no. 1 (February 1999):117–36.

<sup>8</sup> These issues, and the institutional imperatives of high modernism more specifically, are explored in greater detail in James Scott, *Seeing Like a State: How Certain Conditions to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), and Lant Pritchett and Michael Woolcock, "Solutions when *the* Solution is the Problem: Arraying the Disarray in Development," *World Development* 32, no. 2 (February 2004):191–212.

manner than recent history suggests is likely. This conviction is not only based on a near-universal consensus that most previous approaches to judicial reform in developing countries have not yielded hoped-for results.<sup>9</sup> More optimistically, it is also a product of the wider spaces for engagement on legal issues opened up by the most recent (re)interpretations of the Bank's articles of association; new opportunities for exploring social development concerns pioneered by former president James Wolfensohn (1995–2005); a growing worldwide interest in corruption, governance, human rights, and global responsibilities; and broader historical trends (e.g., globalization, the fall of socialism, terrorism) that render inescapable

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<sup>9</sup> See, among others, Thomas Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge," in Thomas Carothers, *Critical Mission: Essays in Democracy Promotion*, 131–44 (Washington, DC: Carnegie Endowment for International Peace, 2004); Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006); Julio Faundez, *Good Governance and Law: Legal and Institutional Reform in Developing Countries* (New York: St. Martin's Press, 1997); Poonam Gupta, Rachel Kleinfeld, and Gonzalo Salinas, "Legal and Judicial Reform in Europe and Central Asia," Working Paper, no. 27811, Operations Evaluation Department, World Bank, Washington, DC, 2002; Linn Hammergren, *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective* (Boulder: Westview Press, 1998); Lawyers Committee for Human Rights, *Halfway to Reform: The World Bank and the Venezuelan Justice System* (New York: Lawyers Committee for Human Rights, 1996); Carol V. Rose, "The 'New' Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study," *Law and Society Review* 32, no. 1 (1998):93–140; Frank Upham, "Myth Making in the Rule of Law Orthodoxy," Carnegie Endowment Working Papers, Rule of Law Series, Democracy and Rule of Law Project, no. 30 (September 2002), Carnegie Endowment, Washington, DC; and USAID, "A Strategic Assessment of Legal Systems Development in Sri Lanka," USAID Working Paper, no. 196, USAID, Washington, DC, 1994.

For discussions about the "failure" of the 1960s version of the law and development movement, see David Trubek and Marc Galanter, "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development," *Wisconsin Law Review* 4 (1974):1062–1101; John H. Merryman, "Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement," *The American Journal of Comparative Law* 25, no. 3 (Summer 1977):457–83; and Elliot M. Burg, "Law and Development: A Review of the Literature and a Critique of 'Scholars in Self-Estrangement,'" *American Journal of International Law* 25, no. 3 (Summer 1975):492–530.

the need for thoughtful strategies for crafting more inclusive and effective legal, political, and economic institutions.

Summaries of the various contributions to this volume are outlined below, but before presenting them, it is appropriate to provide some brief input on scholarly and policy contextualization. We begin by noting that the main messages of the *World Development Report 2006* regarding the role of equity in the development process are less new than significant, given who is saying them and in what forum. The purpose of a World Development Report (hereafter, WDR) is not to conduct original research; rather, it is to use the reach, resources, and convening power of the Bank to present detailed syntheses of core development issues. These qualifications nevertheless do not minimize the substantive importance of the arguments themselves, not least because policy change is in no small part a function of constituency building. Powerful, accessible, evidence-based messages voiced by a globally influential organization such as the World Bank can and do play a central role in such constituency building.

To the extent that the WDR 2006 featured elements of genuine policy innovation, however, these innovations were in (at least) four areas: (1) incorporating historical sensibilities into discussions of institutional origins and trajectories; (2) outlining strategies for solutions to global public goods problems (e.g., the funding of AIDS vaccines); (3) articulating potentially new entry points for the constituent role of state and non-state justice systems in creating (and thus breaking) “legal” inequality traps; and (4) casting a critical eye on the role that international financial, trade, and governance institutions themselves play in perpetuating global inequities.

The third and fourth areas lay the foundations on which Parts I and II of this volume rest, namely, rethinking the processes and practice of law and development, and exploring the broader institutional and policy context in which these processes are shaped. (Part III considers certain recent applications of these ideas at the World Bank.) While these two sets of concerns are not neatly distinguishable from another, they warrant further discussion here.

### **Re-thinking Relations between Law and Society: Core Principles, New Practices**

Part I of this volume provides numerous critiques of previous approaches to legal and justice-sector reform within the development community and explores possible new approaches to this complex area. These new developments, as well as the extraordinary efforts of practitioners working on local governance initiatives (most notably at the World Bank, in Indonesia and Cambodia), have afforded a timely

window of opportunity to explore alternative approaches to legal (and/or justice) reform. It would be inappropriate to provide the details of such approaches in this introduction,<sup>10</sup> but it is possible to outline the four core principles that underlie them.

The first (and most fundamental) principle is that legal and rule-based systems are constitutive of economic, social, and political life, or what might be more holistically understood as everyday human life. Such systems are therefore fundamental to the development process, with legal reform being a central element of broader processes of change.<sup>11</sup> Put another way, the principle demands that development practitioners take seriously the “rules of the game” (an overused but perhaps under-scrutinized phrase). Legal considerations should not be consigned to a single sector, since they cut through all aspects of development in the same way as economic considerations do. Granted, law and justice institutions (commonly seen as the justice sector), like financial institutions, should remain an important focus for development initiatives, given their roles in designing, implementing, and enforcing state legal and regulatory frameworks.

The genesis, role, and force of law, however, stretches far beyond these institutions, from the broader policy context that shapes the creation and functioning of these institutions to seemingly “natural” events (such as birthing children) to everyday transactions (such as buying milk at the local store or enrolling a child in school).<sup>12</sup> Moreover, *cultural norms* and *social context* crucially determine the content, legitimacy, and enforceability of *rules systems*. Rules systems, in all their heterogeneity, both underpin and constitute the prevailing *legal system*, and it is the legal system that underpins government *policies* and makes them actionable. Hence, any attempt to enact or change development policies must engage the legal system, which in turn means understanding the constituent rules systems and social norms in which they are embedded. It is our contention that all three steps

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<sup>10</sup> Details of this work can be found in Daniel Adler, Caroline Sage, and Michael Woolcock, “Interim Institutions and the Development Process: ‘Planning,’ ‘Searching,’ and ‘Struggling’ as Strategies for Pro-Poor Judicial Reform in Cambodia,” 2006, photocopy; and Patrick Barron, Rachael Diprose, and Michael Woolcock, “Local Conflict and Community Development in Indonesia: Assessing the Impact of the Kecamatan Development Program,” Working Paper, no. 10. Social Development Department, World Bank, Jakarta, Indonesia, 2006.

<sup>11</sup> The constitutive nature of legal reform in the development process is taken up by Sen in his speech in this volume.

<sup>12</sup> Sage and Woolcock, forthcoming, “Breaking Legal Inequality Traps.”

in this sequence are largely missing, most graphically (for present purposes) with respect to legal and judicial reform initiatives, but also in development discourse and practice more broadly. The articles in the first section of this volume explore these themes in greater detail.

While all the remaining principles outlined below are arguably encompassed by this first fundamental premise, we have chosen to separate them for clarity's sake. Thus, the second principle of new approaches to legal reform, which follows directly from an understanding of the socially and politically embedded nature of law, is that law and governance initiatives are inseparable. Too many otherwise sensible policy discussions about building the "rule of law" or promoting "good governance" regard these two aspects as distinct realms of reform activity. But *any* change in the structures or procedures of government must necessarily be accompanied by (and/or be embodied in) changes in the prevailing rules systems (if not laws). Similarly, any attempt to improve the quality of the judicial system requires the active support of the government, both to pass and enforce the rule of law. In fact, the rule of law is often seen as the defining characteristic of modern government, in which multiple arms of government—the executive, legislature, and judiciary—hold each other accountable through differing checks and balances. In other words, when they focus on state reform, governance and judicial reform, initiatives are inherently joint undertakings, especially in contexts where the capacity of either government or the judiciary is low. In as much as we broadly support efforts to improve the accessibility, accountability, and effectiveness of governments (which ultimately are responsible for ensuring the delivery of key public services, such as health, education, and infrastructure), we must also work to see that such efforts are predicated on improving those same characteristics in the judicial system. The latter is responsible for ensuring that people's rights are enforced and thus affects their ability to access public services and otherwise participate in all forms of economic and social life.

This principle extends well beyond the realm of the state, particularly in countries where the state arguably has limited reach. The vast majority of human behavior is "governed" by rule-based normative frameworks that in turn reinforce and provide legitimacy for a particular system of governance. Both may or may not be based on or compatible with state legal codes. Forms of customary, informal and/or non-state law operate in the majority of nations across the globe.<sup>13</sup> Informal institutions range

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<sup>13</sup> It is important to note that a vast array of practices, systems, and traditions which function in vastly differing contexts have been defined as informal, traditional or customary law.

from dispute resolution systems operating in different markets across the globe to customary ways of ordering life in remote villages and communities. Any attempt to understand and/or reform systems of governance—whether local government processes in a decentralization program or an effective governance system for a national healthcare system—requires understanding the rule systems underpinning both the governance structures themselves and the processes of change required for effective reform.

The third principle that underlies new approaches to legal and justice reform is that the rules of the game in any given context should be understood in a dynamic way. Discerning what these rules actually are in any particular situation, and, crucially, how they both shape change processes and are changed by them, is a labor-intensive and time-consuming task that will likely require long periods in settings far removed from modern conveniences and major investments in building the capacity of local research teams.<sup>14</sup> Moreover, these problems may be compounded by the fact that the poor may have a vested interest in keeping their rules opaque to outsiders if they sense that, as a group with considerably less political power, this strategy is one of the few effective resistance strategies available to them.<sup>15</sup> Again, the incentives and imperatives in large development agencies—with their strong preference for standardized and/or technocratic interventions—tend to conspire against providing the time and resources necessary to conduct such activities.

The fourth principle, which is really an extension of the third, is the importance of understanding local processes of change and the contestation that likely surrounds them. All interventions undertaken in the name of “development” (e.g., providing microcredit, primary education, maternal health, upgraded roads, etc.) change local power dynamics and social relations precisely because they (hopefully) make the most marginalized groups better-off, not only economically, but also socially and politically. In so doing, these otherwise eminently desirable interventions are likely to result in the issuance of serious, and perhaps unprecedented, challenges to

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The use of “informal” is used here in contrast to “formal” (state) systems and is not meant to imply that such institutions are procedurally informal.

<sup>14</sup> Such teams are likely to have crucial knowledge of local languages, mores, and cultures that are rarely possessed by external consultants, but limited knowledge of formal social science research protocols. Capacity-building efforts are thus a mutually beneficial undertaking.

<sup>15</sup> See James Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven: Yale University Press, 1985).

prevailing elites, who in turn are likely to resist, potentially violently. Development, by overtly or covertly changing social and political relations, is thus likely to bring about conflict.<sup>16</sup> The dominant development discourse, however, especially the hopes and aspirations embodied in the Millennium Development Goals,<sup>17</sup> largely assumes away any sense that being in the development business means that one is simultaneously (and inherently) in the social change business, and thus the conflict management business. Less dramatically, social and political change is ongoing even in the absence of formal development interventions of any kind; cultures and communities are not static entities, but constant processes—albeit typically characterized by long periods of apparent stability followed by sudden rupture—of movement. The very fluidity and fragility of these processes of change need to be carefully understood by policy makers and practitioners concerned with designing and implementing effective development interventions. Because rules (formal and informal) and social relations underpin the basis of exchange in even the most “advanced” economies, attempts at modernizing the legal systems of low-income countries must necessarily be undertaken as part of a broader strategy that explicitly recognizes that the judiciary is but a very small part of the broader set of decision-making, priority-setting, and dispute-resolution mechanisms in society.

For those familiar with previous scholarly efforts to understand the relationship between law and development, it should be apparent that these types of principles represent quite a different stance. The earliest approaches in the 1960s and 1970s (i.e., the original law and development movement) sought largely to import laws, train lawyers, and transplant legal institutional forms (e.g., courts and law schools) deemed effective elsewhere. The dominant approaches of the 1980s and early 1990s (the legal and judicial reform movement) sought to strengthen the capacity of key legal and judicial institutions deemed to be essential building blocks of a rule-of-law system.<sup>18</sup> The still-evolving perspective sketched in this volume, however, provides the basis for a stance that seeks to have legal and political institutions emerge from an equitable political process. Rather than determining *ex ante* via expert technocratic

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<sup>16</sup> See Robert Bates, *Violence and Prosperity: The Political Economy of Development* (New York: Norton, 2000).

<sup>17</sup> See Millennium Development Goals (MDGs) page on website of the World Bank Group, World Bank, Washington, DC, <http://ddp-ext.worldbank.org/ext/GMIS/gdmis.do?siteId=2&menuId=LNAV01HOME1> (accessed August 31, 2006).

<sup>18</sup> A discussion of the different institutions that make up a rule-of-law system can be found in World Bank, “Legal and Judicial Reform: Strategic Directions,” Working Paper, Report no. 26916, Legal Vice Presidency, World Bank, Washington, DC, 2003.

analysis what the end-state form should be, this approach seeks to work incrementally through a sequence of context-specific, interim institutions.<sup>19</sup> The precise design or form of each stage emerges through a local political process informed by evidence grounded in a detailed empirical understanding of its context. Importantly, research to discern this knowledge is carried out by local teams who have received intensive and extensive training in contemporary socio-legal research methods. This process may require considerably more time and (perhaps) resources than its predecessors, but is necessary to adequately ensure improved access to and legitimacy of justice systems, in all their variety, for the poor in low-income countries.

Part II of this volume focuses on the broader institutional and policy context in which the processes of legal and justice sector reform, and development practices more generally, are shaped. Seen from a slightly different perspective, Part I of this volume is concerned with the forms and functions of legal and rule-based systems, whereas Part II focuses more on the values of particular rules systems (whether actual or potential), ethical positions, human rights principles, environmental justice concerns, or the protection of the cultural and intellectual property rights of minority groups. Thus Part I might be seen as focusing on the principles of practice, and Part II, on *why* we do *what* we do.

This is not to say that the four core principles of practice outlined above do not apply in the international institutional context. The legal and regulatory framework of the World Bank is fundamental to, and constitutive of, its form and function, and is also integral to the systems of governance that order, facilitate, and manage the everyday running of the organization. All of these elements in turn reinforce the legitimacy of and need for an effective legal and regulatory framework. Further, in order to understand processes of development, particularly as undertaken by the Bank, it is imperative to understand the rules of the game—which encompass both the formal regulatory framework and informal rules predominantly informed by development economics—as well as how these rule systems shape change processes. It is also fair to say that any challenge to the form and/or function of these rules of the game tends to be highly contested, given that it challenges dominant thinking (and, arguably, the dominance of those doing the thinking).

By drawing attention to the sociopolitical nature of these rules systems at the institutional and policy-making level, these core principles highlight an even more foundational principle: that any given legal or rule-based system is inherently value laden, as are the resultant understandings and approaches to development, despite

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<sup>19</sup> Adler, Sage, and Woolcock, 2006, “Interim Institutions and the Development Process.”

seemingly endless efforts to cloak ideas and actions in technical, objective, or instrumental terms. It is important to remember that a particular policy or approach can only ever be a technical or instrumental solution to an aim that someone has decided is important, such as economic growth or the protection of certain human rights.

Traditionally, the development industry, with its genesis in development economics, has based its modus operandi on economic models and technical solutions. So while legal foundations of human rights are clearly based on a set of agreed values (despite similar misguided beliefs in the technical and objective nature of law), “perfect” markets are inherently valueless. That is, such markets function without regard for differences in opportunities, treatment, or circumstances, and their growth is measured in aggregate terms, removed from individual circumstances and distributional affects. The problem is that there is no such thing as a perfect market, and even if there were, human suffering may be more critical to a holistic notion of poverty and human well-being than economic metrics. In human terms, there is no such thing as a valueless model, any more than there is a functioning legal system that is inherently just.

This is not to say that development practitioners who espouse an economic vision of development are unconcerned with the plight of the world’s poor or marginalized people; economic growth has indeed proved to be the most effective way of alleviating poverty in aggregate. Yet, purely economic understandings of human welfare have increasingly been brought into question. Rights-based advocates, for example, highlight the disaggregated and/or distributional effects of reforms, arguing that, in general, the immediate or short-term effects, negative effects on specific groups, and the effects on other important aspects of human well-being are not measured. Moreover, development approaches have arguably failed to achieve promised results after more than sixty years of development practice, either because growth targets are not being met, are unsustainable in the face of an apparent crisis of governance in many developing countries, or because where growth has occurred, economic growth has not always yielded the expected corresponding reduction in poverty.

Within development circles, these concerns have led to an increased focus on the importance of equity for sustained pro-poor development, as well as an increased interest in issues such as governance, participation, accountability, and rule of law. As the contributions to this volume indicate, they have more recently led to an increased focus on human rights, development ethics, environmental justice, and the protection of minority rights (including the protection of cultural property rights).

## **Law, Equity, and Development: An Overview of the Substantive Contributions**

These general ideas form the broad intellectual and policy context for this volume, the specific contents of which are summarized in this section. As previously mentioned, Part I focuses predominantly on the role that legal and justice systems play in the development process, as well as the way the development industry has or could approach the reform of such systems. Given the focus on equity, many of the chapters focus on pro-poor reform efforts, yet their lessons extend beyond specific examples. In many cases, they challenge the very way the development industry currently operates. Part II shifts the focus to the policy and institutional context within which the World Bank operates; articles in this section explore how international legal concepts, principles, and obligations have shaped—or should shape—development practice, as well as how different development theories and policies affect these relationships. Part III of the volume highlights certain key policy developments that have taken place in the World Bank over the last year, which reflect its growing concern for equity and the protection of vulnerable groups in its work. A brief discussion of the implications and applications of the ideas and evidence here presented concludes the introduction.

### ***Part I: Law, Justice, and the Development Process***

Amartya Sen's contribution leads off Part I of the volume. It is the only piece that did not originate with the 2005 Legal Forum on Law, Equity, and Development. Rather, it is a speech made at a similar conference held at the Bank five years earlier, which focused on comprehensive legal and judicial development. Our reasons for including it in this volume are threefold. First, Sen makes powerful arguments that have shaped thinking in law and development, both inside and outside of the Bank. Yet until now, the paper has not been published; doing so ensures that a broader audience has the benefit of these insights. Second, Sen's arguments are no less potent today than they were five years ago; while his ideas have influenced the thinking of certain practitioners working in the area, the development community as a whole still has a long way to go before it takes the role of law and justice in the development process as seriously as it should. Third, Sen's central thesis can in many ways be seen as a frame of reference for the other articles in the book and thus provides a useful lens through which we can see the different issues raised throughout the volume.

Sen argues that legal and judicial reform are an integral part of comprehensive development, not only because they are causally related to other aspects of development, but because they are a constitutive part of development (understood

in terms of development in general and/or of a particular notion or definition of development, such as legal development). Sen calls these two lines of reasoning *causal interdependence*, which highlights the interconnections between different aspects of development, and *conceptual integrity*, which sees these different aspects as conceptually incomplete and thus inseparable in the first instance.

Conceptual integrity highlights two important considerations of legal development. The first is that development as a whole cannot be considered separately from legal development; legal development is an integral element of development as a whole and should be seen as a central development aim, not just an instrument for achieving other aspects of development. The second consideration is development in a specific sphere (such as economic development) may be contingent on institutions, policies, and instruments in other spheres. For example, pursuit of economic development generally requires some level of social, political, and legal intervention or change.

For Sen, recognizing the foundational significance of legal development does not mean we should ignore the causal interdependence of different aspects of development as a whole. Examining the casual connections allows us to think about the possible sequencing of reforms, as well as assess the effects of certain interventions on other aspects of development.

Sen's speech provides a useful lead into the articles that follow in Part I, which focus specifically on what needs to be done if the development industry is to adopt a more considered approach to the role of law in development. A number of important themes run through the articles in the section. First, most authors believe that the development industry has tended to neglect the importance of law in development, despite what many see as a resurgence of interest in legal and justice sector reform. Second, most agree that work that has focused specifically on legal and justice sector reform has emphasized a state-centric, western understanding of law and tended to ignore the more complex constellation of legal and rule-based systems that exist in any given context. Most of the authors advocate a broader, more socially embedded understanding of law and underscore the need to look beyond state legal systems when thinking about processes of reform. The third theme running through the section is that there is a need to empirically ground the theory and practice of law; more rigorous research and analysis in the area is required to challenge some of the underlying assumptions of development discourse and practice.

Franz Benda-Beckman explores the complexity of legal pluralism—what legal pluralism is and what taking legal pluralism into account in development policies means. He argues that legal pluralism has gained little attention in development circles, despite a resurgence of interest in law and a growing recognition that it should not be reduced to the laws of states, but also includes customary and traditional law.

Benda-Beckman posits that in many societies, multiple sources of law play a role in social organization, the exercise of power, and processes of social change. Given that law organizes and legitimates power, it is also often a resource over which people are willing to fight. Benda-Beckman points out that development processes add a further layer of complexity to such plural legal constellations because they are a source of a new set of laws, namely the rules that govern the relationships between development organizations, their agents, and the target populations. These “laws,” which may be completely foreign to local perceptions, are often a constant source of conflict and misunderstanding and may become a major obstacle to the success of development interventions. Development policy and practice thus add a further dimension to plural rule systems, while simultaneously being potentially confined or constrained by these systems. In Benda-Beckman’s words, plural legal conditions should be seen “as a potentially significant factor influencing development and options for change, as a set of factors constraining and enabling interventionist objectives and practices.”

Benda-Beckman argues, however, that taking legal pluralism into account is difficult in an industry that aims to make complex situations legible and change designable. He argues that development discourse not only constructs reality in order to design development interventions, but that it also explicitly constructs the casual relationships that justify these interventions. This theme of the development industry’s “normative blindness”<sup>20</sup> is developed further by Laura Nader in her article. Nader argues that the modern law and development movement remains premised on a linear view of progress that is underpinned by positional superiority and a blind belief in western law. Further, these beliefs continue to support a “theory of lack” in which a western legal system is a necessary ingredient for modern development. Drawing from examples of recent legal reform efforts in Afghanistan, Sardinia, Zambia, Papua New Guinea, and Iraq, Nader argues that the “practice of rejecting local knowledge” is pervasive. In all of these cases, she demonstrates how empirical ignorance resulted in approaches that in many cases had serious unintended consequences, often at the expense of the rights of poor and marginalized people.

Nader offers the biggest cautions against placing blind faith in western law and the dangers of an empirically uninformed view of legal development. Not only do

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<sup>20</sup> Nader borrows this term from international law scholar Richard Falk, see Falk, “Cultural Foundations for the International Protection of Human Rights,” in A. A. An-Na’im, ed., *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, 144–64 (Philadelphia: University of Pennsylvania Press, 1992).

we risk repeating past mistakes, we have the potential to perpetuate, exacerbate, or even cause abuses of power. Yet she remains hopeful that a “critical learning from the past opens the way for a new dynamic, one that brings practice and ideals into a more healthy alignment.”

Where Sen stresses the importance of paying attention to law in development, both Benda-Beckman and Nader highlight the fact that we often clearly do not know how to support equitable, culturally appropriate, and legitimate processes of reform. In the articles that follow, Julio Faundez, Chidi Odinkalu, and Stephen Golub all explore ways in which law and development policy and practice might be approached differently. Both Faundez and Odinkalu argue that reform projects need to take non-state justice systems seriously, echoing the sentiments that development agencies have tended to ignore such systems, as their efforts focus predominantly on state courts. All three authors emphasize the need to understand and appreciate locally generated processes, systems, and initiatives, either as a source of information about potential mechanisms of change, or as a potential mechanism of change per se.

Faundez argues that non-state justice systems (NSJS) offer “valuable insights into the strengths and weaknesses of local legal institutions, allowing governments and development agencies to formulate more effective pro-poor reform strategies.” Drawing on experiences from Latin America, Faundez describes the main characteristics and risks of NSJS, particularly with respect to their perceived non-adherence to current standards of human rights. He argues that while NSJS often emerge in areas where there are no capable state institutions, governments are often fully aware of their existence and may in fact try to co-opt them. The example of the *Rondas Campesinas*, or Night Watch Patrols, in northern Peru demonstrates these two sets of conflicting responses. Given their success in repressing crime and facilitating community dispute resolution, the government of Peru has tried to co-opt the institutions to assist it to control terrorist groups in the countryside, while at the same time attempting to reduce their power. *Rondas* also elicit conflicting responses from other groups and commentators; some argue that they play an important and effective restorative justice role, while others are concerned about the arbitrary nature of their decisions, lack of due process, use of corporal punishment, and the fact that they are seen to usurp formal legal processes.

Faundez argues that an examination of the emergence of non-state judicial systems, as well as their strengths and weaknesses, means looking beyond purely technical understandings of legal systems and processes of reform to a broader governance perspective. NSJS should be seen as primarily political institutions of governance that have emerged in response to local socioeconomic conditions, highlighting the difficulty of making clear distinctions between political and legal processes. Faundez

also points out some of the challenges that such systems pose for development practitioners, in terms of empowerment and participation, in contexts where local community organizations are considered “outlaws” by state authorities.

Similar to Faundez, Odinkalu explores the tension between the fact that non-state or customary law is often discriminatory and out of step with both international human rights norms and modern economic relations, yet simultaneously enjoys widespread legitimacy and application. Focusing on customary and informal justice systems in Africa, Odinkalu argues that African governments and international agencies need to engage with the challenge of reforming “customary” law and domestic legal systems. He argues that such reform efforts should respond to the limitations of local customary law, while working to adapt it to the “justice delivery needs” of Africa’s poor. Odinkalu contends that while the majority of Africa’s people are subject to (and use) non-state legal systems, legal and justice reform efforts have failed to adequately consider the reform context. In his words, “in country after country, the relationship of the informal justice mechanisms to the formal or state sector institutions is inadequately digested or considered entirely irrelevant.”

Odinkalu argues that both the colonial legacy and post-colonial systems of governance in Africa have been characterized by systems of legal hierarchy and segregation, as well as the racialization of customary legal systems. Colonial institutions conscripted local elites to help control local populations, a pattern that continued after independence, when power shifted from colonial to local elites, with little change to the patrimonial system of rule. Odinkalu contends that legal pluralism therefore exists on two levels: not only are different systems in operation, their segregation and inequitable access to formal justice institutions mean that certain groups are unable to protect or enforce their formal rights in the face of discriminatory customary rules.

Odinkalu suggests a number of ways to think about customary law reform. First, customary law cannot be placed above constitutional standards without risking the perpetuation of a two-tiered citizenry. Second, those who administer mechanisms of customary law need to receive extensive training about constitutional standards, as do the general populations of developing nations. Third, a reliable system of recording customary laws and procedures needs to be created in order to limit what he calls despotism in the application of such law. Finally, customary legal systems need to be monitored to ensure some level of social accountability.

In the next article, Golub explores the concept of legal empowerment and its impact on processes of reform. Golub defines legal empowerment as “the use of legal services and legal capacity building for the poor and other disadvantaged populations, often in combination with other development activities, to increase their freedom, improve governance, and alleviate poverty.” He argues that there

is increasing evidence that legal empowerment initiatives are having some impact on the ground, mainly through the efforts of civil society organizations, yet such efforts are given inadequate attention and remain underfunded by development institutions.

Golub argues that there is no set approach to legal empowerment, rather, the concept points to a range of initiatives. Legal empowerment strategies stem from the priorities of the poor themselves, and hence typically flow from local contexts rather than international principles. Further, given that local priorities are not necessarily explicitly legal, such initiatives may involve blending legal work into other development initiatives. While such initiatives are generally grounded in grassroots activities and priorities, they may influence and/or push national reform in various ways, such as through community mobilization or advocacy. In particular, such approaches can be used to ensure that laws that do exist are implemented and enforced in ways that benefit the poor. In a manner similar to Faundez, Golub argues that legal empowerment touches broader issues of governance, and poverty alleviation more generally.

Interestingly, while Golub focuses on supporting grassroots priorities and initiatives, Sally Engle Merry looks at how transnational principles become meaningful in local settings and how intermediaries serve as knowledge brokers and translators in processes of social change. Merry uses empirical examples of the appropriation of international concepts of women's human rights to examine how these concepts are vernacularized, or adapted to local institutions and meanings, through a process of indigenization, in which concepts are framed and understood in terms of existing norms, values, and practices.

Merry argues that while the historical foundations of international human rights are predominantly western, they are now an integral part of important social justice movements around the world. While translators—intermediaries who “refashion global rights agendas for the local context and reframe local grievances in terms of global human rights principles and activities”—are a key part of this process, Merry demonstrates that intermediaries are at once powerful and vulnerable. On the one hand, they are in a position to manipulate target communities, while on the other, they are open to exploitation by the institutions for which they work. Merry argues that these difficulties are inherent in the translation process; human rights translators need to “frame” rights discourse in a way that resonates with local values and meanings, but they also often attempt to challenge and change these local norms.

Merry goes on to examine different types of translation and provides examples of “replication” (where a particular approach to a problem is transplanted from one context and adapted to a new environment) and “hybridity” (where one set of ideas

merge with another to produce new institutional arrangements). She demonstrates how replication or failure to fully indigenize ideas impedes their diffusion and how too much hybridity can undermine the potential for change and, possibly, the support of the global community.

In the next two articles, Christopher Stone and Amanda Dissel focus on a particular aspect of law and development that, until recently, the World Bank has seen as outside of its purview, namely, crime and criminal law. In many developing countries, high levels of crime and violence not only undermine people's safety on an everyday level, they also undermine broader development efforts to improve governance and reduce poverty. Until now, the World Bank has avoided working directly on crime and violence. Stone argues that this reluctance is related to concerns about the risks that this work will go wrong. He explores a number of different risks and, from this basis, suggests ways in which the World Bank could more affirmatively support initiatives aimed at reducing crime and violence levels while managing the risks inherent in such work.

Stone specifically examines three types of risk associated with working on issues of crime and violence, providing examples from past interventions. Ethical risks refer to the possibility that support for criminal justice reform may strengthen institutions (such as law enforcement agencies) that could be used to repress people; engineering risks are the risks that projects could fail because of problems with their design or implementation; and equality risks refer to the fact that reform programs may in fact reinforce or create new inequality traps. For example, when certain groups become the target of law enforcement initiatives due to existing patterns of discrimination and/or inequality, understanding which policies might reinforce this inequality is difficult, given the complexity of most criminal justice systems and their interrelationship with broader norms and structures of inequality. Stone argues that for an organization like the Bank, the risk is that "[a]ssistance may not only fail to help, it may end up doing substantial harm." In this context, he advocates for an approach to reform that focuses more on the process than the form or content of reforms themselves. Accordingly, he puts forward a three-tiered strategic framework that encompasses "a process of iterative innovation, a focus on accountability, and a commitment to partnerships."

Dissel's article further examines the links between inequality and crime in a specific country. Starting from an understanding that criminal justice reform can have disproportionate and inequitable consequences on marginalized groups in the population, she examines initiatives in South Africa that are attempting to deal with offenders in a socially inclusive manner. She argues that the legacy of poverty, social exclusion, and deprivation of black South Africans under apartheid has led to a "culture of violence," which is now being passed onto a new generation. Despite

the country's transition to democracy, levels of inequality remain exceptionally high, as does the national crime rate.

Dissel argues that young people from marginalized groups in South Africa run a high risk of being both victims and perpetrators of crime and outlines the linkages between inequality, marginalization, and youth offenses in the country. She then explores various mutually reinforcing risk factors that affect whether young people become involved in crime, including community and family breakdown, exposure to high levels of community violence, and persistent anti-social behavior. She argues that these risk factors cannot be separated from the legacy of the country's violent past, when many of these risks became an entrenched part of everyday life. At the same time, young people's experience of the justice system is often highly dependent on their access to (and/or exclusion from) resources, which in turn may reinforce their marginalization.

Dissel then turns to an examination of initiatives that have tried to address problems of the criminal justice institutions in South Africa, as well as strategies to combat youth crime in ways that address broader social problems. Dissel looks at ways that these interventions could be strengthened to better tackle issues of inequality, which she identifies as the root cause of the high crime rate in the country. Dissel's article thus highlights the socially embedded nature of law and of legal institutions and the fact that law-related reform initiatives cannot be designed in isolation from broader social, economic, and political considerations.

In the final article of Part I, Peter Gourevitch brings the focus back to the complex interrelationship between legal, political, and social institutions. By examining how corporate governance systems function in different contexts around the world, Gourevitch sheds light on broader processes of change and the ways in which legal institutions interact with broader political and social institutions and forms of power. While a general consensus exists that political processes affect processes of development, Gourevitch explains that three schools of thought, or models of politics, are used to explain these processes. These schools focus on formal law (i.e., the "legal family"), political institutions (de jure institutions), and social power (de facto institutions), respectively.

Gourevitch contends that the three models "differ most on what shapes law and regulation." The first school focuses on the foundational role of law in the development of good institutions and thus stresses the need for legal and regulatory reform to promote processes of change. The second school argues that such laws and regulations are designed and implemented by policy-making bodies and therefore focuses on formal political institutions and decision-making bodies. The final model focuses on interest groups that influence political decision-making

processes, and thus affect the form and function of both political institutions and the laws they are able to promote and/or enforce.

Gourevitch argues that while each of these schools offer useful insights, each also has limitations and that ultimately, the separation of these interrelated variables is artificial. Any account of law, or legal development, that does not take into account both de jure and de facto political processes is therefore of limited use when designing or understanding effective reform strategies. Again, the volume brings us back to the interrelated and interdependent nature of comprehensive development.

### ***Part II: Policies, Principles, and the Development Context***

The second set of chapters addresses the legal aspects of certain policy-based questions currently being debated within the Bank and broader development circles, namely, (a) the relationship between development and human rights (and consequences of this relationship for the Bank's work); (b) the relationship between development, morality, and ethics; (c) the relationship between sustainable development and environmental justice; and (d) the relationship between intellectual property rights and the development of inclusive economic markets.

The first article in Part II, by the former World Bank General Counsel Roberto Dañino, explores the relationship between human rights and the work of the World Bank. Amidst debates about whether human rights are even relevant to development at all—or whether, if they are, the Bank's Articles of Agreement prohibit it from engaging in human rights concerns—Dañino clearly advocates their relevance and importance to the Bank's work, both legally and substantively. He argues that the very nature of the Bank's work means that it has contributed and will continue to contribute to the progressive realization of human rights in its member countries. He notes that the Bank's role in this area is increasing with its evolving focus on soft lending issues, such as institutional reform, governance, and social and human development.

Dañino outlines his preliminary thoughts on the legal dimensions of these concerns with respect to both the purpose and certain key limitations of the Bank's Articles of Agreement. He argues that while there are limits on what the Bank can do as a financial institution, “[i]n so far as human rights constitute a valid consideration for the investment process, they are properly within the scope of issues which the World Bank must consider when it makes its economic decisions.”

He argues that not only are human rights directly relevant to the Bank's core purpose of poverty alleviation, it has long been recognized that social and political factors have economic effects. At the same time, Dañino issues a few words of caution. He notes, for example, that human rights considerations should not lead to circumstances where double punishment is inflicted on people because of their

government's bad human rights record. He also emphasizes that the Bank is a development institution and while it can clearly exert a positive influence, its role is not to enforce human rights.

The three articles that follow, by Varun Gauri, David Kinley and Mac Darrow, respectively, examine some of the challenges to integrating human rights considerations into the work of the World Bank. Gauri and Kinley provide different perspectives on what is arguably one of the key blocks to such integration—a clash in comprehension, or what both argue is often willful misunderstanding, between the discourses of development economics and human rights law. The articles by Kinley and Darrow both stress the need for the Bank to engage with human rights in a more fundamental and systematic way.

Gauri outlines apparent differences in rights-based and economic approaches to health care and education in developing countries in an attempt to break down these differences and show their large degree of common ground. While he finds considerable overlap in the policy consequences of the two approaches, he argues that differences remain on how outcomes of programs should be assessed and measured, whether service delivery mechanisms and processes should be seen as important ends in themselves, the consequences of long-term deprivation, the metrics for measuring trade-offs, and the behavioral distortions of subsidies. Gauri argues that while most of these differences are not irreconcilable, trade-offs and behavioral distortions do pose serious challenges to rights-based approaches. At the same time, he acknowledges that while economics provides clear and calculable theories about, or solutions to, these issues, these theories have their own problems and blind spots.

Gauri differs somewhat from Kinley and Darrow in that he apparently supports framing social and economic rights as high-priority goals, rather than legally binding constraints on national governments and international agencies. For Gauri, this perspective overcomes some of the theoretical and practical concerns about rights. In particular, such an approach addresses concerns about the enforceability of rights by providing a broader understanding of the concept of duty bearer: "Calling health care and education rights means, in this understanding, that everyone bears some responsibility for their fulfillment."

In contrast, Kinley and Darrow both hold that the legal nature of human rights remains fundamental. As a legal academic, Kinley tries to "explode the myth" surrounding human rights, which he believes is, in part, based on a distrust of law, as well as a fundamental misunderstanding of how law functions in policy and practice. Kinley asserts that the legal basis of international human rights law prompts distrust and misunderstanding among the majority of the Bank's economics-trained staff, fueling misconceptions of what human rights law can

and does bring to development policy and practice. He identifies two levels of misunderstanding: the level of authority (human rights subordinate all else), and the level of application (human rights are seen as clear and unqualified, as well as directly and immediately enforceable). He argues that this rigid and monolithic understanding of human rights is based on a fundamental misunderstanding of how law, particularly international human rights law, functions. Not only does law serve a range of societal functions beyond strict enforceability concerns, it is continuously open to interpretation, qualifications, legal opinions, and judgments on the contexts in which certain principles should apply or the permissible extent to which rights can be legitimately limited.

Kinley focuses on the need for an integrated understanding of the essentially plural nature of human rights, given what he sees as an ignorance or misunderstanding of international human rights law. He argues that an understanding of the plurality of human rights should open Bank staff to rethink their attitude to human rights, which could lead to the adoption of more systematic thinking on human rights within the Bank as a whole.

Darrow also advocates a more integrated approach to the Bank's work on human rights, although he presents a more optimistic view of the research and operational work already underway in certain units of the Bank. Darrow gives two key reasons why human rights should be more explicitly integrated into the Bank's operations. First, he argues that the injunction to "do no harm" constitutes the non-discretionary core of the Bank's obligations under international law. This responsibility connotes, in his words, "the obligation to respect, if not also protect, human rights entitlements in force at the national level." Such an obligation requires the incorporation of human rights concerns and obligations into social safeguard policies and the assessment and evaluation tools used by the Bank to guide program design and implementation. Second, he argues that the growing evidence of the instrumental value of incorporating human rights into development efforts—notwithstanding the fundamental intrinsic value of such approaches—provides grounds for their broader integration into Bank policy and practice. From this perspective, human rights strategies can be used to enhance programmatic approaches to empowerment, accountability, and good governance, while recognizing their potential impact on political mobilization and social change.

Both Darrow and Kinley offer some words of caution, recognizing the many structural and cultural challenges to the effective integration of human rights in the work of the Bank. Both authors argue that the development of a truly integrated approach will, in fact, require significant changes in attitudes and institutional culture. And both highlight the dangers of rhetorical re-packaging, or the re-labeling, of development goals and approaches in human rights, stressing the need for clearer

messages about what human rights bring to development work. Darrow nonetheless reminds us of the responsibilities and obligations of international agencies, a theme taken up by McNeil in the subsequent article.

McNeil explores broader issues of responsibility, raising a number of ethical questions regarding the World Bank's approach to development. While he considers the *World Development Report 2006* as "a definite move in the right direction," he highlights the extent to which the report reflects the Bank's tendency both to favor an instrumental approach to development and avoid discussions of values and ethics. Despite these tendencies, McNeil argues that the World Bank has an obligation to address ethical issues and responsibilities that arise out of its mandate and role in the international arena. He argues that while the Bank is owned by its shareholders and thus formally accountable to its Board of Executive Directors, its core task is to benefit the poor, making it therefore "morally accountable to the poor of the world."

McNeil argues that the World Bank, as a powerful multilateral organization, shares responsibility for the way in which the international economic system works, and thus is responsible for causing—by commission or omission—the widespread poverty that exists. In particular, he argues that the Bank and its staff should take responsibility for giving misguided or poor advice to client countries. For McNeil, this responsibility is linked to the ethical obligations of Bank staff to serve their ultimate clients—the world's poor—even when that advice might run counter to the interests of the Bank's majority shareholders. While entirely legitimate, he sees this conflict as one of the reasons why Bank staff members seek to present arguments in technical and instrumental ways that are devoid of ethical considerations. The picture McNeil paints is of a self-perpetuating cycle of avoidance, in which the values and moral obligations that underpin the Bank's work are downplayed or ignored.

The final two articles of Part II explore links between particular sets of rights and development. McGraw and Lynch look at the links between sustainable development and environmental justice by exploring a number of the specific rights and obligations embodied in both concepts. Kurin turns his attention to the question of cultural rights and the most effective means of empowering local communities to develop and promote local cultural enterprises.

McGraw and Lynch argue that sustainable development and environmental justice have many overlapping goals and characteristics; "[e]ach requires taking into account and integrating policies relating to social justice, environmental protection, and economic development." They argue that the concepts are symbiotically related, a relationship reinforced by the human rights embedded in them. The nexus between environmental justice and human rights has been increasingly recognized

in international and national laws. Human rights abuses may have environmental consequences, and environmental abuses generally affect the rights of people living in a specific environment. People's health, livelihoods, and their access to resources are generally directly dependent on the environment in which they live. In order for them to have a meaningful say in the decisions that directly affect their lives and livelihoods, their right to active involvement and participation need to be supported. McGraw and Lynch point out that there is a growing global consensus within international organizations that people's right to participation is essential for guaranteeing that other rights are upheld and protected.

At the same time McGraw and Lynch outline ongoing obstacles to sustainable development and environmental justice, often reflected in excessive nationalism, sexism, racism, and other forms of discrimination based on ethnicity, religion, etc. These prejudices hinder the development of a sense of global purpose, responsibility, and the future that is necessary for the attainment of both environmental justice and sustainable development.

Kurin takes a different approach to dealing with cultural rights, arguing that legal rights-based approaches are often too rigid or removed from those they are designed to help. He thus advocates more practical programs aimed at developing cultural enterprises. Legal conceptions of cultural rights have tended to fall into two categories, those that focus on collective identity and those that focus on particular cultural products. These conceptions are reflected in a number of recent treaties aimed at protecting cultures in the context of increasing globalization, such as the *International Convention for the Safeguarding of Intangible Cultural Heritage* and the *Convention on the Diversity of Cultural Contents and Artist Expressions*. For Kurin, both treaties run the risk of strengthening national industries and protectionist measures, rather than local diversity and ownership of existing or emerging cultural markets.

Kurin describes the Smithsonian's Global Sounds Program as an example of an approach to cultural industries that aims at practical, life-improving, and revenue-generating outcomes. While issues of cultural ownership and copyright remain complex and challenging, the Smithsonian program facilitates people's capacity to develop, promote, and distribute cultural products in developing countries around the world, while maintaining claims (and thus some kind of financial benefits) to the material they have created.

### ***Part III: Recent Developments***

The topics covered in the last two papers of Part II link directly to the two World Bank policy documents discussed in Part III. Charles Di Leva's article summarizes the history and content of the World Bank's operational policy on physical cultural

resources, while Salman M. A. Salman explains the World Bank's new policy on indigenous peoples. These contributions show how staff from across the Bank, not only in the Legal Department, are beginning—and in some cases continuing—long-standing commitments to engage in very practical operational ways with issues that lie directly at the intersection of law, equity, and development policy.

### **Final Reflections**

The articles in this volume all speak in their own way to the general concerns and principles outlined at the beginning of this introduction. Each explores particular aspects of the ways in which prevailing rules systems conspire to keep poor people poor, and/or innovative ways in which changes in policies and practices can become part of a solution for bringing about a more equitable and just world. Each article reflects an understanding of the socially embedded nature of law and its fundamental role in development policy and practice. And each displays a consciousness of the inter-related nature of the global, national, and local realms, as well as the effects that different parts of the development story has on each of the other parts.

If nothing else, this volume should bring home to readers the fundamental nature of law (in all of its varied forms) as a constitutive element of everyday social, political, and economic life, and thus of social change and development processes. Rule-based systems pattern, organize, and regulate all forms of human behavior, cutting through all spheres and sectors of development at each level of operation. Taking the rules of the game seriously requires coming to terms with these systems—understanding them, engaging with them, and being aware of their effects on different policies and interventions. It also means understanding the interdependent (and mutually reinforcing) nature of policies, laws, rules, and norms, as well as recognizing that development processes (and the rule systems that underpin them) add another lawyer of complexity to, and thus possibly, contestation of, this ever-evolving mix. Development practitioners have ethical (and as Darrow points out, legal) responsibilities to (at the very least) “do no harm” and, therefore, also have a clear responsibility to be aware of the often inadvertent negative consequences of particular approaches to reform. Understanding that the process of development, whether by overtly or covertly changing social and political relations, is likely to bring about conflict gives practitioners a basis for managing the potential for negative consequences.

The relationship between the modernization of socioeconomic relations and an effectively functioning legal and regulatory system is now widely accepted. As the

*World Development Report 2006* makes clear, such systems are seen as crucial to equitable and sustainable development. The modern justice system—imagined as a rule-of-law system—that exists in varied permutations in different developed countries around the world is indelibly an integral component of modern socioeconomic relations. In fact, it is both the result *and* a pre-requisite of the modernization of these relations. Similarly, in the international arena, international law exists to promote international economic, political, and social stability, and to protect the rights of individuals and communities across the world, irrespective of the “morally irrelevant” characteristics of their birth. Unfortunately, these ideals bear little resemblance to the reality experienced by many people in countries around the world. In many countries, legal systems perpetuate inequitable power relations and discrimination, producing “legal inequality traps,” while the international system often falls short of delivering its stated objectives. Even when formal rules that seemingly protect the interests of the broader community exist, they are often undermined by institutional practices and informal strategies. Whether understood as “elite capture”<sup>21</sup> or corruption, these systems and practices serve to increase the power and wealth of a few at the expense of the majority, leaving the poor to suffer the harshest consequences. We sincerely hope that this volume inspires new and ongoing efforts to integrate scholarly and practical efforts in this most vital (if vexing) of causes.

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<sup>21</sup> For a more detailed discussion of elite capture, see Edward Glaeser, Jose Scheinkman, and Andrei Shleifer, “The Injustice of Inequality,” *Journal of Monetary Economics* 50, no. 1 (2003):199–222; and Joel Hellman, Geraint Jones, and Daniel Kaufmann, “Seize the State, Seize the Day: State Capture and Influence in Transition Economies,” *Journal of Comparative Economics* 31, no. 4 (2002):751–73.

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**PART I**

**LAW, JUSTICE AND THE  
DEVELOPMENT PROCESS**



## WHAT IS THE ROLE OF LEGAL AND JUDICIAL REFORM IN THE DEVELOPMENT PROCESS?

AMARTYA SEN\*

On the 4th of July 1776, on the occasion of the signing of the Declaration of Independence, John Hancock is reported to have observed: “We must be unanimous; there must be no pulling different ways; we must all hang together.” To this Benjamin Franklin responded: “Yes, we must all hang together, or most assuredly we shall all hang separately.”<sup>1</sup> That, in fact, is an apt initiating thought also for the analysis I intend to present in this lecture. Franklin was, of course, talking about the interdependence of the security of different groups of American revolutionaries, whereas we have to talk about the interdependence of different aspects of development—economic, social, political, and most immediately in the context of the present meeting, legal as well. It can be argued that if the different aspects of development are not simultaneously addressed and considered together for analysis and action, they may each end up “hanging separately.”<sup>2</sup>

This conference is aimed at the need for understanding the interconnections between different aspects of development, and in particular between legal and non-legal features of the process of development. The title of the conference invokes “Comprehensive Legal and Judicial Development.” Perhaps we can sensibly begin by asking what can “comprehensiveness” mean in the present context. I

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\* This lecture was delivered by Professor Sen at World Bank headquarters in Washington, DC, on June 5, 2000. Professor Sen spoke by invitation of the Bank at its “Global Conference for Comprehensive Legal and Judicial Development.” In 2001, a publication of other papers delivered at this conference was published under the title *Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society*, edited by Rudolf V. Van Puymbroeck.

<sup>1</sup> Paul M. Zall, ed., *Ben Franklin Laughing: Anecdotes from Original Sources by and about Ben Franklin* (Berkeley, CA: University of California Press, 1980), 153–4.

<sup>2</sup> I have discussed the different kinds of interdependences involved in the process of development in *Development as Freedom* (New York: Knopf, and Oxford: Oxford University Press, 1999).

believe that demand can be interpreted in two rather different ways. One notion of comprehensiveness looks outward, at legal and judicial development seen as a part of a fuller view of overall development, linking legal reform with economic expansion, social progress, political enrichment and other kinds of development which complement each other and are mutually reinforcing. This is the more obvious of the two possible interpretations.

The second approach, in contrast, would look inside the legal domain itself, rather than outward from it. Comprehensiveness, thus interpreted, would be concerned with the internal diversity within the huge sphere of legal and judicial activities, demanding fuller integration of the different sub-domains within this large domain. As is said in the subcontinent from which I come, law is a huge banyan tree, and the left branch does not know how the right branch is vegetating. By the way, in India they are vegetating pretty slowly all around; the majority of people held in custody are, I understand, patiently awaiting their trial, rather than serving a prison term. There is need for special efforts in keeping each branch in touch with the others. This is comprehensiveness within “law’s empire” (to use Ronald Dworkin’s articulate phrase).

The title of this talk that the organizers of the meeting proposed to me pointed, as it happens, distinctly at the outward-looking view of comprehensiveness. There is, in fact, a bit of a narrative here, as literary critics say. When I was first asked to speak, my instructions were to speak on “the role of legal and judicial reform in the development process.” But afterwards the title was changed, more interestingly I think, to take the form of a question: “What is the role of legal and judicial reform in the development process?” I don’t think it is a trick question (like such classic ones as: “do consonants hibernate?”). And I will indeed try to answer it. Later on, I shall have to ask the Legal Department of the Bank whether I have passed.

### **Comprehensive Development Framework**

The case for outward-looking comprehensiveness has a close connection with the kind of reasoning that led President James Wolfensohn to the “comprehensive development framework,” which has played an important part in the World Bank’s approach to the process of development and its demands in recent years.<sup>3</sup> This involves rejecting a compartmentalized view of the process of development. Most

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<sup>3</sup> James D. Wolfensohn, “Comprehensive Development Framework,” mimeograph, World Bank, 1999. Available at [www.worldbank.org/cdf](http://www.worldbank.org/cdf) (accessed July 14, 2006).

importantly, it militates against the old wisdom of doing one thing at a time.<sup>4</sup> The idea of doing one thing at a time is, of course, full of charm (I tend to think of it as rustic charm—like “Lorna Doone” or Wordsworth’s “Lyrical Ballads”), but it isn’t a great guide to practical policy, for reasons that Jim Wolfensohn has discussed so well. The idea of different things “hanging together” is quite central to this approach, and indeed to any integrated understanding of the process of development.

Given the emergence of approaches like the Comprehensive Development Framework (or the CDF) in recent years, the task of fitting law and judicial arrangements within a more comprehensive outlook is a new challenge. An interesting policy document recently produced by the Legal Department of the World Bank, called *Initiatives in Legal and Judicial Reform*, draws our attention to the fact, among others, that various “developments and experiences in recent years [have] increased the focus of leading development institutions on the role of law in economic development.”<sup>5</sup> Despite its comparative newness, this is an active, and I believe highly promising, field. The questions that we have to ask, however, are: does this make sense, and if so, exactly *why* and precisely *how*?

The fact that, as stated, leading development institutions take all this very seriously may be adequate for many observers to accept that the complementarity between law and economic development (and more generally, the need for a comprehensive approach to development) must be important. But this is clearly not an adequate ground for professional lawyers or economists or social scientists to accept the soundness of this integrative approach. For one thing, many development institutions have a remarkable record of persistent mistakes, sometimes mind-boggling ones. So the Legal Department is right to call this meeting and to demand critical scrutiny of the growing tendency of development institutions, including the World Bank itself, to emphasize “comprehensiveness.” It is particularly necessary to examine the underlying reasoning that provides the intellectual argument for an integrated and comprehensive approach. As Leonardo da Vinci said about half a millennium ago, relying on authority involves only memory and no intellect. We can do better than that.

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<sup>4</sup> On this, see also Amartya Sen and James D. Wolfensohn, “Development: A Coin with Two Sides,” *New York Times*, May 5, 1999.

<sup>5</sup> Legal and Judicial Reform Unit, Legal Department, World Bank, *Initiatives in Legal and Judicial Reform* (Washington, DC: World Bank, 2000), 2.

### **Conceptual Integrity and Causal Interdependence**

What, then, is the case for a comprehensive approach? I would argue that it is crucial to distinguish between two rather different types of reasons for wanting a comprehensive approach, related respectively to causal interdependence and conceptual integrity. The former points to the causal interconnections between the different domains that can be fruitfully seen together, whereas the latter relates to the possibility that the divided concerns are conceptually incomplete, so that they could not really be considered independently at all. The latter is a more assertive claim and has tended to receive less attention, compared with causal connections, and may be I should discuss it a bit more.

Perhaps an analogy would help to bring out the distinction. Take the weather. We may consider separately different aspects of the weather, viz. the clouds, the rains, the sun, the humidity, the temperatures, and so on, and we can consider their interdependence (such as clouds are associated with more rain, rains are linked with the lack of sun, and so on). If, however, we are concerned with a concept like “a typical summer day,” or “a severe winter month,” the very idea has different components within it, which encompass temperature, rain, snow, sun and other weather characteristics. The issue here is not that temperatures, rain, sun, etc., link with each other (this they certainly do, but that is not the point at issue here), but that we cannot form a judgment as to whether a particular day is a typical summer day, or a specific month is a typical winter month, without considering together a variety of different information about temperature, rain, sun, etc. Conceptual integrity of the idea of a typical summer day or a typical winter month, then, demands all this information together, and this is altogether a separate issue from the causal interdependence of these distinct variables.

I would argue that both kinds of reasoning, conceptual integrity and causal interdependence, are involved in the rationale of a comprehensive development framework. Since the idea of conceptual integrity is perhaps less familiar, let me deal with it first. At one extreme, conceptual integrity may take the form of arguing against the viability of any self-contained notion of “economic development,” or “social development,” or “political development,” or for that matter “legal development.” There is “development” in a general sense, and one can even perhaps talk about its economic, social, political, or legal correlates. But on this conceptually integrated extremist view, it would be misleading, or worse, to talk about economic development, legal development, etc., as separate entities. This is the kind of 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.” We don’t ask: which kind of human

development: economic, social, political or legal? Rather human development encompasses them all, and they can be, in this perspective, only seen together, not in isolation from each other. If such a radical view were to be taken, then legal and judicial reform would be seen as contributing to the process of development in general (or, perhaps, to the process of human development seen as a whole), rather than separately to legal development, economic development and other fragmented concepts of development.

The idea of only one integrated idea of development is, of course, quite extreme, and rather uncompromising. We may choose to be less radical and conceptually more tolerant, and argue that there can, in fact, be viable notions of development in particular domains, even though they also interlink. For example, we can have well-developed democracies with political and civil liberties, or well-achieved economic development with growing economic prosperity, and so on, without presupposing that one must go with another.

### **Legal Development and Conceptual Integrity**

Conceptual integrity is still very important in this less extreme formulation, though it applies in different ways, at two different levels of aggregation.

First, even though we have separate concepts of economic development, legal development, etc., we may still have an interest in the development process as a whole. We have reason to want to know how a country is developing, taking everything into account, and not just how it is doing in one narrowly defined field or another. In this broader, more inclusive reckoning, it may turn out that development as a whole is an amalgam of developments in the distinct domains of economics, law, etc. To use the old analogy again, development seen as a whole — what we may call development tout court — is like a typical summer day, and it requires an integrated consideration of developments in distinct domains such as economic, legal, etc. (much in the way a typical summer day depends on the sun, the temperature, the blue sky, and so on). The claim here is not so much that, say, legal development causally influences development tout court, but rather that development as a whole cannot be considered separately from legal development. Indeed, in this view, the overarching idea of development is a functional relation that amalgamates distinct developmental concerns respectively in economic, political, social, legal and other spheres. This is more than causal interdependence: it involves a constitutive connection in the concept of development as a whole.

Before I go on to the second way in which constitutive connections are important, let me comment briefly on how far-reaching are the implications of an integrated and

overarching concept of development. While I have, so far, used this case only as an illustration, let me now make the substantive claim that this conceptual integrity of the overarching idea of development is indeed correct. It is, of course, true that at one level “development” is a matter of definition, and some people seem to insist that they are free to define any concept in any way they like; it is almost like a “fundamental right to define anew” (a fundamental right in favor of which street demonstrations may soon begin). However, it so happens that linguistic usage over a long time has given a certain content to the idea of development, and it is not possible to define development independently of those established associations.

It is hard to think that development can really be seen independently of its economic, social, political or legal components. We cannot very well say that the development process has gone beautifully even though people are being arbitrarily hanged, criminals go free while law-abiding citizens end up in jail, and so on. This would be as counterintuitive a claim as the corresponding economic one that a country is now highly developed even though it is desperately poor and people are constantly hungry. Only a Humpty Dumpty, in Lewis Carroll’s insightful caricature, can provide full support for the fundamental right to define anew: “When I use a word, it means just what I choose it to mean, neither more nor less.” Development has a strong association of meanings that makes a basic level of legality and judicial attainment a constitutive part of it.

If this is accepted, then one part of the answer to the question that I have been asked becomes immediately clear. In answering the query, “What is the role of legal and judicial reform in the development process?”, we must at least begin by noting the basic fact that legal 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. The notion of development cannot be conceptually delinked from legal and judicial arrangements. That central point deserves recognition before I go on to other constitutive and also to the class of causal connections.

I turn now to the second use of the idea of conceptual integrity. Even when we consider development in a particular sphere, such as economic development or legal development, the instruments that are needed to enhance development in that circumscribed sphere may not be confined only to institutions and policies in that sphere. If the development achievements in a particular sphere is to be judged by what freedom people manage to have in that sphere, then we have to take the

overall effect of all these instrumental variables on the lives of human beings in that particular sphere.<sup>6</sup>

To illustrate, if women are given some legal rights through a process of reform which they did not earlier have, this may look like a legal development, and in a sense it clearly is that. And yet, if the focus of legal development is to give women rights that they can exercise, then this putative legal development may be constitutively hollow if women do not manage in fact to exercise any of these rights because of, say, illiteracy.<sup>7</sup> The very idea of legal development may then be, as in this illustration, contingent on certain social or economic characteristics. If we overlook these constitutive linkages, then we may miss some of the strongest arguments for taking a comprehensive approach, which go well beyond the causal interdependences between separately conceptualized ideas of legal development, social development, political development, and so on.

The basic claim here is this. Legal development, to stick to that example first, is not just about what the law is and what the judicial system formally accepts and asserts. Legal development must, constitutively, take note of the enhancement capability, their freedom, to exercise the entitlements that we associate with legal progress. Given this need for conceptual integrity (in this case, the need to see legal development not just in terms of legislation and laws but in terms of effective freedoms and capabilities), all the instruments that causally influence these freedoms must be taken into account in assessing what progress is being made in enhancing the development of a successful legal and judicial system.

An exactly similar analysis will apply to other notions of development in particular spheres such as economic, political, and so on. Economic development is not just about the formal economic opportunities that are available (such as free markets, open trade, transactional facilities, etc.), but ultimately about the effective freedoms and capabilities that people have in the sphere that we see as economic, in particular to have basic economic needs fulfilled. This integrated concept may, in terms of causal influences, depend on a variety of policies and facilities that are not primarily economic (such as schooling and literacy, epidemiology and health care, etc.), but we cannot leave them out as “non-economic” concerns once we adopt an adequately broad and integrated view of economic development.

This recognition, by the way, has an immediate bearing on the World Bank’s mandate to concentrate on economic development in particular. That seemingly

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<sup>6</sup> This is more fully discussed in my *Development as Freedom* (see footnote 2).

<sup>7</sup> On these connections, see Salma Sobhan, *Legal Status of Women in Bangladesh* (Dhaka: Bangladesh Institute of Legal and International Affairs, 1978).

narrow mandate, seen in a conceptually integrated form, cannot exclude extensive use of policy instruments in social, political, legal and other spheres. They have to be included among the relevant policy variables not just because the overarching concept of development tout court integrates economic development with other kinds of developments to arrive at an integrated view of development as a whole, but also, and more immediately, because economic development itself requires instruments which, by themselves, do not count as economic instruments. Causal interconnections supplement the broadening of policy attention that has its origin in the need for conceptual integrity.

I must also note that the answer to the question I have been asked to address is also influenced by this line of argument. I have already discussed why legal development must be seen to be important in the development process even if it had no influence on development in other spheres (this is because of the need for conceptual integrity in an overarching concept of development). But to this now I must add a different set of considerations which also influence the answer to the question: "What is the role of legal and judicial reform in the development process?" Legal and judicial reform is important not only for legal development, but also for development in other spheres, such economic development, political development, and so on, and these in turn are also constitutive parts of development as a whole. This is like a thickly interwoven textile.

I shall have to say, a few more things about the general framework of analysis, but let me take a little breather away from theory to consider some practical illustrations. This may help to give concreteness to some of the issues of interdependence involved.

### **The Legal Roots of Capitalist Success**

Let me begin with legal development, and its relation with economic and political development. As discussed already, legal development must be seen as important on its own as a part of the development process, and not merely as a means to the end of other kinds of development, such as economic development. It is extremely important to get this point fully accepted, since there is a well-established tradition in development studies and policy making to concentrate exclusively on economic expansion. For example, much harm has been done in the assessment of political development by asking such misleading questions as: "Does democracy help to facilitate development or hinder it?" The champions of "Asian values" have tried to make much of their belief that a negative answer to this question is empirically justified. The fact is, of course, that there is no convincing empirical evidence

at all which indicates that democracy slows down economic growth (it does not seem to have any clear influence on economic growth one way or the other), but there is plentiful evidence that democracy does strengthen social security and the prevention of economic disasters.<sup>8</sup> But more fundamentally, the question is wrongly posed, since it tends to overlook the fact that democracy is a constitutive part of the process of development itself. The case for democracy does not have to be indirectly established through its contribution to economic or some other kind of development. The same applies to legal development. The conceptual integrity of development requires that we value the emergence and consolidation of a successful legal and judicial system as a valuable part of the process of development itself, not just for the way it may aid economic or political or some other kind of development.

It is important to be careful here in recognizing that the basic significance of legal development does not require us to abstain from considering the causal interdependence between legal and other kinds of development. In particular, it does not require us to abstract from the causal interconnections that suggest that legal or judicial reform may be easier to organize once the process of economic or political development has proceeded some distance. In the context of Latin America, Maria Dakolias makes precisely this point in asking for speedier progress of legal change at this time. She provides evidence to argue in this line and concludes: "The Latin American region today is politically, economically and socially better suited for judicial reform than it was in the 1960s and 1970s. There is greater economic stability in the region, which has allowed these countries to begin 'second generation reforms.'"<sup>9</sup> The feasibility, effectiveness and speed of legal and judicial reform may well be influenced by political, economic or social circumstances, and it is possible to take intelligent note of that causal interconnection without denying the constitutive importance of legal development as a part of the process of development. The need to take note of causal connections is not overridden by the basic importance of any component of the development process. Indeed, any rational program of enhancing development must pay attention, simultaneously, to both.

The causal connections are also important in assessing the contribution of legal development to other types of development. It is hard to understand the history of

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<sup>8</sup> On this and related issues, see my "Human Rights and Asian Values," Morgenthau Memorial Lecture (New York: Carnegie Council on Ethics and International Affairs, 1997); a shortened version of which was published in *The New Republic*, July 14 and 21, 1997.

<sup>9</sup> Maria Dakolias, "A Strategy for Judicial Reform: The Experience in Latin America," *Virginia Journal of International Law* 36, no. 1 (Fall 1995), 230.

economic change, for example the rise of capitalism as an economic system, without acknowledging the role of non-economic influences, among which legal changes figure prominently. Let me pause here a bit to recollect how capitalism came into being and became such a successful system. Capitalism did not emerge until the evolution of law and order and the legal and practical acceptance of property rights had made an ownership-based economy feasible and operational. The efficiency of exchange could not work until contracts could be freely made and effectively enforced, through legal as well as behavioural reforms. Economic expansions are hard to plan without the needed trust in each other's plans and announcements and the required confidence that agreed arrangements can be relied upon. Investment in productive businesses could not flourish until the higher rewards from corruption had been moderated, and in this too, legal and behavioural changes played their part. The financing of businesses could not run smoothly until credit institutions had developed, and borrowers were standardly inclined to repay loans, rather than absconding away. Similarly, labour productivity demanded educational arrangements, often arranged by the state; the powerful forces of learning by doing and on-the-job training had to build on the base of institutional education provided by schools and colleges, often run by the state or the local authorities. In these developments too, legal reforms that gave citizens the right to free public education and forced them to accept the duty of sending their children to school played a critical part, as elementary education became both a legal entitlement and a legal obligation of the parents.

It is not hard to point to many other ways in which legal change has facilitated the expansion of Western capitalism. Those early foundations of economic development called for legal and other developments of specific kinds, and these demands have expanded over the years as the early forms of capitalism have given way to reformed arrangements involving social security, unemployment compensation, public health care, and other constituent parts of contemporary western economies.

### **Development Process and Legal Reform**

Similar diagnoses can be made about the process of economic development elsewhere in the world, even though the balance of concentration has sometimes varied over the regions. For example, land reform, according to all evidence (including the World Bank's own research in this field), played an unusually crucial part in the high growth rates and shared economic expansion in East and South-east Asia, from Japan, Korea and Taiwan all the way to the very dissimilar economies of China and Thailand.

The development of education has played a momentous part in Asian economic expansion. This is, of course, spectacularly so for Japan, where the educational priorities and the rights of citizens and residents against the local authorities to provide school education assumed a leading role in the initiation of rapid economic expansion. For example, between 1906 and 1911, education consumed as much as 43 per cent of the budgets of the towns and villages, for Japan as a whole.<sup>10</sup> In this period in Japan, the progress of elementary education in particular was most rapid, and the recruiting army officers noted the remarkable fact that while in 1893 one third of the army recruits were illiterate, already by 1906 there was hardly anyone who was not literate. By 1913, though Japan was economically still quite underdeveloped and very poor, it had become one of the largest producers of books in the world, publishing more books than Britain and indeed more than twice as many books as the United States.<sup>11</sup> To a great extent the fast economic expansion of East and South-east Asia has drawn on the lessons of these experiences, particularly through the arrangements associated with the enhancement of human resources and skill.<sup>12</sup> These developments were at once social (they deal with education and other social opportunities) and economic (they influenced economic performance), as well as legal (they were associated with creating a pattern of rights and duties which influenced the lives of citizen).

Another interesting area, which has come into prominence very recently, is India's sudden and rapid success in the development of computer software (India has become the second largest software producer in the world, behind only the United States). This process has been facilitated not only by the earlier expansion of technical education in India, but also by the comparatively flexible legal arrangements that govern these businesses compared with the much more rigid regulations that apply to more traditional commerce and industrial production, in which progress has been much slower.

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<sup>10</sup> See Carol Gluck, *Japan's Modern Myths: Ideology in the Late Meiji Period* (Princeton: Princeton University Press, 1985), 166; see also the literature cited there.

<sup>11</sup> For these data, see Gluck, 1985, *Japan's Modern Myths*, 12, 172, and the references cited by her.

<sup>12</sup> See World Bank, *The East Asian Miracle: Economic Growth and Public Policy* (New York: Oxford University Press, 1993).

### **The Media, Public Discussion and Gender Equity**

It is possible to identify many different areas of legal and judicial reform on which economic development has drawn in diverse ways in different regions in the world. Perhaps I should briefly mention three further subjects which should figure in the agenda of work here. First, as I have tried to discuss elsewhere, a free and vigorous media can be immensely influential in strengthening economic security, political liberties, legal and human rights, and so on. Much difference can be made in this field by judicial guarantees of, and support for, the right of free speech, fair comment and public criticism. An active media can also help to give an effective voice to the vulnerable and the poor, and can also force the government into greater accountability, which is very central to a successful process of development.

Second, public interest in social responsibility can itself be a factor of some importance, and innovative legal arrangements (for example, public interest litigation, class action suits, etc.) can serve as catalysts for drawing neglected issues into the limelight of open scrutiny and social challenge.

Third, special attention has to be paid to the rights of women, which are important not merely for gender equity (a crucial enough cause even on its own), but also for benefits for all (men, women and children), for example through reduction of child mortality and diminution of high fertility rates. Recent research has brought out the far-reaching role of justice to women which influences nearly every aspect of economic, social, political and legal development, and which call for legal and judicial reform aimed specifically at this objective. I have tried to discuss these issues in *Development as Freedom*.

### **Security and the Environment**

One hopes that the Legal and Judicial Reform Unit of the Legal Department of the Bank, which is hosting this conference, can incorporate interregional comparative investigations on these and other subjects as a part of its forthcoming program. It is also important not to approach the future as if it must be a repetition of the past. East and South-east did very well through its policies for “growth with equity,” but there was, alas, little provision for what we may call “decline with security” and this extracted a very heavy price when the Asian economic crisis occurred in 1997 onwards. This points to the need for facilities for social safety nets, economic security and other provisions, including acknowledging the role of democracy and adversarial politics in providing political incentive to the government to make adequate provisions against insecurity in general and economic catastrophes in

particular. I have tried to discuss these issues elsewhere, and will not further into them here, but I must note in the context of the present-lecture that the changes that seem to be needed all involve specific legal and judicial reforms.

To this already large list, we must also add the growing necessity of seeing the task of economic development in an environment-sensitive way, and particularly in the form of requirements for sustainable development.<sup>13</sup> If economic development is much facilitated by particular legal developments, this applies a fortiori to sustainable economic development. Legal provisions in protecting the environment and helping its sustaining can be a particular crucial field for legal and judicial thinking in the context of development, at the present time.

### **Democracy and an Independent Judiciary**

I have spent some time in discussing a few of the areas in which legal and judicial reforms can contribute greatly to the nature and quality of economic development. Similar interconnections apply to other areas of development as well. Just to illustrate, the progress of political development, particularly in the form of emergence and consolidation of democracy, not only requires legal provisions for elections and the supervision of the independence and neutrality of the process, but it is also dependent on judicial protection of dissent and the guaranteeing of open, pluralist politics.

The independence of the judiciary is obviously a very important prerequisite of generating confidence in the multi-party democratic process and in encouraging people to participate in the democratic process in an unrestrained, and most importantly fearless, way. The experience of various countries that leave a lot to be desired in these judicial arrangement has many lessons to offer in this respect, particularly about what is not to be emulated, and these issues are not made any less important merely because these countries hold periodic elections.

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<sup>13</sup> See, for example, National Research Council Board on Sustainable Development, *Our Common Journey: A Transition toward Sustainability* (Washington, DC: National Academy Press, 1999).

### **Comprehensiveness: Institutions and Freedoms**

Before ending, I may take the liberty of discussing briefly a question of approach and strategy that I have often faced. I have been frequently asked in what way does the “comprehensive development framework” (CDF) explored and advocated by President Wolfensohn relate to the kind of integrated view of freedom on which I have concentrated in my own work, for example in *Development as Freedom*. The CDF approach is institutionally founded, and in many ways, this is a natural extension of the kind of institution-based approach that the World Bank has reason to pursue, except that in the Wolfensohn interpretation the coverage is much wider and the domain of institutional interest remarkably broader than in the past. On the other hand, in the approach based on an integrated view of freedom, the focus is primarily on what freedoms people actually enjoy, and this brings in institutions only as ways and means of achieving development, characterized as expansion of different kinds of interlinked freedoms and the removal of different categories of interconnected “unfreedoms.”

There is really no tension between the two approaches. Both draw on the fact that we live in a world in which different institutions interact with each other, and the success of development efforts depends greatly on the fruitfulness of these interactions. The market, the legislature, the judiciary, the media, political parties, business enterprises, non-governmental organizations, and other economic, political and social institutions all play specific, and interlinked, roles in the overall development experience of a country. This broad and inclusive perspective is extremely important to bear in mind, so that we do not end up seeing development in an artificially narrow way, focusing on one part of the interlinked structure and ignoring others.

Partisans of various schools of thought have often tried to glorify one part of the complex reality, while excluding others, thereby producing an artificially restricted view of development. Many commentators have seen the market, and the market alone, as central, whereas others have conceptualized development simply in terms of policies executed by the government and as exercises of planning. There have also been other constricted and circumscribed views, which have done less than justice to the inclusive and multidimensional nature of development. It is, thus, extremely important to see the linkages clearly and to see the extent to which different aspects of development relate to one another.

Both the CDF view and the integrated freedom view take these interconnections fully on board. The CDF approach looks at different instruments, in particular at different institutions, and want them to be developed in conjunction with each other, taking full note of the causal linkages between their respective effects. The

integrated freedom view starts at the other end, and looks at different aspects of human freedom and how they link with each other. The linkages operate through two different routes, and it is useful to distinguish between them. First, freedom in any particular sphere may depend on instruments from other instrumental spheres. Just to recapitulate, this is well illustrated by the fact that the realization of legal rights of women depends not only on legislation but also on the ability of women to read and write and on other social opportunities that women may or may not have. If illiteracy prevents women from exercising their rights, then it seems right to say that her legal rights were not realized, rather than to assert that her legal rights were all realized but she did not actually use them because of illiteracy. Second, even after the freedoms of different kinds have been appropriately characterized (taking note of constitutive connections), there are also interconnections that come through the fact that different types of freedoms have to be considered together to get an adequate understanding of the process of development as a whole. It is just as important to assert the separate importance of freedoms of different kinds as it is to acknowledge their empirical interdependence.

In making effective use of the approach of Comprehensive Development Framework, there is a good case for bringing in the freedom-based considerations explicitly into the accounting. This gives an immediate reason to ask about the end product of legal and judicial reform and other institutional changes, and the need to be clear about what they are aimed at. This is where the foundational objective of the expansion and consolidation of human freedom becomes central as constitutive of development. It is in these ways that the freedom-based approach can effectively supplement the CDF strategy. Many of the examples I have already discussed bring out the crucial role of freedoms that are enhanced or consolidated by institutional reform. This is a good way of relating the comprehensiveness of the institutional framework to the comprehensiveness of the freedoms at which they are aimed.

### **A Concluding Remark**

In this lecture I have tried to answer the question that was posed to me, and I hope I get reasonable marks at least for effort, if not for achievement. Many of the examples with which I have tried to illustrate the arguments are easy to extend and enrich through further investigation. I believe the lessons that emerge may be much richer and more complex than what we know at this time. I certainly look forward to seeing how World Bank initiative in investigating the role of legal and judicial reform proceeds.

The basic distinction between the case for comprehensiveness arising out of conceptual integrity as opposed to that generated by causal interconnections is particularly important to seize in this context. Conceptual integrity is relevant at different levels. It is critical at the foundational level of an overarching conceptualization of development, and in particular (in the present context), in affirming the constitutive importance of legal development, even if it made no contribution whatever to economic, social and political development. Furthermore, the issue of conceptual integrity is important even at the disaggregated level of identifying the nature and requirements of legal development, economic development, etc., and in particular (in the present context), in taking note of the non-legal influences on legal development, non-economic (often legal) influences on economic development, and so on.

It is in this broad framework that, I believe, the question posed to me can be adequately addressed. We have to see the role of legal and judicial reform in legal development, while taking into account the plentiful influences that may come from other spheres (economic, political, social, etc.). We must also see the role of legal development in general and of legal and judicial reforms in particular in enhancing development in other spheres (again, economic, political, social, etc.). In both these exercises we have to take adequate note of the causal and conceptual interrelations between these different fields which are significant at different levels of aggregation.

If this sound a little complex, I must point out that the complication relates, ultimately, to the interdependences of the world in which we live. I did not create that world, and any blame for it has to be addressed elsewhere. However, I don't really think that the basic approach is particularly exacting to follow, even though it requires that we have to pay attention to quite a few distinct variables and their interrelations. We have no great difficulty in taking plural concerns into account in every other sphere of life. In terms of the analogy used earlier, involving the weather, we seem to be able to pay separate attention to sun, rain, snow, temperatures, etc., without getting confused between them; we recognize that they are distinct and yet interrelated. We also have little problem in understanding that a concept like a typical summer day or a standard winter month is conceptually integrative and requires us to take note of various things at the same time. We may not talk about the weather all the time, as the English is supposed to do, but we do follow what is going on.

Mark Twain once remarked about New England weather that he "counted one hundred and thirty-six different kinds of weather inside twenty-four hours." If he could do that, the Legal and Judicial Reform unit of the World Bank can certainly do the various things I have been suggesting that it should do. The organizers gave

me a question to answer, and I have, in return, given them a list of things to do. I would say we are just about quits.

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## THE MULTIPLE EDGES OF LAW: DEALING WITH LEGAL PLURALISM IN DEVELOPMENT PRACTICE\*

FRANZ VON BENDA-BECKMANN

*Governments all over the world have always used law to organize and legitimate social, economic, and political organizations to either prevent or bring about change. Policies designed to promote change often occur in the form of “legal engineering,” whether policymakers like it or not. Forcing or pushing people to change their behavior implies the exercise of power, which in most contemporary states with democratic ideologies must be legitimated by law. Moreover, most changes affect existing legal relationships, and changing these relationships also must be legitimated by law. All attempts to introduce new laws, therefore, are likely not only to be influenced by and filtered through the social organizations they intend to change, but also by the legal structure of these organizations. The legal dimension of change is further complicated by the fact that in many societies, more than one set of legal orders give rise to patterns of social organization and the legitimation of power. These varying legal orders often contradict each other—a situation usually referred to as “legal pluralism.”<sup>1</sup> Since law organizes and legitimates power, the “legal certification of power” is much sought after in local, national, and transnational arenas; political and economic conflicts are, in fact, frequently expressed as conflicts between legal orders.*

*But while political authorities all over the world have engaged in legal engineering, the issue of law has been neglected for long periods in the realm of development policy and discourse—considered of secondary importance to technological and economic change. During the past two decades, however, law has been given*

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\* This article is an expanded version of a talk given at the World Bank Legal Forum 2005, “Law, Equity, and Development,” held in Washington, DC, December 1–2, 2005.

<sup>1</sup> For overviews on the history and meaning of this contested concept, see John Griffiths, “What Is Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law*, no. 24 (1986):1–55; Sally Engle Merry, “Legal Pluralism,” *Law & Society Review* 22, no. 5 (December 1988):869–96; and Franz von Benda-Beckmann, “Who’s Afraid of Legal Pluralism?” *Journal of Legal Pluralism and Unofficial Law*, no. 47 (2002):37–82.

increasing attention in development planning and practice. The World Development Report 2006 indicates that important development organizations are increasing their interest in law-related issues of development, including non-state laws.<sup>2</sup>

This article places the emerging acknowledgement of legal pluralism in development policy into historical context. It then discusses the complexity of legal pluralism and what it means for development agencies to “take legal pluralism into account.” The problems that result from the inclusion of legal considerations in development practice are illustrated with examples concerning land law and access to natural resources. The article concludes with a consideration of the difficulties that characterize the problematic relationship between social scientists who research law as a factor in development processes and practitioners who work in development organizations.

## Development and Old and New Law

The first period of a “law and development movement” is associated with (but certainly not limited to) the 1960s, the United States, and lawyers. For example, literature that proclaimed law to be a good instrument for social change,<sup>3</sup> as well as the more sober literature on the failures of such attempts in the 1970s, was written by American authors.<sup>4</sup> There were good reasons for rethinking this path

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<sup>2</sup> World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank, 2005).

<sup>3</sup> See Peider Kőnz, “Legal Development in Developing Countries,” in *Proceedings of the American Society of International Law at Its Sixty-Third Annual Meeting* (Washington, DC: ASIL, 1969), 91–100; and J.B. Howard, “Law as a Resource of Development,” *International Development Review* 1976:9-1

<sup>4</sup> See, for example, David Trubek and Marc Galante, “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States,” *Wisconsin Law Review* (1974):1062–1102; John H. Merryman, “Comparative Law and Social Change: On the Origins, Style, Decline and Revival of the Law and Development Movement,” *American Journal of Comparative Law* 25 (1977):457–91; James A. Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison, WI: University of Wisconsin Press, 1980); Frank Snyder, “Law and Development in the Light of Dependency Theory,” *Law & Society Review* 14, no. 3 (1980):723–804; and Sally F. Moore, “Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study,” *Law & Society Review* 7 (1973):719–46. In Germany, see Brun-Otto Bryde, *Politics and Sociology of African Legal Development*

because the successes of legally structured modernization and democratization did not materialize. The movement was consequently discredited. No one was really surprised, because what did lawyers understand of development in the third world anyway? Law and development was seen as a naive ambition with which western lawyers (and the governments that paid them) tried to transform social, economic, and political conditions in developing nations with the help of western law, which clearly seemed to have proven its value in the economic and political development of Europe and the United States. “Law and development” became coterminous with simple instrumentalism, guided by the expectation that the ideal future legal blueprint could also come true—a simple belief in the causative force of law. As is often the case, “law” became identified with “lawyers” or legal scholarship, and the treatment of “law as an intellectual stepchild”<sup>5</sup> rubbed off on legal rules and institutions, although many were eminently cultural, political, social, and economic as well.

With the demise of the “law and development movement,” law more or less disappeared from the development scene. Of course, the process of using law to organize and implement development programs and project objectives by governmental and non-governmental organizations (NGOs), as well as to “modernize” former colonial social formations, continued.<sup>6</sup> As an issue in development theory, however, law remained relatively unimportant in the 1970s and 1980s.<sup>7</sup> Even less attention was paid to the plural legal conditions that existed in former colonial states.

The past two decades, however, have seen a new boom in law and development activities among national governments and bilateral and transnational development agencies. A new wave of law-focused development projects first began in the

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(Frankfurt am Mein: A. Metzner, 1977); and Schott Rüdiger, “Recht und Entwicklung in Afrika,” in *Afrika zwischen Tradition und Fortschritt: Die Schicksalsfrage eines Kontinents*, ed. Heinz Dietrich Ortlieb and Jurgen Zwernemann (Hamburg: Verlag Welt Archiv, 1980), 69–88.

<sup>5</sup> Talcott Parsons, “Law as an Intellectual Stepchild,” in *Social Systems and Legal Process*, ed. H.M. Johnson (San Francisco: Jossey-Bass Publishers, 1978), 11–58.

<sup>6</sup> See Snyder, 1980, “Law and Development in the Light of Dependency Theory,” 723.

<sup>7</sup> In these same years, however, more differentiated analyses of the constraints and possibilities for legal engineering were developed in academic literature. See, for example, Antony Nicholas Allott, *The Limits of Law* (London: Butterworths Publishing, 1980); and Iredell Jenkins, *Social Order and the Limits of Law: A Theoretical Essay* (Princeton: Princeton University Press, 1980).

1990s.<sup>8</sup> An important starting sign of this wave took place when the World Bank largely freed itself from the constraints of its own constitution, according to which it had no mandate to interfere in the political and administrative organization of the countries with which it worked and prescribed “economic” considerations as the only criteria for its decisions.<sup>9</sup> The meaning of “economic” was reinterpreted.

Previously, politics and law had been viewed mainly as factors external to economics. Now, however, they were incorporated into economics as factors relevant to economic growth. For instance, the definition and protection of property rights, the creation of an effective judicial system and, later, “good governance,” became relevant factors for a healthy economy. This reasoning would now influence World Bank decisions and be transformed into conditions for development aid.<sup>10</sup> The change in how law and politics were perceived represented a shift in the Bank’s perspective on the role of governments and the importance of institutions, a development probably also influenced by the increasing dominance of the institutional economics school in the economic world. The *World Development Report 1991* provided a clear and frequently quoted statement of the new policy, according to which “[by] defining and protecting property rights; providing effective legal, judicial, and regulatory systems; improving the efficiency of the civil service and probably the environment; the state forms the very core of development.”<sup>11</sup> This shift contributed to the new boom in law and development activities.

Law became much more of an “in” thing in the policies of important development organizations, including the World Bank, the Asian Development Bank, and the German Agency for Technical Assistance (GTZ). Especially after the end of the Soviet Union, the number of providers and recipients of law and development activities

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<sup>8</sup> Carol V. Rose, “The ‘New’ Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study,” *Law & Society Review* (Journal of the Law & Society Association, Blackwell Publishing, Oxford) 32, no. 1 (April 1998):93–140.

<sup>9</sup> See Article IV, section 10, *Articles of Agreement of the International Bank for Reconstruction and Development*, as cited in F. von Benda-Beckmann, “Good Governance, Law and Social Reality: Problematic Relationships,” *Knowledge and Policy: The International Journal of Knowledge Transfer and Utilization* 55, no. 7, no. 3 (1994):56–67.

<sup>10</sup> F. von Benda-Beckmann, 1994, “Good Governance,” 56.

<sup>11</sup> World Bank, *World Development Report 1991: The Challenges of Poverty* (Washington, DC: World Bank, 1990), 4.

increased dramatically.<sup>12</sup> Given that the spatial structure of economic and political relations has widened, law now plays an important (though often still under-explored) role in the increasing density of transnational and global relations.<sup>13</sup> Legal models in the form of draft legislation for natural resource management, bankruptcy, “soft law” standards, human rights, and other international conventions developed by international organizations and transnational epistemic communities (networks of experts and bureaucrats that develop policy models based on shared normative and causal beliefs) have come to have increasing global significance.<sup>14</sup>

The globalization of law is not a new phenomenon. Throughout history, law has been transported through trading relations and hegemonic state expansions (before, during, and after colonization<sup>15</sup>), but transnational and international law presently play a far greater role in the international order and within legal orders in states than in earlier post-colonial periods.<sup>16</sup> Present activities are not driven so

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<sup>12</sup> At the same time, the collapse of the Soviet empire provided a good example of the dissolution of strong legal ties and a dramatic reduction of the spatial diffusion of law, that is, a sort of “de-globalization.”

<sup>13</sup> Andrew McGrew, “Global Legal Interaction and Present-Day Patterns of Globalisation,” in *Emerging Global Certainty: Empirical Studies on the Globalization of Law*, ed. Volkmar Gessner and Ali Cem Budak (Burlington, VT: Ashgate Publishing Ltd., 1998), 325–45.

<sup>14</sup> See John Hatchard and Amanda Perry-Kessaris, eds., *Law and Development: Facing Complexity in the 21st Century* (London: Routledge Cavendish, 2003); and Franz Benda-Beckmann, Keebet von Benda-Beckmann, and Anne Griffiths, eds., *Mobile Law, Mobile People: Expanding Legal Relations in a Contracting World* (Hants, UK: Ashgate Publishing, Ltd., 2005)

<sup>15</sup> World religions, for example, have contributed to the diffusion of legal codes worldwide. On the spread of world religions, especially Islam and Christianity, see David Held et al., *Global Transformations: Politics, Economics, and Culture* (Cambridge: Polity Press, 1999), 333. For transnational Islam, see Bertram Turner, “Der Wald im Dickicht der Gesetze: Transnationales Recht und lokale Rechtspraxis im Arganwald (Marokko),” *Zeitschrift für Entwicklungsethnologie* 14, no. 1–2 (2005):97–117, and “The Legal Arena as a Battlefield: Salafiyya Legal Intervention and Local Response in Rural Morocco,” in *Conflicts and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity*, ed. Hans-Jörg Albrecht et al. (Berlin: Duncker & Humblot, 2006), 169–85; and Oliver Roy, *Globalised Islam: The Search for a New Ummah* (London: Hurst & Company, 2002).

<sup>16</sup> International law and treaties also have a long history and have been important factors in the globalization of law, although they have not received a great deal of attention in

much by academic lawyers, but by economists, pragmatic lawyers, and powerful development organizations such as World Bank. The number of actors involved has also grown and the structure of their interrelation has become more complex. In previous eras, for example, legal development aid was mainly provided by experts from former colonial powers. Now, a variety of governmental and non-governmental organizations, multilateral and bilateral donors, foreign and international law firms, and epistemic communities offer a broad array of legal services to developing and post-communist nations.<sup>17</sup>

Legal consultancy has also become a new profession, and law and development a lively market in which a variety of “law merchants” are active.<sup>18</sup> The standardization of law no longer occurs exclusively within single colonial empires, but also at a global level. This process often leads to simultaneous homogenization and “transnationally assimilated systems of municipal law,”<sup>19</sup> leading to local refractions and increasing diversification of legal forms. Of note, there is an increasing division of labor among the actors engaged in the export of law and legal advice, as well

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anthropological studies. See Jürg Fisch, *Die europäische Expansion und das Völkerrecht: Die Auseinandersetzungen um den Status der überseeischen Gebiete vom 15. Jahrhundert bis zur Gegenwart* (Stuttgart: Franz Steiner Verlag GmbH, 1984); Keebet von Benda-Beckmann, “Transnational Dimensions of Legal Pluralism,” in *Begegnung und Konflikt: Eine kulturanthropologische Bestandsaufnahme*, ed. W. Fikentscher (Munich: Verlag der Bayerischen Akademie der Wissenschaften, 2001), 33–48.

<sup>17</sup> See Yves Dezalay and Briant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1996), and “The Import and Export of Law and Legal Institutions: International Strategies and National Palace Wars,” in *Adapting Legal Cultures*, ed. David Nelken and Johannes Feest (Oxford: Hart Publishing, 2001), 241–55; and Imelda Maher, “Competition Law in the International Domain: Networks as a New Form of Governance,” *Journal of Law and Society* 29, no. 1 (March 2002):111–136.

Carol V. Rose has illustrated these increasingly complex constellations of actors in development aid and law in Vietnam in Rose, 1998, “The ‘New’ Law and Development Movement.” Also see Nobuyuki Yasuda, “Law and Development from the Southeast Asian Perspective: Methodology, History, and Paradigm Change,” in *Law and Development in East and Southeast Asia*, ed. Christoph Antons (London: Routledge Curzon, 2003), 25–67.

<sup>18</sup> Dezalay and Garth, 1996, *Dealing in Virtue*.

<sup>19</sup> Jarrod Wiene, *Globalization and the Harmonization of Law* (London: Pinter Press, 1999).

as tensions between them.<sup>20</sup> These relations are largely influenced by the structure of funding and the national interests pursued by many actors.

### Legal Pluralism in Development Policy and Practice

These developments have also led to new waves of literature in which the old discussions of legal transplants have been renewed. Despite the growing attention to law as a means of development and an object to be transformed through development, the topic of legal pluralism has lagged behind in development literature. In contrast to studies by anthropologists of law, books written by lawyers and political scientists pay scarce attention to issues of legal pluralism.<sup>21</sup> A similar situation has occurred in the emerging “law and globalization” literature. While the problems caused by the co-existence of state, international, and transnational law and conventions are widely discussed, the implications for the wider constellations of legal pluralism (which frequently include religious law, forms of neo-customary law, and new local law) remain understudied.<sup>22</sup>

In development practice, on the other hand, there has been a growing, albeit uneasy, recognition that “law” cannot simply be reduced to the law of the state, but needs to include customary or traditional law. This has become especially clear in fields such as natural resources management and indigenous peoples’ rights.<sup>23</sup>

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<sup>20</sup> See, for example, Turner, 2005, “Der Wald im Dickicht der Gesetze.” Shalini Randeria specifically describes the tensions between the World Wildlife Fund and the World Bank in “Globalization of Law: Environmental Justice, World Bank, NGOs and the Cunning State in India,” *Current Sociology* 51, nos. 3–4 (May 2003):305–328.

<sup>21</sup> See Ann Seidman, Robert B. Seidman, and Thomas W. Wälde, eds., *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance* (The Hague: Kluwer Law International, 1998); David Nelken and Johannes Feest, eds., *Adapting Legal Cultures*, Oñati International Series in Law and Society, no. 5 (Oxford: Hart Publishing, 2001); and Hatchard and Perry-Kessaris, 2003, *Law and Development: Facing Complexity*.

<sup>22</sup> See, for example, F. and K. von Benda-Beckmann and A. Griffiths, 2005, *Mobile Law, Mobile People*.

<sup>23</sup> See Owen J. Lynch and Kirk Talbot, *Balancing Acts: Community-Based Forest Management and National Law in Asia and the Pacific* (Washington, DC: World Resources Institute, 1995); Rajendra Pradhan et al., eds., *Water Rights, Conflict, and Policy*, proceedings of workshop held in Kathmandu, Nepal, January 22–24, 1996 (Colombo, Sri Lanka:

Ever more development organizations, among them CGIAR organizations, such as IWMI, CIFOR and IFPRI, as well as GTZ,<sup>24</sup> have become sensitized to the problems of legal pluralism and have developed projects dealing with these issues. Despite this growing acknowledgement of legal pluralism, the question of what kind of normative and institutional orders could, or should, fall under the category of “legal pluralism” remains contested in theoretical and policy literature; the treatment of this topic is, moreover, inconsistent.<sup>25</sup> It therefore is useful to explore what legal pluralism is and what it means to “take legal pluralism into account” in development policies.

### Legal Pluralism

There are different notions of “legal pluralism.” The most general refers to the co-existence of more than one legal order (or mechanism) in the same sociopolitical field,<sup>26</sup> but there are different perceptions of what “existence” means. Legal plural-

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IIMI—International Irrigation Management Institute, 1997); Bryan Randolph Bruns and Ruth S. Meinzen-Dick, eds., *Negotiating Water Rights* (London: Intermediate Technology Publications, 2000); Meinzen-Dick and Mark W. Rosegrant, eds., *Overcoming Water Scarcity and Quality Constraints*, 2020 Focus Briefs, a 2020 Vision for Food, Agriculture, and the Environment (Washington, DC: IFPRI, 2001), 9; and Eva Wollenberg, Jon Anderson, and Citlalli López, *Though All Things Differ: Pluralism as a Basis for Cooperation in Forests* (Bogor, Indonesia: CIFOR—Center for International Forest Research, 2005).

<sup>24</sup> CGIAR—Consultative Group on International Agricultural Research, IMWI—International Water Management Institute, CIFOR—Center for International Forestry Research, IFPRI—International Food Policy Research Institute, and GTZ—Deutsche Gemeinschaft für Technische Zusammenarbeit (German Agency for Technical Assistance). Note that the GTZ website (<http://www.gtz.de/en/>) lists 25 different entries for legal pluralism. For more on GTZ projects, see Mechthild Rüniger, ed., “Conference Proceedings,” West African regional conference on “Legal and Judicial Reform to Promote Women’s Rights in Land and Family Law within Plural Legal Systems,” Accra, Ghana, February 10–12, 2004, Access-to-Justice Paper, no. 9, Attorney General and Ministry of Justice, Republic of Ghana, Accra, 2005.

<sup>25</sup> See F. von Benda-Beckmann, 2002, “Who’s Afraid of Legal Pluralism?”

<sup>26</sup> See Griffiths, 1986, “What Is Legal Pluralism?”; Sally Engle Merry, 1998, “Legal Pluralism,” and “Anthropology, Law, and Transnational Processes,” *Annual Review of Anthropology* 21 (October 1992):357–77; and F. von Benda-Beckmann, 2002, “Who’s Afraid of Legal Pluralism?”

ism constructed in a normative, legal way is usually called “weak”<sup>27</sup> or “relative”<sup>28</sup> legal pluralism. These terms refer to the case where one legal order recognizes the existence of other normative orders, such as customary or religious law, and defines their respective spheres of validity. In such cases (typical of colonial legal systems and, to a lesser extent, post-colonial legal systems), a certain extent of legal pluralism is permitted from the perspective of one legal order.<sup>29</sup> The system that defines the respective spheres of legal validity is usually the dominant state law. Other legal orders, for instance, Islamic law, have their own principles under which customary law (identified as *adat* and *urf* in Islamic law) is valid. Last but not least, ethnic local legal orders may also have principles that recognize religious and state laws.<sup>30</sup> Such “weak” legal pluralism differs from “strong” legal pluralism,<sup>31</sup> or, as this author prefers, “wild” legal pluralism, in which several legal orders co-exist, irrespective of the extent of their mutual recognition. The legal construction of weak legal pluralism, meaning co-existing legal orders, is just one (possibly important) element of such wild legal pluralism.

The most crucial conceptual issue of legal pluralism is whether one ties the concept of law to the normative conceptions declared to be law by state agencies, or whether one broadens the concept so that state law becomes just one variation of law.<sup>32</sup> Most anthropologists (and many, but not all, social scientists and legal historians) have adopted this broader concept of law for historical and cross-cultural comparisons. In this approach, law is not confined to the state, but can also be created, maintained, and changed by other forms of social organization and on the basis of other underlying sources of legitimacy. Local, non-state legal orders are, therefore, not identified with local “culture.” They are part of culture in the widest sense, but cannot be reduced to culture. Such reduction softens the “sharp teeth” of law and assumes a congruity between local law and culture, which often simply does not (or no longer) exists—as is the case between national law and

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<sup>27</sup> Griffiths, 1986, “What Is Legal Pluralism?”

<sup>28</sup> Jacques Vanderlinden, “Return to Legal Pluralism: Twenty Years Later,” *Journal of Legal Pluralism and Unofficial Law*, no. 28 (1989):149–57.

<sup>29</sup> See, for instance, M. Barry Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: Clarendon Press, 1975).

<sup>30</sup> See F. von Benda-Beckmann, 2002, “Who’s Afraid of Legal Pluralism?”

<sup>31</sup> Griffiths 1986, “What Is Legal Pluralism?”

<sup>32</sup> See F. von Benda-Beckmann 2002, “Who’s Afraid of Legal Pluralism?”

culture in our own western societies.<sup>33</sup> For the same reason, the term “local legal orders” should be used instead of “local justice systems.” The relationship between law and justice is problematic in all legal orders—state law is not called a “state justice system.” Local traditional or religious legal orders may, for example, be perceived as more “just” than state law by the local population, especially if state law is used to legitimate large-scale expropriation of resources which, according to local law, are under local jurisdiction. This differentiation does not mean that perceptions of justice (and the desire for change) do not differ considerably along lines of age, gender, ethnicity, and economic status—they do in all societies. The term “local justice system” simply smacks too much of a romanticized notion of a homogenous legal order, as seen both from without and within.

Recognition of legal pluralism in this wider sense has, however, mostly been limited to the co-existence of state law and various customary (e.g., tribal, village, ethnic) laws. In recent years, international and transnational law (e.g., human rights law and conventions relating to indigenous peoples, gender equality, and nature conservation) have also become more important. But there are also other major transnational actors in the field of law and development, namely, religious organizations (Islamic and Christian). These actors also use their laws—orthodox interpretations of *shari’a*, for instance—as instruments for social change within family life, agriculture, and political authority. At times, religious legal engineering by Islamic groups coincides and competes with transnational development activities. Turner, for example, describes the activities of *Salaftiya* activists in Southern Morocco, where a UNESCO biosphere project is also underway.<sup>34</sup> Both organizations are competing for the attention of a “target group” and seek its submission to their development goals. Although such developments have not been described very often, they seem to occur quite frequently.<sup>35</sup>

“Project law” is another kind of law that is increasingly being acknowledged in development. As first conceived,<sup>36</sup> project law referred to the complex of rules

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<sup>33</sup> See Carol J. Greenhouse, “Legal Pluralism and Cultural Difference: What Is the Difference? A Response to Professor Woodman,” *Journal of Legal Pluralism and Unofficial Law*, no. 42 (1998):61–72.

<sup>34</sup> Turner, 2005, “Der Wald im Dickicht der Gesetze,” and 2006, “The Legal Arena as a Battlefield.”

<sup>35</sup> See also Roy, 2002, *Globalised Islam*.

<sup>36</sup> See, for example, J.T. Thomson, “Land and Tree Issues in Three Francophone Sahelian Countries: Niger, Mali, and Burkina Faso,” in *Land, Trees and Tenure*, proceedings of an international workshop on “Tenure Issues in Agroforestry,” Nairobi, Kenya, May

that emerges from the interaction of development project staff and their local target group, an interaction that often introduces new rules about access to resources and the distribution of authority in a project area.<sup>37</sup> Classic cases of this interaction have involved projects concerning nature conservation and sustainable resource development,<sup>38</sup> irrigation systems rehabilitation projects,<sup>39</sup> and the introduction of community forestry projects.<sup>40</sup> Project law is generated by two connected social fields that shape the relations and interactions between development agencies, their partners, and their so-called target groups. Project decision-making procedures, legal concepts, and rules of accountability may, however, be alien to the local

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27–31, 1985, ed. John B. Raintree, 3–40 (Madison, WI: ICRAF—International Council for Research in Agroforestry, and Land Tenure Center, University of Wisconsin-Madison, 1987); Franz von Benda-Beckmann, “Scapegoat and Magic Charm: Law in Development Theory And Practice,” *Journal of Legal Pluralism and Unofficial Law*, no. 28 (1989):129–48, and “Legal Uncertainty and Land Management,” in *Making Haste Slowly: Strengthening Local Environmental Management in Agricultural Development*, ed. H. Savenije and A. Huijsman (Amsterdam: Koninklijk Instituut Voor De Tropen [Royal Tropical Institute], 1991), 75–88; and Keebet von Benda-Beckmann, “Development, Law, and Gender-Skewing: An Examination of the Impact of Development on the Socio-legal Position of Indonesian Women, with Special Reference to Minangkabau,” *Journal of Legal Pluralism and Unofficial Law*, no. 30–31(1991):87–120.

<sup>37</sup> Since the 1990s, anthropological literature has been increasingly critical of development discourses, project designs, and implementation processes. See, for example, Norman Long and Anne Long, eds., *Battlefields of Knowledge: The Interlocking of Theory and Practice in Social Research and Development* (London: Routledge, 1992); Mark Hobart, ed., *An Anthropological Critique of Development: The Growth of Ignorance* (London: Routledge, 1993); James Ferguson, *The Anti-politics Machine: “Development,” Depoliticization, and Bureaucratic Power in Lesotho* (Minneapolis: University of Minnesota Press, 1994); R.D. Grillo and R.L. Stirrat, eds., *Discourses of Development: Anthropological Perspectives* (Oxford: Berg Publishers Ltd., 1997); Philip Quarles van Ufford and Ananta Kumar Giri, eds., *A Moral Critique of Development: In Search of Global Responsibilities* (London: Routledge, 2003); and David Mosse, *Cultivating Development: An Ethnography of Aid Policy and Practice* (London: Pluto Press, 2005).

<sup>38</sup> Thomson, 1987, “Land and Tree Issues.”

<sup>39</sup> See Pradhan et al., 1997, *Water Rights, Conflict, and Policy*.

<sup>40</sup> P.N. Nkwi et al., “The Social and Legal Aspects of Forest Management,” in *Seminar Proceedings: Sustainable Management of African Rain Forest*, Kribi, Cameroon, November 1999, Part II: *Symposium*, ed. W.B.J. Jonkers, B. Foahom, and P. Schmidt (Wageningen, The Netherlands: The Tropenbos Foundation, 2001), 132–49.

situation. Resistance to these rules on the part of intended project beneficiaries creates a constant source of conflict and misunderstanding that may become a major obstacle to project success.

The idea of project law was subsequently expanded to include rules and procedures that are usually set by the legal and political conditions of the donor country. These rules and procedures shape interactions within development organizations and between donor agencies and those actors (e.g., national governments, universities, NGOs) with whom they cooperate.<sup>41</sup> The World Bank itself is one of the major organizations that generates project law, as Randeria has shown in India and Li, in Indonesia.<sup>42</sup>

The factors involved in shaping the relations between donor and recipient states and between donors and the beneficiaries and/or victims of interventions should not be reduced to project law. The idea of “project law” is important, however, because it points to the fact that in addition to these relationships, one *also* deals with rules, principles, and sanctioning mechanisms of project interventions themselves, which cannot be reduced to “a cultural factor,” “power,” or “discourse,” and which do not disappear even if one does not call them “law.” Legal development cooperation thus creates an additional layer of law by making plural legal constellations even more complex.

### ***Legal pluralism as a factor of development***

The transformation of development policy and projects is thus taking place in a more or less complex field of legal pluralism. What does the acknowledgement of such legal plurality lead to? “Taking legal pluralism into account” has two meanings here, both factual-empirical and political-normative.

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<sup>41</sup> See Klaus Günther and Shalini Randeria, *Recht, Kultur, und Gesellschaft im Prozeß der Globalisierung* (Bad Homburg, Germany: Werner Reimers Stiftung, 2001); and Markus Weilenmann, “Projektrecht” – *Normative Ordnungen der bilateralen Entwicklungszusammenarbeit und sozialer Wandel: Zum Beispiel die Deutsche Gesellschaft für Technische Zusammenarbeit*, Max Planck Institute for Social Anthropology Working Paper, no. 66 (Halle/Saale, Germany: Max-Planck-Institut für ethnologische Forschung, 2004), and “The Primary Justice Pilot Project of Malawi: An Assessment of Selected Problem Fields from a Legal Pluralistic Viewpoint,” consultancy report commissioned by the GTZ Forum for Dialogue and Peace, Lilongwe, Malawi, and Zürich, Switzerland, 2005.

<sup>42</sup> See, respectively, Randeria, 2003, “Globalization of Law;” and Tanya Murry Li, “Government through Community: The World Bank in Indonesia,” working paper, New York University Law School, Program on Transnational Governance, New York, 2006.

First and always, one should see plural legal conditions—whether one likes them or not—as a potentially significant factor that influences development and options for change. Alternatively, these conditions can be seen as a set of factors that constrain and enable interventionist objectives and practices. (These distinctions apply to both “recognized” and “unrecognized” non-state law.) If one general conclusion can be drawn from several decades of research, it is that the mere abolition of customary or religious law by the state does not necessarily mean that these laws will no longer be used by the population, although their social force may be affected.

It is difficult, if not impossible, to generalize whether local legal orders are enabling or constraining factors in economic development. The normative assertions of legal orders themselves do not determine their importance. Research is needed to determine the extent to which social, economic, and political interaction is influenced by legal ideas, and if so, by which legal ideas. Research is also needed to discover the extent to which legally structured modalities for social and economic transactions (e.g., marriage, property transfers, inheritance, registration of land) are used by people, as well as the conflict-management procedures that people use to resolve disputes. It should be noted, moreover, that representatives of different legal orders may exaggerate the social significance of these orders in hopes of creating a self-fulfilling prophecy. They may also downplay their importance by not identifying these orders as law, or even by attributing “ownership” of this law to other actors, as is often the case with project law.

When researching how legal orders work, and why, social and economic developments cannot be related to one specific law in isolation. People’s interactions are potentially influenced by the entire legal environment, as well as the “co-existence” of legal orders. Patterns of use may lead to a peaceful accommodation of legal orders (whatever their substantive contradictions), and ideas of one order may be taken up by another. However, these orders may also be mobilized against each other to rationalize and justify social, economic, and political claims. Given the manifold interdependence of legal orders in plural legal systems, the functioning of one such order cannot be looked at in isolation. What happens in the village context may, for example, largely be influenced by state court decisions.<sup>43</sup> If local people keep their local law, exercise their own land rights, and go to traditional authorities for dispute management, it may have more to do with their reaction against state law and the social practices associated with it than with any old-fashioned adherence

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<sup>43</sup> See, for example, Keebet von Benda-Beckmann, *The Broken Stairways to Consensus: Village Justice and State Courts in Minangkabau* (Dordrecht, The Netherlands: Foris Publications/KITLV Press, 1984).

to the binding force of their own law. What keeps them away from state institutions, then, may not be so much the substantive content of state law, but the way in which it functions—it is time and money consuming and often uses corrupt and inefficient procedures.

The *World Development Report 2006* also sees legal institutions as factors in “policies and institutions (that) do not arise from a benign social planner who aims to maximize the present value of social welfare.” It goes on to state that “... the correlations between unequal distribution of assets, opportunities, and political power give rise to a circular flow of mutually reinforcing patterns of inequality.”<sup>44</sup> Thus, to explore the potential role of law, or a specific legal order, to influence the (inter)actions of people and organizations, it is necessary to take into account the totality of co-existing orders—whether one likes them or not.

#### ***Legal pluralism: The normative approach***

The second way to “take legal pluralism into account” is to give normative validity (or recognition) to non-state law as “law” in the general public sphere, that is, to expand the validity of non-state legal orders within the realm of state-defined law (or at least grant certain official authorization of its use).<sup>45</sup> Such recognition of non-state law is generally the result of a conscious political decision. The *World Development Report 2006* is highly ambivalent on this issue, and with good reason. From an analytical perspective, calling normative orders “law” does not automatically invest them with legitimacy. Local legal orders may permit relatively equal access to land, but they may also legitimate highly unequal distribution of productive resources along gender, caste, or class lines. Similarly, fundamentalist Islamic and Christian legal ideas may be contrary to principles and values embodied in international human rights law. Indeed, local forms of dispute management often do not function well, and may indeed employ a decision-making style and substantive criteria that run counter not only to what western donors, but also the local population, conceive of

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<sup>44</sup> World Bank, 2005, *World Development Report 2006*, 20 and 21. For more on this topic, see F. von Benda-Beckmann, 1989, “Scapegoat and Magic Charm.”

<sup>45</sup> Markus Weilenmann correctly emphasizes that while “forum shopping” (i.e., seeking a conducive forum for a legal matter) is a useful heuristic perspective for understanding disputatious behavior, its propagation is highly dangerous because it introduces yet additional organizations into existing competitions over power (as exercised through decision making) and financial resources. See Weilenmann, 2005, “The Primary Justice Pilot Project.”

as justice. Local and religious legal orders, however, may very well be in line with the values and legal rules that people consider to be their own law. On the other hand, the law in state courts, as well as the procedures followed by these courts, may be foreign to local people and fully inappropriate to their circumstances, not to mention that the corruption in such courts is often widespread.

An analytical concept of law takes the same approach to the prevailing legal ideology of states as to the claims of indigenous peoples, religious communities, and village republics, as well as to human rights law. Analytic distance avoids any *scientific* justification whatsoever of law. Whether or not one views conditions of legal pluralism (or of local religious, state, or human rights law) as a good thing is a moral and political judgment. Which laws should be valid in the public sphere is the profession of legal scholars, judges, lawyers, law officials, and policy makers, who must make choices and decisions on this issue.<sup>46</sup>

An analytical understanding of law and legal pluralism—and the possibility of identifying as law those regulations that the state does not recognize as such—is frequently not politically acceptable if alternative legal institutions are suppressed and/or invalidated by powerful elites. However politically neutral “analytic” conceptualizations of law may want to be, they nevertheless become political in one sense. Since in the public sphere, public validity and legitimacy are closely connected to the concepts of the law, the state, and sovereignty, a conceptualization of law that does not incorporate this nexus as a constituent element, but treats it as variation, is simply not accepted. Distancing the local understanding of “law” from the dominant legal ideology is thus likely to be interpreted as a political act directed against the dominance of that ideology.

For this reason alone, the World Bank’s understanding of legal pluralism, as “taking non-state law into account as law” is likely to remain constrained because the concept of law itself is so politically loaded. An analytical understanding of law and legal pluralism may be relatively easy for a comparative social scientist, but may run counter to the interests of powerful national elites with which the World Bank must negotiate. It is difficult, if not impossible, both to recognize

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<sup>46</sup> This perspective is more or less consonant with Max Weber’s views on “value-free” science, expressed in 1919. See Max Weber, “Vom inneren Beruf zur Wissenschaft.” In *Soziologie, universalgeschichtliche Analysen, Politik—Mit einer Einleitung von E. Baumgarten*, 5. überarbeitete Auflage [5th revised edition] (Stuttgart: Alfred Kröner Verlag, 1919/1973). From the perspective of social anthropology, see Kirsten Hastrup and Peter Elsass, “Anthropological Advocacy: A Contradiction in Terms?” *Current Anthropology* 31, no. 3 (1990):301–311.

legal pluralism and negotiate with such local elites.<sup>47</sup> Nevertheless, the issue of legal pluralism remains relevant to the credibility of development organizations. The legal alternatives that define the rights of people, the state, and concerned outsiders such as the World Bank is crucial for “articulating pathways for people to effectively claim and protect their rights and resolve their disputes.”<sup>48</sup> If, as the *World Development Report 2006* says, “[A]ccessibility depends on how compatible laws are with the norms and understanding that shape people’s lives,”<sup>49</sup> this accessibility very much depends on which and whose law it is. That is, it depends on which law is used for procedure and which for substantive decision making. This is particularly the case concerning legal rights to control, manage, and profit economically from natural resources.<sup>50</sup>

### **Access to Land and Other Resources**

This section highlights a number of problematic issues relating to property rights and property holders in cases where state and non-state legal orders co-exist.

#### ***The object of property rights***

Resources and the rights to them, which are often involved in policy discourses, are land rights.<sup>51</sup> Despite the justified attention given to land-rights problems, however, land (understood as surface land) is often not an isolated category of resources in local legal orders. These orders, whether in their entirety or in selected aspects, commonly use quite different conceptualizations of resources and property objects than do state law or international law and conventions. They also differ from state and international law in their understanding of who may be a holder of property rights, the nature of property rights and obligations, and who has the authority to make and sanction rules about property. Many legal struggles over economic values go much further than these values and include rights to water, subsoil resources, and

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<sup>47</sup> For a good description of the advantages and disadvantages of legal pluralism and its consequences in forestry, see Wollenberg, Anderson, and López, 2005, *Though All Things Differ*, 39.

<sup>48</sup> World Bank, 2005, *World Development Report 2006*.

<sup>49</sup> *Ibid.*, 158.

<sup>50</sup> *Ibid.*, 162ff.

<sup>51</sup> *Ibid.*

vegetation, most notably forests. Recognizing customary “land rights” does not solve these problems. The depth of these struggles becomes particularly relevant with respect to state law and property rights.

***State property versus local property law and rights***

State property rights must be included in any analysis of property rights in a system of legal pluralism. States do not merely assume final authority and regulatory power over resources and people, they often assume the right to make direct economic profits from resource exploitation, as distinct from taxation. Colonial legal history saw most colonial states develop into “proprietary monsters,” gradually usurping property exploitation rights on a large scale and “vesting” them in the state or the crown.<sup>52</sup> Declarations of state domain over resource areas that, in colonial interpretation, were deemed to be “waste lands” or “terra nullius,” are notorious. Most independent states have retained these legal provisions and continue to control huge resource areas. States are thus an ever-increasing source of “government largesse” in the form of licenses or concessions to these resources (e.g., minerals, timber, etc.). What states consider to be “their” land is often defined as the land of individuals, families, lineages, or larger communities by local, non-state laws. The development of extraction technology (e.g., chain saws, bulldozers, pump technology, etc.) and vastly improved transport facilities has further encroached on the resources of local populations. Only recently has this usurpation begun to be successfully challenged in some countries, mainly by populations considered to be indigenous peoples.<sup>53</sup> In

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<sup>52</sup> Lynch and Talbott, 1995, *Balancing Acts*, 35–36, have shown how colonial governments in Asia and the Pacific gradually expanded sovereign rights to include property rights. Also see Franz and Keebet von Benda-Beckmann, “How Communal is Communal and Whose Communal is It? Lessons from Minangkabau,” in *Changing Properties of Property*, ed. K. and F. von Benda-Beckman and Melanie Wiber (Oxford: Berghahn Books, 2006), 194–217.

<sup>53</sup> For information on the famous Mabo case in Australia, see D. Mardiros, “Fighting for Country: Aboriginal Land Aspirations in the Kimberley Region of Western Australia,” in *Natural Resources, Environment, and Legal Pluralism*, ed. René Kuppe et al., vol. 9 of *Law and Anthropology: International Yearbook for Legal Anthropology* (The Hague: Brill/Martinus Nijhoff, 1997), 146–57. For information on the Waitangi tribunal in New Zealand, see Toon van Meijl, “Who Owns the Fisheries? Changing Views of Property and Its Redistribution in Post-colonial Maori Society,” in F. and K. von Benda-Beckmann and M. Wiber, *Changing Properties of Property*, 170–93.

For developments in Canada, see Bradford W. Morse, “Peoples, Identity, Territory, and Self-Determination,” in *Proceedings of the 7th International Congress of Commission on*

states with greater political freedom, such as Indonesia after the fall of the Suharto regime in 1998, claims to land and forest based on local traditional law are increasingly being mobilized against state law with some success.<sup>54</sup>

The politics of recognizing local rights over natural resources at national and international legal levels, however, has the tendency to make such recognition conditional in different ways, the most frequent of which are:

- Recognition of rights and community participation in resource management is made conditional on good ecological performance.<sup>55</sup>
- Recognition is also made conditional on certain types of economic exploitation, that is, “traditional” economic subsistence activities. The regulation of commercial exploitation is usually retained by state governments, which issue licenses or permits. Such licenses are often granted to large companies, denying the local population the right to economic exploitation.
- Finally, recognition is made conditional on the conformance of communities with certain social and political ideals of community and democracy, such

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*Folk Law and Legal Pluralism*, Wellington, New Zealand, August 27–30, 1992, vol. 2 (Wellington, New Zealand: Victoria University of Wellington, 1992), 457–75; Melanie G. Wiber, “Mobile Law and Globalism: Epistemic Communities versus Communities-Based Innovation in the Fisheries Sector,” in *Mobile Law, Mobile People*, ed. F. and K. von Benda-Beckmann and A. Griffiths, 131–51; and Melanie G. Wiber and John Kennedy, “Impossible Dreams: Reforming Fisheries Management in the Canadian Maritimes after the Marshall Decision,” in *Law and Anthropology: International Yearbook for Legal Anthropology*, ed. René Kuppe and R. Potz, vol. 11 (Dordrecht, The Netherlands: Kluwer Academic Publishers, 2001), 282–297.

<sup>54</sup> See Franz and Keebet von Benda-Beckmann, “Recognizing Water Rights,” Brief, no. 12 (October 2001), in *Overcoming Water Scarcity and Quality Constraints: A 2020 Vision for Food, Agriculture and the Environment*, 2020 Focus 9, ed. Ruth S. Meinzen-Dick and Mark W. Rosegrant (Washington, DC: IFPRI), and 2006, “How Communal is Communal and Whose Communal is It?”; and Tania Murray Li, “Masyarakat Adat, Difference, and the Limits of Recognition in Indonesia’s Forest Zone,” *Modern Asian Studies* 35, no. 3 (July 2001):645–76.

<sup>55</sup> For a description of these tendencies in international legal discussions of the collective rights of indigenous peoples, see K. von Benda-Beckmann, 1997, “The Environmental Protection and Human Rights of Indigenous Peoples: A Tricky Alliance,” in Kuppe, *Natural Resources, Environment, and Legal Pluralism*, 302–323.

as equitable distribution of resources, access to resources, accountable and transparent decision making, and equitable gender relations.<sup>56</sup>

Such conditional recognition fails to satisfy those who would like to follow the recognition of local rights over natural resources to its logical conclusion.<sup>57</sup> Indeed, if one considers that according to most current state laws, resources are owned or held by the state, the involvement of local people (or communities) in cooperative and participatory management of these resources (and perhaps even in profit-sharing ventures) seems rather generous. Extending a hand to local people to form partnerships or engage in co-management seems to suggest benign and enlightened government, one that offers more than democratic principles call for. If, on the other hand, one's point of departure is that the resources in question are legally held by non-state property holders (whether as a community, group, village, or individuals) on the basis of customary or folk laws, the situation looks quite different. The top-down external drive to have the local population participate is no longer self-evident, because the projects and policies involve other people's property. The logical consequence is that the owners, in this case the local or indigenous people, invite outsiders to "participate" in the management of natural resources, but under their own conditions.

It is instructive to look at the differences between official international statements (such as Agenda 21 in the *Rio Declaration*, which presents the compromises reached by state government representatives<sup>58</sup>) and the declaration of the representatives of indigenous peoples, the so-called *Kari-Oca Declaration*.<sup>59</sup> Indigenous peoples claim

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<sup>56</sup> For illustrations from development policy, see Lynch and Talbot, 1995, *Balancing Acts*, 139 ff.; and Jesse C. Ribot, "From Exclusion to Participation: Turning Senegal's Forestry Policy Around?" *World Development* 23, no. 9 (September 1995):1587-99. Lynch and Talbot (1995: 122, 123) themselves also demand such commitment to gender equity.

<sup>57</sup> See, for example, Moana Jackson, "Changing Realities: Unchanging Truths," in *Commission on Folk Law and Legal Pluralism*, 1992, 443-55.

<sup>58</sup> United Nations, "Agenda 21" and the *Rio Declaration on Environment and Development*, A/CONF.151/26, vol. 1, report of the United Nations Conference on Environment and Development, Rio de Janeiro, June 3-14, 1992, <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm#pre> (accessed August 3, 2006).

<sup>59</sup> *Kari-Oca Declaration*, signed at the "World Conference of Indigenous Peoples on Territory, Environment, and Development," Kari-Oca, Brazil, May 30, 1992; reaffirmed at Bali, Indonesia, June 4, 2002. Available on the website of the Indigenous People's Council on Biocolonialism, <http://www.ipcb.org/resolutions/htmls/karioca.html> (accessed August 3, 2006).

that the decision to enter into treaties and conventions is part of their rights, not a condition for recognition.<sup>60</sup> They demand full recognition of their legal system, not just of their land rights (statement 13) and reject the currently dominant language games of weak legal pluralism: “We must never use the term ‘land claims.’ It is the non-indigenous people who do not have any land. All the land is our land. It is non-indigenous peoples who are making claims to our lands. We are not making claims to our land” (statement 71[b]).<sup>61</sup>

### *Conversion of rights*

In addition to differing legal claims to land and natural resources, there is ongoing tension between local-level tenure rights and land-reform titling programs. In these processes of conversion, non-state rights are withdrawn from the current rights holders’ control. Communal rights (held by a lineage, village, or the state) are then “privatized” and redistributed (through direct allocation or via the market) to different rights holders. This process changes the nature of these property rights and leads to the exclusion of weaker and temporary property rights under customary laws, which are often held by weaker members of society, including women and strangers.<sup>62</sup> The transformation of local rights into family or village property (according to the categories of state law) and the registration of these rights facilitates the accumulation of rural wealth in the hand of politically and economically powerful segments of the population. Land rights reform in many African and Asian countries has thus seriously shifted the distribution of local resources and led to the accumulation of

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<sup>60</sup> See Lydia van de Fliert, *Indigenous Peoples and International Organisations* (Nottingham, UK: Spokesman Books, 1994), 182 and 189–93. For information on indigenous people’s claims to natural resources in Papua New Guinea, see Peter Donigi, *Indigenous or Aboriginal Rights to Property: A Papua New Guinea Perspective* (Utrecht, The Netherlands: International Books, 1994). On Maori claims, see Jackson, 1992, “Changing Realities: Unchanging Truths.” On sovereignty aspirations of American Indians, see Carole Goldberg-Ambrose, “Of Native Americans and Tribal Members: The Impact of Law in Indian Group Life,” *Law & Society Review* 28, no. 5 (December 1994):1123–48.

<sup>61</sup> Statement 71(b) of the *Kari-Oca Declaration*; Van de Fliert, 1994, *Indigenous Peoples and International Organisations*, 182, 189–93.

<sup>62</sup> When analyzing the implementation of land reform in Cameroon, Fisiy very appropriately called such processes “land laundering.” Cyprian F. Fisiy, *Power and Privilege in the Administration of Law: Land Law Reforms and Social Differentiation in Cameroon* (Leiden, The Netherlands: Africa Studies Centre, 1992).

the means of production by small political-economic elites at national as well as village levels.<sup>63</sup>

The transformation of customary property rights into western-style private property, and the differential access to resources and state agencies that this process produces among local populations, leads to a situation where there is often less social justice and legal security after land reform. Indeed, in many cases, the introduction of new legal rights magnifies prior forms of legal insecurity. In post-socialist states, the experience of privatizing state farms and introducing “western” concepts of property similarly has led to growing inequalities in property holding and increased legal insecurity.<sup>64</sup>

Much research supports one of the conclusions of the *World Development Report 2006*: “[U]nequal distribution of assets, opportunities, and political power give rise to a circular flow of mutually reinforcing patterns of inequality.”<sup>65</sup> The report seems to be torn, however, between this political-economic analysis and a lingering belief in the eventually benevolent functions of land markets and tradable land rights.<sup>66</sup> It continues to express the beliefs that poverty is caused by bad property law (both state and extra-legal), extra-legal property is an obstacle to development, and good

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<sup>63</sup> On African developments, see Robert K. Hitchcock, “Tradition, Social Justice, and Land Reform in Central Botswana,” *Journal of African Law* 24 (1980):1–34; R.E. Downs and Stephen P. Reyna, eds., *Land and Society in Contemporary Africa* (Hanover, NH: University Press of New England, 1988); Kristin Mann and Richard Roberts, eds., *Law in Colonial Africa* (Portsmouth, NH: Heinemann Educational Books, 1991); and John W. Bruce and Shem E. Migot-Adholla, eds., *Searching for Land Tenure Security in Africa* (Dubuque, IA: Kendall-Hunt Publishing Co., 1994). On southeast Asian experiences, see Toon van Meijl and Franz von Benda-Beckmann, eds., *Property Rights and Economic Development: Land and Natural Resources in Southeast Asia and Oceania* (London: Kegan Paul International, 1999).

<sup>64</sup> Chris M. Hann and “Property-Relations” Group, *The Post-Socialist Agrarian Question: Property Relations and the Rural Condition* (Münster, Germany: Lit Verlag, 2003).

<sup>65</sup> World Bank, 2005, *World Development Report 2006*, 21–22.

<sup>66</sup> *Searching for Land Tenure Security in Africa* by Bruce and Migot-Adholla (Dubuque, IA: Kendall-Hunt Publishing Co., 1994), which was cosponsored by the World Bank but not quoted in the *World Development Report 2006*, gives a far more differentiated account of the conditions under which customary rights and/or registered titles appear to have certain functions in terms of tenure security, access to credit, greater investment for capitalist production, and sustainable resource use.

property law will bring about development.<sup>67</sup> The report even says that the “imperfect saleability of land ... hurts anyone who owns it ... The rural poor probably have more of their wealth in land than most people, so making land unsaleable might be particularly harsh on them.”<sup>68</sup> This sounds like an echo of De Soto’s neo-liberal mystification of ownership titles.<sup>69</sup>

There is no doubt that formal property law has been, and can be, an important means of shaping and expanding the development of elites and emerging middle classes by harnessing the capital potential of property, but it is hard to see how this law ameliorates the economic conditions of the poor. The evidence suggests the contrary: that the unsaleability, or better yet, the “unbuyability,” of land is probably much harsher on the rural rich than on the rural poor. It is wishful thinking to contend that formal property and a free market in which it can circulate will work to the benefit of the poor under conditions of great economic and political inequality.<sup>70</sup>

## Conclusion

What is the significance of these points for the uneasy relationship between social science researchers and development practitioners?<sup>71</sup>

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<sup>67</sup> In view of available knowledge, the *World Development Report 2006* is remarkably general in its propositions on this topic (World Bank, 2005, 93, 163).

<sup>68</sup> *Ibid.*, 93.

<sup>69</sup> Franz von Benda-Beckmann, “Mysteries of Capital or Mystification of Legal Property?” *FOCAAL—European Journal of Anthropology*, no. 41 (2003):187–191.

<sup>70</sup> This conclusion holds equally true for the wider political and economic relationships between rich industrialized countries and the world. See *ibid.*, 191.

<sup>71</sup> For more on this relationship, see Julio Faundez, “Legal Technical Assistance,” in *Good Government and Law: Legal and Institutional Reform In Developing Countries*, ed. Julio Faundez (Hampshire, UK: Macmillan Press; New York: St. Martin’s Press, 1997) 1–24, and “Legal Reform in Developing and Transition Countries: Making Haste Slowly,” paper presented at World Bank conference, “Comprehensive Legal and Judicial Reform—Toward an Agenda for a Just and Equitable Society in the 21st Century,” Washington, DC, June 5–7, 2001. In their book, *A Moral Critique of Development*, Van Ufford and Giri (2003, 11) speak of the “antagonism between critical academic analysis and administrative practice,” as does David Mosse, 2005, *Cultivating Development*. Also see F. von Benda-Beckmann, 1994, “Good Governance, Law, and Social Reality,” and F. and K. von Benda-Beckmann and A. Griffiths, 2005, *Mobile Law, Mobile People*.

*Disappointed expectations*

One problem of this relationship is disappointed mutual expectations. Development policy and projects intervene in the social organizations studied by anthropologists. One would thus expect practitioners to be interested in the research being done by anthropologists. Yet such research is rarely taken into account and is often not welcomed by development professionals. Anthropological research tends to demonstrate the complexity of social relations and processes and points to the consequences that are likely to occur when this complexity, including local legal pluralism, is neglected. Development practice, on the other hand, is more concerned with finding ways to reduce complexity in order to make it possible to design change. The demand on social science researchers, then, is to develop concrete proposals for guiding the transformation of development goals into programs and projects.

Researchers are frequently reproached both for not responding to this invitation and for evading responsibility for projects. Yet researchers are often critical of development policies and projects. They frequently do not want to adapt or submit to the goals and modalities of development cooperation because they perceive and evaluate reality differently; either they do not agree with how a development project defines the problem it seeks to address, or they expect that the project will have unintended consequences which, consciously or unconsciously, have been downplayed in the planning process. Social scientists contend that their expertise should be used when conceiving “the problem” to be addressed by projects, not to work with unconvincing problem definitions after the fact.<sup>72</sup> Many researchers are also irritated when development agents do not seem seriously interested in differentiated analysis and expect researchers to deliver their advice in one or two pages (because practitioners do not have time to read more.) This emphasis on brevity prompts grave doubts in a researcher’s mind about the seriousness of the development agents. After all, development policy pursues very ambitious aims, such as economic development, sustainable resource use, gender equality, democracy, and, equity—aims that are difficult to implement even in one’s own society.

It does not help to bemoan the neglect of existing relevant knowledge in development planning and project implementation. To break this vicious circle, one must look at the mechanisms that lead not only to this neglect but also to the building of walls against useful knowledge or, in the words of van Ufford, the “creation of

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<sup>72</sup> See Weilenmann, 2005, “The Primary Justice Pilot Project.”

ignorance.”<sup>73</sup> Why does this happen? Because such knowledge calls into question the ideals of development or the reasons for being a development professional? Or, to be even more banal, because development actors do not have the time to acquire this knowledge? References to “project law” and the “Icarus effect” are relevant here. Project law points to the fact that planning and implementation of development programs are often influenced by the country or organization funding the project. This means that relations of dependence, economic and political interests, and cultural understanding in a development project go in both directions: they are not just factors of “the other” (i.e., target group or state), but also of the development organization itself. The “Icarus effect,” so named and illustrated by van Ufford and Roth,<sup>74</sup> points to the exaggerated optimism that characterizes most development programs. Icarus’ dream of flying to the sun is like the dreams of development. The wax that held his wings together is like actual development projects and the sun, their objective. The closer he approaches the sun, the more the wax melts, until eventually Icarus crashes. Unlike Icarus, however, development organizations have many lives.

#### ***Law and development***

The Icarus effect is particularly relevant to law-related programs, because law, as an ideal order projected into the future, is the optimal expression of such “over-optimism.”<sup>75</sup> Against the horizon of such overoptimistic goals, failure is more or less automatic.<sup>76</sup> Grand objectives lead to (or require) a distortion of reality. In

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<sup>73</sup> Philip Quarles van Ufford, “Knowledge and Ignorance in the Practices of Development,” in *An Anthropological Critique of Development: The Growth of Ignorance*, ed. Mark Hobart (London: Routledge, 1993), 135–60.

<sup>74</sup> Philip Quarles van Ufford and Dick Roth, “The Icarus Effect: The Rise and Fall of Development Optimisms in a Regional Development Project in Luwu District, South Sulawesi, Indonesia,” in van Ufford and Giri, 2003, *A Moral Critique of Development*, 76–100.

<sup>75</sup> Gunnar Myrdal, *The Challenge of World Poverty* (Harmondsworth: Penguin Books, 1970).

<sup>76</sup> See the cautions against such systematic over-optimism and pleas for a more modest approach (“looking at the smaller evil in the jungle of legal pluralism”) in Franz von Benda-Beckmann, “Op zoek naar het kleinere euvel in de jungle van het rechtsp pluralisme,” inaugural lecture as professor of law and development in developing countries, Wageningen University, The Netherlands, 1983.

the logic of development interventions, whether planned from above or below, development goals come first. Reality is construed as a negative condition which must be changed.<sup>77</sup> The construction of reality through program and project planning therefore involves much more than simplifications needed to make complex situations “legible” and, through legibility, manipulable.<sup>78</sup> These constructions of reality also implicitly or explicitly construct causal relationships which justify the interventions.<sup>79</sup>

It remains seductive to blame failed development efforts on bad laws or institutions and hope that good laws and institutions can bring about change. Many economic and social development flows have occurred under “good” laws. If the laws were “good,” however, then making another good law will not help. It is thus important to draw lessons from earlier attempts to bring about development via legal regulation.<sup>80</sup> Yet the inability or unwillingness to learn from “reason informed

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<sup>77</sup> Hitchcock notes that “people rely on their goals to guide their thinking about what already exists. In such circumstances, planners re-invent the traditional as a negative stereotype; they derive it from their goals, rather than the other way round.” Robert K. Hitchcock, “Tradition, Social Justice, and Land Reform in Central Botswana,” *Journal of African Law* 24 (1980): 1–34 (quote on p. 1).

Also see Franz von Benda-Beckmann, Keebet von Benda-Beckmann, and Joep Spiertz, “Local Law and Customary Practices in the Study of Water Rights,” in *Water Rights, Conflict and Policy*, proceedings of workshop held in Kathmandu, Nepal, January 22–24, 1996, ed. Rajendra Pradhan et al., (Colombo, Sri Lanka: IIMI—International Irrigation Management Institute, 1997), 221–42; Richard Rottenburg, *Weit hergeholte Fakten: Eine Parabel der Entwicklungshilfe* (Stuttgart: Lucius und Lucius Verlagsgesellschaft, 2002); and Weilenmann, 2004, “*Projektrecht*,” and 2005, “The Primary Justice Pilot Project.” In both the 2004 and 2005 works, Weilenmann points to the significance of “problem definitions” in the development policy of GTZ.

<sup>78</sup> James Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven: Yale University Press, 1998), 183.

<sup>79</sup> When talking about the making of a project, Ferguson says, “projects represented places and people as embodiments of the problems, which are amenable to the donor’s currently favored ‘technical’ solution” (Ferguson, 1994, *The Anti-politics Machine*, 49). Also see Mosse, 2005, *Cultivating Development*.

<sup>80</sup> An impressive example of the mass of legal development projects can be seen in the former Soviet Union, where the experience of legal engineering in developing nations has been more or less ignored.

by experience,”<sup>81</sup> which this author criticized in 1989,<sup>82</sup> still seems to have a strong hold on the development community.

We must find ways to change the conditions under which development actors act the way they do, which produces consequences that we dislike. We must take seriously the contention of the *World Development Report 2006* that “unequal distribution of assets, opportunities, and political power [that] give rise to a circular flow of mutually reinforcing patterns of inequality”<sup>83</sup> and change this distribution, and thus change the social, economic, and political bases of power that control the distribution of political and economic resources. This is a difficult goal for development because more noble goals tend to run counter to the interests of the economically and politically powerful. Using laws instrumentally in line with power, and thus maintaining or even increasing the position of those who are currently powerful, is much easier than using law to break their power.<sup>84</sup> As the *World Development Report 2006* says—and as earlier research has frequently shown—even under non-corrupt, relatively neutral conditions, the “haves come out ahead,” to quote Marc Galanter.<sup>85</sup>

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<sup>81</sup> See Ann Seidman and Robert B. Seidman, “Using Reason and Experience to Draft Country-Specific Laws,” in *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, ed. Ann Seidman, Robert B. Seidman, and Thomas W. Wälde (The Hague: Kluwer Law International, 1998), 249–83; and Kennedy, 2003, “Law and Developments.”

<sup>82</sup> This author’s 1989 paper begins with the following quote: “We must view with profound respect the infinite capacity of the human mind to resist the introduction of useful knowledge.” F. von Benda-Beckmann, 1989, “Scapegoat and Magic Charm,” 129. The words are those of Thomas Raynesford Lounsbury, as quoted in David Macarov, *Work and Welfare: The Unholy Alliance* (Thousand Oaks, CA: Sage Publications, 1998), 203.

<sup>83</sup> World Bank, 2005, *World Development Report 2006*, 21–22.

<sup>84</sup> In this respect, colonial legal engineering was quite successful for long periods of time in organizing and legitimating the political oppression and economic exploitation of the colonies. For a good illustration of this process, see H.W.O. Okoth-Ogendo, “Development and Legal Process in Kenya: An Analysis of the Role of Law in Rural Development Administration,” *International Journal of the Sociology of Law* 12, no. 12: 59–83.

<sup>85</sup> Marc Galanter, “Why the ‘Haves’ Come Out Ahead: Speculations on the Limits of Legal Change,” *Law & Society Review* 9, no. 1 (Autumn 1974):95–160.

***Mutual understanding***

When social science researchers point to these facts—this is their task—they are easily seen as spoilsports, especially if such remarks are made to the public to whom development agencies cannot admit their weaknesses. Of course, people inside these agencies know these weaknesses, and often far better than anyone else. So it does not help if researchers and practitioners engage in mutual reproaches and do not even try to cooperate to discover where and how their respective expertise can be usefully employed. One important precondition for an honest and fruitful dialogue between social science researchers and practitioners is the realization that they have different jobs to do under different constraints. Academics engaged in research must realize that practitioners, even such powerful ones as the World Bank, must work within these constraints if they want to achieve anything, even if these achievements do not correspond to grand objectives. They should not be blamed for not being able to reach objectives that they simply cannot reach. One can, however, demand that development practitioners not pretend that they can.

Likewise, practitioners should not demand that researchers desist from pointing their empirical and theoretical questions at these pragmatic constraints. For example, practitioners must not ask researchers to obscure important but unchangeable political conditions, simply because pointing them out would be unpleasant, given the way in which development goals are defined. Nor should they demand that researchers not point to those experiences which make proposed objectives look like naïve wishful thinking.<sup>86</sup> Researchers may frequently be unpopular, but it remains their responsibility to swim against the stream of politically dominant ideas. As Baumgarten states in his introduction to the works of Max Weber, “science and her generalized statements cannot remove individual responsibility by replacing belief, subjectivity, struggle, and guilt. Science can only broaden and clarify the conscience of those engaged in practice, their appreciation for the consequences of their action and of the meaning of what there are doing.”<sup>87</sup> If one proceeds from this point of departure, there should be ample opportunities for fruitful cooperation and

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<sup>86</sup> See F. von Benda-Beckmann, 1994, “Good Governance, Law, and Social Reality,” 65; and Ferguson’s critical study of development in Lesotho, Ferguson, 1994, *The Anti-politics Machine*, 52.

<sup>87</sup> See Baumgarten in his introduction to Max Weber, “Vom inneren Beruf zur Wissenschaft,” in *Soziologie, universalgeschichtliche Analysen, Politik, mit einer Einleitung von E. Baumgarten*, 5. überarbeitete Auflage [5th revised edition] (Stuttgart: Alfred Kröner Verlag, 1919/1973), xxxv.

new forms of cooperation that give development practitioners and social science researchers more space to deliberate about the kind of knowledge required to diagnose problems and then develop modest, realistic scenarios for improving them.

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## **PROMISE OR PLUNDER? A PAST AND FUTURE LOOK AT LAW AND DEVELOPMENT**

LAURA NADER

*Continuities between the law and development movement of the 1960s and current rule of law efforts, some forty years later, indicate that past mistakes might be repeated. Committing to a new course of action first requires examining our original perspective. Normative blindness, false comparisons, legal orientalism, self-serving definitions of what other legal cultures “lack,” imposition versus voluntary receptions of law, and disparities in the developed world create a credibility problem that endangers contemporary efforts.*

*Examples of collisions between state law and non-state law in Zambia, Sardinia, Afghanistan, Iraq, New Guinea, and Paraguay discussed in this article illustrate how the expansion of Euro-American law affects populations in ways that belie “rule-of-law” rhetoric. Examining the purpose of law, development, and equity projects—i.e., whether they support plunder or redistribution, compensation or punishment, or condone economic development by invasion—should motivate further inquiry into the very premises of western law and its uses in colonialization and globalization. Fuller consideration of the framework within which development efforts operate can lead to more effective policies based on deeds rather than words—that is, policies based on the twenty-first rather than the eighteenth century.*

### **The Present in Context**

In order to assess the promise of any modern law and development program, it is imperative that the foundational ideas of development policies be clarified, no matter how distasteful it may be to practitioners. In other words, the lens through which we view development must come under scrutiny, in particular, the use of law in the historical expansion of Euro-American influence. Failure to scrutinize these foundational ideas dooms us to repeat the mistakes of past centuries. The world is smaller now than it was during the first waves of colonialism, and rhetoric and practice of law and development are now better known to its objects of attention.

*The World Bank Legal Review: Law, Equity, and Development: 87-111.*

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Printed in the Netherlands.

Similarly, failure to scrutinize the object of development in the third and fourth worlds means that change is planned and implemented as if in a vacuum. As this article will make clear, non-western legal systems are not of one color, nor are they necessarily ideal. Prior to the appearance of centralized state judicial systems, local systems were in place that allowed relatively easy access to forums for justice. If one traces the evolution of the plaintiff worldwide, however, it becomes obvious that when state law is introduced, the state assumes the plaintiff role in criminal cases and the real plaintiff becomes the victim. It is thus critical to understand how legal relations have changed with respect to the development of modern nation states, especially with respect to legal change agents.

The concept of positional superiority put forth by Edward Said<sup>1</sup> to illuminate how European scholars constructed an imagined East is useful here. In addition to the ethnocentrism that characterized numerous Oriental scholars, there were power differentials between Europe and the Orient. At the time, Europe was more powerful culturally, as well as in every other way, than other cultures. It was, in a word, exceptional. European Orientalists accordingly *perceived* their own societies as exceptional and, using binary logic, deduced that non-western societies lacked what it took to follow the path towards a more advanced, and assumedly just, level of development. Notions of positional superiority or cultural superiority were coupled with eighteenth- and nineteenth-century ideas about social evolution and progress, with a strict linear progression from savagery to barbarism to civilization. European status—seen as the most evolved—was expressed as the white man’s burden to remake the world in his own image.<sup>2</sup> Both concepts—positional superiority and social evolution—still guide law and development efforts today, resulting in what international law scholar Richard Falk has labeled “normative blindness,” the inability to understand that what we observe is a cultural construct, not a given.<sup>3</sup>

A model, in which progress is linear and progressive, gives rise to the idea that certain legal systems lack elements of better systems. This “theory of lack” and its implicit comparison posits western cultural values as the desired norm and engenders the ideological construction of a developing world where western “rule of law” is a

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<sup>1</sup> Edward Said, *Orientalism* (New York: Vintage Books, 1979).

<sup>2</sup> See the recent work by William Easterly, *The White Man’s Burden: Why the West’s Efforts To Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin Press, 2005).

<sup>3</sup> Richard Falk, “Cultural Foundations for the International Protection of Human Rights,” in *Human Rights in Cross-Cultural Perspective: A Quest for Consensus*, ed. A.A. An’Na’im, 44–64 (Philadelphia: University of Pennsylvania Press, 1992).

key ingredient for betterment. The historical story of this theory of “lack” is fairly straightforward, especially if one examines recent law and development projects. It is a continual (now cyclical) process in which the “need” for progress drives the “need” to improve others who lack the key social characteristics of western culture. “Legal missionaries,” as James Gardner called them,<sup>4</sup> were thus sent to Asia and Africa in the 1950s and to Latin America in the 1960s. Ostensibly their purpose was to encourage development along capitalist, liberal-democratic lines and forestall possible communist infiltration.

*The persistence of a self-validating ideology*

The essential ideological belief of the legal missionary effort was that introduction of the rule of law would facilitate democratic reforms, economic development, and nation building. Of course, human rights—simultaneously defined as universal, yet historically specific to the West—also needed to be protected. Moreover, what other cultures lacked in law, the West would provide through conscious transfer via culturally unencumbered legal engineers. These “engineers” ascribed to a culturally unspecific vision of law as an instrument of development policies. There was little doubt or humility in this vision. Modern American legal models, for example, would bring democracy to authoritarian states, regardless of their dissonance with the legal models already in place. This a-cultural vision spawned an empirically unassailable optimism among the legal missionaries. It was considered irrelevant that they often could not speak the language and knew little else of the peoples and places to which they were sent: American legal models were autonomous.

Gardner’s critique cut to the core of the perceived altruism of these legal missionaries.<sup>5</sup> He depicted American legal assistance as a product of disconnect because the movement did not carry abroad the most enduring and basic political foundations of American law and democracy: the Constitution and the Bill of Rights. Instead, modern economic law, including bankruptcy and contract doctrines, became the most common transplant. The consequences were frequently unanticipated: some recipients were technicians of regressive change, others, technicians of repressive change (i.e., apologists for one or another military dictatorship). Concessions by the countries that received legal assistance were, moreover, perceived as exhibiting their faith in an inevitable, linear social evolution underpinned by law.

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<sup>4</sup> James Gardner, *Legal Imperialism: American Lawyers and Foreign Aid in Latin America* (Madison, WI: University of Wisconsin Press, 1980).

<sup>5</sup> *Ibid.*

The negative consequences of this trajectory affected all parties concerned. The application of a theory of lack was not only humiliating to people in other lands, but also had the effect of making the West believe that it did not lack anything. One anthropologist has referred to this phenomenon as “false comparison”: comparing the ideal here with the “realities” there.<sup>6</sup> Legal ethnocentrism has recently even been classified as a form of legal orientalism.<sup>7</sup> Thus, the historic claim made by many western observers that China lacks an indigenous tradition of “law” displays western ignorance. After all, China boasts dynastic legal codes going back to the Tang Dynasty (AD 618–907), which were predominantly (and ironically) based on notions of legal authoritarianism. Yet, despite vigorous efforts to debunk the idea that China is lacking in law, scholars such as Thomas Stephens<sup>8</sup> continue to argue that Chinese law is not even worthy of the phrase “jurisprudence.”

***Idealization and the implicit lack of “others”***

Several historical examples will be cited in this article to provide evidence of the continued use of an a-cultural notion of “lack” grounded in false idealizations of non-western legal cultures. Weber was the first sociologist to develop an explicit taxonomy of law that exemplified the character of Chinese and Islamic legal systems.<sup>9</sup> Of special relevance to the present, Weber claimed that Islam lacked rational law and rejected the possibility of Islamic jurisprudence. *Kadi* (judge) opinions might be authoritative, but they varied from person to person, and were pronounced without any statement of rational reasons. As Jedidiah Kroncke points out in his article, “The Flexible Orientalism of Islamic Law,”<sup>10</sup> Weber’s analysis has since been called into

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<sup>6</sup> Jan Van Velsen, “Procedural Informality, Reconciliation, and False Comparison,” in *Ideas and Procedures in African Customary Law*, ed. M. Gluckman (London: Oxford University Press, 1969), 137–52.

<sup>7</sup> Teemu Ruskola, “Legal Orientalism,” *Michigan Law Review* 1, no. 1 (October 2002):179–234.

<sup>8</sup> Thomas P. Stephens, *Order and Discipline in China* (St. Louis, MO: Washington University Press, 1992).

<sup>9</sup> Max Weber, *Economy and Society: An Outline of Interpretive Sociology*, ed. Guenther Roth and C. Wittich, trans. E. Fischoff and others (New York: Bedminster Press, 1922/1968).

<sup>10</sup> Jedidiah Kroncke, “The Flexible Orientalism of Islamic Law,” *UCLA Journal of Islamic and Near Eastern Law* 4 (2004–2005):41–73.

question by numerous scholars,<sup>11</sup> yet his characterization of Islamic law remains relatively undisturbed—a stagnation in scholarship that has serious consequences.<sup>12</sup> Kroncke notes that an idealized western law “becomes the evaluative standard ... oblivious to peoples who have been radically impacted by colonialism, all of which plays into the hands of those uncritical thinkers planning U.S. foreign policy in these Eastern lands, people who only hear irrationality, illegitimate, unchanging, immorality.”<sup>13</sup>

While idealizations have been operating for as long as other peoples have been observed, it is always easier to create identity through opposition, especially from a perspective of relative ignorance. Law stereotypes, however, are an impediment to understanding how law works, indeed, what law is. Judith Shklar has observed that legal scholars tend to be so captivated by the ideal purposes of law that they think about law only as it ought to be and not as it actually is.<sup>14</sup> While the debate over the impact and utility of legal realism continues in American law schools, this debate has had little lasting effect in the international arena. Needless to say, nowhere are the issues of legal idealization more salient than in colonial or imperial conditions of social and cultural disruption.

“Normative blindness” has consequences. Societies are commonly disrupted as a result of international aid. Resistance to this disruption sometimes evolves into violent conflict, as in the period of African or Indian independence from colonialism, because of the imposition of foreign law. Customs thought to be barbarous by the international community may increase in incidence when the civilizing posture of foreigners is perceived as disrespectful. Such a phenomenon could be seen in the treatment of *sati* (or *suttee*) in British India, where stigmatization of a marginal ritual caused the proliferation of its practice as a symbol of resistance.<sup>15</sup>

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<sup>11</sup> See, for example, Harold J. Berman, “Some False Premises of Max Weber’s Sociology of Law,” *Washington University Law Quarterly* 65 (1987), no. 4:758–70.

<sup>12</sup> See Laura Nader, “Law and the Frontiers of Illegalities,” in *Law, Power and Control*, ed. Franz von Benda-Beckmann, Anne Griffiths, and Keebet von Benda Beckmann (Oxford: Berghahn Press, forthcoming 2006.)

<sup>13</sup> Kroncke, 2004, “The Flexible Orientalism of Islamic Law.”

<sup>14</sup> Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1964).

<sup>15</sup> Dagmar Engles, “Wives, Widows, and Workers: Women and the Law in Colonial India,” in *European Expansion and Law*, ed. W.J. Mommsen and J.A. De Moor, 159–78 (Oxford: Berg, 1992).

Disbelief or cynicism about the promises of international aid organizations arises from increasingly accessible knowledge of the divergence between western social ideals and western realities, for example, the increasing disparities in income in the United States, despite its “modernized” and “developed” institutions. The single most important difference between the Euro-American colonial period and the present is that the world is shrinking. “Others” can evaluate our promises by looking at real performance in the United States. Take, for example, Washington, DC—home of the World Bank’s headquarters. There, for all visitors to see, is widespread poverty that apparently has not been resolved by our own Law, Equity and Development policies.

***Invalid comparisons and the avoidance of self-criticism***

Foreign populaces can now read contemporary articles on law, such as “Peasant Justice” by Michael Goldhaber,<sup>16</sup> which states that “in rural China, tort reform means jailing the plaintiffs and their lawyers. Getting them out isn’t easy.” Goldhaber recommends that readers draw their own conclusions about cause and effect. Yet, while arbitrary local justice is probably present in China’s Shaanxi Province, the United States is also vulnerable to criticism. Not only are large numbers of American prisoners behind bars because they are victims of racial discrimination or because they had woefully inadequate counsel, the tort reform movement in the United States is working to damage possibly the best tort system any modern country has known.<sup>17</sup>

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<sup>16</sup> Michael Goldhaber, “Peasant Justice,” *American Lawyer*, November 2005.

<sup>17</sup> The United States has the only system of tort law that provides compensatory and punitive damage relief for wrongfully injured people before a civil jury and judge, with separate functions that determine facts (jury) and law (judge) in a precedential system of common law. This allows the law to continue to develop and reflect new conditions, values, and community expectations vis-à-vis the responsibility of the defendant and the rights of the plaintiff. Moreover, the common law of torts and its associated judicial system allows both middle-income and poor people unparalleled access to top legal counsel (which they otherwise could never afford) through the contingency fee.

Over the last twenty years, a defendants’ lobby and insurance companies have attacked the tort system and succeeded in codifying (i.e., restricting) common law through state and federal laws passed by legislators. Such restrictive changes seriously erode the capacity of the common law of torts to evolve, award adequate compensation, and preserve the independence of the judiciary and the critical role of the civil jury. More one-sided restrictions against plaintiffs are being planned, which will further erode the tort law system and the epidemic percentage of wrongful injuries that are part of this

Comparisons might be valid if the difference between the imposition of law and equity and the voluntary reception of western law was recognized. Turkey and possibly Japan are often touted as having successfully adapted European legal traditions. However, not only was voluntary reception rare, it is debatable just how “voluntary” such processes were. In Turkey, reception was deliberate because the Ottoman empire borrowed its private and public law from the Swiss, German, Italian, and French.<sup>18</sup> It helped that Turkey was never a colony and that its ruling elite was intent on modernization and national integration. For Turkey, then, “voluntary” meant willing imposition by a social elite. The Japanese case involved more coercion due to its precarious situation in the middle of the nineteenth century, when western powers attempted to force the Japanese empire to renounce its isolationist policies. Dealing with the “white peril” required that Japan accept the legal concept of “the law of nations” while preserving its own identity. Accepting a global system of law for diplomatic reasons then opened the door to foreign legal advisors.<sup>19</sup>

Nevertheless, as Martin Chanock notes, imposition of law under colonial conditions was the rule,<sup>20</sup> and this imposition was one of the most durable consequences of imperialism: it even survived decolonization. In other words, no attempt to adapt (post-colonial) legal systems to an indigenous culture has been successful. Chanock summarized the African situation as follows: “The picture is one of a population subject to extensive regulation imposed by laws, the content of which they [did] not know, and randomly administered by officials, both white and African, who [combined] administrative and judicial roles.”<sup>21</sup> Chanock’s subtle analysis indicates how customary law was interwoven into British law. In this case, the law served

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industrial society. These developments may even halt improvements that stem from the impact of the tort system (e.g., safety improvements in the automobile, foundries, coal mining, medical device industries, etc.).

<sup>18</sup> Esin Örüçü, “The Impact of European Law on the Ottoman Empire and Turkey,” in *European Expansion and Law*, ed. W.J. Mommsen and J.A. De Moor (Oxford: Berg, 1992), 39–58.

<sup>19</sup> Eric Seizelet, “European Law and Tradition in Japan during the Meiji Era, 1868–1912,” in *European Expansion and Law*, ed. W.J. Mommsen and J.A. De Moor (Oxford: Berg, 1992), 59–82.

<sup>20</sup> Martin Chanock, “The Law Market: The Legal Encounter in British East and Central Africa,” in *European Expansion and Law*, ed. W.J. Mommsen and J.A. De Moor (Oxford: Berg, 1992), 279–306.

<sup>21</sup> *Ibid.*, 284–5.

the combined interests of colonial governments and African local authorities. This coincidence of interests has, in essence, trapped “natives” in what was supposed to be their idea of communal ownership, such as patriarchal control of family estates. Anglo-colonial law is thus a transformed law that combines imported and constructed laws. Chanock does not mince words in his conclusion: “The colonial period provided no foundation for the use of law by citizens in defense of their rights.” Indeed, the consequence of the legal encounter was, “individualization without rights and bureaucratization without the rule of law.”<sup>22</sup>

In any society, it is difficult to escape the power of elites to shape the law, but in an increasingly globalized world, elites become increasingly disembedded in their cultures, whether in formally democratic nations or not. The extra-national forces to which they are subject increase their relative social distance and make domestic accountability and attempts to improve their responsiveness even more difficult.

### **Ethnography: The Empirical Subverts the Ideal**

For close to 50 years, ethnographers at Berkeley have concentrated on the direction and development of law in new and old nations. Together with ethnographers elsewhere, their studies have examined isolated instances of customary law (e.g., in West Irian, New Guinea), customary or non-state law as it interacts with nation-state law (e.g., Sardinia, Zambia, and Sweden), and the co-existence of customary, religious, and state law worldwide, including in Euro-American countries.<sup>23</sup> In the United States, the issue of no access to law,<sup>24</sup> and non-state alternatives to the American judicial system used by American consumers of goods and services, were a particular focus. In addition, this author has followed the rise of the Alternative Dispute Resolution (ADR) movement from its public inception and launch in 1977 by then-Chief Justice of the U.S. Supreme Court Warren Burger (ADR was part and parcel of his anti-law movement).

The energetic anti-law movement in the United States that began in the early 1970s and continues into the present, including ADR and International Dispute Resolution

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<sup>22</sup> Ibid., 304.

<sup>23</sup> Laura Nader and Harry F. Todd, eds., *The Disputing Process: Law in Ten Societies* (New York: Columbia University Press, 1978).

<sup>24</sup> Laura Nader, *No Access to Law: Alternatives to the American Judicial System* (New York: Academic Press, 1980).

(IDR), has spread worldwide. Both ADR and IDR address the disenfranchised, described by Mauro Capelletti<sup>25</sup> and other legal scholars as having no access to law. Both of these forms shift dispute resolution away from public institutions into private networks where essential ingredients, such as transparency, precedent, and social context, are often omitted.

This ethnographic work on law, which is embedded in social and political contexts—whether counter-hegemonic or organic (i.e., bottom up) or hegemonic (i.e., top down)—culminated in a deeper understanding of the multiple uses for which law of western origin is promoted. Empirical research has, for example, examined how “little injustices” that add up to large systemic injustices are managed in the United States. The transmission of law from one country to another, its transformations, its instrumental use by neo-liberal economics in pursuit of self-interest, and the use of the concept of lack of engineer change are compatible with Euro-American economic ideas about progress and the civilizing mission. All of these uses of law combine to justify interference in other places. Continuities in this approach have persisted since the early expansion of European law, which favored certain uses of the “rule of law,” democratic theory, and ideas of development rooted in western notions of Euro-American exceptionalism and progress. Ethnographic work, on the other hand, has repeatedly shown that the justice motive is universal.<sup>26</sup> No scholar has yet made the same case for “efficiency,” which is so often invoked in arguments that link legal and economic development. And while negotiation and mediation practices appear worldwide, they work best under conditions of relatively equal power.

### ***Local law and the failure of national integration***

The comprehensive publication of the Berkeley Village Law Project, *The Disputing Process: Law in Ten Societies*, asked what the lives of people in developing countries would be like if they were increasingly integrated into state and national frameworks, but proportionately more of their grievances resulted from contact with larger-scale impersonal organizations, rather than with their neighbors.<sup>27</sup> At the time, the authors had little idea that they would eventually be speaking about

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<sup>25</sup> Mauro Capelletti, *Civil Procedure* (Tübingen, Germany: J.C.B. Mohr, 1973).

<sup>26</sup> Laura Nader and Andree Surssock, “Anthropology and Justice,” in *Justice: Views from the Social Sciences*, ed. Ronald L. Cohen (New York: Plenum Press, 1986), 205–233.

<sup>27</sup> Nader and Todd, 1978, *The Disputing Process*, 30.

structural adjustments, the WTO, TRIPS, NAFTA, CAFTA,<sup>28</sup> and other agreements generally classified as neo-liberal. They noted that a major problem for the new states would be that law — one of the most powerful tools for integrating and cementing national goals — might be despised by the majority of people for reasons that Chanock and others have elaborated (i.e., questions of accessibility).<sup>29</sup>

The reasons for people's disaffection with state law are multiple: the intolerance of social and cultural pluralism in westernized law, unequal power (which becomes more pronounced in differentiated and stratified societies), professionalism (which alters patterns of access to major dispute resolution mechanisms), and general problems of legal competence, corruption and/or delayed prosecutions. Sometimes these matters are all rolled into one cluster of variables — the distribution of power.

I belabor these issues not because they encompass novel observations, but because people in law and development keep repeating the same mistakes. If they mean what they say about democracy, poverty, equity, and other rousing issues, they need to understand the history of their predecessors, both institutionally and culturally. To be totally cynical about repeated failures would not be supportive of those who really do see liberating possibilities in the dissemination of Euro-American rule of law or, for that matter, the possibilities of western culture accepting other (especially non-western) ideas of justice into its own system (currently a conceptual impossibility). While the *World Development Report 2006* of the World Bank recognizes many positive ideals,<sup>30</sup> normative blindness is likely to take over in the practice of law and development without an understanding of the history of this practice. The examples of recent law and development projects that follow illustrate precisely this blindness.

#### ***Afghanistan: The rejection of local knowledge***

A current example of the failure to make use of either local knowledge or anthropological observations of a country's existing legal traditions can be seen in Afghanistan, where local knowledge is being rejected. In December 2001, an international meeting in Bonn, Germany, produced an agreement on provisional arrangements

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<sup>28</sup> WTO—World Trade Organization, TRIPS—Trade-Related Aspects of Intellectual Property Rights, NAFTA—North American Free Trade Agreement, CAFTA—Central American Free Trade Agreement.

<sup>29</sup> Chanock, 1992, "The Law Market.

<sup>30</sup> World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank and Oxford University Press, 2005).

for legal reform in Afghanistan. As a result of that meeting, Italy assumed the preeminent role in judicial reform and in February 2004, presented a complete criminal procedure code to the new Afghan government for implementation at all levels of the Afghan judiciary. The purpose of codification was to reduce arbitrary decision making and promote judicial uniformity, as part of an effort to extend a centralized state structure to outlying provinces. As with past colonial policies, a unified legal system would both standardize state law and abolish customary or sharia religious precepts.

As Faiz Ahmed points out, however, a central problem in this scenario is the imposition of law with little to no Afghan involvement.<sup>31</sup> In addition, Afghanistan has a history of extremely deep distrust of centralized government, let alone foreign presence or the contravention of Islam. In a country where law is adapted locally to an extreme degree, success of Italian, rule-based criminal procedure seems unlikely. What is missing from the planning of such efforts is history. Ignorance of the fact that imposition of law tends to exacerbate internal conflicts, or serve a minority elite at the expense of the poor and the needy, does not serve legal reform efforts. Neither does ignorance of the fact that the role of the active plaintiff in traditional societies differs from litigation traditions in Euro-American societies. But active plaintiffs are not usually what state-centered legal systems are about. As anthropologist Thomas Barfield articulates the problem:

“I think one of the difficulties the international community is going to find in Afghanistan is that the Afghans have a very well developed structure of law, or morality and of justice, but it follows a different logic than our own ... While state structures are very underdeveloped, the question of running a society without state structures is highly developed. And that is not something that people in the international community are used to dealing with, and unless they do recognize the fact, it’ll be asking for trouble, as it attempts to create a viable Afghan government over the course of the next two years.”<sup>32</sup>

The validity of the notion that homogeneity, the state, success, and progress go hand in hand can be challenged by charting the consequences of modernizing actions in particular contexts. One of the intentions of the Berkeley Village Law Project was

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<sup>31</sup> Faiz Ahmed, “Judicial Reform in Afghanistan: A Case Study in the New Criminal Procedure Code,” *Hastings International and Comparative Law Review* 29, no. 1 (Fall 2005):93–134.

<sup>32</sup> Thomas J. Barfield, “On Local Justice and Culture in Post-Taliban Afghanistan,” *Connecticut Journal of International Law* 17, no. 3 (Summer 2002): 437–44.

precisely to examine village law in 15 different geographic contexts in order to have a baseline from which the flood of changes following independence from a colonial situation, and/or modernization more generally, could be measured. Barfield and other anthropologists would concur that the imposition of centralized judicial institutions on local communities which have their own non-state institutions for regulating behavior would periodically provoke regional rebellions, such as the opposition to the Taliban in Afghanistan prior to the U.S. intervention. In the non-state societies traditionally studied by anthropologists, a plaintiff is motivated to secure justice. He or she is not concerned with efficiency, *per se*, although access to disputing processes is, more often than not, easier than access to national state law. His or her experience is in many ways similar to that of average citizens in the United States, where plaintiffs often pursue claims at great cost simply to validate their sense of being wronged. Yet, this experience of the average person is almost completely at odds with economically based justifications that are at the forefront of international rule-of-law efforts. Given that the recent trend of integrating economic analysis and its formalistic assumptions about law has had deleterious effects on social policy in America, it is not surprising that the introduction of modern western law is often a major cause of unrest in more removed cultural settings.

***Centralized versus de facto law: Sardinia and Zambia***

Sardinia is a place where state law functions as the legitimate law. Alongside this state law, however, is a working *de facto* system of law of the Sard shepherds. The Italian state views the shepherds as lawless. The shepherds see state law as foreign and unresponsive to their daily needs. State law seems unnatural because it is imposed from without, while their own law emerges from their environment and seems natural to them. The shepherds argue that state law is not attuned to their reality and describe it as “arbitrary,” “expensive,” “time consuming,” and “corrupt.”<sup>33</sup> They are more gracious when describing their own system. If we look at how cattle theft is handled by the two systems, we find that the distribution of wealth is key. For the Sardis, stealing cattle is a redistribution of cattle wealth—a movement of something from one place to another. It is not regarded as a crime, but a source of dispute to be handled without resort to state law, where the solution results in criminal, rather than restorative, consequences.

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<sup>33</sup> Julio Ruffini, “Disputing over Livestock in Sardinia,” in *The Disputing Process*, ed. Laura Nader and Harry F. Todd (New York, Columbia University Press, 1978), 209–246.

Richard Canter examined cattle rustling in the central province of Zambia after the country's independence.<sup>34</sup> Mungule, a multi-ethnic area, is the home of the matrilineal Lenje-speaking people. There is a sharp dichotomy between the settlement processes applied to civil and criminal cases in this area. Civil cases, such as divorce, adultery, petty theft, land disputes, and the like, have been left to the local court, where disputes are settled by unwritten, yet changing, customary law that is elaborated by statutes and courts in urban centers. Criminal cases are heard at magistrates' urban courts, where hearings follow a form dictated by a unified criminal code originally imposed by the British.

From about 1950 to 1970, cattle-rustling cases increased and were taken to the magistrate's court. By 1970, the huge number of such cases and the lack of deterrence that legal judgments were having on the practice precipitated a local demand that cattle rustlers be returned to the local court for trial. Yet in the Lenje court, two procedures for effecting a just decision were in conflict: those for proof and those for sanction. Local court decisions were primarily based on compensation and group responsibility. Magistrate's courts, however, used punitive sanctions that mandated years in prison at hard labor—compensation for the theft was perceived only as a secondary consideration and often postponed for years. The response of the locals was to create their own (self-help) solutions, which were often devastatingly damaging and disruptive. National officials responded in turn by increasing the maximum penalty for convicted cattle rustlers from 7 to 15 years of hard labor.

Most legal systems do not recognize the distinction between civil and criminal law, both of which are European legal categories related to the rise of the nation state and the need for the state to justify its control and power over its citizens.<sup>35</sup> In Third World states, "civil" and "criminal" are the legacy of a specific western tradition. Thus, in the Sardinian and Zambian examples, the state assumes the role of plaintiff, thereby supplanting the authority and intentions of the original plaintiff and often criminalizing him or her, as in the example that follows.

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<sup>34</sup> Richard S. Canter, "Dispute Settlement and Dispute Processing in Zambia: Individual Choice versus Social Constraints," in *The Disputing Process*, ed. Laura Nader and Harry F. Todd (New York, Columbia University Press, 1978), 247–80.

<sup>35</sup> Laura Nader and P. Parnell, "Criminal Law and its Enforcement in Pre-literate Societies," in *Encyclopedia of Crime and Justice*, vol. 1, ed. Sanford H. Kadish (New York: Free Press, 1983), 200–207.

***Papua New Guinea: The role of law in plunder***

An elegant description of the role of law in plunder can be found in present-day Indonesia and Papua New Guinea, as presented by David Hyndman.<sup>36</sup> Here, two states facing a debt crisis—Indonesia and Papua New Guinea—favored investors who plundered natural resources, casting indigenous peoples in the role of subversive criminals when, in the view of anthropologists, they took up arms to protect their cultural and ancestral homelands. Hyndman observes that third-world colonialism has replaced first-world colonialism. In collusion with Papua New Guinea and Indonesia, transnational corporations entered New Guinea to mine gold and copper—a process Hyndman describes as economic development by invasion. Local peoples fought the foreign presence by blockading airstrips and blowing up the pipes that ran from the mines. Lives were lost and property destroyed. Those who resisted were prosecuted as criminals under state laws that favored the investors. The crime rate went up. Ultimately, those in power decided what constituted a crime. Unsurprisingly, the actions of locals were criminalized and those of Indonesia, Papua New Guinea, and wealthy transnational corporations were legitimized using western justifications of economic development and efficiency. Hyndman concludes that indigenous and western resource management can be incorporated into state policy only if economic development is based on how people are already using their environment—a project more likely in independent Papua New Guinea than in Indonesia.

***Iraq: Law, plunder, and the implications of imposing centralized law***

It is illuminating to compare the ethics of customary or Islamic law in the Middle East with that of Paul Bremer's orders when Iraq was ruled by the Coalition Provisional Authority. When the official reasons for the 2003 American invasion of Iraq evaporated, the justification for war shifted to ridding Iraq of Saddam Hussein in order to bring democracy and the rule of law to the country and region. This shift of rationale was headlined all over the United States with fanfare, and American lawyers and judges were sent to Iraq to pave the way. Ignorant of twentieth-century legal developments in the Arab world—and the fact that the Iraqi Civil Code of 1953 was one of the most innovative, balanced attempts to merge Islamic and French law in the Middle East—Iraq was said to lack the rule of law.

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<sup>36</sup> David Hyndman, *Ancestral Rain Forests and the Mountain of Gold: Indigenous Peoples and Mining in New Guinea* (Boulder, CO: Westview Press, 1994).

As in the case of Afghanistan, empirical ignorance prevailed among American legal engineers. One result was the key to the occupation of Iraq: the 500 pages of Paul Bremer's orders. A sampling of some of the most important orders includes Order No. 39, which stipulated that Iraq's 200 state-owned enterprises be privatized with unrestricted tax-free remittance of all profits and other funds and granted 40-year ownership licenses. Foreign companies and investors can reject Iraq's domestic courts and turn to international tribunals like the WTO, with its closed-door courts, as Order No. 17 granted foreign contractors full immunity from the laws of Iraq. Order No. 81 rewrote Iraq's patent, trademark, and copyright laws so that they complied with WTO requirements on intellectual property (which is presently under scrutiny by activists that follow biopiracy practices). These Orders provoked an anonymous warning by an Iraqi: "The day will come sooner rather than later, when the Iraqis will shred Bremer's laws, soak them in water, and offer the glass to Bremer to drink."<sup>37</sup>

Meanwhile, disconnected from on-the-ground practices in Iraq and their consequences, American pundits pontificated on Sunday morning news interviews that democracy was difficult to build and that one couldn't expect to make it work overnight. According to some observers, the making of democracy and freedom was thus transformed into "plastic words."

#### ***Middle East: Traditions of Islamic and national law***

Unlike nation-state law, Islamic law has a flexibility that historically tolerates and includes pluralities of law. Even in the contemporary Middle East, customary and religious laws co-exist or even compete with national legislation. The socio-legal dynamics surrounding Islamic law explain the erroneous essentializing of sharia, an idea offered by western thinkers since and including Max Weber.<sup>38</sup> Sharia is not a single entity; there are variations. It can, for example, justify and afford protection for rights of private ownership in urban areas, and of private ownership of natural resources and land outside urban areas. Historically in the Middle East, provisions have existed for common or communal ownership of water and grazing land.<sup>39</sup>

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<sup>37</sup> Iman Khaduri, ed., "US Declares Iraqis Must Destroy Their Own Seeds," <http://www.rense.com/general62/seeds.htm> (from <http://abutamam.blogspot.com> and <http://www.globalresearch.ca>, 2-1-5), February 1, 2005 (accessed July 18, 2006).

<sup>38</sup> See Kroncke, 2004, "The Flexible Orientalism of Islamic Law."

<sup>39</sup> Ann Elizabeth Mayer, ed., *Property, Social Structure, and Law in the Modern Middle East* (Albany: State University of New York, 1985).

That sophisticated commercial activity existed in this area prior to colonialism should come as no surprise to those who but for a moment reflect on the role of the Middle East in pre-modern global economic development. Islamic law was not, moreover, always the overarching norm that determined how property was regulated. Rather, at times it functioned to complement other modes of property regulation, particularly in rural settings where customary laws existed prior to Islamic law. Classical Islamic theory also does not prohibit Muslims from following customary law, since it treats custom as a complementary source of legal rules, a strategy that supports resolution of conflicts and differences without resorting to hierarchical authoritarian political structures or alien political powers. The process is thus structured to prevent the development of a hegemonic political power in support of elite groups, alien or indigenous.<sup>40</sup>

In independent countries, such as Morocco, Algeria, or Tunisia—once colonized by the French—the unified notion of legal power inherent in the western notion of the nation state, first articulated in the colonial period, remains intact. Centralized law appears, on the surface at least, to have maintained the upper hand, if not over Islamic law in its entirety, then at least over customary law. “On the surface” because at any moment, the interrelatedness of customary, Islamic, and state law is significant. But this interrelated character of law is not static; reassertion of one or another sphere can be seen, for example, in the recent histories of Yemen, Sudan, Iran, and Afghanistan.

### **Considering the Inconceivable: A New Context for Moving Beyond Western Law**

Military law and development schemes make it difficult to continue to work in a “business-as-usual” style. Indeed, the invasion and occupation of Iraq prompted Tanzanian jurist Issa G. Shivji to write, “the ‘new’ comeback of rule of law had little to do with the original Enlightenment values ... this time it came as both a farce and a tragedy.” He continues:

“... 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

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<sup>40</sup> For an analysis of antagonism against state law in positive terms, see Pierre Clastres, *Society against the State: Essays in Political Anthropology*, trans. Robert Hurley (Cambridge, MA: Zone Books, 1987).

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 civilization's claim to universality. Its universalization owes much to the argument of force rather than the force of argument. We have to rediscover other civilizations and weave together a new tapestry borrowing from different cultures and peoples."<sup>41</sup>

Shivji also notes, "The moral rehabilitation of imperialism was first and foremost ideological, which in turn was constructed on neo-liberal economic precepts—free market, privatization, liberalization, etc., the so-called Washington consensus. Human rights, NGOs, good governance, multiparty democracy, and rule of law were all rolled together..." Professor Shivji is not, moreover, a solo voice on contemporary imperialisms.<sup>42</sup>

Disputes in village or tribal law are mostly between people who know each other or at least share certain common social and political linkages. But the spread of industrialization and the migration of people from rural to urban centers changes not only production, but also consumption patterns. The effects of these developments on law are dramatic. The function of law as a power equalizer, and its role relative to everyday, quality-of-life issues, diminishes. This shift is reflected in the general absence of any kind of social control through which order is traditionally maintained. The diminishing centrality of law at the local level is exacerbated because, in western tradition, law has commonly been considered autonomous and independent from the rest of society. Hence the cookie-cutter, a-cultural approach (e.g., transplanting an Italian criminal procedure code to Afghanistan).

In Islamic thought, the gap between sharia and social needs and opinions was addressed by recognizing customary law as a legitimate source of law. Western law, whether in code or other form, continues to affect practically all countries of the world. Although there is some recognition of the problems that this influence entails, the juggernaut moves ahead, independent of the consequences for locals and localities in their struggle for a livelihood. Even in decentralized places like

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<sup>41</sup> Issa G. Shivji, "Law's Empire and Empire's Lawlessness: Beyond Anglo-American Law," *Journal of Law, Social Justice and Global Development* (an electronic law journal), no. 1 (2003), [http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003\\_1/shivji2/shivji2.rtf](http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji2/shivji2.rtf). Accessed December 2005.

<sup>42</sup> See Keith Aoki, "Neocolonialism, Anticommons Property and Biopiracy in the (not so Brave) New World Order of International Intellectual Property Protection," *Indiana Journal of Global Legal Studies* 6, no. 1 (Fall 1998):11–58.

Afghanistan, people react to national legal systems that do not respond to their needs either by violence or the elaboration of local solutions. International law and economic schemes conceived in some distant place may be viewed as suspect or anathema.

***Rationalized ignorance: Repeating the mistakes of the past***

The first wave of law and development efforts in the 1960s operated within a paradigm that gave priority to the role of the state. Through state-managed industry, lawyers facilitated state-led economic development (when trained to do so with an instrumental view of the law). The history of the demise of this first wave of legal assistance has been repeatedly analyzed since James Gardner's initial critique in *Legal Imperialism*,<sup>43</sup> but it is not clear that any lessons have been learned.<sup>44</sup> The rule-of-law development efforts that followed have eclipsed all earlier efforts, aided by the post-Cold War historical moment and an organized, global international regime with a vision of world economic integration. The rule-of-law enterprise is now big business, responsible for billions of dollars of investments. Legal connections are being established between national legal systems and transnational legal power brokers, interwoven with western ideas of democracy and international (read western) approaches to such issues as national human rights, women's rights (paving the way toward more strident, holier-than-thou rhetoric), guarantees of property rights, contracts, and minimal regulation—the purpose being to attract foreign investors. While political ideals are given rhetorical prominence, in practice, good governance is always judged in terms of economic practice. But where are the little people in this picture? Trickled down upon? They are exactly where Paul Bremer put them: at the bottom of the ladder, ensuring that they will continue to be an example of lack, which will again justify further foreign interference.

***Reinvigorating the credibility gap***

Throughout this review, examples past and present have implied that law and development efforts have a credibility problem. During the colonial period, the

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<sup>43</sup> Gardner, *Legal Imperialism*, 1980.

<sup>44</sup> The globalization of informal law (such as ADR, peacekeeping, and peacemaking strategies) are, perhaps, an attempt to use soft legal technologies to address local-level law. See Laura Nader, "The Globalization of Law: ADR as 'Soft' Technology," in *American Society of International Law (ASIL), Proceedings of the 93rd Annual Meeting* (Washington, DC: 1999).

colonized were generally ignorant of their western colonizers; that is not the case today. The histories of Europe and the United States—with all their strengths and weaknesses, accomplishments, and failures—are available, as is a plethora of information sources that document how law and development has been oversold. A final example illustrates the results of how multiple interested parties participating in reform, or economic development, jeopardized indigenous rights to traditional lands. Because native peoples have been plundered for over 500 years, the credibility gap—between reformers, governments, and international agencies (whether non-profit or not)—may best illustrate the problems associated with law and development.

Richard Reed summarizes the development problem in his article, “Two Rights Make a Wrong,”<sup>45</sup> which concerns indigenous peoples, the Guarani and Ache, who maintain traditional ways of life in the forests of eastern Paraguay, and their encounter with joint Paraguayan and international “debt-for-nature” swaps. In 1968, the forest of these two indigenous peoples was purchased by a timber company. In 1971, the Guarani were forced out of their territory by the timber company. In 1974, the timber company went bankrupt, and the World Bank acquired the land by default. In 1976, the World Bank and the Paraguayan government tried to force the Ache people out of the forest. In 1983, anthropologists approached the World Bank and requested that it cede the forest to the indigenous groups, but the Bank ignored both the anthropologists and its own guidelines on indigenous peoples. Nevertheless, the Nature Conservancy acquired 53,000 hectares of forest from the World Bank and anthropologists then worked with indigenous groups to create a reserve. In 1991, all Guarani indigenous people were denied access to the reserve, while the Ache were granted limited access to it, provided that they maintained their “traditional” lifestyles as defined by the Nature Conservancy and the NGO, Fundación Moises Bertoni. As Reed concludes, “... the plan that was implemented reinforced the inequities of power and resources that characterize other relations between small-scale societies and the larger system.”<sup>46</sup>

Once touched by the market, native peoples are expected to lay down the mantle of “noble savage” and align with the environmentally destructive society. In this context, environmental protection groups are the new “developers,” backed by worldwide networks of information, political connections, and significant amounts of money—economic and political weapons—that enable them to confront some

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<sup>45</sup> Richard Reed, “Two Rights Make a Wrong: Indigenous Peoples versus Environmental Protection Agencies,” in *Applying Cultural Anthropology: An Introductory Reader*, 6th ed., ed. Aaron Podolefsky and Peter J. Brown (Boston: McGraw-Hill, 2003), 108–115.

<sup>46</sup> Ibid.

of the most powerful corporations and many national governments. The Nature Conservancy, for example, was able to rally support for the reserve and the relocation of indigenous residents. From the indigenous peoples' point of view, however, its activity was just one more appropriation of indigenous land for purposes outside the rule of law.

The credibility of law and developments projects is compromised by such outcomes. The story has been repeated so often that indigenous groups do not distinguish between *latifundistas*, the Nature Conservancy, or the World Bank. Proponents of new projects thus often set the stage for failure or unrealistic expectations. Their credibility is also compromised by pressures from various political and economic interest groups, which in the above case were agro-industrialists and a growing peasant population whose land demands were satisfied by the Paraguayan government land reform law. Between 1963 and 1984, the Paraguayan land reform agency redistributed millions of hectares to peasant colonists.<sup>47</sup> The resulting (and continued) deforestation in Paraguay is the most significant in any Latin American country.<sup>48</sup> Paraguay's subtropical forests are becoming an international breadbasket, while indigenous peoples are losing their land. It is important to be aware that such outcomes produce effects on those who interact with projects on the rule of law—what they have known best is lawlessness and public pronouncements. Is there any reason for them to trust yet another development effort, especially one that promises equity and the rule of law (a particularly untrustworthy institution vis-à-vis indigenous affairs in both North and South America)?

### **Conclusion: Bridging the Word-Deed Divide**

Critically learning from the past opens the way for a new dynamic, one that brings practice and ideals into more healthy alignment. In doing so, we must be attentive to the underside of law and its practice as an instrument of appropriation, given that shifting legal ideologies can make illegitimate acts legitimate, depending on the contenders and the prizes at hand. During different periods in history, there have been changing legal emphases—exploration, “missionizing,” colonization, depopulation, development, democratization, or (in the present military-industrial period) globalized development—but local, regional, and international networks of power have consistently disrupted idealized notions of law.

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

### *New legal instruments*

The implicit assumption that markets conform to fixed laws impervious to human intervention strengthens the view that the economic forces that shape the world are predetermined and beyond human control. Few writers, however, have analyzed the role of ideologies of fate and destiny as insulating mechanisms.<sup>49</sup> Those who have studied the role of ideology indicate that the belief in neo-liberalism as destiny produces passivity and acquiescence in local cultures, which in turn inhibits creative thought and problem solving. A crucial starting point, then, would be to recognize that what we think of as the natural unfolding of history is actually manmade and, therefore, can be redesigned.

Real alternatives are more likely to enter the conversation at a point of discontinuity. A number of alternative legal instruments exist, for example, in the thoughts and actions of people around the world who already had or have adopted the ideals of the rule of law. These instruments range from the development of a database on India's traditional remedies by Indian physicians and technicians (to protect them from theft by multinational drug companies in a practice known as biopiracy) to efforts to control the definition of nature, as in the Kayapo Indian case in Brazil.<sup>50</sup> Other new legal instruments seek to address the way in which individual rights are favored over collective rights. Native Americans, for example, question the legitimacy of law that absconds with their land by people who employ the "make good use" argument.<sup>51</sup> In addition, efforts to reinvent or eliminate patent laws so as to protect local peoples' use of seeds are now ubiquitous. These efforts to work within the concept of the rule of law are but a sampling of examples.

### *Reweaving notions of law and civilization*

Shortly before her death, Margaret Mead was reported to have observed that capitalism, socialism, and communism were invented in the nineteenth century to

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<sup>49</sup> See Peter Shorett, "Dogmas of Inevitability: Tracking Symbolic Power in the Global Marketplace," *Kroeber Anthropological Society Papers* (University of California, Berkeley) 87 (2002):219-41.

<sup>50</sup> See Laura Nader, *The Life of the Law: Anthropological Projects* (Berkeley: University of California Press, 2000).

<sup>51</sup> See M. Pinkoski and M. Asch, "Anthropology and Indigenous Rights in Canada and the United States: Implications in Steward's Theoretical Project," in *Hunter-Gatherers in History, Archaeology, and Anthropology*, ed. Alan Barnard, 187-200 (Oxford: Berg Publishers, 2004).

deal with nineteenth-century problems. She concluded that we need a philosophy for our own times. Professor Shivji's critique cited earlier echoes her observation. Shivji begins with hope—"We are on the threshold of reconstructing a new civilization, a more universal, a more humane civilization"—and ends with a challenge for all people on this planet: "We have to rediscover other civilizations and weave together a new tapestry, borrowing from different cultures and peoples."<sup>52</sup> As this author has argued previously, it is possible for law to serve as the basis for a more just democracy, provided that the plaintiff is not thwarted.<sup>53</sup> Rule-of-law projects, however, will continue to lack wider legitimacy if law is used, as is the norm today, to maintain factors of power and control that work against the majority of the world's citizenry.

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<sup>52</sup> Shivji, 2003, "Law's Empire and Empire's Lawlessness."

<sup>53</sup> Nader, 2000, *The Life of Law*.

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## SHOULD JUSTICE REFORM PROJECTS TAKE NON-STATE JUSTICE SYSTEMS SERIOUSLY? PERSPECTIVES FROM LATIN AMERICA

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*The justice reform projects sponsored by the World Bank and other development agencies have largely concentrated on state courts, ignoring non-state institutions involved in the administration of justice. This paper argues that an adequate understanding of non-state justice systems (NSJS) is crucially important for the design and successful implementation of legal reform projects. Non-state systems provide valuable insights into the nature of governance, clarify community responses to legal and political regulation, enhance our understanding of the shortcomings of ordinary courts, and help identify the root cause of human rights violations. Understanding these systems can enable governments and agencies involved in the promotion of justice reform to formulate more effective policies to benefit the poor in rural and urban communities.<sup>1</sup>*

*This paper is divided into four parts. The first part discusses conceptual and practical issues relating to NSJS. The second part briefly describes two examples of these systems in Latin America: Rondas Campesinas in rural Perú and community justice processes in Colombian shantytowns. The third section identifies some of the lessons that justice reform projects can draw from NSJS and the fourth examines factors that should inform the design of strategies and policies to engage these systems.*

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<sup>1</sup> This chapter draws on a report prepared by the author for the U.K. Department for International Development (DFID). See Julio Faundez, "Non-State Justice Systems in Latin America; Case Studies: Peru and Colombia," Governance and Social Development Resource Centre, UK, <http://www.gsdr.org/docs/open/DS39.pdf> (accessed June 20, 2006).

## Introduction

Justice reform in Latin America has concentrated mainly on improving the efficiency of state courts by providing loans and technical assistance to update court facilities and introduce modern systems of case management. The expectation is that the cumulative effect of these reforms will strengthen the rule of law, enhance access to justice, strengthen economic efficiency, and help improve the quality of governance. This state-centered approach to justice reform has largely ignored the role of non-state justice systems, yet the neglect of these systems is a paradox. As non-state institutions, NSJS could well be regarded as attractive alternatives to overloaded, inefficient state justice systems. In many countries in the region, NSJS play a major role in delivering legal (and other) services to the poorest members of the population. Given that legal reform requires local knowledge, NSJS are an ideal starting point for discovering grassroots perceptions of law and society.

In Latin America, the legal reform process itself is beginning to change. After more than a decade of internationally sponsored justice reform projects, there is now widespread awareness of the shortcomings of these projects and some agreement on how to overcome them. The shortcomings include the realization that legal transplants rarely work, that most projects are excessively legalistic, and that those in charge of implementing reform have failed to take into account developments in other fields and social practice. In addition, more co-ordination—rather competition—is needed among external agencies on these projects, as well as more work to ensure their long-term sustainability.<sup>2</sup> Awareness of these shortcomings has led to several proposals on how to resolve them. Although these proposals are still understood to be under consideration, they have already had an impact on the terminology used in documents and discussions on justice reform. Thus, notions such as homegrown solutions, comprehensive approaches to reform, participation, and empowerment are now frequently used. It is still too early to know, however, whether this shift in terminology will have a significant impact on the practice of legal and judicial reform.<sup>3</sup>

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<sup>2</sup> See generally, Thomas Carothers, ed., *Promoting the Rule of Law Abroad* (Washington, DC: Carnegie Endowment for International Peace, 2006); and Julio Faundez, ed., *Good Government and Law* (London: St. Martin's Press, Inc., 1997).

<sup>3</sup> See, generally, World Bank, "Reforming Public Institutions and Strengthening Governance: A World Bank Strategy," Public Sector Group, Poverty Reduction and Economic Management Division (Washington, DC: World Bank, 2000); and Rudolph V. Van Puymbroeck, ed., *Comprehensive Legal and Judicial Development: Toward an Agenda*

This paper explores NSJS with an eye toward what we can learn from them. It does not argue that NSJS are faultless or that they offer an alternative to formal legal institutions. The intention is simply to bring the experience and relevance of these systems to the attention of those involved in designing and implementing justice reform projects.

### **General Concepts of NSJS**

The concept of non-state justice systems is problematic and calls for a precise definition. The phrase “justice systems,” suggests a level of specialization rarely found among NSJS. The notion of NSJS also presupposes a sharp distinction between state and non-state institutions. In practice, however, such a distinction is often blurred. In many Latin American countries, indigenous communities that apply customary law are recognized and regulated by the state, and thus would not qualify as NSJS. Justices of the peace (*jueces de paz*) in Perú and other Andean countries, for example, would fall outside the definition since they are appointed by the state, despite the fact that they do not always apply state law. To avoid these difficulties, a broad approach to the notion of NSJS has been adopted. While accepting that most NSJS apply norms that are non-state in origin, this paper includes in the definition of the term any institution staffed by lay people or, if staffed by lawyers, any institution not subject to the procedural requirements of formal courts.

#### ***Attributes***

In contrast to state justice systems, NSJS have three main characteristics: legitimacy, informality, and accountability. Such systems enjoy considerable legitimacy because they are closely linked to the local community. While judges are generally regarded as bureaucrats imposed by state authorities, members of NSJS have roots within a community. As a consequence, they understand local problems (often due to their linguistic abilities) and are capable of finding practical solutions to them. Procedures in NSJS are informal, fast, and generally free. Given the excessive formality, inordinate delays, and high cost of legal proceedings associated with state courts, NSJS are an extremely attractive alternative. Because of their links to the local community, members of NSJS are also accountable. Community members,

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*for a Just and Equitable Society in the 21st Century* (Washington, DC: World Bank, 2001).

moreover, have a sense of ownership of their respective systems. By contrast, state judges are accountable to the hierarchy of the judiciary. In remote areas, the state structure of accountability rarely works and judges often abuse their power. Moreover, since most judges are not from the local area and often do not speak the local language, it is unrealistic to expect communities to trust them.

### ***Risks***

From the perspective of a formal system of law, the main risks of NSJS relate to their non-adherence to current standards of human rights.<sup>4</sup> In procedural terms, this means the absence of due process safeguards. Decisions by NSJS are often partial and not subject to any form of review. Moreover, these systems sometimes do not give the accused a chance to be heard or adequately represented. In substantive terms, NSJS often take decisions that are blatantly inconsistent with basic principles of human rights. Such decisions often involve inhumane forms of punishment, such as flogging or banishment, or decisions that, under cover of an alleged tradition, tend to perpetuate the subordination of women or the exploitation of children.

### ***Links with the state***

It is generally assumed that because NSJS often emerge in areas where there are no state institutions, the state is oblivious to their existence. This assumption is closely linked to another: that NSJS are exotic mechanisms that, at best, play marginal roles in contemporary social and political affairs. It is true that in remote areas (for example, in the Amazon area of Perú), many NSJS flourish precisely because state institutions are not there to interfere with their activities. But in Latin America, these systems are present in both rural and urban areas. In rural areas, they are often found among indigenous communities where NSJS are an essential component of their governance structures. This is the case, for example, in communities in the Peruvian Amazon and in parts of Bolivia, Ecuador, Colombia, and Guatemala. In urban areas, NSJS are generally found in the shantytowns that encircle most Latin American cities. Yet evidence also shows that where NSJS are successful, governments endeavor to co-opt them. Sometimes, as with the Rondas Campesinas in Perú, the government has successively co-opted and repressed them. Thus in many cases, state authorities are fully aware that NSJS exist, play

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<sup>4</sup> For a discussion of the risks of NSJS in the context of Africa, see Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (London: Penal Reform International, 2001).

important political roles, and have a significant impact on the provision of legal services to a local community.

## **NSJS in Latin America: Two Experiences**

### ***Rondas Campesinas: Night watch patrols***

Rondas Campesinas, or night watch patrols (hereafter, “Rondas”), sprang up in rural areas in northern Perú in the mid-1970s. At the outset, they were neighborhood watch schemes designed to prevent cattle rustling in the area. However, they slowly evolved into full-fledged community organizations that carried out dispute settlement and other governance activities.<sup>5</sup> The Rondas’ success in repressing crime prompted communities in other rural areas to emulate them, replicating their structure and techniques. Their success also attracted the attention of the central government, which attempted to enlist the Rondas in its struggle against terrorist groups in the countryside. Yet, while the government made determined efforts to co-opt and control the Rondas, judges and lawyers in provincial areas regarded their members as usurpers of judicial power and enemies of the rule of law. By contrast, local people generally supported the work of the Rondas and regarded them as genuine community institutions that protected residents from criminals and inefficient, corrupt local officials.<sup>6</sup>

Rondas were originally established in the provincial area of Cajamarca by small and generally impoverished independent commercial farmers to protect their property—mainly cattle. Initially, they represented a spontaneous attempt by members of the community to find a solution to a problem that the police and local courts were unable to resolve. Criminal gangs, which roamed the area from time to time, stealing cattle and committing other criminal offences, seemed to operate with complete impunity. The police were reluctant to investigate allegations of

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<sup>5</sup> On *rondas campesinas*, see John S. Gitlitz and Telmo Rojas, “Peasants Vigilante Committees in Northern Perú,” *Journal of Latin American Studies* 15, no. 1 (May 1983): 163–97; Orin Starn, *The Politics of Protest in the Andes* (Durham, NC: Duke University Press, 1999); Raquel Yrigoyen, “Rondas Campesinas y Pluralismo Legal: Necesidad de Reconocimiento Constitucional y Desarrollo Legislativo,” in *Hacia Una Ley de Rondas Campesinas* (Lima: Defensoría del Pueblo, 2002), 81–122.

<sup>6</sup> Iván Degregori et al., eds., *Las Rondas Campesinas y la Derrota de Sendero Luminoso* (Lima: IEP Ediciones, 1996).

cattle rustling, and the courts rarely convicted those accused of this offence. According to one report, only 10 percent of criminal cases in the courts of Cajamarca resulted in convictions.<sup>7</sup> Another report described how in other rural provinces, local elites—the police and even schoolteachers—were directly or indirectly involved in cattle rustling.<sup>8</sup> Given this background, it is hardly surprising that peasants in Cajamarca had a deep-seated mistrust of courts and other public authorities, and sought to resolve their problems through community organizations.

Community distrust of public authority also played a major role in shaping the evolution of the Rondas. Instead of handing over suspects to the police or the courts, Ronda members handed them over to the Rondas' general assembly, effectively a dispute settlement body made up of local property owners. It decided whether a suspect was guilty and, if so, meted out the punishment. The success of the Rondas in resolving the problems associated with cattle rustling slowly led to an expansion of their dispute settlement activities, including resolution of disputes over family and property issues. The Rondas also assumed responsibility for general issues of public order, as well as more general governance issues, including the establishment of irrigation schemes and the promotion of welfare within their respective communities.

The response of state institutions to the Rondas has been ambiguous. In addition to attempting to co-op them, so as to take advantage of their undisputed grassroots legitimacy, the Peruvian national congress attempted to reduce their power. In 1993, the newly enacted Peruvian constitution acknowledged the existence of the Rondas, but did not allow them to play a role in the administration of justice. Indeed, Article 149 of the constitution acknowledges that certain indigenous communities (*comunidades campesinas* and *comunidades nativas*) have the right to administer justice, but does not give the same right to the Rondas. It merely states that Rondas may be established within the territorial boundaries of indigenous communities. As a consequence, Ronda members are, in constitutional and legal terms, outlaws, despite their undisputed success in reducing crime in rural areas. Hence, they are regularly imprisoned for usurping the functions of the police and the judiciary.

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<sup>7</sup> ASER (Asociación de Servicios Educativos Rurales), "Proceso de Desarrollo Social de las Rondas Campesinas y Organizaciones de Autodefensa Rural," photocopy, ASER, Lima, Peru, 2001.

<sup>8</sup> Christiane Paponnet-Cantat, "Gamonalismo after the Challenge of Agrarian Reform: The Case of Capamarca, Chumbivilcas (Cusco)," in *Unruly Order*, ed. Deborah Poole (Boulder, CO: Westview, 1994), 199–222.

*People's justice*

The reluctance of the Peruvian state to grant Rondas the formal right to administer justice stems largely from concerns about the arbitrary nature of their decisions and the type of punishments that these institutions favor. Non-governmental organizations (NGOs) and scholars who support the Rondas argue that this reluctance stems from prejudice and ignorance. In their view, the justice administered by the Rondas, while not based on formal legal rules, is based on traditional notions of restorative justice.<sup>9</sup> Unfortunately, despite the importance of this debate, the available evidence is scant, making an objective evaluation impossible.

There are only three scholars who have examined how the Rondas administer justice in some detail.<sup>10</sup> Their findings, however, are based on a small sample of cases and they are therefore reluctant to draw general conclusions about the nature and quality of Ronda justice. What is beyond doubt, however, is that the Rondas use corporal punishment. Gitlitz reports, for example, that in a case of a man found guilty of rape, the local Ronda assembly decided that he should be subjected to "mass discipline." This punishment involved two lashes from each community member present at the hearing. Since this particular case attracted enormous interest, 250 neighbors attended the hearing. As a consequence, the man should have received 500 lashes. Because some in the Assembly felt that this punishment was excessive, they decided to reduce the number to 70, and allowed all married women present to administer the punishment. Starn also reports that Rondas resort to corporal punishment, but he notes that they do so to restore harmony in the community.<sup>11</sup>

Another worrying issue from a western legal perspective is the inconsistency of Ronda decisions. Indeed, while the punishment in the case of rape mentioned above involved corporal punishment, in another case where a man was found guilty of

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<sup>9</sup> Raquel Yrigoyen, "Perú: Pluralist Constitution, Monist Judiciary: A Post-Reform Assessment," in *Multiculturalism in Latin America Indigenous Rights, Diversity and Democracy*, ed. Rachel Sieder (Hampshire, UK: Palgrave MacMillan, 2002), 157–184.

<sup>10</sup> John Gitlitz, "Justicia Rondera y Derechos Humanos, Cajamarca," paper presented at First Conference of RELAJU (Red Latinoamericana de Antropología Jurídica, The Latin American Network on Legal Anthropology), Peruvian Chapter, 2000 (on file with author); Starn, 1999, *The Politics of Protest in the Andes*; and Jemima García-Godos, "Defending Ourselves, Asserting Our Rights: The Rondas Campesinas en Cutervo in the Peruvian Andes," dissertation and thesis no. 6/98, Centre for Development and the Environment, University of Oslo, 1996.

<sup>11</sup> Starn, 1999, *The Politics of Protest*, 135.

raping an adolescent,<sup>12</sup> the accused was only required to pay a small fine and perform six days of community work. It must be noted that in this case, the accused was a popular member of the community, while the parents of the victim were not.

Although the Jemima García-Godos' study of the Rondas in Cutervo (in the Peruvian Andes) confirms the use of corporal punishment,<sup>13</sup> she suggests that a more common form of punishment is the so-called *rotativa*. During the day, people convicted of offenses have to do community work, and at night they must serve on the night patrol of the Ronda. The nature and intensity of community work is calibrated to fit the offence. If the offence is serious, the rotativa could well involve strenuous physical exercise. One of the cases reported by García-Godos supports Starn's views about the restorative nature of Ronda justice. A woman found guilty of stealing an ox was sentenced to 14 days of rotativa. Two days after the conviction, she confessed to the crime, acknowledging that she had taken the ox and sold it. The Ronda Assembly let her off the rotativa, but required her to return the proceeds of the sale of the ox to the rightful owner.<sup>14</sup>

There is little doubt that some practices of the Rondas give rise to serious concerns, yet there are some encouraging signs. Recent studies suggest that Rondas increasingly rely on community work as the preferred form of punishment. There are also reports that Ronda members are actively seeking training in human rights.<sup>15</sup> It is encouraging that most Ronda representatives are keen to achieve legal recognition of their role in dispute settlement. So far, however, the state has been inflexible on this point. One of the main obstacles is Article 149 of the Peruvian Constitution, which fails to include the Rondas among community organizations allowed to dispense justice. The popularity and legitimacy enjoyed by the Rondas within their communities should not be ignored. That these institutions have largely ignored the constitutional provision should perhaps give the authorities in Perú cause for

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<sup>12</sup> Also reported by Gitlitz, 2000, "Justicia Rondera."

<sup>13</sup> García-Godos, 1996, "Defending Ourselves," 70.

<sup>14</sup> *Ibid.*, 71.

<sup>15</sup> Wilfredo Ardito, "Los Peligros de Buscar la Justicia," available on the website of *La insignia*, 8 de febrero del 2004, [http://www.lainsignia.org/2004/febrero/ibe\\_037](http://www.lainsignia.org/2004/febrero/ibe_037) (accessed February 25, 2006); the article can also be found at <http://www.idl.org.pe/idlmail/boletines/339.doc>; Mirva Victoria Aranda, 2003, *Las Rondas Campesinas en las Provincias Altas del Cusco, 2003* (Lima: Consorcio Justicia Viva, Informe Externo), [www.justiciaviva.org.pe/publica.htm](http://www.justiciaviva.org.pe/publica.htm) (accessed February 25, 2006); and Emilio Laynes, "Estabilización post conflicto y rehabilitación psicosocial en las comunidades alto Andinas del Perú," Ayacucho, Perú, 2004.

reflection and prompt them to explore ways of linking the justice work performed by Rondas with that carried out by provincial courts.

***Community justice in urban areas: Colombia***

The urban poor in Latin America generally live in large shantytowns on the outskirts of major cities. They are known by a different name in each country: *favelas* in Brazil, *barrios* in Venezuela and Colombia, *pueblos jóvenes* in Perú, *poblaciones callampas* in Chile, and *villas miseria* in Argentina. They all symbolize the shortcomings of economic and political development in the region. Shantytown dwellers are generally migrants from the countryside in search of economic opportunities or personal security, as is the case in Colombia and Perú. However, shantytowns offer neither peace nor prosperity. Politicians, leading members of civil society, and public opinion generally regard shantytowns and their inhabitants as the root cause of all social evils. Moreover, state institutions in Latin America tend to have a deep-seated distrust of any policy that seeks either to empower the urban poor or recognize as legitimate any mechanism for the administration of justice that is not tightly controlled by the state. Their response to the plight of the urban poor is hence unsurprisingly characterized by a mix of neglect and repression.

Against this background, the experience of the urban poor in the barrios of Colombia offers interesting lessons, as well as a sparkle of hope. Ciudad Bolívar, for example, a shantytown in Bogotá with a population of half a million people, is in many respects typical of squatter settlements in the rest of Latin America. Nearly half of the households in Ciudad Bolívar have no sewage, a third have no access to fresh water, and more than 80 percent of the roads in the shantytown are in poor condition. Illiteracy rates are high and 15 percent of young people do not attend school.<sup>16</sup>

A pervasive feature of squatter settlements is the vicious circle of illegality in which residents find themselves.<sup>17</sup> Because the settlements originated in land invasions, settlers do not have legally recognized property rights. Since in legal terms settlements do not exist, the process of urbanization cannot, moreover, be carried

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<sup>16</sup> Gabriel Ignacio Gómez, "Justicia Comunitaria en Zonas Urbanas," in *El Caleidoscopio de las Justicias en Colombia*, vol. 2, ed. Boaventura de Sousa Santos and Mauricio García Villegas (Bogotá: Siglo del Hombre, 2001), 217–74.

<sup>17</sup> Edesio Fernandes, "Law and the Production of Urban Illegality: Urban Development in Brazil," in *Governance Development and Globalization*, ed. Julio Faundez, Mary Footer, and Joseph Norton (London: Blackstone Press, 2000), 227–44.

out or is seriously delayed. As a consequence, basic amenities and services, such as clean water, electricity, and sewage, are not readily available and people are forced to find illegal alternatives. Other basic public services, such as health, education, and police are likewise generally unavailable. Conflicts and disputes arising within these settlements rarely reach the official state system and are either resolved by force or left unresolved. As a result, the level of violence in squatter settlements is often extremely high. In 1997, for example, there were nearly 500 violent deaths in Ciudad Bolívar, a large proportion of which were homicides.<sup>18</sup>

Information about daily life in shantytowns in Colombia is limited because conditions are unfavorable to empirical research. The available evidence suggests, however, that the experience of Colombia is noteworthy on two accounts: first, both state and non-state institutions have attempted to develop strategies to enhance access to justice; and second, community organizations have in some instances made courageous attempts to compensate for the inadequacy (or even absence) of state institutions by creating structures of governance and mechanisms to resolve local disputes. The section that follows is based mainly on evidence taken from studies of Colombian barrios in Bogotá, but reference will also be made to experiences of urban settlements in the city of Medellín.

#### *Building community institutions*

Communities in the various barrios respond to their problems in different ways, depending on a variety of issues, of which the most important is land ownership. If the settlement concerns a land invasion, as is often the case, the ensuing confrontation with the police and other state authorities generates considerable solidarity within the community and leads to the establishment of lively organizations that represent the interests of the community. In Bogotá such community organizations are generally called Juntas de Acción Comunal (JACs). During their initial stages, JACs enjoyed widespread support from community members because they protected the community from police efforts to end the occupation or confrontation, as well as lobbied state institutions to provide essential services, such as water, electricity, and sewerage. After a barrio is consolidated and the confrontation with state authorities subsides, the role of the JACs changes. In some cases, its profile

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<sup>18</sup> Colombia is one of the most violent countries in Latin America, with one of the highest homicide rates in the world. In 2000, the rate of homicides per 100,000 was 63, while in the same year, the average in Latin America was 25, and in Europe was 1.5. See United Nations Development Programme, *Report on the Development of Democracy in Latin America* (New York: UNDP, 2004), table 9.

within the community diminishes and it may disappear. In other instances, it continues to represent the community before state institutions or resolve disputes among neighbors.

Puente Aranda in the Los Comuneros barrio of Bogotá was a small squatter settlement of about 1,000 inhabitants formed in 1975 along an unused railway line. The community was cohesive and militant because eviction was a permanent threat. Initially, the state-owned railway attempted to evict them, but was dissuaded from doing so by other state agencies. After the privatization of the railways, however, the new owners eventually succeeded in obtaining a court order and evicted the dwellers of Puente Aranda.

Law and order in Puente Aranda was secured by an elaborate system of regulation developed and enforced by the local JAC. Interestingly, however, the regulations resembled local municipality bylaws. They set closing times for local shops and announced that neither public meetings could take place after 11:00 p.m. nor could work be carried out on the streets after that time. The regulations also required members of the community to attend Assembly meetings, participate in local events, and pay a contribution to a community fund.<sup>19</sup> The JAC at Puente Aranda also resolved property disputes, such as lease agreements, that could not be taken to ordinary courts because of the underlying illegality of tenure. It also played an important role in mediating other disputes. The experience of Puente Aranda shows that communities left on their own can take control of public life, often replicating the norms and procedures of the official system.<sup>20</sup> This finding is consistent with the celebrated study of Pasargada, a shantytown in Rio de Janeiro, by Boaventura de Sousa Santos.<sup>21</sup>

#### *From child care to conflict management*

Other community organizations that play important roles in shantytowns are support groups, usually established by women. These groups often raise awareness about community violence and develop strategies to reduce it. They also provide help for working mothers and unemployed youth. An example of such an organization is the Child Care Centre in the barrio Jerusalén in Ciudad Bolívar. Initially, the center's

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<sup>19</sup> CANSEL, 1999, *Justicia y Conflicto Urbano en Colombia: Formas Comunitarias de Tratamiento y Resolución* (Bogotá: CANSEL).

<sup>20</sup> *Ibid.*, 161–75.

<sup>21</sup> Boaventura de Sousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada," *Law & Society Review* 12 (Fall 1977):5–126.

objective was to resolve the concrete problem of childcare, but it soon expanded to include training in human rights and conflict management. It was initially created when a house in the barrio caught fire and five children, left on their own while the mother was at work, died. This tragedy prompted a group of local women to establish a center to look after children while their parents were at work. The community welcomed this initiative, and, within a relatively short time, the Child Care Centre was looking after 120 children between the ages of 7 and 14.<sup>22</sup>

Through their daily interaction with the children, women at the center became aware of the prevalence of child abuse and domestic violence in the community. They subsequently decided to invite parents to the center to discuss the problem. Although most of the fathers ignored the invitation, the mothers welcomed the center's support and advice. The center soon realized, however, that it did not have the skills or financial resources to meet the demand for counseling. It approached a local NGO that provided the center training on human relations, sexuality, and general sociopolitical topics. The experience of the Child Care Centre is regarded as a success: it has improved the lot of children and enhanced the capacity of the community to resolve its problems.<sup>23</sup>

#### *Conflict resolution*

Unfortunately, there is no detailed analysis that explains how the dispute resolution mechanisms of the JACs and other community organizations work in practice. Some information does exist, however, on the Community Centre for the Resolution of Conflicts (CCRCC), which was established in the barrios of Moravia and El Bosque in the city of Medellín. Although the experience of urban settlements in Medellín in the mid-1990s could be regarded as unusual in some respects because of the presence of guerrilla groups in the area, their response to violence and the absence of channels to resolve disputes is not unusual.<sup>24</sup>

The barrios Moravia and El Bosque, established in the 1960s, are located in a central part of town near the municipal dump. Their inhabitants are primarily economic migrants and rural people displaced by armed confrontation in the region. By the late 1990s, the population of the two barrios was estimated at about 40,000,

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<sup>22</sup> Gómez, 2001, "Justicia Comunitaria en Zonas Urbanas," 239.

<sup>23</sup> *Ibid.*, 241.

<sup>24</sup> Hernando Roldán, "Construcción de Consensos en las Comunas de Medellín: El Caso del Barrio Moravia," *Pensamiento Jurídico* (National University of Colombia, Bogotá), no. 12 (2000): 85–101.

of which 53 percent was under 18 years of age. As ever, efforts by local authorities to evict the settlement generated solidarity among its inhabitants. Community spirit was reinforced by the settlement's proximity to the municipal dump, which enabled local residents to form collaborative ventures. Inhabitants of these two barrios soon became prominent in the recycling industry in Medellín.

During the first years of the settlement, its community leaders were called upon to mediate or resolve disputes involving property matters through the local JAC, as well as disputes concerning access to public services (mainly water and sewage) and, to a lesser extent, family matters. The role of the JAC in mediation and conciliation virtually disappeared when drugs, common crime, and violence overwhelmed the barrios. Given the inability of the state to maintain law and order, the neighbors of Moravia and El Bosque turned to a militia group linked to a guerrilla organization operating in the country. The militia succeeded in establishing order and also became involved in dispute resolution. However, their decisions met with little approval and were regarded as unfair and arbitrary.

By 1994, a process of reconciliation began as the political groups with which militia members were affiliated gave up the armed struggle. The establishment of the CCRCC was one of the outcomes of reconciliation. During its first four years (1994–98), the CCRCC handled a total of 3,287 cases, the decisions on which have been meticulously recorded.<sup>25</sup> Nearly one-third of the cases involved property. Disputes between neighbors accounted for a quarter of the total, and family disputes (domestic violence, alimony and matrimonial strife) accounted for another quarter. Other matters handled by the CCRCC included theft, assault, rape, and labor disputes.

The success of this experience prompted some local NGOs to propose that the CCRCC be legalized, allowing its decisions to be recognized by the official legal system. Advocates of legalization also regarded legalization as essential to securing funding for its operations. Local residents, however, opposed the idea. In their view, legalization would weaken the community institution. The CCRCC undoubtedly strengthened solidarity within the community and enjoyed widespread legitimacy at the local level. Where neighbors had a choice, they preferred to refer their problems to the CCRCC, rather than to the municipality or the police.

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<sup>25</sup> Gómez, 2001, "Justicia Comunitaria en Zonas Urbanas," 263.

*State intervention: A mixed blessing*

In contrast to many other developing countries, state institutions in Colombia—especially local government agencies—have made efforts to support community institutions in the barrios. These interventions have not, however, been altogether successful. One such case was the Child Care Centre at Jerusalén. Initially, the center was successful, but it soon ran out of funds and a government agency, the Instituto Colombiano de Bienestar Social, was brought in to provide financial support. However, the Instituto's policy soon changed and the center was notified that it could no longer take in children over the age of six if it was to remain eligible for further funding. As a consequence, a large number of children in the center's care were thrown back on to the streets. The Instituto undoubtedly had important reasons for its policy shift, but it is unlikely that any of these reasons would have convinced either the promoters of the center or the children's parents.

Another example of the negative impact of state intervention is also based on the experience of the barrio Jerusalén. With the support of a local NGO (Fundación Social), the community in Jerusalén established a unit they called El Colectivo to coordinate and resolve problems arising from the work of community organizations in the barrio.<sup>26</sup> The experience of El Colectivo was successful. As a result, it soon began to mediate and conciliate minor disputes among neighbors. Its success, however, was short-lived; it began to decline when the municipality issued a directive stating that, in order to become eligible for municipal funding, communities were required to establish special centers for community participation. This directive divided El Colectivo members: some chose to cooperate, while others refused. In any event, owing to political and financial problems within the municipality, the centers of community participation never did receive the promised funds. In the meantime, solidarity within El Colectivo began to erode.

A more sinister aspect of state intervention has been described by some observers as social cleansing: a deliberate and premeditated activity designed to rid communities of alleged delinquents or troublemakers. These interventions have become a depressingly familiar feature in some Latin American countries. In Brazil, for example, the targets of social cleansing are street children, who are often stalked by criminals hired by local businesses wishing to re-establish law and order so that they can trade in peace. State security forces, sometimes with the support of community

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<sup>26</sup> *Ibid.*, 242.

leaders, are known to carry out social cleansing in certain barrios in Bogotá.<sup>27</sup> The operation has a disturbing formality, eliminating known troublemakers, usually youths who have received only one formal warning (delivered to their parents or guardians). The warning is an anonymous note, stating that the person targeted has three choices: shape up, leave the community, or face death. These targets of social cleansing are usually identified either by members of JACs or local merchants (who are often harassed by local youths).

The case of Tibabuyes, a barrio in southwest Bogotá, illustrates the complicity between security forces and community leaders in social cleansing. In this barrio, poverty levels are extraordinarily high and social cohesion low. Members of the local JAC, however, joined forces with the police to eradicate youth gangs through social cleansing. The operation greatly enhanced the legitimacy of the JAC within the local community, but their members acknowledged that the problem of security remained unresolved and that youth gangs would soon reappear. Similar social cleansing methods have reportedly been used by the JAC in Comuneros, another barrio in southwest Bogotá.<sup>28</sup>

#### *Urban justice and its context*

This section illustrates the difficulty of examining NSJS in isolation from the efforts of local residents to develop survival strategies to resist eviction, protect their families from local gangs, and/or prevent unwanted newcomers from joining the settlement. Given that state institutions are either part of the problem, incapable, or unwilling to assist them, shantytown residents have no alternative but to rely on collective action. Yet as the preceding discussion illustrates, conditions for collective action are often unsuitable. Collective action is usually easier during early stages of a settlement, when the level of confrontation with local authorities and police is at its peak. As the number of residents increases and the population becomes more heterogeneous, however, solidarity diminishes and the possibility of collective action decreases.

Establishing mechanisms to resolve local disputes, although often necessary, is not always a top priority for community organizations in urban settings. Given the nature of the tasks that most of these organizations perform, their leaders are unlikely candidates to lead conciliation panels or other dispute resolution

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<sup>27</sup> Mauricio García Villegas, "Justicia Penal Comunitaria en Bogotá," *Pensamiento Jurídico* (National University of Colombia, Bogotá), no. 12 (2000):167–208.

<sup>28</sup> M. García Villegas, 2000, "Justicia Penal Comunitaria en Bogotá," 177, 190.

mechanisms. The skills required to mobilize a community against the police or to lobby local authorities to secure water or electricity differ from those required to administer justice.

It is not surprising that local residents have deep misgivings about the intervention of external agencies in the affairs of their communities. Support by local and central state agencies is often conditional, seldom reliable, and frequently meager. Support from local NGOs—often acting on behalf of external donors—is also often resisted, either because it has not been solicited or because it seeks to impose unfamiliar solutions that are inconsistent with local expectations.

Information on NSJS in marginal urban areas of Latin America is meager. The information that does exist points to an interesting paradox. Although shantytown conditions suggest that NSJS would tend toward mob justice, certain evidence points to the contrary. The view that NSJS in shantytowns tend to be ruthless is consistent with the fact that their residents lack the sense of community and cohesion of rural settlements. This view seems to be confirmed by the fragility of NSJS in shantytowns, combined with the tendency of certain groups to take justice into their own hands. Yet, because shantytown dwellers are in permanent interaction with the wider society, it seems that NSJS in shantytowns are more likely to replicate the rules and practices of the formal legal system than those in remote rural areas. If this is really the case, it opens up an interesting range of options for justice reform initiatives.

## **Lessons**

### ***In search of the rule of law***

Few justice reform advocates question that the main objective of justice reform is to secure improvements in the rule of law. Although legal academics have conflicting views about the meaning of this concept, legal reform practitioners generally accept the World Bank's notion that the rule of law prevails when a legal system fulfills the following five objectives: legal rules are known in advance, rules are enforced, mechanisms ensure that legal norms are applied, conflicts over the meaning of the rules are decided by independent agencies, and procedures are available to amend the rules.<sup>29</sup> At the same time, few practitioners in the field would dispute that in most

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<sup>29</sup> World Bank, "Governance and Development" (Washington, DC: World Bank, 1992), 30.

developing and transition countries, some or most of these attributes of the legal system are missing. Many laws are never enforced or, if they are, enforcement is haphazard. Courts lack independence and the political organs of the state are neither capable nor willing to respond to the legal needs of its citizens. As a consequence, the majority of citizens, especially the poor, distrust the formal legal system.<sup>30</sup>

In sharp contrast, NSJS enjoy enormous popular support and legitimacy within their communities. Their popularity is intriguing. After all, NSJS are not formally institutionalized, nor do they apply written rules. The rules they do apply are often arbitrary and inconsistent with principles of human rights. In many respects, NSJS are opposed to the ideals embodied in the notion of the rule of law. What explains this paradox? Why is it that the factors that account for the popularity of NSJS seem to discredit formal legal institutions?

This paradox is more apparent than real. The behavior of most NSJS is not as erratic or unpredictable as suggested above. Indeed, as some of the experiences recounted in the previous section suggest, NSJS members are often as keen as state officials to enact rules (self-regulation) and claim that they are applying them impartially and fairly. On the other hand, a careful examination of how state courts in Latin America operate shows that one of the main reasons for their shortcomings stems from their inflexibility, a result of excessive attachment to legal formalism. Moreover, the absence of legal skills does not explain the poor, or haphazard, enforcement of legal rules. Indeed, the failure to enforce rules is generally due to extra-legal factors of a social, economic, or political nature.

The foregoing analysis suggests that one must look beyond the purely technical components of rules and procedures in order to understand the success or failure of particular legal systems. This platitude is worth repeating because many international agencies, despite their vast experience, continue to approach justice reform as if it were an exclusively legalistic enterprise. The law, as embodied and reflected in rules, legal institutions, and judicial decisions, is only the tip of the large and somewhat amorphous iceberg called governance. Adopting a governance perspective will not guarantee successful outcomes, but it should provide a realistic point of departure for projects that seek to strengthen the justice sector and the rule of law in a given country.

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<sup>30</sup> Guillermo O'Donnell, "Polyarchies and the (Un)Rule of Law in Latin America: A Partial Conclusion," in *The (Un)Rule of Law and the Underprivileged in Latin America*, ed. Juan E. Méndez, Guillermo O'Donnell, and Paulo Sérgio Pinheiro (South Bend, IN: University of Notre Dame Press, 1999), 303–338.

***Law and social change***

There is consensus among academics and practitioners of legal reform on the limitations of law as a policy tool. First, everyone agrees that law by itself cannot resolve social problems. Second, merely changing the rules of governing charters is generally acknowledged not to strengthen institutions. Third, there is widespread awareness that achieving social change through law is a slow process. Yet, despite this consensus, people who design justice reform projects still seem to expect law and adjudication to resolve any and every conceivable social problem. This approach, apart from overloading the system, trivializes politics and has serious implications for the democratic process. Most social and economic problems in developing countries have deep political roots. Thus, the expectation that re-routing these problems through the legal system can circumvent the political process is misguided and dangerous. The legal system is then further discredited when these problems remain unresolved.

The difference between NSJS and formal legal institutions can thus be more fully appreciated through a political lens. A distinctive feature of the practices of non-state systems of justice is the lack of clear demarcation between political and legal processes. Most lawyers accordingly have justified misgivings about the possibility of recognizing their decisions as genuinely legal. Yet it must be noted that the reason why NSJS enjoy such popularity in their communities is precisely because they do not distinguish between legal and political processes. Uninhibited by the invisible wall that divides law from politics, NSJS are capable of finding the most suitable solutions for private disputes and community problems. As already noted, they are primarily governance mechanisms and, when they become involved in dispute resolution, unconstrained by the procedural and substantive rules of liberal legal systems.

Since the objective of legal reform is to promote a liberal version of the rule of law, it would seem out of the question to adopt the NSJS approach to the resolution of community problems and disputes. If this is truly the case, then legal reformers should not expect legal institutions to resolve political problems that local elites are unable, or unwilling, to resolve. Provincial judges in Perú forcefully made this point when they met with local government officials and members of community organizations.<sup>31</sup> The process of adjudication cannot resolve problems that have not been the object of proper political deliberation and decision. Failure to acknowledge

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<sup>31</sup> "Cusco: Por una agenda local en administración de justicia," *Ideele*, no. 153 (June 2003): 67–8.

this fact will only fuel further disappointment regarding the performance of law and legal institutions.

***Empowerment, stakeholders, and ownership***

As the legal and judicial reform enterprise strives to shift away from top-down to more participatory approaches, notions such as empowerment, stakeholders, and ownership became more prominent. The basic idea behind these concepts is that the success and continued viability of legal reform projects can only be secured if those directly affected by them are involved in their design, implementation, and supervision. The involvement of local residents is expected to ensure that stakeholders are committed to the success and long-term sustainability of such projects.

It is difficult to disagree with such laudable objectives. In the area of law, however, identifying stakeholders is not always easy. Here again, the experience of NSJS offers interesting perspectives, particularly that of the Rondas. As noted earlier, these NSJS have been the target of conflicting state policies, ranging from repression to co-optation through legislation, at various stages of their existence. The formal legal system has tried different ways, including imprisonment of members, to persuade the Rondas to abstain from performing judicial functions. Although these efforts have weakened some Rondas in Cajamarca and other rural areas of Perú, they continue to administer justice in defiance of the rules and policies of the central government. Supporters of the Rondas would probably claim that they have managed to resist the onslaught of assaults from state institutions because their members—the stakeholders—have a strong sense of ownership, which in turn guarantees their long-term sustainability. It is inconceivable to expect ordinary citizens anywhere in Latin America to have the level of loyalty toward local courts that members of the Rondas have for their organizations. Such commitment would, in any event, be inappropriate and inconsistent with the principle of judicial independence. Nevertheless, there is much that legal and judicial reform projects can and should do to foster a closer relationship between courts and citizens.

One characteristic feature of most justice reform projects in Latin America is that the people who design them consult only a limited number of government officials, who usually have the authority to approve loans that fund their projects. Such office holders generally include senior officials from a country's ministry of justice, members of its supreme court, a few appellate court officials, and, of course, the all-important finance minister. They rarely consult the stakeholders of such projects. The views of lower court judges, even those living in the capital, are usually ignored. The legal profession is not consulted either, although occasionally project officers pay courtesy visits to local law societies. Moreover, law schools and other institutions of higher education rarely participate in these legal reform

projects. A select number of NGOs are often included, but their participation is often controversial, given fierce competition for project funds.

The neglect of stakeholders is often justified on the grounds that consultation is time consuming and resource intensive. But this is a small price to pay if the objective is to achieve sustainable outcomes. Unless those in charge of legal reform projects engage in meaningful consultations, the much-used notions of empowerment, participation, and stakeholders will soon become meaningless.

### **Engaging with NSJS**

Non-state systems of justice in Latin America are diverse and few specifics are known about their work. As a consequence, one precondition for a productive and successful engagement with these institutions is to learn more about them. At the moment, the paucity of information is striking. Not only is there virtually no information about how they work and the disputes they handle, there is also little reliable information regarding where they operate and how they differ by region. As a consequence, intellectual and political debates about NSJS tend to be dominated by ideological preconceptions rather than genuine understanding. If promoters of justice reform wish to take NSJS seriously, they should encourage local academics and NGOs to research these organizations in their respective countries.

Project managers who want to work with NSJS should see them as imperfect legal institutions and avoid the temptation to incorporate them into the formal system either by regulating them (via legislation) or linking them to lower echelons of the judiciary. While it could well be that this is a feasible strategy in some cases, it is important to bear in mind that NSJS are not primarily legal institutions. Thus, in order to decide on a strategy for engaging with NSJS, their role and functions within their communities should be assessed from a wider governance perspective, rather than an exclusively legalistic one. Such a broad perspective makes it possible to avoid the common mistake of regarding non-state systems of justice as exotic cultural artifacts and instead see them as dynamic political actors capable of influencing and responding to contemporary developments.

The seemingly stable indigenous communities of certain remote areas of Latin America are in a permanent state of flux due to economic, political, and military reasons connected with the presence of guerrilla groups. The ever-present pressure for land, combined with changing patterns of employment and out-migration from these small communities, inevitably affect the behavior of community institutions and their relations with the wider world. NSJS are thus contemporary instruments of governance that, for better or worse, often reflect and reproduce the weaknesses

and strengths of governance in the wider community. Such is the case of the *Rondas Campesinas* in Perú, which emerged in response to the shortcomings and corruption of state institutions. After demonstrating their capacity to deal with issues of local governance, the *Rondas* evolved into mechanisms of conflict resolution. Likewise, community institutions in the *barrios* of Colombia emerged to resist eviction, protect inhabitants from criminal gangs, and lobby government authorities for essential social services. They only became involved in dispute resolution after they had acquired a degree of legitimacy within their respective localities.

Any legal reform project that attempts to engage with NSJS also requires clear objectives. Should such engagement seek to improve the efficiency of NSJS? Should it seek to enhance their accountability? Should it aim to stamp out gender and other forms of discrimination? It could well be that a careful assessment of a specific NSJS may lead legal reform practitioners to conclude that the best policy is to abstain altogether from intervention, either because the institutions are precarious or because they have been hijacked by criminal elements, as it is often the case in certain urban settlements. There are no hard and fast rules. Decisions about intervention must depend on the nature and features of the specific NSJS and the wider institutional context.

Given that most NSJS have functions that go beyond mere dispute resolution, any attempt to develop a policy toward them should include national and local agencies involved in health, agriculture, education, labor, and the police. In Perú, the support of the local police appears to have played a crucial role during the early years of the *Rondas Campesinas*. Municipalities can also play key roles in supporting NSJS, especially in urban areas. In Colombia, for example, the municipality of Bogotá managed to establish durable partnerships among shantytown dwellers to improve the quality of life and reduce violence in their communities, while simultaneously supporting some NSJS initiatives.

Engaging with NSJS is resource intensive and politically delicate. In judicial reform projects, the counterparts of external agencies are generally ministries of justice or supreme courts and the implementation of projects is delegated to an executing agency. NSJS, by contrast, are generally fragmented and diverse, and their members often lack the expertise to manage projects. Moreover, working with such organizations entails a level of involvement with local communities that could well be resented. It is thus advisable to establish links with NGOs that are experienced, mature, and trusted by local communities. Identifying and selecting these NGOs is not an easy task, however, since these groups are often deeply involved in local political conflict.

Legal culture in Latin America is state oriented and, as a consequence, places almost exclusive emphasis on legislation as the source of law and on formally ap-

pointed judges as the sole interpreters of that law. Given this legal perspective, it is hard for most lawyers and other members of national elites to accept that individuals without legal training can play a role in conflict resolution. It is also hard for them to acknowledge the importance of legal pluralism or customary law. Despite this cultural bias, some universities in Colombia and Perú (e.g., Universidad Nacional de Bogotá and Pontificia Universidad Católica del Perú), as well as certain NGOs (e.g., Centro de Excelencia en la Justicia in Colombia and Instituto de Defensa Legal in Lima) have conducted research on various aspects of non-state justice systems. Promoters of justice projects should support these efforts, including the introduction of NSJS issues into the curricula of law schools.

Engaging institutions of legal education should be complemented by policies that engage the legal profession. The general hostility of state institutions towards NSJS derives primarily from the fears and prejudices of members of the legal profession. It must be noted, however, that even lawyers sympathetic to policies and decisions of NSJS are sometimes unable to defend their interests properly because they are not familiar with local practices. Although it would be unrealistic for external agencies to tackle all these fears and prejudices, they could, as a first step, target lawyers who support the work of NSJS. Workshops that disseminate information about the experiences of NSJS in other countries would be extremely useful to lawyers working with local communities. It would also be useful if external agencies helped establish a permanent forum where members of the community and interested lawyers could exchange views, not only about law but also about wider policy issues affecting NSJS.

Lawyers are, of course, not the only professionals that need to improve their awareness of NSJS activities and the complexities of their own communities. Other professionals working with these communities have the same need, including social workers, teachers, police, health workers, and members of local government structures.

There is little doubt that the formal court system does not always reach rural areas and shantytowns in Latin America. People from these areas generally regard courts as hostile, expensive, inefficient, and generally unfamiliar with and disinterested in their plight. Initiatives likely to improve local courts' understanding of the realities of the communities they serve are thus worthy of serious consideration. Obviously, such initiatives would constitute complex processes that involved several steps, including:

1. Conducting surveys and other studies on the accessibility of courts in both the countryside and marginal urban areas.
2. Investigating the ways in which judges and court personnel in rural areas could become more responsive to local needs and culture.

3. Finding out whether the appointment of judicial personnel in rural and marginal urban areas affects local people's perceptions of the judiciary.
4. Evaluating initiatives that bring judicial and social services closer to local communities.
5. Monitoring the activities of (and providing assistance to) supreme courts and constitutional courts that are interpreting such recently introduced concepts as legal pluralism, multiculturalism, and customary law.

Human rights commissions and ombudsman offices have only been established relatively recently in Latin America. Although their achievements vary from country to country, they all, in different ways, provide a useful link between state institutions and local communities. The experience of the ombudsman office in Perú (Defensoría del Pueblo) is especially interesting, since it has played an informal but vital role in supporting, monitoring, and supervising the work of many NSJS in remote rural areas of the country. The Peruvian office is worthy of close examination because it has achieved a remarkable level of legitimacy, despite an initially hostile political environment and a tradition of weak state institutions. Its experience could be regarded as an alternative to the regulation of NSJS through elaborate legislation.

The inadequacy of existing legislation often prompts the establishment of NSJS. So-called "people's laws" are generally not the product of rebellion against state authority, but acts of self-preservation, given that prevailing legislation either does not address issues of concern to local communities or does so inadequately. It is not surprising, then, that NSJS often compensate for the shortcomings of the formal legal system in many developing countries. In some shantytowns in Brazil, this reality is known as "asphalt law." The inadequacy of the formal legal system was most obvious in the illegal settlements in urban areas, where conflicts over the interpretation of leases among neighbors could not be resolved by ordinary courts because of the underlying illegality of their communities. It would thus be worth exploring to what extent legislatures could address the real problems that rural or marginal urban communities face on a daily basis. The three most obvious problem areas to consider are criminal, property, and family law. It must be stressed, however, that any attempt to engage with NSJS must be carefully designed and sensitively implemented.

## Conclusion

A wider governance perspective is needed to better understand non-state justice systems as social entities within specific historical and political contexts. In Perú, the Rondas Campesinas were a response to the corruption and inefficiency of local and national institutions. In the shantytowns of Colombia, NSJS surfaced to fill the void caused by social exclusion and institutional neglect. There is no doubt that NSJS often employ procedures and forms of punishment inconsistent with basic principles of human rights. Since most NSJS are far from embodying the ideal of liberal legality, it would seem natural for policy advisors and project managers to develop policies designed to improve NSJS practices. Indeed, it seems self-evident that all NSJS should comply with international minimum standards of human rights, refrain from any form of discrimination, and not resort to physical punishment. Yet, one does not need moral relativism to realize that it is often impossible, unwise, and even counter-productive to attempt to remedy all the shortcomings of NSJS simultaneously. It must also be borne in mind that many NSJS come into existence precisely because the official legal system tramples or ignores the rights of their members. It is necessary, therefore, to thoroughly understand the role of NSJS within their specific political and legal systems before jumping in with policy advice.

Taking the time to understand NSJS can provide valuable insights into why state and legal institutions in developing nations are weak and how they can be strengthened. Investigating these systems can yield a wealth of evidence with which to gauge the social and political needs of ordinary people, as well as their expectations and responses to law and legal institutions. Understanding NSJS will also provide an opportunity to identify the root cause(s) of human rights violations, thus helping external advisors to formulate effective policies that enhance human rights in marginal rural and/or urban communities. For these reasons, justice reform projects should take NSJS seriously.

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**POOR JUSTICE OR JUSTICE FOR THE POOR?  
A POLICY FRAMEWORK FOR REFORM OF  
CUSTOMARY AND INFORMAL JUSTICE  
SYSTEMS IN AFRICA**

CHIDI ANSELM ODINKALU

*This paper is based on two fundamental and somewhat contradictory claims. First, customary law is inherently racial in origin, despotic in operation, and often discriminatory and unfair in outcome. Second, this system nevertheless enjoys widespread legitimacy and application among the majority of Africans.<sup>1</sup> Far from calling for the abolition of customary law, this paper argues that African governments engaged in the reform of their domestic legal systems (and the international and other institutions that facilitate or collaborate in such reform) should first address the reform of customary law by establishing two basic precepts: the constitutional principle of the normative equality of all human beings and the prohibition of discrimination. The paper suggests how reform of domestic African legal systems may be implemented to more effectively respond to the limitations of customary law, while simultaneously adapting this law to serve the justice needs of Africa's poor in a manner compatible with human rights and equal protection under the law.*

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<sup>1</sup> The views expressed in this paper are the author's personal views and do not necessarily reflect the official position or policies of the Open Society Institute or any of its associated programs and foundations.

To understand why these apparently contradictory claims are both valid would require an investigation into the nature of colonial legal regimes and the post-colonial African state—objectives that are too ambitious for the present article. See Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*, chapters 2–4 (Princeton: Princeton University Press: 1996).

## Justice Needs in Search of Fulfillment

For the majority of Africa's people, the lack of a functioning justice system is a life-and-death matter. Families are regularly unlawfully deprived of their ancestral lands and livelihood by the rich and powerful without notice, compensation, or relocation. Grieving widows are disinherited by surviving in-laws, who grab assets of the dead with calculated disregard for their traditional kinship obligations to the surviving children. Traditional and bureaucratic institutions impoverish beneficiary communities by privatizing their service provision for unlawful private gain. Communities have been driven to develop mechanisms of existence outside the reach or care of the state by a long history of failed or unresponsive governments. Each of these and similar examples abound in everyday African life and present a compelling case for redress. Unfortunately, in most cases, the need for redress will remain unfulfilled.

The African state has mostly been unable or unwilling to guarantee the existence of and access to mechanisms of justice.<sup>2</sup> For the few people whose justice needs ever receive any attention, the meaning of justice is uncertain, its content varies from place to place, and the outcome of the justice process invariably depends on where they live, who they know, how much they can afford, and the extent to which effective state authority extends to their neighborhood. The rather limited scope of the state across Africa's many borders arguably compels a majority of the continent's people to seek fulfillment of their justice needs outside its formal mechanisms. At least, this is what a majority of Africans appear to do.<sup>3</sup>

Yet, when justice sector reform advocates in Africa and their international partners set out to recalibrate justice delivery systems in different countries, it is not clear that the resulting package of measures addresses the complex mix of variables that

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<sup>2</sup> See Abdullahi Ahmed An-Na'im, ed., *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press, 2002); and Chidi Anselm Odinkalu, "Back to the Future: The Imperative of Prioritizing for the Legal Protection of Human Rights in Africa," *Journal of African Law* 47, no. 1(April):1-37.

<sup>3</sup> Basil Davidson asserted in 1992 that the post-colonial state in Africa collapsed in the 1980s (*The Black Man's Burden: Africa and the Curse of the Nation-State* [New York: Three Rivers Press, 1992], 50). According to journalist Richard Dowden, "the nation state bequeathed to Africa 40-odd years ago by departing imperial powers has collapsed or withered away, or been maintained as a façade hollowed out by theft and corruption" ("Blair's Mission Impossible," *The Observer* (London), February 3, 2002, 25).

constrain these systems. These variables include limited state capacity, a patrimonial context, perennial impoverishment, and legal pluralism—all of which determine access or lack of access to the continent's various justice mechanisms. The primary focus of legal reformers is usually the efficient resolution of commercial disputes involving investors and business people. More recently, the reform of formal criminal justice systems has been recognized as a priority. But in country after country, the relationship of informal justice mechanisms to the formal (or state-sector) institutions is either inadequately understood or considered entirely irrelevant. To understand how this situation came about, it is necessary to understand the origins of informal or traditional justice systems in Africa.

### **From “Primitive” Law to Decentralized Despotism**

The coexistence of civil (or formal) and traditional (or informal) systems of justice is a feature of all contemporary African legal systems. This state of affairs was part of the colonial experience and has become an entrenched part of Africa's post-colonial constitutional settlement. While formal law remains normatively dominant in the hierarchy of formal sources and institutions of law and government, informal or traditional law continues to be demographically pervasive. By some estimates, it governs “the daily lives of more than three-quarters” of the populations of most African countries.<sup>4</sup> In a comparative study of 15 African legal systems, Abdullahi An’Na’im finds that “for the majority of Africans, customary law is the most important source of law with which they are likely to have first and most frequent contact.”<sup>5</sup> Illustrating this point in a study of legal dualism in Sierra Leone, Vivek Maru easily concludes that “of the two overlapping legal regimes, customary law has more practical relevance for the vast majority of Sierra Leoneans than the

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<sup>4</sup> M.O. Nweje, “In Search of Justice,” in *African Indigenous Law*, ed. T.O. Elias, S.N. Nwabara, and C.O. Akpangbo, 185–91, proceedings of workshop at University of Nigeria, Nsukka, August 7–9, 1974 (Nsukka: University of Nigeria, Institute of African Studies, 1975).

<sup>5</sup> Abdullahi Ahmed An’Na’im, “Protecting Human Rights in Plural Legal Systems of Africa: A Comparative Overview,” in *Universal Rights, Local Remedies: Implementing Human Rights in the Legal Systems of Africa*, ed. Abdullahi Ahmed An-na’im (London: Interights/ AFRONET/ GTZ, 1999), 39.

formal legal system,”<sup>6</sup> while Joseph Otteh suggests that up to 90 percent of cases in Nigeria are settled by customary courts.<sup>7</sup>

Informal, traditional, or non-statutory law in Africa is — somewhat conveniently but inadequately — called customary law. This appellation is intended to affirm the legitimacy of customary law, with its implicit suggestion that customary law is somehow indigenous in origin. In reality, expressions such as “customary” or “traditional” law are only convenient labels for what is in fact a very complex set of rules that, in particular localities, have with time acquired the force of habit, backed by mechanisms of social coercion and, in post-colonial Africa, state power. While commonalities may be discerned in a comparison of these rules and their application across different communities, the manner in which they are constituted, their content, and the mechanisms for their enforcement usually vary from place to place. In many areas, the line between traditional (or customary) and religious law is normatively unclear. In Nigeria, for example, “native law and custom includes Moslem law.”<sup>8</sup> The application of both sharia and ethnic customary norms in any particular case is, however, subject to a test of repugnancy whose origins are founded in outdated notions of imperial Victorian jurisprudence.<sup>9</sup> Additionally, the colonial

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<sup>6</sup> Vivek Maru, “The Challenges of African Legal Dualism: An Experiment in Sierra Leone,” in *Justice Initiatives: Human Rights and Justice Sector Reform in Africa*, Open Society Justice Initiative, February 2005, 18. <http://www.justiceinitiative.org/publications/jinitatives>. Accessed June 25, 2006.

<sup>7</sup> Joseph Otteh, “Fading Lights of Justice: An Empirical Study of Criminal Justice Administration in Southern Nigeria Customary Courts” (Lagos, Nigeria: Civil Liberties Organization; Copenhagen: Danish Centre for Human Rights, 1995), x.

<sup>8</sup> A.E.W. Park, *Sources of Nigerian Law* (Lagos, Nigeria: African Universities Press; London: Sweet and Maxwell, 1963), 65.

<sup>9</sup> See *Raskaki Yinusa v. Adesubokun*, SC 27/70 (1972); and Mohammed Tawfiq Ladan, “Legal Pluralism and the Development of the Rule of Law in Nigeria: Issues and Challenges in the Development and Application of the Sharia,” in *Sharia Penal and Family Laws in Nigeria and in the Muslim World: Rights-based Approach*, ed. Jibrin Ibrahim, 57 (Zaria, Nigeria: Ahmadu Bello University Press; Abuja, Nigeria: Global Rights, 2004).

In South Africa, Section 1(1) of the Law of Evidence Amendment Act of 1988 requires that “indigenous law shall not be opposed to the principles of public policy or natural justice.” Similarly, the Nigerian Evidence Act requires customary law in each case in which its application is asserted to be compatible with natural justice, equity, and good conscience, and with existing law and public policy. (Federal Republic of Nigeria, *Evidence Act*, Chapter 112, Laws of the Federation of Nigeria, 1990.)

courts in West Africa even took the view that “a great many native customs in West Africa are manifestly of European origin.”<sup>10</sup>

The only thing that is clearly indigenous about customary law is its application to people described in the language of colonial law as “indigenous,” “native,” or “African,” that is, the entire non-white populations of colonial territories, who were regarded as somewhere between primitive and barbaric. The racialized origins of customary law are well acknowledged in both jurisprudence and literature, with varying degrees of benevolence and malevolence. To colonial-era anthropologists, customary law was “primitive law,”<sup>11</sup> or the law of primitive or “barbarous” tribes.<sup>12</sup> The preservation, evaluation, and evolution of customary law was thus the duty of colonial civilization. These attitudes were confirmed in the most authoritative jurisprudence that exists on customary law. In *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*, the Judicial Committee of the Privy Council observed that:

The more barbarous customs of earlier days ... may, under the influence of civilisation, become milder without losing their essential character of custom...It is the assent of the native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate.<sup>13</sup>

This case merely elaborated on a theme that was flagged in an earlier decision of the same Judicial Committee in *Re Southern Rhodesia*, where it explained the civilizational challenges of customary law as follows:

Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood, they are no less enforceable than rights under English law.<sup>14</sup>

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<sup>10</sup> *Wokoko v. Molyko* NLR, 42, 44 (1938).

<sup>11</sup> See Arthur S. Diamond, *Primitive Law: Past and Present* (London: Routledge, 2004).

<sup>12</sup> *Eshugbayi Eleko v. Officer Administering the Government of Nigeria* A.C. 662, 670 (1931) (Judicial Committee of the Privy Council). Laws J ([1995] 1 AllER 513, 524j).

<sup>13</sup> *Ibid.*, 670.

<sup>14</sup> *Re Southern Rhodesia* AC 211 (1919) (Judicial Committee of the Privy Council).

Hierarchy as well as segregation characterizes the co-existence of customary and formal law. Normatively, customary law is considered inferior to formal law.<sup>15</sup> Thus in French colonial practice, traditional law was inapplicable if it was “contrary to the principles of French civilization.”<sup>16</sup> In the British colonial model of indirect rule, customs asserted as law had to pass a test of repugnancy, that is, it was required that such customs not be “repugnant to natural justice, equity and good conscience...”<sup>17</sup> Yet neither the principles of French civilization nor those of Victorian justice, to which traditional or customary law must not be repugnant, were particularly embodied in any clear set of enunciations. Quite clearly, therefore, it was up to the colonial officials charged with supervising the application of customary law to make up these principles as they went along, which thereby sanctioned arbitrariness. The result, as narrated by George Padmore, was that in the colonial era:

The chief is the law, subject only to one higher authority, the white official, stationed in his state as advisor. The chief hires his own police ... he is often the prosecutor and the judge combined and he employs the jailer to hold his victims in custody at his pleasure. No oriental despot ever had greater power than these black tyrants, thanks to the support which they receive from the white officials who keep quietly in the background.<sup>18</sup>

Obviously, the white official has been eliminated since independence, but much of the despotism depicted in this narrative remains. The application of customary law is founded on the segregation of its subjects along racial lines. This practice has been transformed in post-colonial society to include entrenched ethnic discrimination. In British colonial statutory practice, customary law was applicable to “natives,”<sup>19</sup>

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<sup>15</sup> Nnaemeka-Agu, 1975, “The Dualism of English and Customary Law in Nigeria,” 250, 262.

<sup>16</sup> Mamdani, 1996, *Citizen and Subject*, 115.

<sup>17</sup> Supreme Court Proclamation (1900), repeated in Native Courts Ordinance, CAP 142, Laws of Nigeria, 1963. Also see M.O. Balonwu, “The Growth and Development of Indigenous Nigerian Laws as Part of our Heritage from the British Colonial Policy of Indirect Rule,” in *African Indigenous Laws*, ed. T.O. Elias, S.N. Nwabara, and C.O. Akpangbo (Lagos: Nigerian Government Printer), 31, 33.

<sup>18</sup> George Padmore, *How Britain Rules Africa* (New York: Negro Universities Press, 1936/1969), 317.

<sup>19</sup> Mamdani, *Citizen and Subject*, 1996, 111.

“persons of African descent,”<sup>20</sup> “blacks,”<sup>21</sup> or persons described in French as “*les autochtones*.” In Nigeria, the Native was statutorily defined to include a “native of Nigeria” or a “native foreigner,” the latter being “any person (not being a native of Nigeria) whose parents are members of a tribe or tribes indigenous to some part of Africa and the descendants of such persons, and shall include any person one of whose parents was a member of such tribe.”<sup>22</sup>

Far from being customary, however, these distinctions between types of law clearly represented a racial dichotomy. Under colonialism, the effect of this dichotomy was to banish colonized African populations from access to the formal systems of law, justice, and citizenship. In post-colonial society, this racial segregation has been preserved in law and, in some countries, the constitution. For instance, while Article 23(1)(a) of the Constitution of Zimbabwe prohibits discrimination, Article 23(3)(b) exempts from this prohibition “the application of customary law in any case involving Africans, or an African and one or more who are not Africans where such persons have consented to the application of African Customary law in that case.”<sup>23</sup> Africans in this context refers to “black Africans,” a racial category different from whites or Africans of Asian origin or descent. Such a blatantly racialized distinction in any other area of life would be considered constitutionally impermissible and, indeed, offensive.

It has been said of customary law that it is “... unwritten. It was handed down the ages, from generation to generation. Like a creed, it seems to live in the minds of people.”<sup>24</sup> For this reason, the application of customary law is mostly limited to issues of personal and property law such as local lands, chieftaincy, and customary marriage and succession.<sup>25</sup> Lacking in formal sources as such, customary law must rely on the best and, sometimes, induced recollections of community elders,

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<sup>20</sup> E.A. Keay and S.S. Richardson, *The Native and Customary Courts of Nigeria* (London: Sweet and Maxwell; Lagos, Nigeria: African Universities Press, 1966), 248; Park, 1963, *Sources of Nigerian Law*, 63–5.

<sup>21</sup> Republic of South Africa, *Black Administration Act* (Act 38, 1927).

<sup>22</sup> Park, 1963, *Sources of Nigerian Law*, 102–103.

<sup>23</sup> Republic of Zimbabwe, *Constitution of the Republic of Zimbabwe*, 1979 (as amended to No. 16 of 20 April 2000), Article 23(3)(b).

<sup>24</sup> Dan O. Ibekwe, “Conflict of Cultures and Our Customary Law,” in *African Indigenous Law*, ed. T.O. Elias, S.N. Nwabara, and C.O. Akpangbo, 297ff. (Lagos: Nigerian Government Press), 1975.

<sup>25</sup> Nnaemeka-Agu, 1975, “The Dualism of English and Customary Law,” 256.

supplemented by “scanty court records and a few reported cases.”<sup>26</sup> Its content “is not constant but relative and varies sometimes within special localities.”<sup>27</sup> Unsurprisingly, its application “appears to have been always subject to motives of expediency.”<sup>28</sup>

In conformity with the practice of colonial administration, the normative dualism of customary and statutory law was replicated in an institutional dualism of customary and statutory institutions and courts. In those countries where customary law is applicable today, it is mostly administered by local chiefs and authorities far removed (in terms of both logistics and bureaucratic limitations of the state) from any form of oversight or supervision. These factors effectively put in the hands of local chiefs and authorities a pernicious form of power and abuse that Mamdani has aptly described as “decentralized despotism.”<sup>29</sup> In effect, the application of customary law is segregated in terms of race, ethnicity, institutions, and location. Given its inherent tendency to discriminate against or patronize women, customary law also tends to be segregated in terms of gender.<sup>30</sup>

### **The Evolution from Kinship to Civil to Post-code (In)Justice**

Informal, traditional, or customary law in its purest form was meant to be a form of localized kinship law for regulating the social relations of people in small communities where most people knew one another or were joined in filial or marital relations of varying degrees of attenuation. People outside this regime of kinship were regarded as visitors entitled to courtesies, but not necessarily the entitlements of kinship. The bewildering social, locational, and transactional mobility of contemporary anonymous society, however, confronts this underlying foundational system of

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<sup>26</sup> Olive P. Taylor, “1975, The Position of Women under Sierra Leone Customary Law,” 197.

<sup>27</sup> *J.E. Edokpolor v. J.I. Idehen*, WNLR (Pt. 1) 11 (1961).

<sup>28</sup> Nnaemeka-Agu, 1975, “The Dualism of English and Customary Law,” 252.

<sup>29</sup> Mamdani, 1996, *Citizen and Subject*, 37.

<sup>30</sup> See Banda Fareda, *Women, Law and Human Rights: An African Perspective* (Oxford: Hart Publishing, 2006); Alice Armstrong, Beyani Chaloka, and Himonga Chuma, “Uncovering Reality: Excavating Women’s Rights in African Family Law,” *International Journal of Law, Policy, and the Family* 7, no. 3 (1993):314–69; *Ephraim v. Pastory* LRC (Const) 757 (1990); Taylor, 1975, “The Position of Women,” 197.

customary law with a challenge that it cannot overcome. In light of modern communications, kinship societies have become easily permeable, but customary law has failed to evolve beyond the status of atomized kinship law.

A justice system is said to be pluralist when it derives the rules and institutions of its laws from two or more normative traditions. This is true of every African country. In Egypt, for instance, the major sources of law are as varied as the Napoleonic Code and Islamic sharia. In Nigeria and Sudan, a constitutional, statutory, and civil system of laws co-exists uneasily with both sharia and indigenous African customary norms and institutions. The South African Constitution, widely admired as possibly the most advanced on the continent, accommodates traditional legal systems subject to overarching constitutional principles of equality and non-discrimination. Statutory and civil norms are established in written, formal instruments of law. Similarly, sharia is characterized by the existence of formal sources. Indigenous and traditional customs, on the other hand, are mostly uncodified.<sup>31</sup>

There is yet another, less formalistic, sense in which the justice delivery systems of African countries can be said to be plural. In a very practical way, justice delivery in most of the continent, more than in any other part of the world, is sensitive to the capacities and incapacities of both the state and the interlocutors that seek to use them. Pluralism in this sense captures the diverse ways in which users of legal or justice systems—both potential and actual—are included or excluded, or have their justice needs met or frustrated by the presence or absence of a system for justice and legal services delivery.

In their colonial origin, statutory and traditional systems of law were designed to be segregated from one another.<sup>32</sup> In post-colonial Africa, however, their operation is, for the most part, shaped by the essential patrimonialism of the African state. This state is characterized by high levels of personalized dispensation of favors and the consequent diminution of the idea that entitlements can be obtained through either formal or informal networks of power and patronage. As explained by Paul Richards in relation to Sierra Leone, this patrimonialism:

... involves redistributing national resources as marks of *personal* favour to followers who respond with loyalty to the leader rather than to the institution the leader represents ... In patrimonial systems of government “big persons” at the

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<sup>31</sup> For a survey and description of the structure of the various legal systems and traditions of Africa, see An’Na’im, 1999, “Protecting Human Rights.”

<sup>32</sup> Mamdani, 1996, *Citizen and Subject*, 63.

apex of political power compete to command some share of the “national cake” which they then redistribute through their own networks of followers.<sup>33</sup>

This patrimonialism dates back to the colonial origins of contemporary African legal systems, when the authority of local elites—as chiefs or other lackeys of colonial administrators—was conscripted into the service of dominating local populations.<sup>34</sup> The transfer of power at independence from white to black “masters” was not accompanied by the creation of mechanisms of local accountability.<sup>35</sup> Following independence, therefore, traditional power structures adapted to the new power dynamics—often remarkably similar to the old—in return for continuing relevance.

In Africa, as in other parts of the world, states bear the basic obligation to guarantee the existence, availability, and effectiveness of justice delivery infrastructure. In this connection, African states undertake, in Article 26 of the *African Charter on Human and Peoples’ Rights* of the Organization of African States, for example, “the duty to guarantee the independence of the Courts” and “allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed in the present Charter.”<sup>36</sup>

In a 1994 case against it before the United Nations Human Rights Committee, Zambia sought to argue (an argument with which the Committee disagreed) that a developing country such as Zambia could not be expected to possess the resources to fund adequate justice provision.<sup>37</sup> In this case, the complainant argued that his conviction on a capital offense had suffered from prejudicial delay and relied on evidence obtained by torture and third-degree policing. In excusing the allegations

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<sup>33</sup> Paul Richards, *Fighting for the Rainforest: War, Youth, and Resources in Sierra Leone* (Portsmouth, NH: Heinemann, 1996), 34–6.

<sup>34</sup> On the colonial origins of African legal systems, see Sandra Fullerton Joireman, “Inherited Legal Systems and Effective Rule of Law: Africa and the Colonial Legacy,” *Journal of Modern African Studies* 39, no. 4 (December 2001):571.

<sup>35</sup> Robert Delavignette remarked in 1977 that “African Republics (have) changed from white civil servants to black ones, but they have not changed the structure of their administration.” See W.B. Cohen, ed., *Robert Delavignette on the French Empire: Selected Writings*, trans. Camille Garnier (Chicago: University of Chicago Press, 1977), 130.

<sup>36</sup> OAU (Organization of African States), *African Charter on Human and Peoples’ Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3, Rev. 5, 21 INT’L. LEGAL MATERIALS 58 (1982), entered into force October, 21, 1986.

<sup>37</sup> *Lubuto v. Zambia* (2001) AHRLR 37 (HRC 1995).

of torture, Zambia argued before the Committee that “due to the bad economic situation in the country, it has not been possible to ensure equipment and services in order to expedite the disposal of cases.”<sup>38</sup> This is an argument for a legal system in which affordability or lack of it, replaces traditional and civil societies as the basis of pluralism. This new pluralism is built on a distinction between the poor and rich that is locational, both in terms of social status and geography.

### **Normative, Faith-Based, and Institutional Dualisms**

All over Africa, the justice infrastructure includes norms and institutions of civil and statutory law, as well as those of informal and traditional law. The mechanisms of formal justice delivery (e.g., the police, bureaucracies of administrative justice and government, courts, lawyers, and judges), are mostly found in urban areas and maintained at the expense of public taxes and appropriations. Informal mechanisms (e.g., traditional chiefs, vigilantes, and neighborhood, faith-based, and age-grade institutions), on the other hand, are found in all forms of human settlements in Africa, and almost exclusively, dominate the lives of people of African descent in rural areas.

Although recognized by the state throughout Africa, traditional justice systems do not necessarily owe their existence or viability to the state. In Ghana, for example, a viable traditional justice system survived attempts by the regime of President Kwame Nkrumah to abolish it.<sup>39</sup> Informal mechanisms of justice enjoy uneven degrees of integration into the state. At one extreme, those founded on chieftaincy institutions are the most integrated into structures of government. There are good examples of this integration in many parts of Southern Africa, including Botswana, Lesotho, and Swaziland. In Botswana, the *kgotla*, the court of the traditional chief, retains significant civil as well as criminal jurisdiction over offenses that can be punishable (in some cases) by up to four years imprisonment.<sup>40</sup> In Sierra Leone,

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<sup>38</sup> Ibid.

<sup>39</sup> Richard Rathbone, *Nkrumah and the Chiefs: The Politics of Chieftaincy in Ghana, 1951–1960* (Accra, Ghana: F. Reimmer; Athens, Ohio: Ohio University Press, 2000), 140–160; Kasim Kasanga, “Ideology and Land Policy in Ghana: The Third Way,” *Public Agenda* (online publication, Accra, Ghana) 8, no. 40 (November 6):38, [http://www.ghanaweb.com/public\\_agenda/article.php?ID=704](http://www.ghanaweb.com/public_agenda/article.php?ID=704). Accessed June 25, 2006.

<sup>40</sup> L.D. Ngcongco, “Tswana Political Tradition: How Democratic?” In *Democracy in Botswana*, ed. John D. Holm and Patrick P. Molutsi, 46ff, proceedings of symposium,

chiefdoms are recognized as the basic unit of administrative and judicial power within the state.<sup>41</sup>

The Emir's Court in Northern Nigeria exercised temporal, spiritual, and judicial functions until 1967, when it was stripped of its judicial powers. These powers were then transferred to the area or *alkali* Courts.<sup>42</sup> The *libandla*, a quasi-legislative/judicial national council in Swaziland, the *gacaca* in traditional Rwanda,<sup>43</sup> and the *kgotla* in Botswana are similar examples of such institutions. In most other post-colonial systems in Africa, by contrast, the criminal jurisdiction of traditional courts was abolished after independence by the requirement that crimes had to exist under written laws.<sup>44</sup> Nevertheless, customary arbitration remains recognized as

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Gaborone, Botswana, August 1–5, 1988 (Gaborone, Botswana: Friedrich Ebert Foundation Botswana, 1989); Mogopode H. Lekorwe, 1989, "The *Kgotla* and Freedom Square: One-Way or Two-Way Communication?" 117.

<sup>41</sup> Sierra Leone comprises 149 chiefdoms. See Maru, 2005, "The Challenges of African Legal Dualism," 18, 19–22.

<sup>42</sup> Chidi Anselm Odinkalu, *Justice Denied: The Area Courts System in the Northern States of Nigeria* (Ibadan, Nigeria: Kraft Books for Civil Liberties Organisation, 1992), 32–35.

<sup>43</sup> A French-language publication of the National University of Rwanda describes the *gacaca* as follows: "Littéralement, Gacaca fait référence à une 'petite herbe' métonymie désignant un espace physique qui sert d'espace social dans une communauté donnée, de lieu de rencontre des personnes, en particulier des mâles d'un certain âge considérés comme des notables d'une contrée donnée. A l'occasion, cet espace sert de lieu où se discutent les questions qui préoccupent la dite communauté et se prennent les décisions concernant cette communauté. C'est ainsi qu'à l'occasion d'un conflit, les parties sont conviées pour être entendues et jugées par les membres de l'assemblée réunie à cette fin. La dite assemblée est composée essentiellement des personnes désignées comme Inyangamugayo acceptées par tous comme des individus détestant l'opprobre. A l'analyse, il s'agit des personnes d'influence pour des raisons diverses: leur probité, leur grand âge, leur érudition, la sagesse de leurs décisions, l'atruisme ou encore leur puissance politique et économique." See National University of Rwanda, "Les juridictions Gacaca et les processus de réconciliation nationale," *Cahiers du Centre de Gestion des Conflits* no. 3 (2001):31.

<sup>44</sup> Section 3(2) of the Northern Nigerian Penal Code (1960), for instance, provides "[a]fter the commencement of this law, no person shall be liable to punishment under native law and custom." Thus, in *Aoko v. Fagbemi* ALL NLR 400, 1 (1961), the claimant was tried and found guilty by a family council for the customary law crime of adultery, following which she was expelled from and ostracized by the family. The High Court found the purported trial, conviction, and sentence by the family council was without basis in law and in violation of her human rights.

a mechanism of judicial settlement in most common law African countries. The integrity of customary arbitration decisions is, moreover, preserved by the formal state system through a judicial doctrine (*res judicata*), which precludes re-litigation of matters that have already been judicially settled.<sup>45</sup>

At another extreme, the integration into state structures of systems founded on or melded with religious faiths varies in degree. In those parts of Africa where Islam is the dominant faith, for instance, religious and ethnically founded norms and institutions converge to the point of being both unique and indistinguishable. The Nigerian Supreme Court, for instance, protesting the categorization of Islamic law as customary law in certain jurisprudence, observed in the case of *Alkamawa v. Bello & Another* that “Islamic [l]aw is not the same as customary law, as it does not belong to any particular tribe. It is a complete system of universal law, more certain and more permanent and more universal than the English Common Law.”<sup>46</sup> In the Sahel regions of Africa, *marabouts*, the *ulema*, and leaderships of religious brotherhoods have long exercised both temporal and religious authority, irrespective of the disposition of the state in much the same way as elders would in any traditional African society. In Senegal, for instance, this phenomenon is colloquially referred to as the *wolofisation* of Islam.<sup>47</sup>

### Popular Myths about Customary Law

Mahmood Mamdani demonstrates in his *Citizens and Subject: Contemporary Africa and the Legacy of Late Colonialism* that the system referred to in com-

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<sup>45</sup> O.D. Amucheazi, “Validity of Customary Arbitration in Nigeria: A Review of *Egesimba v. Onuzuruike*,” *Nigerian Bar Journal* 1, no. 4 (2003):515; G. Ezejiolor, G., “The Prerequisites of Customary Arbitration,” *Journal of Private and Property Law* (University of Lagos) 16 (1992–93): 32.

<sup>46</sup> *Alkamawa v. Bello & Another*, 6 SCNJ, 127, 136 (1998).

<sup>47</sup> The Wolof are the dominant ethnic nationality in Senegal and comprise about 43.3 percent of the population. Other nationalities are the Pular (23.8 percent), Serer (14.7 percent), Jola (3.7 percent), Mandinka (3 percent), Soninke (1.1 percent), European and Lebanese (1 percent), and other (9.4 percent). Wolof is also Senegal’s dominant African language. See the CIA’s *World Factbook*, <http://www.cia.gov/cia/publications/factbook/geos/sg.html#People> (accessed May 22, 2006). Also see Donald Cruise O’Brien, “The Shadow-Politics of Wolofisation,” *Journal of Modern African Studies* (Cambridge University Press) 36, no. 1 (March 1998):25–46.

mon law African countries as customary law, or in civil law countries as *droit du cotoumier*, is in fact a collection of rules, norms, and institutions of dubious provenance, including “judge-made” law, mutations of inherited colonial practices, and the indigenous values and practices of various African communities, as refined through decades, possibly centuries, of inter-migration and interaction with one another.<sup>48</sup> Judge-made law in this context includes the recognition of customary law by the formal courts through the notion of *judicial notice*, by which the common law doctrine of judicial precedent provides a back channel for judges to refer to customs applicable in another locality which often bear limited, if any relevance, to the locality in which the judges are adjudicating.

It is widely believed that *droit du cotoumier* is alien to the homogenous formalized justice systems of civil law Africa. It is assumed that the assimilation policy of French colonial administrations allowed only for the supremacy of post-Revolution, egalitarian French legal traditions, with no room for any interloping indigenous norms or institutions.<sup>49</sup> The reality is somewhat less categorical. In many French-speaking West African countries, such as Senegal and Guinea (Conakry), traditional *marabouts* and *serignes* exercise considerable civil, adjudicatory, and spiritual authority, founded on a unique mix of ethnic identity and religious moorings. In Rwanda, the government of this former Belgian territory excavated a customary institution of considerable antiquity, the *gacaca*, to deal with an unprecedented crisis of the justice system following the elimination of that country’s formal justice personnel during the genocide of 1994. In Gabon, the highest court has held that a custom known as *ntoumou* among that country’s Nkodje clan precludes civil inter-marriage among clan members, irrespective of whether or not consanguinity or affinity between them was established.<sup>50</sup> These examples tend to suggest that customary norms and institutions retain considerable relevance, even in civil law Africa.

The majority of Africans use these non-formal systems of justice. Hasty generalizations about the relationship of formal to customary justice systems, law, and institutions in Africa are thus generally ill advised. Three broad categories, however, are apparent. First, there are countries — mostly English-speaking — with dominant

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<sup>48</sup> See Mamdani, 1996, *Citizen and Subject*, chapters 3–4; and Joireman, 2001, “Inherited Legal Systems,” 578.

<sup>49</sup> Mamdani, 1996, *Citizen and Subject*, chapters 3–4.

<sup>50</sup> See Court of Cassation (then known as the 2nd Civil Chamber of the Judiciary) of Gabon, *P.E.N. & F.E.O. v. D.N.B.*, case no. 13/95-96, reprinted in *La Revue du CERDIP* 1, no. 1 (2002):131ff.

common law or Roman-Dutch Law (in Southern Africa) formal traditions—in which the existence of customary and traditional law is expressly recognized, but limited in application to civil, especially personal, status, and succession matters.

Even within this category of countries, the nature and relationship of customary to civil law varies. In Zimbabwe and Sierra Leone, for instance, constitutional prohibitions against discrimination do not extend to customary law. This constitutional provision enabled the Zimbabwean Supreme Court in the *Magaya* case to hold that a rule of customary succession law of the Shona people, which allegedly preferred males to females as heirs, did not breach the prohibition of discrimination in Article 23 of Zimbabwe's Constitution because sub-articles 23(3)(a) and (3)(b) exempt provisions relating to the devolution of property upon death to the application of customary law.<sup>51</sup> This decision effectively placed customary law above and beyond the reach of the foundational constitutional principle of equality. The constitutions of these countries have thus created two categories of citizens, one (the rich minority) that is able to use both customary and civil law, and one (the poor majority) that is imprisoned in the injustices of a customary system without mobility or choice.<sup>52</sup>

This result would be untenable in South Africa. Articles 211(1) and (2) of the South African Constitution simultaneously recognize “the institution, status and role of traditional leadership according to customary law,” but expressly subject customary law to both the constitution and statute.<sup>53</sup> Notwithstanding the formidable formal legal and institutional apparatus of South Africa, the reform of customary law nevertheless confronts considerable obstacles because of its atomized nature.<sup>54</sup> In Nigeria, the situation is somewhere between these two examples. Nigeria's constitution expressly prohibits discrimination on several grounds, including sex

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<sup>51</sup> *Magaya v. Magaya*, 3 LRC 35 (Sup. Ct. of Zimbabwe [1999]).

<sup>52</sup> Nnaemeka-Agu points out that “one may argue that it is open to a party to proceedings to choose which of the two systems of courts (customary or statutory) to go to—hence no need to complain. The weakness of this argument is that the defendant has no choice” (Nnaemeka-Agu, 1975, “The Dualism of English and Customary law,” 256).

<sup>53</sup> The *Constitution of the Republic of South Africa*, 1996, Article 211(1), expressly makes customary law subject to the Constitution.

<sup>54</sup> AFRIMAP (Africa Governance Monitoring and Advocacy Project) and OSF-SA (Open Society Foundation-South Africa), *South Africa: Justice Sector and the Rule of Law; A Review by AFRIMAP and Open Society Foundation for South Africa* (Newlands, South Africa: OSF-SA, 2005).

and status.<sup>55</sup> In view of the fact that a great deal of personal status is a matter of customary law (and that sex discrimination is entrenched in this law), constitutional interpretation and application could be used to extend the constitutional prohibition against discrimination to matters decided by customary law.

The second category of countries are countries where the application of customary law extends to criminal matters, the best example of which is Botswana.<sup>56</sup> In Mauritania, Sudan, and Nigeria, to name but a few African countries, the application of Islamic sharia extends to crimes of *huddud*. Essentially, this means faith-based morality regulated by Islamic theology, the application of which as criminal law is legislated by the state.<sup>57</sup> The third category consists of civil law countries in which, as illustrated above, customary justice systems are in fact part of the living experience of ordinary people, although the contrary is asserted.

In its colonial origins, customary law as it is now known was based on both the racial segregation of Africans from white colonialists and the locational segregation of rural and urban Africans. The nature of post-colonial segregation has become infinitely more complex. The distinction between customary and formal law today does not necessarily replicate the division between rural and urban spaces in Africa. Thus, for reasons mostly associated with contemporary transactional mobility, which has overtaken customary law, it is impossible to make the generalization that customary law applies in rural spaces, while civil law applies in urban spaces. In the first place, urban and rural spaces are very permeable—many African cities sprawl into the bush and have rustic slums at their margins. Secondly, the distinction between rural and urban life in the African context often refers not to physically separated spaces, but rather, degrees of acceptance of westernization among varying levels of elites. In this sense, people are composites of both rural and urban spaces, a difference that is merely situational. Far from being absolute, this difference is a matter of degree. Finally, customary law is a regime of personal status, identity, and indigeneity. It "... attaches to a person by reason of one's birth."<sup>58</sup> It is thus quite

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<sup>55</sup> Federal Republic of Nigeria, *Constitution of the Federal Republic of Nigeria*, adopted May 1999, Section 45.

<sup>56</sup> See An'Na'im, 2002, *Human Rights under African Constitutions*.

<sup>57</sup> An'Na'im, 1999, *Universal Rights, Local Remedies*, 47–9.

<sup>58</sup> John Ademola Yakubu, "Colonialism, Customary Law and the Post-colonial State in Africa: The Case of Nigeria," *Africa Development* 30, no. 4 (2005):201, 218.

portable, making it a notoriously impossible companion to divorce.<sup>59</sup> Customary law, then, applies to the people subject to it everywhere, irrespective of whether they are in rural or urban locations.

### **A System of Locational Public Ethics**

The justice system of African customary law reflects the post-colonial balance of power in which indigenous elites replaced a foreign minority as the dominant decisional force. Contemporary customary law in this context essentially became one of the mechanisms for the indigenization of unaccountable elite power, which is largely undifferentiated from formal state systems in its functions and outcomes. Unlike the administrative machinery, however, customary law is a racialized system, the assertion of whose exclusivity is not extended to perceived “settlers,” such as Asian or Caucasian communities in Africa. The Constitutional Assembly that negotiated Uganda’s 1995 Constitution, for instance, denied the request of Uganda’s sizeable Asian community to recognize it as an ethnic group, which would have meant, among other things, formal recognition of the customary norms and institutions of that community.

Customary law thus affords the dominant indigenous elites of Africa a choice in both the forum and location of the justice process, a choice that is not available to the overwhelming majority of the continent’s poor people. Quite often, the determining factor in resolving competing claims founded on customary law is a calculus of the relative power and convenience of the claimants. It is obvious, then, that powerful men are liable to and do, in fact, get a better deal out of the application of customary law. However, this is not the same thing as saying that the wealthy always get their way in every system. Traditional African society which customary law supposedly reflects was, after all, supposed to be founded on respect for wisdom, experience, and fair dealing—not money. This is particularly the case in disputes concerning personal status, marital rights in customary law, and ancestral land. These elements make it possible for the rich to enjoy the benefits of statutory property law for their urban, personal property, while simultaneously using customary law to grab ancestral lands in rural communities. The rural lands are then taken into the orbit

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<sup>59</sup> See *Olowu vs. Olowu*, 12 SC 84, 88 (1985), in which the Nigerian Supreme Court recognized the possibility of changing personal law through a process it called “culturalization,” a process that can be accomplished by choice or by assimilation.

of statutory law through cynical manipulation of the complex rules that govern conflict between the two systems of laws. These rules are unintelligible to local people, who are poorly equipped to use the law to defend themselves against the abuse of power. As one writer has said in the context of customary law, “how far the average citizen...benefits from our administration of justice depends on how the manipulators of law treat those customs.”<sup>60</sup>

Customary law gives the rich and powerful in contemporary Africa the freedom to choose both the law and legal forum they wish to use, based on situational convenience. When it suits them, they use the formal courts, the police, and state paraphernalia; when they calculate it to be more favorable, they deploy the norms or institutions of the countryside from which they came. At other times, they may deploy a cross-over of customary norms into the formal legal system through expensive “judge-made” law that only the rich can afford. Juxtaposed to the formal justice system in this way, customary law could be described as one-half of a composite system of line-item public ethics that makes it possible, for instance, for a powerful man to implausibly accept marital equality (under civil law) but reject gender equity (pleading customary law) and get away with it (because the patrimonial system allows it). This system of line-item public ethics creates a credibility crisis for the entire justice system and reinforces the marginalization of the average African from the legitimate space of the civil state.

### **Possibilities for Reform: When the Law Comes to the Village ...**

The norms and institutions of the informal justice system determine the fates of most of the continent’s population, the majority of which is poor. The post-colonial African state has facilitated this state of affairs without having necessarily created it. The reality is that for most of the continent’s people, the obstacles to accessing formal structures of justice delivery are overwhelming. In many countries, these structures have been destroyed by a succession of venal governments or war. Where these mechanisms still exist, they are dysfunctional, inaccessible, or lack credibility. Lawyers are too few, courthouses are mostly in the capital or other metropolitan areas, and judicial processes are very technical and poorly funded. There is also insufficient penetration of the structures and personnel of the formal justice system into isolated communities (whether by reason of being rural, desert,

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<sup>60</sup> Nweje, 1975, “In Search of Justice,” 191.

semi-desert, mountain, or water-bound settlements). Public transport is, moreover, too inadequate to ensure access to the presumed portals of justice. Given pervasive absolute poverty—over 70 percent of the population in many African countries—few people can afford to use the formal justice system. Families and communities, moreover, discourage the transfer of disputes from paternalistic family networks to the anonymous mechanisms of the formal justice system. When all these obstacles have been navigated by the obdurate few with means, most African governments and their officials still pick and choose which court orders, if any, they will obey and which they will disregard.

The human rights framework is a state-dependent, state-centered system. It is thus inherently suspicious of any claims that customary or non-formal systems of justice can deliver fair justice. But the reality is that the formal justice mechanisms of the post-colonial African state have woefully failed to deliver or guarantee justice. Nourished by this failure, informal and customary justice systems exist and continue to prosper without necessarily being better than their more formal counterparts. It is indeed possible in many cases to see both as part of a decentralized infrastructure of rent-seeking, the former for civil/urban elites, and the latter for rural elites.<sup>61</sup>

Among human rights treaties, the OAU's *African Charter on Human and Peoples' Rights* guarantees every person the right to "freely take part in the cultural life of his community,"<sup>62</sup> and requires states to promote and protect "morals and traditional values recognized by the community."<sup>63</sup> To ensure reconciliation between tradition, culture, and rights, the Charter requires that the African Commission on Human and Peoples' Rights apply only to "... African practices *consistent with international norms of human and peoples' rights*."<sup>64</sup> The real challenge is not whether or not to have or support informal justice systems, but how best to achieve the reconciliation mandated by the African Charter framework.

In the end, a justice system is only as good as its capacity to respond to the demands made on it. Given that most Africans rely on traditional or informal systems, this means that reform efforts must focus on those systems. Some basic changes are required to encourage people to make demands on these systems and

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<sup>61</sup> Eze Onyekpere, *Justice for Sale: A Report on the Administration of Justice in the Magistrates and Customary Courts of Southern Nigeria* (Lagos, Nigeria: Civil Liberties Organization, 1996); Otteh, 1995, "Fading Lights of Justice," 76–92.

<sup>62</sup> OAU, 1981, *African Charter on Human and Peoples' Rights*, Article 17(2).

<sup>63</sup> *Ibid.*, Article 18(3).

<sup>64</sup> *Ibid.*, Article 61 (emphasis added).

enable them to respond to the justice needs of its numerous users in Africa. These changes will, in turn, transform customary justice, both in terms of its normative content and its application.

To begin with, customary law must not in fact or in law be placed above accepted constitutional standards. Given that all African countries have bills of rights, this adjustment can be achieved by eliminating outdated doctrinal tests of repugnancy and replacing them with a unified test of the compatibility of customary law with constitutionally mandated norms of equality and non-discrimination. The compatibility test should reduce the proclivity of customary law to discriminate as a result of post-colonial, locational, or local circumstances. All administrators of customary justice mechanisms—by whatever name they are called—should also be required to undergo essential and regular training in basic constitutional standards. Relevant curriculums should be developed in both official and African languages. Popular versions of national constitutions with illustrations of how the constitutions govern customary neighborhood issues must be produced for this purpose. Electronic means of diffusion through radio and television would get this message to villages and the countryside.

In addition, it is necessary to address the (supposed) over-reliance of customary law on ancestral traditions transmitted through oral cultures. Without necessarily altering the content of customary norms as such, it is surely possible and necessary to create a system to record evidence of legal interests founded on customary law. Systems could be created, for example, to register or notify customary marriages, interests in customary and ancestral lands, and decisions of customary arbitrations, to cite three examples. Such systems would not require lawyers. They could be operated by paralegals, local teachers, and other lay people. These relatively minor adjustments to the realities of 21st-century transactional life would facilitate the protection of interests founded on customary law while limiting the despotism in its application.

Finally, mechanisms can be created to monitor the application of customary law. For this purpose, community legal services must be institutionalized through private-public partnerships to train and deploy community-based paralegals. These paralegals would enable ordinary people to make demands on the system and ensure proper oversight of misconduct by the administrators of customary legal systems.

Varying policy and philosophical dispositions exist towards customary and formal law. Abolitionists want customary law eliminated by state *diktat*, equating non-formal or customary systems of justice with non-western, “under-developed” societies of the southern hemisphere or “indigenous” minorities of the northern hemisphere. French colonial authorities in West Africa were firmly rooted in this tendency and

reportedly required in a 1912 law that customary norms “contrary to the norms of French civilization” be replaced with newly minted colonial norms.<sup>65</sup> Customary law has, however, survived many legislative attempts to write its obituary: some of the better-known examples include French colonial administrations and President Nkrumah’s initiatives in this direction in post-independence Ghana.

Hybridization has also been attempted, as in Sudan, with unhappy consequences. Cognizant of the resilience of local ways of life, British colonial policy preferred to co-opt (or integrate) customary law into the state system, with its variant of separate-but-equal doctrine based on indirect rule. This tendency, as Mamdani pithily explains, ultimately decentralized despotism. Reform will entail maintaining decentralization while eliminating the despotism. Achieving this goal will require measures that actively re-engineer the norms of customary law by positively transforming the mechanisms by which they are applied. In the end, a justice system that excludes the poor or forgets them on the margins of informality endangers even the rich and comfortable who can buy access to its processes.

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<sup>65</sup> Mamdani, 1996, *Citizen and Subject*, 115.

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# LEGAL EMPOWERMENT: IMPACT AND IMPLICATIONS FOR THE DEVELOPMENT COMMUNITY AND THE WORLD BANK

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*Legal empowerment means the use of legal services and legal capacity building for the poor and other disadvantaged populations, often in combination with other development activities, to increase their freedom, improve governance, and alleviate poverty. Experience to date documents the impact of legal empowerment on achieving these goals, typically through the efforts of civil society. Although legal empowerment often advances legal reform, it also addresses the most basic problem confronting law and development: lack of legal implementation, i.e., the fact that in most developing countries, existing laws and reforms are not enforced on the ground. Furthermore, government-focused efforts to reform laws and institutions often have a negligible impact on the poor. Unless the poor (or their civil society allies) work to implement law on a case-by-case, community-by-community, group-by-group basis, favorable laws and legal reforms will not exist for them. Unfortunately, legal empowerment receives inadequate attention and funding in development circles, yet it merits increased support, including research that can illuminate its impact and draw out lessons learned.<sup>1</sup>*

## **Introduction: Clarifying the Concept**

Legal empowerment is a valuable strategy for promoting development, but at present it is underappreciated and underfunded by development agencies. The first use of the term legal empowerment, in a 2001 Asian Development Bank

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<sup>1</sup> This paper is adapted from a presentation made at the “Legal Empowerment and Justice for the Poor” plenary session, World Bank Legal Forum 2005, “Law, Equity, and Development,” Washington, DC, December 2005.

(ADB) study,<sup>2</sup> employed a variation of the following current definition: the use of legal services and legal capacity building for the poor and other disadvantaged populations, often in combination with other development activities, to increase their freedom, improve governance, and alleviate poverty. A 2003 paper prepared for the Carnegie Endowment for International Peace further explained the concept.<sup>3</sup> While the above definition mentions three goals—freedom, improved governance, and poverty alleviation—all of these goals can be viewed in terms of the third. A narrow definition of poverty alleviation focuses on increasing the income or other material resources of poor people, but most development agencies define poverty alleviation more broadly as expanding the poor’s control over their lives, a process that involves freedom and, often, governance. Legal empowerment programs typically feature civil society activities because experience indicates that they are the best route to strengthen poor people’s legal capacity and power. They also engage governments wherever possible, and thus do not preclude important roles for dedicated officials and ministries.

There is no single template for legal empowerment work. As this article will make clear, it takes many forms. Although the term is being increasingly adopted by non-governmental organizations (NGOs), funding organizations, and development agencies across the globe, legal empowerment often goes by other names. The point is not the label used, but the nature and aims of the work involved.

Thus, legal empowerment is often a manifestation of community-driven or rights-based development.<sup>4</sup> It is sometimes distinguished by the use of legal services and legal capacity building for the poor. These legal activities include legal aid, public interest litigation, paralegal development, non-formal legal training for communities or groups, and media-based rights education. By contrast, the two other approaches can, but not always, include similar law-oriented work.

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<sup>2</sup> Stephen Golub and Kim McQuay, *Legal Empowerment: Advancing Good Governance and Poverty Reduction, Law and Policy Reform at the Asian Development Bank*, 2001 ed., Office of the General Counsel (Manila: Asian Development Bank, 2001), [http://www.adb.org/Documents/Others/Law\\_ADB/lpr\\_2001.asp?p=lawdevt](http://www.adb.org/Documents/Others/Law_ADB/lpr_2001.asp?p=lawdevt).

<sup>3</sup> Stephen Golub, “Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative,” Carnegie Endowment for International Peace Working Paper, Rule of Law Series, no. 41, Democracy and Rule of Law Project, Carnegie Endowment for International Peace, Washington, DC, 2003, <http://www.carnegieendowment.org/files/wp41.pdf>.

<sup>4</sup> The relationship between legal empowerment and rights-based development is discussed later in this paper.

The three approaches frequently overlap, but it is not useful to draw hard boundaries between them. Even where references to laws or rights are more implicit, it would be splitting hairs to claim that one approach is or is not legal empowerment, community-driven, or rights-based.

The reference to rights here does not involve only international human rights; legal empowerment more often makes use of rights embodied in national laws, ministerial regulations, and local ordinances. It can even involve rights to services and benefits that development projects (including those funded by the World Bank and other development agencies) are supposed to provide to target populations.

The types of rights and laws invoked by and for the poor flow from the priorities of poor people themselves. These priorities typically involve local officials and powers-that-be, not international forums. Depending on the context and the population in question, priorities of the poor can include livelihoods; access to agrarian, aquatic, upland, or other natural resources; access to credit or government services; health; shelter; ownership or use of property; physical security; and freedom from abusive, repressive, or corrupt conduct by government representatives or powerful private interests. While many legal empowerment initiatives can be seen in terms of governance or the rule of law, many others fall under the rubric of sectoral programs that address mainstream socioeconomic development goals. This is why legal empowerment often involves blending legal work with other development activities.

Stand-alone legal aid for individuals can be vitally important in making the rule of law a reality for the poor, but integrating legal work into other sectoral efforts can yield more multi-faceted impacts, particularly when lawyers are modest enough to accept that their contributions often hinge on the efforts of other development actors, whether prior or concurrent. For example, legal services and capacity building are most effective if built on a community organizing or group formation effort. It is programmatically (perhaps even physically) safer for a development initiative to address rights in some locales only after it has established its credibility by positively impacting, say, livelihoods. Discussion of natural resource rights might, for example, best go hand-in-hand with a focus on natural resources management.

Because legal empowerment is grounded in grassroots needs and activities, it can translate community-level work into an impact on national laws and institutions in various ways. Sometimes this means identifying flaws in laws as a first step toward law reform. It can also involve mobilization and advocacy to inform, or even drive, law reform efforts. In some instances, representatives of the disadvantaged or their civil society allies assume important government positions that allow them to initiate reforms of laws, policies, or government agencies.

## Why Fund Legal Empowerment?

### *The contrast with rule-of-law orthodoxy*

The most basic reason to fund legal empowerment work is its apparent track record of achieving the goals of freedom, governance, and poverty alleviation. It also has great potential to improve the impact of socioeconomic development projects that do not involve legal services or legal capacity building. Yet there are additional reasons, both in principle and in practice, to support legal empowerment. One threshold consideration is how legal empowerment compares to rule-of-law orthodoxy, the dominant rule-of-law approach pursued by most development agencies. This approach features a “top-down” emphasis on funding and working through judiciaries, ministries of justice, and other government organizations.<sup>5</sup> The effectiveness of rule-of-law orthodoxy is, however, subject to debate and has been questioned by numerous sources<sup>6</sup> In fact, even thoughtful explicit or implicit arguments for the rule-of-law orthodoxy tend to focus more on how to pursue it than whether it is effective.<sup>7</sup> Although the impact of legal empowerment has been imperfectly

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<sup>5</sup> For a more in-depth discussion and critique of rule-of-law orthodoxy, see, for example, Golub, 2003, “Beyond Rule of Law Orthodoxy.”

<sup>6</sup> See, for example, Frank Upham, “Mythmaking in the Rule of Law Orthodoxy,” Carnegie Endowment for International Peace Working Paper, Rule of Law Series, no. 30 (September), Democracy and Rule of Law Project, Carnegie Endowment for International Peace, Washington, DC, 2002, <http://www.carnegieendowment.org/files/wp30.pdf>; Patrick McAuslan, “Law, Governance, and the Development of the Market: Practical Problems and Possible Solutions,” in *Good Government and the Law: Legal and Institutional Reform in Developing Countries*, ed. Julio Faundez (New York: St. Martin’s Press; London: MacMillan, 1997), 25–45; Amanda Perry, “International Economic Organizations and the Modern Law and Development Movement,” in *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, ed. A. Seidman, R. B. Seidman, and T. Walde (The Hague: Kluwer Law International/Aspen Publishers, 1999), 19–32; John Hewko, “Foreign Direct Investment: Does the Rule of Law Matter?” Carnegie Endowment for International Peace Working Paper, Rule of Law Series, no. 26 (April), Democracy and Rule of Law Project, Carnegie Endowment for International Peace Washington, DC, 2002, <http://www.carnegieendowment.org/files/wp26.pdf>; and Thomas Carothers, *Aiding Democracy Abroad: The Learning Curve* (Washington, DC: Carnegie Endowment for International Peace, 1999).

<sup>7</sup> See, for example, Linn Hammergren, “Rule of Law: Approaches to Justice Reform and What We Have Learned; A Summary of Four Papers,” Center for Democracy and

documented, the international community's emphasis on rule-of-law orthodoxy is similarly not a proven approach to integrating law and development.

Moreover, the orthodox programs pursued by donor agencies (whether top-down justice sector or economic law reform initiatives) are not priorities for the disadvantaged, who typically have more immediate concerns of livelihood, health, housing, physical security, and related matters. The programs flow from donors' diagnoses of and prescriptions for legal problems affecting the poor, not what the poor themselves identify. By contrast, the disadvantaged play a role in setting the programmatic priorities of legal empowerment efforts.

In establishing these priorities, disadvantaged groups can also transcend the narrow notions of legal systems, justice sectors, and institution building that characterize the dominant rule-of-law approach. The legal needs of the poor arguably involve non-formal or traditional non-state justice systems and processes that are administered by executive agencies and local governments. Legal empowerment thus goes beyond certain donors' restrictive, and often counterproductive, fixation on the courts.

Another advantage of legal empowerment involves the respective roles of lawyers and poor people. Through their monopoly on legal expertise, attorneys tend to dominate the poor in orthodox rule-of-law programs (and, in fact, conventional legal practice in most countries). Legal empowerment offers instead the promise and, often, the reality of the two groups working as partners in development and rights advocacy. A further related benefit is that the legal empowerment approach can be relatively cost-effective. By building the capacity of paralegals and the disadvantaged more generally, this approach offers a partial alternative to reliance on expensive lawyers (to provide legal services) or costly consultants (to design and implement orthodox rule-of-law programs). In legal empowerment activities, moreover, law is often just part of an integrated development strategy. These activities address law in ways that blend its use with organizational, media, natural resource, gender, and rural development initiatives, as well as activities in a host of other sectors.

Legal empowerment makes explicit a reality that often goes unacknowledged: legal reform and implementation are about politics, although not in the sense of who gets elected to public office. Rather, "politics" refers to power and resource allocation, be it in the family, the community, between groups, or on a national or international level. In theory, development agencies such as the World Bank

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Governance, U.S. Agency for International Development (USAID), Washington, DC, 1998; and Madelein Crohn and William E. Davis, eds., "Lessons Learned: Proceedings of the Second Judicial Reform Roundtable, Williamsburg, VA, May 19-22," National Center for State Courts/ USAID/ Inter-American Development Bank, 1996.

cannot delve into politics, but in reality they do. Development is not only a matter of freedom; it is profoundly political.

### ***The civil society dimension***

A final, salient consideration of the value of legal empowerment is that it features civil society engines of innovation. Ideas and initiative tend to come from indigenous NGOs rather than foreign sources. While there are reasons to be cautious about supporting civil society, these reasons argue for careful consideration of which civil society groups to fund and how to build their capacity, not ignoring them. It is true that some NGOs are composed of middle- or upper-income elites, rather than the poor themselves, but even these elites are more in touch with disadvantaged populations than are many development agency personnel or consultants.

A logical rejoinder to the argument for supporting civil society is that it is arguably more efficient and sustainable to build government institutions. The answer to this logic is four-fold. First, the track record of legal empowerment shows that it can yield impacts even when it does not directly focus on government. Civil society can sometimes bring progress through its interaction with officials, without donor programs aimed at these officials. Second, the problems of justice facing the poor are so multi-faceted that it can be counterproductive to focus on a specific government organization; it is better to let civil society groups and the disadvantaged decide which routes to pursue. Third, as already noted, the prospects for conventional donor efforts to alleviate poverty by reforming laws or building up government legal organizations have been questioned by numerous sources. Fourth and most fundamental, the development community's current focus on the justice sector is far too government-oriented. Donors need to strike a balance that includes more civil society funding.

In considering these matters, it is necessary to clarify what is meant by institutional change. The development community is consumed by a misinterpretation of this concept, which partly accounts for the fixation on working with governmental entities as opposed to civil society. Contrary to most development assumptions, institutions are *not* organizations such as judiciaries or ministries of justice. Instead, institutions really represent the rules of the game, both formal (in terms of laws) and informal (in terms of the many incentives that shape individual and organizational conduct).<sup>8</sup> Legal empowerment is about institutional change and civil society is often an important, even essential, element in this change.

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<sup>8</sup> Douglass C. North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), 3–4.

## The Nature and Impact of Legal Empowerment

### *Types of impact*

In a natural resources management project in Ecuador, the international NGO CARE has worked with local partners to train paralegals<sup>9</sup> and win government recognition of indigenous people's communal land rights. This work contributed to the inclusion of these rights in the country's 1998 constitution.<sup>10</sup> In Senegal, UNICEF has worked with NGOs and women's groups in ongoing efforts against female genital mutilation. These endeavors prompted the country to pass a law banning the practice.<sup>11</sup>

In South Africa, NGO public interest litigation won a string of favorable court decisions that helped undermine the legal foundations of apartheid.<sup>12</sup> Since democracy has come to the country, public interest litigation has helped enforce rights and influence policies pertaining to housing and public health.<sup>13</sup> Like a great deal of legal empowerment work, many of these court cases build on the community and political mobilization of local populations by NGOs.

In Nepal, international and domestic NGOs carried out a women's empowerment project that included organizing and raising awareness of legal rights among 100,000 women. The impact of the project in the villages showed that more women

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<sup>9</sup> In the development context, paralegals are not law firm employees. Rather, they are non-lawyers who often are members of the communities or disadvantaged groups they serve and receive training to provide those communities or groups with law-oriented advice and assistance. For a discussion of paralegal operations, see Stephen Golub, "Nonlawyers as Legal Resources for Their Communities," in *Many Roads to Justice*, ed. Mary McClymont and Stephen Golub (New York: Ford Foundation, 2000), 297–313, [http://www.fordfound.org/publications/recent\\_articles/manyroads.cfm](http://www.fordfound.org/publications/recent_articles/manyroads.cfm).

<sup>10</sup> CARE, "CARE Ecuador's Subir Project," unpublished summary produced by CARE International's Ecuador office, October 2000.

<sup>11</sup> UNICEF, "Senegal Bans Female Genital Mutilation," press release, UNICEF, New York, January 14, 1999, <http://www.unicef.org/newsline/99pr1.htm> (accessed January 9, 2006).

<sup>12</sup> Richard L. Abel, *Politics by Other Means: Law in the Struggle against Apartheid, 1980–1994* (London: Routledge, 1995).

<sup>13</sup> Stephen Golub, "Battling Apartheid, Building a New South Africa," in *Many Roads to Justice*, ed. Mary McClymont and Stephen Golub (New York: Ford Foundation, 2000), 19–54.

were participating in income-allocation decisions and had a fuller understanding of the importance of sending their daughters to school. The project also involved the mobilization of villages against domestic violence, drunkenness, and men's gambling—phenomena that reflect or exacerbate women's poverty.<sup>14</sup>

Philippine NGOs have helped farmers make the most of a flawed but still useful agrarian reform law. The NGOs have written implementing regulations, trained paralegals to help fellow farmers with land conversion processes and tribunals, and occasionally go to court as a last resort.<sup>15</sup> The aforementioned legal empowerment research of the ADB found that the law has been implemented better, with indications of favorable income ramifications, in areas where NGOs are active.<sup>16</sup>

In Bangladesh, NGOs are working in several parts of the country to reform a widespread, village-level dispute resolution procedure called *shalish*. In its traditional form, shalish is easily available and comprehensible to the poor, but the process is often corrupt. Since male village elders typically run the process, it can be extremely gender-biased. The NGOs have put a dent in these problems. Among other achievements, women's active participation in shalish has increased, so that they are less likely to be silent, suffering observers of decisions affecting their lives.<sup>17</sup>

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<sup>14</sup> Rajju Malla Dhakal and Misbah M. Sheikh, 1997, "Breaking Barriers—Building Bridges: A Case Study of USAID/Nepal's SO3 Women's Empowerment Program," Asia Foundation, Washington, DC; and Gwen Thomas and Ava Shrestha, 1998, "Breaking New Ground: A Case Study of Women's Empowerment in Nepal," Women's Empowerment Program, USAID, Nepal.

<sup>15</sup> For a general discussion of these NGOs and similar ones working in other sectors, see Stephen Golub, "Participatory Justice in the Philippines," in *Many Roads to Justice*, ed. Mary McClymont and Stephen Golub (New York: Ford Foundation, 2000), 197–231. Also see Stephen Golub, 1998, "The Growth of a Public Interest Law Movement: Origins, Operations, Impact, and Lessons for Legal Systems Development," in *Organizing for Democracy: NGOs, Civil Society and the Philippine State*, ed. G. Sidney Silliman and Lela Garner Noble (Honolulu: University of Hawaii Press), 254–279.

<sup>16</sup> Golub and McQuay, 2001, *Legal Empowerment*, Appendix 1, "The Impact of Legal Empowerment Activities on Agrarian Reform Implementation in the Philippines," 127–134.

<sup>17</sup> Stephen Golub, "From the Village to the University: Legal Activism in Bangladesh," in *Many Roads to Justice*, ed. Mary McClymont and Stephen Golub (New York: Ford Foundation, 2000), 197–231; and Sumaiya Khair, "Alternative Approaches to Justice: A Review of ADR Initiatives under the Democracy Partnership," unpublished report prepared for the Asia Foundation's Bangladesh office, May 2001.

Finally, it should be noted that the World Bank has started to support legal empowerment initiatives in various ways, although they are still minor and largely experimental elements of its legal work. For instance, the Bank supported a compilation of legal empowerment experiences in connection with a workshop on legal services for the poor in 2003.<sup>18</sup> It also funded pilot programs that offered legal services to women in Ecuador, Jordan, and several African nations. Its most ambitious legal services effort is its “Justice for the Poor” program in Indonesia, launched under the rubric of the Bank’s Social Development branch in 2002.<sup>19</sup> The latter, multi-faceted program includes support for research, paralegals, mediation, litigation, anti-corruption activities, and the integration of legal services into programs in other sectors.

### *Evidence of impact*

The efforts described above, together with other legal empowerment initiatives, have been documented to varying quantitative and qualitative degrees that fall between the extremes of full and no confirmation of impact. It is unclear, however, whether this documentation represents rigorous evidence of impact or meets World Bank research standards. For the purposes of this paper, it is nevertheless useful to review some of the findings of the ADB legal empowerment study,<sup>20</sup> specifically the work of three Bangladeshi NGOs that, to various degrees, implement law-oriented activities. While the results discussed here should not be taken as absolutely probative, they provide grounds for the possible expansion of support for and research on such efforts.

One of the NGOs in the ADB study was a women’s organization with thousands of members. The NGO focused on integrating group formation with non-formal legal education, together with other types of training and shalish reform. The second NGO focused on community development and advocacy to help the poor gain access

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<sup>18</sup> Daniel Manning, *The Role of Legal Services Organizations in Attacking Poverty* (Washington, DC: World Bank, 2001).

<sup>19</sup> World Bank, “World Bank Justice for the Poor: Reforming Legal Institutions in the Sub-National Environment,” World Bank Social Development Office, Jakarta, Indonesia, 2005.

<sup>20</sup> The 2001 Asian Development Bank legal empowerment study looked at the legal empowerment experience in seven Asian countries, and conducted survey research in two of them, the Philippines and Bangladesh. See Golub and McQuay, 2001, *Legal Empowerment*, 135–149.

to public land. The third was a legal services NGO that both conducted shalish and provided other legal services to the poor. The ADB research compared partner (or “intervention”) populations served by these NGOs to control populations (i.e., demographically similar populations not served by the NGOs) in nearby areas. It is noteworthy that the educational and income levels of the control populations were higher, which might make the NGO impact all the more significant in some respects.

The study found that the populations where the NGOs intervened knew the law better than those of the control groups.<sup>21</sup> For instance, 68 percent of the members of the women’s NGO knew of the legal recourses available to them if their husbands’ families subjected them to abusive and violent demands for illegal dowry payments. This figure contrasted with 24 percent for the control group. Such knowledge, combined with organizing and other activities by the NGOs, often affects both conduct and material circumstances. Eighty-five percent of the members of the women’s NGO reported that young women’s families did not have to pay a dowry, as opposed to 40 percent for the control group. Similarly, 36 percent of respondents to a survey conducted by the community development NGO reported success in gaining access to land, as opposed to zero percent for the control population.

Legal empowerment work also favorably impacts community attitudes and dynamics. For example, when young women took the initiative to solve their own problems, only 11 percent of the community development NGO population saw them as “creating more problems,” versus 32 percent for the control population. Across the partner populations of the three NGOs, just 25 percent would first turn to local elites for help with a matter of injustice versus 57 percent for the control groups. The gap was even greater for women.

Finally, the ADB study registered a surprising impact relating to governance. Contrary to the impression in some quarters that NGOs sow distrust of government, the NGO populations consistently scored higher than the control groups in satisfaction with government officials and services. The women’s NGO and community development NGO also scored higher than their control groups in favorable attitudes toward women in government and favorable interactions with government officials.

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<sup>21</sup> Golub and McQuay, 2001, *Legal Empowerment*, Appendix 2, “The Impact of Legal Empowerment on Selected Aspects of Knowledge, Poverty, and Governance in Bangladesh: A Study of Three NGOs,” 135-149.

### **Implications for the Development Community**

The most basic problem confronting law and development—a problem addressed by legal empowerment—is the lack of legal implementation: the fact that the existing laws in most developing countries are not enforced on the ground. Furthermore, government-focused efforts to reform laws and institutions often have a negligible impact on the poor. Unless the poor (or their allies) work to implement law on a case-by-case, community-by-community, group-by-group basis, favorable laws and legal reforms will not exist for them.

Yes, there is an ongoing need for legal reform, but such reform means nothing to the disadvantaged unless it is implemented, and implementation often does not take place if it primarily focuses on strengthening government capacities and systems. Often favorable court decisions are not enforced in many countries unless there are extensive follow-up efforts. One comment heard over and over, that consistently cuts across borders, is: “Even when our laws are good, they’re not enforced.”

Legal empowerment is not, however, only about legal implementation. In fact, most of the legal empowerment examples cited here include law reform, but these reforms differ from those usually promoted by development agencies. They largely sprang from domestic civil society efforts, not from externally driven initiatives to which many donors are accustomed. Such homegrown efforts are usually preferable to those flowing from development agency programs and consultants—not least because they reflect local insights and build local capacity for further reforms.

Justice remedies also frequently build on work carried out by other development sectors. For instance, it is often only possible to address the legal needs of the disadvantaged after group formation has occurred for such basic needs as microcredit, livelihood, or reproductive health. There are many contexts in which an NGO first enters a community to work on these “safer” issues. It can cautiously expand to explicitly address rights concerns only after it and its partner populations have established local legitimacy.

Legal empowerment is often about governance and the many government processes and decisions that have justice implications for the disadvantaged. It is even more about poverty alleviation, both in the narrow sense of income levels and in the broader sense of the poor’s power over their own lives.

Legal empowerment constitutes a basic rights approach to development. Yet it often departs from the elaborate rights-based approaches promulgated by the United Nations. The U.N.’s intention to integrate rights and development is admirable, but the comprehensive nature of its effort, which attempts to view all development through a human rights lens, can prove counterproductive in some contexts. Specifically, it could end up being too doctrinaire on one hand, or a cover for programs that

actually have negative implications for human rights and development on the other. In contrast, legal empowerment initiatives are relatively straightforward attempts to help the disadvantaged understand and use their rights.

Legal empowerment has the added advantage of pursuing rights that are most crucial to the poor. International human rights are, of course, important. In many contexts, however, rights that are national, local, or project-specific in nature are of greater salience to the poor.<sup>22</sup> For example, low-income farmers and their allies are much more likely to call for national land reform or local land use laws than an international convention.

As suggested above, in view of the limited capacity or will of government agencies in many countries, civil society takes the lead in legal empowerment efforts. For donors, this means that in certain contexts it can be useful to support international and domestic NGOs and build civil society capacity where it is weak or nonexistent. It can also mean that donors could effectively provide core funding to these NGOs to construct and pursue their own agendas and those of the poor. This approach contrasts with simply viewing these organizations as implementers of development agency projects.

## **Implications for the World Bank**

Having sketched the implications of the experiences of legal empowerment efforts for the development community in general, let us turn to the specific operational implications for the World Bank.

### ***Rule-of-law programs***

For rule-of-law programs, the logical implication is to fund and promote the civil society side of the equation. The World Bank can invest large sums in reforming laws and judiciaries, but this does not make much difference to the poor unless they

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<sup>22</sup> Of course, there are many other contexts in which national, local, and/or project-specific laws and regulations are inadequate or even counterproductive, perhaps particularly as they relate to gender. Although legal empowerment activities may cite international human rights and educate the poor regarding them, they nevertheless rely more on domestic mechanisms and strategies. These domestic approaches can involve pressing for law reform or favorable interpretations of existing laws, as well as placing a greater emphasis on political, organizing, or development activities that are not blocked by counterproductive laws.

have the assistance or capacity to make use of these reforms. Particularly in light of the Bank's increasing use of grant funds, there can and should be avenues for supporting legal empowerment programs. Perhaps the best avenues for providing such support would be to channel funds through established domestic or international NGOs that work with local groups and can build local capacity more effectively and flexibly than can the Bank or most governments.

A specific program that the Bank might consider supporting is clinical legal education and other efforts to introduce law students and young lawyers to the legal empowerment experience.<sup>23</sup> The purpose of such programs would not be to replicate the experience of the law and development movement of the 1960s and early 1970s (which was far too ambitious concerning the degree of societal change that legal education can produce), but rather, to develop and fund more appropriate initiatives that build skills and capacities that students and young lawyers do not learn in law school, but are fundamental to working with the poor. These skills include how to teach the poor most effectively about their rights, train and work with paralegals, integrate legal work into other development sectors, listen to disadvantaged individuals and groups, and undertake political as well as legal analyses of the challenges, and even dangers, that legal advocacy can generate.

The Bank's legal vice presidency should institutionalize appropriate expertise by hiring lawyers and perhaps non-legal professionals with multi-country experience in legal empowerment. Non-legal professionals are relevant because supporting legal empowerment involves much more than knowing a country's laws. Instead, it can require comparative experience, knowledge of the political and cultural contexts, and strategizing on how to support local implementation and reform efforts. For example, some of the best program officers hired by the Ford Foundation to work on its law programs have been non-legal practitioners because they bring broader perspectives to the table.

Echoing initiatives that the Bank abandoned in the 1990s, all of the Bank's lawyers should be required to spend a month with legal services NGOs and other organizations that work on the justice needs of the poor. This would expose them to the realities that the disadvantaged confront and the degree to which current Bank legal reform programs address those realities—or fail to do so. The goal

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<sup>23</sup> For a discussion of relevant experience and strategies, see Stephen Golub, "Forging the Future: Engaging Law Students and Young Lawyers in Public Service, Human Rights, and Poverty Alleviation," Open Society Justice Initiative Issues Paper, New York, 2004, [http://www.justiceinitiative.org/db/resource2/fs?file\\_id=12880](http://www.justiceinitiative.org/db/resource2/fs?file_id=12880) (accessed January 27, 2006).

here is not to revolutionize their thinking about law and development, but simply to broaden their horizons.

The following point goes without saying, but it merits emphasis anyway: in undertaking any legal empowerment initiative, it is crucial to adopt a long-term perspective. It is widely recognized that judicial reform takes years or decades to be effective. The same applies to legal empowerment. Furthermore, just as no one would consider state-oriented legal reform to be a cure-all for a country's development ills, neither is legal empowerment. It impacts particular populations and policies; it is not a panacea.

### ***Social Development and other Bank units***

As already noted, legal empowerment often is a manifestation of the community-driven development supported by the Bank, although it adds an explicit rights component to the mix. The Bank's Social Development units should thus consider steps to initiate legal empowerment programs along the lines of the Justice for the Poor program in Indonesia.

More broadly, there is a strong case for creating explicit loan or grant programs for legal empowerment, starting with assessments of the justice needs of the poor. These programs would fall under the rubric of social development units because they involve many relevant non-legal skills and perspectives relevant to the units' personnel and activities. However, this approach does not preclude the legal vice presidency from launching such initiatives, were it so inclined, and if, as suggested here, it hires personnel with appropriate experience.

Legal empowerment also offers a mechanism through which social development can be infused into many sectoral Bank programs by familiarizing beneficiaries with their rights with respect to those sectors and programs. Among other benefits, legal empowerment efforts can provide feedback or monitoring mechanisms through which the Bank and its senior government counterparts can assess whether a program's field personnel are doing their jobs. Such a mechanism would work to combat corruption and advance efficiency.

The challenge of integrating legal and sectoral efforts should not be underestimated. A few years ago, for example, there was an ill-fated effort to mainstream legal empowerment into what was to be an ADB-funded irrigation program in Indonesia. (The term "ill-fated" is used here, not because of problems with the legal empowerment component, but because of problems that the loan itself encountered.) The greatest foreign-language problem encountered was not the English-Indonesian divide, but the different languages and orientations of lawyers and irrigation engineers. But such divides can be bridged.

A final and fundamental recommendation is for social development personnel to undertake the kind of legal empowerment research that the ADB supported in Bangladesh, but on a more rigorous, larger, and multi-country basis. Given that the World Bank studies countless development topics, it can and should devote several million dollars to exploring legal empowerment, which is a crucial interface between rights and development.

## **Conclusion**

The development community needs to adopt a much broader view of justice problems and processes. Its emphasis on judicial reform, or other narrow notions of the justice sector, often does not overlap with the legal needs of the poor. Their justice and rights-oriented needs involve administrative law; ministries that control agrarian, aquatic, or upland resource allocation; local governments; non-formal or traditional dispute resolution mechanisms; and even the rights of the poor in development programs.

Justice remedies similarly need to be viewed much more broadly. Yes, these remedies can involve courts and litigation, but in many contexts they involve paralegal work, group formation, community organizing, use of the media, conducting and publicizing research, coalition building, and identifying allies and opponents in government. These remedies are as much or more political than they are legal. Most importantly, they involve supporting or strengthening civil society as a mechanism for real institutional change.

This paper has not contended that judicial reform or other top-down, orthodox initiatives are irrelevant; they may sometimes benefit the disadvantaged. But from the point of view of the poor, much of this work is froth floating on the surface of the sea. It does not penetrate the issues of justice that they confront. When considering the potential impact of legal empowerment work, perhaps one should ask: Compared to what? The track record of state-focused law programs is not so impressive that alternative or complementary options, such as legal empowerment, should not be considered.

In summary, legal empowerment can help make the rule of law a reality for the poor and strengthen the endeavors of other development sectors. It merits increased funding, including support for research that can illuminate its impact and lessons for the development community.

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# TRANSNATIONAL HUMAN RIGHTS AND LOCAL ACTIVISM: MAPPING THE MIDDLE

SALLY ENGLE MERRY

*How do transnational ideas, such as human-rights approaches to violence against women, become meaningful in local social settings?<sup>1</sup> How do they move across the gap between a cosmopolitan awareness of human rights and local socio-cultural understandings of gender and family? Intermediaries, such as community leaders, NGO participants, and social movement activists, play a critical role in translating ideas from the global arena down and from local arenas up. These are people who understand both the worlds of transnational human rights and local cultural practices, who can look both ways. They are powerful in that they serve as knowledge brokers between culturally distinct social worlds, but vulnerable to manipulation and subversion by states and communities. This article theorizes the process of translation between these two worlds and argues that anthropological analysis of translators helps to understand how human rights ideas and interventions circulate around the world and transform social life.*

## **Introduction**

How are transnational ideas, such as human rights approaches to violence against women, adopted in local social settings? How do they move across the gap between

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<sup>1</sup> The author is grateful to the Cultural Anthropology Program and Law and Social Sciences Program, National Science Foundation, BCS-9904441, for support for this research. Research support from Wellesley College and the Mellon New Directions Fellowship is also greatly appreciated, as are a fellowship year at the Carr Center for Human Rights Policy at the Kennedy School of Harvard University and a semester as a visiting fellow at the American Bar Foundation. Mark Goodale, Richard Rottenburg, and Aradhana Anu Sharma provided helpful comments on an earlier draft. This is an abridged version of an article published in March 2006 in the *American Anthropologist*.

a cosmopolitan awareness of human rights and local socio-cultural understandings of gender, family, and justice? Ethnographic research shows that human rights ideas and practices developed in one locality are being adopted or imposed transnationally in a variety of ways. Legal documents and policy statements produced in transnational sites, such as U.N. conferences, circulate globally through the work of movement activists and states. Although the historical foundations of human rights and much of their content is western, they are currently important for social justice movements in many parts of the world. Groups such as indigenous peoples, ethnic minorities, and women,<sup>2</sup> as well as military officials and government employees in Colombia<sup>3</sup> and the United States use human rights language and techniques. Mark Goodale describes a local activist in rural Bolivia who delivers a long lecture on women's human rights to each couple he marries,<sup>4</sup> while Celestine Nyamu-Musembi shows how women's human rights claims to land ownership affect local administrative forums in Kenya.<sup>5</sup> Hussaina J. Abdullah describes the growth of human rights and civil liberties activism in Nigeria, while noting that the religious revivalism and authoritarian state feminism emerging at the same time have reinforced patriarchal structures, undermining the challenges posed by the explosion in human rights activism.<sup>6</sup>

There is also active resistance to these human rights claims by elites who fear loss of power, states unwilling to have their activities exposed, and men who want to retain their authority over women. Local leaders in many parts of the world resist the human rights claims of subordinated groups by asserting that these claims are

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<sup>2</sup> See, for example, Jane K. Cowan, Marie-Benedict Dembour, and Richard Wilson, eds., *Culture and Rights* (Cambridge: Cambridge University Press, 2001).

<sup>3</sup> Winifred Tate, "Counting the Dead: Human Rights Claims and Counter-claims in Colombia," Ph.D. diss., Department of Anthropology, New York University, 2004.

<sup>4</sup> Mark Goodale, "Legal Ethnography in an Era of Globalization: The Arrival of Western Human Rights Discourse to Rural Bolivia," in *Practicing Ethnography in Law: New Dialogues, Enduring Methods*, ed. June Starr and Mark Goodale (New York: Palgrave Macmillan, 2002), 50–72.

<sup>5</sup> Celestine Nyamu-Musembi, "Are Local Norms and Practices Fences or Pathways? The Example of Women's Property Rights," in *Cultural Transformation and Human Rights in Africa*, ed. Abdullahi An-Na'im (London: Zed Books, 2002), 126–50.

<sup>6</sup> Hussaina J. Abdullah, "Religious Revivalism, Human Rights Activism, and the Struggle for Women's Rights in Nigeria," in An-Na'im, *Cultural Transformation and Human Rights in Africa*, 152–3.

an alien, western import not suited to local normative systems, a position framed most strongly in the claim that Asian values are distinct from human rights.<sup>7</sup>

This article explores the practice of human rights, focusing on where and how human rights concepts and institutions are produced, how they circulate, and how they shape everyday lives and actions. It is part of a move within anthropology to skirt the universalism/relativism debate which preoccupied anthropologists in the 1990s and focus instead on the social processes of human rights implementation and resistance.<sup>8</sup> It does not debate the universality of human rights or the theoretical opposition between culture and rights. Instead of asking if human rights are a good idea, it explores what difference they make.<sup>9</sup>

Understanding how human rights circulate and are transplanted raises larger questions about how cultural life is changing in response to globalization and the deepening inequalities in wealth and power. It is not clear how the spread of human rights institutions and discourses is reshaping these inequalities. Is human rights law simply a strategic weapon used by powerful groups to legitimate their power grabs—a window dressing for real politik? Is it a form of neo-imperialism by which the West claims to save the benighted, savage peoples of the rest of the world while pursuing its own interests? Or does it provide an emancipatory tool for vulnerable people, such as women, racial minorities, or indigenous peoples? Are there ways in which it promotes social equality, the rule of law, and protection against the ravages of the market? Clearly, there are no simple answers to these pressing questions.

This article uses empirical examples of the appropriation of women's human rights to analyze the process by which human rights are remade in the vernacular. Women's human rights are a distinctive facet of human rights in that they are still new and regarded as marginal by many human rights institutions. The central focus of women's rights activism has been on violence against women. The causes of this violence are social, economic, and political, often involving poverty, displacement,

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<sup>7</sup> See Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights* (London and New York: Cambridge University Press, 1999).

<sup>8</sup> See Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law into Local Justice* (Chicago: University of Chicago Press, 2006).

<sup>9</sup> See Richard A. Wilson, "Introduction: Human Rights, Culture and Context," in *Human Rights, Culture, and Context: Anthropological Perspectives*, ed. Richard A. Wilson (London: Pluto Press, 1996); Dembour, Cowan, and Wilson, 2001, *Culture and Rights*; Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge: Cambridge University Press, 2003).

armed conflict, and state policies, but the human rights system conceptualizes violence against women largely as individual injuries. Indeed, feminists have long been skeptical about rights approaches to gender violence because of the narrow conception of the problem embedded in this discourse.

As ideas from transnational sources travel to small communities, they are typically vernacularized, or adapted to local institutions and meanings. The concept of vernacularization was developed to explain the nineteenth-century process by which national languages in Europe separated, moving away from the medieval transnational use of Latin and creating a new and more differentiated sense of nationhood in Europe.<sup>10</sup> Human rights language is similarly extracted from the universal and adapted to national and local communities. The term indigenization refers to shifts in meaning, to the way new ideas are framed and presented in terms of existing cultural norms, values, and practices. Indigenization is the symbolic dimension of vernacularization. It is commonly used in development programs, as well as human rights implementation. For example, Kim Berry describes how an Indian non-governmental organization (NGO) focusing on women's development uses slides of pre-Aryan goddesses to develop a concept of *shakti*, or feminine spiritual power, as a way for women to imagine their power to contest all forms of oppression.<sup>11</sup> The NGO staff members interweave practices and discourses from the locality, from elsewhere in the country, and from outside India to produce a hybrid feminist discourse of *shakti*. This discourse produces new subjectivities that are embraced by members and negotiated along with prior ones.<sup>12</sup>

The people in the middle are a key dimension of the process of vernacularization—those who translate the discourses and practices from the arena of international law and legal institutions to specific situations of suffering and violation. Intermediaries, or translators, work at various levels to negotiate between local, regional, national, and global systems of meaning. Translators refashion global rights agendas for local contexts and reframe local grievances in terms of global human-rights principles and activities. However, the source of global ideas and

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<sup>10</sup> Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism*, rev. ed. (London: Verso, 1991).

<sup>11</sup> Kim Berry, "Developing Women: The Traffic in Ideas about Women and their Needs in Kangra, India," in *Regional Modernities: The Cultural Politics of Development in India*, ed. K. Sivaramakrishnan and Arun Agrawal, 86–7 (Stanford, CA: Stanford University Press, 2003).

<sup>12</sup> Berry, 2003, "Developing Women," 94–6.

institutions is usually another locality that has developed an idea or practice that is translated into a form that circulates globally and is then transplanted into another locality. This work is done by actors who move between the discourses of the localities in which they work, taking ideas from one place and redefining them or adapting them to another.<sup>13</sup> Multiple translators connect transnationally, circulating discourses and particular social contexts.

The term “local” is, of course, deeply problematic here, as is its oppositional twin, “global.” In the context of discussions of transnationalism, local tends to stand for a lack of mobility, wealth, education, and cosmopolitanism, as well as recalcitrant particularity, while global encompasses the ability to move across borders; to adopt universal moral frameworks; and to share in the affluence, education, and cosmopolitan awareness of elites from other parts of the world. Thus social class, education, travel, and transnational consciousness blend with geography in defining these terms. Clearly, the cluster of ideas evoked by local and global goes far beyond spatial referents. Their wider array of meanings is relevant to understanding the process of localizing human rights. Despite considerable critique of the terms “global” and “local,” as well as numerous studies that show that things we call global are often circulating “locals,” these terms have a recalcitrant tendency to shape discussions of transnational phenomenon.

Translators are both powerful and vulnerable. They work in a field of conflict and contradiction, able to manipulate others who have less knowledge than they, but subject to exploitation by those who installed them. As knowledge brokers, translators channel the flow of information, but they are often distrusted, since their ultimate loyalties are ambiguous and they may be double agents. They are powerful in that they have mastered both of the discourses of the interchange, but vulnerable to charges of disloyalty or double-dealing. They usually have greater knowledge and commitment to one side than the other, and their translation skills can undermine the communities they represent, as in the famous cases of La Malinche and Sacajawea.<sup>14</sup>

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<sup>13</sup> For example, Kim Berry discusses the way Indian policies toward women’s development were shaped by the U.S. emphasis on the woman as housewife, an idea that conformed to the ideas of local elites in some parts of India—that a family’s honor is connected to a woman’s confinement to the home. American ideas of female domesticity also conformed to Indian nationalist representations of women as mothers of the nation (2003, “Developing Women,” 84–85).

<sup>14</sup> La Malinche and Sacajawea were women who served as intermediaries and translators between explorers and native communities in Mexico and the USA; both are viewed

Since translation takes place within fields of unequal power, translators' work is influenced by funding, ethnic and gender commitments, and institutional frameworks that create opportunities for wealth and power. They may have greater interest in the source or in the target of the transaction. Moreover, translators work within established discursive fields, which constrain the repertoire of ideas and practices available to them. Intermediaries face the dilemma that their power depends on their ability to look both ways and work with conflicting value systems, but they are vulnerable to the demands of more powerful actors who put them in place, as well as their followers' suspicions of disloyalty.

Translators are not always successful. New ideas and practices may be ignored, rejected, or folded into pre-existing institutions to create a more hybrid discourse and organization, or they may be subverted—seized and transformed into something quite different from the transnational concept, out of the reach of the global legal system, but nevertheless called by the same name. Some of those who talk about women's human rights under sharia in northern Nigeria, for example, envision a different set of rights from those articulated in international human rights conventions. For example, the leader of an Islamic women's organization in northern Nigeria said that one reason women suffer fistula from protracted childbirth is that when their husbands are away, they cannot get permission to leave the house to seek medical care.<sup>15</sup> The staff of this organization teach young women that they have rights under sharia to leave the house under these circumstances, but they do not talk about women's human rights under international law or gender equality. In the context of the recent politicized expansion of sharia criminal law in many northern Nigerian states, references to women's rights under sharia are more likely to be accepted than human rights arguments. Thus, women's human rights, in this context, become women's rights under sharia.

## **Women's Human Rights**

Violence against women has been a key issue for women's movements in many parts of the world since the 1960s, but only recently has it been defined as a human rights violation. The battered women's movement that began in Europe and North America

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alternatively as heroes or as having betrayed their people. La Malinche helped Cortes conquer the Aztecs; Sacajawa was a Shoshoni woman who accompanied the Lewis and Clark expedition to the American West.

<sup>15</sup> Author interview, March 2005, Kano, Nigeria.

in the 1970s sought to improve the position of women through a variety of social interventions, such as counseling, shelters, and strengthening laws and enforcement at the local and national level.<sup>16</sup> Similar movements focusing on violence against women developed in other parts of the world at the same time.<sup>17</sup> After a decade of mobilization and pressure, women's groups succeeded in 1993 in persuading the world conference on human rights in Vienna to declare that women's rights are human rights.<sup>18</sup> The Fourth World Conference on Women in 1995, often called the "Beijing Conference," produced an influential policy document, the "Platform for Action," that defined violence against women as one of 12 key areas for action from governments, the international community, and civil society, and women's human rights as another area.<sup>19</sup> The major women's human rights convention, the *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW), included this issue with a new general recommendation in 1992.<sup>20</sup> Many women's groups around the world worked to establish the idea that violence against women is a human rights violation, but battered women's groups still put priority on providing shelter and social services to battered women, passing national laws

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<sup>16</sup> See Susan Schechter, *Women and Male Violence: The Visions and Struggles of the Battered Women's Movement* (Boston: South End Press, 1982).

<sup>17</sup> See Amrita Basu, ed., with assistance of C. Elizabeth McGrory, *The Challenge of Local Feminisms: Women's Movements in Global Perspective* (Boulder, CO: Westview Press, 1995); and Urvashi Butalia, "Confrontation and Negotiation: The Women's Movement's Responses to Violence Against Women," in *The Violence of Development: The Politics of Identity, Gender, and Social Inequalities in India*, ed. Karin Kapadia (London: Zed Books, 2002), 207–35.

<sup>18</sup> Elisabeth Friedman, "Women's Human Rights: The Emergence of a Movement," in *Women's Rights, Human Rights: International Feminist Perspectives*, ed. Julie Peters and Andrea Wolper, 18–35 (New York: Routledge, 1995).

<sup>19</sup> Fourth World Conference on Women, *Beijing Declaration* and "Platform for Action," Beijing, China, September 15, 1995, UN Doc. A/CONF. 177/20 (1995) and A/CONF. 177/20/Add.1, 33–4, <http://www.un.org/womenwatch/daw/beijing/platform/declar.htm> (accessed August 15, 2006); also see Annelise Riles, "Infinity within the Brackets," *American Ethnologist* 25 (1998):378–98.

<sup>20</sup> OHCHR, *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW, U.N. General Assembly res. 34/180, December 18, 1979) included this issue with a new general recommendation in 1992: General Recommendation 19 to the CEDAW convention. [http://www.ohchr.org/english/countries/ratification/9\\_a.htm](http://www.ohchr.org/english/countries/ratification/9_a.htm) (accessed August 15, 2006).

against domestic violence, enhancing the criminal justice response, and raising public awareness of the problem.<sup>21</sup>

Although it had begun earlier, during the 1990s and 2000s, core human rights principles concerning women spread more extensively from their global sites of production in New York and Geneva to local settings around the world. How did these ideas travel? What are the paths by which human rights ideas become relevant to local settings? The nature of cultural translation is an old anthropological problem, but the globalization of human rights discourse raises it in a new guise.

### ***Framing a Social Movement***

One approach to understanding the adoption of rights discourse is through the concept of framing, developed by social movement theorists to analyze what makes an idea persuasive in a social movement. Frames are not themselves ideas, but ways of packaging and presenting ideas that generate shared beliefs, motivate collective action, and define appropriate strategies of action.<sup>22</sup> Snow and Bedford use the term “framing” to refer to the signifying work of social movement activists: “they frame, or assign meaning to and interpret relevant events and conditions in ways that are intended to mobilize potential adherents and constituents, to garner bystander support, and to demobilize antagonists.”<sup>23</sup> The frame is an interpretive package surrounding a core idea.<sup>24</sup> It can produce significant change in individual consciousness about an issue or problem or, more broadly, in a wider domain in a manner similar to religious conversion.<sup>25</sup> Indigenization occurs when an innova-

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<sup>21</sup> See Merry, 2006, *Human Rights and Gender Violence*.

<sup>22</sup> See David Snow et al., “Frame Alignment Processes, Micromobilization, and Movement Participation,” *American Sociological Review* 51, no. 4 (1986): 464–81; and Sidney Tarrow, *Power in Movements: Social Movements and Contentious Politics*, 2nd ed (Cambridge: Cambridge University Press, 1998).

<sup>23</sup> David Snow and R.D. Benford, “Ideology, Frame Resonance, and Participant Mobilization,” *International Social Movement Research* 1:198, as cited in Snow, “Framing Processes, Ideology, and Discursive Fields,” in *The Blackwell Companion to Social Movements*, ed. David A. Snow, Sarah A. Soule, and Hanspeter Kriesi (Malden, MA: Blackwell, 2004), 384.

<sup>24</sup> Myra Marx Ferree, “Resonance and Radicalism: Feminist Framing in the Abortion Debates of the United States and Germany,” *American Journal of Sociology* 109, no. 2 (September 2003):308.

<sup>25</sup> See Snow, 2004, “Framing Processes, Ideology, and Discursive Fields,” 394.

tion is framed in terms of local symbols and terminology. In social movements, the products of this framing activity are called “collective action frames.” These frames can have powerful effects on the way situations are understood and on the tactics that their supporters deploy.<sup>26</sup>

Social movement theorists point out that the frame needs to be resonant with cultural traditions and narratives to be appealing.<sup>27</sup> Snow et al. argue that the higher the degree of frame resonance, the greater the likelihood it will be successful, all else being equal.<sup>28</sup> However, Ferree counters that resonant discourses are less radical than non-resonant ones, and that some movement leaders may chose the non-resonant approach in order to induce greater social change in the long run.<sup>29</sup> Indeed, resonance is a costly choice since it may limit the possibility of long-term change. Choosing resonance requires sacrificing ideals, limiting demands on authorities, and possibly excluding significant groups and their demands from the movement.<sup>30</sup>

This is precisely the problem human rights activists confront: if they present human rights as compatible with existing ways of thinking, these ideas will not induce change. It is only their capacity to challenge existing power relations that offers radical possibilities.<sup>31</sup> For example, the success of the battered women’s movement in the United States depended on fundamentally changing the way women understood violence from their partners, shifting it from discipline to abuse. On the other hand, to be adopted, human rights ideas must be framed in indigenous cultural categories. Translators must assess to what extent they can challenge existing modes of thinking and to what extent they must conceal radical ideas in familiar packages.

Frame theory has been criticized for its overly fixed understanding of frames, however. Mark Steinberg argues that the metaphors of frame and package suggest

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<sup>26</sup> Sanjeev Khagram, James V. Riker, and Kathryn Sikkink, eds. *Restructuring World Politics: Transnational Social Movements, Networks, and Norms* (Minneapolis: University of Minnesota Press, 2002), 12–13.

<sup>27</sup> Snow, 2004, “Framing Processes, Ideology, and Discursive Fields,” 401.

<sup>28</sup> Snow and Benford, 1986, “Ideology, Frame Resonance, and Participant Mobilization,” 477.

<sup>29</sup> Ferree, 2003, “Resonance and Radicalism,” 305.

<sup>30</sup> *Ibid.*, 340.

<sup>31</sup> Martin Chanock, “ ‘Culture’ and Human Rights: Orientalizing, Occidentalizing and Authenticity,” in *Beyond Rights Talk and Culture Talk*, ed. Mahmood Mamdani, 15–37 (New York: St. Martin’s Press, 2000).

that these discourses operate as bounded and linked issue statements, ignoring the continuous contestation over meanings, the susceptibility to change, and the ambiguities of these meanings.<sup>32</sup> He suggests talking about collective action discourses as repertoires rather than frames.<sup>33</sup> Moreover, frame analysis neglects the constraints that discourse imposes on actors, who must work within established, often hegemonic, discursive fields that determine the frameworks that are available. Actors have unequal power to reshape these fields.<sup>34</sup> Steinberg advocates a more dialogic analysis, which sees the production of meaning as contested, shaped by group conflict and the internal dynamics of the discourse itself.<sup>35</sup> From a social semiotic perspective, meanings are produced by the interaction between systems of signs and social action, so that words may be interpreted differently by activists and their targets. Given the multivocality of messages, it is possible for actors and targets to interpret these signs differently than intended. There are limits to the capacity of the producers of these discourses to control their meanings. Human rights translators work in situations of this kind, within the constraints of existing discursive fields with complex and multivocal messages open to various—and uncontrollable—interpretations.

Thus for global human rights concepts to be adopted locally, they must be presented within familiar symbolic frameworks and treated as serious violations by local legal institutions.<sup>36</sup> The role of intermediaries is essential. These intermediaries do the work of translation: they put global human rights ideas into local terms and use stories of local indignities and violations to give life and power to global movements. They hold a double consciousness, combining both human rights

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<sup>32</sup> Marc W. Steinberg, “The Talk and Back Talk of Collective Action: A Dialogic Analysis of Repertoires of Discourse among Nineteenth-Century English Cotton Spinners,” *American Journal of Sociology* 105 (1999):740.

<sup>33</sup> *Ibid.*, 750.

<sup>34</sup> *Ibid.*, 199, 742, 747–8.

<sup>35</sup> *Ibid.*, 737.

<sup>36</sup> See Abdullahi An-Na’im, “Toward a Cross-Cultural Approach to Defining International Standards of Human Rights: The Meaning of Cruel, Inhuman, or Degrading Treatment or Punishment,” in *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. Abdullahi An-Na’im (Philadelphia: University of Pennsylvania Press, 1992), 19–44; and An-Na’im and Jeffrey Hammond, “Cultural Transformation and Human Rights in African Societies,” in An-Na’im, *Cultural Transformation and Human Rights in Africa*, 13–38.

concepts and local ways of thinking about grievances. They may be local activists, human rights lawyers, feminist NGO leaders, academics, or a host of other people who have one foot in the transnational community and one at home. But they are constrained by the human rights discourse and by the cultural meanings of the situation where they are working.

### *Translators*

Translators negotiate the middle in a field of power and opportunity. On one hand, they have to speak the language of international human rights preferred by international donors in order to get funds and global media attention. On the other hand, they have to present their initiatives in cultural terms that will be acceptable to at least some of the local community. As they scramble for funds, they need to select issues that international donors are interested in, such as female genital cutting, women's empowerment, or trafficking, and connect these agendas to problems that interest local populations, such as clean drinking water, jobs, or good roads. State policies may silence these efforts or subvert them into reinforcing forms of male authority, even as they seem to be promoting women's human rights.

These people translate up and down. They reframe local grievances up by portraying them as human rights violations. They translate transnational ideas and practices down as ways of grappling with particular local problems. In other words, they remake transnational ideas in local terms. At the same time, they reinterpret local ideas and grievances in the language of national and international human rights. Those occupying the middle are no longer the village headmen of colonial indirect rule but activists providing services and advocacy to local communities. They work within national and transnational movements and discourses of justice and seek to place the experiences of poor people in urban and rural areas in these frameworks. Victim's stories are essential to generating a social movement, but in order to be heard, they are reframed in more globally transportable language by more powerful actors. In the process, victims are often alienated from their stories, which are now retold in a new framework.

The position of the development consultant is in many ways parallel to that of the human rights activist. In development as in human rights implementation, competing ideas of action, objectivity, and value coexist and must be translated in situations of substantial inequality. The consultant, as broker and translator, is caught in the middle. In his fascinating ethnographic study of an organizational improvement project in Ruritania (an unnamed African country), funded by Normland (an unnamed European country), Richard Rottenburg describes the tensions created by differences in perspectives, classifications, and priorities that various actors and organizations

brought to the project.<sup>37</sup> The development bank, the national development ministry, the Normland consultant, the water utilities administration, the regional and urban administration, and finally, the management of the Ruritania urban water utilities, all had different expectations. After twenty years of investing in the country's water supply system, Normland's development bank wanted to solve the water system's lack of economic viability rather than build new capacity. The key problem was the small percentage of consumers who actually paid for their water, a figure of about 30 percent. However, generating an accurate list of customers proved a political as well as administrative nightmare, for which the language of technical development was completely inadequate. Nevertheless, the demands of a structure that required collaboration between the African water engineers and the development consultants meant that this issue remained the subject of a purely technical conversation. A "metacode" based on ideas of development, progress, and technical expertise dominated discussions, although the problems were largely based in political and organizational arrangements, not the technologies of water production.<sup>38</sup>

In his analysis of this development project, Rottenburg describes chains of translation (*Übersetzungsketten*) along which interpretations of situations and facts are developed at various stages of reporting results that then become the basis for further interpretations. These chains stretch from the situation in the urban water utilities ministry of Ruritania to the headquarters of the development bank to the political process in Normland, where politicians must justify the expenditure of tax money on development projects.<sup>39</sup> At each point, facts are gathered, classified, and separated into individual units that have been delineated in project documents, subject always to further subdivision and reclassification within a particular context. As data is subdivided and reclassified, its underlying fragility and unreliability is converted into an appearance of stability and solidity. This leads in some cases to a transformation of the data into forms that promote the ultimate goal of the project and avoid the appearance of mistakes.

The consultant is in the position of negotiating between the donor and the recipient. The recipients, who have resisted supplying the information on customers and the details of the water supply system, see the consultant as "other" and are

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<sup>37</sup> Richard Rottenburg, *Weit hergeholte Fakten: Eine Parabel der Entwicklungshilfe* [Far-fetched facts: A parable of development] (Stuttgart, Germany: Lucius und Lucius, 2002).

<sup>38</sup> *Ibid.*, 232.

<sup>39</sup> *Ibid.*, 228–9.

suspicious of him, but at the same time ask him to produce the numbers necessary for the project to proceed. The donor wants the project to go forward, so ignores the concerns of the consultant that customer data is not forthcoming. Both leave the consultant apparently responsible for the failure of the project. The intermediary becomes the “fall guy.” The African water ministers claim that he failed to provide adequate data and view him suspiciously as the source of development problems, while the donor sees him as failing to meet project goals in time.<sup>40</sup>

Rottenburg’s study highlights the creative work of intermediaries navigating between different and incompatible perspectives on a shared task, as well as their vulnerability to those who refuse to cooperate or maintain unrealistic expectations of the other side. The intermediaries exercise power in their mastery of the technicalities of report writing, yet they are vulnerable as they sift and sort flawed data to fit predetermined goals. Ironically, the African managers are the strongest advocates of a universal approach to water utility management and standards of objectivity. This allows them to present themselves as worthy partners in development, yet insulates them from European managers by assuring them they are carrying out the work according to universal principles, so that further intervention and inspection are unnecessary. The universalist facade obscures the fact that things are still being done in local ways.

There are clear parallels with the translation of human rights ideas from a transnational metacode of human rights law to local situations. Local leaders are often eager to appear compliant with human rights expectations while continuing to act in non-compliant ways: following the form and language of human rights while ignoring local violations is common practice. Human rights translators, like development consultants, are often caught in the middle. As Stacy Pigg observes, however, the development process itself, with its emphasis on transnational expertise juxtaposed to local “traditional culture,” creates the stark oppositions that then require mediators to negotiate.<sup>41</sup> Human rights discourse similarly juxtaposes a transnational expertise onto the problems posed by “culture,” which include “harmful traditional practices.”

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<sup>40</sup> Ibid., 70–83.

<sup>41</sup> Stacy Leigh Pigg, “‘Found in Most Traditional Societies:’ Traditional Medical Practitioners between Culture and Development,” in *International Development and the Social Sciences: Essays on the History and Politics of Knowledge*, ed. Frederick Cooper and Randall Packard (Berkeley: University of California Press, 1997), 265.

### **Forms of Vernacularization**

Vernacularization varies in the extent to which local cultural forms and practices are incorporated within the imported institution. Replication is a process in which the imported institution, and its forms of authority and practice, remains virtually unchanged from the transnational prototype. Adaptation to a particular locale is superficial and decorative, such as the use of local names or images. Hybridization occurs when institutions and symbolic structures created elsewhere merge with those in a new locality, sometimes uneasily. These differences are a matter of degree. Transplanted ideas and institutions often evoke resistance instead of adaptation. They can be subverted when the name and transnational referent are retained, but the content of the ideas and the structure of the organization are dramatically changed.

#### ***Replication***

In translation by replication, the transnational model sets the overall organization, mission, and ideology of an intervention, while the local context provides its distinctive content. The transnational idea remains the same, but local cultural understandings shape the way the work is carried out. Of course, the global prototype was developed in another local situation before being launched into global circulation. Some of its original content is stripped away in the process, although some remains. One example is the effort to adapt a U.S. treatment program for batterers to Chinese concepts of masculinity, which was developed by a women's center in Hong Kong.

Women's centers first developed in the late 1970s and early 1980s in North America and Europe to encourage women to see that they had the right not to be hit and could take their batterers to court. Most provide counseling for women, legal assistance, and in some cases temporary housing. Some also offer training programs for the men who are violent. The technology of batterer treatment programs comes from Euro-American traditions of therapeutic intervention in family situations and from law: men are taught how to recognize their anger and identify their feelings and are told that their partners have rights to equality and freedom from violence.<sup>42</sup> They are also told that their violence is a crime.

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<sup>42</sup> Sally Engle Merry, "Gender Violence and Legally Engendered Selves," *Identities: Global Studies in Culture and Power* 2 (1995):49–73, and Sally Engle Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, NJ: Princeton University Press, 2000).

By 1985, Hong Kong had its first center for battered women, called Harmony House. It was started by Americans and Britons, as well as Hong Kong residents with North American experience, using models from the United States and the United Kingdom. Thus, its origins were local Euro-American practices for dealing with gender violence. When the executive director was interviewed in 2002, she mentioned that she had spent ten years in Canada working on family violence before coming to Harmony House. At first, the center described its program as promoting women's welfare rights, rather than human rights, in order to deflect opposition to a human rights approach that sounded so western.<sup>43</sup> By 2002, three other centers had opened in Hong Kong, offering shelter; hotlines; counseling; legal, financial, and housing assistance; and support groups, plus tutorial groups for children, with considerable private funding and limited state support.<sup>44</sup> When interviewed in 2002, several staff members of the women's centers in Hong Kong said it was important to indigenize these institutions.<sup>45</sup>

In 1995, one of these centers initiated a treatment program for men who battered their wives. The idea of training men who batter not to use violence against their spouses developed in several cities in the United States and United Kingdom in the early 1980s. Some of the best known are Emerge, in Boston, and the Duluth, Minnesota, Domestic Abuse Intervention Program, with its iconic "power/control wheel" expressing the theory that battering is fundamentally about power and control.<sup>46</sup> U.S. programs for batterers focus on teaching anger management, violence control, and gender equality. They use feminist theories that see domestic violence as an expression of patriarchy. They teach men how to avoid using power and control

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<sup>43</sup> Author interview with Executive Director of Harmony House, Hong Kong, March 2002.

<sup>44</sup> *South China Morning Post*, February 16, 2002, 4; Caroline Yeung, "Wife Abuse: A Brief Historical Review on Research and Intervention," *Hong Kong Journal of Social Work* 25 (1991):35; and Catherine So-kum Tang, Antoinette Lee, and Fanny Mui-ching Cheung, "Violence against Women in Hong Kong," in *Breaking the Silence: Violence against Women in Asia*, ed. Fanny M. Cheung, Malavika Karlekar, Aurora De Dios, Juree Vichit-Vadakan, Lourdes R. Quisumbing (Hong Kong: Equal Opportunities Commission, in collaboration with Women in Asian Development and UNESCO National Commission of the Philippines, 1999), 38–58.

<sup>45</sup> Author interviews with staffs of Harmony House and Hong Kong Family Welfare Society, Hong Kong, March 2002.

<sup>46</sup> See Ellen Pence and Michael Paymar, *Education Groups for Men Who Batter: The Duluth Model* (New York: Springer Publishing, 1993).

tactics against their partners. Many of the programs are mandated by courts when a batterer has been convicted or is the subject of a restraining order.<sup>47</sup>

In 1997, Chan Ko Ling, a graduate social work student at the University of Hong Kong, began research on programs for batterers. His goal was to develop an indigenous batterer's treatment program grounded in the values of Chinese masculinity. He hoped this approach would help social workers understand why men had such difficulty talking about their problems with violence and would suggest a more culturally appropriate strategy for working with these men. He was, in other words, transplanting a local North American program into the Hong Kong context, but adapting it to Chinese culture. His dissertation describes his exploration of Chinese conceptions of honor, family, relationships, and achievement, then explains how these ideas prevent men from talking to others about their problems and seeking help for their violence.<sup>48</sup>

Chan participated with two social workers in running two groups, each of which had a two-hour session once a week for eight weeks. He interviewed 19 men before and after the program.<sup>49</sup> Chan argues that it is very difficult for these men to talk about their violence given Chinese conceptions of gender, face, and marital relationships. He explores Confucian, Taoist, and Buddhist traditions of family life, emphasizing the importance of the concept of *yi*, or rightness, as the place where a program should begin.<sup>50</sup> The idea of a "yi husband and following wife" means that men are to be committed to and responsible for the marriage relationship and expect their wives to be obedient and submissive. When marital relations do not follow this pattern, men sometimes become violent.<sup>51</sup> The concept of "face," the public representation of one's self, is also important since personal success is linked

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<sup>47</sup> See Merry, 1995, "Gender Violence and Legally Engendered Selves."

<sup>48</sup> Chan Ko Ling, "Unraveling the Dynamics of Spousal Abuse through the Narrative Accounts of Chinese Male Batterers," Ph.D. diss., publication no. 61332, The University of Hong Kong, 2000. The author interviewed Professor Chan in Hong Kong, March 2002.

<sup>49</sup> The men were mainly working class, but a few were middle class. Most reported significant job stress and financial difficulties. See Ko Ling Chan, "Unraveling the Dynamics of Spousal Abuse through the Narrative Accounts of Chinese Male Batterers," Ph.D. diss., publication no. 61332, University of Hong Kong, 2000, 195.

<sup>50</sup> Chan, 2000, 146.

<sup>51</sup> *Ibid.*, 318.

to face.<sup>52</sup> Because an individual receives help from others depending on how they perceive his power and status, maintaining face in front of others is critical.<sup>53</sup> A man's face is affected by the actions of his wife, who can diminish his face and therefore his power in social relationships. Aggression is the strongest form of face-saving strategy. Interpreting domestic violence in this way shifts responsibility for the violence to the woman, who is viewed as responsible for the loss of face.<sup>54</sup>

This model of Chinese masculinity explains why Chinese men have difficulty seeking help. To talk about their violence is to disclose family secrets and personal weaknesses, leading them to feel embarrassed and to lose face. They are thus reluctant to participate in the voluntary batterers' program. In 2002, Chan said that his program had held only five groups in seven years, with a total of about 30 participants, while during the same period, 6,000 cases of spouse abuse were reported to the social welfare department, 90 percent of them perpetrated by men. He advocates shifting the programs to be more similar to their US prototypes: "Mandatory counseling for batterers, aimed at managing the emotions, anger control, and abusive beliefs of batterers, should be encouraged by the government."<sup>55</sup>

Chan theorizes that Chinese batterers suffer from an impaired ability to differentiate the self, citing an American text on family therapy. In the Chinese context, the undifferentiated self is the product of rigid cultural beliefs of *yi* and putting the pursuit of *yi* over the fulfillment of personal needs.<sup>56</sup> He concludes, "The more rigid the definition of masculinity in *yi*, the more serious the *undifferentiation of self*, and thus the lower is the capacity of conflict resolution. As a result, the higher will be the probability of using violence against their female partners."<sup>57</sup> In an interview with the author, he noted that the problem is not traditional beliefs, but the rigidity with which these men hold them. He also emphasized the positive side of traditional values, such as non-violence, as well as the value of greater flexibility in beliefs.

Chan described a program with local cultural content but imported structure, aims, and methods. Despite references to Chinese tradition, it was still a group therapy program with two-hour weekly meetings where people talk about feelings. He used

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<sup>52</sup> Ibid., 130, 148.

<sup>53</sup> Ibid., 144.

<sup>54</sup> Ibid., 148–53.

<sup>55</sup> Ibid., 430.

<sup>56</sup> Ibid., 387.

<sup>57</sup> Ibid., 421 (emphasis in original).

an approach shaped by western ideas that the self must be disentangled from others in order to deal with conflict, as well as Chinese conceptions of masculinity. Theoretically and analytically, this work builds on western social science. The “local cultural content” is also complicated. Given the British colonial past and current cosmopolitan status of Hong Kong as the center of international commerce, Chinese masculinity is hardly a stable entity rooted only in past beliefs.

Chan is a translator. As a doctoral student and now professor of social work and social administration at the University of Hong Kong, he is fluent in English, Cantonese, and U.S. theories of psychology and domestic violence, as well as Chinese conceptions of masculinity. Chan frequently visits North America for conferences and works with a leading family violence researcher in the United States.<sup>58</sup> His study shows how a transplanted program can be symbolically indigenized, but remain fundamentally unchanged in organization, ideology, and practices. The Hong Kong program replicates North American theories of domestic violence as learned behavior and practices of therapeutic intervention in the shadow of the law, while adopting alternative cultural models of masculinity and identity. It is grounded in local culture as well as transnational practices, such as Chinese tradition and Hong Kong modernity. Indeed, a program imported from the West is likely to appeal to “local” conceptions of modernity, particularly among Hong Kong’s men and women with feminist sympathies.

### **Hybridity**

Vernacularization can take a more interactive form, with symbols, ideologies, and organizational forms generated in one locality merging with those of other localities to produce new, hybrid institutions. One example is the *nari adalats*, or women’s courts, that emerged in India in the mid-1990s to promote women’s human rights. A national women’s development program encouraged the formation of poor village women’s collectives, which decided to develop women’s courts to handle domestic violence, divorce, and other family conflicts.

The parent program, called *Mahila Samakhya* (MS), is a national-level, rural women’s “empowerment” program started by the Department of Education of the Government of India in 1989, with funding from the Dutch government.<sup>59</sup> Mahila

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<sup>58</sup> His vita on the web lists at least six visits to the United States and Canada to attend conferences or give papers, four to China, and one to Europe.

<sup>59</sup> International Center for Research on Women (ICRW), *Men, Masculinity, and Domestic Violence in India: Summary Report of Four Studies* (ICRW: Washington, DC, 2002),

Samakhya endeavored to promote gender equality, development, and social change by empowering poor women and providing them the knowledge and self-confidence to make changes.<sup>60</sup> The philosophy of the MS program is that decision making should rest with local level collectives. In the early years of the MS program, participants were trained by Jagori, a feminist resource and training center in Delhi connected to global feminism.<sup>61</sup> In Jagori, in 2001, the MS director said that the program puts a strong emphasis on women's rights, but that although they refer to international conventions and treaties, Indian sources of rights concepts are more important.

The program depends on a cadre of women activists, or *sahyoginis*, who develop and encourage *sanghas*, or women's collectives, in each village. Each sahyogini works with a cluster of ten villages and is supported by a more formal, government-supported leadership structure. MS staff are expected to bring skills and commitment to women's issues.<sup>62</sup> Many come from NGO backgrounds and subsequently move to other women's NGOs.<sup>63</sup> The MS program straddles the government/NGO divide, claiming whichever identity seems most helpful at the moment.<sup>64</sup> Sahyoginis are paid by the government, but they are not government employees and receive less pay than government workers.<sup>65</sup> The largely female

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[http://www.icrw.org/docs/DV\\_India\\_Report4\\_52002.pdf](http://www.icrw.org/docs/DV_India_Report4_52002.pdf) (accessed August 23, 2006); Revathi Narayanan, "Grassroots, Gender, and Governance: Panchayati Raj Experiences from Mahila Samakhya Karnataka," in Kapadia, 2002, *The Violence of Development*, 295–351; Aradhana Sharma, "Crossbreeding Institutions, Breeding Struggle: Women's 'Empowerment,' Neoliberal Governmentality, and State (Re)Formation in India," *Cultural Anthropology* 21, no. 1 (2006):60–95.

<sup>60</sup> Veena Poonacha and Divya Pandey, *Responses to Domestic Violence in the States of Karnataka and Gujarat*, RCWS Gender Series (Mumbai, India: Research Centre for Women's Studies, SNDT University, 1999), 161; Sharma, 2006, "Crossbreeding Institutions;" and ICRW, 2002, *Men, Masculinity, and Domestic Violence in India*, 32–65.

<sup>61</sup> Mekhala Krishnamurthy, "In the Shadow of the State, in the Shade of a Tree: The Politics of the Possible in Rural Gujarat," Bachelor of Arts thesis, Harvard University, 2002 (on file with author), 42. Seventeen women were trained as paralegals with a feminist critique of the legal system and offered feminist approaches to violence against women and divorce (ICRW, 2002, *Men, Masculinity, and Domestic Violence in India*, 49).

<sup>62</sup> Narayanan, 2002, "Grassroots, Gender, and Governance," 299.

<sup>63</sup> Sharma, 2006, "Crossbreeding Institutions;" author interviews in Gujarat, 2005.

<sup>64</sup> Ibid.

<sup>65</sup> Ibid.

work force lacks job security, pensions, and health benefits and is poorly paid.<sup>66</sup> Ironically, some were fired when they tried to unionize to demand their right to higher wages, suggesting that there are limitations on their ability to translate human rights ideas into their local situations.

Women's collectives developed nari adalats to handle women's legal problems in Gujarat in 1995 and in Uttar Pradesh in 1998.<sup>67</sup> A 2001 study reported that the four adalats in the Vadodara district of Gujarat handled about 1,200 cases of marital violence, harassment, divorce, maintenance, property, and child custody in the previous six years. They successfully resolved a majority of these cases. The clients were mostly low-caste and tribal women.<sup>68</sup>

A nari adalat consists of a core team of sahyoginis and selected sangha women, most of whom have poor literacy skills and many of whom are dalits, people of low-caste status.<sup>69</sup> Members of the nari adalat tour the district, meeting on regular days and at regular times in public places near government offices to dispense legal advice and settle marital disputes.<sup>70</sup> For example, in 2005, a nari adalat in Gujarat met next to the government court and a police station, both of which supported the women's efforts. The women leaders, who tend to rely on collective leadership, are not paid nor is their transportation covered. They have no legal authority but rely on pressure and shaming. Like the parent MS program, they straddle the government/NGO divide, claiming either identity as it seems helpful.<sup>71</sup>

Krishnamurthy's ethnography describes how nari adalats move creatively between community and state to gain recognition in the villages and access to formal institutions.<sup>72</sup> The women meet in government compounds close to police and local government offices assert their status as part of the official MS program; use state symbols, such as files, stamp paper, and seals; call on the police for

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<sup>66</sup> In 1998, they received only slightly above the government-stipulated minimum wage for skilled work (Sharma, 2006, "Crossbreeding Institutions," footnote xlii).

<sup>67</sup> ICRW, 2002, *Men, Masculinity, and Domestic Violence in India*, 34.

<sup>68</sup> Mekhala Krishnamurthy, "In the Shadow of the State, in the Shade of a Tree: The Politics of the Possible in Rural Gujarat," Bachelor of Arts thesis, Harvard University, 2002 (on file with author), 3.

<sup>69</sup> ICRW, 2002, *Men, Masculinity, and Domestic Violence in India*, 36.

<sup>70</sup> Poonacha and Pandey, 1999, *Responses to Domestic Violence*, 161–78.

<sup>71</sup> Sharma, 2006, "Crossbreeding Institutions."

<sup>72</sup> Krishnamurthy, 2002, "In the Shadow of the State, 12, 51.

protection; and cite formal laws to support their decisions as they were trained to do by urban activists. Because they meet outside local government offices, they have considerable impact on government workers.<sup>73</sup> At the same time, they reflect the communities they come from. They use humor and shaming to pressure litigants; adjust their meeting times to the rhythms of village life; and use their knowledge of local practices, customs, and social networks to gather evidence and negotiate agreements. They do not try to end marriages but emphasize the rights of the woman within marriage.<sup>74</sup> Their authority is limited, and they seem to be most successful in helping women arrange divorces and escape violent marriages, particularly among poor families. They are less successful with wealthy families and with cases of rape and molestation, which require greater evidentiary effort.<sup>75</sup> Some police and courts support these organizations because they think they are a good way to deal with “women’s issues.”

An International Center for Research on Women (ICRW) study in 1999–2000 indicated that the operation of these courts and the closely related *mahila panch* (Women’s Councils) made violence in the home a more open and public offense. ICRW evaluations of these programs indicate that sangha and sahyogini women and those who experienced the nari adalats were more aware of their rights and better able to speak up.<sup>76</sup> A counter-culture based on resisting violence in terms of the intrinsic rights of women is developing slowly, largely in local terms: “Research documented the innovative ways in which activists use their local knowledge to reshape and reinterpret community idioms, phrases, and beliefs to create and persuade the community to adopt new perspectives.”<sup>77</sup> As they promote the ideology of human rights, some women say they have learned to stand up for themselves.

Although the nari adalat was a new initiative, it appropriated a familiar political structure. The *panchayat*, as the juridical institution of a *jati* (caste) or village, is a very old institution used for hearing complaints and negotiating solutions to conflicts.<sup>78</sup> Many panchayats are caste-based and handle conflicts within the caste

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<sup>73</sup> See Sharma, 2006, “Crossbreeding Institutions.”

<sup>74</sup> ICRW, 2002, *Men, Masculinity, and Domestic Violence in India*, 51.

<sup>75</sup> *Ibid.*, 99.

<sup>76</sup> *Ibid.*, 40–41, 54.

<sup>77</sup> *Ibid.*, 72.

<sup>78</sup> See Catherine S. Meschivitz and Marc Galanter, “In Search of Nyaya Panchayats: The Politics of a Moribund Institution,” in *The Politics of Informal Justice, Comparative*

community. These put caste interests first, focusing on maintaining caste honor and promoting upward social mobility.<sup>79</sup> In the late nineteenth century, the Indian government created simple judicial tribunals called *panchayat adalati* to hear small cases.<sup>80</sup> After India's independence, "democratic" panchayats were instituted by the state and made responsible for local development. The lowest tier, the village panchayat, was directly elected, although still under the control of the state and local elites.<sup>81</sup>

In 1974, recognizing that village panchayats tend to consist of men of the dominant castes, the Government of India's Committee on the Status of Women issued a report that advocated creating women-only panchayats at the village level as a transitional measure to ensure women's participation. However, in subsequent years, the idea of creating reservations for women in existing panchayats became a major issue of the Indian women's movement, and in a 1992 amendment to the Indian constitution, 33 percent of the seats in village panchayats were reserved for women. These quotas have opened panchayat participation to women to some extent, particularly in areas where the MS program has provided training, the sanghas have been supportive, and governments have been positive.<sup>82</sup> However, there have been differential levels of implementation around the country and substantial resistance from males of dominant castes.<sup>83</sup>

Thus, the nari adalats are an adaptation of the familiar panchayat structure, as well as the product of Indian feminist demands for women's political participation and reduced domestic violence.<sup>84</sup> They introduce new ideas of women's empower-

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*Studies*, vol. 2, ed. Richard L. Abel (New York: Academic Press, 1982), 48–94; and Shail Mayaram, "New Modes of Violence: The Backlash Against Women," in Kapadia, 2002, *The Violence of Development*, 394.

<sup>79</sup> See Marc Galanter, *Law and Society in Modern India* (Delhi: Oxford University Press, 1989); and Robert M. Hayden, "Turn-Taking, Overlap, and the Task at Hand: Ordering Speaking Turns in Legal Settings," *American Ethnologist* 14(1987): 251–70.

<sup>80</sup> Meschievitz and Galanter, 1982, "In Search of Nyaya Panchayats," 50.

<sup>81</sup> Mayaram, 2002, "New Modes of Violence," 394.

<sup>82</sup> See Narayanan, 2002, "Grassroots, Gender, and Governance," 295; Mayaram, 2002, "New Modes of Violence," 396–7.

<sup>83</sup> See Karen Kapadia, ed., 2002, *The Violence of Development*.

<sup>84</sup> See Urvashi Butalia, "Confrontation and Negotiation: The Women's Movement's Responses to Violence against Women," in Kapadia, 2002, *The Violence of Development*, 207–235.

ment and human rights promoted by the cosmopolitan feminist leaders of the MS program, as well as ideas already embedded in Indian law regarding women's rights to the return of some of their dowry at divorce and protection from cruel treatment. Within the nari adalat system, the key translators are the sahyoginis and the leading sangha members. More educated and cosmopolitan Indian feminists working at higher levels in the MS program translate feminism and human rights ideas to the sahyoginis they train and support. Although participation leads some poor women to stand up for themselves, whether many have adopted core human rights ideas, such as equality, autonomy, and bodily integrity, is more questionable. The stories of women who participate in panchayats suggest that a few acquire a strong rights subjectivity, but that many retreat in the face of violence, social pressure, and resistance from their own families and caste communities when they take leadership positions.<sup>85</sup> In some areas, the state is strongly opposed to women's leadership, and in many areas grassroots women leaders face resistance from local male elites.

## Conclusions

Unlike replications, which are thinly adapted to local circumstances, hybrids are thickly shaped by local institutions and structures. Replications retain the basic structure of the imported institution, such as therapy groups for batterers, but overlay them with local symbols, such as ideas of *yi* and *face*. Hybrids merge local structures such as panchayats or village councils with imported ideas, such as women's human rights. They draw more extensively on local institutions, knowledge, idioms, and practices. In replications, the source is dominant, while in hybrids, the target is more powerful. Translators who are committed to the target tend to produce hybrids, while those who care more about the source create replicas. For example, the sahyoginis who created the nari adalats were village women, while the author of the Chinese batterer treatment program was a cosmopolitan university professor. For these reasons, the hybrid seems more likely to succeed in bringing reformist ideas to local communities than the replica.

These examples illustrate the power and vulnerability of the translator. The power of translators is their ability to set the terms of the exchange and to channel it, but

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<sup>85</sup> Mayaram, 2002, "New Modes of Violence," Anandhi S, "Interlocking Patriarchies and Women in Governance: A Case Study of Panchayati Raj Institutions in Tamil Nadu," in Kapadia, 2002, *The Violence of Development*, 425–459.

their vulnerability is an ability to persuade people with grievances to accept their definition of the problem and to extract financial and political support from states and donors. The translator must walk a fine line between too much replication, in which case the new ideas will lose their appeal to local communities, and too much hybridity, in which case the reforms will lose the support of the global community, including funding and publicity.

Moreover, intermediaries are always suspect since they are not fully in one world or the other. They are vulnerable to accusations of disloyalty by either side. The consultants in Ruritania were viewed with suspicion by the African managers and held responsible for data problems by the Normland donor agency. The sahyoginis face criticism and even violence from male family members and male village elites for being too assertive, although they are supported by village sanghas and the educated feminist MS leaders. The professor developing battering programs is supported by the transnational family violence movement, but apparently has more difficulty winning the voluntary participation of batterers.

These translators work within state systems whose commitment to women's rights is at best ambivalent. For example, the sahyoginis are not paid adequately and were prevented from running for panchayat seats on the grounds that they were state employees. Mayaram describes how the radical women activists in a similar program in neighboring Rajasthan were disempowered and the program ultimately eliminated by the state.<sup>86</sup> The Hong Kong government failed to make batterer treatment programs mandatory. States often resist human rights laws and obligations and undermine initiatives that challenge patriarchy. Under these conditions, states maintain an appearance of compliance while doing nothing or something that is quite different than what international law specifies as human rights.

Moreover, translators are restricted by the discursive fields within which they work. All the translators used human rights discourse, with its reference to international standards and its focus on individual injury and cultural oppression, rather than structural violence. The batterers' treatment program does not address social class and poverty, while the nari adalats are powerless to challenge caste, class, and gender hierarchies. While individual women were helped to deal with violence and divorce, village inequalities remained untouched.

The larger structure of economic and political power that surrounds human rights activism means that translation is largely a top-down process from the transnational to the local and the powerful to the less powerful. Since NGOs and

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<sup>86</sup> Mayaram, 2002, "New Modes of Violence."

social service programs are usually dependant on international foundations or foreign government funding, they need to present their work in a way that inspires these funders. Transnational human rights principles are effective in attracting international funding and garnering media attention. Organizations may thus adopt international human rights language even when they would rather take a different approach. Despite arguments that human rights must be translated into local webs of meaning based on religion, ethnicity, or place, in order for them to appear both legitimate and appealing, translators must please their donors. Local programs developed in affluent nations, such as the United States, are more likely to circulate transnationally to poorer ones than vice versa. This uneven circulation is driven by funders and governments. Transnational imports are usually local conceptions from elsewhere launched into the transnational domain by the economic and political power of their creators. As this analysis suggests, processes of vernacularization are intimately connected to the interests of states and funders, as well as those of local communities.

Consequently, human rights ideas are not fully indigenized, even though this might make them more readily accepted. They are embedded in a distinctive vision of the good society that envisions the state as the provider of social justice and the individual as responsible for making rights claims on the state. This vision assumes that all people have equal rights, although all do not have equal needs. As human rights are vernacularized, these conceptions of person, state, and community remain the same. The failure to fully indigenize these ideas impedes their spread, yet to do so would undermine their potential for change. As Grewal points out, human rights are Eurocentric in origin and inspiration, yet at the same time are some of the only tools available to struggle for rights of the disenfranchised.<sup>87</sup>

This is the paradox of making human rights in the vernacular: in order to be accepted, they have to be tailored to the local context and resonant with the local cultural framework. However, in order to be part of the human rights system, they must emphasize individualism, autonomy, choice, bodily integrity, and equality—ideas embedded in the legal documents that constitute human rights law.<sup>88</sup> Whether this is the most effective approach to diminishing violence against women is still an open question. It is certainly an important part of the expansion of a modernist view of

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<sup>87</sup> Inderpal Grewal, "On the New Global Feminism and the Family of Nations: Dilemmas of Transnational Feminist Practice," in *Talking Visions: Multicultural Feminism in a Transnational Age*, ed. Ella Shohat (New York: New Museum of Contemporary Art, and Cambridge, MA: MIT Press, 1998), 507.

<sup>88</sup> Merry, 2006, *Human Rights and Gender Violence*.

the individual and society embedded in the global North, which promotes it along with democracy, the rule of law, capitalism, and the free market. As translators vernacularize these transnational institutions and ideas, they promote this modernist view, with its emancipatory and homogenizing effects. Whether they achieve an expanded human rights subjectivity is far more uncertain.

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## CRIME, JUSTICE SYSTEMS, AND DEVELOPMENT ASSISTANCE

CHRISTOPHER STONE

*There is growing acceptance among scholars and practitioners that reducing high levels of crime and increasing access to justice among the poor are important aspects of governance with significant implications for development.<sup>1</sup> The reluctance of the World Bank and other development agencies to invest in this work is less the result of doubts about its value and more about the risks that it will go wrong. This paper takes these risks seriously, examining the challenges of ethics, engineering, and equity in some detail. It then considers how the Bank could work more affirmatively in this field while managing the inherent risks. The paper concludes that a program of iterative innovation, with special attention given to accountability, would build on the Bank's strengths, minimize the attendant risks, and allow the Bank to make a valuable contribution to crime reduction, in partnership with other development bodies.*

### **The Challenge of Crime and Injustice**

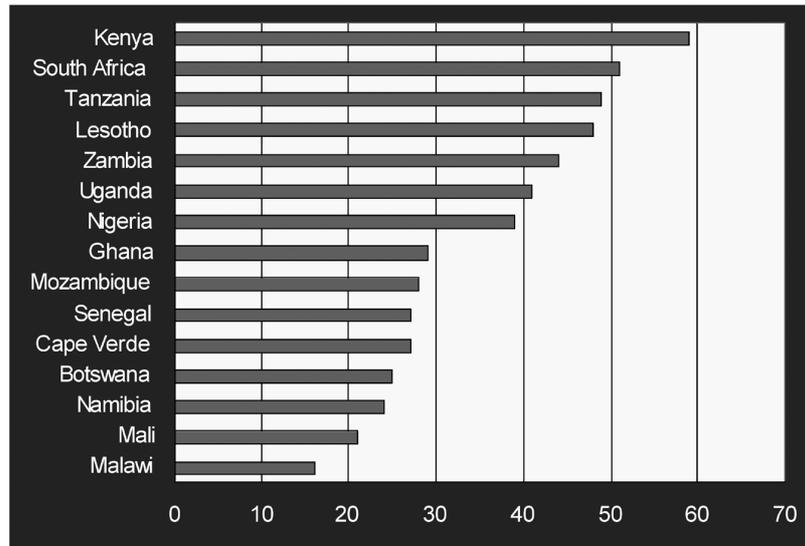
Crime and violence are found in all human societies, but in many developing and transitional countries, their levels are either growing or seem stuck at debilitating heights. In both Kenya and South Africa, for example, more than half the population feels vulnerable to crime *in their own homes* (see Figure 1).<sup>2</sup> In terms of social and economic development, high levels of crime and violence threaten to

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<sup>1</sup> This paper is a revision of a paper originally presented at the "Crime and Personal Safety" session of the World Bank Legal Forum 2005, "Law, Equity, and Development," Washington, DC, December 1–2, 2005.

<sup>2</sup> The percentages are 59 in Kenya and 52 in South Africa. Calculations by the author, based on source data provided by the Afrobarometer Network (Michigan State University, Lansing, MI; Institute for Democracy in South Africa, Cape Town, South Africa; Centre for Democratic Development, Legon-Accra, Ghana).

Figure 1. Percent of population of African countries fearful of crime in their homes



Source: Michael Bratton et al., "Afrobarometer Round 2," Afrobarometer Network, 2004.

undermine the best-laid plans to reduce poverty, improve governance, and relieve human misery. At the same time, the failure of governments to administer justice in a competent, timely, and fair manner can turn even modest levels of crime into sources of grievance that corrode government legitimacy, provoke vigilantism, and fuel markets for organized crime.

Whether the aim of development assistance is the growth of national economies, the effective administration of national and local governments, or simply the relief of those conditions that people in poverty identify as their greatest concerns, reducing crime and violence is important.<sup>3</sup> It is well known that building legitimate and

<sup>3</sup> An interesting link between crime and economic growth was noted in World Bank research on the determinants of city growth in Brazil, published in September 2005. This research noted, for example, that a 10-percent increase in baseline homicide rates reduces city

effective government institutions—including police, prosecutors, public defenders, victim advocates, courts, and penal administrations—makes development and poverty reduction possible.<sup>4</sup> Broadening access to institutions of justice for the poor and providing fair, respectful policing should make it possible for even the poorest people to live less desperately.

Not only would reducing crime and improving the administration of justice advance the goals of development agencies, it would respond to the explicit requests of governments in developing and transitional countries. Whether a government is trying to move beyond a period of internal conflict, as in Liberia or Rwanda, or strengthen its foundation of governance to sustain rapid economic growth, as in India and South Africa, reducing levels of crime and violence, strengthening public security, and providing access to justice are frequently high on a government's list of requests for assistance.

Yet until now, the World Bank has avoided working directly on issues of crime and criminal justice. This reluctance is not due to skepticism about the links between safety, justice, and development. Instead, it reflects a nervousness that this work could go wrong. The work is important, but its risks are real. This paper examines three of these risks in some detail and then considers how the World Bank might manage them while pursuing work in this area.

### Three Risks

The three largest risks of development assistance in the sphere of crime and justice are the risks of ethics, engineering, and equality. The first two—ethics and engineering—are commonly evoked during discussions within the Bank. The

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growth by 1.1 percent over the next decade. See Daniel Da Mata et al., "Determinants of City Growth in Brazil," World Bank Policy Research Working Paper, no. 3723, World Bank, Washington, DC, 2005, 19.

<sup>4</sup> The World Bank's governance indicators, for example, measure six dimensions, one of which is "rule of law." This dimension measures the quality of the police and courts, as well as the likelihood of crime and violence, in two-year intervals. The Bank has been monitoring this indicator since 1996. Research shows, for example, that this dimension of governance appears to have strengthened in Mozambique over the last decade, while it has deteriorated in Uganda. See Daniel Kaufmann, Aart Kraay, and Massimo Mastruzzi, "Governance Matters IV: Governance Indicators for 1996–2004," World Bank Policy Research Working Paper, no. 3630. World Bank, Washington, DC, 2005.

third—the equality risk—is less often articulated, but is a central concern of the *World Development Report 2006*.<sup>5</sup>

### ***Ethical risks***

Ethical risks refer to the possibility that Bank assistance could produce better-equipped law enforcement and penal institutions that would be used to repress people, such as men and women in poverty, members of religious or ethnic minorities, trade unionists, students, or political opponents of the government. This possibility is real. In the 1970s, evidence that U.S. assistance to police in Latin America had been used in precisely this way led the U.S. Congress to enact section 660 of the Foreign Assistance Act, banning future assistance from the U.S. Agency for International Development (USAID) to law enforcement and police forces.<sup>6</sup> The Bank's current prohibition on assistance to police forces is, in part, intended to protect the Bank from complicity in this kind of repression. Unfortunately, however, banning assistance to police or criminal justice programs does not eliminate the ethical risks because assistance tends to continue despite the ban, flowing through exceptions or other guises.

In the case of USAID police assistance, for example, section 660 remains law, but there are now so many exceptions that a recent estimate put total U.S. support for civilian, non-secret assistance to police abroad at US\$635 million in fiscal year 2004 alone, spread across 150 countries.<sup>7</sup> This may be less assistance than would be offered if the ban were not in place, but by any measure, it is a huge volume of funding to be granted on an exceptional basis. The result may be worse than a formal program, for the “exceptional” nature of this police assistance means that there is no overall list, no comprehensive review, and no rigorous monitoring of the program as a whole.

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<sup>5</sup> World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank and Oxford University Press, 2005).

<sup>6</sup> The relevant section of the act provides that “none of the funds made available ... shall be used to provide training or advice, or provide any financial support, for police, prisons, or other law enforcement forces ...” Cited in David H. Bayley, *Changing the Guard: Developing Democratic Police Abroad* (New York: Oxford University Press, 2006), 25–28.

<sup>7</sup> This estimate is made by Bayley (2006, *Changing the Guard*, 30–8), who concludes that “despite the legal prohibition on providing foreign assistance to the police, the U.S. government is doing it in a big way” (*ibid.*, 37).

Within the World Bank, assistance for criminal justice programs has expanded in a similar fashion, despite a general prohibition against it. This assistance is built into programs to reduce youth violence, violence against women, corruption, and so on. As with bilateral U.S. assistance, however, the general prohibition means that projects are not coordinated, centrally managed, or monitored. Despite the Bank's powerful internal search engines, for example, there is no straightforward way even to build a complete list of programs that include criminal justice projects. If one takes the ethical risks here seriously, and history suggests that one should, a well-managed program may be a more practical strategy for spotting and managing those risks than a prohibition with exceptions.

### *Engineering risks*

Engineering risks refer to the possibility that mistakes in program design or faulty implementation could cause mechanical failures in the projects themselves, leaving them unable to reduce crime or expand access to justice. These are not risks about the development effects of greater safety or justice, but about the ability of criminal justice experts to reliably reduce crime rates and improve access to justice.

There is strong evidence that lower levels of crime and violence encourage economic growth. The problem is not that annual reductions in serious crime of 10 percent or more over several years would fail to promote growth (even though there are important caveats to the causal relationships between public safety and growth). Instead, the problem is that even experts in law enforcement and crime prevention do not know very much about how to reduce crime reliably at the macro level. Experts know something about how to end a series of robberies on a particular corner and, more generally, how to mount small-scale projects directed at specific crimes in specific places for limited periods of time. However, these are micro-level interventions with micro-level effects. Little is known about what is required to reduce the overall crime rate in a particular city, province, or country—and it is this kind of change at the macro level that is needed to support development goals.

To date, overall reduction of serious crime across a state or nation remains as much a matter of luck as science. For example, the Bank's *World Development Report 2006* trumpets the reduction of violence in Soweto schools as an achievement of the Tilsa Thuto project;<sup>8</sup> one could cite several other dramatic successes in crime reduction from low- and middle-income countries around the world. But how can good results be reliably reproduced at a hundred more sites? Why did the program

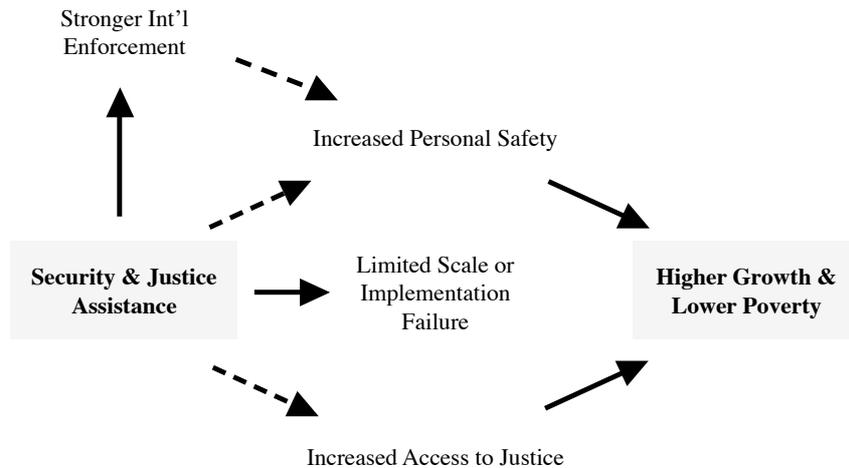
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<sup>8</sup> World Bank, 2005, *World Development Report 2006*, 161.

in Soweto work, when similar projects elsewhere do not yield similar results? More ambitiously, is enough known yet to reliably engineer crime-reduction projects that would work on a large scale? The answer is no, at least not yet. Even where there is evidence that particular interventions are likely to reduce a particular crime, development specialists are not yet very skilled in reliably implementing them.

These engineering difficulties are illustrated in Figure 2. The dotted lines indicate the poor state of current expertise to make these links. The solid lines are better understood. Overall, the figure suggests that when implementation succeeds, security and justice assistance produces small-scale successes in personal safety and access to justice or stronger international law enforcement, but such assistance does not reliably translate into larger improvements in safety and justice on the scale associated with good development outcomes. The following discussion considers the problems of scale and implementation separately.

Figure 2. Pathways from justice assistance to development outcomes



To begin with, there is little evidence about which kinds of interventions are likely to reduce crime on a large scale. Even in the United States, where rates of serious, violent, and property crimes have fallen steadily for more than 15 years, criminologists, economists, sociologists, and law enforcement experts remain bitterly divided

about the causes. James Q. Wilson, one of the deans of criminology, concludes in his recent review of the scholarly evidence, “[S]ome unknown combination of age, culture, prisons, and urban conditions have shaped the American crime rate in ways that are hard to predict ... There is no silver bullet that will reduce crime, much less eliminate it ... [N]o one can satisfactorily explain changes in crime rates.”<sup>9</sup>

Part of the problem is that because high levels of crime urgently call for multiple responses, many interventions are tried at once. When crime subsides, it is then nearly impossible to sort out the causal chains. This was evident in South Africa, where an epidemic of car hijacking in the late 1990s provoked multiple, simultaneous responses. Parliament lengthened prison sentences and required mandatory prison terms for those convicted; foreign governments provided the police with faster cars and more training to make them better able to intercept hijackers; through their charity (Business Against Crime), South African businesses provided assistance in forensic investigation, police response, and basic management. The private sector responded with an array of security services and devices to thwart hijackers. The new National Prosecuting Authority created a special unit to investigate and prosecute the criminal organizations involved, as well as to establish more effective partnerships between police and prosecutors generally. These and additional interventions were not elements of a coordinated program, but separate initiatives of a diverse array of local, national, and international bodies. When car hijackings subsided, everyone took credit.

The lesson, therefore, is *not* that crime remains uncontrollable, merely that engineering knowledge is crude. The good news, however, is that this engineering

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<sup>9</sup> James Q. Wilson, “Crime and Public Policy,” in *Public Policies for Crime Control*, ed. James Q. Wilson and Joan Petersilia (Oakland, CA: ICS [Institute for Contemporary Studies] Press 2004), 537–8, 546–7. Wilson then expands on this point: “No one, so far as I am aware, has ever explained a nation’s crime rate by systematically taking into account all of the variables that might affect it. (Unfortunately, this inability has not prevented some scholars from confidently explaining to journalists why the crime rate has gone up or gone down.) Moreover, it is no simple matter to drive down crime rates by relying more on imprisonment. Doing that requires changing the effectiveness of policing, altering the behavior of prosecutors and judges, and coping with the costs, tangible and intangible, of having a large prison population. The same problems confront efforts to reduce the crime rate by means of prevention, employment, and rehabilitation programs. We are getting better at evaluating such efforts and drawing lessons from them, but we have no idea what would be the cumulative effect of putting in place all of the best programs on a large scale” (ibid.).

knowledge is gradually improving. A responsible program of assistance in criminal justice ought to aim to rigorously and rapidly advance that knowledge.

In the second place, criminal justice practitioners are not yet very good at implementing even those interventions that appear to have a good chance of reducing crime and violence. It is sobering to recall here the experience of the Crime Reduction Programme in the United Kingdom, a three-year effort in which the U.K. government invested 400 million pounds. As the government research report described it, this was “the most ambitious, best resourced, and most comprehensive effort for driving down crime ever attempted in a Western developed country.”<sup>10</sup> But after three years, the disappointment was stark: far fewer projects got off the ground than had been expected, and most had grave implementation problems. The modal result was implementation failure. According to the government research reported published in 2004, the implementation failure was generally due to three causes: (1) difficulties in finding, recruiting, and retaining suitably qualified and skilled staff; (2) inadequate technical and strategic advice and guidance; and (3) inadequate levels of project management competence and skill.<sup>11</sup>

To people who manage justice reform and rule-of-law programs in low- and middle-income countries, these are familiar problems. It is sobering to recognize that even a highly funded crime reduction program in one of the highest-income countries faces the same lack of adequately skilled staff, technical advice, and management skill as do those in lesser-developed countries. A similar fate befell the first iteration of the Access to Justice (A2J) program mounted by the U.K. Department for International Development in Nigeria early in this decade. A complex and ambitious effort to improve penal regimes, modernize courts, introduce community policing, and improve the effectiveness and rights orientation of customary and informal security institutions in four “focal states,” the original design proved well beyond the capacities of international experts and Nigerian participants. The program

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<sup>10</sup> Peter Homel et al., *Investing to Deliver: Reviewing the Implementation of the UK Crime Reduction Programme*, Home Office Research Study, no. 281 (London: Home Office Research, Development and Statistics Directorate, 2004), v. The report continues: “While other countries across Europe, North America, and Australasia were still largely focusing on pilot projects and often-fragmented crime reduction efforts, the UK turned to 25 years of accumulated crime research and experience to develop and implement a new and highly innovative programme” (ibid.).

<sup>11</sup> Ibid., x.

had produced few improvements in access to justice or public safety before it was completely redesigned and renamed.<sup>12</sup>

If the state of engineering knowledge is still so crude, on what forms of police assistance is the U.S. government spending US\$635 million each year? The most recent study of U.S. development assistance in the sphere of law enforcement found that most projects were not primarily intended to improve public safety or widen access to justice within those countries, but “to make criminal justice agencies abroad more effective at combating the forms of crime that are considered most threatening to the United States, such as terrorism, illegal narcotics, money-laundering, and trafficking in persons.”<sup>13</sup> These may be crucial purposes for a single country, but they should not be confused with the goals of development assistance, which are economic growth and poverty reduction.

The diversion of development assistance to international security projects is not only a problem for the United States. The U.K. government recently completed a review of its own police and security sector assistance and found a similar divergence between assistance projects designed to benefit U.K. law enforcement by strengthening its ties abroad and those designed to aid the development of a recipient country. The review included examples of programs mounted for U.K. security purposes that were successfully adapted to serve a development purpose as well;<sup>14</sup> however, as with other engineering tasks, knowledge of how to combine these purposes reliably in a single program is thin.

I have often heard World Bank managers worry out loud that, at best, they will have difficulty working on a topic like criminal justice, in which the Bank has little technical expertise, and at worst, they may inadvertently help unscrupulous regimes repress their own people. They are correct about the risks—it is difficult work at

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<sup>12</sup> See the description of the Nigeria case study in Christopher Stone et al., “Supporting Security, Justice, and Development: Lessons for a New Era,” Vera Institute of Justice, New York, 2005, <http://www.gsdrc.org/go/display/document/legacyid/1407> (accessed May 26, 2006). The most hopeful element in the program concerned the introduction of pilot projects on community policing, although here, too, the actual impact is very hard to measure.

<sup>13</sup> Bayley, 2006, *Changing the Guard*, 43–5.

<sup>14</sup> A particular U.K. assistance program to the Jamaican police was designed to assist the Metropolitan Police in its own investigations in London, while a separate program supported the longer-term development of the Jamaican police. A concerted effort at improved coordination succeeded at harmonizing the two parallel programs. See Stone et al., 2005, “Supporting Security, Justice and Development.”

best. Yet, it is also useful and important work for the Bank to do. The challenge is to craft a role for the Bank that recognizes and makes the best use of the Bank's currently limited expertise and leverages the limited expertise available elsewhere, while protecting against the ethical risks inherent in this work. Before turning to what such a role might entail, however, equality risks merit a look.

### ***Equality risks***

Equality risks refer to the possibility that projects to reduce crime and improve the administration of justice may themselves create new inequality traps, i.e., conditions that reinforce structural inequality and make it more difficult for people to escape poverty, even across generations. The *World Development Report 2006* discusses the danger of creating these traps, but uses only one illustration of inequality in the criminal justice sector. The example is the incarceration of black men in the United States, which serves as a useful warning to governments in developing nations that are tempted to adopt law enforcement and criminal sentencing provisions used in the United States.<sup>15</sup>

Today, about 1 in 8 black men in the United States in their 20s and early 30s are incarcerated, compared with about 1 in 30 Hispanic males in the same age range, and fewer than 1 in 50 white males. The inequality trap lies in two features: the unequal distribution of incarceration and the sheer volume of incarceration in the United States (far greater per capita than in any other country of the world). Across the United States as a whole, 1 in every 138 residents was incarcerated in mid-2004. The United States is far and away the world leader in this category, well ahead of second-place Russia. But while 1 in 138 is high, 1 in 8 for young black males is almost incomprehensible.<sup>16</sup>

It is worth focusing a bit longer on this particular inequality trap to appreciate fully the risk that it represents for development assistance in this sector. The trap is not merely a product of incarceration, but instead derives from the combined effect of high rates of arrest, pretrial detention, imprisonment, and community-based penal supervision. Even something as apparently neutral as improving criminal record management may play a role. For example, in the 1980s, the United States greatly expanded the use of community penalties as criminal sentences—from probation

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<sup>15</sup> World Bank, 2005, *World Development Report 2006*, 161.

<sup>16</sup> See Paige M. Harrison and Allen J. Beck, "Prison and Jail Inmates at Midyear 2004," *BJS Bulletin* (April 2005), NCJ 208801 (Washington, DC: U.S. Department of Justice, Bureau of Justice Statistics.)

and electronic monitoring through boot camps and residential addiction treatment. Reformers hoped that these “alternatives to incarceration” would slow or reverse the growth of imprisonment. Ironically, however, the expansion of these penalties may have exacerbated the inequality trap, allowing the penal supervision system as a whole to extend more deeply and more quickly into poor communities than it could have done by increasing incarceration alone.<sup>17</sup> Most people sentenced to community service or other community penalties end up serving some of their sentences in jail or prison, either because they violate the conditions of their release or because closer surveillance leads to re-arrests. One can see this effect in the continued growth of the population under penal supervision over the last ten years.

The lesson from the United States is that stricter sentencing policies, such as longer prison terms, mandatory prison sentences, and restrictions on early release, are only part of what fuels the growth in incarceration and, consequently, a growing division between those trapped in a lifetime of criminal justice supervision and those who live largely ignorant of the rigors of this system. Another example is the increasing sophistication of information systems that quickly reveal criminal records of people who are arrested for relatively minor offenses. Electronic criminal records, which only a few years ago might never have been retrieved in time for a bail hearing or plea negotiation, are leading prosecutors and judges to detain and punish more people arrested on minor charges, a disproportionate number of whom are black males.

The impact of a more efficient records system is especially large in the United States due to the high volume of discretionary arrests. Police in the United States make as many arrests each year for the single charge of disorderly conduct as they do for homicide, rape, robbery, and aggravated assault combined. Arrests for serious violent and property crimes, on the other hand, are a very small proportion of total arrests in the country. The large volume of discretionary arrests is where structural inequality can most easily be reinforced. An examination of pretrial detention in the United States, which has been growing rapidly over the last ten years, even as the number of arrests themselves has remained constant or even declined, is likely to corroborate this argument.

The point is not that better criminal record systems are a bad investment, but that if the new information is not used wisely, it may lead to expensive and discriminatory results. When prosecutors and judges are used to having less information early in a case, as used to be the case with criminal records, they adjust their decision

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<sup>17</sup> See, for example, Loïc Wacquant, *Les prisons de la misère* (Paris: Éditions Raisons d'Agir, 1999).

criteria accordingly. When much more information is available to decision makers at early stage, there is a danger that they may apply their former criteria to the new data. The result in this example is a larger number of detention decisions than is necessary to achieve safety and justice objectives.

The lesson here is that inequality traps are deeply embedded in the operation of justice systems. Inequality in imprisonment is not merely a function of penal policies, but also of arrest practices, criminal record systems, prosecution policies, and the use of pretrial detention. As the examples above demonstrate, the kind of people who are arrested for disorderly conduct and the way in which computerized data systems are used can exacerbate or ameliorate inequality in other corners of the justice sector. This insight should make reformers particularly cautious when borrowing policing or prosecution strategies from countries with high rates of imprisonment. To avoid producing new inequality traps as a result of penal practices in countries such as Nigeria, Mexico, or India, it will not be sufficient simply to scrutinize new sentencing proposals; changes in policing and prosecution are just as likely to cause inequity in imprisonment.

What does this mean for the kinds of development assistance that the World Bank or other development agencies should offer? Is it possible to separate out the better aspects of U.S., British, French, German, Dutch, or Japanese crime policies from those aspects that may reinforce inequality? Are justice systems severable? The stakes riding on the answer to this question are enormous. Consider, for example, the different uses of arrest in the criminal justice strategies of the United States, England, and Russia. Police in the United States annually arrest about 4,770 people per 100,000—almost twice the rate of 2,500 in England and Wales and about thirty times the remarkably low rate of about 150 in Russia. Yet Russia has a rate of imprisonment about three-quarters of that of the United States.<sup>18</sup> What would happen to Russia's prison population if police in Russia began adopting the best

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<sup>18</sup> Arrest data for the United States are from the Federal Bureau of Investigation, "Section IV: Persons Arrested," in *Crime in the United States, 2004* (Washington, DC: U.S. Department of Justice, Federal Bureau of Investigation, 2005), [http://www.fbi.gov/ucr/cius\\_04](http://www.fbi.gov/ucr/cius_04) (accessed May 26, 2006). Arrest data for England and Wales are from Margaret Ayres and Liza Murray, "Arrests for Recorded Crime (Notifiable Offences) and the Operation of Certain Police Powers under PACE, England and Wales, 2004/05," *Home Office Statistical Bulletin* 21 (December 16, 2005) (London: Home Office, 2005). The arrest rate for Russia was calculated by the author based on original data provided by the Russian Federation Ministry of the Interior (on file with the Justice Systems Workshop at the Program in Criminal Justice Policy and Management, Kennedy School of Government, Harvard University).

American or English models of policing? If arrest rates rose tenfold, approximating English levels, would Russia's prison population rise by a factor of two, five, or even ten? Or would it decline because the greater number of low-level arrests would reduce serious crime and arrests for serious crime? Questions such as these about the interrelationship between policies and outcomes within specific criminal justice systems are precisely the sort for which Bank analysis, learning, and guidance could be invaluable.

Issues of pretrial detention and imprisonment in sub-Saharan Africa, where approximately one million people are incarcerated out of a population of about 650 million (an incarceration rate about one-fifth of that in the United States and about one-third of that in Russia) make for another compelling topic for analysis. Should program managers resist the use of better data systems to improve the administration of pretrial detention in this region simply because in the United States, such systems lead to decisions that contribute in some way to the over-incarceration of black Americans? Of course not. These risks should nevertheless make program managers wary of pretrial release procedures and training offered by well-meaning judges, prosecutors, and defense lawyers with knowledge only of their own respective justice systems. If the Bank supported the development of analytic frameworks for understanding the macro-level interactions of these kinds of policy and practice innovations, the benefit to justice assistance and development could be substantial.

The *World Development Report 2005* posed the question of whether policing and prosecution reforms that have accompanied reductions in crime in the United States, including intensive law enforcement in "hot spots," could be exported to lower-income countries. In just a few paragraphs, the 2005 report presented a subtle and astute account of the challenge of reducing crime. In certain places, the report seemed to promote specific models of law enforcement, wondering if New York City's police reforms were exportable. In other places, it suggested that the principles underlying these reforms were most suitable for export, stressing the importance of delegation, accountability, and public confidence in the police.<sup>19</sup>

What is most admirable about this section of the 2005 report, however, is not the focus on what happened in New York, but the stories from Brazil, South Africa, Colombia, and Russia. Community policing in South Africa, for example, certainly drew some inspiration from abroad, but constitutionally required community-policing forums are a South African innovation, as is the connection between community

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<sup>19</sup> World Bank, *World Development Report 2005: A Better Investment Climate for Everyone* (Washington, DC: World Bank and Oxford University Press, 2004), 89–92.

policing and respect for human rights. Similarly, handgun regulations in Colombia and the restriction on alcohol sales may also have been inspired by efforts elsewhere, but the combination is an original contribution to the field. These are examples of how innovators are applying widely applicable principles in locally powerful ways. It is commonplace for models of governance to be replicated blindly from one country to the next, but the problem remains that insufficient tools exist for identifying the inspirational nuggets of foreign examples and the management process for transforming those nuggets into effective local policies and services.

### **Toward a Rigorous Program**

What, then, is the World Bank to do? Efforts to reduce criminal violence and improve the administration of justice are important for economic growth, good governance, and the security of people in poverty. Yet the ethical, engineering, and equality risks are all high. Assistance may not only fail to help, it may end up doing substantial harm. The way forward needs to be plotted differently in different national contexts, but managed under a single rigorous framework. That framework should have two consistent elements: one that structures the process of designing and implementing safety and justice projects, and one that informs their substantive content.

First, engineering and equality risks suggest that, whether or not foreign practices have helped to inspire a new program, implementation of the program should be rigorously managed through a process of *iterative innovation*, accompanied by simple but careful performance measurement. Success will come through local adaptation during an iterative process of innovation and learning, not through strict adherence to foreign models. Even a program with a good track record elsewhere—whether it is the Soweto program to reduce school violence or community policing from Montreal—is unlikely to work well when it is first implemented in a new context. Establishment of an effective program, even one based on a success elsewhere, often proceeds through trial and error, supported by close monitoring with rapid feedback loops.

To protect against creating new inequality traps, monitoring should disaggregate survey and administrative data by poverty, gender, and other categories of local interest. Disaggregation is not difficult to do, even in the absence of sophisticated data systems. But managers of such efforts will need to be adept at problem identification and problem solving. Although management and leadership skills can be taught, the evidence is overwhelming that training and coaching is essential, especially in this sector. Just as public health officials have learned to look for positive deviance—that is, local, protective behaviors that keep small numbers of

people healthy during an epidemic—so security and justice advisors and project designers can be trained to look for local practices that already produce pockets of equitable safety and respect in the midst of fear and injustice. Development agencies could help scale up these positive practices through iterative innovation, so that inevitable implementation and expansion problems can be quickly spotted and solved. If development institutions focus on ensuring the quality of the iterative process, rather than on importing foreign models and practices, and if performance management systems remain focused on increasing public safety and widening access to justice, these aims should be achievable in the medium term. There is, moreover, ample evidence that these achievements would translate into real growth and poverty reduction.

As for substantive content, the ethical risks described earlier imply a need for unflinching accountability. Any new assistance in the safety and justice sector should include strong accountability mechanisms. A country seeking assistance with a new prosecution or penal program should receive financing and technical assistance only if the new program is accompanied by clear internal and external oversight systems that are adequately funded and to which poor people have access.

The creation of robust, independent accountability bodies is a trend in rich nations as well as in post-conflict and developing countries. Among the most recent additions to the array of such bodies is the Independent Police Complaints Commission of England and Wales, which together with the Police Ombudsman of Northern Ireland, represents an exceptionally well-resourced and powerful model. In India and Mexico, the national and provincial (or state) human rights commissions are increasingly playing strong oversight roles, a practice which avoids some of the difficulties of creating entirely new institutions for criminal justice accountability. Oversight institutions need not be complex or expensive, but they must be locally credible. The Office of the Inspecting Judge for Prisons in South Africa is an example of a simple, credible oversight mechanism that could usefully inspire counterparts elsewhere.

Recent history suggests that the World Bank and other development agencies will need to insist that accountability mechanisms be in place at the start of new projects. For example, that insistence was not maintained in El Salvador, where the intended oversight body, the National Council on Public Security, ended up functioning merely as an advisory body on crime prevention. Similarly, the Independent Police Inspection and Review Agency recommended for Bosnia-Herzegovina has never been implemented.<sup>20</sup> Insisting on the actual implementation

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<sup>20</sup> Bayley, 2006, *Changing the Guard*, 52–53.

of accountability mechanisms will not only provide crucial protection against the ethical risks inherent in criminal justice work, it will also align the Bank with the interests of people living in poverty, as well as with those working and investing in the business sector with integrity in developing countries.

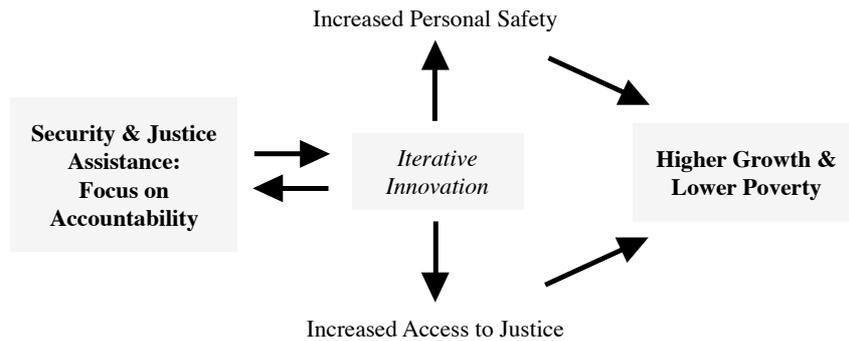
Finally, to further protect against all three risks described above, the World Bank should work in partnership with bilateral development agencies, other international financial institutions, and civil society institutions. Partnerships with other development agencies will increase the expertise available to the Bank as it begins to develop depth in this area, protecting it against some of the engineering risks of crime and justice interventions. Partnerships with national and international research institutes and academic centers would similarly provide valuable expertise; these civil society partnerships would also help protect against the ethical risks inherent in the field. If civil society partners bring expertise in program monitoring and performance measurement, they can also help protect against equality risks that might not be apparent to those with more operational roles.

In sum, a World Bank program on safety and justice should embrace three elements: a process of iterative innovation, a focus on accountability, and a commitment to partnerships. Embracing these elements is far more important than the choice of the specific problem (e.g., gun violence, domestic violence, car hijacking, youth crime) on which to focus a new safety or justice program. One can only hope that integrating these three elements into actual projects will become automatic. Not only would these habits mitigate the risks of working in this sector, they would build skills and expertise that could last for generations in the governments and civil society organizations of the countries that receive such assistance.

Launching a program of this kind is not as difficult as it might appear. The analytic and managerial skills of iterative innovation are well within the World Bank's core competence. The Bank is in a strong position to quickly assume a leadership position in designing and using empirical tools to test existing models and monitor implementation of new projects. The rule-of-law governance indicator used by the Bank could, for example, be supplemented to provide more sensitive and precise measurements of the outcomes (including equity) of criminal justice systems. Efforts are currently underway to develop indicators along these lines at the United Nations in such bodies as the Office of Drugs and Crime, the United Nations Development Programme (UNDP), the Department of Peacekeeping Operations, and the Office of the High Commissioner for Human Rights.<sup>21</sup> All of

<sup>21</sup> See, for example, Vera Institute of Justice, "Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice

Figure 3. A more rigorous program



these efforts would benefit from the Bank's engagement and expertise. The Bank's General Counsel could, for example, initially create a centralized capacity to train and support project managers and coordinate a simple, consistent, and robust performance monitoring system.

Sector-specific design and operational skills in criminal justice reform are less plentiful within the World Bank, but many of the Bank's bilateral partners have accumulated substantial experience in this sector of development assistance over the last decade. To harness this experience and to further extend its partnerships, the World Bank could sponsor an annual meeting of experts from these institutions. In addition, credible organizations and institutes from civil society could be invited to join at least a portion of such an annual event in order to rigorously test the expertise developed by the Bank and the success of its strategies for mitigating the abovementioned risks.

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Sector," Vera Institute of Justice, New York, 2003. [www.vera.org/indicators](http://www.vera.org/indicators) (accessed May 26, 2006); and UNDP (United Nations Development Programme), "Indicators for Human Rights Based [sic] Approaches to Development in UNDP Programming: A User's Guide," UNDP, New York, 2006, [http://www.undp.org/governance/docs/HR\\_guides\\_HRBA\\_Indicators.pdf](http://www.undp.org/governance/docs/HR_guides_HRBA_Indicators.pdf) (accessed June 29, 2006).

A centralized training capacity and an annual meeting are not nearly enough to guarantee success, but they represent a practical and essential start. Problems of crime and violence are ubiquitous, and the poor administration of justice can be found in any country. In some of the poorest countries of the world, however, these problems are now threatening all the other good work being done to ease poverty and inequality. The Bank, moreover, is in a good position to build a rigorous program that could provide real help in this section. Iterative innovation, accountability, and partnership would provide a solid foundation from which to proceed.

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## YOUTH, CRIME AND CRIMINAL JUSTICE IN SOUTH AFRICA

AMANDA DISSEL

*As South Africa celebrates over a decade of democratic transformation, it continues to struggle with the legacy of poverty and the marginalization of disadvantaged groups. Despite progress in the delivery of basic services to poor sectors of the society, high levels of unemployment persist and the wealth gap has increased. Although crime is beginning to stabilize and certain more serious crimes have begun to decline, its extent and nature is a source of national concern. The “culture of violence” has been passed on to new generations and is now manifesting in increasing levels of criminal and family violence. While the criminal justice system should not be the primary means of dealing with the root causes of crime, the culture of development and human rights in South Africa provides an environment for criminal justice initiatives that deal with offenders in a socially inclusive manner. This article explores some of the initiatives undertaken by state and civil society groupings targeted at youth, identifies the challenges of these initiatives, and draws lessons for other developing countries experiencing transition. Michael Aliber describes the context of the current situation as follows:*

*The breakdown of apartheid [in South Africa] did not immediately translate into improved material conditions for the majority of South Africans. Three hundred years of colonialism, and fifty of internal colonialism, had hard wired a duality into the system, whereby two domains coexisted: on the one hand, a globally integrated world of production, exchange and consumption, and on the other, a constrained world of informality, poverty, and marginalization. These two worlds may be conceptualized as first and second economies.<sup>1</sup>*

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<sup>1</sup> Michael Aliber et al., “Synthesis Report of the 2005 Development Report: Overcoming Underdevelopment in South Africa’s Second Economy,” HRSC (Human Sciences Research Council) of South Africa/ UNDP South Africa/ DBSA (Development Bank of South Africa), Pretoria, 2005.

## **Introduction**

Apartheid resulted in poverty, social exclusion, and deprivation for the majority of the black population. Despite the apparent success of South Africa's negotiated transition to democracy in 1994, the country continues to experience disparities in wealth, income, and opportunity. In addition, contrary to early expectations that violence might start to subside once democracy became entrenched, South Africa has an exceptionally high crime rate. The incidence of most serious crimes has increased since 1995, although many have begun to stabilize in the last two to three years (with the exception of sexual offenses and offenses against children).<sup>2</sup> Young people often run a high risk of becoming both victims and perpetrators of crime and violence, with marginalized and excluded communities tending to be the most at risk.

This article outlines the linkages between inequality, marginalization, and youth offenses in South Africa. It also highlights issues of concern regarding youth, together with some promising initiatives adopted over the last decade that try to address these problems. The following section looks at the links between crime and inequality. Later sections examine this linkage with respect to risk factors for youth crime, including the country's violent past. The article then looks at the criminal justice response to this group, focusing on the contributions that both the justice and correctional system can make in addressing the fundamental causes of crime and promoting inclusion. A number of community-based interventions for young people accused of crimes are examined in the course of the analysis. Finally, the article concludes by looking at how criminal justice interventions could be strengthened to better tackle the issues of inequality that lie at the root of the high crime rate in South Africa.

## **Crime and Inequality**

Experiences of crime and victimization throughout the world are often linked to poverty and marginalization. Tittle and Meier, for example, have found that the relationship between class and crime is "positive (direct), negative (inverse),

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<sup>2</sup> South African Police Service. Department of Safety and Security, "Crime Statistics, 2004–2005," South African Police Service, Pretoria, South Africa, 2004, [http://www.saps.gov.za/statistics/reports/crimestats/2005/crime\\_stats.htm](http://www.saps.gov.za/statistics/reports/crimestats/2005/crime_stats.htm). Accessed October 10, 2005.

*conditional* or some combination of the three.”<sup>3</sup> It has also been suggested that the class/crime relationship is stronger for women than it is for men. Western suggests that an additional dimension of the relationship is a new form of inequality that arises from increasing social polarization—the growing division between a large and expanding group of socially disadvantaged urban poor and a large an expanding group of affluent, socially secure urban households.<sup>4</sup> These exact conditions could be said to apply to South Africa today. Jock Young argues that this relative, rather than absolute, deprivation excludes marginalized citizens from employment, but encourages their voraciousness as consumers. These two characteristics, combined with the rise of individualism, are in Young’s words, a “vital ingredient in the criminogenic cocktail of late modern society.”<sup>5</sup> A comparative study of 63 countries, for example, found that the greater the income gap as measured by the Gini coefficient, the greater the number of homicides. This was particularly noticeable in South Africa, which had both the worst income inequality and the highest homicide rates among the countries surveyed.<sup>6</sup> A similar correlation was found between income inequality and serious assaults.

The relationship between crime and inequality was also the subject of a study that analyzed crime and welfare data across all police precincts in South Africa. Demombynes and Özler found that inequality within a given precinct was highly correlated to property crime, indicating that the returns to crime (i.e., the financial benefit to the criminal) are a major determinant of this type of crime. Violent crimes are more likely to occur where there is a high degree of inequality within a precinct and in the areas surrounding it. Violent property offenses (e.g., burglary and murder) also showed a positive significant relationship between unemployment

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<sup>3</sup> Charles R. Tittle and Robert F. Meier, “Specifying the SES/Delinquency Relationship,” *Criminology* 28, no. 2 (May):271–300, as cited in John S. Western, 2003, “Social Inequality, Alienation, and Socio-economic Position,” in John S. Western, Mark Lynch, and Emma Ogilvie, *Understanding Youth Crime: An Australian Study* (Hants, UK: Ashgate Publishing, Ltd., 1990), 100.

<sup>4</sup> Western, 2003, “Social Inequality, Alienation and Socio-economic Position,” 99–119.

<sup>5</sup> Jock Young, *The Exclusive Society* (London: Sage, 1999), as cited in Bill Dixon, “Exclusive Societies: Towards a Critical Criminology of Post-apartheid South Africa,” *Society in Transition: Journal of the South African Sociological Association* 32, no. 2 (2001):8.

<sup>6</sup> Alan Wood, “Correlating Violence and Socio-economic Inequality: An Empirical Analysis,” in *Poverty, Inequality, Violence: Is There a Human Rights Response?* Collection of papers presented at the Geneva International Conference (Geneva: World Organization against Torture, 2004), 21.

and crime. The authors also found that racial heterogeneity in a precinct was highly correlated with all types of crime.<sup>7</sup>

Statistics suggest that inequality in South Africa is increasing rather than diminishing. Although the country is among the 50 wealthiest nations in the world, its Human Development Index (HDI) ranking has declined by 28 ranks from 1990 to 2003.<sup>8</sup> Much of this decline is attributed to the drop in life expectancy due to AIDS-related illnesses, however the lower HDI indicates that poverty and inequality have increased in the country since 1993, with a growing divergence between the poor and non-poor. The poorest segment of the population is still comprised of previously disadvantaged groups. Unemployment is a major contributor to poverty and inequality. Between 1995 and 2002, the economically active population increased by about 4.8 percent a year, but the number of employed people increased only by about one third as much, meaning that an increasingly larger group of people are unemployed.<sup>9</sup> Following democratization, rapid urbanization and inter-provincial migration occurred, creating a growing number of households in which no one is employed.

As discussed below, young people are profoundly affected by poverty and marginalization, and their experiences of social exclusion may contribute to risk drivers for crime.

### **Risk Factors for Youth Crime**

Crime risk is impacted by the complex interaction of class, gender, and socioeconomic status. According to Newburn, “it is undeniable that a significant portion of crime is committed by young people.”<sup>10</sup> British statistics tend to suggest that one-quarter of all crimes in the United Kingdom are committed by 10-to-17-year-olds, and that

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<sup>7</sup> Gabriel Demombynes and Berk Özler, “Crime and Inequality in South Africa,” *Journal for Development Economics* 76, no. 2 (April 2005):287.

<sup>8</sup> UNDP (United Nations Development Programme), “2003 Human Development Index Reveals Development Crisis,” news release, July 8, 2003.

<sup>9</sup> Aliber et al., 2005, “Synthesis Report of the 2005 Development Report,” 6.

<sup>10</sup> Tim Newburn, “Young People, Crime, and Youth Justice,” in *The Oxford Handbook of Criminology*, 3rd ed., ed. Mike Maguire, Rod Morgan, and Robert Reiner (Oxford: Oxford University Press, 2002), 540.

two-fifths are committed by youth under the age of 21. Generally, the peak age of offending is higher for males (18 years) than it is for females (15 years).<sup>11</sup>

Young people up to the age of 25 years constitute the majority (54.6 percent) of the national population of South Africa.<sup>12</sup> The large proportion of youth in the country is an indicator of the high incidence of crime; it is estimated that approximately 15 percent of all criminal offenses in South Africa are committed by children under the age of 18 years,<sup>13</sup> with the number of children being arrested rising by 47 percent in just 3 years (from 114, 773 in 1999 to 170, 224 in 2002).<sup>14</sup> However, this increase might reflect an increase in the number of police stations, better recording and computerization of statistics, and an overall increase of arrests during this period. Although imprisonment statistics are a poor indicator of actual crimes committed, they also point to a high percentage of youth involvement in crime. Forty percent of South Africa's prisoners are younger than 25 years of age.<sup>15</sup>

For these reasons, it is important to understand the risk factors that affect youth in order to design and adopt appropriate crime prevention measures. The criminological literature indicates several pathways to offending among young people, with an interaction of factors at the individual, family, and community level. Although these factors are well known, it is worthwhile to briefly canvass their extent among South African youth.

The nature of the surrounding community is a critical risk factor for young people to become involved in crime. The extent of social disorganization, such as low household income, sparse social networks, family disruption, and a shifting

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<sup>11</sup> Cited in Newburn, 2002, "Young People, Crime, and Youth Justice," 540.

<sup>12</sup> Statistics South Africa, *Census 2001—Achieving a Better Life for All: Progress between Census '96 and Census 2001*, Report 03-02-16 (Pretoria: Statistics of South Africa, 2005).

<sup>13</sup> E. Pereira, "Wette se koste bereken," in *Finansies en Tegniek* 52, no. 11 (2002):6, cited in Francois Steyn, comp., *Review of South African Innovations in Diversion and Reintegration of Youth at Risk* (Newlands, South Africa: Open Society Foundation-South Africa, 2005).

<sup>14</sup> Lukas Muntingh, "NICRO's Submission to the Portfolio Committee," *Article 40* 5, no. 1 (2003):8. [http://www.communitylawcentre.org.za/children/2003art40/vol5\\_no1\\_nicro.php#nicro](http://www.communitylawcentre.org.za/children/2003art40/vol5_no1_nicro.php#nicro). Accessed July 1, 2006.

<sup>15</sup> Department of Correctional Services, Republic of South Africa, "Offender Statistics: In Custody," Department of Correctional Services, Republic of South Africa, Pretoria, 2005.

population, are some of the relevant characteristics of this risk factor. As the discussion above made clear, the extent of poverty in South Africa puts a significant number of young people at risk.<sup>16</sup> Exposure to adverse circumstances affects children in different ways: they suffer from ineffective parenting practices, stress, limited access to mainstream opportunities, and anti-social role models.<sup>17</sup> In addition, frequent changes of residence and limited access to quality schooling play havoc with a child's developmental progress. Research by van der Merwe and Dawes suggests that chronic exposure to these conditions produces anti-social tendencies in children and adolescents, as well as increased defiant and aggressive behavior,<sup>18</sup> often precursors of criminal behavior. High levels of community violence also contribute to the development of antisocial behavior. South African youth have a high level of exposure to violence both as victims and witnesses to violence.<sup>19</sup>

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<sup>16</sup> Only 13 percent of the population between the ages of 16 and 25 years are employed. Statistics South Africa, Government of the Republic of South Africa, "Census 2001; requested run by status and population group by sex for persons, weighted 0–25 years," one-off run from 2001 census database requested by author (created November 16, 2005), unpublished.

<sup>17</sup> See Francois Steyn, comp., *Review of South African Innovations in Diversion and Reintegration of Youth-at-Risk* (Newlands, South Africa: Open Society Foundation-South Africa, 2005), 8; and Western, 2003, "Social Inequality, Alienation and Socio-economic Position," found that youth from poorer socio-economic backgrounds are no more likely than those from better-off economic backgrounds to be delinquent, but growing up parentless and in a household in which parents are not in the workforce does affect their involvement in crime.

<sup>18</sup> A. P. van der Merwe and Andy Dawes, "The Development of Minimum Standards for Diversion Programmes: A Literature Review," research report commissioned by NICRO (National Institute for Crime Prevention and Reintegration of Offenders, Cape Town, South Africa), Human Sciences Research Council of South Africa, Pretoria, 2004.

<sup>19</sup> A recent survey of youth victimization in South Africa found that 41.4 percent of youth aged 12 to 22 had been the victim of some crime in the past 12 months, almost double the rate of that experienced by adults. See Lezanne Leoschut and Patrick Burton, *How Rich the Rewards? Results of the 2005 National Youth Victimization Study*, Centre for Justice and Crime Prevention (CJCP) Monograph Series, no. 1 (Cape Town, South Africa: CJCP, 2006), 45. Another study found that 14 percent of young people surveyed had witnessed a murder, and that a majority (53 percent) had witnessed a murder when they were between the ages of 16 and 25 years. More than half of the people who had witnessed a murder knew the victim, but few defined the victim as a sibling (5 percent) or parent (2 percent). See Patrick Burton et al., *National Victims of Crime Survey, South Africa 2003*, Monograph,

Family-related issues constitute another set of risk factors, including coercive and hostile parenting styles, punitive and inconsistent discipline, and poor supervision. The latter can lead to bad behavior, academic failure, and association with deviant peer groups in adolescence.<sup>20</sup> Lower family socio-economic status, anti-social parents, and substance abuse have been identified as strong predictors of antisocial behavior, as have large families, adolescent parenthood, broken homes, and neglect—a common experience for South Africa youth.<sup>21</sup> Not only do youth from troubled homes miss out on the advantages of dual or single parenting and income, but a higher percentage of children do not attend school when both parents are absent.<sup>22</sup> Low educational attainment is an additional risk factor for offending when it occurs in conjunction with other factors. Living without parents, as well as migration from a rural to an urban context, can contribute to the breakdown of traditional values and morals. Other significant risk factors are a history of crime among parents and siblings, and being physically and emotionally abused as a child.<sup>23</sup>

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no. 101 (Twshane [Pretoria] and Cape Town, South Africa: Institute of Security Studies, 2004), 58.

<sup>20</sup> P. Farrington David, “Developmental Criminology and Risk-Focused Prevention,” in Maguire, Morgan, and Reiner, *The Oxford Handbook of Criminology*, 657–701.

<sup>21</sup> A South African national household survey in 2004 reported that among 7–15-year-olds, 1 in 4 live in households with both parents, while among 16–24-year-olds, 2 in 5 live in households where both parents are absent. Statistics South Africa, *General Household Survey: July 2004*, statistical release PO318 (Pretoria: Statistics South Africa, Government of the Republic of South Africa, 2005), xii, <http://www.statssa.gov.za/Publications/P0318/P0318July2004.pdf> (accessed October 10, 2005).

<sup>22</sup> Ibid.

<sup>23</sup> In a program offered by the Centre for the Study of Violence and Reconciliation and its partners to convicted young offenders, 81 percent of participants in one prison in 2004 and 67 percent in 2005 reported that close family members had a history of imprisonment. See Margaret Roper, “Johannesburg Juvenile Maximum Security Prison Drug Peer Counseling Programme: External Evaluation,” evaluation prepared for Khulisa Crime Prevention Initiative, Craighall, South Africa, 2004.

For more on the link between child abuse and criminal behavior, see Cathy S. Widom and Michael G. Maxfield, “An Update on the ‘Cycle of Violence,’” National Institute of Justice Research in Brief, NCJRS (National Criminal Justice Research Service) website, Rockville, MD, USA, 2001; Peter Wedge, Gwyneth Boswell, and A. Dissel, “Violence in South Africa: Key Factors in the Backgrounds of Young Serious Offenders,” *Acta Criminologica* 13, no. 2 (2000):31–8.

Finally, anti-social behavior and hyperactivity have been found to be risk factors for individuals. Persistent antisocial behavior over the life cycle is a maladaptive behavior pattern that manifests in seeking attention, lack of control, aggression, and distorted processing of information. Antisocial behavior limited to adolescence, on the other hand, is triggered by particular situations, such as peer pressure, and is considered an adaptive response to the social environment. Adolescents who engage in crime for these reasons tend to gradually stop engaging in antisocial behavior as they grow older.<sup>24</sup> A South African national youth victim survey found that almost half the individuals interviewed were personally acquainted with individuals who had committed criminal acts, and more than a quarter knew people who made their living from crime—indicating the normalization of criminal conduct in some communities, as well as a high level of antisocial role modeling.<sup>25</sup>

In addition to the usual array of risk factors, youth crime in South Africa today cannot be divorced from the country's violent past. Apartheid and urbanization placed families under enormous pressure, disintegrating traditional family structures and systems of support. Educational systems were weak, lacked resources, and during apartheid, were sites of political struggle. Youth were often the most marginalized and disempowered group in the population. Many young people became involved in the liberation struggle, often engaging in violent defensive and offensive action against the government, as well as communities and individuals perceived to be aligned with different political factions, acting as the "shock troops of the liberation."<sup>26</sup> But as the process of transition moved from a period of violent activism to one of negotiation, youth were again marginalized, as more experienced and older members of the liberation movements assumed a central role. Simpson argues that during this period, when youth were marginalized from the mainstream political process, many young people found an alternative home in criminal gangs—replacing one form of identity, together with its codes and motivations, with another.

The violent identity that was to some extent legitimized by the political nature of the conflict with the apartheid regime, and which disguised many forms of criminal violence, thus continued into the new era. Now, however, it found its principal expression in criminal modes of violence. Because young people could not find a place in the new democratic government, many were also largely excluded from

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<sup>24</sup> Steyn, 2005, *Review of South African Innovations in Diversion*.

<sup>25</sup> Leoschut and Burton, 2006, *How Rich the Rewards*, 20.

<sup>26</sup> Graeme Simpson, "Urban Crime and Violence in South Africa," in *Justice for Children*, ed. C. Petty and M. Brown (London: Save the Children, 1998), 66–71.

employment, education, and leisure opportunities. Youth (again, mostly from previously disadvantaged groups) who were unable to establish themselves in the new society were thus pushed to the margins in various ways. Simpson argues that South African society must thus acknowledge the uneasy slide from political to criminal violence and that old forms of violence may transmute into new patterns and forms of violence.<sup>27</sup>

To sum up, communities shattered by the political violence of the past now find themselves subject to new forms of violence and fear due to the proliferation of firearms, armed violence, violent property offenses, domestic violence, and community vigilante action. It is crucial not only to note that the rise in youth crime has resulted from a search for meaning via alternative structures, but also from the impact of the political violence and trauma of armed rebellion and regime change itself. A recent study of ex-combatants living in conflict-torn areas on the East Rand of Gauteng, South Africa, found that many were young men during the time of political violence and still suffer from its trauma and emotional scars. These young adults continue to struggle to reintegrate into their communities and find a meaningful role in the new society.<sup>28</sup> Indeed, many of the reintegration challenges faced by ex-combatants from all sides of the political spectrum mirror those faced by the perpetrators of criminal violence. The two groups share certain needs and concerns, and can benefit from some of the same approaches to reintegration.

The following section looks at some of the difficulties that the criminal justice system is encountering in its response to youth crime. It also identifies a number of promising initiatives to prevent re-offending that have been developed by the government and civil society organizations.

### **Interaction with the Criminal Justice System**

Increasing numbers of children and young people are coming into contact with the criminal justice system in South Africa. Much of their interaction is limited to a police officer, who may caution them and release them, but others are arrested, detained, prosecuted, and sentenced. Most young people who are arrested come

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<sup>27</sup> Ibid.

<sup>28</sup> Vanessa Barolsky, "Kathorus Youth and Violence: A Brief Project Overview," prepared for presentation of the paper, "Transitioning out of Violence: Snapshots from Kathorus," CSVR (Centre for the Study of Violence and Reconciliation), Johannesburg and Cape Town, South Africa, 2005.

from disadvantaged backgrounds and their experience of the criminal justice system is often affected by their access to resources (i.e., whether or not they have a place to stay at the time of their arrest, having parents to bail them out or stand surety, and whether or not they can afford legal representation). Their experience of the criminal justice system may in turn impact their further engagement in crime, as a result of traumatization, hardening of attitudes, and further social exclusion. It is for this reason that we now examine how the criminal justice system deals with the factors that lead to crime.

### ***Dealing with youth in prison***

Imprisonment is the most severe response of the criminal justice system and represents the ultimate sanction available in South Africa. Imprisonment rates are high in general and among youth in particular; as many as 24,669 youth under the age of 21 were in prison in 2005.<sup>29</sup> Although the Constitution recognizes and protects the rights of prisoners, it is widely acknowledged that these rights are severely compromised. Apartheid prisons were designed to warehouse large numbers of people in seclusion from society, rather than to contribute to their rehabilitation and reintegration after release. Prison facilities were basic and often inhumane. With the growth of the prison population—occupation levels hover around 164 percent—these conditions have worsened.<sup>30</sup>

As a result of overcrowding, prison resources are restricted, limiting access to rehabilitation programs, training, education, and recreational activities. In addition to dehumanizing conditions, prisoners are often further victimized in prison by correctional officials and inmates. Prison violence, including gang and sexual assaults, appear to be endemic, although under-reported. According to the South African Department of Correctional Services, 10 prisoners died of assaults by prisoners and gangs in 2002, a year when 2,973 assaults by inmates on other inmates were reported.<sup>31</sup> Prison victimization impacts a prisoner's sense of well-being and their

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<sup>29</sup> Judicial Inspectorate of Prisons, *Annual Report 2004/2005: Prisoners and Prisons* (Cape Town: Judicial Inspectorate of Prisons, Republic of South Africa, 2005), 26. South Africa has the highest per capita incarceration rate in Africa, and ranks sixth in the world (*ibid.*, 18).

<sup>30</sup> Author's calculation as of March 31, 2005, based on then current figures for occupancy and available accommodations (187,394 / 113,825.) See *Ibid.*, 17.

<sup>31</sup> Department of Correctional Services, Republic of South Africa, *Annual Report, 1 April 2002 to 31 March 2003* (Pretoria: Government Printer, 2003).

ability to interact and gain from rehabilitative initiatives. It may also compound and intensify earlier experiences of victimization.<sup>32</sup>

The challenges facing prisons are not unique to South Africa. Imprisonment has been criticized worldwide for its failure to rehabilitate prisoners, despite the fact that most prison regimes in the world identify this as an aim. According to the Social Exclusion Unit (SEU) of the Office of the British Deputy Prime Minister, many prisoners have experienced a lifetime of social exclusion. The situation is often worse for 18–20-year-olds, whose basic education and unemployment rate are roughly one-third worse than those of other prisoners. A prison sentence often threatens to worsen factors associated with re-offending. Prison tends to remove people from society, isolate them from their families, and interrupt their education, often producing a negative impact on the rest of the prisoner's family.<sup>33</sup>

Despite the inherent disadvantages, prison regimes around the world try to rehabilitate offenders by addressing the factors that give rise to criminal offenses, although with very modest success. Indeed, even the best prison-based rehabilitation programs have been shown to have only marginally reduced the rate at which offenders return to crime after release from prison.<sup>34</sup> Imprisonment can, in fact, have the most long-term, damaging impact on offenders. For this reason, some specialists argue that the criminal justice system should aim firstly to reduce the negative impact of contact with the system and imprisonment. Imprisonment, they argue, should be viewed as a scarce resource and reserved only for those offenders who represent the greatest threat to society or who have committed the most reprehensible crimes. Prison conditions must also be improved to reduce the harmful impact that overcrowded and squalid conditions have on human dignity. In addition, measures must be taken to reduce violence and prison staff must be trained to treat prisoners with the dignity and respect that should be accorded all human beings.

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<sup>32</sup> Andy Hochstetler, Daniel S. Murphy, and Ronale L. Simmons, "Damaged Goods: Exploring Predictors of Distress in Prison Inmates," *Crime and Delinquency* 50, no. 3 (2004):436–57.

<sup>33</sup> See Social Exclusion Unit (SEU), Office of the Deputy Prime Minister of the United Kingdom, "Reducing the Re-offending by Ex-prisoners," Social Exclusion Unit, London, 2002.

<sup>34</sup> Studies indicate that recidivism can be reduced by up to 5 or 10 percentage points by effective rehabilitation programs. Francis T. Cullen and Paul Gendreau, "Assessing Correctional Rehabilitation: Policy, Practice, and Prospects," *Criminal Justice* 3 (2000):109–175.

Once these basic measures are in place, programs can be put in place to help prisoners turn away from crime. Such programs should be multi-faceted and diverse. Some examples of this approach can be found in the U.K. SEU, which has identified factors that can further lead to social exclusion of offenders and ways in which the prison system can help address the factors that lead to offending. The risk drivers are mutually reinforcing and need to be tackled in an integrated manner. The SEU argues that imprisonment can provide much-needed education for prisoners, tackle the problems of substance abuse (often linked to offending), and provide an opportunity to develop positive attitudes, thinking skills, and anger management. On a more concrete level, the SEU suggests that appropriate support should be provided in prison to ensure that prisoners are helped to manage debt, develop practical employment skills, and secure accommodation after their release.<sup>35</sup>

South Africa's Department of Correctional Services amended its legislation in 1998 in order to reflect its respect of human rights norms and values.<sup>36</sup> Recognizing international concern for rehabilitating prisoners, it sought to promote the development and reintegration of prisoners in a supportive environment. A White Paper was adopted in 2005 that seeks to gear imprisonment primarily towards this end.<sup>37</sup> One of the premises of the policy document is that corrections should respond to broader societal challenges related to crime (e.g., family dysfunction, lack of positive values, poverty alleviation, development) and recognize the value of community engagement in attempting to address these issues. It envisages programs attuned to the needs of each individual that offer assessments, provide services and resources for the correction and development of inmates, and facilitate their reintegration into the community. The White Paper outlines a process that includes changing the organizational culture of prisons, structural improvement, and programmatic interventions. Although the elaborate paper sets a morally incontestable course for South Africa, it has been widely criticized as too ambitious and not sufficiently grounded in the reality of the country's limited human and physical resources and overcrowded prisons. Indeed, the department is struggling to roll out some of the basic systems fundamental to the rehabilitation process and has thus elected to "pilot" its initiatives in 36 "Centres of Excellence," selected from 241 national prisons.

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<sup>35</sup> SEU, 2002, "Reducing the Re-offending by Ex-prisoners."

<sup>36</sup> Parliament of the Republic of South Africa, *Correctional Services Act III of 1998*, November 27, 1998.

<sup>37</sup> Department of Correctional Services, "White Paper on Corrections in South Africa," Department of Correctional Services, Republic of South Africa, Pretoria, 2005.

Several concrete initiatives have also been developed to address the overcrowding problem in South Africa—perhaps the biggest challenge to penal reform in the country. A national forum, chaired by a respected Judge of the High Court, is seeking to coordinate efforts by different sectors of government and civil society and raise public awareness of the measures taken to date.<sup>38</sup> Although the forum has mainly focused on people awaiting trial in prison, as well as children in prisons, it is also looking at alternative sentencing.

Because the Department of Correctional Services has often lacked resources and skills to implement effective interventions for prisoners, civil society actors have developed many new initiatives. Although some of these initiatives are longstanding, only recently (and then only in very few organizations) have they been driven by an evidence-based approach to program design. These initiatives attempt to develop appropriate interventions for youth offenders relevant to the South African context, taking into account the scarcity of resources both inside and outside of prison. They also endeavor to take into account the complexity of factors that contribute to offending behavior, both with respect to the individual and the family. Several of these programs are attempting to assist inmates to re-enter society by building family relationships; their interventions provide support to young offenders both inside and outside of prison.

One intervention, coordinated by the Centre for the Study of Violence and Reconciliation (CSVR), is trying to coordinate the work of different rehabilitation (NGOs) to tackle the range of risk and resilience factors pertinent to youth offending in a holistic way, similar to the approach posited by the SEU. This project combines a focus on improving psycho-social skills and interpersonal relationships, as well as addressing HIV/AIDs, family relationships, and employment skills. A program evaluation has found that it is successfully achieving these aims and creating a positive attitude among participants towards their lives in prison and after their release. Group cohesion during the 8-month intervention and interaction with outside facilitators were found to be critical to building positive peer relationships, providing role models, and learning alternative forms of behavior—all of which are crucial for young people to participate meaningfully in society.<sup>39</sup>

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<sup>38</sup> For example, a recent initiative of the Judicial Inspectorate of Prisons and the Legal Aid Board aims to reduce the number of prisoners awaiting trial by securing bail and speeding up the trial process. See Karyn Maughan, “Call to Do Away with ‘Prisons of Hell,’” *Independent Online*, June 8, 2006.

<sup>39</sup> Margaret Roper, “A Review of the Integrated Youth Offender Programme Piloted in Boksburg Juvenile Correctional Centre with the ‘Inkanyezi Yentathakusa,’” research

The National Institute for Crime Prevention and Reintegration of Offenders (NICRO) runs a life-skills intervention program that continues to provide support after prisoners' release. Its Tough Enough Programme (TEP) focuses on the development of life skills, building and improving relationships, and developing individuals' potential and motivation for action. The program runs for about 3 to 6 months in prison and continues for up to 9 months after a prisoner's release. It encourages participants to take responsibility for the factors that lead them to engage in crime. An evaluation consisting of interviews and surveys with released prisoners, their families, and service providers found that the program was effective in addressing three key factors related to the risk of recidivism: improved personal empowerment, increased ability to deal with the experience of stigmatization, and to a lesser extent, improving economic empowerment.<sup>40</sup>

The biggest challenge for preventing re-offending comes when a prisoner is released into the community after completing his or her prison sentence. The ex-prisoner generally returns to the very same social circumstances that prompted him to engage in crime in the first place, but must try to resist the renewed pull of crime, perhaps using skills learned during imprisonment. Khulisa, an NGO working in several provinces in South Africa, conducted research on released young prisoners who had participated in its pre- and post-release rehabilitation programs to identify "emerging pathways for effective reintegration." The research suggested two critical vehicles for supporting offender reintegration: strengthening family and peer relationships and developing sustainable, non-criminal financial stability.<sup>41</sup> Khulisa found in particular that restorative processes with the family were important for healing fractured relationships.

Ensuring financial sustainability is perhaps a more challenging task, considering the extent of unemployment in the country and the impoverished circumstances

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report written for CSVR (Centre for the Study of Violence and Reconciliation), Johannesburg and Cape Town, South Africa, 2005. For another NGO initiative, see Roper, *Johannesburg Juvenile Maximum Security Prison Drug Peer Counseling Programme* (Johannesburg: Khulisa, 2004).

<sup>40</sup> Dena Lomofsky and Gail Smith, "Final Report: Impact Evaluation of the Tough Enough Programme," evaluation report prepared for NICRO (National Institute for Crime Prevention and the Reintegration of Offenders) by Southern Hemisphere Consultants (PTY) Ltd., in association with Roots Research SA, South Africa, 2003.

<sup>41</sup> Margaret Roper, "Emerging Pathways for Effective Reintegration of Juvenile Offenders in South Africa, Based on the Khulisa 'My Path' Programme Evaluations," evaluation prepared for Khulisa Crime Prevention Initiative, Craighall, South Africa, 2005.

of most offenders and their families. Despite having acquired some educational or vocational skills in prison, as well as the desire to earn an income through legal means, most prisoners find it immensely difficult to enter the formal workplace. The high unemployment rate in South Africa adds to this difficulty. Many ex-prisoners find a job through family connections or in the informal sector. Khulisa has taken an active role in trying to find work placements for released offenders, with limited success. As a result, it has developed partnerships with community organizations to create business opportunities for ex-offenders. Organizations such as Khulisa have also attempted to teach business and other skills that can be utilized by released prisoners in a self-sustaining way. One of its more recent initiatives is a printing enterprise staffed and managed by ex-offenders.<sup>42</sup>

The initiatives discussed here illustrate the positive role that civil society can play in reintegration in partnership with relevant government departments. These initiatives, moreover, test new models that can be replicated by the government.

#### ***Diversion and the Child Justice Bill***

As noted earlier, the democratization of South Africa has created a desire to develop more humane and effective strategies for combating crime. It has also opened up opportunities to learn from the initiatives of other countries. Since the early 1990s, South Africa has been attempting to develop a more comprehensive and appropriate child justice system. This effort is a response to the brutal conditions experienced by many young children in prisons and those awaiting trial in correctional facilities, as well as to a scattered, uncoordinated response to child crime. Guided by international instruments protecting the rights of children and those in conflict with the law,<sup>43</sup> the effort draws on the examples of New Zealand and Australia. Projects are accordingly being developed and piloted with the aim of intervening in the early stage of offending to save young people from entering the criminal justice system.

After an extended process of policy proposals and consultation, a Child Justice Bill was drafted in 2002.<sup>44</sup> This draft law seeks to serve as the comprehensive

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<sup>42</sup> Ibid.

<sup>43</sup> See in particular United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice* (the "Beijing Rules"), General Assembly Resolution 40/33) 1985; and United Nations, 1990, *Convention on the Rights of the Child*, General Assembly Resolution 44/25, November 20, 1989.

<sup>44</sup> Parliament of the Republic of South Africa, *Bill No. 44 (2002)*, introduced November 2002.

legislative framework for managing youth offending. The bill aims to channel the majority of children under the age of 18 years away from the criminal justice system and prevent the harmful effects of stigmatization and criminalization. It draws on the African notion of *ubuntu* (humanness) by strengthening the dignity and worth of offending youth and reinforcing their respect for human rights and the freedom of others by holding them responsible for their own behavior. Its chief goal is to bring about reconciliation through a restorative justice approach that recognizes the African tradition of restoration and community dispute resolution.

The Child Justice Bill is designed to meet the needs of the particular child in trouble with the law and promote his or her reintegration into the family and community. It envisages a process where child offenders are held accountable for the harm they have caused. Victims are encouraged to express their needs and encourage the children to make symbolic reparation. The bill requires that a probation officer be notified of the arrest of every child so that he or she can conduct an assessment and present it to a magistrate at a preliminary enquiry. The assessment makes recommendations on the possible release of the child (into parental custody or some other arrangement), as well as their suitability for diversion. The magistrate, usually on advice from the probation officer, then develops an individual diversion plan. Incrementally longer and more intense diversion options are envisaged, depending on the seriousness of the offense. Such options include one or a combination of community service, attendance of a life-skills or similar developmental program, house arrest, or participation in a victim or family group conference.

The bill has not yet been passed into legislation due to political unhappiness with some of its provisions (e.g., its proposed lenient treatment of rape offenders), but its concepts have been widely accepted and are being put into practice through the courts on a daily basis. Provisions for diversion are also included in other forms of legislation. For example, amendments to the Probation Services Act set out the responsibilities of probation officers for assessment, referral, and the delivery of diversion programmes.<sup>45</sup> Diversion projects are mainly run by an increasing number of NGOs that offer a variety of different programs for youth at risk. These programs attempt to tackle the factors related to offending, even though the probation service is increasingly playing this role. NICRO (National Institute for Crime Prevention and Reintegration of Offenders) is the main non-

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<sup>45</sup> Parliament of the Republic of South Africa, *Probation Services Amendment, Act 35 of 2002*. Adopted November, 7, 2002.

governmental service provider in this field, providing diversion programs for up to 91 percent of diverted youth.<sup>46</sup>

As a result of concerted attempts to deal with children from diverse sectors, a growing number of cases are diverted each year. The National Prosecutions Authority, for example, diverted 89,425 children July 1999 to March 2005.<sup>47</sup> NICRO itself has documented that, for the period April 2003 to March 2004, 16,534 children were referred to its diversion programs.<sup>48</sup> In addition to these programs, NICRO also provides ongoing after-care services for 3 to 9 months for youth who have completed its programs in order to assist youths and their families to reach the goals they have set.

The impact of such programs on recidivism rates has only been tested by a few of the organizations that run them, but evaluations have shown positive results. A longitudinal evaluation by NICRO, for example, found that only 6.7 percent of youth who had completed one of their program re-offended in the first 12 months, with a further 9.8 percent in the second year.<sup>49</sup> Khulisa, another organization that provides diversion services for youth, found positive changes with respect to self-awareness, self-management, interpersonal relationships, and democratic citizenship. Khulisa programs also impacted on behavior and school competency.<sup>50</sup> These programs aim to change offending behavior via personal development of the individual and providing them with the skills, attitudes, and confidence needed to participate successfully in education and work opportunities. While these initiatives mainly address the individual, FGCs deal with family and social issues related to

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<sup>46</sup> National Institute for Crime Prevention and Reintegration of Offenders (NICRO), "Written Submission and Oral Presentation to the Parliamentary Portfolio Committee on Correctional Services," August 14, 2004.

<sup>47</sup> Personal communication of author with a senior state advocate of the National Prosecution Authority's Child and Justice Section, May 19, 2005.

<sup>48</sup> NICRO, 2004, "Written Submission and Oral Presentation." According to NICRO, a comparison of the 2004 to 2003 diversion statistics indicates an 8 percent decrease, representing 1,411 children. NICRO's diversion programs include community service, as well as the Youth Empowerment Scheme (YES), Family Group Conference (FGC), and Journey programs.

<sup>49</sup> Lukas L. Muntingh, "The Effectiveness of Diversion Programmes: A Longitudinal Evaluation of Cases," NICRO, Cape Town, South Africa, 2001.

<sup>50</sup> Khulisa Crime Prevention Initiative, "Khulisa's Diversion/Rehabilitations/ Reintegration Programme," Khulisa Crime Prevention Initiative, Craighall, South Africa, 2005.

youth crime. However, diversion programs play a limited role in addressing the fundamental issues of poverty and social exclusion.

One limitation of these programs is that service providers are often concentrated in urban areas, meaning that youth from impoverished rural areas tend to have less access to them. (Most of these children are referred to diversion programs as a result of socio-economic crimes—often associated with substance abuse—which, according to NICRO, reflects deprivation and poverty.<sup>51</sup>) The government is currently trying to extend these programs to children living in rural areas, but this is not always an easy task. Children in rural areas are often situated some distance from the courts or offices of probation workers. Moreover, because they are arrested and diverted in smaller numbers, it is difficult to bring them together for group sessions.<sup>52</sup> These difficulties do not mean that courts are unwilling to divert children; even where an NGO or probation officer is not available, the courts often make arrangements for children to be diverted and compelled to perform some form of supervised community service for a government entity—often the courts, police, or hospitals. Probation officers employed in these areas also offer individual sessions with diverted youth.

There is no doubt that diversion programs will be strengthened when the Child Justice Bill is adopted into legislation. But a firm grounding has nevertheless been established and the diversion of children has already become part of established practice. However, a number of challenges remain before these policies can be rolled out on a mass scale. These challenges include the need to: promote diversion within all courts, particularly in rural areas; train and recruit suitable staff to run and manage diversion programs; and rigorously monitor diversion services. The Department of Social Development has recently developed minimum standards for diversion programs to ensure adequate practice and protect the rights of children.<sup>53</sup>

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<sup>51</sup> NICRO, 2004, “Written Submission and Oral Presentation.”

<sup>52</sup> Amanda Dissel, “Evaluation Report of the Restorative Justice Centre Rural Diversion Pilot Project in Three Districts in Mpumalanga,” Restorative Justice Centre, Pretoria, South Africa, 2005.

<sup>53</sup> Lukas L. Muntingh, “Minimum Standards for Diversion Programmes,” *Article 40* (Children’s Rights Project of the Community Law Centre, South Africa) 4, no. 7 (December 2005).

### ***Victim Offender Conferencing***

Victim Offender Conferencing (VOC), a process in which an offender is diverted into a mediated conference with the victim, is beginning to gain popularity in South Africa. VOC uses a restorative justice approach to dealing with youth crime, encouraging offenders to acknowledge the wrong they have done, make amends, and take steps to deal with why they engage in crime. In a VOC pilot initiative, 660 cases in South Africa were mediated in this way (most of them diverted from the courts), of which 9 percent of the offenders were under the age of 21 years. Most of the cases referred were for relatively minor offenses.

The VOC process effectively reduces the caseload of the criminal justice system and keeps offenders out of jail. It is also effective in helping address the social and relationship difficulties that give rise to conflict and crime. All participants (victim and offender) in the pilot initiative reported a high level of satisfaction with the process; victims subsequently reported that agreements resulting from mediation were adhered to in 86 percent of cases.<sup>54</sup> These agreements often attempted to address the root causes of the criminal dispute by dealing with relationship issues, how parents support their children, and substance abuse. The project suggests that non-formal and community-based justice mechanisms can be highly effective in dealing with social fabric crimes, while at the same time building social cohesion.

The Community Peace Programme in the Western Cape has developed a uniquely South African approach to community dispute resolution. "PeaceMaking" gatherings composed of representatives of the communities in which they are sited bring together disputants (often where criminal offenses have occurred) and help resolve the dispute. A member of the gathering is mandated to monitor the implementation of all agreed plans. "PeaceBuilding" gatherings, on the other hand, tackle more generic, long-term problems in a community, which are often related to frequent disputes and/or crime. Problem solving has included building children's playgrounds, meal programs, and youth projects. While Peace Committees are also concerned with issues of security, they are essentially a governance model that promotes community self-direction and capacity building. The project is a successful partnership between community groups, local governments, and

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<sup>54</sup> Amanda Dissel, "Piloting Victim-Offender Conferencing in South Africa," in *Beyond Retribution: Prospects for Restorative Justice in South Africa*, ed. Traggy A. Maepa, ISS Monograph Series, no. 111 (Pretoria, South Africa: ISS [Institute for Security Studies], 2005), 89–104.

the South African Police Service.<sup>55</sup> Peace Committee members are paid a small amount for their participation in the process and committee activities are funded by the local municipality.

## **Conclusion**

There are several important initiatives in South Africa that are addressing the root causes of youth crime, both inside and outside the formal criminal justice system. Most such initiatives help offenders become “included” into society by strengthening an individual’s psycho-social competencies, educational and vocational skills, and family relationships. Research suggests, however, that these skills are not sufficient to prevent recidivism. Given community hostility towards criminals and the ailing job market of South Africa, a fundamental shift is required in how South African society deals with offenders.

A recent proposal suggests that funds for the justice system be expended on community crime prevention initiatives, rather than on incarceration alone.<sup>56</sup> Where people are incarcerated, offenders should be prepared, trained, and skilled to become “builders and restorers of healthy, safe communities.”<sup>57</sup> The proposal advocates a cross-sectoral re-entry strategy targeted at the needs of local communities. People returning home from prison would become “agents of community restoration” and join other residents in rehabilitating housing and schools, redesigning and building parks, and contributing to the social fabric of their neighborhoods. Offenders would have the opportunity to develop useful job-related skills through this process, which would be designed to enable the development of the individual within a community framework.

Given that the South African Department of Correctional Services aims to promote the rehabilitation, social responsibility, and reintegration of young offenders into the community, the idea of “justice reinvestment” could also be applied to

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<sup>55</sup> John Cartwright, “Mobilising Local Capacity and Knowledge,” photocopy, unpublished paper, 2004.

<sup>56</sup> Susan B. Tucker and Eric Cadora, “Justice Reinvestment: To Invest in Public Safety by Reallocating Justice Dollars to Refinance Education, Housing, Healthcare, and Jobs,” *Ideas for an Open Society* 3, no. 3 (November 2004), Occasional Papers from OSI (Open Society Institute)-US Programs.

<sup>57</sup> *Ibid.*, 5.

sentencing. A sentence, for example, could be used to bring about a change in the cycle of offending and re-offending by requiring community work or attendance of a diversion program. As Margaret Roper concludes in a study of the reintegration of young offenders,

This requires new thinking by all role players towards managing reintegration at [the] family, community, business and town level. Creative strategic approaches need to be developed to utilize correctional centers as spaces for community involvement and 'hubs' for reconnecting and healing between offenders, families and victims.<sup>58</sup>

This paper has sought to illustrate how a more holistic approach to youth crime and rehabilitation is beginning to be developed in South Africa. The restorative justice models used in diversion and current community mediation programs create the potential for healing spaces and developing responses to the wider social problems that occur in a community. Increasingly, civil society actors are developing innovative solutions and providing ongoing support to the criminal justice system in South Africa. While these initiatives receive policy-based support from the government and refer cases to other community-based programs, the government is able to provide them only limited financial support. Development agencies such as the World Bank might consider supporting these partnerships between civil society organizations and the South African government. Support is needed not only to start up new programs, but also to provide longer-lasting interventions that have sustainable results. Although South Africa has borrowed from the lessons of developed countries and created initiatives unique to the history and culture of the country, it has also learned valuable lessons by grappling with the problems of poverty and limited resources. These latter lessons could be of great use to developing countries.

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<sup>58</sup> Roper, 2005, *Emerging Pathways*, 39.

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## **POLITICS, INSTITUTIONS, AND SOCIETY: SEEKING BETTER RESULTS**

PETER GOUREVITCH\*

*We know that political processes influence growth and equality, but we disagree on how they do so. A vibrant debate about variance in corporate governance systems reveals three categories of the causality of political influence: the type of law (i.e., “legal family”), political institutions (i.e., de jure institutions), and social power (i.e., de facto institutions). The first explanation stresses the impact of contracting arrangements generated by civil and common law systems and finds common law to be more encouraging of growth. The political institutions explanation stresses the impact of political arrangements. It argues that structures that obligate governments to be accountable to constituencies inhibit predation and encourage growth. The third explanation stresses the ability of social power (in such forms as land, media, family, and organizational capacity) to bend governments to its will. It holds that high concentrations of social power undermine the capacity of de jure institutions to restrain predation.*

*Each of these arguments has contributed something to our understanding, but each has its own shortcomings. The legal family school has demonstrated the existence of variance in corporate governance, but has difficulty explaining variations within countries over time, as well as variations among countries within the same legal family. The formal political institutions school helps account for variance among countries within a single legal family, but underplays the role of social power among interest groups. The social power school helps account for variance across similar institutions across countries, and within a country over time, but has some problems in measurement. Better measurements exist of the influence of formal law and political institutions on development and economic growth than of social forms*

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\* The author thanks both the Russell Sage Foundation, where this paper was written on a fellowship 2005–2006, and the Guggenheim Memorial Fellowships for support. Additional thanks go to Stijn Claessens, Simon Johnson, James Shinn, and Christopher Woodruff for comments on earlier drafts, as well as to Lauren Porzelt and Orly Clergy for editorial assistance.

*of power. This paper examines these three schools within the context of the debate on corporate governance to ask the following questions: Why do corporate governance systems vary around the world (diffuse shareholder models in the United States and the United Kingdom versus concentrated blockholder models in most of the world)? And, what can be done to improve these systems? Once a topic unto itself, the debate about corporate governance is now tightly interwoven with important discussions about economic development and “endogenous institutional change.” An examination of corporate governance shows the importance of social forms of power in influencing how institutions and legal family affect growth.*

## Introduction

There is substantial consensus that political processes influence growth and equality—a marked change from the recent past. The latest *World Development Report*<sup>1</sup> for example, explores the political and social variables that shape policy and development outcomes. Indeed, so great is the consensus on the importance of politics in development that we can disagree on the next big point: just what model of politics do we have in mind? What produces “good political practices” that lead to economic growth (and along the way, good corporate governance, equity, freedom, and justice)? There are three primary arguments: the formal law (legal family) argument,<sup>2</sup> the political institutions argument, which is based on de

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<sup>1</sup> World Bank, *World Development Report 2006: Equity and Development* (Washington, DC: World Bank and Oxford University Press, 2005).

<sup>2</sup> The formal law argument is associated with the research of La Porta, Lopez de Silanes, Shleifer, and Vishny. The problem of managers escaping the control of investors was famously observed by Berle and Means in 1933. See Adolph A. Berle and Gardiner C. Means, *The Modern Corporation and Private Property* (New York: McMillan, 1933). While country specialists knew the U.S. pattern was by no means universal, La Porta and his colleagues have helped develop recent awareness of the variations in this pattern. See La Porta, Rafael, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert W. Vishny, “Legal Determinants of External Finance,” *The Journal of Finance* 52 (1997):1131–50; “Law and Finance,” *Journal of Political Economy* 106, no. 6 (December 1998):1113–54; “Corporate Ownership around the World,” *The Journal of Finance* 54, no. 2 (April 1999):471–517; “Investor Protection and Corporate Governance,” *Journal of Financial Economics* 58, nos. 1–2 (2000):3–27; “Investor Protection and Corporate Valuation,” *Journal of Finance* 57, no. 3 (June 2002):1147–70. For an extensive review of the literature on this topic, see Marco Becht, Patrick Bolton,

jure institutions associated with constitutions,<sup>3</sup> and the social power or political sociology argument, based on elements of civil society, such as interest groups, social class, media, professional associations, or de facto institutions.

Each of these arguments has a different sense of “politics” and political mechanisms. In the legal formalism school, good institutions that promote growth and corporate governance are derived from a country’s legal family, with common law held to be superior to civil law. Improving country performance thus means improving the codes that regulate corporate and securities law. The political institutions school argues that the implementation of codes, as well as passage of “good” laws, requires support from policy-making institutions. Because “good” institutions produce good policy, change requires the improvement of political decision-making bodies. The political sociology school argues that institutions themselves express the preferences of groups in society who actually use the institutions and can make them serve their interests. Good policy, then, requires altering the distribution of power in society. The debate over the cause of good institutions is thus a debate over three forms of power—legal, institutional, and social—and thus, over three models of politics.

The rest of the paper explores this debate through the specific prism of corporate governance. It first sets out corporate governance as a dependent variable—the outcome to be explained—and explores variations in the patterns of corporate governance around the world. The paper then examines the three arguments on the causality of “good” institutions. Finally, it explores the implications of these arguments for policy and the larger question of institutions that promote development.

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and Ailsa Röell, “Corporate Governance and Control,” in *Handbook of the Economics of Finance*, ed. G.M. Constantinides, M. Harris, and R.M. Stulz, 1–109, Handbooks in Economics, vol. 1A (Oxford: Elsevier/ North-Holland, 2003).

<sup>3</sup> This particular use of the terms “de jure” and “de facto” derive from Daron Acemoglu and Simon Johnson, “Unbundling Institutions,” *Journal of Political Economy* 113, no. 5 (October 2005):949–95. Also see Daron Acemoglu and James Robinson, 2006 “The Persistence of Power: Elites and Institutions,” photocopy; Daron Acemoglu, Simon Johnson, and James A. Robinson, “Institutions as the Fundamental Cause of Long-run Growth,” in *Handbook of Economic Growth*, vol. 1A, ed. Philippe Aghion and Steven Durlauf, 385–472 (Oxford: Elsevier/ North-Holland, 2005); Daron Acemoglu, Simon Johnson, and James A. Robinson, “The Colonial Origins of Comparative Development: An Empirical Investigation.” *American Economic Review* 91, no. 5 (December 2001):1369–1401; and Daron Acemoglu, “Constitutions, Politics and Economics: A Review Essay on Persson and Tabellini’s ‘The economic effects of constitutions,’ ” *Journal of Economic Literature* 43, no. 4 (December 2005):1025–1048.

### **Variance in Corporate Governance Outcomes**

Corporate governance systems vary by the degree of shareholder concentration. In blockholder models, a few actors (banks, governments, individuals, or other firms) hold a large percentage of issued shares. This allows them, as owner-principals, to monitor directly, or through agents on the board of directors, the behavior of corporate managers, who are their agents. Owner-principals have the means (the majority of board seats) and the motive (a large ownership share) to act. By contrast, in the diffuse shareholder model, a board of directors represents the interests of minority shareholders without their direct management. In this system, minority shareholders are protected from insider dealing by blockholders, but lack the means and motive to intervene or monitor their mediating agents (the elected directors). Minority shareholders are thus vulnerable to opportunism by insiders in the blockholding model, but also get a free ride from the activism of those blocks that watch the managers. A comparative analysis begins with a description of the differences in shareholder concentration around the world.<sup>4</sup> Table 1 draws on the foundational work of La Porta and others,<sup>5</sup> the World Bank, and other researchers to show these differences by country.

Note that there is considerable variation among countries. While Japan and China appear to be at the diffuse end of the spectrum, these rankings merit important qualifications. In China, for example, only a small portion of the economy exists in the form of listed stock—the rest is owned by the state. In Japan, there is extensive cross-shareholding among corporations, so that there is no effective market for control. Because of these caveats, no one regards either country as exemplifying the diffuse shareholder model. According to the table, the most diffuse country is the United States, and the least diffuse, Chile. There is no substantial disagreement over the variations shown in the table—the battle heats up when we try to explain the reasons for these variations.

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<sup>4</sup> Earlier work looked at bank debt versus equity ratios. This is still the dominant measure for comparing patterns of corporate governance in earlier periods because shareholder concentration is difficult to document. See Raghuram Rajan and Luigi Zingales, “The Great Reversals: The Politics of Financial Development in the 20th Century,” *Journal of Financial Economics* 69, no. 1 (July 2003):5–50.

<sup>5</sup> See footnote 3.

*Table 1. Ownership concentration*

<i>Country</i>	<i>Concentration</i>	<i>Country</i>	<i>Concentration</i>
Japan	4.1	Venezuela	49.0
China	5.0	Belgium	51.5
United States	15.0	Thailand	51.9
Netherlands	20.0	South Africa	52.0
United Kingdom	23.6	Austria	52.8
Ireland	24.6	Israel	55.0
New Zealand	27.0	Spain	55.8
Australia	27.5	Turkey	58.0
Canada	27.5	Italy	59.6
South Korea	31.8	Portugal	60.3
Denmark	37.5	Brazil	63.0
Norway	38.6	Germany	64.6
Malaysia	42.6	France	64.8
India	43.0	Mexico	66.0
Singapore	44.8	Indonesia	67.3
Taiwan	45.5	Hong Kong	71.5
Philippines	46.4	Argentina	72.5
Sweden	46.9	Greece	75.0
Switzerland	48.1	Chile	90.0
Finland	48.8		

*Note:* The index is constructed from measures of the percentage of publicly traded stock held by the largest shareholders in publicly traded major firms in each respective country.

*Source:* Peter Gourevitch and James Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton: Princeton University Press, 2005). Reprinted with the permission of Princeton University Press.

### Explaining the Variations: Three Models of Politics

As noted earlier, the three models of politics can be sorted into three camps: legal family, political institutions, and interest groups (social power). The models differ most on what shapes law and regulation. That is, they differ in how they answer the question, if law and regulation protect investors from exploitation by insiders, what explains the existence of these laws and regulations? In addition, the models differ on whether law matters and which laws matter, an issue that is addressed in the discussion below.

#### *Legal family: The formal rules approach*

In order to have diffuse corporate ownership, an investor must accept a minority position in a firm, either as an outsider coming in or as a blockholder selling down. Both types of investors risk, however, exploitation by insiders. A rich literature argues that they must obtain some kind of protection from insider abuse. Laws and regulations thus provide minority shareholder protections,<sup>6</sup> measures that include information (disclosure and audit), oversight (board independence), control rules (voting processes), and managerial incentives (executive pay). The higher the level of minority shareholder protections (MSP), the more managers are supervised, the more outside investors and blockholders are reassured, and the deeper markets become. Such, at least, are the core assumptions of the “law matters” school.<sup>7</sup>

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<sup>6</sup> This passage draws on Peter Gourevtich and James Shinn, *Political Power and Corporate Control: The New Global Politics of Corporate Governance* (Princeton: Princeton University Press, 2005), especially chapters 2 and 3.

<sup>7</sup> Historical research questions the causal sequence: do shareholders precede minority shareholder protections (MSP) or do MSP precede shareholders? Private bonding arrangements via stock exchanges or mergers may have created a group of shareholders who then demanded MSPs. Although this theory makes political sense (why create something for which there is no constituency?) and may be historically accurate, it is unclear how the theory would explain the present, that is, can formal MSP regulations and their enforcement induce shareholding? See the following works by Brian Cheffins: “Does Law Matter? The Separation of Ownership and Control in the United Kingdom,” *Journal of Legal Studies* 30, no. 2 (June 2001):459–484; “Corporate Law and Ownership Structure: A Darwinian Link?” *University of New South Wales Law Journal* 25, no. 2 (2002):346–55; “Putting Britain on the Roe Map: The Emergence of the Berle-Means Corporation in the United Kingdom,” in *Corporate Governance Regimes: Convergence and Diversity*, ed. Joseph A. McCahery, Piet Moerland, Theo Raaijmakers, and Luc Renneboog, 147–74 (Oxford: Oxford University

Laws about insider trading, the composition of boards, the issuance of shares, as well as required information on a firm's finances, take-overs, and the market for control allow outsiders to judge the value of their investment and take action, be it to buy, sell, or take over.

The predictive assumption of this school is that where minority shareholder protections are strong, diffusion occurs. Comparative research that measures various components of MSP was pioneered by LaPorta and others, who helped create a new field of study. Initially, they measured issues of firm governance, but they and others have since broadened the terrain to include other elements that influence minority shareholder protections. (The index shown in Table 2 combines several measures drawn from LaPorta and others,<sup>8</sup> together with evaluations made by Gourevitch and Shinn in *Political Power and Corporate Control*<sup>9</sup>).

From the perspective of the legal family model, high levels of minority shareholder protections should correlate positively with shareholder diffusion; the stronger the MSP, the more investors should be willing to become minority shareholders. See Figure 1 for a correlation between blockholding (from Table 1) and minority shareholder protections (from Table 2) in countries around the world. As the figure makes clear, the correlation is strongest for developed countries and weakest for developing countries.

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Press, 2002). Also see Randall K. Morck, ed., *History of Corporate Governance around the World: Family Business Groups to Professional Managers* (Chicago: University of Chicago Press, 2006); and John C. Coffee, Jr., "The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control," *The Yale Law Journal* 111, no. 1 (October 2001):1–82.

<sup>8</sup> See footnote 3.

<sup>9</sup> Gourevitch and Shinn, 2005, *Political Power and Corporate Control*.

*Table 2. Minority shareholder protections index*

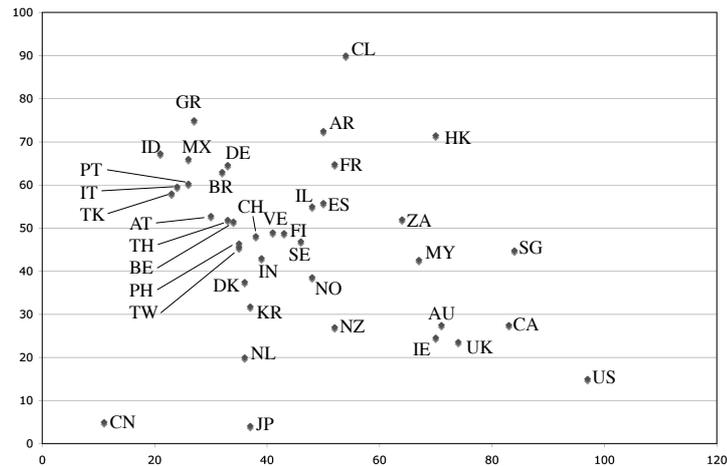
<i>Country</i>	<i>Information</i>	<i>Oversight</i>	<i>Control</i>	<i>Incentive</i>	<i>Total MSP</i>
Argentina (ARG)	48	0	80	72	50
Australia (AUS)	75	71	80	59	71
Austria (AUT)	40	36	40	6	30
Belgium (BEL)	43	32	0	59	34
Brazil (BRZ)	27	0	60	41	32
Canada (CAN)	83	71	100	78	83
Chile (CHIL)	35	14	100	66	54
China (CHIN)	25	0	20	0	11
Denmark (DEN)	44	43	40	16	36
Finland (FIN)	60	36	60	16	43
France (FRA)	64	37	60	47	52
Germany (GER)	44	29	20	41	33
Greece (GRC)	53	14	40	0	27
Hong Kong (HK)	85	14	100	81	70
India (IND)	50	7	100	0	39
Indonesia (INDO)	45	0	40	0	21
Ireland (IRE)	69	71	80	59	70
Israel (ISR)	74	29	60	31	48
Italy (ITAL)	69	7	20	0	24
Japan (JPN)	66	0	80	0	37
Malaysia (MAL)	84	36	80	69	67
Mexico (MEX)	59	14	20	9	26
Netherlands (NED)	57	0	40	47	36

<i>Country</i>	<i>Information</i>	<i>Oversight</i>	<i>Control</i>	<i>Incentive</i>	<i>Total MSP</i>
New Zealand (NZ)	56	71	80	0	52
Norway (NOR)	66	29	80	16	48
Philippines (PHL)	74	7	60	0	35
Portugal (POR)	43	0	60	0	26
Singapore (SIN)	89	71	80	97	84
South Africa (SAF)	73	43	100	41	64
South Korea (SK)	65	21	40	22	37
Spain (SPN)	57	14	80	50	50
Sweden (SWD)	67	36	60	22	46
Switzerland (SWT)	59	36	40	16	38
Taiwan (TAI)	74	7	60	0	35
Thailand (THAI)	78	7	40	6	33
Turkey (TURK)	51	0	40	0	23
United Kingdom (UK)	81	60	100	53	74
United States (US)	86	100	100	100	97
Venezuela (VEN)	49	14	20	81	41

*Note:* The rankings shown here are a composite constructed by the authors from numerous sources.

*Source:* Gourevitch and Shinn, *Political Power and Corporate Control*, 2005, 48.

Figure 1. Blockholding and shareholder protections



Source: Gourevitch and Shinn, *Political Power and Corporate Control*, 2005, 51, 301 (Table A-4).

Notes: (1) See first column of Table 2 for the acronym key. (2) The correlation is strongest for developed countries, at  $-0.42^{**}$  ( $p < .05$ ), at a significance of .03, while reversed in sign and of weak significance for developing countries (0.29).

It would appear from Figure 1 that minority shareholder protections and corporate governance patterns do correlate, as expected. Some relationship exists, but the correlation is not strong, which suggests that other variables are at play. These variables are discussed further below, but first the “hot button” arguments about politics need to be addressed. Even if MSP (i.e., laws and regulations about shareholders) account for diffusion, they do not explain the existence of MSP. La Porta and others argue that the “legal family”—whether a country has civil or common law—explains the existence of these protections. Common law systems, they suggest, have higher MSP than do civil law systems. Having measured MSP in many countries, they correlated levels of minority shareholder protections with the legal family of various countries. Their conclusions provide evidence that confirms the intriguing

“eyeball” observation that the United Kingdom and its former colonies, including the United States, are heavily grouped in a high shareholder diffusion and high MSP pattern, while France, Spain, and their former colonies tend to be grouped in a high blockholder and low protection pattern. This is a striking difference that deserves serious attention.

Closer inspection reveals, however, problems with the legal family explanation. On the empirical side, there is substantial variance in corporate governance patterns within countries over time, while their legal family stays constant. There is also substantial variation among countries within the same legal family. In their important paper, “The Great Reversals,” Rajan and Zingales track in-country change extensively and show that France and Japan developed substantial stock markets prior to World War I, then made a sharp swing toward bank dominance.<sup>10</sup> Corporate governance in the United States looked much like that in Germany prior to World War I. However, policy changes subsequently created the anti-trust regulatory system, banking regulations, and minority shareholder protections that produced the system we know today.<sup>11</sup> Berkowitz, Pistor, and Richard, on the other hand, show a “transplant effect,” in which local conditions cause countries to considerably alter legal structures that they import from elsewhere.<sup>12</sup>

On the conceptual side of the legal family argument, the mechanism of causality remains unclear: why does legal family produce the claimed effect? Legal family, a formal characteristic, does not explain the content of actual laws that are passed nor does it explain the pattern of enforcement, which is even more important. Nothing in common law systems guarantees that countries will enact vigorous MSP or that they will enforce these protections. And nothing in civil law systems prevents countries from enacting strong minority shareholder protections or enforcing them.

*Political institutions: De jure power*

Laws are made and enforced by political systems. Variations in the content of laws, regulations, and enforcement, might thus be the result of variations in political systems. Formal legal systems (civil versus common law), however, differ from both political institutions and social structures. Acemoglu, Johnson, and Robinson

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<sup>10</sup> Rajan and Zingales, 2003, “The Great Reversals.”

<sup>11</sup> Mark Roe, *Strong Managers, Weak Owners: The Political Roots of American Corporate Finance* (Princeton: Princeton University Press, 1994).

<sup>12</sup> Daniel Berkowitz, Katharina Pistor, and Jean-Francois Richard, “Economic Development, Legality and the Transplant Effect,” *European Economic Review* 47, no. 1 (February 2003):165–95.

call legal systems “contractual institutions,” while labeling political structures “property-rights institutions.”<sup>13</sup> Contractual processes, they argue, differ according to legal family, but do not predict economic development. Institutions that protect property, meanwhile, do not correlate with legal family, but do correlate with economic growth. Corporate governance patterns show similar results.

What are property-protecting institutions? In formal terms, they are the structures that organize power in political systems. Here Acemoglu, Johnson, and Robinson make another important distinction between *de jure* institutions (formal structures that shape the way “preferences”—interests, ideas, goals—are aggregated) and *de facto* institutions (forms of power in civil society, such as land, guns, and money).<sup>14</sup> Different methods of counting votes and agenda control both can produce different outcomes out of the same base of preferences. This insight has generated an important body of literature that compares the political institutions of countries, such as electoral laws, the structures of the executive and legislature, the degree of federalism, courts and the independence of the judiciary, and freedom of speech and the press. Countries are also compared by categories such as presidential versus parliamentary systems, majoritarian versus consensus systems, and high or low number of veto gates or veto players. World Bank research by Beck and others has contributed significantly to this literature over a number of years, building a valuable database,<sup>15</sup> as has other recent research.<sup>16</sup>

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<sup>13</sup> Acemoglu and Johnson, 2005, “Unbundling Institutions.” Also see Christopher Woodruff, “Measuring Institutions,” in *International Handbook on the Economics of Corruption*, ed. Susan Rose-Ackerman (Cheltenham, UK: Edward Elgar, 2006), 105–124; Luc Laeven and Christopher Woodruff, “The Quality of the Legal System: Firm Ownership and Firm Size,” photocopy, 2005.

<sup>14</sup> Acemoglu, Johnson, and Robinson, 2005, “Institutions as the Fundamental Cause of Long-run Growth.” Glaeser and others make an important warning about the need to be sure that measures of institutions are independent from the outputs they produce. See Edward L. Glaeser, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, “Do Institutions Cause Growth?” *Journal of Economic Growth* 9, no. 3 (September 2004):271–303.

<sup>15</sup> Beck et al., “New Tools in Comparative Political Economy: The Database of Political Institutions,” *World Bank Economic Review* 15, no. 1(2001):165–76.

<sup>16</sup> See Acemoglu, Johnson, and Robinson, 2005, “Institutions as the Fundamental Cause of Long-run Growth,” and 2001, “Colonial Origins of Comparative Development.” Also see C. Douglass North, *Structure and Change in Economic History* (New York: W.W. Norton, 1981); Stephen Haber, Armando Razo, and Noel Maurer, *The Politics of*

The institutionalist approach—the focus on de jure institutions—accounts better for variations in minority shareholder protections and corporate governance outcomes among countries. In stable democracies, for example, Gourevitch and Hawes<sup>17</sup> and Gourevitch and Shinn<sup>18</sup> show that MSP and corporate governance outcomes correlate with majoritarian-consensus systems. Majoritarian systems are more likely to have high MSP and diffuse shareholder patterns, a logic derived from the impact that institutions have on the bargains made among groups in each system. But majoritarian systems have wider policy swings, which undermine the corporatist foundations of particular blockholding arrangements, inducing actors to seek autonomy through arms-length economic relationships, and consequently, MSP and shareholder diffusion. Conversely, “consensus” systems reinforce corporate bargains and sustain blockholding arrangements.<sup>19</sup> Pagano and Volpin stress the impact of electoral systems: countries with proportional representation are more likely to have strong shareholder protection rules and diffuse shareholding patterns than countries with once-past-the-post, single-member plurality districts.<sup>20</sup>

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*Property Rights: Political Instability, Credible Commitments, and Economic Growth in Mexico, 1876–1929* (Cambridge: Cambridge University Press, 2003); Arend Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-six Countries* (New Haven: Yale University Press, 1999); Torsten Persson and Guido Tabellini, *The Economic Effects of Constitutions: What do the Data Say?* (Cambridge, MA: MIT Press, 2003); Matthew S. Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics* (Cambridge: Cambridge University Press, 1992); and Stephan Haggard and Mathew D. McCubbins, eds., *Presidents, Parliament and Policy* (Cambridge: Cambridge University Press, 2001).

<sup>17</sup> Peter Gourevitch and Michael B. Hawes, “The Politics of Choice among National Production Systems,” *L’Année de la regulation* no. 6 (2002–03):241–70.

<sup>18</sup> Gourevitch and Shinn, 2005, *Political Power and Corporate Control*.

<sup>19</sup> See Peter Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001); Torben Iversen and David Soskice, “An Asset Theory of Social Policy Preferences,” *American Political Science Review* 95, no. 4 (December 2001):875–93, <http://www.people.fas.harvard.edu/~iversen/PDFfiles/SocialPreferences.pdf> (accessed June 25, 2006); Isabela Mares, *The Politics of Social Risk: Business and Welfare State Development*. Cambridge: Cambridge University Press, 2003).

<sup>20</sup> See the following works by Marco Pagano and Paolo F. Volpin: “The Political Economy of Corporate Governance,” *American Economic Review* 95, no. 4 (September 2005):1005–1030; “Workers, Managers, and Corporate Control,” *The Journal of Finance* 60, no. 2 (April

The impact of veto players and stable institutions differs in stable democracies and authoritarian regimes. Strong regimes can enforce rules, but may prey on economic life by undermining incentives to invest; weak regimes cannot enforce rules, which itself undermines incentives. Blockholding may arise in either extreme. Having too many veto points can paralyze the policy process. Too few veto points lessen the chance of policy paralysis, but increases the threat of predation. The confidence of investors may be highest at some intermediate point on a U-shaped curve, where a certain balance exists between too much action and none at all. Investment in authoritarian regimes can, moreover, be significant in periods when such regimes signal some kind of commitment to investors that predation will be limited.

*Social forms of power: De facto power*

In contrast to the stress on de jure political institutions, another body of literature looks at de facto forms of power (e.g., control of land, guns, people, etc.) that enable social groups to manipulate the political process to their advantage.<sup>21</sup> Constitutions seek to constrain later generations by structuring the political game on behalf of whomever is writing the documents; the constitution is thus a commitment mechanism. However, groups with social power are able to undermine these restrictions by capturing the formal structures of politics, altering their usage, or even changing the constitution. The histories of Latin America, Africa, and indeed Europe and the United States, are full of examples of this kind of change. Acemoglu and Robinson cite the American South after the civil war, Colombia, and Liberia as examples where landed elites blocked formal political efforts that sought to limit their power.<sup>22</sup>

In the American South, the fourteenth amendment to the U.S. Constitution (which guaranteed citizenship, due process, and equality—especially for freed slaves) was rendered meaningless by barriers to voting, terrorism from the Ku Klux Klan, and Jim Crow exclusion from education, jobs, and many social practices. In Colombia, the landed elite made a bargain to rotate power among themselves and exclude most of the population from participating in politics. In Liberia, the descendents of American slaves created a similar system of elite power. In France, the authors of the Third Republic's constitution planned a strong executive, hoping for a return to

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2005): 841–68; and “The Political Economy of Finance,” *Oxford Review of Economic Policy* 17, no. 4 (Winter 2001):502–19.

<sup>21</sup> Acemoglu and Johnson, 2005, “Unbundling Institutions.”

<sup>22</sup> Acemoglu and Robinson, 2006, “The Persistence of Power, Elites and Institutions.”

monarchy. When the president of the Third Republic lost a fight with the National Assembly, however, the system rapidly became a parliamentary-dominant, weak presidential model.<sup>23</sup> Stasavage<sup>24</sup> critiques the influential North-Weingast essay<sup>25</sup> on the English political settlement of 1688 by noting that the limits on the crown came not only from formal changes in parliamentary oversight, but from the goals of the particular majority that dominated the parliament at the time. A different majority would have led to a different outcome, as it did in France. These examples suggest that to understand how formal institutions work, one needs to know who uses them and for what purposes.<sup>26</sup>

In the case of corporate governance, these considerations compel us to look at the interest-group politics involved in policies on minority shareholder protections. Laws that regulate corporations and shareholders express the demands of specific groups acting through politics, the support of which is needed by politicians and bureaucrats in order to create and enforce legislation. Finance theorists begin any analysis of the moral-hazard issues of governance by positing the goals, or interests, of investors and managers. They ask how investors, i.e., the principal, are able to monitor the behavior of the managers, or agents, given the principals' great need for the expertise and initiative of the agents. This analysis helps model the incentives that operate inside a firm. In order to explain public policy, however, one needs to examine how the goals of the actors inside the firm are translated into public policy processes outside the firm. To do so requires scrutiny of interest groups and their actions through political parties, elections, lobbying regulators, and the familiar trappings of political life.

Key social actors can be specified using the owner-manager distinction of finance theory. One must then add the workers, an important group in society as well as in firms. These actors can combine in various ways to generate alternative support (or

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<sup>23</sup> A similar concern with social forms of power can be found in Rajan and Zingales, 2003, "The Great Reversals."

<sup>24</sup> David Stasavage, "Credible Commitment in Early Modern Europe: North and Weingast Revisited," *Journal of Law, Economics, and Organization* 18, no. 1 (April 2002):155–86. For the original essay, see C. Douglas North and Barry Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England," *Journal of Economic History* 49, no. 4 (December 1989):803–832.

<sup>25</sup> C. Douglas North and Barry Weingast, "Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth Century England," *Journal of Economic History* 49, no. 4 (December 1989):803–832.

<sup>26</sup> Rajan and Zingales, 2003, "The Great Reversals."

opposition) to laws that influence corporate governance outcomes, such as minority shareholder protections. Possible and real coalitions among these three groups are shown graphically in Table 3.

*Table 3. Political coalitions and governance outcomes*

<i>Coalition lineup</i>	<i>Winner</i>	<i>Model Name</i>	<i>Predicted Outcome</i>
Pair A: Class conflict			
Owners + Managers vs. Workers	Owners + Managers	Investor	Diffusion
Owners + Managers vs. Workers	Workers	Labor	Blockholding
Pair B: Sectoral			
Owners vs. Managers + Workers	Managers + Workers	Social Bargain	Blockholding
Owners vs. Managers + Workers	Owners	Oligarchy	Blockholding
Pair C: Property and voice			
Owners + Workers vs. Managers	Owners + Workers	Transparency	Diffusion
Owners + Workers vs. Managers	Managers	Managerism	Diffusion

*Source:* Gourevitch and Shinn, *Political Power and Corporate Control*, 2005.

Each “pair” in Table 3 is based on a different political cleavage that separates society into alternative policy views. The first pair pits workers against owners and managers. Roe provides evidence that labor-related groups oppose strong minority shareholder protections; where such groups are politically strong, one sees weaker MSP.<sup>27</sup> Many authors suggest the mirror of this: capital gets its way

<sup>27</sup> Mark Roe, *Political Determinants of Corporate Governance: Political Context, Corporate Impact* (Oxford: Oxford University Press, 2003).

by forcing through capital flow convergence around high MSP because investors demand legal protections for their stock purchasing.<sup>28</sup> This model of political differences explains the presence or absence of significant minority shareholder protections by the distribution of votes on a left-right continuum: the larger the labor vote (left), the weaker the MSP; alternatively, the bigger the conservative vote, the stronger the MSP.

The second pair in Table 3 sees the political divide along cross class or sector patterns, where workers, managers, and owners inside the firm support a mutually reinforcing regime of blockholding. These coalition members prefer the stability of existing employment, investment, and leadership arrangements to the fluid relationships of strong MSP systems. Minority shareholders are seen as outsiders who seek to uproot stable relationships that have been built up over time. These relationships sustain a distinctive pattern of production that reduces transactions costs and specializes in high-quality products and producer goods.<sup>29</sup> Germany has the most well-known examples of this corporate governance pattern, which involves extensive collaboration among members of the system through arrangements that are frequently labeled corporatist.

While both of these coalition patterns have received considerable attention in the literature on political economy, the third has not. This coalition aligns external investors with workers against blockholders and managers to defend high levels of MSP and general transparency. Pension funds are a key ingredient of this coalition. In fact, the growth of pension funds may be causing a historical shift in the patterns of coalitions that seek to influence public policy on MSP and corporate governance.<sup>30</sup> Reversing the expectation that workers and investors are in conflict, this coalition builds on motives that draw them together. Employee pension funds see minority

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<sup>28</sup> Paul MacAvoy and Ira Milstein, *The Current Crisis in Corporate Governance* (New York: Palgrave MacMillan, Ltd., 2003); Henry Hansmann and Reiner Kraakman, "The End of History for Corporate Law," *Georgetown Law Journal* 89, no. 2 (January 2001):439–68.

<sup>29</sup> W. Carl Kester, "American and Japanese Corporate Governance: Converging to Best Practice?" In *National Diversity and Global Capitalism*, ed. Suzanne Berger and Ronald Dore, 107–37 (Ithaca: Cornell University Press, 1996); Hall and Soskice, 2001, *Varieties of Capitalism*.

<sup>30</sup> This historical shift was predicted by Peter Drucker in 1976. See Drucker, *The Unseen Revolution: How Pension Fund Socialism Came to America* (New York: Harper Collins, 1976).

shareholder protections as a way of protecting their investments in firms, and lobby political parties to secure these protections. The result is a “leftist” government that does more for investors than a supposedly capital-friendly, right-wing government, which is more beholden to insiders and managers.<sup>31</sup> This pattern has been observed in Germany, where the Social Democratic Party (SPD) supported legislation that strengthened shareholder protection and lowered the capital gains tax on selling shares, while the supposedly more business-friendly Christian Democratic Union (CDU) opposed these initiatives.<sup>32</sup>

If a greater share of a country’s pension funds is in private assets, rather than in public pay-as-you-go systems, the level of minority shareholder protections is generally higher,<sup>33</sup> and demands to strengthen them further are more likely to grow. How actively pension funds use MSP powers to impact corporate governance is substantially dependent on the micro-institutional details of the financial intermediaries in the country in question. Pension systems around the world are presently having trouble in countries rich and poor alike, whether highly developed or not. Much of the debate on the appropriate solutions to pension fund problems has focused on the rate of return—do pensions benefit people better in public or private systems, taking into account the degree of risk? Of course, the rate of return is hugely important, but that issue, and the impact of pension funds on corporate governance, is connected to the micro-details of the institutional investors that actually manage these privatized funds. The questions that need to be answered are many: Who controls these privatized funds? Are they in the hands of the same people who control the firms where the money is invested? What is the fee structure? How are these institutional investors regulated? How much competition is there? What control do investors have over the funds and their money? What powers do institutional investors have to challenge management? These details

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<sup>31</sup> Martin Hoepner, “European Corporate Governance Reform and the German Party Paradox,” *Program for the Study of Germany and Europe Working Paper Series* 03.1, Max Planck Institute for the Study of Societies, Cologne, Germany, 2003, <http://www.ces.fas.harvard.edu/publications/Hoepner.pdf> (accessed June 25, 2006); John W. Cioffi and Martin Hoepner, “The Political Paradox of Finance Capitalism: Preferences and Center-left Party Politics in Corporate Governance Reform,” paper presented at the 2004 Conference of Europeanists, Council for European Studies (Columbia University), Chicago, IL, March 11–13, 2004.

<sup>32</sup> Cioffi and Hoepner, 2004, “The Political Paradox of Finance Capitalism.”

<sup>33</sup> Gourevitch and Shinn, 2005, *Political Power and Corporate Control*.

influence both the rate of return and the impact of privatized funds on corporate governance.<sup>34</sup>

What brings these coalitions together, causing some to win at certain points and lose at others? Institutionalists stress the role of formal structures in shaping the way clusters of preferences aggregate, hence the argument that electoral law or majoritarian structures shape the victory of different coalitional patterns among countries. The de-facto power approach looks instead at the resources that the various groups have to mobilize for political action (e.g., votes, organizations, ability to strike). Different outcomes among countries thus express differences in the political strengths of the various interest groups.

### **Historical Context, Path Dependence, and Comparative Political Economy**

The interest-group approach helps clarify the role of historical context and path dependence in shaping corporate governance outcomes.<sup>35</sup> The demands of interest groups vary across countries, in part because of incentives that are shaped by prior choices in public policy or the results of earlier conflicts. The “great reversals” described by Rajan and Zingales<sup>36</sup> can, for example, be seen as the reaction of interest groups to economic dislocations after 1914: domestic groups reacted against the disruptive effects of free trade and sought stability via regulation. Among the effects of this change in strategy was a shift toward bank influence and away from open equity markets. Similarly, the “transplant effect” analyzed by Berkowitz, Pistor, and Richard<sup>37</sup> can be interpreted as the impact of interest groups

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<sup>34</sup> Ibid; Peter Gourevitch and Jacob Allen, “Chilean Pension Reform and Corporate Governance,” Graduate School of International Relations and Pacific Studies, University of California at San Diego, CA, photocopy, 2006; Fernando Lefort and Eduardo Walker, “Ownership and Capital Structure of Chilean Conglomerates: Facts and Hypotheses for Governance,” *Revista Abante* 3, no. 1 (October 1999–April 2000):3–27.

<sup>35</sup> See L. Bebchuck and M. Roe, “A Theory of Path Dependence in Corporate Governance and Ownership,” *Stanford Law Review* 52 (1999):127–70; and Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” *American Political Science Review* 94, no. 2 (2000):251–67.

<sup>36</sup> Rajan and Zingales, 2003, “The Great Reversals.”

<sup>37</sup> Berkowitz, Pistor, and Richard, 2003, “Economic Development, Legality.”

within each country toward the costs—and benefits—of adopting foreign practices. Roe has specifically explored the impact of war on interest-group alignments: countries that experienced considerable damage from the two world wars shifted toward blockholding.<sup>38</sup> Perrotti and von Thadden similarly looked at the impact of hyper-inflation during the 1920s: countries where middle class investors were wiped out shifted toward a regulatory, bank-centered model.<sup>39</sup> Other researchers have examined the impact of world trading patterns on policy choices: contractions in the world economy produce demands for protection, while prosperity prepares the ground for free trade.<sup>40</sup>

These policy choices, made in response to trade, war, or depression, generate mutually reinforcing patterns of regulation and interest-group preferences. Hall and Soskice categorize market economies into two contrasting models, or production systems: liberal market economies and coordinated market economies.<sup>41</sup> The former have fluid labor relations, vigorous anti-trust regulations, general skill-oriented educational systems, strong product-market competition, and diffuse shareholder-oriented corporate and governance systems. Coordinated market economies, on the other hand, have highly structured labor relations, limited domestic competition, price and market coordination, specific skill-oriented educational training, and blockholding governance systems. Drawing on Milgrom and Roberts,<sup>42</sup> these

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<sup>38</sup> Mark Roe, “Legal Origins and Stock Markets in the Twentieth Century,” photocopy, 2006.

<sup>39</sup> See the following works by Enrico Perotti and Ernst-Ludwig von Thadden: “Dominant Investors and Strategic Transparency,” *Journal of Law, Economics and Organization* 21, no. 1 (April 2005):76–102; “Corporate Governance and the Distribution of Wealth: A Political-economy Perspective,” *Journal of Institutional and Theoretical Economics* 162, no. 1 (March 2006):204–17; “The Political Economy of Corporate Control and Labor Rents,” *Journal of Political Economy* 114, no. 1 (February 2006):145–74.

<sup>40</sup> See Ronald Rogoswki, *Commerce and Coalitions: How Trade Affects Domestic Political Alignments* (Princeton: Princeton University Press, 1989); Peter Gourevitch, *Politics in Hard Times: Comparative Responses to International Economic Crises* (Ithaca, NY: Cornell University Press, 1986); Michael Hiscox, *International Trade and Political Conflict: Commerce, Coalitions, and Mobility* (Princeton: Princeton University Press, 2002); Jeffrey A. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York: W.W. Norton & Company, Inc., 2006).

<sup>41</sup> Hall and Soskice, 2001, *Varieties of Capitalism*.

<sup>42</sup> Paul Milgrom and John Roberts, “The Economics of Modern Manufacturing: Technology, Strategy and Organization,” *American Economic Review* 80, no. 3 (1990):511–28.

authors see strong “institutional complementarity,” that is, a country’s economic model reinforces its institutional complement. Thus, investing in worker training makes sense if there is low market fluidity in both market share and employment, and patient capital can be shielded from shareholder pressures. Once this type of system starts, the pieces then reinforce each other over time. Managers, blockholders, and labor find reasons to cooperate to preserve the firm. The interests and politics of each production factor are therefore strongly influenced by context. What labor, management, or capital want depends, in part, on the national production system in which they operate.

Institutional complementarity challenges the idea that the level of minority shareholder protection can explain corporate governance patterns. This paper has so far emphasized the provision of minority shareholder protections, using the three models—legal family, formal political institutions, and interest-group politics (social power). Investor willingness to take minority positions is affected not only by the formal rules of MSP, however these are generated, but by the rules that shape labor relations, market competition, price setting, and labor training. Roe notes that where labor is strong, investors may prefer to maintain a stronger bargaining posture with labor; labor in turn may remain militant in order to deal with blockholding management.<sup>43</sup> Power relationships and policy regulation beyond the strict domain of corporate governance (as defined by MSP) thus have an impact on corporate governance patterns. These factors may explain the limited correlation of MSP with shareholder concentration—other variables are at play.<sup>44</sup>

Another critique of the MSP approach moves away from regulation and law altogether. Shareholder diffusion began, argue several specialists,<sup>45</sup> before regulation: the listing requirements of both the London and New York stock exchanges include

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<sup>43</sup> Roe, 2003, *Political Determinants of Corporate Governance*.

<sup>44</sup> See Gourevitch and Shinn, 2005, *Political Power and Corporate Control*; Hiscox, 2002, *International Trade and Political Conflict*; Frieden, 2006, *Global Capitalism*.

<sup>45</sup> See Cheffins, 2001, “Does Law Matter?”, 2002, “Corporate Law and Ownership Structure,” and 2002, “Putting Britain on the Roe Map.” Also see Julian Franks, Colin Mayer, and S. Rossi, “Spending Less Time with the Family: The Decline of Family Ownership in the UK,” in *A History of Corporate Governance around the World: Family Business Groups to Professional Managers*, ed. Randall K. Morck (Chicago: University of Chicago, 2005); Randall K. Morck, Daniel Wolfenzon, and Bernard Yeung, “Corporate Governance, Economic Entrenchment and Growth,” *Journal of Economic Literature* 43, no. 3 (September 2005):655–720.

“private bonding” reassurances. In the United Kingdom, mergers occurred among local elites who knew each other well. The demand for formal shareholder protections occurred later, as shareholding spread. In addition to the historical evidence, this pattern is reinforced by political logic: Who would lobby for shareholder protection if there were no shareholders? The social foundations of markets can thus be quite important and deserve more analysis.<sup>46</sup>

Historical patterns, policy choices made at earlier historical moments, path dependence, and institutional complementarity provide a way to understand the context of political choices related to corporate governance and the outcomes of economic policy. At any given moment, policy choices reflect the interaction of interest-group preferences, ideology, and political institutions. These factors reinforce each other: policy sustains the interests of the groups that implement it. Then come shocks or changes in incentives, such as changes in the terms of trade (e.g., between agriculture and industry), recession, war and the development of political obstacles to trade, economic depression, or inflation. These changes alter incentives and political coalitions; they may even change formal political institutions, creating a more open political game. Policy may then coalesce around a new policy framework, which will continue to reinforce itself until the next external shock or change in conditions.

## **Conclusion**

Political variables—the interaction of preferences and institutions to produce policy outputs—shape the way formal laws, rules, and procedures work. An account of law without a model of politics thus seems limited in both predictive power and policy utility. A strong model of politics may be difficult to develop, but it is vital for understanding the interaction of these factors.

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<sup>46</sup> Avner Greif, Paul Milgrom, and Barry Weingast, “Coordination, Commitment and Enforcement: The Case of the Merchant Guild,” *The Journal of Political Economy* 102, no. 4 (August 1994):745–76; Avner Greif, “Contract Enforceability and Economic Institutions in Early Trade: The Maghribi Traders’ Coalition,” *American Economic Review* 83, no. 3 (June 1993): 525–48. For an evaluation of how decision-makers’ understanding of their options shapes their behavior, see Pepper D. Culpepper, “Institutional Change in Contemporary Capitalism: Coordinated Financial Systems since 1990,” *World Politics* 57, no. 2 (January 2005):173–99.

This paper has made clear that the same formal institutions do not work the same way everywhere: one size does not fit all. We must be cautious, therefore, in advising countries to adopt the same codes and laws on corporate governance, given the greatly differing contexts in which they must enforce and apply them. Best-practice codes on corporate governance, for example, call for strong minority shareholder protections, but these rely on enforcement mechanisms that are not supported in much of the world. The diffuse shareholding model requires more, not less regulation, and as the Enron and other corporate scandals in the United States show, regulation can be hard to do well even in highly developed legal systems. In certain circumstances, blockholders or various forms of private bonding, may therefore do a better job of protecting minority shareholder interests. Much is known about the ability of private bonding mechanisms to substitute for weak formal enforcement<sup>47</sup> and these insights should be built into policy advice.

It is commonly understood that formal law is not the same as the practice of law. That laws and codes are adopted does not mean that the incentives of social actors, nor their actions, have truly changed. In the field of corporate governance, for example, countries around the world have adopted good governance codes following the recommendations of the Organization for Economic Cooperation and Development (OECD) and many other organizations. Good codes are better than bad ones, but codes by themselves do not constitute practice—changes in corporate governance activities are not measured by the adoption of such codes, even if they are translated in law, because there is no guarantee that either the codes or law will be enforced. Studies of the “transplant” effect,<sup>48</sup> moreover, show that laws and codes that are imported from outside a country are not enforced in the absence of political support for them.

It is surely the case that the three variables, or models, explored in this paper—law, formal institutions, and social power—interact in a complex system. This paper has attempted to push at the endogeneity of that interaction in order to tease out the ways in which these variables can combine. As we have seen, courts and lawyers operate in a context of legislation, with enforcement policy generated by political choices. The actual content of law, however, expresses the political realities of a given country. Depending on these realities, good and bad codes can be generated

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<sup>47</sup> John McMillan and Christopher Woodruff, “The Central Role of Entrepreneurs in Transition Economies,” *Journal of Economic Perspectives* 16, no. 3 (August 2002):153–70; Simon Johnson, John McMillan, and Christopher Woodruff, “Property Rights and Finance,” *American Economic Review* 92, no. 5 (December 2002):1335–56.

<sup>48</sup> Berkowitz, Pistor, and Richard, 2003, “Economic Development, Legality.”

from the same intellectual roots. De jure forms of the political process can also influence the content of laws and enforcement. De jure political processes thus trump legal formalism. Informal mechanisms of social power are, however, able to adapt formal political institutions to their purposes. Hence, de facto power trumps de jure power, which trumps legal formalism.

The intricate interaction of these three variables suggests a compelling potential research project for the World Bank: a handbook on de facto forms of power. The important work already done on de jure institutions needs a counterpart. Research on social forms of power, such as the distribution of landholding, private armies, and guns; patron-client networks; cross-holding and overlapping patterns of ownership; interest-group structures; press concentration and control; families;<sup>49</sup> and private bonding mechanisms. This kind of research could help unravel how legal formalism, formal political institutions, and the social distribution of power interact.

Several policy implications flow from the observations made in this paper. Minority shareholder protections and diffuse shareholding models require extensive law and regulation: the liberal market economy rests on rules. Without a strong foundation of social support for those rules and their reliable enforcement, however, the model cannot work. Blockholding may thus be a serious alternative. It follows that investing resources in legal training may not be effective if such investments are not accompanied by an analysis of the balance of political power in a given country. In certain cases, investing in the mechanisms of free speech, responsible politics, economic journalism, trade union leadership, and business expertise may be more effective than training lawyers. It may well be that supporting the groups that seek economic development may be the key ingredient for promoting such development. An approach that allows for a variety of approaches across countries thus appears essential.

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<sup>49</sup> See, for example, Marianne Bertran, Simon Johnson, Krislert Samphantharak, and Antoinette Schoar, "Mixing Family with Business: A Study of Thai Business Groups and the Families behind Them," photocopy, 2004; Haber, Maurer, and Razo, 2003, *The Politics of Property Rights*; Alfred Stepan, *Rethinking Military Politics: Brazil and the Southern Cone* (Princeton: Princeton University Press, 1988).

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**PART II**

**POLICIES, PRINCIPLES, AND THE  
DEVELOPMENT CONTEXT**



## THE LEGAL ASPECTS OF THE WORLD BANK'S WORK ON HUMAN RIGHTS: SOME PRELIMINARY THOUGHTS

ROBERTO DAÑINO\*

*This article argues that the World Bank should embrace the centrality of human rights in all of its work, rather than be divided by the issue of whether or not to adopt a "rights-based approach" to development. Given that human rights constitute a valid consideration for the investment process, they are properly within the scope of issues that the Bank must consider when it makes economic decisions. Legal and judicial reform is, in this view, an indispensable component of alleviating poverty through economic growth and social equity. As a development institution, however, the Bank must work in a manner that does not inflict a "double punishment" on the people of its member countries by turning its back on them because of the human rights record of their governments. The Bank's overall role in this sphere is to work collaboratively with its member countries in the implementation of their human rights obligations.*

### Introduction

A focus of this volume of essays is on the ways in which efforts to promote development and human rights can reinforce one another.<sup>1</sup> Development is precisely what

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\* Roberto Dañino was Senior Vice President and General Counsel at the World Bank from November 2003 to January 2006. This article is based on a speech delivered at a conference held at New York University Law School in March 2004. The article represents the personal views of the author and should not be taken as a statement of World Bank policy. The author would like to acknowledge the research and substantive contributions of Siobhan McInerney-Lankford, Counsel, to the Legal Vice Presidency's work on human rights, and to this article in particular.

<sup>1</sup> A number of leading resources on human rights were consulted in the process of preparing this article. They provided general background to the thinking it contains and

the World Bank works for and it believes that this work consistently contributes to the progressive realization of human rights in its member countries.<sup>2</sup> This article represents the personal thoughts of the author concerning the legal considerations that affect the work of the World Bank with respect to human rights.

One of the author's first acts on assuming the position of General Counsel of the World Bank at the end of 2003 was to establish a Work Group on Human Rights within the Legal Vice Presidency. The response from World Bank lawyers for expressions of interest in serving on this committee was overwhelming. That group has since been analyzing the legal framework applicable to the Bank's work in connection with human rights. It is also developing a matrix that charts human rights against the activities of the Bank to help it get a better understanding of the interconnections between the work of the Bank and each member's human rights obligations, and more generally, between development and human rights.<sup>3</sup>

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informed the normative and principled bases of the arguments and the basic precepts underpinning these views. These include, but are not limited to, the following: Jack Donnelly, *The Concept of Human Rights* (London: Croom Helm, 1985); Louis Henkin, *The Age of Rights* (New York: Columbia University Press, 1990); Paul Sieghart, *The Lawful Rights of Mankind* (Oxford: Clarendon Press, 1986); R. Falk, "The Theoretical Foundations of Human Rights," in *The Politics of Human Rights*, ed. Paula R. Newburg (New York: New York University Press, 1980), 31; Philip Alston, ed., *Human Rights Law* (Aldershot, UK: Dartmouth, 1996); Bertrand G. Ramcharan, *The Concept and Present Status of the International Protection of Human Rights Forty Years after the Universal Declaration* (Dordrecht, The Netherlands: Martinus Nijhoff, 1989); Frances Butler, ed., *Human Rights Protection: Methods and Effectiveness of the British Institute of Human Rights* (The Hague: Kluwer, 2002); Hurst Hannum, *Guide to International Human Rights Practice*, 3rd ed. (Philadelphia: University of Pennsylvania Press, 1999); Philip Alston, *The United Nations and Human Rights: A Critical Appraisal* (Oxford: Clarendon Press, 1992); and Shale Horowitz and Albrecht Schnabel, eds., *Human Rights and Societies in Transition: Causes, Consequences, Responses* (New York: United Nations University Press, 2004).

<sup>2</sup> In this article, the concept of progressive realization is understood as a principle of human rights law which recognizes that the realization of human rights is often constrained by the scarcity of resources, and that such constraints cannot be remedied instantly. Its special relevance to economic, social, and cultural rights and to the context of the ICESR (International Convention on Educational, Social, and Cultural Rights) is also acknowledged. See, for example, Philip Alston and Gerard Quinn, "The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social, and Cultural Rights," *Human Rights Quarterly* 9 (1987):156–229.

<sup>3</sup> Some research has shown that a modern economic approach to service provision (and

The following example illustrates the framework employed by the matrix:

<i>Human right</i>	<i>International human rights instrument/provisions</i>	<i>IBRD policy</i>	<i>IBRD practice</i>
Right to freedom of opinion and expression	UDHR Article 19	Disclosure; public consultation requirements in Operational Policy/Bank Procedure 4.01	Access to information; public information
Right to hold opinions without interference	ICCPR Article 19	Environmental assessment; Operational Policy/Bank Procedure 4.04: Natural Habitats	Economic and Sector Work (ESW)
Right to receive and impart information and ideas through any media and regardless of frontiers		Operational Policy 4.09: Pest Management	Document translation framework; public information centers
		Operational Policies/Bank Procedures 4.12: Involuntary Resettlement; 4.20: Indigenous Peoples; 4.36: Forests; 11.03: Cultural Property; plus Public Information Centers and ESW	Education; education for the knowledge economy; global distance learning; technology diffusion; telecom projects  Dissemination of environmental assessments and other reports

*Note:* IBRD—International Bank for Reconstruction and Development (the World Bank); UDHR—*Universal Declaration of Human Rights* (1948); ICCPR—*International Covenant on Civil and Political Rights* (1966); ESW—Economic and Sector Work of the World Bank.

The group was established not only because of the author's personal conviction that work in this area is a moral imperative, but also because of his sense that human rights are progressively becoming an explicit and integral part of the Bank's work, just as has happened over the last twenty years with the environment<sup>4</sup> and, in the last five years, with anti-corruption.<sup>5</sup>

However, it appears that concerns and uncertainties about the "constitutional" restrictions under the *Articles of Agreement* of the Bank have somewhat inhibited a more proactive and explicit consideration of human rights as part of its work. The preliminary thoughts presented here on the nature of the Bank's legal boundaries fall into three broad parts.

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development more broadly) overlaps substantially with a rights-based approach—both emphasize transparency, accountability, and strengthening the position of clients. See, for example, Varun Gauri, "Economics and the Right to Basic Services," in *The World Bank Legal Review*, vol. 2, *Law, Equity, and Development*, ed. Caroline Mary Sage and Michael Woolcock, 325–351 (The Hague: Martinus Nijhoff, 2006).

<sup>4</sup> World Bank, *Making Sustainable Commitments: An Environment Strategy for the World Bank* (Washington, DC: World Bank, 2001), <http://intresources.worldbank.org/INTRANETENVIRONMENT/Resources/EnvironmentStrategy2001FullDocument.pdf> (accessed August 21, 2006). See especially chapter 1, which addresses the connections between development policy and the environment. For a more general narrative of the evolution of environmental considerations in the work of the World Bank, see Robert Wade, "Greening the Bank: The Struggle over the Environment," in *The World Bank: Its First Half Century*, ed. Devesh Kapur, John P. Lewis, and Richard Webb, 611–734 (Washington, DC: Brookings Institution Press, 1997); World Bank, *World Development Report 1992: Development and the Environment* (Washington, DC: World Bank, 1992); and David Freestone, "Incorporating Sustainable Development into the Development and Investment Process—The World Bank Experience," in *Exploitation of Natural Resources in the 21st Century*, ed. Malgosia Fitzmaurice and Milena Szuniewicz, 91–112 (The Hague: Kluwer Law International, 2003).

<sup>5</sup> See Ibrahim F.I. Shihata, "Corruption—A General Review with an Emphasis on the Role of the World Bank," *Dickinson Journal of International Law* 15, no. 3 (Spring 1983): 451. See also World Bank, "Helping Countries Combat Corruption: Progress at the World Bank since 1997," Poverty Reduction and Economic Management (PREM) Network and Operational Core Services (OCS) Network, World Bank, Washington, DC, 2000; World Bank, *Anticorruption in Transition: A Contribution to the Policy Debate* (Washington DC: World Bank, 2000); and World Bank, "Reforming Public Institutions and Strengthening Governance: A World Bank Strategy" (Washington, DC: World Bank, Public Sector Group, Poverty Reduction, and Economic Management (PREM) Network, 2000).

The first part is a discussion of the Bank's legal framework: *the Articles of Agreement*.<sup>6</sup> The framework has limitations—as it should—for it is important to bear in mind that the Bank is a financial institution. As a specialized agency of the United Nations, it has a specific financial purpose and a clearly designated role within the structure of the UN,<sup>7</sup> as well as within the structure of the two International Human Rights Covenants.<sup>8</sup> Within these limitations, the objectives of the institution have been, and should continue to be, dynamically interpreted and applied. The author's view is that this legal framework can also be seen as enabling.

In order to put these discussions in context, the second part is a discussion of the evolution of the Bank's role in development. As the world has changed over the past sixty years, so, too, have the Bank and its practice. Its emphasis has shifted dramatically from bricks and mortar infrastructure to the large-scale inclusion of human development, institutional reform, and social development.<sup>9</sup> In other words, the focus of its work has clearly evolved from "hard" to "soft" lending.<sup>10</sup> A significant proportion of the Bank's lending portfolio is also directly aimed at the attainment of the Millennium Development Goals (MDGs).<sup>11</sup> It is clear that, as a

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<sup>6</sup> IBRD (International Bank for Reconstruction and Development), 1942, 1965, *Articles of Agreement*, entered into force December 27, 1945, 2 UNTS 134 (amended December 17, 1965, 16 UNTS).

<sup>7</sup> Agreement concluded with the United Nations in 1947, *United Nations Charter*, Article 57, 16 UNTS 346, makes specific provision for the specialized agencies and for their relationship to the United Nations.

<sup>8</sup> ICCPR (International Covenant on Civil and Political Rights), 1966, art. 40, 44, and 46, General Assembly res. 2200A (XXI), December 16, 1966, entered into force March 23, 1976; and ICESCR (International Covenant for Educational, Social, and Cultural Rights), 1966, art. 16, 17, 18, 19, 20, 21, 22, and 24, General Assembly res. 2200A (XXI), December 16, 1966, entered into force January 3, 1976.

<sup>9</sup> World Bank, "Empowering People by Transforming Institutions: A Strategy and Implementation Plan for Social Development in World Bank Operations," Social Development Strategy Paper, World Bank, Washington, DC, 2005, [http://Inweb18.worldbank.org/ESSD/sdvext.nsf/62ByDocName/EmpoweringPeopleByTransformingInstitutions/\\$FILE/SD+Strategy+Board+version+01+12+05+Final.pdf](http://Inweb18.worldbank.org/ESSD/sdvext.nsf/62ByDocName/EmpoweringPeopleByTransformingInstitutions/$FILE/SD+Strategy+Board+version+01+12+05+Final.pdf) (accessed July 4, 2006).

<sup>10</sup> See World Bank, *World Bank Annual Report 2004*, vol. 1 (Washington, DC: World Bank, 2004), 91.

<sup>11</sup> *Ibid.*, 87–90.

result of this progress, the Bank has made major contributions to the substantive furtherance of a broad array of human rights in a range of fields.<sup>12</sup>

Bearing in mind that the author was a newcomer to the Bank at the time of writing, the third part of this article articulates his preliminary thoughts about the way forward for the Bank in this area.

### **The Bank's Legal Framework**

The legal framework within which the World Bank must operate with respect to human rights, as with all its activities, is anchored in the *Articles of Agreement*. They contain important limitations, but they have been and must continue to be interpreted dynamically so as to achieve the mission of the Bank.<sup>13</sup>

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<sup>12</sup> See generally, World Bank, *Development and Human Rights: The Role of the World Bank* (Washington, DC: World Bank, 1998). In his 1995 "Legal Opinion on 'The Prohibition of Political Activities in the Bank's Work,'" July 11, 1995, the then-general counsel concluded, that "in fact, the Bank's work has promoted a broad array of economic, social and cultural human rights. Its proclaimed, overriding objective at present is to enable its borrowing countries to enjoy freedom from poverty, a basic freedom which many find to be required for the full enjoyment of human rights. The Bank increasingly contributes to the borrowing countries' efforts to develop their human resources, through its lending for education, health and nutrition, and to strengthen their systems of governance, through its lending for legal, regulatory, judicial and civil service reform. It encourages the involvement of affected peoples and local NGOs in the design and implementation of the projects it finances. It, and the Global Environment Facility of which it is the trustee and the main implementing agency, currently represent the multilateral organization with the greatest involvement in the protection of the human environment. It has also integrated the promotion of the role of women in development in its operations. It tries to ensure, through its pioneering directives, humane conditions for the resettlement and rehabilitation of the people affected by the projects it finances and protection for the rights and distinctive cultures of indigenous peoples. More broadly, it advocates through its lending operations and policy advice the liberalization of investment and the free flow of services, goods and information. Clearly, these activities have a direct effect on the amelioration of non-political human rights. They may even pave the way for greater awareness and protection of political rights in the borrowing countries." Reproduced in Ibrahim F.I. Shihata, *World Bank Legal Papers* (The Hague: Martinus Nijhoff, 2000), 233.

<sup>13</sup> The *Articles of Agreement* themselves vest the role of interpretation in the executive directors. This is provided for in Article IX. The general counsel's role is distinct: "As a

There are three key issues in the *Articles* that need to be discussed:

- (i) First and foremost, all Bank activities must further the purposes for which the Bank was established, which are set out in Article I.<sup>14</sup> Drafted in 1944 at the end of World War II, it sets out a variety of activities related to reconstruction and development, such as the facilitation of investment capital for productive purposes, the restoration of economies after wars, and the development of productive facilities and raising standards of living.
- (ii) Second, the *Articles* provide that only economic considerations shall be relevant to the decisions of the Bank and its officers, and these must be weighed impartially. When Bank lending is involved, funds must be used without regard to political or other non-economic influences or considerations.<sup>15</sup>
- (iii) Third, there are two distinct political prohibitions:
  - (a) the Bank and its officers may not interfere in the political affairs of any member;<sup>16</sup> and

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general matter, a general counsel of an international organization does not decide on the questions addressed to him; he only provides advice based on thorough legal analysis.” Shihata, 2000, *World Bank Legal Papers*, xxxviii and xlii. See also A. Broches, “Legal Aspects of the World Bank,” *Recueil des cours* (Hague Academie de droit international) 98, part III (1959):297–409.

<sup>14</sup> Article I provides that “the Bank shall be guided in all its decisions by the purposes set forth above.” It is generally accepted also that the process of the *Articles*' interpretation is itself subject to the requirement that all the decisions of the Bank be guided by Article I. See Shihata, 2000, *World Bank Legal Papers*, lviii.

<sup>15</sup> Article III, sec. 5(b): “The Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations” (Shihata, 2000, *World Bank Legal Papers*).

<sup>16</sup> Article IV, sec. 10, “Political Activity Prohibited: The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.” There is one further limitation that applies specifically to Bank lending—the requirement that funds be used for the purposes intended and “without regard to political or other non-economic influences or considerations” (Article III, sec. 5). This limitation, coupled with the need

- (b) the Bank cannot be influenced in its decisions by the political character of the member or members concerned.<sup>17</sup>

This article considers each of these three norms in more detail.

## Purposes

Article I sets out the purposes of the institution. Although it was drafted sixty years ago, its provisions have stood the test of time. Nevertheless, as the challenges of development have changed, the Bank's mission has also evolved to serve a broader concept of development.<sup>18</sup> The Bank's mission as currently defined is the alleviation of poverty through economic growth and social equity<sup>19</sup>—this conception of the alleviation of poverty has an especially strong human rights dimension.<sup>20</sup>

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for economy and efficiency, strengthens the economic and technical character of Bank operations. It can be considered a protection against corruption and misuse of funds. Shihata, 2000, *World Bank Legal Papers*.

<sup>17</sup> Article IV, sec. 10, "Political Activity Prohibited." Shihata, 2000, *World Bank Legal Papers*.

<sup>18</sup> This broadened understanding of development is clear from the Comprehensive Development Framework launched in 1999, part 1, and in the Bank's more recent emphasis on human development, social development, and social protection. See James D. Wolfensohn, "A Proposal for a Comprehensive Development Framework (CDF)," World Bank, January 21, 1999, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/CDF/0,,contentMDK:20072890~menuPK:140147~pagePK:139301~piPK:261885~theSitePK:140576,00.html> (accessed July 4, 2006).

<sup>19</sup> On poverty and the Bank's mission generally, see World Bank, *World Development Report 2000/2001: Attacking Poverty* (Oxford: Oxford University Press and World Bank, 2000). On society equity, see World Bank, *World Development Report 2006: Equity and Development* (Oxford: Oxford University Press and World Bank, 2005).

<sup>20</sup> Speaking at the opening of the 61st session of the Commission on Human Rights, United Nations High Commissioner for Human Rights Louise Arbour made the following observation about poverty in relation to human rights: "When we talk of the need to end poverty, to entrench systems of good governance and the rule of law, of the importance of democratic institutions, of ending racism and intolerance in whatever form, and of the need to protect the dignity and safety of all, we are talking directly of the reality of human rights." (Louise Arbour, "Opening Speech," 61st Session of the Commission on Human Rights, Geneva, March 14, 2005, <http://www.unpo.org/article.php?id=2145>, accessed August 21, 2006.)

This approach to the alleviation of poverty also understands poverty as a multidimensional and relational phenomenon. As Nobel Laureate Amartya Sen has argued, we must view development in terms of freedom and the removal of obstacles to it, including poverty, tyranny, poor economic opportunities, systemic social deprivation, the neglect of public facilities, as well as intolerance.<sup>21</sup>

Social equity, the heart of the author's conception of poverty alleviation, includes fighting inequality, giving the poor and marginalized a voice (i.e., empowerment),<sup>22</sup> freedom from hunger and fear, and access to justice.<sup>23</sup> Social equity has, therefore, an obvious human rights content. It is clear that under former president James Wolfensohn, the Bank moved towards a conception of development, and of its mandate, that is more grounded in equity and the social face of development.<sup>24</sup> In this interpretation of the *Articles of Agreement*, one must therefore maintain a focus on the purposes of Article I and the overall mission of the Bank.<sup>25</sup>

#### ***Economic considerations***

The *Articles* provide that only economic considerations of economy and efficiency shall be relevant to the decisions of the Bank and its officers, and these must be weighed impartially.<sup>26</sup> What, then, constitutes economic considerations for these purposes?

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<sup>21</sup> Amartya Sen, *Development as Freedom* (New York: Knopf; Oxford: Oxford University Press, 1999), 3. Also see Sen, *Commodities and Capabilities* (Oxford: Clarendon Press, 1999).

<sup>22</sup> See, for example, Deepa Narayan, ed., *Empowerment and Poverty Reduction: A Sourcebook* (Washington, DC: World Bank, 2002); Ruth Alsop, ed., *Power, Rights and Poverty: Concepts and Connections* (Washington, DC: World Bank, 2004).

<sup>23</sup> The World Bank's social development strategy paper (2005) is strongly supportive of and imbued with the concept of social equity. Its core principles are those of cohesion, inclusion, and accountability. (World Bank, 2005, "Empowering People by Transforming Institutions.")

<sup>24</sup> Wolfensohn, 1999, "A Proposal for a Comprehensive Development Framework."

<sup>25</sup> Shihata, 2000, *World Bank Legal Papers*, lix. Shihata goes on to state that "a teleological, functional approach to interpretation based on the purposes stated in the text has in fact been found by the World Bank and its members to be the most appropriate for the Bank's Articles, as it has been generally for charters of other multilateral institutions," lix-lx.

<sup>26</sup> The *Articles of Agreement* speak of "considerations of economy and efficiency"; the term "economic considerations" is used throughout this chapter.

Let us start by reminding ourselves that the World Bank, although a development institution, is primarily a financial institution. In making decisions about the investment of limited available public resources, the Bank—like its private-sector counterparts—needs to evaluate the wisdom of proposed investments. It must rely upon analysis of all the factors that can affect an investment, including the “investment climate” in the recipient country.<sup>27</sup> The Bank has already accepted the fact that issues of governance are relevant for purposes of such economic analysis,<sup>28</sup>

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<sup>27</sup> A number of the Bank’s policy instruments are designed to assess factors that affect an investment. See for instance, the CPIA—Country Policy Institutional Assessment—which rates a variety of dimensions of a country’s policy and institutional framework. (World Bank, “Country Policy Institutional Assessment [CPIA],” Washington, DC, 2006, <http://siteresources.worldbank.org/IDA/Resources/CPIA2005Questionnaire.pdf>; accessed July 4, 2006.) With respect to the investment climate in a given country, see Ibrahim F.I. Shihata, “Issues of ‘Governance’ in Borrowing Members: The Extent of Their Relevance under the Bank’s Articles of Agreement, Legal Memorandum of the General Counsel, December 21, 1990,” December 21, 1990, World Bank, Washington, DC, citing a memorandum of the Vice President and General Counsel of December 21, 1990: “(i) the degree of political instability of the government of a member requesting a loan and of the security of its territories could be such as to affect the development prospects of the country including its prospective creditworthiness. Political changes may also affect the borrower’s ability to keep its commitments under a loan agreement or the ability of the Bank to supervise project implementation or to evaluate the project after its completion.

As a result, partial or full foreign occupation of the country’s territories or civil strife in such territories cannot be deemed irrelevant to the Bank’s work simply because they are of a political nature. Bank lending in such circumstances may run counter to the financial prudence required by the Bank’s Articles” (Article III, sec. 4[v]). It may also threaten the standing of the Bank in financial markets or otherwise adversely affect its reputation as a financial institution. Indeed, the Bank has long recognized that it “cannot ignore conditions of obvious internal political instability or uncertainty which may directly affect the economic prospects of a borrower.” This position has been consistently upheld by the Bank’s legal department, most recently in a legal memorandum of December 23, 1987. It is important to recall, however, that in such situations the Bank would still be taking into account relevant economic considerations; political events would represent only the historical origins or the causes which gave rise to such considerations. Reproduced in Shihata, 2000, *World Bank Legal Papers*, 245, 265–266.

<sup>28</sup> See World Bank, *Governance: The World Bank Experience*, Development in Practice series, (Washington, DC: World Bank, 1994), 58. Also see Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobaton, “Aggregating Governance Indicators,” World Bank Policy Research Working Paper, no. 2195, World Bank, Washington, DC, 1999; and Kaufmann,

but it goes further than this—it is now widely recognized that a host of political and institutional factors may affect economic growth.<sup>29</sup> Research, for example, has shown that substantial violations of political and civil rights are related to lower economic growth.<sup>30</sup>

Similarly, it has long been recognized in the Bank that political considerations can have direct economic effects. For instance, in judging country creditworthiness, as required by the *Articles*, the Bank has to consider the degree of political stability of a government.<sup>31</sup> In the author's opinion, therefore, it is consistent with the *Articles* that the decision-making processes of the Bank should incorporate social, political, and any other relevant factors which may have an impact on its economic decisions.

This same line of analysis applies to the discussion of which human rights are relevant for making economic decisions. Some assert that only economic rights are relevant, not political rights. In the view argued here, there is no stark distinction

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Kraay, and Zoido-Lobaton, "Governance Matters," World Bank Policy Research Working Paper, no. 2196, World Bank, Washington, DC, 1999.

<sup>29</sup> See generally, Alberto Alesina and Roberto Perotti, "The Political Economy of Growth: A Critical Survey of the Recent Literature," *World Bank Economic Review* 8, no. 3:351–71. For an example of research suggesting a link between the quality of institutions and investment and growth, see Janine Aron, "Growth and Institutions: A Review of the Evidence," *World Bank Research Observer* 15, no. 1 (February 2000):99–135; for other work on related issues, see Jonathan Isham, Daniel Kaufman, and Lant H. Pritchett, "Civil Liberties, Democracy, and the Performance of Government Projects," *World Bank Economic Review* 11, no. 2 (1997):219, 237; see also Arup Baerji and Hafez Ghanem, "Does the Type of Political Regime Matter for Trade and Labor Market Policies?" *World Bank Economic Review* 11, no. 1 (1997):171; and Robert J. Barro, "Economic Growth in a Cross Section of Countries," *Quarterly Journal of Economics* 106, no. 425 (1991):432.

<sup>30</sup> Robert Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (Cambridge, MA: MIT Press, 1997).

<sup>31</sup> Article III, sec. 4, "Conditions on Which the Bank May Guarantee or Make Loans" provides that

"(v) in making or guaranteeing a loan, the Bank shall pay due regard to the prospects that the borrower, and, if the borrower is not a member, that the guarantor, will be in a position to meet its obligations under the loan; and the Bank shall act prudently in the interests both of the particular member in whose territories the project is located and of the members as a whole." (Shihata, 2002, *World Bank Legal Papers*.)

between economic and political considerations: there is an interconnection among economic, social, and cultural rights on the one hand, and civil and political rights on the other.<sup>32</sup> Indeed, it is generally accepted at the political level that “all human rights are universal, indivisible, interdependent and interrelated.”<sup>33</sup>

Also from a financial point of view, the author believes that the Bank cannot and should not make a distinction between different types of human rights. In all cases, however, Bank decision making must treat these considerations impartially, treating similarly situated countries equally.

### ***Political prohibitions***

The other limitations in the *Articles* relate to politics. There are two general political prohibitions in the *Articles* that must be respected. First, Bank interference in a country’s political affairs is barred—this applies to both domestic and foreign partisan politics.<sup>34</sup> Second, Bank decisions cannot be influenced by the political character of the member country.<sup>35</sup> The ban on political interference requires the Bank to distance itself from partisan politics; favoring political factions, parties,

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<sup>32</sup> A number of General Assembly resolutions also affirm the principles of indivisibility and interdependence or interrelatedness of human rights; see, for example, United Nations, “Alternative Approaches and Ways and Means within the United Nations System for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms,” General Assembly res. 32/130, December 16, 1977.

<sup>33</sup> *Proclamation of Teheran*, proclaimed by the International Conference on Human Rights at Teheran, May 13, 1968. Para. 14 reads: “[S]ince human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible. The achievement of lasting progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development,” [http://www.unhcr.ch/html/menu3/b/b\\_tehern.htm](http://www.unhcr.ch/html/menu3/b/b_tehern.htm) (accessed July 6, 2006). The U.N. World Conference on Human Rights, Vienna, June 14–25, 1993, issued the *Vienna Declaration and Programme of Action*, (A/CONF.157/23) July 12, 1993, sec. 5, which provides that “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>34</sup> See footnote 16 above.

<sup>35</sup> *Ibid.*

or candidates in elections; and active participation in political life. The prescribed neutrality with respect to political character keeps the Bank from endorsing or mandating a particular form of government, political bloc, or political ideology.<sup>36</sup> But neither of these limitations prevent the Bank from considering political issues that have economic consequences or implications, so long as this is done in a non-partisan, non-ideological, and neutral manner.<sup>37</sup>

Just as the prevailing understanding of what can constitute economic considerations has evolved over the past sixty years, it is clear that the concept of interference in the sovereign affairs of a country has undergone a similar process.<sup>38</sup> In interpreting the meaning of these political prohibitions, it should be recognized that the concepts of sovereignty and interference have also evolved.<sup>39</sup> In the modern world, sovereignty

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<sup>36</sup> Shihata, 2002, *World Bank Legal Papers*, 270.

<sup>37</sup> Thus, these prohibitions do not bar all political considerations, since not all such considerations amount to interference in the political affairs of a member, and not all such considerations relate to the political character of a member. Yozo Yokota, "Non-political Character of the World Bank," *Japanese Annual of International Law* 20 (1978):39.

<sup>38</sup> "Unlike many components of classical international law, the human rights movement was not meant to work out matters of reciprocal convenience among states ... Rather it reached broad areas of everyday life within states that are vital to the internal rather than international distribution of political power. As international law's aspirations grew, as the law became more critical of and hence more distanced from state's behavior, the potential for conflict between human rights advocates within a state and that state's controlling elites escalated." Henry Steiner, "The Youth of Rights," *Harvard Law Review* 104 (1991):929.

<sup>39</sup> "At its very threshold and to this day, the human rights movement has inevitably confronted antagonistic claims based on conceptions of sovereignty. How could its premises coexist with the then reigning concepts of state sovereignty? Or have the nature of the state, and the concept of that protean concept as well as of allied concepts like domestic jurisdiction and autonomy, themselves undergone substantial change over the half century of this movement?" Henry Steiner and Philip Alston, *International Human Rights: Law, Politics and Morals*, 2nd ed. (Oxford: Oxford University Press, 2000), 573. Also see Louis Goodman, "Democracy, Sovereignty and Intervention," *American University Journal of International Law and Policy* 9, no. 1 (1993):27; Allan Rosas, "State Sovereignty and Human Rights: Toward a Global Constitutional Project," *Political Studies* 43 (1995): 61-78; Gene M. Lyons and Michael Mastanduno, eds., *Beyond Westphalia? State Sovereignty and International Intervention* (Baltimore, MD: Johns Hopkins University Press, 1995); and Louis Henkin, Lecture: "That 'S' Word: Sovereignty, and Globalization and Human Rights, et cetera," *Fordham Law Review* 68 (1999):4.

is no longer an absolute shield against scrutiny of states' respect for international norms.<sup>40</sup> That should not be taken to mean that human rights involve a "loss" of sovereignty, but rather that human rights flow from the inherent dignity of every human being, which lies at the heart of the United Nations Charter.<sup>41</sup>

International law now recognizes that there are issues which traverse national boundaries.<sup>42</sup> The examples abound: corporate or financial crimes, money laundering, corruption,<sup>43</sup> environmental hazards,<sup>44</sup> the work of the International Criminal Court,<sup>45</sup> the work of the International Criminal Tribunal for the former Yugoslavia

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<sup>40</sup> The U.N. Charter, adopted in 1945, balances the principles of sovereignty and noninterference with that of respect for human rights. Moreover, the emergence of what Louis Henkin called "the new law of human rights" ("Introduction," in *The International Bill of Rights*, ed. Louis Henkin [New York: Columbia University Press, 1981], 6); or what Thomas Buergenthal referred to as "contemporary international human rights law" ("The Normative and Institutional Evolution of International Human Rights," *Human Rights Quarterly* 19, no. 4 [November 1997]:703) is properly traced to the United Nations Charter.

<sup>41</sup> See International Court of Justice, "Application of the Genocide Convention (*Bosnia-Herzegovina v. Serbia-Montenegro*): Separate Opinion of Judge Weeramantry in Application of the Genocide Convention," July 11, 1996, 54. Also see Oscar Schachter, "Human Dignity as a Normative Concept," *American Journal of International Law* 77, no. 4 (October 1983):848–54.

<sup>42</sup> Nikos Passas, ed., *International Crimes* (Aldershot, UK: Ashgate, 2003); M. Cherif Bassiouni, *Introduction to International Criminal Law* (Ardsley, NY: Transnational Publishers, 2003).

<sup>43</sup> Ernesto Savona and L. Mezzanotte, "Double Standards in Public Life: The Case of International Corruption," in *Corruption: The Enemy Within*, ed. B. Rider, 105–111 (The Hague: Kluwer, 1997); Shihata, 1997, "Corruption—A General Review," 255–83. More generally, see Transparency International, *Global Corruption Report 2004—Special Focus: Political Corruption* (London: Pluto Press, 2004).

<sup>44</sup> See, for example, the preambular provisions of the *United Nations Framework Convention on Climate Change* (entered into force on March 21, 1994) acknowledging the need for the widest possible co-operation by all countries and their participation in an effective and appropriate international response. 1994. (UN, 1994, *U.N. Framework Convention on Climate Change*, preambular provisions, 1770 UNTS 107, March 21, 1994).

<sup>45</sup> Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003), 571–75; Antonio Cassese, Paolo Gaeta, and John R.W.D. Jones, eds., *The Rome Statue of the International Criminal Court: A Commentary*, 3 vols. (Oxford: Oxford University Press, 2002).

and the International Criminal Tribunal for Rwanda,<sup>46</sup> and the special jurisdictional rules for crimes against humanity.<sup>47</sup>

The significance of this for the Bank is that it can and should take into account human rights in the process it uses and the instruments it relies on to make economic decisions. Moreover, because of the way in which international law has evolved with respect to concepts of sovereignty and interference, and the range of issues that are considered to be of global concern, the Bank would not, in doing so, fall foul of the political prohibitions of the Articles. Globalization has forced us to broaden the range of issues that are of global concern. As former Bank president Wolfensohn noted in his address to the Bank's Board of Governors in 2003, the world faces an immense challenge in creating a new global balance.<sup>48</sup> Human rights lie at the heart of that global challenge.

These, in sum, are some preliminary thoughts on the legal framework applicable to the Bank on this topic.

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<sup>46</sup> On the proliferation of international criminal courts and tribunals more generally, see Philippe Sands, ed., *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003).

<sup>47</sup> A different, but related issue is that of universal jurisdiction, which is recognized by a number of international law experts. See Derek J. Bowett, "Jurisdiction: Changing Patterns of Authority over Activities and Resources," *British Yearbook of International Law* 53, no. 1 (1982):11–4; Kenneth J. Randall, "Universal Jurisdiction under International Law," *Texas Law Review* 66, no. 4 (1988):785; Oscar Schachter, "International Law in Theory and Practice, General Course in Public International Law," *Recueil des cours* 178 (1982-V):1–395; Brownlie, 2003, *Principles of Public International Law*, 303; Eric David, *Principes de droit des conflits armes* (Brussels: Bruylant, 1994), 592. The Third Restatement provides as follows, "that genocide and war crimes are subject to universal jurisdiction was accepted after the Second World War," American Law Institute, "Reporter's Note," in vol. 1, *Restatement of the Law (Third), The Foreign Relations Law of the United States*, 2 vols., 254 (Philadelphia, PA: American Law Institute, 1987). Another formulation is "crimes under international law" for breaches of the laws of war, especially the *Hague Convention* of 1907 or the *Geneva Conventions* of 1949: such crimes may be punished by any state having custody of those suspected to be responsible; see Brownlie, *ibid.*, 303–304.

<sup>48</sup> Address by James D. Wolfensohn, president of the World Bank Group, to the board of governors of the World Bank Group at the joint Annual Discussion, Dubai, United Arab Emirates, September 23, 2003.

## Bank Practice

Operating within the legal framework described above, it is clear that the work of the Bank, as well as the concept of development itself, will continue to reflect trends and changes in the world at large. As early as 1973, then World Bank President Robert McNamara, addressing the Board of Governors on the meaning of development, said, “[We] believe that economic progress remains precarious and sterile without corresponding social improvement. Fully human development demands attention to both. We intend, in the Bank, to give attention to both.”<sup>49</sup> Jim Wolfensohn endorsed a similar vision in the Comprehensive Development Framework, in which he emphasized an integral approach and the two dimensions of development: “The macroeconomic aspects on the one side, and the social, structural and human on the other, must be considered together.”<sup>50</sup>

Overall, there has been a marked shift in emphasis from infrastructure lending to human development. Thirty years ago, the Bank had 58 percent of its portfolio in infrastructure, by 2004, it had been reduced to 22 percent while human development and law and institutional reform represented 52 percent of total lending. The evolving practice of the Bank has an important legal dimension for the interpretation of its *Articles*, since Article 31 of the *Vienna Convention on the Law of Treaties* regarding the general rule of interpretation makes provision for “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”<sup>51</sup>

Another dimension of the evolving mandate of the Bank is embodied in the world community’s commitment towards realizing the MDGs.<sup>52</sup> The Bank has joined other global partners to pledge attainment of the major targets which relate to the eradication of extreme hunger, the achievement of universal education, the

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<sup>49</sup> Robert McNamara, “Address to the Meeting of the Board of Governors,” Copenhagen, Denmark, September 21, 1970, as quoted in Edward S. Mason and Robert Asher, *The World Bank Since Bretton Woods* (Washington, DC: Brookings Institution Press, 1973), 475.

<sup>50</sup> See Wolfensohn, 1999, “A Proposal for a Comprehensive Development Framework.”

<sup>51</sup> Article 31 of *Vienna Convention on the Law of Treaties* (entered into force on January 27, 1980), UNTS vol. 1155:331.

<sup>52</sup> World Bank, n.d., Millennium Development Goals (MDGs) page on website of the World Bank Group, World Bank, Washington, DC, <http://ddp-ext.worldbank.org/ext/GMIS/gdmis.do?siteId=2&menuId=LNAV01HOME1> (accessed July 6, 2006).

promotion of gender equality, reduction of child mortality, improving maternal health, combating HIV/AIDS, ensuring environmental stability, and developing a global partnership for development.

The Bank's work contributes to the realization of all eight MDGs, and all eight MDGs involve more than one human right.<sup>53</sup> One concept that the Bank has taken a leading role in developing is governance.<sup>54</sup> Its consideration of this issue followed from a deepened understanding of how to achieve effective development.<sup>55</sup> The importance of effective governance is now well appreciated, as a result of which the Bank now finances a range of activities in support of these concerns.<sup>56</sup> Governance itself has a strong human rights content. Indeed, this is an area in which Bank

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<sup>53</sup> Indeed, each MDG can be traced to the furtherance of one or several core human rights. For instance, MDG number 2 embodies a commitment to achieve universal primary education. This is a right provided in Article 26 of the *Universal Declaration on Human Rights* (1948, General Assembly res. 217A [III], U.N. Doc A/810:71); and Articles 6, 10, 13, and 14 of the ICESCR (993 UNTS 3, entered into force January 3, 1976). In the ICCPR (1976, 999 UNTS 171, entered into force March 23, 1976), the right to education is provided for in Article 18 and Article 19. Of general relevance to this point is United Nations Millennium Project, "Investing in Development: A Practical Plan to Achieve the Millennium Development Goals" (New York: UNDP, 2005), <http://www.unmillenniumproject.org/reports/fullreport.htm> (accessed July 4, 2006), which also highlights the relevance of human rights to the attainment of the MDGs. See, for example, pages 36, 108, and 118–120.

<sup>54</sup> World Bank, 1990, *Governance: The World Bank Experience*.

<sup>55</sup> On the link between good governance practices and economic growth, see Kaufmann, Kraay, and Zoida-Lobaton, 1999, *Governance Matters*. See also Robert M. Sherwood et al., "Judicial Systems and Economic Performance," *Quarterly Review of Economics and Finance* 34, no. 1 (1994):101. The authors estimate that countries that attempt economic liberalization under a weak judicial system suffer "at least a 15 percent penalty in their growth momentum," *ibid.*, 113. Also see Ibrahim F.I. Shihata, "Preface: Good Governance and the Rule of Law in Economic Development," in *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, ed. Ann Seidman, Robert B. Seidman, and Thomas Walde (The Hague and Boston: Kluwer Law International, 1991).

<sup>56</sup> Ibrahim F.I. Shihata, *The World Bank in a Changing World*, comp. and ed. Franziska Tschofen and Antonio R. Parra, vol. 1 (Dordrecht, The Netherlands: Martinus Nijhoff, 1991), especially chap. 3, "The World Bank and Governance in Its Borrowing Members," and vol. 3, especially chap. 6, "Relevant Issues in the Establishment of a Sound Legal Framework for a Market Economy."

research has found a rich set of connections in charting the work of the Bank to key international human rights provisions. Governance incorporates transparency, accountability, and a predictable legal framework.<sup>57</sup>

All of these principles are clearly linked to the “rule of law,” with its inherent notions of fairness and social justice.<sup>58</sup> The rule of law itself includes access to justice, recognition before the law, proper public sector management,<sup>59</sup> and the independence of the judiciary<sup>60</sup>—all of which are protected under international human rights law.<sup>61</sup> However, the rule of law must also be supported by a number of other indispensable factors, such as public participation, a free press, and a voice for civil society. These, too, relate to important provisions of a number of international human rights instruments, particularly those of the *International Covenant on Civil and Political Rights*.<sup>62</sup>

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<sup>57</sup> Ibid., “Legal Framework for Development and the Role of the World Bank in Legal Technical Assistance,” vol. 2, chap. 3.

<sup>58</sup> Sabine Schlemmer-Schulte, “The World Bank’s Role in the Promotion of the Rule of Law in Developing Countries,” in *Liber Amoricum Ibrahim F.I. Shihata*, ed. Sabine Schlemmer-Schulte and Ko Yung Tung (Boston: Kluwer Law International, 2001), 677.

<sup>59</sup> The World Bank has also worked to improve public sector management and reform the civil service. See, for example, Ibrahim F.I. Shihata, “Some Aspects of Civil Service Reform,” in *Complementary Reform, Essays on Legal, Judicial, and Other Institutional Reforms Supported by the World Bank*, ed. I.F.I. Shihata, 119–38 (The Hague: Kluwer Law International, 1997).

<sup>60</sup> See, for instance, World Bank, “Georgia—Judicial Reform Project,” Report no. 19346, World Bank, Washington, DC, 1999. The project had as its objective the development of an independent and professional judiciary, committed to high standards of judicial ethics, and capable of efficient and effective dispute resolution (Credit No. 3263-GE, approved June 29, 1999, US \$13.4 million [equivalent]).

<sup>61</sup> The right to be recognized as a person before the law is provided for in Article 6 of the *Universal Declaration on Human Rights*, and in Articles 2, 9, 14, 16 of the ICCPR. The right to an effective remedy by a competent national tribunal is provided for in Article 8 of the UDHR and in Articles 2, 14 of the ICCPR. The right to a fair and public hearing by an independent and impartial tribunal in the determination of one’s rights is provided for in Article 10 of UDHR. The right to be presumed innocent unless proved guilty according to law in a public trial is provided for in Article 11 of the UDHR, and in Articles 14 and 15 of the ICCPR.

<sup>62</sup> For instance, freedom of thought, conscience, and religion are provided for in Article 18 of the UDHR, Article 10 of the ICESCR, and Article 18 of the ICCPR. The right to

So, while governance is a crucial concept, the author's personal view is that governance does not go far enough—it must go farther and look at issues of social equity alongside economic growth. Here legal and judicial reform programs have a key role to play if they support the development of such concepts within national legal systems.<sup>63</sup> Social equity programs should be seen as falling squarely within the mandate of the Bank. Its legal and judicial reform projects already advance social equity.

The Bank supports a wide array of legal and judicial reform initiatives. In 2004, there were approximately 600 Bank-financed activities related to legal and judicial reform and 16 active “free-standing” projects in four regions. The Bolivia Judicial Reform Project,<sup>64</sup> for example, was designed to support the development of the national judicial system that contributed to economic growth in Bolivia by facilitating private-sector activity and promoting social welfare by guaranteeing the basic rights of all citizens. The project comprised two principal components: one related to reforming the judicial system and another related to supporting the work of the Ministry of Justice. Another illustrative example emerged in the Ecuador Judicial Reform Project,<sup>65</sup> the object of which was to improve access to justice, the efficiency of judicial services, and participation of civil society in judicial reform.<sup>66</sup>

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freedom of opinion and expression, the right to hold opinions without interference, and the right to receive and impart information and ideas through any media and regardless of frontiers are provided for in Article 19 of the UDHR, and Article 19 of the ICCPR.

<sup>63</sup> Amartya Sen, “What Is the Role of Legal and Judicial Reform in the Development Process?” in *The World Bank Legal Review*, vol. 2, *Law, Equity, and Development*, ed. Caroline Mary Sage and Michael Woolcock, 31–49 (The Hague: Martinus Nijhoff, 2006).

<sup>64</sup> World Bank, “Bolivia—Judicial Reform Project,” Report no. 13052, World Bank, Washington, DC, 1995 (Credit No. 2705-BO, approved April 13, 1995 for US \$11.0 million [equivalent]).

<sup>65</sup> World Bank, “Ecuador—Judicial Reform Project,” Report no. 15385, World Bank, Washington, DC, 1996 (Loan No. 4066-EC, approved April 13, 1995 for US \$10.7 million [equivalent]).

<sup>66</sup> See, generally, World Bank, “Legal and Judicial Reform: Observations, Experiences and Approach of the Legal Vice Presidency,” Washington, DC, World Bank, 2002, and “Legal and Judicial Reform: Strategic Directions,” Washington, DC, World Bank, 2003.

## The Way Forward

The author strongly believes that an objective assessment of the work of the Bank leads inevitably to the conclusion that it has made a substantial positive contribution to the realization of human rights, and that it will increasingly continue to do so. In particular, it has fulfilled and will continue to fulfill an important role in assisting its members to progressively realize their human rights commitments. However, there are limits that must be respected. First, there are legal limits that need to be interpreted in a way that is consistent with the purposes of the Bank, in a dynamic way and in a contemporary context. But these limits do exist and the Bank must work within the legal framework described in this article to tackle the challenges presented by human rights issues as they evolve.

There are also institutional limits. The Bank is a specialized financial agency. It cannot lose sight of the specificity of its function as a financial institution in the development context. It also has finite capacity and limited resources. For now at least, the Bank should embrace the centrality of human rights in its work instead of being divided by the issue of whether or not to adopt a “rights-based approach” to development.<sup>67</sup>

Within both of these constraints there is still a great deal of latitude. In so far as human rights constitute a valid consideration for the investment process, they are properly within the scope of issues that the World Bank must consider when it makes economic decisions. And this consideration should include all human rights: those classified as economic, social, and cultural, as well as those classified as civil and political. Moreover, it stands to reason that it must address the potential economic consequences of human rights situations, and consider the risks *ex ante*, not only *ex post facto*.

However, as a development institution, the Bank must also ensure that it works in a manner that does not inflict a “double punishment” on the people of member countries by turning its back on them because of the human rights record of their

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<sup>67</sup> A well-established definition of a rights-based approach to development is that promulgated by the Office of the United Nations High Commissioner for Human Rights (OHCHR). See OHCHR website, “Rights-based approaches,” <http://www.unhchr.ch/development/approaches.html> (accessed July 6, 2006). See also OHCHR, “Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies,” 2003, annex 2 in UN-OHCHR, *Frequently Asked Questions on a Human Rights Based Approach to Development* (New York: UN-OHCHR, 2006), [http://www.ohchr.org/english/about/publications/docs/FAQ\\_en.pdf](http://www.ohchr.org/english/about/publications/docs/FAQ_en.pdf) (accessed March 15, 2006).

governments. It is easier for a private company to walk away from a particular investment than for the Bank to walk away from an investment program for a whole country and thus inflict additional hardship on those who may already be suffering governmental abuse as a result of the government's failure to respect or protect human rights. It should also be clear that the Bank's role is not that of enforcer. Enforcement belongs primarily to the mandate of member countries and other non-financial entities. The Bank's role is a collaborative one in the implementation of member countries' human rights obligations. It is also a complementary role to that of its U.N. partners, which are entrusted with the job of respecting, protecting, promoting, and fulfilling human rights globally.

The Bank needs to work within countries to exert a positive influence, to deepen dialogue, and to share knowledge and expertise. In this venture, it needs to accept that it must work with countries that do not respect human rights as well as those that do. So, how does the Bank move forward in this area? The way forward in the area of human rights and development must be consistent with the mission of the Bank, that is to say, consistent with poverty alleviation through economic growth and social equity. The human rights content of this direction is beyond question.

As the Bank moves in this direction, there is a clear and unmet demand from member countries for legal and judicial reform programs. The Bank certainly needs to substantially scale up its interventions in this field with a wide range of partners. Through these programs, as well as through every other aspect of the Bank's work, many human rights aspirations can be progressively realized.

The Bank is fully committed to its institutional mission of poverty alleviation through economic growth and social equity. Given that the rule of law is an indispensable component of these goals, the Bank strongly supports legal and judicial reform, and thus contributes to the progressive realization of human rights everywhere in the world.

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## ECONOMICS AND THE RIGHT TO BASIC SERVICES

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*This article analyzes rights-based and economic approaches to the provision of health care and education in developing countries.<sup>1</sup> It assesses the foundations and uses of social rights in development, outlines the economic approach to health care and education, highlights differences and similarities, and assesses the hard questions that the economic critique poses for rights. The article argues that the policy consequences of the two approaches overlap considerably. Differences include the consequences of long-term deprivation, metrics for trade-offs, and the behavioral distortions of subsidies. However, the differences are not irreconcilable, and advocates of the approaches need not regard each other as antagonists.*

### **Introduction**

Human rights are increasingly important in international development discourse, particularly in the areas of health and education. The legal foundations for these rights are the Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social, and Cultural Rights (1966). In addition, references to the right to education and health care are found in the European Social Charter (1961), the African Charter on Human and Peoples' Rights (1981), and the Convention of the Rights of the Child (1989). A number of international and bilateral development agencies have endorsed a human-rights orientation to the provision of health care and

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<sup>1</sup> The author would like to thank Claudio Montenegro for able research assistance, Imran Hafiz and Hedy Sladovich for help in preparing the manuscript, and Paul Clements, Deon Filmer, Mead Over, Thomas Pogge, Jamie Radner, and two anonymous referees for insightful comments.

education in developing countries.<sup>2</sup> Social rights are also important at the national level. One analyst found that 110 national constitutions make reference to a right to health care.<sup>3</sup> A review conducted for this paper assessed constitutional rights to education and health care in 187 countries. Of the 165 countries with available written constitutions, 116 made reference to a right to education and 73 to a right to health care. Ninety-five, moreover, stipulated free education and 29, a right to free health care for at least certain population subgroups and services.<sup>4</sup>

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<sup>2</sup> See, for example, DFID, “Realising Human Rights for Poor People,” DFID Target Strategy Paper (London: DFID, 1997); Human Rights Council of Australia, *The Rights Way to Development: A Human Rights Approach to Development Assistance* (Sydney, Australia: Human Rights Council of Australia, 1995); UNDP, *Human Development Report* (New York: Oxford University Press, 2000); UNESCO, *World Education Report 2000: The Right to Education—Towards Education for All throughout Life* (Paris: UNESCO, 2000); and WHO, *25 Questions and Answers on Health and Human Rights* (Geneva: WHO, 2002).

Summary reviews of these policies include Brigitte I. Hamm, “A Human Rights Approach to Development,” *Human Rights Quarterly* 23, no. 4 (2001):1005–1031; and Stephen P. Marks, “The Human Rights Framework for Development: Five Approaches,” Working Paper Series, no. 6, François-Xavier Bagnoud Center for Health and Human Rights, Harvard School of Public Health, Cambridge, MA, 2001.

<sup>3</sup> Eleanor D. Kinney, “The International Human Right to Health: What does this Mean for Our Nation and World?” *Indiana Law Review* 34 (2001):1457–75.

<sup>4</sup> The coding system identified a right to education or health care if a constitution used the word “right” and stated that the service was “guaranteed,” the government was to provide the service to “all,” or that everyone was “entitled” to the service. Weaker formulations (e.g., the “state shall endeavor to provide education”) were not considered constitutional rights. The analysis identified a provision for free health care if any population subgroup was to receive free services (usually the poor or indigent) and a provision for free education if any level of education was free (usually primary and/or secondary education). The analysis of the right to health care focused on the right of access to medical services, not population-based preventive measures. The later a constitution was written, the more likely it incorporated a right to education (correlation = 0.22) and a right to health care (correlation = 0.21). The review was conducted in November 2002; the constitutions were found at four websites: <http://www.psr.keele.ac.uk/const.htm> (Richard Kimber’s Political Science Resources website, “Constitutions, treaties, and official declarations” page); <http://confinder.richmond.edu> (website of the University of Richmond, Virginia, “Constitution Finder” page); <http://doc-iep.univ-lyon2.fr/Ressources/Liens/sliens.html?th=15> (Documentation Services web server of The Institute of Political Studies of Lyon, France); and <http://www.cia.gov/cia/publications/factbook> (CIA *World Factbook*).

Brazil offers a compelling example of the force of human rights language. The Brazilian constitution of 1988 guarantees each citizen the right to free health care. Although the constitutional guarantee has not eliminated shortages and inequalities in that sector, this provision had real “bite” in 1996, when a national law initiated a program of universal access to highly active anti-retroviral therapy (HAART) for AIDS patients, free of charge. Partly as a result, AIDS deaths have dropped sharply in major Brazilian cities, falling more than 40 percent during 1997–2002. The program is costly: even after prices declined 48 percent from 1997–2001 as a result of generic production and government pressure, drugs alone still cost the government US\$2,530 per patient for 113,000 HAART patients in 2001.<sup>5</sup> Meanwhile, many basic antibiotics remained too expensive for or inaccessible to millions of citizens.

Reactions to Brazil’s AIDS drugs program are divided, so much so that an account of it is an almost perfect screening instrument to distinguish people inclined to a rights-based approach to health care from those who gravitate toward an economic analysis. On one hand, rights advocates contend that because the Brazilian program is based on a constitutional guarantee and an explicit human rights orientation, it prevents at least some Brazilians from dying prematurely while the country possesses the resources to save them, and more generally illustrates why health care is not a mere “commodity.” On the other hand, economists argue that to the degree that providing those drugs displaces private expenditures, it is merely an income transfer, and that AIDS treatment might be a lower priority than other health initiatives that could save more lives at lower social cost, such as disease prevention and the provision of clean water. Also, more generally, without the information that prices convey, health-care providers would slack off, innovation and scientific progress in these fields would slow, and consumers would have a harder time distinguishing good providers from bad.

This article argues that the disagreements between the two approaches are not as large as they appear, and that with regard to the practical policy consequences for health care and education, rights advocates and economists are not far apart. Both approaches recommend wider access to information, more local organizations for clients, stronger advocacy, and changes in sectoral governance. The goal of both approaches is to strengthen the position of service recipients. Still, there remain differences. Whether or not procedures for service delivery are ends in themselves, the degree of disaggregation at which outcomes should be assessed, and the consequences of long-term deprivation are all areas where the two approaches diverge. However,

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<sup>5</sup> Ministry of Health of Brazil, “National AIDS Drugs Policy” (Brasilia: Ministry of Health, 2002).

even in these areas the differences are not irreconcilable. More difficult to reconcile are issues that emerge from two pointed questions of the economic critique: given scarce resources, why allocate according to a principle other than social welfare, and why ignore the behavioral distortions that follow from subsidies?

Although other moral entitlements and immunities, such as subsistence rights and the right to physical security, have obvious relevance for health and education outcomes, this article focuses on direct rights to health care and education services. Moreover, it addresses only some of the most common approaches: it is impossible to do justice to the vast literature on these topics in a short space. The four sections of this article assess the foundations and uses of social rights in development, outline an economic approach to improving health and education service provision, highlight differences and similarities, and draw inferences for policy work in these sectors in developing countries.

### **Social Rights: Foundations, Uses, and Criticisms**

Genealogically, the concept of human rights is related to Locke's notion of the natural right to one's labor, Rousseau's and Kant's ideas of innate liberty, and before that, Stoic and Christian conceptions of natural law, or the divinely inspired respect that is owed to human beings.<sup>6</sup> There is a lively debate about whether this historical relationship necessarily makes the existing human rights regime parochial, but one can argue that the regime can, in fact, be built on a variety of philosophical foundations.<sup>7</sup> There are "plural foundations"<sup>8</sup> because human rights, while con-

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<sup>6</sup> For a history of these transitions, see Richard Tuck, *Natural Rights Theories: Their Origin and Development* (New York: Cambridge University Press, 1987). Primary sources for the concept of human rights include Immanuel Kant, *Groundwork for the Metaphysics of Morals*, ed. and trans. Allen W. Wood, with critical essays by J. B. Schneewind, Marcia Baron, Shelley Kagan, and Allen W. Wood (New Haven, CT: Yale University Press, 1785/2002); John Locke, *The Second Treatise of Government (1690)* and *A Letter Concerning Toleration (1692)* (Mineola, New York: Dover Publications, 2002); and Jean-Jacques Rousseau, *Discourse on the Origin of Inequality (1755)*, ed. Patrick Coleman, trans. Franklin Philip (New York: Oxford University Press, 1994).

<sup>7</sup> For discussions of the parochialism of human rights from the East Asian perspective, see Joanne R. Bauer and Daniel Bell, *The East Asian Challenge for Human Rights* (Cambridge, UK: Cambridge University Press, 1999).

<sup>8</sup> Amy Gutmann, "Introduction," in Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 2001).

ceptually vague for the reasons described below, are the product of a powerful intuition—common across many if not most cultures and religions—that human beings are especially important in the cosmos and deserve special treatment. Ideas inspired by that intuition have caught on in a variety of forms and circumstances, sometimes in conjunction with conquest, as in the cases of Islam in the Middle East and liberalism in the colonial world, but frequently independent of it as well, such as in Buddhism in India, Christianity in the Mediterranean world, and Islam in Indonesia.<sup>9</sup> The foundations of human rights can be secular or religious, and religious in a variety of forms, because the notion that human beings are worthy of respect recurs throughout history. It is arguable, moreover, that human rights do not have, and do not need, any particular philosophical foundation: they might be a “freestanding moral idea”<sup>10</sup> or a “common agreement” that constrains institutions, describes goals, and furnishes the grounds of political criticism.<sup>11</sup>

As the preceding paragraph indicates, the theoretical issues surrounding human rights are complex, and this article can only illustrate a few of the principal concerns. One key issue is what counts as a right. The list of possibilities is long, but can be distilled into five types: personal rights (life, liberty, security, property, conscience); legal rights (due process, equal protection under the law); political rights (participation, suffrage, assembly); social and economic rights (standard of living, employment, health care, education, nutrition); and collective rights (ethnic self-determination, minority rights).<sup>12</sup>

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<sup>9</sup> Charles Taylor, “Explanation and Practical Reason,” in *The Quality of Life: Studies in Development Economics*, ed. Martha Craven Nussbaum and Amartya K. Sen, 208–231 (Oxford: Oxford University Press, 1993).

<sup>10</sup> Martha Craven Nussbaum, “Aristotle, Politics, and Human Capabilities: A Response to Antony, Arneson, Charlesworth, and Mulgan,” *Ethics* 111 (2000):102–140, and *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press, 2000).

<sup>11</sup> Charles R. Beitz, “Human Rights as a Common Concern,” *American Political Science Review* 95, no. 2 (2001):269–82.

<sup>12</sup> This list borrows from Beitz, 2001, “Human Rights as a Common Concern.” Philosophical treatments of human rights include J. Baker, *Group Rights* (Toronto: University of Toronto Press, 1994); Ronald M. Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977); Alan Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996); Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford: Oxford University Press, 1995); M. J. Perry, *The Idea of Human Rights: Four Inquiries* (New York: Oxford University Press, 2000); Thomas W.

Secular justifications for social rights, such as health care and education, which are the concern of this article, usually depend on the selection and defense of a set of basic needs, primary goods, or essential human capabilities. (The key difference between an approach based on human needs, or primary goods, and one based on capabilities is that the latter recognizes that different people need different levels of resources: a disabled person, for instance, needs more resources to function in society than someone who is not disabled.)<sup>13</sup> There are at least two general approaches to establishing social rights. In the first, which emphasizes human agency, it is argued that (a) in a fully human life, a person makes important decisions, such as where to live, what to work on, how to worship, and whom to marry on one's own, in accordance with one's own understanding of the elements of a good or worthy life; and (b) that abject poverty, disease and disability, and illiteracy and ignorance can so impair a person's ability to imagine and realize plans that one's own human life fails, in an important way, to be realized.<sup>14</sup> Disease and ignorance are akin to

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Pogge, "An Egalitarian Law of Peoples," *Philosophy & Public Affairs* 23, no. 3 (Summer 1994):195–224; John Rawls, *The Theory of Justice* (Cambridge, MA: Belknap Press, 1971) and *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999); and Richard Rorty, "Human Rights, Rationality, and Sentimentality," in *On Human Rights: The Oxford Amnesty Lectures 1993*, ed. Stephen Shute and Susan Hurley, 111–134 (New York: Basic Books, 1993).

<sup>13</sup> "Primary goods" is the term used by Rawls, 1971, *The Theory of Justice*, and *The Law of Peoples*, 1999; "basic needs" is used by Henry Shue, *Basic Rights: Subsistence, Affluence, and US Foreign Policy* (Princeton, NJ: Princeton University Press, 1996); and the capabilities approach is developed by Martha Craven Nussbaum, "Capabilities and Human Rights," *Fordham Law Review* 66 (1997):273–300; and Amartya K. Sen, "Equality of What," in *Tanner Lectures on Human Values*, ed. S. McMurrin (Cambridge, UK: Cambridge University Press, 1980), and *Choice, Welfare, and Measurement* (Oxford, UK: Blackwell Publishing, 1982). Pogge describes criteria for basic goods; see Thomas W. Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, UK: Polity Press, 2002). On the differences between Rawls and Sen, see Gerry A. Cohen, "Equality of What? On Welfare, Goods, and Capabilities," in Nussbaum and Sen, *The Quality of Life*, 9–29.

<sup>14</sup> An argument of this kind is found in Nussbaum, 2000, "Aristotle, Politics, and Human Capabilities," and 2000, *Women and Human Development*. Somewhat similar is Shue, 1996, *Basic Rights*, who argues that basic subsistence is essential to the exercise of human capacities. See also O. O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development* (London: Allen & Unwin Hyman, 1986), and *Bounds of Justice* (Cambridge: Cambridge University Press, 2000).

enslavement in the sense that those afflicted cannot experience themselves as beings whose lives are significant.

The second approach, which emphasizes human dignity, emphasizes not falling victim to fate, but being left in that condition by one's fellow citizens. It points out that enjoying a healthy, vigorous life and being well educated is desirable in contemporary societies worldwide, which, at least in their urbanized centers, generally admire health and material well-being.<sup>15</sup> Being denied education and health care, then, is tantamount to being excluded from modern society, with its attendant social and psychological consequences. The rights to health care and education become elements in the "social bases of self-respect," defined by John Rawls as perhaps the most important of his "primary goods."<sup>16</sup> Closely related are Amartya Sen's notion (drawing on Adam Smith) of the "ability to appear in public without shame"<sup>17</sup> and Joel Feinberg's idea that "having rights enables us to stand up like 'men,' to look others in the eye, and to feel in some fundamental way the equal of anyone."<sup>18</sup> There can also be, of course, religious foundations for broad access to health care and education, such as commandments to love one's neighbor or engage in charity, as well as communitarian approaches.<sup>19</sup>

Some critics of social rights fear that an expansive list causes "rights inflation" and cheapens "genuine" human rights, particularly the rights of the person.<sup>20</sup> Others contend that guaranteeing minimal income, health care, and education necessarily

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<sup>15</sup> Walzer points out that centuries ago in Europe, access to a spiritual advisor was considered indispensable for every soul, whether a noble or a serf, whereas access to health care and education was not a pre-requisite for meaningful participation in society (Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* [New York: Basic Books, 1993], 87). Now close to the reverse is true.

<sup>16</sup> Rawls, 1971, *The Theory of Justice*, and 2001, *The Law of Peoples*.

<sup>17</sup> Amartya K. Sen, *Development as Freedom* (New York: Knopf; and Oxford: Oxford University Press, 1999).

<sup>18</sup> Joel Feinberg, *Social Philosophy* (Englewood Cliffs, NJ: Prentice-Hall, 1973).

<sup>19</sup> See, for example, William T. De Bary, *Asian Values and Human Rights: A Confucian Communitarian Perspective* (Cambridge, MA: Harvard University Press, 2000); and L. S. Rouner, *Human Rights and the World's Religions* (Notre Dame, IN: University of Notre Dame Press, 1988).

<sup>20</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton, NJ: Princeton University Press, 2001).

entails large government, or even socialism.<sup>21</sup> Political and philosophical concerns such as these have partly motivated the theoretical effort to distinguish “negative rights,” which put constraints on other actors (e.g., the right to personal liberty enjoins unjustified detention and is the principle behind the common law doctrine of *habeas corpus*), from “positive rights,” which entail intervention or resource support from others (e.g., the right to health care). Again, the arguments are complex. However, one can show that, for their fulfillment, all rights require restraint, protection, and aid from the entity from whom the rights are claimed, and that a reasonably effective and well-funded state is a *sine qua non* for all rights.<sup>22</sup>

In addition to these theoretical difficulties of social rights, a practical objection concerns judicial enforcement. Because education and health care services involve considerable discretion at the point of delivery on the part of numerous independent providers, and because they entail a large number of transactions,<sup>23</sup> it is difficult for courts, where claims of rights violations are typically taken, to determine whether a given student or patient is being denied the right to education or health care. The example of desegregation in the United States is illustrative. When courts intervened on the grounds that separate schooling for black and white students was inherently in conflict with the equal protection clause of the national constitution, the courts discovered that school management, financing, and politics were so intertwined that remedies, such as court-ordered busing, affected the entire educational system in ways that could not be determined in advance. As a result, in some cases courts had to operate school systems themselves, which in turn created a backlash that

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<sup>21</sup> This disagreement was acute during the Cold War, leading to the bifurcation of the international instruments meant to codify the Universal Declaration of Human Rights into one on economic, social, and cultural rights, and another on civil and political rights. See P. G. Lauren, *The Evolution of International Human Rights: Visions Seen* (Philadelphia: University of Pennsylvania Press, 1998). Libertarian critics contend that restraints are justified because taxation for the purposes of economic redistribution or social support amounts to unjustified taking. See Richard A. Epstein, “Imitations of Libertarian Thought,” *Social Philosophy and Policy* 15, no. 2 (Summer 1998): 412; and Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

<sup>22</sup> Stephen Holmes and Cass. R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (New York: W.W. Norton, 1999); and Shue, 1996, *Basic Rights*.

<sup>23</sup> Lant Pritchett and Michael Woolcock, “Solutions When the Solution is the Problem: Arraying the Disarray in Development,” Center for Global Development Working Paper, no. 10, Center for Global Development, Washington, DC, 2002.

weakened the educational rights of black students.<sup>24</sup> Judicial remedies for social inequalities would be even more difficult in developing countries, where legal systems are often weak and less than impartial.

One response to these problems is to interpret social and economic rights, not as binding constraints, but as high-priority goals.<sup>25</sup> In this view, rights are not legal instruments for individuals (though they can be, if governments codify them in domestic law), but duties of governments, international agencies, and other actors to take concrete measures on behalf of individuals or restructure institutions so that the rights can be fulfilled more effectively.<sup>26</sup> Failure to develop plans, achieve benchmarks, or establish and finance implementing agencies constitute violations of the duties associated with these rights and invite legitimate criticism, moral pressure, and in egregious cases, justifiable external intervention.<sup>27</sup> Failure to pursue actions in pursuit of the rights might also raise serious issues concerning the legitimacy and long-term stability of governments and international institutions because social rights have become critical elements of the modern social compact and modern personality.

With rights so conceived, the problem of whether people can hold a right without a designated person or entity bearing a duty to fulfill or protect it becomes less important. Identifying health care and education as rights means, in this understanding, that everyone bears some responsibility for their fulfillment. If individuals in developing (or for that matter, developed) countries receive miserably inadequate health care and education, their rights impose duties on their local governments, national governments, foundations, neighbors, international agencies, and citizens of the rich countries—on all people who might be in a position to help. The fact that no one actor bears responsibility for them means that coordinating a response might be difficult, but as Sen notes they remain rights nevertheless: “But it is surely possible for us to distinguish between a right that a person has which has not been fulfilled and a right that the person does not have.”<sup>28</sup>

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<sup>24</sup> J. L. Hochschild, *The New American Dilemma* (New Haven, CT: Yale University Press, 1984).

<sup>25</sup> Feinberg, 1973, *Social Philosophy*; and James W. Nickel, *Making Sense of Human Rights* (Berkeley, CA: University of California Press, 1987), and 2002, “Human Rights as Goals.”

<sup>26</sup> Pogge, 2002, *World Poverty and Human Rights*.

<sup>27</sup> Beitz, 2001, “Human Rights as a Common Concern.”

<sup>28</sup> Sen, 1999, *Development as Freedom*, 230–31.

From this viewpoint, proceed the problems of adjudicating exactly what the rights to health care and education entail and how to ensure that their attainment is effected, and appropriately so, by political processes within countries. This might mean that standards of health care and education, as well as their means of delivery, vary from place to place. It is possible, however, to distinguish between governments and other actors that recognize the fundamental importance of those goods, but depart from international norms of provision, and those that fail to recognize their importance altogether.<sup>29</sup> Similarly, with this understanding of rights, the problem of judicial enforcement is reframed and made far less damaging for the rights approach. If rights are not binding constraints, then every perceived shortcoming is not actionable in courts, although certain categories, such as those premised on equal protection claims, might be.

Another approach maintains that institutional enforcement of social and economic rights is possible. In this view, although there is no single standard for determining whether governments have complied with social and economic rights, courts, national human rights commissions, human rights ombudsmen, or other institutions are still capable of scrutinizing the policies of the executive and legislative branches to determine whether reasonable social and economic policies are in place. In this account, constitutionally based scrutiny of social and economic rights might resemble administrative law, in which courts do not set policies, but nevertheless review them.<sup>30</sup>

The notion that no single standard exists for social and economic rights is implicit in some of the legal documents underlying the rights approach to development. The 1946 constitution of the World Health Organization (WHO) and its Declaration of Alma Ata (1978),<sup>31</sup> for instance, make reference to the “highest attainable

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<sup>29</sup> It might even be necessary for standards to vary. Local understandings of agency and social inclusion, arrived at through rich democratic self-government, have to be incorporated into the norms of service provision because it is, in principle, impossible for an outsider to predict in advance what services a person will say are essential for one’s ability to live a good or worthy life. As a result of these varying standards, there will remain sharp disagreements across regions regarding certain aspects of social policy, notably in gender roles and reproductive health, though these, too, can be the subject of persuasion.

<sup>30</sup> Cass R. Sunstein, *The Second Bill of Rights: FDR’s Unfinished Revolution and Why We Need it More than Ever* (New York: Basic Books, 2004).

<sup>31</sup> WHO, 1946 Constitution, [http://policy.who.int/cgi-bin/om\\_isapi.dll?hitsperheading=on&infobase=basicdoc&jump=Constitution&softpage=Document42#JUMPDEST\\_](http://policy.who.int/cgi-bin/om_isapi.dll?hitsperheading=on&infobase=basicdoc&jump=Constitution&softpage=Document42#JUMPDEST_)

standard of health,” a principle that implicitly acknowledges that many developing countries cannot provide comprehensive health care for all of their citizens. The WHO interprets the principle to mean that governments should put into place “policies and action plans which will lead to available and accessible health care for all in the shortest possible time.”<sup>32</sup> The United Nations also describes the right to education as a mandate that is being progressively realized.<sup>33</sup>

Understanding social rights as goals brings out their self-reinforcing quality and helps clarify the somewhat opaque assertion that rights are “indivisible” (as per the Declaration on the Right to Development, 1986).<sup>34</sup> From the perspective of human agency, certain social goods, such as health care and education, are indispensable for the exercise of one or more critical human faculties, such as self-understanding or reason, because they provide essential physical and cognitive infrastructure. But, reason and self-understanding in turn facilitate the articulation, assertion, and defense of social and political rights. Where a society supports education, for example, a woman is more likely to understand a clinical diagnosis, demand appropriate treatment, and complain if her health needs are not met. Yet, reasoning ability and rhetorical skills also help position her to organize and participate in community oversight of clinics and schools. There is a parallel argument from the perspective of dignity: individuals for whom social rights are fulfilled are more likely to consider themselves fully equal participants in decision making, both within the household and outside it, and are therefore emboldened to speak and organize in defense of their social rights. This structure of argument for rights makes clear that rights are both the ends of, and instruments for, development. To extent that they are instruments, the policy consequences of a rights approach overlap considerably with a modern economic approach to health care and education.

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Constitution, and 1978, Declaration of Alma Ata, [http://www.who.int/hpr/NPH/docs/declaration\\_almaata.pdf](http://www.who.int/hpr/NPH/docs/declaration_almaata.pdf) (accessed August 15, 2006).

<sup>32</sup> WHO, 2002, *25 Questions and Answers*.

<sup>33</sup> UNESCO, 2000, *World Education Report 2000*.

<sup>34</sup> Declaration on the Right to Development, 1986, as cited in Marks, 2001, “The Human Rights Framework for Development.”

### The Economic Approach to Health Care and Education

The consumption of education and health care services is positively related to household productivity and economic growth. Although empirical work has identified a significant relationship between health and nutrition in childhood and lifetime cognitive and motor skills,<sup>35</sup> it has been more difficult to establish that health mitigates poverty and enhances labor productivity. The reasons for this difficulty include measurement problems related to the fact that health is multidimensional, changes over time, and is unreliably reported. In addition, there are conceptual problems related to the dynamic relationship between health and income, including that, within households, labor can be substituted for; health falls in importance as the physical intensity of labor declines; and health is in general both a cause and effect of labor productivity.<sup>36</sup>

Recent studies have demonstrated some success in identifying an effect. For instance, at the individual level, there is a correlation between adult height, a measure of long-term nutrition, and income even among uneducated Brazilian men and women.<sup>37</sup> At the macro level, writers have argued that nutritional gains account for a large part of economic growth in Europe over the past two centuries,<sup>38</sup> that malaria and endemic diseases depress economic growth in Africa,<sup>39</sup> and that declining mortality and fertility rates were associated with the unprecedented economic growth in East and Southeast Asia from the 1960s to the 1990s.<sup>40</sup> Of

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<sup>35</sup> See, for example, Reynaldo Martorell, "Promoting Healthy Growth: Rationale and Benefits," in *Child Growth and Nutrition in Developing Countries*, ed. Per Pinstrup-Andersen, David Pelletier, and Harold Alderman, 15–31. (Ithaca, NY: Cornell University Press, 1995).

<sup>36</sup> J. Strauss and D. Thomas, "Health, Nutrition, and Economic Development," *Journal of Economic Literature* 36, no. 2 (1998):766–817.

<sup>37</sup> Duncan Thomas and John Strauss, "Health and Wages: Evidence on Men and Women in Urban Brazil," *Journal of Econometrics* 77, no. 1 (1997): 159–86.

<sup>38</sup> Robert W Fogel, "Economic Growth, Population Theory, and Physiology: The Bearing of Long-term Processes on the Making of Economic Policy," *American Economic Review* 84, no. 3 (1994):369–95.

<sup>39</sup> John Luke Gallup and Jeffrey D. Sachs, "The Economic Burden of Malaria," CID Working Paper, no. 52, Harvard Center for International Development, Cambridge, MA, 2000.

<sup>40</sup> ADB, *Emerging Asia: Changes and Challenges* (Manila, Philippines: ADB, 1997).

course, factors such as income, access to clean water, and education might be as or more important in promoting health than access to health care.

While just how important health care is for health status remains controversial,<sup>41</sup> there is enormous evidence at the micro level that some health-care interventions (skilled birth attendance, for example) have enhanced health outcomes,<sup>42</sup> and compelling arguments that publicly provided and financed health-care services have been important in mortality declines in some countries.<sup>43</sup> In addition, partly because purchasers of health insurance can hide their actions and health status from insurers, health insurance is expensive and unavailable to many. Governments have a role in subsidizing or regulating insurance for catastrophic health events, which in developing countries can take the form of directly financing hospital care.<sup>44</sup>

Evidence for the impact of education on private wages is more strongly established. Calculations of the annual private returns to educational investments average about 6 percent in industrialized countries and 11 percent in developing countries.<sup>45</sup> These remain rough estimates because they do not control for school quality, and there remain problems in controlling for the endogeneity of the schooling enrollment decision. But, a review of studies that used compulsory schooling laws and other variables as instruments for completed education found that estimates for the returns to education were as big or bigger than standard ordinary least-squares estimates.<sup>46</sup> At the national level, the relationship between educational attainment

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<sup>41</sup> Deon Filmer, Jeffrey Hammer, and Lant H. Pritchett, "Weak Links in the Chain: A Diagnosis of Health Policy in Developing Countries," *The World Bank Research Observer* 15, no. 2 (2000):199–224.

<sup>42</sup> See V. De Brouwere, R. Tonglet, and W.V. Lerberghe, "Strategies for Reducing Maternal Mortality in Developing Countries: What Can We Learn from the History of the Industrialized West?" *Tropical Medicine and International Health* 3, no. 10 (1998):771–82.

<sup>43</sup> S. R. Johansson and C. Mosk, "Exposure, Resistance, and Life Expectancy: Disease and Death during the Economic Development of Japan, 1900–1960," *Population Studies* 41, no. 2 (1987): 207–35; and James McGuire, "Social Policy and Mortality Decline in East Asia and Latin America," *World Development* 29, no. 10 (2001):1673–97.

<sup>44</sup> Filmer, Hammer, and Pritchett, 2002, "Weak Links in the Chain."

<sup>45</sup> George Psacharopoulos, "Returns to Investment in Education: A Global Update," *World Development* 22, no. 9 (1994):1325–43.

<sup>46</sup> David Card, "Estimating the Return to Schooling: Progress on Some Persistent Econometric Problems," NBER Working Paper, no. 7769, National Bureau of Economic Research, Cambridge, MA, 2000.

and growth in output per worker is weaker,<sup>47</sup> but a study that measures labor-force quality, based on international mathematics and science test scores, finds that it is strongly related to national growth rates.<sup>48</sup>

Given that education and health-care services are desirable, how should they be provided? An economic approach to service provision begins with an analysis of private markets. If individuals were left to finance and purchase education and health-care services on their own, particularly basic education and disease control, spending would be less than optimal because individuals would not take into account the benefits to others when making consumption decisions. Pure private provision does not spontaneously lead to professional associations and provider networks, which are important for the efficient provision of some aspects of health care, such as clinical referrals. Private provision would also make it difficult for patients and students to monitor the diligence of health-care workers, who necessarily have large discretion in decision making and therefore make it hard for consumers to assess quality.

For reasons such as these, governments have involved themselves in the financing and provision of health care and education. However, government provision is bedeviled by the same problems that affect private provision. It is hard for clients and citizens to monitor the work of civil servants and bureaucrats; indeed, in government service delivery, the one power clients have over service providers—the power to seek services elsewhere—by design usually has no effect on the behavior of government providers. Governments, at least democratic ones, are in theory accountable to citizens through elections rather than through market power. But because elections in modern states are relatively infrequent, votes are for candidates and parties, not single issues, and occur in relatively large districts without much voter deliberation, the existence of elections is weakly related to service quality, especially in developing countries. In other words, although elections can confer

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<sup>47</sup> See, for example, Jess Benhabib and Mark M. Spiegel, “Role of Human Capital in Economic Development: Evidence from Aggregate Cross-Country Data,” *Journal of Monetary Economics* 34 (1994):143–73; Mark Bils and Peter J. Klenow, “Does Schooling Cause Growth?” *American Economic Review*, 90, no. 5 (December 2000); and Lant Pritchett, “Where has All the Education Gone?” Policy Research Working Paper, no. 1581, Policy and Human Resources Division, Policy Research Department, World Bank, Washington, DC, 1996.

<sup>48</sup> Eric A. Hanushek and Dennis D. Kimko, “Schooling, Labor Force Quality, and the Growth of Nations,” *American Economic Review* 90, no. 5 (2000):1184–1208.

legitimacy, they do not assure accountability.<sup>49</sup> These problems are compounded by the fact that several different principals (the various ministries and institutions of government) share responsibility for health and education services, and thereby dilute their accountability to their agents (the citizenry).<sup>50</sup> In addition, the interests of civil servants are often not aligned with those who receive the services, and civil servants mobilize in pursuit of their own interests more easily than the public at large.

There exists no optimal solution to the accountability problem for the provision of health and education services. Instead, there are a variety of mechanisms through which health and education service delivery can be made more accountable to clients. These include (a) strengthening citizens' power with respect to providers, either by granting them authority over, or participation in, health and education facilities or by allowing them more market choices; (b) making contracts between government and frontline providers explicit, so that provider performance is linked to rewards and sanctions; and (c) amplifying the voice of citizens in health and education by changing electoral rules, creating advocacy groups, and releasing information. Examples include service "report cards" in Bangalore, India; community control over the river-blindness reduction campaign in West Africa; participatory budget formulation in Porto Alegre, Brazil; publication of budget allocations targeted to each school in Uganda; explicit contracting for all city services in Johannesburg, South Africa; and direct cash transfers to households that send their children to school and obtain immunizations in Brazil and Mexico.<sup>51</sup>

### Similarities, Differences, and the Hard Questions

The preceding sections make clear that a rights orientation and an economic approach prescribe similar methods for service delivery in health care and education. From the perspective of social rights, participation, empowerment, transparency,

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<sup>49</sup> Melissa Lane, "Accountability, Transparency, Legitimacy: The New Staples of Democratic Discourse and Their Implications for Non-Elected Institutions," paper prepared for the 2002 annual meeting of the American Political Science Association, Boston, MA, August 29–September 1, 2002.

<sup>50</sup> Avinash Dixit, "Power of Incentives in Private versus Public Organizations," *American Economic Review* 87, no. 2 (May 1997):378–82.

<sup>51</sup> See World Bank, *World Development Report 2004: Making Services Work for Poor People* (New York: Oxford University Press, 2003).

and accountability in service delivery are important for ensuring health care and education quality; and in some forms (such as informed consent, whereby patients can make fully informed treatment decisions, as well as parental participation, so that local understandings of respect for elders and holidays are included in classroom practices), they are also constitutive of the kind of social respect that is critical for self-esteem. From the economic perspective, participation, empowerment, transparency, and accountability are important because problems related to collective action and asymmetric information lead to inefficiencies in publicly provided services. Both private and public provision are suboptimal because the quality and cost of education and health care (particularly health insurance) are related to who else is in one's school or health care program, which leads people of similar backgrounds to sort themselves into the same schools or programs.

It is not surprising that a rights orientation shares certain principles with an economic approach because both are genealogically related to the renewed emphasis on reason and individualism that emerged in the Enlightenment. Both recognize individuals, not societies, tribes, or other entities, as the principal locus of moral value and meaning in the world. One way to see this is to note that both view political systems, including electoral democracies, skeptically. Both are compatible with democracy, of course, and a commitment to human rights probably requires universal suffrage and contested elections. But in both cases, empowerment, participation, and information become critical because regular elections do not, as a matter of routine, lead to universal access to minimally decent health care and education.

From the human rights perspective, the reason for this is that explicit legal discrimination, prolonged social exclusion, patterns of prejudice, and/or the internalization of low expectations lead to inadequate service utilization by some groups and individuals. Problems such as these are acute in developing countries, where former colonial powers bequeathed varying group-based civil laws for different ethnicities and religions, and where liberal constitutions are contemporaneous with feudal, clientelist, and patriarchal practices.<sup>52</sup> The remedy is to correct the legal defects, as well as empower citizens and the civil society organizations that act on their behalf to campaign against the informal cultural, social, and economic practices that sustain unfairness in access and utilization.

The economic approach is skeptical that electoral democracy by itself creates accountability in the health and education sectors for two reasons. Drawing on public

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<sup>52</sup> Mahmood Mamdani, *Citizen and Subject* (Princeton, NJ: Princeton University Press, 1996).

choice theory, some economic analysts argue that interest groups, such as teachers unions, “capture” the institutions of service delivery for their own purposes.<sup>53</sup> Using the principal findings of social choice theory, others contend that the preferences of service recipients are so heterogeneous that efforts to aggregate them, whether through democratic procedures or market provision of jointly provided services (such as health care and education) are invariably bedeviled by impossibility, arbitrariness, and instability.<sup>54</sup> Economic solutions to interest group capture entail strengthening the market and political position of recipients by giving consumers choices, exposing providers to competitive pressures, and, where services remain publicly provided, allowing service recipients more direct participation in decision making and monitoring. One solution to the aggregation problem involves group deliberation and the development of trust.<sup>55</sup>

In spite of these similarities, the economic and human rights approaches result in at least three important, though not irreconcilable, differences in policy. First, the mechanisms and processes for the delivery of health and education services are themselves, in the rights approach, morally compelling. This follows from the understanding of the rights to health care and education as critical elements of social inclusion. If protecting and fostering the social basis of self-esteem partly motivates the provision of health care and education services, either because the denial of those services is a marker of low status or is related to a pervasive sense of personal ineffectiveness, then service delivery should be structured to support self-esteem. That means that consent to treatment, norms for due process in delivery and allocation, participation and consultation, and transparency regarding professional and bureaucratic decision making not only facilitate good service delivery, but are constitutive of it.

On the other hand, the economic approach views these processes instrumentally: they could in principle be reconciled with authoritarian styles in medicine and school governance if they lowered mortality and raised literacy. But the entire thrust of normative micro-economic theory is to expand choices available to consumers, both

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<sup>53</sup> See, for example, Nancy Birdsall and Estelle James, “Efficiency and Equity in Social Spending: How and Why Governments Misbehave,” Policy, Research, and External Affairs Working Paper, no. WPS 274, World Bank, Washington, DC, 1990.

<sup>54</sup> Kenneth J. Arrow, *Social Choice and Individual Values*, (New Haven, CT: Yale University Press, 1970).

<sup>55</sup> See John S. Dryzek and Christian List, “Social Choice Theory and Deliberative Democracy: A Reconciliation,” *British Journal of Political Science* 33, no. 1 (January 2003.):1–28.

because choices directly raise utility and because competition among providers increases social welfare. In addition, benchmark theories of competitive equilibrium require full information on prices, quantities, quality, and preferences; and contemporary accounts of service delivery endorse reducing information asymmetries among principals and agents. In other words, the processes of service delivery are critical in the economic approach, even if they do not have intrinsic value.

Second, in the rights approach, evaluations of health and education programs emphasize the distribution of outcomes, not only averages. The entire distribution is of concern because rights theories take seriously the idea that every human being is worthy of respect. If systematic discrepancies appear among large populations, rights advocates take this as evidence that services are unavailable or inadequate for some groups. Typically, the rights approach views these discrepancies as direct evidence of inequity, whereas the economic approach would first examine whether they are the result of household choices. Rights advocates pay particular attention to disaggregated data among ethnic and religious minorities, women, and the poor because they are particularly vulnerable to practices and prejudices that weaken their agency and the social basis of their self-esteem.

Economists, of course, are also concerned with the distribution of outcomes. But, economists usually disaggregate data by income level because standard assumptions regarding the poor and the rich, such as the degree of risk aversion and the marginal utility of consumption, are available to build positive accounts of individual and household behavior. However, there is nothing inherent in economic theory that conflicts with a normative concern for excluded groups or with the development of new behavioral assumptions regarding women or ethnic groups.

Third, rights approaches accommodate adaptive preferences. Some constraints to the fulfillment of rights are external. For example, many cannot afford the direct or opportunity costs of schooling, do not receive information about how to receive medical care, or live in communities where collective action is costly or impossible. Economic analyses highlight the important role of these factors—resources, information, and coordination—in the quality of service delivery. Especially in the guise of the capabilities framework, rights approaches also emphasize constraints internal to individuals, such as adaptive preferences—the habit of individuals, subject to deprivation, to lower their standards regarding what they need, want, and deserve. Rights advocates call for consciousness raising, political education, and other measures to expand the imagination and demands of excluded groups. The discipline of economics does not easily accommodate individuals who do not maximize their welfare. But many of the mechanisms through which economists propose second-best solutions involve changes in available information, participation, and incentives that, in practice, also change people’s awareness of what they

have and what they deserve. In practice, then, the policy consequences that follow from this aspect of the rights approach overlaps, at least in part, with the economic solutions.

There are two additional and less easily reconciled challenges that economic analysis poses for rights approaches. First, rights-based approaches have no distributional metric. The question arises: in the rights framework, just how high is the high-priority status of educational and health-care goods and services, and how should governments and other actors decide allocations, both within and across sectors? Economics offers alternative approaches: allocations can be based on consumer preferences and existing endowments, or on an objective social welfare function, such as cost per life saved or real social returns to human capital investments. Both of these approaches are problematic. The former simply assumes that market allocations are just and offers no ground for moral criticism, and the latter places no value on deliberative procedures or actual preferences, which might or might not prioritize welfare and material well-being. Still, the approaches have the virtue of being clear and calculable.

Rights-based approaches also do not offer an explicit metric for making trade-offs and are in fact premised on the incommensurability of human dignity. It is true that some aspects of health care and education, such as literacy and skilled attendance at birth, can be identified as more fundamental to agency, social inclusion, and life chances than others (for example, contact lenses and earth science). But there are also countless close calls, both within and across sectors. As a result, from a rights perspective, there are always ambiguous trade-offs, and recommended allocations are not robust enough to support small changes in circumstances.<sup>56</sup>

Sorting out the various claims and counterclaims in a large population is, from the rights perspective, inevitably an activity without a formula, one that relies on judgment guided by principle. Because ambiguities in trade-offs stem from disagreements about priorities, not only from lack of information about the priorities that people already have, fair procedures that adjudicate claims according to

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<sup>56</sup> Allocations are also ambiguous because they not only favor some services over others, but some people over others. Claims by people to health or education services are always broader than their membership in any group, including the poor, the socially excluded, or those afflicted with a particular disease or condition. Their moral claims might also involve how they came to have the need. For instance, deprivation as the direct result of negligence or malfeasance, as a result of military or other national service, or as a consequence of oppressive family or political circumstances affects the claims, independent of whether the claimant is poor or socially excluded.

principles of representative self-government are critical. Those procedures might in turn entail a collective decision to employ disability-adjusted life years, net present value of human capital investments, or some other welfare function; the justification for the use of any welfare function would, however, not be independent of the adequacy of the political procedures and principles of the society. As a result of complexities like these, when making policy proposals, some rights advocates tend for the sake of simplicity to fall back on modest versions of social rights, such as the right to subsistence, basic education, and minimal health (note that even these are not available in developing countries) and argue that, globally, resources are available to fulfill at least some basic rights without having to confront the most vexing trade-offs.

The second tough problem that economic analysis poses for rights involves the behavioral distortions associated with subsidies. If a rights approach leads to subsidies or otherwise more accessible services for at least some individuals or groups, those who receive the (implicit or explicit) subsidies will spend less of their own money on the services, or will engage in more costly activities (moral hazard), with the result that the government or the entity supporting the services will buy them at a higher social cost than anticipated. In health care, for example, providing HAART for HIV patients might, to some extent, encourage risky behavior and reduce the effectiveness of prevention efforts. To take a different example, the more strictly a state regulates the adoption process, on the understanding that it is protecting the well-being of potential adoptees, the greater the number of prospective parents who will be deterred by the regulatory costs, leading to greater numbers of children who are not adopted. The general problem is that subsidies change relative prices, which in turn change the decisions that individuals make.

Economists charge that rights advocates ignore these reactive behaviors, which might in some cases be large enough to undermine the right that the policies are designed to promote. It is a fair criticism. On the other hand, rights advocates note that unanticipated behavioral changes that lower social costs can also follow from subsidies. For example, after Brazil, India, and other countries, as well as non-governmental organizations and other actors started to argue for the right to HAART, surprising pressure to lower prices worldwide resulted. When Uganda abolished user charges in schools, enrollments increased far beyond expectations because the move established a new norm that everyone deserved to go to school.<sup>57</sup>

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<sup>57</sup> Klaus Deininger, "Does Cost of Schooling Affect Enrollment by the Poor? Universal Primary Education in Uganda," *Economics of Education Review* 22, no. 3 (2003):291–305;

Responses associated with subsidies can have perverse effects, but in other instances making something a right can affect norms and customs, resulting in large and desirable changes in household behavior.

## Conclusion

Rights are an increasingly important component of international development discourse. At the same time, they are also subject to a number of criticisms. In reality, the criticisms both over- and underestimate the contentions of rights advocates. They overestimate the contentions because most accounts of social rights interpret them as goals and grounds for moral criticism, not as legally binding constraints on the policies and programs of governments and international agencies. Most accounts also hold that rights cannot be realized at once, and that the provision of services can take several forms. The criticisms underestimate the contentions of rights advocates because they fail to recognize the enormous rhetorical importance of rights, both at the international level and within developing countries, and their historical role in the mobilization of social movements, professionals, and others in the expansion of education and health-care services. Although there remain significant differences between a rights-based approach and an economic approach to health care and education, particularly regarding the issues of long-term deprivation, trade-offs, and the behavioral effect of subsidies, their policy consequences overlap considerably. Both are skeptical that electoral politics and de facto market rules, by themselves, provide sufficient accountability for the effective and equitable provision of health and education services, and that further intra-sectoral reforms in governance—particularly those that strengthen the hand of service recipients—are essential.

Three implications for development policy follow. First, the analysis shows that not only are sectoral reforms that strengthen the bargaining positions of students, families, and patients useful for enhancing service delivery, they are intrinsically valuable because they are constitutive of the social basis of self-respect. Seen this way, existing efforts to restructure sectoral governance in health and education become even more important. Second, the analysis highlights the problem of internal constraints—particularly the tendency for people accustomed to deprivation to

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and “Brazil and AIDS Drugs—A Cure for High Prices,” *The Economist*, May 17, 2001, 64.

lower their expectations—for the achievement of health and education outcomes. Initiatives to augment information and participation in health care and education could also, as Arjun Appadurai puts it, incorporate efforts to enhance the “capacity to aspire.”<sup>58</sup> Third, the analysis shows that, in typical formulations, both the economic and right-based approaches ignore behavioral changes that might follow interventions: the right-based approach can miss the effects of subsidies, and the economic approach can fail to anticipate discontinuous changes following the emergence of new norms. The identification of the potential, unforeseen consequences of policy change remains critical both for development research and practice.

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<sup>58</sup> Arjun Appadurai, “The Capacity to Aspire: Culture and the Terms of Recognition,” in *Culture and Public Action*, ed. Vijayendra Rao and Michael Walton, 59–84 (Stanford, CA: Stanford University Press, 2004).

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## HUMAN RIGHTS AND THE WORLD BANK: PRACTICE, POLITICS, AND LAW

DAVID KINLEY

*This article is about the plurality of international human rights law; it explores the political, policy, and practical dimensions of human rights law as they relate to the work of the World Bank. It is situated within the broad debate of the role of human rights in aid and development policy, and also within the more particular discussion of the place of human rights in the strategic thinking and operational practices of the World Bank.*

### Introduction

This article argues for greater engagement with human rights by the World Bank at all levels of operation, that is, for a broad-based acculturation or politicization of human rights in the Bank's thinking and its practice.<sup>1</sup> Stressing the need for this "political" embrace, however, does not mean undercutting the fundamental principles (whether moral or legal) on which human rights are founded. Nor does it suggest that such an attempt is, or might be, cynically pursued by elements within the Bank who might bend human rights language to suit their political ends. To be sure, one can detect within the Bank's policy statements and public comments, resistance to the notion of institutional engagement with human rights, albeit alongside substantial rhetoric that appears to embrace this very notion. This ambiguous position arises

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<sup>1</sup> Research for this piece was funded in part by a Discovery Grant from the Australian Research Council (2005–2007) and in part by a Senior Fulbright Scholarship (2004). Earlier versions were presented at the City University of Hong Kong's conference on Human Rights and Development, "Approaches to Reform of Governance in Asia," May 2005, and at the World Bank Legal Forum 2005, "Law, Equity, and Development," Washington, DC, December 2005. The author would like to thank the participants at both of these events for their comments and suggestions. Natalie Zerial contributed invaluable research and editorial assistance, for which the author is most grateful.

out of a combination of factors that range from the marginalization of human rights thinking generally, and of rights-based approaches to development specifically, to the practical difficulties of implementing “in the field” what little commitment there is to human rights protection. Underlying the spectrum of attitudes exhibited by the Bank is the perception that beyond a coincidence of the objectives of human rights and certain development initiatives, such as building social welfare capacity and supporting good governance and the rule of law, human rights matters are irrelevant to the Bank’s policy endeavors.

What is patently lacking at present is a World Bank Group-wide integrated understanding of the essentially plural nature of human rights and how that relates to the work of the World Bank. Official pronouncements of the Bank on the question of human rights often attest to a half-hearted or superficial engagement with the nature, functions, and operations of human rights law. It has been this lack of sufficient comprehension, above all, that has led directly to the rejection of the Bank that it has any obligation (most certainly, any legal kind of obligation) to protect and promote human rights.

The argument for a deeper engagement with human rights within both the policy-making and operational nerve centers of the Bank focuses on an engagement that opens up international human rights law and shows what choices are being and can be made about human rights, as well as within human rights. The nature of these choices is fundamentally politicized. While it is acknowledged that such a perspective could leave human rights language open to possible abuse, it is more likely—and certainly hoped—that it will better equip the Bank to recognize the relevance and, indeed, utility of human rights to the Bank at all levels of its functioning.

There are five parts to this article: the first part considers the relationship between development and human rights generally. The second looks at the changing nature of international law and its implications for the role that the World Bank might play in human rights. The third part examines the particular relationship between the World Bank and human rights. The fourth part reflects on the plural and, to an extent, pragmatic nature of human rights law; and the final part considers the practical problems of implementing human rights within development programs and how a better understanding and acceptance of the wider political dimensions of human rights may assist in overcoming such obstacles.

## **Development and Human Rights**

The architectural debate about the place of human rights within aid and development discourses is of obvious importance, not least because the World Bank is so often

a key player in (or object of) this discussion. The parameters of debate, as well as its implications, can be categorized as follows.

At its base, the concern is to investigate the links between poverty and rights; or to be more precise, the links between the alleviation of poverty and the enhancement of human rights protection. Thus, it is argued that without basic nutrition, shelter, consistent and adequate income, health care, and education services, few human rights (even civil and political ones) can, in any meaningful way, be protected. It is equally held that the active promotion and protection of human rights, such as access to adequate health care, nutrition, housing, and education (as well as the liberty to both receive and impart information, to associate, to found families), together with the right to privacy, and religious, cultural, political, and philosophical freedoms, are fundamental to successfully breaking the cause and effect cycle of poverty.<sup>2</sup>

Rights-based approaches to development also feature prominently in this debate. The plural here is important, for this “genre” has reached such a stage that it now behooves commentators to disentangle the various rights-based approaches propositions in order to make their own views clear.<sup>3</sup> Darrow and Tomas stress what are (or should be) the core features of this approach—namely, that viewing development through the prism of human rights allows (or insists upon) the empowerment of those toward whom development ought properly be directed and raises the prospect of the enforcement of the rights that flow to them therefrom.<sup>4</sup> This means facilitation of empowerment and enforcement, not just in narrow legal terms but in wider political terms as well. The normative framework provided by adopting human rights in this way may help “orient development cooperation,”<sup>5</sup> although equally,

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<sup>2</sup> Amartya Sen, 1999, *Development as Freedom*, chap. 4 (New York: Knopf, and Oxford: Oxford University Press, 1999); UNDP (United Nations Development Programme), *Human Development Report 2000: Development and Human Rights* (Oxford: Oxford University Press, 2000); Peter Uvin, *Human Rights and Development*, chap. 1 (Bloomfield, CT: Kumarian Press, 2004); World Bank, *World Development Report 1998/99: Knowledge and Information for Development* (New York: Oxford University Press, 1998), 3.

<sup>3</sup> See, for example, Andrea Cornwall and Celestine Nyamu-Musembi, “Putting the ‘Rights-Based Approach’ to Development into Perspective,” *Third World Quarterly* 25, no. 8 (2004):1415–37.

<sup>4</sup> Mac Darrow and Amparo Tomas, “Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation,” *Human Rights Quarterly* (Johns Hopkins University Press) 27, no. 2 (May 2005):487.

<sup>5</sup> Cornwall and Nyamu-Musembi, 2004, “ ‘Rights-Based Approach’ to Development,” 1416.

and more controversially, it might serve to elevate the rights approach above any others,<sup>6</sup> or spawn what the U.K. Department of International Development (DFID) recently referred to disapprovingly as “old style [i.e., didactic] conditionality.”<sup>7</sup> The 2006 *World Development Report's* analysis of the developmental problems of inequity is a variation on this theme, despite its entertainment of human rights more broadly,<sup>8</sup> nevertheless boils down the particular concern of protecting rights to equal opportunity.<sup>9</sup>

The perceived, as well as actual, relationship between economic and social rights, and between civil and political rights, has considerable implications for the debate—that is, whether one sees the two sets of rights as interrelated and interdependent (as does the United Nations and most human rights advocates)<sup>10</sup> or as separate or separable (as do some development agencies and many nation states).<sup>11</sup> Depending on which perspective one takes—and the rhetoric of the Bank

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<sup>6</sup> See also Mahmoud Monshipouri, “Promoting Universal Human Rights: Dilemmas of Integrating Developing Countries,” *Yale Human Rights and Development Law Journal* 4 (2001):25. For arguments why this should be so, see Human Rights Council of Australia, *The Rights Way to Development: Policy and Practice*, chaps. 1 and 2 (Moroubra, NSW, Australia: Human Rights Council of Australia, Inc., 2001). For how this approach has been put into practice multilaterally, see OHCHR (Office of the United Nations High Commissioner for Human Rights), “Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies,” May 2003, in OHCHR, *Frequently Asked Questions on a Human Rights-based Approach to Development* (New York: OHCHR, 2006), and UNDP, “Practice Note: Human Rights in UNDP,” UNDP, New York, 2005. For how this approach has been put into practice bilaterally, see DFID (Department for International Development of the United Kingdom), *Realizing Human Rights for Poor People*, target strategy paper (London: DFID, 2000), and SIDA (Swedish Agency for International Development), “Justice and Peace: SIDA’s Programme for Peace, Democracy, and Human Rights,” SIDA, Stockholm, 1997.

<sup>7</sup> DFID, *Partnerships For Poverty Reduction: Rethinking Conditionality*, policy paper (London: DFID), 13, <http://www.dfid.gov.uk/pubs/files/conditionality.pdf> (accessed June 29, 2006.)

<sup>8</sup> World Bank, 2005, *World Development Report 2006: Equity and Development*, chap. 4 (Washington, DC: World Bank and Oxford University Press), 78–80.

<sup>9</sup> *Ibid.*, 7, 79, 206.

<sup>10</sup> UNWCHR (United Nations World Conference on Human Rights), 1993, *Vienna Declaration and Programme of Action*, A/CONF.157/23.

<sup>11</sup> See, for example, USAID (United States Agency for International Development), “U.S.

points to accepting interconnection<sup>12</sup>—hangs the answer to the question of how far development can and should *support* human rights and how far it can and should be *supported by* human rights.<sup>13</sup> With the two sets of rights seen as inextricably linked, the inter-reliance of human rights and development is easier to establish, as many development outcomes accord very closely with the goals of economic and social rights. But, even accepting that for some (in the West), human rights proper are restricted to civil and political rights, their relevance to development practice is no less vital.<sup>14</sup>

The emergence of systemic, capacity-building development projects driven by such normative constructs as the “rule of law” and “good governance” has also proved to be central in both the legal and political realms, as such programs are seen as potential vehicles for the delivery of human rights.<sup>15</sup> This approach flows directly from the last, in that justification of such rule-of-law and good governance-based projects in aid programs today promotes the goals of economic and social development by making the civil and political mechanisms that affect its delivery more accountable.<sup>16</sup> And this means that the goal of protecting both civil and political rights *and* economic, social, and cultural rights necessarily forms part of the development process, whether stated explicitly or implicitly.

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Foreign Aid: Meeting the Challenges of the Twenty-First Century,” white paper, Bureau for Policy and Program Coordination, USAID, Washington, DC, 2004.

<sup>12</sup> See World Bank, 1998, *World Development Report 1998/99*, 3; and more recently, Roberto Dañino, “The Legal Aspects of the World Bank’s Work on Human Rights: Some Preliminary Thoughts,” in *World Bank Legal Review*, vol. 2, *Law, Equity, and Development*, ed. Caroline Mary Sage and Michael Woolcock, 293–324 (The Hague: Martinus Nijhoff, 2006).

<sup>13</sup> With respect to the MDGs, see UNDP, 2000, *Human Development Report 2000*; and further, Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen through the Lens of the Millennium Development Goals,” *Human Rights Quarterly* 27, no. 3 (2005):759–62.

<sup>14</sup> See K. Decker, S. McInerney-Langford and C. Sage, “Human Rights and Equitable Development: ‘Ideals,’ Issues, and Implications,” in World Bank, 2004, *World Development Report 2006*, 14–23.

<sup>15</sup> H.V. Morais, “The Globalisation of Human Rights Law and the Role of International Financial Institutions in Promoting Human Rights,” *George Washington International Law Review* 33 (2000–2001):89–90.

<sup>16</sup> Antony Anghie, “International Financial Institutions,” in *Politics of International Law*, ed. C. Reus-Smit, 229–35 (Cambridge: Cambridge University Press, 2004).

## The Changing Landscape of International Law

A key feature of the wider context within which the World Bank is being urged to take its relationship with, and impact on, human rights more seriously, concerns the changing nature of the landscape of international law. A central question in this respect is whether the failings and limitations of the post-modern, privatizing state in protecting human rights provide both the space and need for supranational entities, such as the Bank, to fill in the gaps. The matter has arisen as a consequence of a number of interrelated factors. The first factor is the changing parameters of international law, resulting from the greater intertwining of the international and domestic spheres such that, as Bradlow and Grossman pointed out more than ten years ago, “problems have become transnationalized ... [their] proper resolution ... require[ing] action on both the local and the global level.”<sup>17</sup> This should be considered together with the extension of the cast of players, beyond states alone, to include inter-governmental organizations, individuals, non-governmental organizations (NGOs), and transnational corporations. While it is argued that responsibility for human rights promotion and protection still sits squarely on the shoulders of the state (albeit increasingly so in its capacity as regulator, rather than as direct service provider), the state is now (or should be) aided in its task because ever more responsibilities are held by, or are being foisted on, these other international actors.<sup>18</sup>

Over the last 60 years, human rights have emerged as a significant feature of both international relations and international law. This has occurred despite human rights’ inherent potential to be used to breach the walls of state sovereignty. International human-rights law obligations necessarily precipitate “interference” in intra-state affairs. That this potential has increasingly been born out in practice has been characterized as “surprising,”<sup>19</sup> or further, “conceptually irreconcilable with

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<sup>17</sup> Daniel D. Bradlow and Claudio Grossman, “Limited Mandates and Intertwined Problems: A New Challenge for the World Bank and the IMF,” *Human Rights Quarterly* 17, no. 3 (August 1995):411–442.

<sup>18</sup> This trend is giving rise to what Anne-Marie Slaughter labels the “disaggregated state” and “disaggregated world order” (Slaughter, *A New World Order* [Princeton: Princeton University Press, 2004], 13 and 158ff, respectively).

<sup>19</sup> Richard Falk, *Predatory Globalisation: A Critique* (Cambridge: Polity Press, 1999). As Louis Henkin puts it, making the promotion of human rights an express object of the UN was done “perhaps without full appreciation of the extent of the penetration of

the Westphalian logic of world order.”<sup>20</sup> One result of this growth in stature and prominence has been that the wider cast of international actors mentioned above are now being pressed into serving the objectives of human rights.

The simultaneous liberalization and globalization of trade and commerce as vehicles of both the potential promotion and abuse of human rights has become a significant aspect of the international legal landscape. The debate over the extent to which trade advances economically sustainable and socially equitable results is especially Byzantine, as it forges all kinds of alliances, not all of them predictable, across such entities as governments, north and south; globalist and anti-globalist NGOs (local and international); corporations (both local and transnational); intergovernmental organizations, such as the United Nations Development Program (UNDP), United Nations Conference on Trade and Development (UNCTAD), the United Nations High Commissioner for Human Rights (UNHCHR), the World Trade Organization (WTO), the European Union (EU), the International Monetary Fund (IMF), the World Bank, and the International Labour Organization (ILO); and development economists, international trade specialists, and human rights lawyers.<sup>21</sup> The parallelism of economic globalization with human rights “globalization” (or universalization)—that is, the fact that they are playing on the same global field and essentially with the same state players—has inevitably drawn calls for their closer interaction and alliance.

### **The World Bank and Human Rights**

From the debates on development and human rights generally, and on the remodeling of certain features of international law specifically, there has emerged over the past decade or so a sizeable body of commentary and critique on the particulars of what

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Statehood that was involved.” See Henkin, *International Law: Politics and Values* (The Netherlands: Kluwer Academic Publishers, 1989), 215.

<sup>20</sup> Richard Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York: Routledge, 2000), 39.

<sup>21</sup> See Jagdish Bhagwati, *In Defence of Globalization* (New York: Oxford University Press, 2003), and UNCTAD, *Least Developed Countries Report Series: Linking International Trade with Poverty Reduction* (New York: UNCTAD, 2004).

the World Bank can and should do—and already does—in terms of protecting and promoting human rights in its work.<sup>22</sup>

Notwithstanding this voluminous literature, it is no easy task to establish even what it is that the World Bank already does in terms of human rights protection. Quite apart from the fact that Bank initiatives and activities seldom make explicit reference to human rights—even when they clearly have a human rights impact—there are other complicating factors. In particular, there is a recurring dissonance between what the Bank purports to be doing with respect to human rights and what it actually does (or is able to do).<sup>23</sup> Not least is the institutional dysfunction that hampers all large international organizations (especially ones with such a high public profile and with such a politically charged agenda as the Bank). This, of course, reflects the fact that the Bank works on different levels and, to some degree, according to different agendas.<sup>24</sup> It is through the perspectives of these different levels that we now view the Bank's interactions with human rights.

#### ***The Political Perspective: From Presidents Wolfensohn to Wolfowitz***

With a new helmsman in place, there is a tendency to focus on how he will steer the ship in terms of human rights, as in all else. Certainly, President Wolfowitz's interventions in the matter will be crucial. But, in fact, it will be the intent and actions of the World Bank more broadly that will determine both what course is set (by the Boards of Directors), and how closely the ship will follow the course set by the operational arms of the Bank. There are, in any case, few clear indications of how President Wolfowitz might address this issue. In his foreword to the 2006 World Development Report, for example, although he demonstrates an awareness of the issue in his identification of the links between equity, equality of opportunity, and "respect for individual freedoms," he provides no hint as to how he might see

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<sup>22</sup> For compendiums of many of the key contributions to the debate, see especially Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law* (Oxford: Hart Publishing, 2003), 307–348; and also (more briefly) Sigrun Skogly, *Human Rights Obligations of the World Bank and the International Monetary Fund*, 1st ed. (London: Cavendish, 2001), 199–215.

<sup>23</sup> See Canan Gunde, "Human Rights and Development: The World Bank's Need for a Consistent Approach," Working Paper, no. 49, DESTIN Working Paper Series (London: London School of Economics, Development Studies Institute, 2004).

<sup>24</sup> Tim Anderson, "The Political Economy of Human Rights," *Journal of Australian Political Economy* (University of Sydney) 50 (December 2002):200–227.

the ways in which human rights more generally might be supported by the Bank, beyond demonstrating an unabashed faith in the role that the market can play in allocating resources more equitably.<sup>25</sup>

President Wolfensohn was, of course, adamant that the World Bank “is already engaged in human rights” and that it is, in fact, “one of the major protectors and developers of programs which ... give rights to people, starting with reducing poverty and the desire to give people the chance for a better life.”<sup>26</sup> However, such rhetoric, as many have argued, constitutes neither a Bank policy on human rights (let alone an accurate representation of how the Executive Directors, or still less, the Board of Governors necessarily see it), nor necessarily an accurate reflection of how the Bank staff, who implement such projects and programs, see the Bank’s position.<sup>27</sup> Whatever might be the role of human rights thinking within the Bank in the future, there will have to be a closer alignment of the attitudes toward, and understanding of, the relevance of human rights between the Boards, president and staff if there is to be any meaningful impact at all.

#### ***The Legal Perspective: From General Counsels Shihata to Daniño***

An especially important role within the upper levels of World Bank management is played by the office of the General Counsel. Irrespective of any political aspirations and the operational capacity to carry them out, the interpretation of the legal authority to act will ultimately decide the issue. Indeed, the question of the scope of the Bank’s mandate has dominated the legal debate for more than a decade. The International Bank for Reconstruction and Development’s (IBRD)

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<sup>25</sup> See “Foreward,” in World Bank, 2005, *World Development Report 2006*. In his speech to the World Bank Legal Forum 2005, “Law, Equity, and Development,” December 1, 2005, Wolfowitz referred to the importance of human rights to the Bank’s work, albeit without any details or elaboration.

<sup>26</sup> World Bank, “Human Rights and Sustainable Development: What Role for the Bank?”, proceedings of an internal, cross-network Bank seminar, Washington, DC, May 2, 2002; also see *World Development Report 1998/99*, 1–2, 130–131. Former World Bank Senior Vice-President and General Counsel Roberto Daniño has echoed these sentiments by declaring that “human rights is the very essence of what the World Bank does” (Roberto Daniño, “Opening Remarks,” presentation delivered at the World Bank Legal Forum 2005, “Law, Equity, and Development,” Washington, DC, December 2, 2005).

<sup>27</sup> Sebastian Mallaby, *The World’s Banker: A Story of Failed States, Financial Crises and the Wealth and Poverty of Nations* (New York: Penguin Press, 2004), 145–7.

Articles of Agreement (specifically article IV, section 10) are famously opaque. At one and the same time, they prohibit “interfere[nce] in the political affairs of any member [state],” and insist that “only economic considerations shall be relevant” in the Bank’s deliberations.<sup>28</sup> That said, however, the provisions are apparently sufficiently robust to have allowed General Counsel Shihata in the early 1990s to accept political considerations in respect, at least, of the Bank’s “functions,” even if not its “purposes.”<sup>29</sup> More recently, General Counsel Daniño has felt comfortable with posing the question of what constitutes “economic considerations,” and answering that, in the end, “there is no stark distinction between economic and political considerations,” and therefore “it is consistent with the Articles that the decision-making processes of the Bank [should] incorporate social, political, and any other relevant factors which may have an impact on its economic decisions.”<sup>30</sup> At least on the face of it, therefore, there does seem to be adequate legal authority for the Bank to address human rights issues on a more formal and regularized basis than at present; in other words, there is room for the formulation of a systemic policy on human rights.

***The Policy Perspective: From Structural Adjustment Programs to Poverty Reduction Strategy Papers, “Rule of Law” and “Good Governance” Initiatives***

The economic (as well as political and social) “shock therapy” of the old-style, crudely conditional Structural Adjustment Programs (SAPs) has given way to the apparently more nuanced, participatory, partnership-oriented Poverty Reduction

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<sup>28</sup> IBRD (International Bank for Reconstruction and Development/ The World Bank), *Articles of Agreement*, 2 UNTS 134, July 22, 1944, in force December 27, 1945, amended December 17, 1965, 16 UNTS 1942. In a similar vein, see also article III, section 5, paragraph b, which insists that the Bank ensure that its loans are used only for the purposes for which they were granted, and that in so doing, it gives “due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.” This situation of open-ended interpretation is not helped, according to Anghie (2004, “International Financial Institutions,” 221–2), by the absence of any mechanism for independent judicial review of the Bank’s compliance with its own Articles of Agreement.

<sup>29</sup> See Darrow, 2003, *Between Light and Shadow*, 153; and Ibrahim F.I. Shihata, 1995, *The World Bank in a Changing World: Selected Essays and Lectures*, vol. 2 (The Hague, London, and Boston: Martinus Nijhoff). Shihata further says that human rights are only allowed where they have direct and obvious effects on the economic objectives of the Bank.

<sup>30</sup> Daniño, 2006, “The Legal Aspects of the World Bank’s Work on Human Rights.”

Strategy Papers (PRSPs).<sup>31</sup> It has been the latter initiative's stressing of the "multi-dimensional nature of poverty and the scope of actions needed to effectively reduce poverty," together with the need for broad-based participation in such action,<sup>32</sup> that has facilitated the growth of systemic programs centering on good governance and the rule of law. On the face of it, this emphasis provides one road by which human rights have found a place in World Bank programs, although it has to be said this is apparent less in name than by inference, since little has changed in the way of policy formulation or project implementation.<sup>33</sup> Such appropriation of rights-based language in the rhetoric overlaying these initiatives may be driven by opportunistic concerns to deflect external criticism of the Bank's insensitivity towards human rights.<sup>34</sup> Alternatively, it may simply be the result of the Bank's ignorance of, or indifference to, the human rights connotations of the notions of good governance and the rule of law.<sup>35</sup>

In any event, the rights at the center of good governance and rule-of-law initiatives are nearly always civil and political—primarily fair trial and equality, and secondarily, privacy and freedom of speech, thought, and religion. Another road to

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<sup>31</sup> On rule of law and good governance initiatives in general, see World Bank, 1998, *World Development Report 1998/99*. Specifically, see Morais, 2002, "The Globalisation of Human Rights Law," and Uvin, 2004, *Human Rights and Development*, chapter 4. Regarding the shift from SAPs to PRSPs, see World Bank, "Adjustment from Within: Lessons from the Structural Adjustment Participatory Review Initiative," report for the second global SAPRI forum, Washington, DC, July 30–31, 2001; and World Bank, 2002, "Human Rights and Sustainable Development."

<sup>32</sup> World Bank, 2006, "Poverty Reduction Strategies—Overview: What are the Core Principles Underlying the PRSP Approach?" World Bank Poverty Network website, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTPOVERTY/EXTPRS/0,,menuPK:384209~pagePK:162100~piPK:159310~theSitePK:384201,00.html> (accessed June 30, 2006).

<sup>33</sup> T. Davis, 2005, "The Public Policy of the World Bank and Human Rights," unpublished (on file with author), 5–6.

<sup>34</sup> Uvin, 2004, *Human Rights and Development*, chapter 3.

<sup>35</sup> See Alston, 2005, *Ships Passing in the Night*, 780, and his critique of the impoverished nature of the World Bank and IMF Development Committee's understanding of the notions of good governance and the rule of law in their "Global Monitoring Report: Policies and Actions for Achieving the Millennium Development Goals and Related Outcomes," Development Committee Meeting Report, World Bank and IMF, Washington, DC, April 25, 2004.

the Bank's operational activities for human rights has been through the addressing of specific sectorial interests, such as programs focusing on criminal justice, children, women, indigenous peoples, and HIV/AIDS. Each of these sectors has added some coverage of economic and social rights to the Bank's portfolio (especially the rights to health, environmental protection, housing and education, as well as access to food and water).<sup>36</sup> The Bank's core commitment to aiding countries in meeting the Millennium Development Goals (MDGs) has also advanced this process to some degree,<sup>37</sup> although there is an erroneous tendency within development agencies to view the MDGs and human rights as existing in largely separate worlds.<sup>38</sup>

#### ***The Private Sector Development Perspective: IFC and MIGA***

During the late 1980s and early 1990s, the World Bank began pushing the role that the private sector (autochthonous and foreign) could play in development, through both a sharp increase in the "business" of its private sector arm—the International Finance Corporation (IFC)—and the establishment of the Multinational Investments Guarantee Agency (MIGA) in 1988.<sup>39</sup> This direction presented a new set of problems, as well as opportunities, in terms of human rights protection.<sup>40</sup> In part, this has been due to the fact that these two private-sector development arms of the World Bank Group have not only been exposed to the usual pressures put on the Bank as a whole to address human rights issues, but also to the separate human rights and corporate social responsibility pressures being brought to bear on their corporate partners and/or clients.

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<sup>36</sup> See for example, World Bank, "Indigenous Peoples," Operational Policy 4.10, World Bank, Washington, DC, <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,,menuPK:407808~pagePK:149018~piPK:149093~theSitePK:407802,00.html> (accessed June 29, 2006); and Darrow, 2003, *Between Light and Shadow*, 158.

<sup>37</sup> See World Bank, 2006, Millennium Development Goals web page, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20104132~menuPK:250991~pagePK:43912~piPK:44037~theSitePK:29708,00.html> (accessed June 30, 2006).

<sup>38</sup> Alston, 2005, *Ships Passing in the Night*, 759–762.

<sup>39</sup> See IFC, "About IFC—History of the IFC," on IFC website, <http://www.ifc.org/about> (accessed August 13, 2006); and the MIGA website, <http://www.miga.org> (accessed August 13, 2006), respectively.

<sup>40</sup> See, generally, UNCTAD, 2004, *Least Developed Countries Report Series*.

The IFC especially has been active in seeking to raise the profile of human rights in its work—it was the chief broker of the Equator Principles (2004) on social and environmental standards for private sector banks financing development projects.<sup>41</sup> The IFC has itself re-configured its safeguard policies as “performance standards.” The new standards were originally intended to expressly address human rights issues (in contrast to the prevailing focus on environmental matters), but have not turned out to do so.<sup>42</sup> Criticism of the IFC’s involvement in projects that allegedly violate multiple human rights continues unabated.<sup>43</sup> MIGA, on the other hand, has not yet addressed the question of the relevance of human rights to its core business of providing political risk insurance, being instead preoccupied, in the eyes of some, with deflecting criticism of the competitive advantage it appears to have over insurers, offering clients the opportunity not only to buy insurance, but also to pay protection money.<sup>44</sup>

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<sup>41</sup> “Equator Principles,” 2003, <http://www.equator-principles.com/principles.shtml> (accessed August 13, 2006). These are financial industry guidelines developed by banks for managing social and environmental issues related to the financing of development projects.

<sup>42</sup> See A. McBeth, “International Financial Institutions and Human Rights,” chapter 4, unpublished PhD diss., 2005, on file with author, 21; Margaret Wachenfeld, “Safeguard Policy Gap Analysis: Human Rights,” background document on IFC sustainability policy, IFC, Washington, DC, 2003. Also see various NGO criticisms of the draft performance standards: Bretton Woods Project, “From Bad to Worse: IFC Safeguards,” 13 June 2005, [http://www.brettonwoodsproject.org/article.shtml?cmd\[126\]=x-126-235769](http://www.brettonwoodsproject.org/article.shtml?cmd[126]=x-126-235769) (accessed June 29, 2006); and CEE Bankwatch Network, “Comments to the IFC Draft Safeguard Policy Review,” November 10, 2005, [http://aa.ecn.cz/img\\_upload/2a47e698cb07569dfd0ebe077b6aad99/comments\\_ifcspr\\_11\\_05.pdf](http://aa.ecn.cz/img_upload/2a47e698cb07569dfd0ebe077b6aad99/comments_ifcspr_11_05.pdf) (accessed June 29, 2006).

<sup>43</sup> See, for example, David Kinley and T. Davis, “Human Rights Criticism of the World Bank’s Private Sector Development and Privatisation Projects,” unpublished discussion paper prepared for the Special Adviser (Human Rights), Managing Director’s Office, World Bank, 2004, 41–66, on file with author. On the potentially malign effect on human rights protection of host government agreements, see Amnesty International, “Contracting Out of Human Rights: The Chad-Cameroon Pipeline Project,” 2005, online Amnesty online documentation library, <http://web.amnesty.org/library/index/engpol1340122005> (accessed June 29, 2006).

<sup>44</sup> Friends of the Earth, *Risky Business: How the World Bank’s Insurance Arm Fails the Poor and Harms the Environment* (Washington, DC: Friends of the Earth, 2001), 5. Consider, too, the report by the Compliance Advisor/Ombudsman (CAO) on MIGA’s underwriting of Anvil Mining’s operations in the Democratic Republic of Congo: CAO, “Democratic

### ***The Overall Picture***

What the above review amounts to in terms of the aggregate of the World Bank's awareness of, and commitment to, human rights is patchy at best. Essentially, it comprises some rhetorical statements from the top; some specific, targeted programs at the operational level; and very little in the middle. It is fair to say that there is some limited evidence of acceptance of the Bank's human rights footprint—at times, maybe even an acknowledgment that it is significant in terms of HIV/AIDS, gender-related, criminal justice, child-focused and indigenous projects (and possibly others that focus on enhancing access to basic health, housing and education services, for example, where some familiarity with, and acceptance of, economic and social rights is evident).<sup>45</sup> What is more, this stance has even been interpreted as evidence that the Bank accepts some role in ensuring that its activities at least do no harm to the protection of human rights in the areas that it works.<sup>46</sup> But all in all, the evidence in aggregate falls far short of a recognition of the breadth and relevance of human rights to the Bank's functions,<sup>47</sup> let alone any recognition of the existence of a legal responsibility for any standard levels of respect for or protection, promotion or fulfillment of human rights on the part of the Bank.<sup>48</sup>

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Republic of Congo—Dikulusi Copper-Silver Mine,” World Bank, Washington, DC, 2006, <http://www.cao-ombudsman.org/html-english/DemocraticRepublicofCongo.htm> (accessed August 13, 2006). While the CAO's final audit was submitted to the World Bank Group on October 14, 2005, it was not officially made public. NGOs, such as RAID-UK, have expressed concern about this failure to make the report public. See letter to Paul Wolfowitz from RAID-UK, dated December 6, 2005, <http://www.if-watchnet.org/LettertoWolfowitzDikulushiCAO.pdf> (accessed June 30, 2006). Also see Mining Community Website, “World Bank Support for Extractives: Complicity in Human Rights Violations,” Mining Community Website, London, UK, September 12, 2005, <http://www.minesandcommunities.org/Action/press743.htm> (accessed August 13, 2006).

<sup>45</sup> See Darrow, 2003, *Between Light and Shadow*, 64–6; and Andrew Clapham, *Human Rights Obligations of Non-state Actors* (New York: Oxford University Press, 2006), 153–4, for pertinent remarks from the World Bank Inspection Panel's report.

<sup>46</sup> See, for example, World Bank Operations Evaluation Department, “Cultural Properties in Policy and Practice,” 2001, which analyzes the “do no harm principle” with respect to the protection of cultural rights and cultural heritage.

<sup>47</sup> This is especially true with respect to civil and political rights, which appear to be seen as incidental concerns; see World Bank, 1998, *World Development Report 1998/99*, 3.

<sup>48</sup> The argument for the legal responsibility of the Bank to respect standard levels of human rights was first articulated by Henry Shue, *Basic Rights: Subsistence, Affluence,*

### The Political Dimensions of Human Rights Law

There are, as indicated, many reasons for this cautious approach: ignorance or misunderstanding of the nature of international human rights law, misplaced concern that it would require the Bank to take on the mantle of a global human rights policeman,<sup>49</sup> skepticism or antagonism towards human rights as understood by the Bank, and questions about their relevance to the Bank in terms both of its mandate and practicability, and the ever-present political pressures that shape the Bank's behavior from top to bottom. These reasons interact in such a complex way that unraveling which ones are the key reasons, and from there, constructing an approach that might explain and seek to address them, is manifestly challenging. Still, an enduring theme that is discernable is how human rights *law* comes into the equation. In so far as appeals are made from outside or even inside the Bank to the normative framework provided by a rights-based approach to development, the framework in question is invariably provided by international human rights *law*, specifically, the International Bill of Rights (which encompasses the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights).<sup>50</sup>

However, with the invocation of legal instruments, there also necessarily come questions of interpretation, implementation, and enforcement. For the Bank's predominantly economically trained and oriented staff, it seems, the standard reception given to the introduction of international human rights law into discussions of the role and responsibilities of the Bank is one of suspicion and distrust (and, sometimes, disdain). Human rights, as with many sociopolitical phenomena, are not easily accommodated by orthodox econometric calculus. These "externalities," as economists are prone to rendering them are, at best, peculiarities that often challenge rational (i.e., welfare-maximizing) economic analysis<sup>51</sup> or, at worst,

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*and U.S. Foreign Policy*, (Princeton: Princeton University Press, 1980), and endorsed by the United Nations, *Limburg Principles on the Implementation of the International Covenant on Economic, Social, and Cultural Rights*, 1977, UN Doc. E/CN.4/1987/17, Annex at para. 17 and 18.

<sup>49</sup> See McBeth, 2005, "International Financial Institutions and Human Rights," 17.

<sup>50</sup> See United Nations, OHCHR, *International Bill of Rights*, n.d., <http://www.unhchr.ch/html/menu6/2/fs2.htm> (accessed August 13, 2006).

<sup>51</sup> See Varun Gauri, 2006, "Economics and the Right to Basic Services," in *World Bank Legal Review*, vol. 2, *Law, Equity, and Development*, ed. Caroline Mary Sage and Michael

efficiency-distorting irrelevancies.<sup>52</sup> Such perspectives are born of misconceptions around what human rights *do* bring and *can* bring to the debate, and lead directly to the marginalization of human rights concerns within the Bank.

It appears to be the combination of the moral force of human rights qua rights and the fact of their encasement within international law that is particularly troubling for economists and Bank officials alike. Thus arises the desire to uncouple the two dimensions and instead, treat human rights as “high priority goals” (accepting their moral force), rather than legally binding obligations.<sup>53</sup> But that not only necessarily and obviously denies the *sine qua non* of international human rights law, it also does so on the basis of a fundamental misunderstanding of what international human rights law actually entails. In fact, this misunderstanding of the consequences of the legal characteristics of human rights comprises two steps. These are: (i) at the level of authority (or concept)—that rights are seen as trumps, subordinating all else; and (ii) at the level of application (or practice)—that they are seen as being both clear and unqualified in form, and directly and immediately enforceable.

In all law—but especially international human rights law—the promotion of such a rigidly doctrinal view is false and misleading. In the present case, however, it is also strategically damaging (a big “turn-off” factor for the Bank and other international financial institutions). Moreover, the perceptions relating to both of these levels of the impact of human rights law are eminently rebuttable at two levels of argument. First, at the level of *principle*, one must stress the utility of laws outside their promise of enforcement, what Yasuaki Onuma calls the broad

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Woolcock, 325–351 (The Hague: Martinus Nijhoff, 2006). For admittedly compromised or incomplete attempts at economic measurement of the value or quality of human rights, see Alan O. Sykes, “International Trade and Human Rights: An Economic Perspective,” John M. Olin Law and Economics Working Paper, no. 188, 2nd series, University of Chicago Law School, 2003, 1–10, [www.law.uchicago.edu/Lawecon/workingpapers.html](http://www.law.uchicago.edu/Lawecon/workingpapers.html) (accessed June 30, 2006). On the costs of human rights, see R.A. Posner, “The Cost of Rights: Implications for Central and Eastern Europe—and for the United States,” *Tulsa Law Review* 32 (Fall 1996):1–19.

<sup>52</sup> Of course, not all economists aver the relevancy of human rights. See, for example, Sen, 1999, *Development as Freedom* (drawing on Adam Smith for support), and Sengupta’s “efficiency model” analysis of the economic impact of human rights (Arjun Sengupta, “On the Theory and Practice of the Right to Development,” *Human Rights Quarterly* 24, no. 4 [November 2002]: 888).

<sup>53</sup> See Gauri, 2006, “Economics and the Right to Basic Services.”

“societal functions” of international law,<sup>54</sup> which may envelope the core legal concern of enforceability but are *not* co-terminus with enforceability. This is a view that finds its roots in H.L.A. Hart’s reasoning that curial enforceability represents a “vital but ancillary” feature of law as a means of social control, given that law’s principal functional impact “is to be seen in the diverse ways in which law is used to control, to guide, and to plan life *out of court*” (emphasis added).<sup>55</sup> At the second level of *practice*, international human rights law is “open-textured;”<sup>56</sup> it is replete with qualifications to otherwise simply and starkly stated human rights. Indeed, the vast body of international human rights jurisprudence centers on the permissible extents to which rights may be limited.<sup>57</sup> This, it must be stressed, is not a weakness but a (necessary) strength of international human rights law, in that it permits legitimately variable enforcement, albeit dependent on the precise line between legitimacy and illegitimacy.<sup>58</sup>

It is, therefore, a fundamental mistake to assume that human rights laws are monolithic in meaning and immediately binding and enforceable on the duty holder (whether the state or any other entity). International human rights laws can be and are correctly viewed as “duties for governments, international agencies, and other actors,”<sup>59</sup> and yet remain laws, with their attendant qualities of universal standard-setting, backed, ultimately, by sanction. It is neither necessary nor jurisprudentially

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<sup>54</sup> Yasuaki Onuma, “International Law in and with International Politics: The Functions of International Law in International Society,” *European Journal of International Law* 14, no. 1 (2003):105.

<sup>55</sup> H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon, 1961), 39, as cited in Onuma, 2003, “International Law in and with International Politics,” 118.

<sup>56</sup> Darrow and Tomas, 2005, “Power, Capture, and Conflict,” 487.

<sup>57</sup> Rhona K.M. Smith, *Textbook on International Human Rights* (Oxford: Oxford University Press, 2005), 171–180.

<sup>58</sup> Swaminathan underscores the role that international human rights play as normative standards against which the actions of states and international organizations (such as the Bank) are measured, while recognizing the frustratingly elusive dimensions of those standards as typically expressed in international human rights law. See R. Swaminathan, “Regulating Development: Structural Adjustment and the Case for National Enforcement of Economic and Social Rights,” *Colombia Journal of Transnational Law* 37(1998–99):161–214.

<sup>59</sup> See Gauri, 2006, “Economics and the Rights to Basic Services.”

sustainable to separate human rights from their international law moorings in order to make them practicable for such organs to implement.<sup>60</sup>

How these arguments are conveyed, of course, is as much part of the problem as the misapprehensions themselves. And there is as much a need for the storytellers (lawyers and human rights advocates) to tell a good story as there is a need for the audiences (World Bank officials) to sit up and listen. The nature and nuances of international human rights law must be promoted in a meaningful and accessible format, with as much attention paid to the language and presentation of argument as to the nature and content of the law itself. In fact, the endeavor falls within the broader context of the quest to mainstream human rights within the general discourse of economic globalization, wherein the Bank has a conspicuous role. In this regard, we might be able to avoid the pitfalls of what Michael Ignatieff refers to as “human rights imperialism”<sup>61</sup> (where human rights purport to colonize other societal constructs) and what David Kennedy sees as the human rights community’s tendency to “insult the economy”<sup>62</sup> (where the economic implications of human rights are ignored or scantily regarded).

Human rights and human rights laws are not above politics,<sup>63</sup> but rather immersed in it; they are, indeed, the very stuff of politics in the broadest sense, concerned with how and on what basis states treat those within their jurisdiction. What human rights bring to political discourse, however, is a means by which the boundaries of political compromise are marked—both the maximum (the aspirational, ideal state) and the minimum (base standards, dipping towards unacceptable). They can—according to Ignatieff—provide “a discourse for the adjudication of conflict,”<sup>64</sup> rather than a manifesto of non-negotiable and trumping demands.

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<sup>60</sup> Ibid. Gauri tries to make this case by arguing that economic and social rights in particular are merely “high-priority goals” rather than “legal binding constraints,” at the same time insisting that these “goals” impose duties on states and international agencies that are almost identical to the way in which human rights laws are described above.

<sup>61</sup> Michael Ignatieff, *Human Rights as Politics and Idolatry*, ed. Amy Gutmann (Princeton: Princeton University Press, 2001).

<sup>62</sup> David Kennedy, “The International Human Rights Movement: Part of the Problem,” *European Human Rights Law Journal* 3 (2001):252.

<sup>63</sup> David Kinley, “Human Rights, Globalisation, and the Rule of Law: Friends, Foes, or Family?” *UCLA Journal of International Law and Foreign Affairs* 7, no. 2 (Fall/Winter 2002–2003): 248–9.

<sup>64</sup> Ignatieff, 2001, *Human Rights as Politics and Idolatry*, 20.

The implication for the World Bank of disaggregating the notion of international human rights in this way is that it provides the opportunity, if not a requirement, to rethink its attitude towards human rights. The Bank can and must engage with human rights on a footing that requires greater internalization and politicization of human rights. Certainly, prompting and goading from without will help the process, but human rights will only have any real leverage once they are broadly accepted within the Bank, and frankly, at least initially, that will be largely on the Bank's own terms. As such, the likely key matters of concern will be: the question of how to monitor and evaluate human rights impacts, their fit with the "economic" outputs of the Bank, and balancing the competing political and economic interests on the Bank's Boards of Northern financier states and the Southern recipient states (points that are expanded below). But it is surely the case that the Bank (and others) no longer ought to be able to labor under the misconception of the purported rigidity of human rights laws, and no longer thereby excuse its rejection of a systematic and comprehensive incorporation of human rights into its operations.

Understanding the plurality of both the idea and practice of human rights, and the role that law plays therein, will certainly help recover human rights from the "distrust and suspicion" part of Bank thinking. It will also provide for a more ready recognition and acceptance of the fact that the Bank is already knee-deep in human rights, albeit without fully understanding what that implies. Through various programs and activities, the Bank certainly does promote women's and children's rights, the rights of indigenous peoples, access to health and education rights, rights to fair trial and to participation,<sup>65</sup> and the right to an adequate standard of living—although it also at times impacts on those same rights adversely.<sup>66</sup> Typically, however, these effects are not expressly recognized in human rights terms, despite the ubiquitous appropriation by the Bank of language akin to "rights talk," in its use of terminology such as pro-poor, empowerment, transparency and accountability, capacity building, and the promotion of good governance and the rule of law.<sup>67</sup> Fundamentally, there is no systematic incorporation of human rights in policy formulation and analysis.

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<sup>65</sup> See, for example, World Bank, 1998, *World Development Report 1998/99*, especially 6–7, 9–10, and 14–29.

<sup>66</sup> See Kinley and Davis, 2004, "Human Rights Criticism."

<sup>67</sup> Davis, 2005, "The Public Policy of the World Bank," 5–6.

### The Practicalities of Implementing Human Rights Goals

If we are to accept therefore, the above case that the Bank's fears of international human rights law generally, and a rights-based approach to development in particular, are essentially groundless, we can now ask what the Bank should do to be more supportive of human rights. The remainder of this article addresses these questions by examining some of the obstacles to implementation that exist at present and offering some suggestions as to how these might be overcome. First and foremost (as indicated at the end of the previous section), the Bank has no integrated, global policy that directly and explicitly incorporates human rights into its development agenda. Certainly, it has a raft of initiatives that address human rights issues in a piecemeal fashion<sup>68</sup>—including a number of operational policies and directives (of which ten have been labeled “safeguard policies”), covering mostly environmental and some social concerns;<sup>69</sup> Poverty Reduction Strategy Papers, which include such matters as women's empowerment, job creation, health and education in their terms; and the Inspection Panel, whose complaint-handling mandate incorporates both procedural and substantive protection of rights to participation, fair trial, non-discrimination, health and environmental protection.<sup>70</sup> But, none of these amount to anything like the comprehensive policy pronouncements on human rights of the United Nations Development Programme (UNDP) or of such bilateral development agencies as the U.K. Department for International Development (DFID) and Swedish International Development Agency (SIDA).<sup>71</sup> Therefore, obviously the clearest and

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<sup>68</sup> See generally, *ibid.*, 12–13.

<sup>69</sup> See World Bank, 2006, “Safeguard Policies,” World Bank website, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,menuPK:584441~pagePK:64168427~piPK:64168435~theSitePK:584435,00.html> (accessed June 30, 2006). With respect to the IFC's safeguard policies, see World Bank Compliance Advisor Ombudsman (CAO), “A Review of IFC's Safeguard Policies; Core Business: Achieving Consistent and Excellent Environmental and Societal Outcomes,” January 2003, World Bank, Washington, DC; and Wachenfeld, 2004, “Safeguard Policy Gap Analysis.”

<sup>70</sup> See Dana L. Clark, *A Citizen's Guide to the World Bank Inspection Panel*, 2nd ed. (Washington DC: Centre for International Environmental Law, 1999).

<sup>71</sup> See OHCHR, 2003, “Human Rights Based Approach to Development Cooperation;” UNDP, 2005, “Practice Note: Human Rights in UNDP;” DFID, 2000, *Realizing Human Rights for Poor People*; and SIDA, 1997, “Justice and Peace.”

most effective way in which to promote a human rights approach within the Bank would be to have a fully-fledged policy on the subject.

Much would flow from such an initiative, which would otherwise have to be dealt with on an ad hoc basis. For instance, such a global policy—while itself being a product of what Davis calls “policy entrepreneurship”<sup>72</sup>—would certainly encourage further policy innovation in this regard at various levels of the Bank. These policies would need to address such issues as finding ways to make Structural Adjustment Programs more accountable, as the existing safeguard policies are clearly unsuited for the task,<sup>73</sup> and to recognize and incorporate in a coordinated manner the obligations of client states under international human rights laws and to assist in their fulfillment.<sup>74</sup> These policies would also have to devise effective responses to the difficulties posed by “deficiencies in local institutional capacity, as well as the preparedness of local governments to dedicate resources to them,”<sup>75</sup> if the Bank is to provide any meaningful assistance in this regard.

A key test of any attempt to operationalize a rights-based policy will be the effectiveness of the devices used to measure the impact of the resultant programs and projects. The key performance indicators, impact analyses, and other accountability mechanisms must be sufficiently nuanced to pick up qualitative and well as simple quantitative changes; they must embrace a wide stakeholder base, and they must be instituted over long periods of time, especially after the implementation phase of the project has been completed. Such pro formas are being trialed at the moment, notably by the UNDP and HURIST, and also by some large private aid providers such as Oxfam.<sup>76</sup> The Halifax Foundation, in a 2004 discussion paper, chartered a

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<sup>72</sup> Davis, 2005, “The Public Policy of the World Bank.”

<sup>73</sup> World Bank, 2002, “Safeguard Policies,” 15.

<sup>74</sup> See DFID, 2000, 13.

<sup>75</sup> Davis, 2005, “The Public Policy of the World Bank,” 6. Also see DFID, 2004, *Realizing Human Rights for Poor People*, 13, for a policy outline of just this sort.

<sup>76</sup> See UNDP, 2005, “Practice Note: Human Rights in UNDP;” OHCHR, n.d., “Executive Summary: Second Phase of HURIST (Human Rights Strengthening), March 2002–March 2005,” Human Rights in Development website, <http://www.unhchr.ch/development/hurist.html> (accessed June 30, 2006); Davis, 2005, “The Public Policy of the World Bank,” 8. Also see the Human Rights Council of Australia, 2001, *The Rights Way to Development*; and Oxfam International, “Towards Global Equity: Strategic Plan 2001–2004,” Oxfam International, Oxford, United Kingdom, 2001, [http://www.oxfam.org/en/files/strat\\_plan.pdf#search=%22Towards%20global%20equity%3A%20Oxfam%](http://www.oxfam.org/en/files/strat_plan.pdf#search=%22Towards%20global%20equity%3A%20Oxfam%20) (accessed August 30, 2006).

range of best practice “human rights impact analyses.”<sup>77</sup>

What emerges from these various models are certain common characteristics. First, the “standards” enunciated in relevant international human rights laws (principally those within the International Bill of Rights)<sup>78</sup> are actively promoted as gauges against which to measure donor and recipient state performances regarding (typically) levels of inclusion and participation in decision making, recompense for losses, non-discrimination, dispute settlement, and equitable distribution of benefits. Secondly, measurement against these standards is employed throughout the complete project cycle, that is, from initial feasibility and design stages, through the approval process, to the implementation and review and impact analysis phases.<sup>79</sup>

The development of such new policy directions will require a fundamental shift in the Bank’s attitude towards human rights. In terms of how this might be done, this article offers at least one important step forward by “exploding the myth” of what deleterious consequences might flow from the adoption of more systematic rights thinking within the Bank. In terms, however, of whether such a policy shift will occur, the decision lies within the power and authority of the upper echelons of the Bank’s management-ownership structure. The various and at times competing political agendas of individual states and blocs of states at the levels of both the Executive and Governors’ Boards, as well as the agendas of the offices of the president and vice-presidents combine to raise serious questions about whether, in its current institutional form, the Bank would be capable of agreeing to such a proposition.<sup>80</sup>

The situation may require, as some argue, democratizing the Bank’s Board of Governors and abandoning the weighted voting system currently in place.<sup>81</sup> In any

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<sup>77</sup> NGO Working Group on EDC, “Risk, Responsibility, and Human Rights: Taking a Rights-Based Approach to Trade and Project Finance,” discussion paper, The Halifax Initiative, Ottawa, Canada, 2004.

<sup>78</sup> Namely the UDHR (Universal Declaration of Human Rights), ICCPR (International Covenant on Civil and Political Rights), and ICESCR (International Covenant on Economic, Social, and Cultural Rights).

<sup>79</sup> See H.O. Sano, “Equity Empowerment and Accountability: Incorporating a Human Rights Perspective in the World Bank,” conference paper presented at the World Bank Legal Forum 2005, “Law, Equity, and Development,” Washington, DC, December 2, 2005.

<sup>80</sup> Davis, 2005, “The Public Policy of the World Bank,” 15.

<sup>81</sup> S. Subedi, “A Critique of the Human Rights Policy of the World Bank and the IMF,” paper presented at the International Conference on Human Rights and Development,

event, it will certainly require changes to the incentive schemes that determine the way in which meso-level bureaucrats currently make decisions, which begat the much-maligned “approvals culture.”<sup>82</sup> A refocusing on outcomes and questions of the redistribution of social and economic gains (rather than merely evaluations based on their aggregate increase),<sup>83</sup> clearly will facilitate, and be facilitated by, the adoption by the Bank of a rights-based approach to development.

## Conclusion

Whatever the precise level of acceptance and incorporation of international human rights law into the strategic and operational mandates of the Bank may be, either now or in future, the questions regarding whether it is or ought to be so engaged are today non-questions. The inquiry now must focus on how best to ensure, on the one hand, that engagement remains viable for the Bank while, on the other, that it yields an increase in the effectiveness of the promotion and protection of human rights. All this will depend—like all grand regulatory designs—on a synthesis of principle, pragmatism, practice and, above all, politics across all levels of management of the Bank’s operations and activities.

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<sup>82</sup> See Kinley and Davis, 2004, “Human Rights Criticism,” 85–102.

<sup>83</sup> Gauri, 2006, “Economics and the Rights to Basic Services.”

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# A HUMAN RIGHTS–BASED APPROACH TO DEVELOPMENT: THEORETICAL AND OPERATIONAL ISSUES FOR THE WORLD BANK

MAC DARROW\*

*This article offers critical reflections on the relevance of a human rights–based approach to the work of the World Bank and explores the legal, policy, and operational parameters that might apply to such an approach. Attempts by the United Nations and the International Finance Corporation to define and implement a human rights approach are surveyed, as is the current discussion of the “value added” of human rights in development work. The article concludes that a nascent yet intriguing human rights mosaic seems to be emerging from the empirical and policy research, as well as operational activities, of certain units of the Bank, which are actively addressing how to mainstream these rights into Bank projects. However, there are a number of structural constraints that must be tackled head-on if the human rights agenda is to be reflected more systematically in the Bank’s lending policies and operations.*

## Introduction

The calls for the World Bank to implement a “human rights–based approach” (HRBA) in its work have proliferated in recent years, including, on occasion, from within.<sup>1</sup> However, consensus around this concept remains elusive, partly

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\* This article represents the personal views of the author and should not be attributed to Office of the United Nations High Commissioner for Human Rights (OHCHR) or the United Nations.

<sup>1</sup> John M. Ackerman, *Human Rights and Social Accountability*, Social Development Papers, Participation and Civic Engagement, no. 86. Washington, DC: World Bank. [http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/07/20/000012009\\_20050720134205/Rendered/PDF/330110HR0and0SAc0paper0in0SDV0format.pdf](http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2005/07/20/000012009_20050720134205/Rendered/PDF/330110HR0and0SAc0paper0in0SDV0format.pdf). Accessed July 8, 2006.

due to the wide range of policy and institutional contexts and operational settings in which it has been invoked. While U.N. agencies have agreed on a definition of a human rights–based approach that applies to a certain level of prescription,<sup>2</sup> as will shortly be discussed, the “rights-based approach” label continues to find widespread expression as a surrogate for social mobilization or community-based development, ordinary “good governance,” and even to describe projects that are narrowly focused on commercial contracts or property rights.<sup>3</sup> Yet, conceptual clarity and integrity are of paramount importance in this field to safeguard against the colonization of human rights language and the blunting of the empowering potential of human rights.<sup>4</sup>

This article offers some critical reflections on whether, and to what extent, a human rights–based approach might be necessary or desirable to the work of the World Bank. The present analysis should be read with an important caveat in mind. In exploring the logic and limits of this approach, the article makes extensive reference to human rights as understood in international human rights

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<sup>2</sup> There is no consensus definition of the term, although for present purposes, the term can be taken to refer to the reorientation or realignment of development in accordance with human rights goals, and the integration of human rights principles and standards in development policies and processes. The agreement of U.N. agencies on a human rights-based approach to development cooperation is recorded in the so-called Stamford “Common Understanding.” See Annex 2 in OHCHR, *Frequently Asked Questions on a Human Rights-based Approach to Development* (New York: OHCHR, 2006), 35, [http://www.ohchr.org/english/about/publications/docs/FAQ\\_en.pdf](http://www.ohchr.org/english/about/publications/docs/FAQ_en.pdf) (accessed March 15, 2006).

<sup>3</sup> For a striking example of such a narrowly focused program, see World Bank, “A Rights-based Approach to Management: The Case of the Pacific Halibut Fishery in Canada and the USA,” World Bank Policy Brief, Good Management Practice in Sustainable Fisheries, World Bank, Washington, DC, April 2004. The brief is available on the website of One Fish, a portal for fisheries research worldwide, [http://www.onefish.org/servlet/BinaryDownloaderServlet?filename=1140618422196\\_WBPolicyBrief04.pdf&refID=213527](http://www.onefish.org/servlet/BinaryDownloaderServlet?filename=1140618422196_WBPolicyBrief04.pdf&refID=213527) (accessed January 26, 2006). In this program, “rights-based fishing” effectively meant the protection of property rights through individual fishing quotas.

<sup>4</sup> See, for example, Peter Uvin, “On High Moral Ground: The Incorporation of Human Rights by the International Development Enterprise,” *Praxis: The Fletcher Journal of Development Studies* 17 (2002):1–11, <http://fletcher.tufts.edu/praxis/archives/xvii/Uvin.pdf> (accessed January 26, 2006.); and Mac Darrow and Tomas Amparo, “Power, Capture, and Conflict: A Call for Human Rights Accountability in Development Cooperation,” *Human Rights Quarterly* 27, no. 2 (2005):471–538.

law, especially as defined in the core seven international human rights treaties.<sup>5</sup> However, this understanding does not ignore the politically charged climate in which international standards such as these are negotiated, the ideological biases and conflicting interests that shape their implementation, or the relative importance of informal or customary rule-making systems in all regions of the world. Human rights are not a static normative domain that embodies perfect consensus. For the present then, this law should be understood as a “dynamic condensation of power relations”<sup>6</sup> that requires an appreciation of the political and ideological agendas and structures of power that value certain rights over others and thus enable (or disable) particular people or groups of people from claiming entitlements. An anthropological understanding of law can be useful in order to link the present analysis to the realities of everyday people on the ground.

### **Why Integrate Human Rights into Development?**

The reasons for integrating human rights into development are commonly perceived as falling into two broad categories: (1) *intrinsic* reasons, that is, factoring in human rights by legal or moral compulsion because it is “the right thing to do,” and (2) *instrumental* reasons, that is, because the integration of human rights promotes development objectives. These two factors are considered separately below for analytical convenience, although in fact they are closely related.

From a human rights perspective, however, instrumental rationales should not be permitted to obscure the fact that human rights are part of an overarching value

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<sup>5</sup> See the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), Convention on the Elimination of Discrimination Against Women (CEDAW), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Rights of the Child (CRC), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Protection of the Rights of Migrant Workers and Members of Their Families (MWC). All member states of the United Nations have ratified at least one of these core seven international human rights treaties, and 80 percent have ratified four or more. The treaties are available on the website of the Office of United Nations High Commission for Human Rights (OHCHR) at <http://www.ohchr.org/english/law/index.htm> (accessed January 26, 2006).

<sup>6</sup> Julio Faundez, “The Rule of Law Enterprise: Promoting a Dialogue between Practitioners and Academics,” *Democratization* 12, no. 4 (2005):567–86.

system grounded in international law to which all states and other subjects of international law (including the international financial institutions) are to varying degrees bound.<sup>7</sup> Regardless of whether it is useful to speak of the instrumental value of human rights (such as girls' education, freedom of expression and association, the right to adequate housing including security of tenure, the right to food, etc.) in realizing the Millennium Development Goals (MDGs) and similar development objectives, instrumental arguments should be seen as supplementary to the "intrinsic" importance of human rights and should not cloud this importance.

### *The "intrinsic" rationale*

Human rights inhere in an individual only by reason of the fact that (s)he is human—they are a reflection of our equal worth and dignity. The international legal regime for human rights codifies—without ossifying—internationally agreed prerequisites for a life with dignity. The intrinsic or "constitutive" rationale for human rights in the context of social service provision is described well by Gauri, who characterizes these rights as critical elements of social inclusion:

If protecting and fostering the social basis of self-esteem partly motivates the provision of health care and education services, either because the denial of those services is a marker of low status or is related to a pervasive sense of personal ineffectiveness, then service delivery should be structured to support self-esteem. That means that consent to treatment, norms for due process in delivery and allocation, participation and consultation, and transparency regarding professional and bureaucratic decision making not only facilitate good service delivery but are constitutive of it.<sup>8</sup>

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<sup>7</sup> On the sources of international law, see Article 38 of the Statute of the International Court of Justice, [http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER\\_II](http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm#CHAPTER_II) (accessed July 12, 2006). Proclamations as to the universality of the values codified in the Universal Declaration of Human Rights (1948) and succeeding treaties have been reiterated in numerous global conferences including the World Conference on Human Rights in Vienna (1993), the Millennium Summit in New York (2000) and the 2005 World Summit in New York.

<sup>8</sup> Varun Gauri, "Economics and the Right to Basic Services," in *The World Bank Legal Review*, vol. 2, *Law, Equity, and Development*, ed. Caroline Mary Sage and Michael Woolcock, 325–351 (The Hague: Martinus Nijhoff, 2006).

There is a legally grounded analogue to the intrinsic case for human rights in development. The World Bank's Operational Policies state clearly that the Bank will not support projects that violate borrowers' obligations under international environmental agreements.<sup>9</sup> In theory, there is no plausible reason why human rights or other international treaty obligations should be treated differently from environmental rights and obligations. Indeed, senior Bank officials have in the past publicly supported a more balanced interpretation of this "do no harm" requirement, subject to additional technical requirements for monitoring the impacts of development activities in terms of human rights.<sup>10</sup> Moreover most international lawyers would agree that, as a subject of international law, the Bank has, at a minimum, a duty to respect international human rights obligations in force at the national level. It also has at least a moral, if not legal, duty and a political imperative to protect human rights within the scope of Bank-supported activities.<sup>11</sup>

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<sup>9</sup> World Bank, "Operational Policy (OP) 4.01" (January 1999), in *The World Bank Operational Manual*, World Bank, Washington, DC, <http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/toc2/9367A2A9D9DAEED38525672C007D0972?OpenDocument> (accessed July 12, 2006).

<sup>10</sup> See comments of Ian Johnson, Senior Vice President for the Environmentally and Socially Sustainable Development Network, World Bank, and Judith Edstrom, Sector Manager for Social Development, World Bank, in the transcript of "The World Bank and Human Rights," debate organized by the Human Rights Forum of the Institute for the Study of International Migration, Georgetown University, November 14, 2002, <http://www.georgetown.edu/sfs/programs/isim/pages/Human%20Rights%20Forum%20Pages/WBHR.html> (accessed January 23, 2006).

<sup>11</sup> Human rights obligations are increasingly understood as falling into three categories: to *respect* (not breach), protect, and fulfill human rights. The latter category is more commonly associated with direct provisioning, but all three categories include duties of both a positive and negative (non-interference) kind. On the positive obligations of international financial institutions see Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford: Oxford University Press, 2006), 151; Sigrun Skogly, *The Human Rights Obligations of the World Bank and International Monetary Fund* (London: Cavendish Press, 2001); Pierre Klein, *La responsabilité des organisations internationales*, Collection de droit international, Bruxelles (Bruylant, Belgium: Editions de l'Université de Bruxelles, 1998); and Peter Woicke, "Putting Human Rights Principles into Development Practice through Finance: The Experience of the International Finance Corporation," in *Human Rights and Development: Towards Mutual Reinforcement*, ed. Philip Alston and Mary Robinson, 334, 349. New York: Oxford University Press, 2005.

In recent years the International Financial Corporation (IFC) appears to have taken a lead in formally and publicly responding to its human rights obligations.<sup>12</sup> In its March 1998 “Harmful Child and Forced Labour Policy Statement,” the IFC undertook: (a) not to support projects that use “forced or harmful child labour” (as defined in ILO Convention No. 29 on Forced and Compulsory Labour [1930] and Article 32(1) of the Convention on the Rights of the Child). It also committed itself to incorporating provisions into its contractual documents that were required to implement this policy.<sup>13</sup> At the time of writing, however, it remained unclear whether the IFC’s ongoing revision of its safeguard policies would continue these earlier orientations.<sup>14</sup>

### *The “instrumental” rationale*

Former Bank President James Wolfensohn pertinently characterized indifference as the common enemy of human rights and development.<sup>15</sup> Passive indifference and bureaucratic inertia can violate human rights and frustrate development just as effectively as overt acts of discrimination. Human rights are quintessentially concerned with enlivening the responsiveness and sense of accountability of people in positions of responsibility and authority, as well as encouraging people to identify themselves as rights claimants and voice their own claims, thus invigorating chan-

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<sup>12</sup> See Woicke, 2005, “Putting Human Rights Principles into Development Practice,” 334, 339.

<sup>13</sup> IFC, “Introductory Note: IFC’s Policy Statement on Forced Labor and Harmful Child Labor,” IFC, Environment Division, Washington, DC, 1998/1999, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol\\_ChildLabor/\\$FILE/ChildForcedLabor.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/pol_ChildLabor/$FILE/ChildForcedLabor.pdf) (accessed August 23, 2006).

<sup>14</sup> IFC, “IFC Safeguards Update: Discussion on Human Rights; IFC’s Policy and Performance Standards on Social and Environmental Sustainability; Summary Notes; New York, February 14, 2005,” IFC, Washington, DC, [http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Feb+14+Human+Rights+Meeting/\\$FILE/Meeting+Summary+HR+EGI+-+IFC+Feb+14.pdf](http://www.ifc.org/ifcext/policyreview.nsf/AttachmentsByTitle/Feb+14+Human+Rights+Meeting/$FILE/Meeting+Summary+HR+EGI+-+IFC+Feb+14.pdf) (accessed January 26, 2006). Also see Bretton Woods Project, “IFC Safeguard Review Closes,” *Bretton Woods Update*, no. 48 (November–December 2005), 6, <http://www.brettonwoodsproject.org/update/48/bwupdt48.pdf> (accessed January 23, 2006). The latter source suggests that human rights deficits remain.

<sup>15</sup> James D. Wolfensohn, “Some Reflections on Human Rights and Development,” in Alston and Robinson, *Human Rights and Development* (see note 11), 24.

nels of contestation.<sup>16</sup> Human rights seek to achieve these aims in accordance with objectively ascertainable performance standards and corresponding entitlements, using institutions to negotiate, mediate and adjudicate grievances as they inevitably arise. In 2005 the former Senior Vice President and General Counsel of the World Bank, Roberto Dañino, postulated a purposive and dynamic interpretation of the legal width of the Bank's mandate under its Articles of Association, enabling robust engagement with the complex development challenges of the day, including—most international lawyers would agree—the human rights dimensions of these challenges.<sup>17</sup>

Recent work by the Inter-American Development Bank (IDB), which has a mandate similar to that of the International Development Association (IDA) of the World Bank,<sup>18</sup> insofar as its engagement with issues deemed to be “political” is concerned,<sup>19</sup> provides useful and practical insights into the instrumental gains of human rights in development. Of particular interest is the extent to which international human rights standards in the area of justice and prisons reform are being incorporated by the IDB directly into the substantive content of its operational guidelines and

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<sup>16</sup> Caroline Moser, “Power Relations and Poverty Reduction,” in *Power, Rights, and Poverty Reduction: Concepts and Connections*, ed. Ruth Alsop, 29–50. Washington, DC: World Bank, 2005, <http://siteresources.worldbank.org/INTEMPowerment/Resources/PP-FinalText.pdf> (accessed January 28, 2006).

<sup>17</sup> Roberto Dañino, “The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts,” in *The World Bank Legal Review*, vol. 2, *Law, Equity, and Development*, ed. Caroline Mary Sage Michael Woolcock, 293–324 (The Hague: Martinus Nijhoff, 2006).

<sup>18</sup> “The International Development Association (IDA) is the part of the World Bank that helps the earth's poorest countries reduce poverty by providing interest-free loans and some grants for programs aimed at boosting economic growth and improving living conditions” (World Bank website, Washington, DC, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTA-BOUTUS/IDA/0,,menuPK:83991~pagePK:118644~piPK:51236156~theSitePK:73154,00.html> [accessed July 12, 2006]).

<sup>19</sup> See Article VIII, Section 5(f) of *Agreement Establishing the Inter-American Development Bank*, December 30, 1959 (July 31, 1995), IDB, Washington, DC, <http://www.iadb.org/leg/Documents/Pdf/Convenio-Eng.Pdf> (accessed July 12, 2006).

project interventions, thus building bridges between potentially abstract human rights norms and the realities of people in everyday life.<sup>20</sup>

A number of instrumental reasons are offered for the IDB's explicit engagement with human rights in rule-of-law reforms, including the goals of:

- grounding policies and programs within a nationally owned legal framework;
- assisting the IDB in raising sensitive issues, framing them in more objective terms than might otherwise be possible (referring, for example, to judicial independence as a requirement under law, rather than a policy stipulation of the IDB alone);
- helping define project content and measuring achievements using human rights-based indicators;
- helping the IDB to shift its focus and requirements for achieving citizen participation in justice sector project design and implementation; and
- urging a greater emphasis on the role of the legal system in maintaining or fighting systems of discrimination and exclusion.<sup>21</sup>

Also noteworthy in the IDB experience is the extent to which this development bank supports capacity building of national human rights institutions and regional organizations (e.g., Inter-American Court on Human Rights) and involves human rights non-governmental associations (NGOs) and similar constituencies as implementation partners and/or “watchdogs” over project implementation.<sup>22</sup> Part of the explanation for the IDB's relatively progressive efforts in this field can be traced to the explicit recognition of the importance of human rights for governance and development in the report of its eighth capital replenishment negotiations in 1994.<sup>23</sup> It is worth noting that a similar recognition was reflected in the IDA's twelfth replenishment

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<sup>20</sup> Christina Biebesheimer, “The Impact of Human Rights Principles on Justice Reform in the Inter-American Development Bank,” in *Human Rights and Development* (see 11), 2005, 269–98.

<sup>21</sup> *Ibid.*, 281–84, 290.

<sup>22</sup> *Ibid.*, 289, 292–4.

<sup>23</sup> The IDB's eighth replenishment report recognized that “democracy and respect for human rights have helped create appropriate conditions for development.” IDB, *Report on the Eighth General Increase in the Resources of the Inter-American Development Bank*, AB-1704, 12 August 1994 (Washington D.C.: IDB, 1994), 27. Also see Biebesheimer, “The Impact of Human Rights Principles,” 2005, 270–71.

negotiations in 1999,<sup>24</sup> laying the groundwork for a similarly progressive policy orientation. Based on the IDB's early experience, Biebesheimer predicts that a "greater understanding of the rights perspective and greater application of rights methodologies and goals could improve the ability of IDB rule of law projects to help bring justice on a sustainable basis to ordinary citizens."<sup>25</sup>

Other instrumental values of human rights in development are described insightfully by Gauri with respect to claims to social rights.<sup>26</sup> Noting the predilection of economic analysis to find external constraints to the fulfillment of rights (e.g., lack of information on medical care or the inability to fund direct or opportunity costs of schooling), Gauri observes that rights approaches are comparatively well attuned to constraints internal to the individual, such as "adaptive preferences—the habit of individuals, subject to deprivation, to lower their standards regarding what they need, want, and deserve."<sup>27</sup> Sometimes also referred to as the "false consciousness" problem, this phenomenon is discussed in some depth in the World Bank's *World Development Report 2006* as both a cause and manifestation of the inter-generational "poverty trap," which chokes off human agency and the "capacity to aspire."<sup>28</sup>

Writing about community mobilization in India, Alston and Bhuta argue that "the diffusion of 'rights consciousness' could provide a basis for political organization within communities against discrimination and division on the basis of caste and gender, and thus be an instrument towards the creation of a 'social consensus' on the entitlement of equal access to quality elementary education."<sup>29</sup> These authors assert

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<sup>24</sup> Specifically, the IDA replenishment recognized that "democracy and respect for human rights have helped create appropriate conditions for development." World Bank, *Additions to IDA Resources: Twelfth Replenishment—A Partnership for Poverty Reduction* (IDA/R98-195), World Bank, Washington, DC, December 23, 1998.

<sup>25</sup> Biebesheimer, 2005, "The Impact of Human Rights Principles," 295.

<sup>26</sup> Gauri, 2006, "Social Rights and Economics."

<sup>27</sup> *Ibid.*, 342.

<sup>28</sup> World Bank, *World Development Report 2006: Equity and Development* (New York: Oxford University Press, 2005). The term "capacity to aspire" is generally attributed to Arjun Appadurai, "The Capacity to Aspire: Culture and the Terms of Recognition," in *Culture and Public Action*, ed. Rao Vinjayendra and Michael Walton, 59–84. Stanford, CA: Stanford University Press, 2004.

<sup>29</sup> Philip Alston and Nehal Bhuta, "Human Rights and Public Goods: Education as a Fundamental Right in India," in *Human Rights and Development* (see note 11), 2005, 242–65.

that couching desired social goals as human rights (as far as legally defensible) can enhance the impact of mobilization strategies at the local and national levels, and that litigation or the threat of litigation may — subject to effective community legal services — greatly enhance the bargaining power of local communities vis-à-vis national bureaucracies and other centers of political power. Moreover, successful litigation may help change the budgeting priorities of a country and thus spur more authentic institutional commitments to desired social goals, as has been witnessed in the educational achievements of the Indian state of Himachal Pradesh.<sup>30</sup>

Empirical research by the World Bank over the last several years has helped to shed light on how human rights — or at least a sub-set of internationally recognized rights labeled “civil liberties” (part of the so-called “category” of civil and political rights) — can improve development outcomes and the economic rate of return on projects.<sup>31</sup> Moreover, marginalized groups are increasingly asserting human rights claims, including economic and social rights claims, in courts and other bodies at national and regional levels, frequently with life-saving impacts.<sup>32</sup> These experiences suggest that litigation strategies are most effective when implemented within an integrated program for political mobilization and social change.<sup>33</sup> Community-based

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<sup>30</sup> Ibid, 261–2.

<sup>31</sup> Jonathan Isham, Daniel Kaufmann, and Lant Pritchett, “Civil Liberties, Democracy, and the Performance of Government Projects,” *World Bank Economic Review* 11, no. 2 (1997):219–42; Daniel Kaufmann, Aart Kraay, and Pablo Zoido-Lobaton, “Governance Matters: From Measurement to Action,” *World Bank Policy Research Working Paper* 2196 (Washington, DC: World Bank, 1999); Daniel Kaufmann, “Human Rights and Governance: The Empirical Challenge,” in Alston and Robinson, *Human Rights and Development*, 352–402.

<sup>32</sup> The literature on the assertion of human rights claims in national and regional bodies is vast. For a sampling, see COHRE, *Litigating Economic, Social and Cultural Rights: Achievements, Challenges, Strategies* (Geneva: COHRE, 2003); Jean Drèze, “Democracy and the Right to Food,” in Alston and Robinson, *Human Rights and Development*, 45–64, 59–61; Albie Sachs, “The Judicial Enforcement of Socio-Economic Rights: The Grootboom Case,” in *Democratising Development: The Politics of Socio-Economic Rights in South Africa*, ed. Peris Jones and Kristian Stokke, 131–52, 148–52 (Amsterdam: Martinus Nijhoff Publishers 2005).

<sup>33</sup> As Siri Gloppen asserts with respect to the South African experience, “litigation should not be viewed on its own. In the [Treatment Action Campaign case concerning access to HIV anti-retrovirals], litigation was part of a larger process of social mobilisation, and the case was effectively won on the streets before the verdict was handed down. This

legal awareness, community organizing, and empowerment strategies should be integrated with justice-sector reform initiatives, thus linking legal reforms to politics, empowerment, and people's realities.<sup>34</sup> Further interdisciplinary research is needed to help us better understand the preconditions for successful litigation in any given context, bearing in mind complementary and/or alternative approaches of "claiming" rights through political processes (however flawed and unresponsive to the poor these processes may be), customary or informal justice systems, and "legal empowerment" initiatives designed to enliven administrative decision making.<sup>35</sup> Close attention must be paid to the circumstances that shape people's perceptions of their rights, as well as their ability to enforce them.<sup>36</sup>

### **What do Human Rights Bring to Development Practice and How?**

There are persistent misconceptions within the development community about precisely what human rights bring to development, and in practical terms, how potentially abstract human rights entitlements and obligations can be identified and fulfilled through development work in a given national or local setting. Clear messages are needed about what human rights bring to development work. As vital as human rights can be in re-orienting development objectives and shaping the substantive focus of policies and programs, human rights standards alone will rarely be sufficient to resolve difficult policy trade-offs and questions of prioritiza-

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does not mean that litigation was irrelevant. On the contrary, it provided a focal point and platform for the struggle." Siri Gloppen, "Social Rights Litigation as Transformation: South African Perspectives," in Jones and Stokke, *Democratising Development*, 174–5. The Treatment Action Campaign case is discussed in World Bank, 2005, *World Development Report 2006*, 215.

<sup>34</sup> See Sally Engle Merry, "Creating Human Rights Consciousness and Human Rights Activism," conference paper for World Bank Legal Forum 2005, Washington, DC, December 1, 2005. On file with author.

<sup>35</sup> See Gloppen, 2005, "Social Rights Litigation," 153–80; COHRE, 2003, *Litigating Economic, Social and Cultural Rights*; Drèze, 2005, "Democracy and the Right to Food;" Alston and Bhuta, 2005, "Human Rights and Public Goods;" and Peris Jones and Kristian Stokke, "Democratising Development: The Politics of Socio-Economic Rights," in Jones and Stokke, *Democratising Development*, 1–38.

<sup>36</sup> Drèze, 2005, "Democracy and the Right to Food," 60.

tion.<sup>37</sup> In practice, the “process” attributes of human rights—requiring information availability; transparency; active, free, and meaningful participation in decision making; impact assessment; and accessible and effective redress mechanisms—are just as important as the substantive content of human rights obligations outlined in international and national law. There is no neat demarcation between the two.<sup>38</sup>

These attributes are now recognized in UN human rights reform initiatives. At a Stamford, Connecticut, workshop in May 2003, the U.N. development agencies agreed on a “Common Understanding on a Human Rights–based Approach to Development Cooperation.” This document was subsequently incorporated by the United Nations Development Group into its Guidelines for U.N. Country Teams for use in preparing Common Country Assessments and U.N. Development Assistance Frameworks,<sup>39</sup> and has assumed particular significance following the 2005 World Summit resolution that human rights be mainstreamed into national development policies.<sup>40</sup>

Reflecting the experiences of numerous U.N. agencies, the “Statement of Common Understanding” recognizes that a “rights-based approach to development” does not seek to *supplant* “good development practice,” rather, it seeks to *reinforce* it. While not a blueprint by any means, the “Statement of Common Understanding” recognizes that the chief distinguishing characteristic that human rights brings to development is the identification of human rights entitlements and obligations in any given situation. Development programming, in turn, focuses on building the capacities of “claim holders” to claim their legitimate entitlements, and of “duty bearers” to

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<sup>37</sup> Some of these tensions are well articulated by Gauri, 2006, “Social Rights and Economics” (in this volume). For ways in which human rights can influence policy choices and trade-offs, see OHCHR, 2006, “Frequently Asked Questions,” 11.

<sup>38</sup> For a similar formulation, see Peter Uvin, *Human Rights and Development* (Bloomfield, CT: Kumarian Press, 2004), 129, who focuses on changes to the vision, ends, and means of development.

<sup>39</sup> See “The Human Rights Based Approach to Development Cooperation: Towards a Common Understanding Among UN Agencies,” May 2003, Annex 2 in OHCHR, “Frequently Asked Questions,” 2006, and the “Common Country Assessment/United Nations Development Assistance Framework; Guidelines for UN Country Teams,” United Nations, New York, 2005, [http://www.undg.org/documents/4874-CCA\\_\\_UN-DAF\\_Guidelines\\_-\\_Guidelines\\_CCA\\_\\_UNDAF.doc](http://www.undg.org/documents/4874-CCA__UN-DAF_Guidelines_-_Guidelines_CCA__UNDAF.doc) (accessed February 13, 2006).

<sup>40</sup> United Nations, “World Summit Outcome Document,” U.N. Doc. A/RES/60/1 (2005), United Nations, New York, paragraph 126, <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (accessed July 19, 2006).

fulfill their corresponding obligations. While human rights law has potentially a great deal to say about the content and reasonable limits of these entitlements and obligations in any given context, it does not pretend to be exhaustive.

The record of operationalizing a human rights-based approach is, however, mixed. It is difficult to generalize the causes of the mixed nature of this record, although conceptual and technical hurdles are no doubt part of the explanation. But it is futile to focus on technical fixes without attention to the structural preconditions for an ambitious agenda—such as that embodied in a human rights-based approach—to take hold. Such an approach certainly constitutes an ambitious agenda, as it imports a vision of stakeholders as claim holders and duty bearers and demands respect for and fulfillment of rights, rather than focuses solely on helping people in need. In short, as a recent U.N. evaluation observed, “this is a totally new deal that, if consistently implemented, cannot but radically change the conditions of engagement of U.N. field development agencies and programs with member governments.”<sup>41</sup> Profound changes in organizational culture are needed, far beyond conventional managerial re-engineering, to support the required changes. Political support is also required, along with capacity building of senior personnel and internal instructions that empower and support staff at all levels to engage on human rights issues in accordance with this mandate.<sup>42</sup>

So how do these insights and comparative experiences play out in the Bank’s work? The Bank’s approach to operationalizing human rights can be analyzed at two levels: the responsibility to do no harm (or the obligation to take all reasonable measures to ensure that it does not violate borrowing members’ human rights obligations) and strategies for research, analysis, and country assistance that support the integration of human rights into Bank work on empirical or instrumental grounds. (The structural preconditions for the Bank’s effective and objective fulfillment of these human rights responsibilities are addressed in the concluding section.)

The rationale to “do no harm”—i.e., the obligation to respect, if not also protect human rights entitlements in force at the national level—can be argued to constitute the non-discretionary core of the Bank’s own obligations as a subject of international law.<sup>43</sup> If we take environmental obligations as an analogue, this is an obligation that few would publicly dispute, although there may be technical challenges to

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<sup>41</sup> G. Perez de Castillo, H. Lund Madsen, and R. Ring, “HURIST Evaluation Mission Report, May-July 2005 (1 August 2005),” internal UNDP-MDGD document, 4.

<sup>42</sup> *Ibid.*, 5.

<sup>43</sup> See footnote 11.

adapting existing social assessment methodologies (whether *ex ante* or *ex post* at both the policy and project level) to meet human rights requirements. Beyond the Bank's methodological work on "Poverty and Social Impact Analysis" (PSIA),<sup>44</sup> the obligation not to violate human rights can be examined with respect to the Bank's conditionality policies and lending practices. While it is impossible to do justice to so vast and complex a topic as human rights conditionality in the present paper, a cursory survey of the Bank's recent stances on issues of human rights and governance in Chad, Cambodia, Ethiopia, Uzbekistan, Kenya, and the occupied Palestinian Territories seems to suggest a fairly well-developed concern to avoid becoming complicit in the human rights violations of borrowing countries.

In certain cases, the international human rights obligations of borrowing countries have also forced their way onto the agenda of the World Bank's Inspection Panel, notwithstanding the relative lack of explicit human rights content in Bank operational policies. The Chad/Cameroon pipeline case is perhaps the most striking and controversial example of this intrusion of human rights concerns into the Bank's work.<sup>45</sup> In addition, the emerging practice and discourse of asserting human rights claims directly against the Bank, be it through national or regional tribunals or international mechanisms, brings the do-no-harm obligation center stage in a very compelling way.<sup>46</sup>

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<sup>44</sup> See Poverty and Social Impact Analysis page on World Bank website, <http://www.worldbank.org/psia> (accessed February 13, 2006).

<sup>45</sup> Of note, the World Bank Inspection Panel observed that: "It is not within the Panel's mandate to assess the status of governance and human rights in Chad in general or in isolation, and the Panel acknowledges that there are several institutions (including UN bodies) specifically in charge of this subject. However, the Panel felt obliged to examine whether the issues of proper governance or human rights violations in Chad were such as to impede the implementation of the Project in a manner compatible with the Bank's policies ... The Panel differentiates the approach of Management which is to accept the legitimacy of human rights considerations only so far as they affect economic development. Nevertheless the Panel confine themselves to examining the conformity of the Bank's behaviour with regards to its own policies, the human rights dimension goes to inform the issue of the Bank's conformity with its own policies. Human rights are not considered as a policy as such. This is not surprising given the Panel's actual mandate, but the report demonstrates how far the Management are being asked to move away from an approach which only incorporates human rights considerations when they threaten development." See Andrew Clapham, 2006, *Human Rights Obligations*, 154-5.

<sup>46</sup> With respect to regional tribunals, the Chixoy Dam case in Guatemala, a case before the Inter-American Commission on Human Rights concerning allegations of complicity

With these issues in mind, it may seem odd that successive general counsels of the Bank have to date failed to grapple explicitly with the nature and content of the obligations incumbent upon the Bank under international human rights law. Neither have they addressed the substantive criteria and processes that should guide the Bank's country dialogues, advocacy efforts, and lending decisions (including decisions to suspend lending), with all the delicate political implications and difficult trade-offs that such criteria and policies would entail. The fact that the former general counsel of the IMF, François Gianviti, chose to venture out on this limb, whatever the merits of his arguments, makes for a striking comparison.<sup>47</sup>

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by the Bank in acts of forced displacement and violent repression perpetrated by the borrowing government, provides a good example. See Bretton Woods Project, "World Bank Accountability: Demand for Reparations Won't Go Away," *Bretton Woods Update*, no. 43 (November–December 2004), 1,3 <http://www.brettonwoodsproject.org/update/43/bwupdt43.pdf> (accessed February 13, 2006).

During the 2004 annual meeting of the World Bank, former President Wolfensohn reportedly indicated that the Bank was ready to be actively involved in negotiations between the Guatemalan government and villagers on the issue of reparations. And in September 2005, two complaints were brought against the IFC and MIGA to the Inter-American Commission on Human Rights which alleged breaches of IFC and MIGA social safeguards, together with human rights violations under international treaties connected with paper mill projects in Fray Bentos, Uruguay. See Bretton Woods Project, "Using Human Rights Tribunal to Force Bank Compliance: Uruguay Paper Mill," *Bretton Woods Update*, no. 49 (January–February 2006), <http://www.brettonwoodsproject.org/update/49/bwupdt49.pdf>, 3 (accessed July 18, 2006).

For an innovative analysis of the possibilities of international mechanisms for the resolution of human rights claims against multilateral institutions, see Namita Wei, "Human Rights Accountability of the IMF and the World Bank: A Critique of Existing Mechanisms and Articulation of a Theory of Horizontal Accountability," *International Journal of Civil Society Law* IV, no. 1 (January 2006):19–80, <http://www.law.cua.edu/students/orgs/ijcsl/IJCSL4.1%20PDF.pdf> (accessed February 13, 2006).

<sup>47</sup> François Gianviti, "Economic, Social and Cultural Human Rights and the International Monetary Fund," paper presented at an IMF conference in Washington, DC, May 7–17, 2002, <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf> (accessed February 13, 2006). For a critique of the substance of the arguments of Gianviti, former General Counsel of the IMF, see Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law* (Portland, OR: Hart Publishing, 2003), 133–8; and Clapham, 2006, *Human Rights Obligations*, 145–9.

The World Bank's legal doctrine is considerably stronger on the question of how far the Bank may lawfully go in responding to borrowing countries' requests for technical or financial support for human rights, as well as on how to integrate human rights more explicitly into the Bank's operational and lending activities for the sake of improved and sustained development outcomes.<sup>48</sup> To this end, the World Bank Institute, the Bank's thematic networks and its policy research units are laying out an increasingly solid set of empirical foundations for human rights work.<sup>49</sup> The Bank's Gender Network, moreover, has taken an active role in identifying the importance of the normative human rights framework (especially the standards and processes of the Convention on the Elimination of Discrimination Against Women, or CEDAW) in policy research work, with a strong emphasis on ensuring equal access to property rights, as well as the institutional and legal frameworks needed for women's empowerment.<sup>50</sup>

To some degree, the Bank's lending activities explicitly reflect human rights entitlements and obligations in specific areas. For example, HIV/AIDS projects in certain parts of the world seem driven by a blend of "principled" and instrumental concerns.<sup>51</sup> Human rights have also begun to be explicitly featured in a number of Poverty Reduction Strategy Papers (PRSPs)<sup>52</sup> and, less frequently, Bank staff appraisals,

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<sup>48</sup> See Dañino, 2006, "Legal Aspects of the World Bank's Work," in this volume.

<sup>49</sup> See notes 26, 27, and 31 plus the text to which they refer.

<sup>50</sup> See World Bank, "Integrating Gender into the Bank's Work: A Strategy for Action," World Bank, Washington, DC, 2002, <http://siteresources.worldbank.org/INTGENDER/Resources/strategypaper.pdf> (accessed February 13, 2006). For a general discussion of the rationale for integrating gender within the Bank's work on land reform issues, see Karen O. Mason and Helene M. Carlsson, "The Development Impact of Gender Equality in Land Rights," in *Human Rights and Development* (see note 11), 2005, 114–132. However, as Kerry Rittich argues, a human rights perspective makes it critical to look beneath the legal and institutional reform project and examine the ideological biases that underpin such reforms and the different ways in which women and men are impacted in different contexts. See Kerry Rittich, "The Properties of Gender Equality," in Alston and Robson, *Human Rights and Development*, 87–113.

<sup>51</sup> See Darrow, 2003, *Between Light and Shadow*, 158–65.

<sup>52</sup> Examples of Poverty Reduction Strategy Papers (PRSPs) of the World Bank that take human rights explicitly into account are those for Rwanda and Serbia and Montenegro, available at, respectively, [http://povlibrary.worldbank.org/files/Rwanda\\_PRSP.pdf](http://povlibrary.worldbank.org/files/Rwanda_PRSP.pdf), and [http://www1.worldbank.org/prem/poverty/strategies/cpapers/serbia\\_prsp.pdf](http://www1.worldbank.org/prem/poverty/strategies/cpapers/serbia_prsp.pdf) (accessed July 19, 2006). However, practical impacts are another matter entirely, as recent evaluations

in addition to country analytical work, assistance strategies and portfolio performance reviews.<sup>53</sup> While these are the exceptions rather than the norm, the Bank's "Country Policy and Institutional Assessment" (CPIA) tool, a rating instrument for annual assessments of the quality of policy and institutional performance of International Development Association (IDA) client countries, includes indicators for gender equality, as well as CEDAW ratification and implementation.<sup>54</sup> The systematic

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reveal. See, for example, Frances Stewart and Michael Wang, "Poverty Reduction Strategy Papers within the Human Rights Perspective," in Alston and Robison, *Human Rights and Development*, 447–76; and World Bank and IMF, "2005 Review of the Poverty Reduction Strategy Approach: Balancing Accountabilities and Scaling Up Results," World Bank and IMF, Washington, DC, 2005, [http://siteresources.worldbank.org/INTPRSP1/Resources/PRSP-Review/2005\\_Review\\_Final.pdf](http://siteresources.worldbank.org/INTPRSP1/Resources/PRSP-Review/2005_Review_Final.pdf) (accessed February 13, 2006).

<sup>53</sup> The World Bank's review of its Nepal portfolio outlines a catalogue of civil and political rights violations that are pertinent to Bank-supported operations. See World Bank, "Nepal Portfolio Performance Review (NPPR) 2005: Background Report (September 14–16, 2005)," Nepal Country Office, World Bank, [http://siteresources.worldbank.org/INTNEPAL/147270-1126878808062/20650216/NPPR2005Report\(Complete\).pdf](http://siteresources.worldbank.org/INTNEPAL/147270-1126878808062/20650216/NPPR2005Report(Complete).pdf) (accessed February 13, 2006), 10.

The Bank PRSP for Nepal (2002–2007) has, however, been criticized as "conflict blind." See Swiss Agency for Development and Cooperation (SDC), *Swiss Development Strategy for Nepal, 2005–2008* (Berne, Switzerland and Kathmandu, Nepal: SDC, 2005), [http://www.sdc.admin.ch/ressources/resource\\_en\\_63998.pdf?userhash=49575e21707bc8abfe5b7ea334582399](http://www.sdc.admin.ch/ressources/resource_en_63998.pdf?userhash=49575e21707bc8abfe5b7ea334582399), 9–12 (accessed March 15, 2006). See also the Bank's own review of the document: World Bank, "Nepal—Poverty Reduction Strategy Paper (PRSP); Joint Staff Assessment," World Bank Report No. 26674-NEP, International Development Association and the International Monetary Fund, Washington, DC, October 16, 2003, [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/10/27/000090341\\_20031027111013/Rendered/PDF/266740NEP.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/10/27/000090341_20031027111013/Rendered/PDF/266740NEP.pdf) (accessed July 12, 2006). Similar shortcomings are evident in the U.N. report, *Nepal Millennium Development Goals: Progress Report 2005* (Kathmandu, Nepal: His Majesty's Government of Nepal/ United Nations Country Team of Nepal, 2005), [http://www.undg.org/documents/6563-Nepal\\_MDG\\_Progress\\_Report\\_2005.pdf](http://www.undg.org/documents/6563-Nepal_MDG_Progress_Report_2005.pdf) (accessed March 15, 2006).

For an alternative approach to development policy in Nepal that focuses more explicitly on human rights and working in—and on—conflict, an approach that links development with conflict transformation, see SDC, 2005, *Swiss Development Strategy for Nepal*, especially 9–12.

<sup>54</sup> See World Bank, "Country Policy and Institutional Assessments: 2004 Assessment Questionnaire, Operations Policy and Country Services," World Bank, Washington,

application of a tool such as CPIA no doubt brings human rights—women’s rights in particular—more consistently within the framework of country analytical work. However, the selectivity of the rights included in the CPIA, along with the difficulty of objective interpretation, pose challenges to the legitimacy and effectiveness of the tool vis-à-vis human rights. Systematic disclosure of CPIAs is necessary, to bring all such issues to light.

### **Integrating Human Rights at the Project Level**

Much learning has been underway in the United Nations that could benefit the World Bank and other development organizations as they re-orient their development programming. The most pertinent lesson derived from experience so far is, perhaps, also the most obvious: the operationalization of human rights in development work depends on the context.<sup>55</sup> The joint OHCHR/UNDP<sup>56</sup> “Human Rights Strengthening (HURIST)” program, for example, developed and piloted a methodology to review UNDP country programs from a human rights perspective. Evaluations conducted in 2005 revealed much about the prerequisites, benefits, and possible pitfalls of a human rights-based approach to development.<sup>57</sup> Over the years, UNICEF (the United Nations International Children’s Emergency Fund) has generated distinctive human rights programming approaches in different regions. These approaches have been tailored to the context of community level development programming (East and Southern Africa); legal, institutional, and social policy reform (Latin America); and State accountability and systems change (Europe and the Commonwealth of Independent States).<sup>58</sup>

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DC, 2004, <http://siteresources.worldbank.org/IDA/Resources/CPIA2004questionnaire.pdf> (accessed February 13, 2006), 20–22.

<sup>55</sup> See, for example, Laure-Hélène Piron and Tammy O’Neil, *Integrating Human Rights into Development: A Synthesis of Donor Approaches and Experiences*, report prepared for GOVNET (DAC Network on Governance) (Paris: OECD, 2006), <http://213.253.134.29/oecd/pdfs/browseit/4306091E.PDF> (accessed July 18, 2006); and Darrow and Tomas, “Power, Capture, and Conflict,” 2005.

<sup>56</sup> UNDP—United Nations Development Programme, OCHCR—Office of the United Nations High Commissioner for Human Rights.

<sup>57</sup> Perez de Castillo, Madsen, and Ring, 2005, “HURIST Evaluation Mission Report.”

<sup>58</sup> For a sampling of experiences and results to date, see Urban Jonsson, *Human Rights*

Of particular relevance to the Bank is a recent series of case studies by the IFC Compliance Advisor Ombudsman (CAO). These case studies map out the main human rights issues that would come to light in a CAO appraisal if an IFC project team were asked to address human rights issues related to a typical mining project.<sup>59</sup> While the dominant focus of the cases is on “due diligence” criteria linked to host country human rights obligations under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the analysis considers direct applications of a human rights approach to Bank-supported projects and lending activities.

The CAO analysis begins at the stage of project planning and situation analysis. As former IFC head Peter Woicke writes, “respect for human rights by both governments and the private sector is increasingly recognized as playing an important role in improving the stability necessary for a vibrant private sector.”<sup>60</sup> The CAO

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*Approach to Development Programming* (Nairobi: UNICEF, 2003); Caroline Moser and Annalise Moser, “Moving Ahead with Human Rights: Assessment of the Operationalisation of the Human Rights Based Approach in UNICEF Programming,” internal UNICEF document, 2003 (on file with author); Joachim Theis, “Consolidation and Review of the Main Findings and Lessons Learned of the Case Studies on Operationalizing HRBAP in UNICEF,” internal UNICEF report, 2004 (on file with author); Yulia Pripalova Krieger, “Human Rights and Poverty Reduction Strategy Paper (PRSP) in Bosnia and Herzegovina,” UNICEF, Bosnia and Herzegovina, 2003 (internal draft on file with author).

Also see the summary of Mahesh Patel’s presentation at the OHCHR workshop, September 21–25, 2005, Bangkok, Thailand, in “Lessons Learned from Rights-Based Approaches in the Asia-Pacific Region; Workshop Report of the September 2005 Regional Consultation of the Lessons Learned Project,” Asia-Pacific Office of the OHCHR, Bangkok, Thailand, 2005, 34–8, <http://regionalcentrebangkok.undp.or.th/practices/governance/a2j/docs/FinalLLPConsultationReport2005.pdf> (accessed February 14, 2006). His remarks show how UNICEF’s country programming strategy in Costa Rica was radically re-focused following the adoption of a human rights-based approach linked to the principles and standards contained in the U.N. Convention on the Rights of the Child.

<sup>59</sup> Woicke, 2005, “Putting Human Rights Principles into Development Practice,” 335–50.

<sup>60</sup> *Ibid.*, 338. Reviewing a litany of human rights ills in an unnamed project country, the Compliance Advisor Ombudsman (CAO) of the IFC concluded that “[t]he host country is not in the group of pariah states, but it nonetheless has a well-recognized poor human rights record. IFC would not be expected to forgo investments there on the basis of the country’s human rights record alone, as doing so would deprive the local population of much-needed investment and development,” *Ibid.*, 340.

cases examine, for example, how to approach interactions with an authoritarian government, including attempting to limit the government's role in the project; undertaking a human rights risk analysis and a conflict analysis; establishing a forum for raising human rights concerns connected with governmental action and conflicting rights and interests over natural resources; instituting "best-practice" revenue management processes; and taking strategic opportunities to raise human rights concerns directly with the host government. The CAO directly reviewed IFC compliance with numerous international human rights standards, including the right to adequate housing (and safeguards against forced evictions), rights to free speech, assembly and freedom of association, and rights connected with labor, health, non-discrimination, participation and personal security. Its conclusions on the accountability mechanisms that are needed to implement such standards were especially pertinent, given that an adequate response to a complaint presupposes the existence of "the policies, management system, and monitoring system to track ... performance against ... human rights issues ... and to address new issues raised in an appropriate manner."<sup>61</sup>

Not all of these observations are new, of course, and indeed some of the CAO findings have been recognized within the Bank's own projects and lending activities. The Kecamatan Development Project (KDP), which operates in 28,000 villages across Indonesia, is one such example. The project seeks to improve the political agency of marginalized groups and to integrate practical mechanisms to address project and non-project conflicts at the local level.<sup>62</sup> Reviewing aspects of the Bank's village justice experience in Indonesia, Philip Alston suggests that human rights accountability can be further advanced through means such as: (a) the identification at the local level of minimum performance standards through participatory processes underpinned by mechanisms of redress; (b) integrating human rights standards within performance or delivery targets; and (c) incorporating human rights education within community mobilization strategies in order to strengthen the demand side of the equation.<sup>63</sup>

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<sup>61</sup> *Ibid.*, 350; for text that addresses how to engage an authoritarian government, see 341–2.

<sup>62</sup> The project is discussed in World Bank, 2005, *World Development Report 2006*, 50, 71.

<sup>63</sup> Philip Alston, comments at the New York University Ethical Globalization Initiative forum, "The World Bank and Human Rights," March 1, 2004, New York. For documentation on the Indonesia village justice program, see World Bank, "Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance," World Bank

In 2005, the Bank's legal department began drafting a matrix that mapped each human right reflected in the "International Bill of Rights" (i.e., the UDHR, ICESCR and ICCPR<sup>64</sup>) against those World Bank policies and practices ostensibly connected with the right. The matrix was an attempt to map the linkages between the human rights obligations of World Bank members and the Bank's development work, as well as between human rights and development more generally. For example, the right to hold opinions without interference (ICCPR Article 19) is mapped against the consultation requirements of the World Bank in Operational Policies on Environmental Assessment (4.01), Natural Habitats (4.04), Indigenous Peoples (4.20) and Involuntary Resettlement (4.12), as well as practices such as "access to information, public information, Economic and Sector Work (ESW), public information centers, education and dissemination of environmental assessment and other reports."<sup>65</sup>

As useful a tool as the matrix might be for revealing to the uninitiated areas of thematic overlap between the Bank's work and internationally recognized human rights, it should not be mistaken as a tool for analysis. Granted, there is a serious communications challenge to be overcome if human rights are to take hold within alien or agnostic institutional settings and organizational cultures. If experience elsewhere is any guide, however, great care is needed to avoid framing the human rights agenda in terms that imply mere fine-tuning of "business as usual," re-labeling, or rhetorical re-packaging is all that is required. To the contrary: the human rights compatibility of development projects cannot possibly be assessed in the abstract, especially when individual projects are part of larger packages of reforms. Too many putative "rights-based" analyses of development activities—especially at the project level—fail to penetrate rhetorical or technocratic realms and reach substantive and structural levels of analysis. That is, they fail to examine in depth such issues as how development initiatives are conceived, who owns and

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Social Development Unit, Indonesia, February 2004: <http://siteresources.worldbank.org/INTINDONESIA/Resources/Publication/04-Publication/VillageJustice+.pdf> (accessed February 14, 2006).

<sup>64</sup> UDHR—Universal Declaration of Human Rights (1948), ICESCR—International Covenant on Economic, Social, and Cultural Rights (1966), ICCPR—International Covenant on Civil and Political Rights (1966).

<sup>65</sup> Dañino, 2006, "Legal Aspects of the World Bank's Work."

implements them, whether the poorest of the poor are engaged in and benefit from them, whether systems of accountability are strengthened or weakened thereby, as well as the nature of countervailing externalities and internal contradictions within the wider development policy agenda, and the functional indivisibility and inter-relatedness of all human rights. Without deeper and more systematic *ex ante* and *ex post* analysis at these levels, the significance of human rights can too easily be reduced to window dressing.

Finally, while this discussion has principally focused on human rights claims and obligations at the national level (that is to say, the claims of individuals against the state as principal duty bearer, as reflected in international human rights treaties), one cannot speak meaningfully or convincingly of a “rights-based approach to development” without addressing human rights obligations at the international level.<sup>66</sup> Granted, identifying specific lines of legal accountability at this level can be problematic, although international law may well be evolving in line with such demands.<sup>67</sup> The implementation gaps in the areas of trade (especially agricultural

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<sup>66</sup> For a discussion on international responsibilities, see Louise Arbour, “Using Human Rights to Reduce Poverty,” in World Bank Institute, *Development Outreach*, February 2006, <http://www1.worldbank.org/devoutreach> (accessed February 14, 2006); and ICHRP, *Duties San Frontières: Human Rights and Global Social Justice* (Versoix, Switzerland: 2003).

<sup>67</sup> On the status of MDG 8 (“Global partnership for development”) under international law, see Philip Alston, “Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals,” *Human Rights Quarterly* 27, no. 3 (August 2005), 775–8. At its seventh session in January 2006, the Working Group on the Right to Development (an open-ended, inter-governmental expert body established by the U.N. Commission on Human Rights) developed a recommended set of criteria to be applied to the periodic evaluation of development partnerships. See U.N. Commission on Human Rights, “Right to Development: Report of the Working Group on the Right to Development on its Seventh Session (Geneva, 9–13 January 2006),” U.N. Doc. E/CN.4/2006/26, U.N. Commission on Human Rights, 62nd Session, February 22, 2006, <http://daccessdds.un.org/doc/UNDOC/GEN/G06/110/34/PDF/G0611034.pdf?OpenElement> (accessed July 12, 2006). A background paper for the session provides valuable suggestions on how the indicators for MDG 8 could be supplemented in order to meet human rights demands. See “Millennium Development Goal 8 : Indicators for Monitoring Implementation,” background paper prepared by Sakiko Fukuda-Parr for the seventh session of the U.N. Working Group on the Right to Development,” U.N. Doc. E/CN.4/2005/WG.18/TF/CRP.2 (2005), U.N. Commission on Human Rights, 62nd Session, <http://www.ohchr.org/english/issues/development/docs/crp2.doc> (accessed February 13, 2006).

trade) are, however, of shameful dimensions, as outlined in the UNDP *Human Development Report 2005*.<sup>68</sup> There are no easy answers or template approaches to such problems. Surely a minimum requirement from an economic, as well as a human rights standpoint, should be the empowerment of stakeholders and legitimate decision-making authorities at the national level so that they can understand and participate effectively in macroeconomic policy debates, thus genuinely widening the frame of policy options.

## Conclusions

A nascent yet intriguing human rights mosaic seems to be emerging from the empirical research, policy research, and operational activities of the World Bank. While the present survey is far from comprehensive, it suggests that the Bank may not need to look far beyond its own walls to answer the “why, what, and how” questions of mainstreaming human rights in its work. Whether incidentally or by design, many such questions are already actively being addressed by certain research and policy units and, to a more limited extent, operational areas (with backing from the Nordic-Baltic Executive Directors and a number of senior Bank officials).<sup>69</sup> The directions highlighted in this article find common cause with U.N. efforts to discharge of its own international human rights responsibilities in a more coherent and effective manner. The comparative experiences of the IDB and IFC are also relevant to the directions in which the Bank’s human rights mandate might evolve in the future.

This article has made a conscious effort to avoid the term “human rights-based approach to development” when describing certain aspects of the work of the World Bank. This restraint might seem odd at first blush, as it appears to contradict the stated thesis of the article. However, the approach taken here was intended to

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<sup>68</sup> UNDP, *Human Development Report: International Cooperation at a Crossroads* (Oxford: Oxford University Press, 2005), chapters 3 and 4, especially 171.

<sup>69</sup> Former president of the World Bank James Wolfensohn raised the issue of human rights in the joint World Bank-IMF Development Committee in 2005 and actively facilitated exploratory work in this field. Support for this approach has come from a number of World Bank Vice-Presidencies, most notably, of Legal Affairs, Environmentally and Socially Sustainable Development, the World Bank Institute, the Poverty Reduction Group, External Relations, and in particular, the World Bank’s Special Representative to the United Nations and The World Trade Organisation. Personal conversations of the author with World Bank personnel.

underscore the fact that terms, or labels, are at best a secondary issue, and at worst, can discourage analysis at levels at which it is most sorely needed. The threshold question posed at the outset of this article was: “*Why* integrate human rights explicitly into development?” The author has argued that the injunction to do no harm—i.e., the obligation to respect, if not protect, human rights entitlements in force at the national level—are the non-discretionary core of the Bank’s own obligations as a subject of international law. This injunction requires, at a minimum, more systematic adherence to social safeguard policies and additional *ex ante* and *ex post* Poverty and Social Impact Analyses (PSIAs). The full spectrum of international human rights commitments and the relevant jurisprudence of human rights treaty bodies must be factored into social assessments, Country Policy and Institutional Assessments (CPIAs), and country analytical work. Objective and transparent human rights criteria need to be included in World Bank country dialogues, as well as its policies and practices concerning conditionality, to safeguard Bank credibility, consistency, legitimacy, and effectiveness.<sup>70</sup> Whether for instrumental or principled reasons, or to manage political or reputation risks, human rights dialogues and “conditionalities” (writ large) are an increasingly visible feature of Bank work at the country level and seem likely to remain so.

The instrumental justifications for integrating human rights into development interventions that are emerging from the Bank’s work signal a potentially wider programmatic scope for integration. This broader field of integration can be seen in the deliberate and dynamic interpretation of the Bank’s Articles of Association by the former general counsel, Roberto Dañino, which appears earlier in this volume. However, the Bank’s engagement with human rights should be strategic and cautious, driven by principles as well as instrumental justifications. The experience of the UN to date has revealed many structural obstacles to this integration, including challenges in ensuring consistent leadership, problems of organizational culture, internal disincentives including pressures for rapid disbursement, political resistance, conflicting donor agendas and policy demands, and the challenges of adapting internal accountability and evaluation systems to include human rights criteria. All of these obstacles must be tackled head on if an agenda as challenging as a human rights-based approach to development is to take hold.<sup>71</sup>

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<sup>70</sup> For suggestions along these lines, see Anna Würth and Frauke Lisa Seidensticker, *Indices, Benchmarks, and Indicators: Planning and Evaluating Human Rights Dialogues*, trans. Peter Jaschner (Berlin: German Institute for Human Rights, 2005).

<sup>71</sup> Internal evaluations and assessments carried out to date have, to varying degrees, identified inadequate “core” development programming competences as a constraint within different

In the case of the World Bank, the pressure to disburse loans has for many years been identified as an obstacle both to reform and the more consistent implementation of social safeguard policies.<sup>72</sup> The pressures under which the Inspection Panel of the Bank has operated are testimony to this fact,<sup>73</sup> as, arguably, is the fact that the Bank's new "Operational Policy on Development Policy Lending" (OP 8.60) does not require observance of the Bank's own safeguard policies. Moreover, the relative dominance of a handful of shareholders on the Executive Board of the World Bank, and the geopolitical fault lines within that board, present serious challenges to the impartial and effective discharge of program responsibilities in the contested domain of human rights.

These factors may well constrain how far the Bank may ultimately be able to go in adopting an explicit programmatic human rights role beyond minimum non-discretionary responsibilities. It bears remembering that the human rights issues discussed in this article cannot be considered in isolation either from structural constraints or political and ideological debates, both of which also influence the Bank's role as a knowledge broker.<sup>74</sup> Far greater support is needed to build national

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agencies. The additional demands of a human rights-based approach, including advanced analytical skills, institutionalizing meaningful and sustained participation, transcending a "service delivery" orientation, reaching the most marginalized populations, adapting monitoring and evaluation systems to human rights standards, exploring innovative partnerships, working across sectors, and integrating necessary internal and external accountability mechanisms, can seem especially daunting in such circumstances.

<sup>72</sup> See World Bank, "Memorandum R92-125: Effective Implementation; Key to Development Impact," November 3, 1992, as cited in Darrow, *Between Light and Shadow*, 2003, 196–201.

<sup>73</sup> *Ibid.*, 224–5.

<sup>74</sup> The Inspection Panel is a quasi-judicial review body established by a resolution of the Bank's Executive Board to oversee compliance by the World Bank with its operational policies. Responding to an Independent Evaluation Group report critical of the Bank's role on trade issues, the Committee on Development Effectiveness of the Board of Directors called for the Bank to make better use of external knowledge resources and analyses, which could enhance and even substitute for in-house research: See Bretton Woods Project, "Over-optimistic about Trade Liberalisation: Bank Trade Evaluation," *Bretton Woods Update*, no. 50 (March–April 2006), 8, <http://www.brettonwoodsproject.org/update/50/bwupdt50.pdf> (accessed April 15, 2006).

For more extensive critiques of the Bank's knowledge management role, see Michael Goldman, *Imperial Nature: The World Bank and Struggles for Social Justice in the Age*

and local capacity for knowledge generation, as well as for data collection, monitoring, and analysis. In addition to capacity constraints, however, the political obstacles to weak information systems must also be confronted, using broad coalitions of national and international stakeholders. To the extent of its policy influence, the Bank in many cases may be positioned to take a lead in such coalitions.

Finally, accessible accountability mechanisms should become a central feature of the development policy agenda. These mechanisms serve to voice the grievances that inevitably arise when the people who are the target beneficiaries of development projects are given a say in decisions on development trade-offs. While accountability mechanisms at the national and local level are of most immediate importance, equal attention is needed at the international level—where the democratic deficit is often most pronounced—in terms of strengthening existing grievance mechanisms and searching for new ones.<sup>75</sup>

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## **EQUITY, DEVELOPMENT, AND THE WORLD BANK: CAN ETHICS BE PUT INTO PRACTICE?**

DESMOND MCNEILL\*

*This article addresses certain ethical issues concerning the role of the World Bank which arise from the World Development Report 2006: Equity and Development. First, it discusses the extent to which the report argues the case for equity on intrinsic or instrumental grounds, suggesting that it is ambivalent in this regard. The article argues that the Bank tends to favor the more cautious instrumental approach, a preference in line with the more general tendency of the Bank to avoid discussions of ethics. It further argues that this tendency may be related to issues of responsibility for global poverty and responsibility for economic advice.*

*The article examines the claim that the World Bank, as a powerful multilateral organization, shares responsibility for the way in which the international economic system works. Since this system fails to deliver for many of the world's poor, this claim holds that the Bank therefore shares responsibility for causing, by commission or omission, the widespread poverty that exists. The article specifically addresses the advice given to poor countries and asks whether the Bank should acknowledge responsibility for such advice in cases where this advice is misguided.*

*The World Development Report 2006 (hereafter, WDR 2006) is quite outspoken in its criticism of the international rules of the game. This criticism has implications for overarching issues of politics, governance, and organizational culture. It also raises questions about the relationship between the World Bank, International Monetary Fund, and World Trade Organization, as well as between the World Bank staff and its Board of Executive Directors. Ultimately, this criticism leads to the question: Who runs the World Bank and for whose benefit? The article concludes that the Bank need not be a conservative force. It could instead open up, and even encourage, change, as its former general counsel Roberto Dañino has shown. Laws and mandates need not necessarily hinder moral awareness; they can instead promote it.*

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\* The author is extremely grateful for the comments and advice received from colleague Asuncion Lera St. Clair of the University of Bergen, Norway, Caroline Sage, and two anonymous reviewers while preparing this paper.

## Introduction

This article addresses certain ethical issues that arise from the World Bank's *World Development Report 2006: Equity and Development* (hereafter, WDR 2006). These issues are fundamental, so fundamental perhaps, that they are difficult to connect to the everyday policies and activities of a development agency like the World Bank. The term "development agency" is used here to underline the task of the Bank to promote the well-being of the world's poor, whereas that of multilateral organizations, such as the World Trade Organization (WTO) and the International Monetary Fund (IMF), is to ensure the smooth working of the global system of trade and finance (a task that may or may not promote the same goal). Some readers might dispute this claim. The *Articles of Agreement* of the IMF and World Bank were written 60 years ago and now only imperfectly match the current practice of these organizations, which has, necessarily, changed considerably in response to dramatically changing world conditions. By contrast, the WTO is a far more recent organization. Although its roots also go back more than half a century, its explicit mandate is to organize multilateral trade negotiations so as to reduce tariff and non-tariff barriers to trade.<sup>1</sup>

The main focus of this article is the World Bank, which, the text suggests, is in a rather special position. The Bank is owned and controlled by its shareholders, which are predominantly rich countries. However, its task is to benefit the poor—predominantly in poor countries. One might say that the World Bank is formally accountable to its Board, but morally accountable to the poor of the world. To quote President Wolfowitz's address at the Bank's annual meeting in September 2005:

Whether investing in education, health, infrastructure, agriculture, or the environment, we in the World Bank must be sure that we deliver results. And by results, let me be clear. I mean results that have a real impact on the daily lives of the poor. *We stand accountable to them.*<sup>2</sup>

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<sup>1</sup> For a more elaborate comparison of the mandates and tasks of these three organizations, see Morten Bøås and Desmond McNeill, *Multilateral Institutions: A Critical Introduction* (London: Pluto Press 2003).

<sup>2</sup> Paul Wolfowitz, "Charting the Way Ahead: The Results Agenda," address at the annual meeting of the World Bank and IMF, September 24, 2005, Washington, DC, emphasis added, <http://web.worldbank.org/WBSITE/EXTERNAL/NEWS/0,,contentMDK:20659654~menuPK:34472~pagePK:34370~piPK:34424~theSitePK:4607,00.html> (accessed July 28, 2006).

This article raises fundamental questions and suggests that if there is to be substantial change in the policies and practices of the World Bank, there will need to be substantial changes in its culture. Although the article may be interpreted as a challenge to the Bank, two introductory points are in order. First, the World Bank should be given due credit for addressing the issue of equity at all in its flagship document, the *World Development Report*. One may have wished that it had done so earlier and could argue that the WDR 2006 treats these issues in a rather cautious manner. The report nevertheless represents a definite move in the right direction. Second, the Legal Department of the World Bank also deserves credit, both for its active involvement in the WDR and for organizing the Legal Forum in December 2005 as a follow-up to the report.

In his opening remarks at that meeting, then Senior World Bank Vice-President and General Counsel Robert Dañino asserted that not only was a focus on equity essential for the development and reform of legal and judicial systems themselves, but that

[L]egal and regulatory systems underpin and govern market and non-market interactions that are central to all other areas of development. Laws shape the distribution of rights and responsibilities in all areas of our work as development practitioners—from people's rights to health care and education, to the rules that govern international trade and the protection of human rights.<sup>3</sup>

This is a welcome recognition of the significance of law and the potential role of the Legal Department of the World Bank, which, as Dañino noted, has recently become quite active. Dañino, who has since left the Bank, noted that the Legal Department was re-examining provisions of the *Articles of Agreement* regarding the Bank's work in human rights and drafting a legal opinion to provide a more enabling environment for this work.

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<sup>3</sup> Roberto Dañino, "Opening Remarks," World Bank Legal Forum, December 1, 2005, Washington, DC, <http://siteresources.worldbank.org/INTLAWJUSTICE/214576-1139604306966/20817193/LegalForum2005.pdf> (accessed July 28, 2006).

### The WDR 2006: A Foundation for Broadened Responsibility?

The WDR 2006 is divided into three parts. Part I considers the evidence on inequality of opportunity within and across countries. Part II asks why equity matters.<sup>4</sup> Part III addresses how public action can level the political and economic playing fields in both the domestic and international arenas. The report is noteworthy for addressing political issues more explicitly than has often been the case in this annual publication, and in World Bank reports more generally.<sup>5</sup> The language is occasionally unusually strong for a WDR; to cite a few examples:

We show that the inequalities between countries are staggering despite some improvements over time.<sup>6</sup>

A country's power in decision making in multilateral banks is usually correlated with its economic strength. Even when each country has equal representation in an international body, such as the United Nations system or the World Trade Organization (WTO), powerful forces can chisel away at developing country interests (through separate bilateral agreements, for example).<sup>7</sup>

[P]olitical and economic elite interests often coincide at the expense of a disempowered majority.<sup>8</sup>

The report uses the term "elite capture" several times, a phrase that reflects the explicit inclusion of political issues in the analysis. The report also contains a

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<sup>4</sup> The text of this section of the report was significantly changed from earlier drafts, including the title, which was formerly "Does Equity Matter?" and not the final, "Why Equity Matters."

<sup>5</sup> The leaders of the core team that wrote the World Development Report, Francisco Ferreira and Michael Walton, were even more outspoken in an earlier study by David de Ferranti et al., *Inequality in Latin America: Breaking with History?* World Bank Latin American and Caribbean Studies, no. 28989 (Washington, DC: World Bank, 2004), [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/06/22/000160016\\_20040622141728/Rendered/PDF/28989.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2004/06/22/000160016_20040622141728/Rendered/PDF/28989.pdf) (accessed July 28, 2006).

<sup>6</sup> World Bank, *World Development Report 2006: Equity and Development* (New York: Oxford University Press, 2005), 55.

<sup>7</sup> *Ibid.*, 66.

<sup>8</sup> *Ibid.*, 156.

statement that is of relevance to the issue of responsibility for economic advice:

Macroeconomic stability is a public good ... But the fact that stability is a public good does not mean that the incidence of benefits is equal .... [T]he distribution of income gains from economic growth is typically as unequal as the initial income distributions. Moreover, macroeconomic instability ... can have differential and potentially inequitable effects, because the pattern of power and wealth can influence the distribution of losses.<sup>9</sup>

The chapter on achieving greater global equity (chapter 10), which discusses the promotion of fairness in global markets (i.e., greater labor mobility, freer and fairer trade, intellectual property rights protection, financial market liberalization, etc.) may be described as cautiously hard-hitting.<sup>10</sup> To cite but two examples of this caution:

Greater global equity is desirable for itself to all those who find equity intrinsically valuable.<sup>11</sup>

This argument is circular: the statement is true simply by virtue of definition of the term “intrinsic.”

The international human rights regime testifies to the shared belief that all should have equal rights and be spared extreme deprivation. Some even argue that there is a powerful moral case for rich countries to take action, because of the huge disparities and (arguably) because they partly created and perpetuate global inequities.<sup>12</sup>

Here, the authors state the argument, but then seem to distance themselves from it. In other sections, however, the WDR 2006 is openly critical of the unfairness of the international “rules of the game” and the lack of free movement of labor.

In sum, the report addresses tissues of inequity, including inequalities in power and influence, at both the national and the international level (this article is par-

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<sup>9</sup> Ibid., 198.

<sup>10</sup> This cautiousness is no doubt the result of compromises in the editing of the text, which sometimes leads to rather incongruous wording.

<sup>11</sup> World Bank, 2005, *World Development Report 2006*, 206.

<sup>12</sup> Ibid. For precisely such an argument, see Thomas Pogge, “‘Assisting’ the Global Poor,” in *The Ethics of Assistance: Morality and the Distant Needy*, ed. Deen K. Chatterjee (Cambridge: Cambridge University Press, 2004), 260–88.

ticularly concerned with the latter). It combines fairly standard views with certain rather novel, even radical, perspectives—at least for the WDR. As is usually the case for this publication, it seeks to be rigorous in argument.<sup>13</sup> But the result is sometimes incoherent, as the report seeks to be acceptable to a wide audience by playing down conflicts and contradictions between different positions and having it both ways.<sup>14</sup>

### **An Intrinsic or Instrumental Case for Equity?**

Is the case for equity intrinsic or instrumental? What are the implications of these two arguments? As the terms imply, an intrinsic argument in favor of a principle or an action is one that necessarily follows from within. By contrast, an instrumental argument requires an objective that is possible to attain. In brief, the intrinsic argument for equity is that all human beings share a common humanity, which is the basis for moral judgments concerning how one, or the collective, should treat others. The instrumental argument is that increasing equity is an effective approach for the design and implementation of policies to promote development.

Although Part II of WDR 2006 contains very few explicit references to the word “intrinsic,” it does state, “To the philosophical and legal arguments for equity ... we add a final argument [the instrumental].”<sup>15</sup> This sentence implies that this part of the report emphasizes intrinsic arguments. It is interesting here to compare this text with the overview, which primarily emphasizes instrumental arguments for equity, even though it also asserts:

Why does equity matter for development?... Most people feel that such egregious disparities violate a sense of fairness, particularly when the individuals concerned can do little about them. This is consistent with the teachings of much political

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<sup>13</sup> Although informed by other disciplines, the arguments are predominantly couched in economic terms.

<sup>14</sup> In his generally favorable review of the report, John Roemer notes, “[T]he claim that improving equity is the best way to maximize ‘prosperity’ or GDP per capita is surely false. The easiest way to see this is to note that, except in singular situations, one cannot simultaneously maximize two objective functions.” (John E. Roemer, “Review Essay: *The 2006 World Development Report; Equity and Development*,” February 1, 2006, 10; <http://www.cuizhiyuan.cn/jr/RoemerWDR%20Review.doc> [accessed July 30, 2006]).

<sup>15</sup> World Bank, 2005, *World Development Report 2006*, 84.

philosophy and with the international system of human rights. The core moral and ethical teachings of the world's leading religions include a concern for equity, although many have also been sources of inequities and historically have been linked to unequal power structures. There is also experimental evidence suggesting that many—but not all—people behave in ways consistent with a concern for fairness, in addition to caring about how they fare individually.<sup>16</sup>

The report also emphasizes continuity and consistency by linking the overall argument for equity with the two pillars of Bank policy—"opportunity" and "empowerment"—set out in the *World Development Report 2000*. In fact, the 2006 publication clearly specifies:

This is not intended as a new framework. It means integrating and extending existing frameworks: equity is central both to the investment environment and to the agenda of empowerment ...<sup>17</sup>

It is consistent with earlier practice for the WDR to favor instrumental arguments concerning development.<sup>18</sup> Such arguments contrast with the practice of activist NGOs, but also, to some extent, with other international organizations, such as the United Nations Development Programme (UNDP) and the United Nations Education, Scientific, and Cultural Organization (UNESCO). There are a number of reasons, both intrinsic and instrumental, why it is appropriate for the World Bank to address issues of equity.<sup>19</sup> Some of these reasons are more relevant or more compelling for

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<sup>16</sup> Ibid., 7. The material quoted here includes a footnote that references Pogge.

<sup>17</sup> Ibid., 3–4.

<sup>18</sup> For a useful analysis of World Development Reports over the years, see E. Mawdsley and J. Rigg, "A Survey of the World Development Reports I: Discursive Strategies," *Progress in Development Studies* 2, no. 2 (April 2002):93–111; and "The World Development Report II: Continuity and Change in Development Orthodoxies," *Progress in Development Studies* 3, no. 4 (October 2003):271–86.

<sup>19</sup> The question of intrinsic or instrumental arguments applies to human rights as well as to equity. The former was the focus of a human rights workshop held in Oslo, Norway, in October 2004, at which the *World Development Report 2006* was presented in draft form. The arguments for equity and human rights have much in common. The case for human rights may be made in legal terms, which some would regard as an intrinsic argument: the nations of the world, in the name of their peoples, have committed themselves to a number of human rights conventions and these conventions apply equally to the World Bank. From a legal perspective, two issues concerning human rights responsibilities of

different audiences.<sup>20</sup> But it should not be assumed that instrumental arguments, by virtue of some supposed basis in fact, are superior; indeed, there are good grounds for believing that the reverse is the case: intrinsic arguments based on fairness have considerable power to motivate, both morally and politically.

When documents such as the *World Development Report* are being prepared, the question is often asked, what is the added value of the intrinsic argument? But this is an unsatisfactory way to formulate the question. First, it reflects a technocratic-economist language and way of thinking. Second, this way of presenting the question turns the matter on its head. Rich and powerful countries of the world (and, hopefully, the rich and powerful in poor countries) should not promote development because economic growth is an end in itself. They should do so because they believe that extremely poor people, because they are fellow human beings, deserve better. One suspects that this is the main motivation for very many World Bank staff, who have an abhorrence for extreme deprivation and believe that people share certain basic rights by virtue of their common humanity. It may well be difficult to make the leap from this fundamental premise to decisions as to what to do in a specific country in a specific sector at a specific time (e.g., setting a tariff for drinking water); or, perhaps of equal importance, what to do regarding a specific policy decision at an international meeting (e.g., on debt forgiveness). But the fundamental guiding

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the World Bank are particularly central. The first is whether or not the Bank has human rights obligations at all, as a subject under international law. If this question is answered in the affirmative, the second is the extent to which the Bank can—and should—consider human rights in its operations. While the first requires, at a minimum, that the Bank respect (or, alternatively, not violate) human rights, the second concerns the degree to which the Bank has obligations to actively protect and fulfill human rights. See Mac Darrow, *Between Light and Shadow: The World Bank, the International Monetary Fund, and International Human Rights Law* (Portland, OR: Hart Publishing, 2003); and Joseph Sigrun, *The Human Rights Obligations of the World Bank and the International Monetary Fund* (London: Cavendish Publishing, 2001).

<sup>20</sup> In order to understand the World Development Reports (and, indeed, any such document) it is necessary to ask who the authors consider to be their target audience. Authors of the WDR typically claim that ministers of finance of developing countries are the primary audience of the report. The present writer would argue that these authors are also very concerned with the views of their peers, who consist of other economists in the Bank and academia. But one may question whether the WDR has, or should have, such a narrow audience. One may also argue that ministers of finance are politicians as well as bureaucrats, and may therefore also see the merit in non-technical arguments.

principle, however far removed from concrete decisions, should be a belief in shared humanity rather than the target of economic growth.

### **Equality of Opportunity or Outcomes?**

Although the WDR 2006 report does not reject the intrinsic view of equity, the way in which it defines the term “equity” presents a hybrid argument, leading to a middle path between two extreme views. These views might be termed “egalitarian” and “libertarian,” arguing respectively for equality in final outcomes or ignoring final outcomes provided that all people start with equal opportunity. But the report’s definition of equity also includes the avoidance of extreme poverty: “By equity we mean that individuals should have equal opportunities to pursue a life of their choosing and *be spared from extreme deprivation in outcomes.*”<sup>21</sup> The authors demonstrate, convincingly and with a wealth of empirical data, that huge inequalities of opportunity exist in practice—both within and between countries. They also note that economics are inseparable from politics, to cite but two examples:

A level economic playing field is not sustainable without a level political playing field, and vice versa.<sup>22</sup>

So a portion of the economic and political inequalities we observe around the world is attributable to unequal opportunities. This inequality is objectionable on both intrinsic and instrumental grounds. It contributes to economic inefficiency, political conflict, and institutional frailty.<sup>23</sup>

The latter argument (“It contributes to ...”) is, of course, instrumental; no intrinsic argument is offered in the latter sentence. This is a clear instance of the report (or, more specifically, the overview of the report) treating these two arguments unequally, that is, it primarily emphasizes the instrumental argument. But there is no contradiction between the two. In fact, the report requires the intrinsic argument in order to make the case for avoiding extreme deprivation. “Leveling the playing field” is a way of ensuring equality of opportunity. Yet even a level playing field

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<sup>21</sup> World Bank, 2005, *World Development Report 2006*, 2. Emphasis added.

<sup>22</sup> *Ibid.*, 228.

<sup>23</sup> *Ibid.*, 9.

may leave some people in abject poverty.<sup>24</sup> And the case for helping the abject poor is different, as it is based on an acknowledgement of the intrinsic value of human beings. (The fact that the instrumental argument provides support only for equality of opportunity and not equality of outcomes does not imply that the reverse is true for the intrinsic argument; the latter provides support both for equality of opportunity and equality of outcomes.)

Clearly, the report is reluctant to place major emphasis on the intrinsic argument for equity, a reluctance that is consistent with the Bank's general disinclination to address ethical issues. Nevertheless, two specific ethical issues, both of which concern responsibility, are highly relevant to the Bank's work. These issues may also explain its reluctance to discuss ethical topics.

### **Responsibility for the Global Economic Order**

This section of the article addresses the claim that the World Bank, as a powerful multilateral organization, shares responsibility for the way in which the international economic system works. Since the system fails to deliver for a large proportion of the world's population, this claim holds that the Bank shares responsibility for causing, by commission or omission, the widespread poverty that exists. This argument has been put forward quite forcefully by the philosopher Thomas Pogge. Pogge has written a considerable amount on the issue of global justice, much of which is relevant to this paper, but this discussion will limit itself to the article cited in the WDR 2006.<sup>25</sup> In this article, Pogge criticizes the famous philosopher John Rawls for focusing only on the national and not the international order, arguing that the duty of assistance should be complemented by the duty to structure the global order to minimize personal poverty and international inequality. Pogge's main argument is that in many countries, domestic factors contribute to the persistence of severe poverty, but certain features of the global institutional order sustain these factors. He refers to the "elaborate system of treaties and conventions about trade, investments, loans, patents, copyrights, trademarks, double taxation, labor standards, environmental protection, use of seabed resources and much else" and notes that

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<sup>24</sup> It should be stressed, however, that leveling the playing field (equality of opportunity) is an enormously ambitious task on a global scale; to even begin to achieve this aim would have a huge impact on poverty.

<sup>25</sup> Pogge, 2004, "'Assisting' the Global Poor."

these rules “can be shaped to be more or less favorable to various affected parties such as, for instance, the poor or the rich societies.”<sup>26</sup> Pogge continues,

If the global economic order plays a major role in the persistence of severe poverty worldwide and if our governments, acting in our name, are prominently involved in shaping and upholding this order, then the deprivation of the distant needy may well engage not merely positive duties to assist but also more stringent negative duties not to harm.<sup>27</sup>

Although it does not go so far as to assign duties, the WDR 2006 convincingly demonstrates that the rules of the international game are unfair. It could further be argued that powerful nations, in addition to ensuring that the rules of the game operate in their favor, also cheat; for example, by subsidizing agriculture, or imposing illegitimate tariff barriers. One may also note that rich countries are often hypocritical, for example, by requiring poor countries to adopt policies that they themselves do not follow in similar situations (i.e., “do as I say, not as I do.”) To quote Ha-Joon Chang of Cambridge University:

If the policies and institutions that the rich countries are recommending to the poor countries are not the ones that they themselves used when they were developing, what is going on? We can only conclude that the rich countries are trying to kick away the ladder that allowed them to climb [to] where they are. It is no coincidence that economic development has become more difficult during the last two decades, when the developed countries started turning on the pressure on the developing countries to adopt the so-called “global standard” policies and institutions.<sup>28</sup>

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<sup>26</sup> Ibid., 4. In support of his case, Pogge quotes at length from a 1999 article in *The Economist*, a publication that, he notes, is not biased in his favor: “Rich countries cut tariffs by less in the Uruguay Round than poor ones did. Since then they have found new ways to close their markets ... Poor countries are also hobbled by lack of know-how. Many had little understanding of what they signed up to in the Uruguay Round. That ignorance is now costing them dear ...” *The Economist*, September 25, 1999, 89. As the citations in this article demonstrate, the WDR 2006 in fact makes many of these same arguments.

<sup>27</sup> Ibid., 6. It should be noted that in this article, Pogge is mainly concerned with “governments acting in our name.” This article, by contrast, concerns the World Bank. However, the Bank is governed by a Board that represents governments, acting in our name. And, as noted below, powerful countries exert considerable influence through other channels.

<sup>28</sup> Ha-Joon Chang, “Kicking Away the Ladder,” *Post-autistic Economics Review*, no. 15 (September 4, 2002), [http://www.btinternet.com/~pae\\_news/review/issue15.htm](http://www.btinternet.com/~pae_news/review/issue15.htm) (accessed July 30, 2006).

Of course, the World Bank does not make the global rules concerning trade and finance. However, it sometimes promotes these rules, whether through policy dialogue or, more concretely, by using conditionality (e.g., to open up capital markets). This practice of promoting global rules applies even more strongly to the IMF than the World Bank, which raises the second issue of responsibility: the World Bank and IMF have in a number of cases given bad advice which has cost poor countries and poor people dearly.

### **Responsibility for Expert Advice**

When the advice given to poor countries is misguided, should the Bank acknowledge responsibility for this advice? In other words, do the individual staff of the World Bank, or the institution as a whole, have legal or moral responsibility for the advice that they give? One may ask (as this author was asked by engineers on the same team when he first undertook a feasibility study in Africa 35 years ago) why do economists, like engineers, not require professional training and practice before they can call themselves economists — and consequently be held liable for any errors attributed to their professional negligence? Certainly, this article is not suggesting that World Bank economists should risk being sued in court; responsibility and accountability do not necessarily entail liability. But in what sense might staff of multilateral development organizations nevertheless be responsible for the advice that they give?

Joseph Stiglitz has recently written on the subject of responsibility for economic advice. His experience is in the World Bank, but his criticism is mainly directed at the IMF. He is harshly critical, for example, of the way in which the IMF handled the Asia crisis and of IMF policies more generally, arguing that these policies have produced unnecessarily large adverse consequences for the poor.<sup>29</sup> He also takes up the question of legal and moral responsibility, although he shifts rapidly from the former to the latter:

In American jurisprudence, in many states, there is the principle of contributory negligence. All parties that had a role in the adverse outcome are held,

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<sup>29</sup> Joseph Stiglitz, "Ethics, Economic Advice, and Economic Policy," paper prepared for the Inter-American Initiative on Social Capital, Ethics and Development, Inter-American Development Bank, Washington, DC, December 2002, [http://www.iadb.org/etica/documentos/dc\\_sti\\_ethic-i.htm](http://www.iadb.org/etica/documentos/dc_sti_ethic-i.htm) (accessed July 30, 2006).

in part, responsible. Similar issues arise in the realm of ethics. To be sure, the governments made the final decision about what policies were to be pursued. But the governments were often pushed to undertake the policies by the IMF, and felt that they had little room for maneuver. Here, we do not have to parse the “blame.” What we can say unambiguously is that the IMF and others who supported and especially those like the US Treasury who pushed those policies, bear considerable moral culpability for the outcomes.<sup>30</sup>

Although Stiglitz does not suggest a conspiracy—that the Bretton Woods institutions have given advice which they knew was bad for the poor because it was good for the rich—he does argue that advanced industrial countries use their economic power to forge international agreements, the disproportionate volume of benefits of which accrue to the developed countries, leaving less developed countries even worse off in some cases. Stiglitz then asks if alternative policies might have better helped the poor, or at least might have imposed less risk on them? As he puts the question, “Have the international institutions that have pushed these policies been honest in portraying these risks? Have they been dishonest in exaggerating the evidence concerning their economic benefits?”<sup>31</sup>

At a minimum, one may assert that the policies promoted by the IMF have been based on an inadequate understanding of the situation of poor developing countries and an underestimation of the risks of the policies that it has promoted. One may further suggest that when advice is given, the primary consideration is to keep the international system of trade and finance running smoothly, even if the rules of this system do not favor the poor of the world. A more serious charge is that the advice given by multilateral institutions, such as the IMF and World Bank, is influenced by the interests of one or a number of rich countries. There is certainly evidence of this phenomenon in particular cases, but it is much more difficult to prove that it is a systemic practice. Even if there are powerful political forces at play, the arguments in favor of the policies recommended by these institutions are normally presented in the language and logic of economics and finance.

The WDR 2006 does not directly address the question of competing views within the Bank, or between the Bank and the IMF. It does, however, raise the issue of the international rules of the game. Many of the recommendations made by the report are rather familiar; where the report is more hard-hitting, even controversial, the

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

recommendations tend to be more implicit. Chapter 10, for example, is concerned with promoting fairness in global markets and addresses such issues as greater labor mobility, freer and fairer trade, intellectual property rights protection, the global market for ideas, and financial market liberalization. The main message is clear: the international rules of the game are unfair and “greater participation and voice in rule-setting bodies would help ensure that outcomes are more favorable to developing countries.”<sup>32</sup>

The task of the WTO and the IMF is, crudely expressed, to make globalization work. These organizations are not explicitly concerned with the well-being of the poor, even if many of their staff genuinely believe that freer trade and capital markets are good for all. By contrast, the task of the Bank is to promote the well-being of the poor. This task may often involve disagreement with the WTO and IMF on certain issues and with certain countries or groups of countries. This is not necessarily always the case, but if an issue is viewed from the perspective of a developing country, the conclusion will often be different than that drawn by the IMF or WTO. Some Bank staff honestly claim not to experience any such conflicts, even if critics find this hard to accept. They may genuinely believe, for example, that reducing the fiscal deficit in a particular country is in the interest of the poor, despite the immediate, very negative impacts of such a policy. In practice, however, there are often professional differences of opinion between well-qualified economists over such issues. In many cases, these differences of opinion are between macro- and micro-economists, the staff of World Bank and that of the IMF, or in-country staff and staff in Washington, DC. And since economics cannot easily be disentangled from politics, there are also instances where the interests of powerful countries on the World Bank Board are at odds with those of the countries that the World Bank is supposed to assist.

The problem is that the rich countries are the major shareholders of the Bank. The staff of the Bank, seeking to promote the interests of poor countries, may thus find that they are offering advice that runs counter to the interests of the organization’s major shareholders. This conflict is entirely legitimate. The staff of the Bank have a responsibility to point out the (sometimes glaring) anomalies in the global economic system and seek to counter them. The recent joint World Bank-IMF statement on European Union and U.S. tariffs is a sign that the Bank as an institution is willing to do just that. The WDR 2006 provides similar examples in its discussion of how to achieve greater global equity.

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<sup>32</sup> World Bank, 2005, *World Development Report 2006*, 216.

It is here that the two aspects of responsibility are linked. The responsibility of economists in the Bank, when giving economic advice, is necessarily related to the power of that organization to influence the international economic system. And so we again confront the question posed at the beginning of this article: To whom is the World Bank accountable? I have argued (quoting President Wolfowitz) that the answer is to the poor of the world. But this rather simplistic view ignores the formal mandate and governance structure of the Bank. The *Articles of Agreement* of the Bank, for example, state that, “The Bank and its officers shall not interfere in the political affairs of any member country ... Only economic considerations shall be relevant to their decisions ...”<sup>33</sup> In the early 1990s, when issues of governance—whether broadly defined or more narrowly focused on corruption and “good management”—entered the development agenda more explicitly, there was much discussion of the political implications of good governance in the Bank.<sup>34</sup> These discussions led to what may be described as a cautious widening of the agenda. It seems that a further widening is now seen as both desirable and possible, as became apparent at the “Human Rights and Development Conference” in Oslo in 2004<sup>35</sup> and at the World Bank Legal Forum in 2005. As Robert Dañino then made clear, the role of human rights in the World Bank agenda was open for discussion. Given certain subsequent policy work at the Bank, the possibility of putting human rights more firmly on the agenda is now greater than ever before.<sup>36</sup>

<sup>33</sup> IBRD (International Bank for Reconstruction and Development/ The World Bank), *Articles of Agreement*, 2 UNTS 134, July 22, 1944, in force December 27, 1945, amended December 17, 1965, 16 UNTS 1942, amended February 16, 1989, Article IV, sec. 10. Available on the World Bank website, <http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20040600~menuPK:34625~pagePK:34542~piPK:36600~theSitePK:29708,00.html> (accessed July 30, 2006).

<sup>34</sup> Then Senior Vice-President and General Counsel of the World Bank Ibrahim Shihata (1983–98) played an important part in these discussions.

<sup>35</sup> At the behest of former World Bank President James Wolfensohn, the conference was organized by the Norwegian Centre for Human Rights and the Centre for Development and the Environment of the University of Oslo on October 11–12, 2004.

<sup>36</sup> For example, the recently drafted Social Development Strategy of the Bank goes quite a long way in emphasizing the accountability of the Bank for addressing these issues. See World Bank, “Empowering People by Transforming Institutions: A Strategy and Implementation Plan for Social Development in World Bank Operations,” Social Development Strategy Paper, World Bank, Washington, DC, 2005, [http://lnweb18.worldbank.org/ESSD/sdvext.nsf/62ByDocName/EmpoweringPeopleByTransformingInstitutions/\\$FILE/SD+Strategy+Board+version+01+12+05+Final.pdf](http://lnweb18.worldbank.org/ESSD/sdvext.nsf/62ByDocName/EmpoweringPeopleByTransformingInstitutions/$FILE/SD+Strategy+Board+version+01+12+05+Final.pdf) (accessed July 4, 2006).

But it is not only the legal interpretation of the Bank's mandate that matters, so, too, do the views of the Board. The WDR notes that, "Developed country governments have a majority of the votes on the boards of the IMF and World Bank and two Executive Directors represent more than 40 African countries."<sup>37</sup> The implication is that this situation should be rectified. This would certainly be more democratic, but the effects of such a change are uncertain. Some Executive Directors—from both the "North" and the "South"—have substantial reservations regarding the sorts of issues discussed in this article.<sup>38</sup> Just as it is argued that the governments of many poor countries do not necessarily represent their people's interests, however, one may make the same argument vis-à-vis members of the Board. This is a classic dilemma in development assistance, one that admits no easy solution.

It is partly to avoid such problems that members of the World Bank staff seek as far as possible to present arguments in technical terms drained of value judgments.<sup>39</sup> This tendency fits well within the framework of economics. The Bank, and not least its research department, is dominated by economists and the language of economics. When making a case for a policy or project, rigorous analysis is demanded. This requirement is generally taken to mean rigorous economic analysis and based (primarily, if not exclusively) on quantitative data. A number of non-economist social scientists (sociologists, anthropologists, political scientists, etc.) are now employed by the Bank, largely in the Social Development Department, but they are very much in the minority. Philosophers and human rights lawyers are even fewer.

In recent writings and discussions, this author has criticized the Bank and similar organizations for what he calls their "economic-technocratic approach."<sup>40</sup> This

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The Bank has also organized conferences and workshops on topics such as a rights-based approach to development. Bank operations already include relevant human rights activities, whether these are explicitly linked to these rights (e.g., support for the legal sector) or indirectly linked to them (e.g., financing projects that have a major component relating to participation, transparency, accountability, etc.).

<sup>37</sup> World Bank, 2005, *World Development Report 2006*, 223.

<sup>38</sup> The question of human rights is certainly controversial within the Bank's Board. Discussion of ethics has been less common, except when narrowly framed in terms of corruption; religion is also very controversial.

<sup>39</sup> In the face of the very real dilemma, "to whom is one accountable?", perhaps the tendency to excise the political at the institutional level is matched by a tendency to excise the moral at the individual level.

<sup>40</sup> See, for example, Desmond McNeill, "Social Capital and the World Bank," in *Global Institutions and Development: Framing the World?*, RIPE Series in Global Political

term describes how complex issues of a social, political, and even ethical nature are analyzed in the somewhat distorting language of economics. The resulting recommendations for action are also of a purely technical nature and take the form of detailed guidelines, checklists, operational directives, etc., which sometimes paradoxically undermine their own purpose and distract attention from more fundamental issues. There is a danger that a similar situation could arise with respect to ethical concerns, especially if such concerns are couched in terms of human rights. Even if they find a place in the development agenda, the risk is that ethical concerns will be seen simply as an addition to an already long list of other issues, or even as a new technical “sector” that will compete, perhaps unsuccessfully, with other development priorities.

## Conclusion

This article has attempted to address certain basic, inter-related issues raised by the *World Development Report 2006*. What are the merits of arguing for equity on intrinsic rather than instrumental grounds? Does the World Bank prefer the latter type of argument? To what extent may it be said that the organization shares responsibility for global poverty? Intrinsic arguments based on fairness have considerable motivating power, both morally and politically, but as a bureaucracy dominated by economists, the World Bank always tends to downplay the moral and political aspects of its work. A perhaps controversial interpretation of why the Bank avoids the ethical arena is that this arena may be dangerous to enter. It risks raising the question not only of the Bank’s moral responsibility for relieving poverty, but also of the organization’s partial responsibility for existing poverty.

The World Bank Legal Forum of 2005 sought to explore ways to move the Bank forward in the area of equity and development, particularly with respect to law. In all societies and institutions, law is a reflection, or formal manifestation, of the shared and underlying values of those who make it. And these values and institutions change over time, as do material circumstances. The roles that World Bank lawyers can play in implementing the areas highlighted by the WDR 2006 are of two rather different kinds. One role, which might be described as instrumental, is to undertake specific actions, either in terms of projects (e.g., justice reform) or

providing technical guidance and expertise that complements that of existing Bank staff (particularly economists). The second role relates to the more basic issues addressed by this article.

Although this text in no way has suggested that World Bank economists, as individuals, should incur legal liability for their advice, it would nevertheless be valuable for them to ask themselves “to whom am I accountable?” Is it true, as is widely claimed, even by its new president, that the World Bank’s primary clients are poor people in poor countries? If so, what happens if a staff member believes that a conflict of interest exists, for example, between these clients and the Board of Directors of the Bank, or between these clients and the government of the country concerned? Clearly, the Board ultimately makes decisions on behalf of the Bank. The responsibility of staff members should, however, be to represent the interests of their clients in poor countries. The staff of the Bank constitute an unparalleled store of technical competence. It is important that this competence be used in the best interests of the world’s poor. The implication of this argument is that Bank staff should be permitted, indeed encouraged, to give advice that they believe to be technically sound and in the best interests of the poor, even, perhaps especially, when this advice runs counter to the interests of the rich and powerful (whether this refers to members of the Bank Board or to elites within development countries themselves) or challenges the international rules of the game.

The initial, and more basic, point of this article is that our shared humanity should provide the justification and motivation for development assistance. Here it is far more difficult to draw specific implications for action, especially because this article has warned against simply translating new ideas into still more detailed guidelines, operational directives, etc. Perhaps the gap between the rhetoric of senior Bank staff and the practice of project officers could be narrowed by encouraging staff at all levels to think and speak in human terms. It seems that this practice is more acceptable when dealing with humanitarian disasters than when facing the day-to-day realities of grinding poverty. It is in this sphere that the Bank’s Legal Department may have a significant role to play. Discussions about ethics and responsibility tend to be discouraged in the Bank, not by any explicit regulation, but rather through very subtle, implicit, and powerful norms that influence what may or not be said in what context—in brief, by the culture of the Bank. This culture is very much determined by economists, but is also, perhaps, influenced by lawyers. With respect to fundamental debates within the Bank, the Legal Department could open up, and even encourage, change; as Robert Dañino has shown. Laws and mandates need not necessarily hinder moral awareness; they can instead promote it.

Implicit (and occasionally quite explicit) within the WDR 2006 are some fundamental challenges to the ethical foundations of development and the role

of the Bank. The more fundamental the issue, very often the more difficult it is to connect to day-to-day practice. Drawing on the report, this article has raised overarching questions of politics, governance, and organizational culture. It has also raised questions about the relationship between the World Bank, IMF, and WTO, as well as between the staff and Board of the Bank. Ultimately the report invites the question: Who runs the World Bank and for whose benefit? By stimulating debate on these fundamental questions, it is hoped that the WDR 2006 will contribute to making the Bank an organization whose explicit purpose is to promote the reduction of poverty.

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## ONE SPECIES, ONE PLANET: ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT

DANIEL MAGRAW AND OWEN LYNCH

*Recent international developments indicate a growing global consensus regarding certain fundamental rights to public participation in environmental and human rights matters. Supranational mechanisms now exist by which individuals and communities can enforce their rights as independent or collective subjects of international law. In order to create an effective enabling environment for more voices to be heard and amplified, however, individual and community participation, as a broad-based political and legal phenomenon, needs to be more clearly provided for and enforced. This article examines the legal relationship between sustainable development and environmental justice, as well as between human rights and environmental justice. The article analyzes how basic human rights are embedded in international and national laws, how these rights relate to environmental issues, and how decision-making processes and opportunities for meaningful public participation in environmental and development matters can be enhanced.<sup>1</sup>*

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In December 1984 in Bhopal, India, a toxic cloud of deadly methyl isocyanate was released from a Union Carbide chemical plant, an incident that, to date, has resulted in thousands dead and many more injured. Eighteen years after the disaster, people are still suffering severe health effects and have not been adequately compensated.

The name Cancer Alley refers to the area along the Mississippi River between Baton Rouge and New Orleans, Louisiana, USA. Here, over a hundred chemical and oil companies have set up along the river, often near poor and/or minority communities. Residents in these areas suffer disproportionate exposure to the

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<sup>1</sup> This paper was originally prepared for World Summit on Sustainable Development, Johannesburg, South Africa, September 2002. A revised version was presented at the World Bank Legal Forum, "Law, Equity, and Development," World Bank, Washington, DC, December 2005.

environmental hazards that come with living near chemical waste. Cases of rare cancers are reported in these communities in numbers far above the national average.

In Nigeria's Ogoniland, Shell Petroleum Development Corporation continues to reap profits from oil exploration—almost none of which reach the local people, who instead suffer from oil spills, contaminated drinking water, land erosion, adverse health effects, and displacement.<sup>2</sup>

## Linking Sustainable Development and Environmental Justice

### *Sustainable development*

Sustainable development has become a key obligation and aspiration in various national and international legal instruments. It is the **international community's** agreed-upon goal for improving human well-being and environmental management. Sustainable development is often invoked as a means for reconciling important objectives that sometimes appear to compete. These include respect for human rights, promotion of **socially and environmentally sustainable economic growth**, and protection and wise use of the natural environment. Paragraph 6 of the 1995 *Copenhagen Declaration* on social development expresses these interconnections as: "We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people ..."<sup>3</sup>

Despite the *Copenhagen Declaration's* advance in defining the term sustainable development, it frequently means different things to different people. One of the most often-quoted definitions is from *Our Common Future*, also known as the Brundtland Report, which defines sustainable development as "development that

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<sup>2</sup> For more information, see Sierra Club website, <http://www.sierraclub.org/human-rights/Nigeria/links.asp> (accessed May 2006).

<sup>3</sup> European Union, 1995, *Copenhagen Declaration*. Declaration of the European Ministers of Educational and Vocational Training and the European Commission, adopted at the World Summit on Social Development, Copenhagen, Denmark, March 1995, U.N. Doc A/CONF.166/7/Annex (1995), <http://www.un.org/esa/socdev/wssd> (accessed May 2006).

meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>4</sup> In addition to policy integration and concern for future generations, the Brundtland Report’s vision of sustainable development contains within it two other key concepts: “the concept of ‘needs,’ in particular, the essential needs of the world’s poor to which overriding priority should be given; and the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs.”<sup>5</sup> Some argue that sustainable development should also include the following components:

- efficient resource allocation to meet basic human needs;
- equitable and just allocation of resources and benefits arising from their use;
- ecological sustainability—maintaining the long-term viability of supporting ecosystems;
- social sustainability—fulfilling people’s cultural, material, and spiritual needs in equitable ways;
- increased accountability in institutions of governance;
- increased and meaningful public participation;
- strengthened local democracy;
- focus on environmental rights;
- economic viability; and
- greater sensitivity to conditions in the Global South.<sup>6</sup>

The concept of sustainable development, described in the proceedings of a 1999 seminar of the Organisation for Economic Co-operation and Development (OECD) “Social and Environmental Interfaces,” focuses on the quality of human life now

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<sup>4</sup> WCED, *Our Common Future* (Oxford University Press, 1987), 3.

<sup>5</sup> *Ibid.*, 43.

<sup>6</sup> The term “Global South” as used here refers to developing countries. This term reflects the reality that most developed countries are north of developing countries, and avoids potentially pejorative connotations in other terms such as “third world” or even “developing.” The term has been applied by the UNDP and described in the UNDP document, *Forging a Global South: United Nations Day for South-South Cooperation* (New York: UNDP, December 2004), <http://tcdc.undp.org/Global%20South-web.pdf> (accessed May 2006). It has also been adopted by non-governmental organizations, such as Focus on the Global South, <http://www.focusweb.org> (accessed May 2006).

and in the future. The report stressed, “If the primary goals of environmentally sustainable development are freedom from poverty, secure livelihoods, good health, and quality of life, then socially responsible development has to deal with such needs as food, basic housing, access to good water, health care (especially for children and older members of society), sanitation, education, energy in the form of fuel, transport, etc.”<sup>7</sup> According to the World Conservation Union, sustainable development means achieving a quality of life or standard of living that can be maintained for many generations because it is:

- socially desirable, fulfilling people’s cultural, material, and spiritual needs in equitable ways;
- economically viable, paying for itself, with costs not exceeding income; and
- ecologically sustainable, maintaining the long-term viability of supporting ecosystems.<sup>8</sup>

Environmental protection is now perceived as an essential part of the process of socioeconomic development and an integral feature of international law. International environmental law, in particular, has elaborated various rules and principles for promoting sustainable development, which are codified in conventions, guidelines, and declarative texts. Use of the term “sustainable development” in these instruments has enriched legal and policy dialogue and, in some respects, has modified responsibilities and behavior.<sup>9</sup>

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<sup>7</sup> OECD, “OECD Seminar Social and Environmental Interface Proceedings” (hereinafter “OECD Seminar Proceedings”) ENV/EPOC/GEP (99) 13 (September 22–24, 1999), [http://www.oecd.org/olis/1999doc.nsf/LinkTo/env-epoc-gep\(99\)13](http://www.oecd.org/olis/1999doc.nsf/LinkTo/env-epoc-gep(99)13) (accessed May 2006).

<sup>8</sup> IUCN-World Conservation Union, “Guide to Preparing and Implementing National Sustainable Development Strategies and Other Multi-sectoral Environment and Development Strategies,” pre-publication draft prepared by the IUCN Commission on Environmental Strategies Working Group on Strategies for Sustainability, IUCN Secretariat, and the Environmental Planning Group of the International Institute for Environment and Development, 1993.

<sup>9</sup> See Gregory Maggio and Owen J. Lynch, “Human Rights, Environment, and Economic Development: Existing and Emerging Standards in International Law and Global Society,” report prepared for the Earth Council, Costa Rica, and the World Resources Institute, 1996’ [http://www.omced.org/wri/om\\_wri.htm](http://www.omced.org/wri/om_wri.htm) (accessed May 2006); and WTO (World Trade Organization), “Report of the Panel on United States-Import Prohibition of Certain

Article 1 of the *Convention on Biological Diversity*, for example, promotes conservation along with sustainable utilization and equitable sharing of benefits derived from the use of biological resources. Operational policies of the United Nations Commission on Human Rights, United Nations Environment Programme (UNEP), United Nations Development Programme (UNDP), World Bank, Inter-American Development Bank (IDB), United States Agency for International Development (USAID), and other multilateral and bilateral institutions concerning tropical forestry, involuntary resettlement, and indigenous peoples have also begun to emphasize a sustainability approach with a strong environmental component.

Various efforts aimed at addressing environmental degradation now accord significance to socioeconomic concerns. This transformation in thinking is reflected in documents arising out of the United Nations Conference on Environment and Development (UNCED), the North American Agreement on Environmental Co-operation, the U.N. *Convention to Combat Desertification*, and a host of guidelines, action plans, and legal documents of various U.N. organizations and other institutions.

All mainstream definitions of sustainable development share three characteristics. First, achieving sustainable development requires integrating policies related to social justice, environmental protection, and economic development. Second, the interests of future generations must be taken into account. And third, transparency and public participation at all levels of decision making, from local to global, are essential to achieving sustainable development. The international community has recognized these characteristics, for instance, at the 2002 World Summit on Social Development<sup>10</sup> and the 1992 United Nations Conference on Environment and Development.<sup>11</sup>

### ***Environmental Justice***

Environmental justice has often been defined with reference to the right to a safe, healthy, productive, and sustainable environment for all, where “environment” is

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Shrimp and Shrimp Products, ‘Shrimp Turtle,’” 37 I.L.M. 832. May 15, 1998. [http://www.internationaltraderelations.com/WTO.Shrimp-Turtle%20\(AB%201998\).htm](http://www.internationaltraderelations.com/WTO.Shrimp-Turtle%20(AB%201998).htm) (accessed May 2006).

<sup>10</sup> See, generally, the *Copenhagen Declaration*, 1995.

<sup>11</sup> See, generally, UNESCO, *Rio Declaration on Environment and Development*, U.N. Doc.A/CONF.151/26; 31 I.L.M.874 (1992), [http://www.unesco.org/education/information/nfsunesco/pdf/RIO\\_E.pdf](http://www.unesco.org/education/information/nfsunesco/pdf/RIO_E.pdf) (accessed May 2006).

considered in its totality, including ecological (biological), physical (natural and created by human labor), social, political, aesthetic, and economic conditions. The term implies that environmental “injustice” exists and highlights the need for sociopolitical initiatives to address these problems.

That environmental justice has an economic aspect is clear both from the fact that it must be achieved in the context of environmentally sustainable economic activity and from international instruments, such as the 1995 *Copenhagen Declaration*. The second and third sentences of Paragraph 6 state: “Equitable social development that recognizes empowering the poor to utilize environmental resources sustainably is a necessary foundation for sustainable development. We also recognize that broad-based and sustained economic growth in the context of sustainable development is necessary to sustain social development and social justice.”<sup>12</sup>

For environmental justice to be attained, five basic principles should be adhered to:

1. A disproportionate burden of protecting the environment should not be borne by any particular group, especially not vulnerable populations.
2. The benefits of environmental protection, such as clean water and clean air, should be equally available to all.
3. There should be transparency and the opportunity for meaningful public participation in decision making.
4. Everyone should have access to effective remedies for violations of environmental rights, and laws should be enforced irrespective of the political or economic power of wrongdoers.
5. A level of environmental protection adequate to sustain human health and well-being, and ecosystem equilibrium should be achieved and maintained.

Environmental justice recognizes the need for a special concern for certain groups, such as vulnerable populations, as was acknowledged in the internationally negotiated text of the 1996 Second United Nations Conference on Human Settlements (Habitat II).<sup>13</sup> The OECD seminar, “Social and Environmental Interfaces,” stressed

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<sup>12</sup> *Copenhagen Declaration*, 1995, para. 6.

<sup>13</sup> U.N. Conference on Human Settlements (“Habitat II”), “Annex I: Istanbul Declaration on Human Settlements,” Turkey, August 7, 1996. Available on the website of Agora 21, Francophone website for sustainable development, <http://www.agora21.org/HABITAT2/a01a.html> (accessed May 2006). Also see paras. 72, 75, 79, 82, 94, 95, 96, and 97.

that environmental justice focuses on distributional inequities in the exposure to environmental risk.<sup>14</sup>

### *Linking Sustainable Development to Environmental Justice*

The concepts of sustainable development and environmental justice share many critical and defining characteristics. Each concept takes into account and integrates policies relating to social justice, environmental protection, and economic development. Furthermore, each involves focusing on real-life conditions now facing individuals and local communities, while also addressing the impacts that different policy options may have in the future—to ensure, on one hand, that development is sustainable and, on the other, that policy choices not only achieve equitable results in the short term, but also do not cause or perpetuate injustice in the longer term. Similarly, achieving sustainable development requires transparent decision-making processes and meaningful opportunities for public participation, as does environmental justice.

The international community recognized most aspects of the challenges posed by environmental justice at Habitat II in 1996, although it did not specifically use the term “environmental justice” and did not address the topic comprehensively.<sup>15</sup> The First National People of Color Environmental Leadership Summit adopted 17 principles of environmental justice in 1991.<sup>16</sup> Principle 3 emphasizes the inextricable link between environmental justice and sustainable development: Environmental justice mandates the right to ethical, balanced, and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living things.” As this article demonstrates, sustainable development and environmental justice are entirely compatible. Moreover, because sustainable development is the overarching framework for improving the quality of life, environmental justice can be seen as an integral component of sustainable development. This is evident

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<sup>14</sup> OECD, 1999, “OECD Seminar Proceedings,” 19.

<sup>15</sup> See “Habitat II” agenda, available on the website of Agora 21, the Francophone website for sustainable development, <http://www.agora21/HABITAT2> (in French; accessed May 2006), paras. 72, 75, 79, 82, 94, 95, 96, and 97.

<sup>16</sup> “Principles of Environmental Justice,” proceedings of the First National People of Color Environmental Leadership Summit, October 24–27, 1991, Washington, DC, available on the website of the Institute for Global Communications, San Francisco, CA, <http://www.igc.org/saepej/Principles.html> (accessed May 2006).

in the definitive paragraph 6 of the Copenhagen Declaration, which emphasized the linkage.

Sustainable development and environmental justice, are thus symbiotically related and should be pursued in tandem. Only then will sustainable development be achieved at the ground level where all biodiversity reservoirs, carbon sinks, watersheds, forests, pasturelands, and coastal and marine resources are located, often in close proximity to hundreds of millions of human beings directly dependent on these vital resources for their lives and livelihoods. The relationship between sustainable development and environmental justice is further reinforced by the universality of human rights and by the close relationship between human rights and the environment.

#### *The universality of human rights*

Human rights are the inherent rights of all human beings. The Preamble to the Charter of the United Nations states, “We the Peoples of the United Nations [are] determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small.”<sup>17</sup> Human rights exist, and are invoked, to protect and to promote human life and dignity.<sup>18</sup> In this article, it is understood that all human beings by virtue of being human—not on the basis of citizenship, education, levels of melanin in their skin, or access to wealth—are entitled to have their human rights respected and protected. As such, human rights are general rights in that they pertain to all human beings, and while the understanding of these rights may vary from region to region and from culture to culture, the concept of human rights remains universal.

The evolving nature of our understanding of human rights, especially the lack of complete agreement on the extent and precise definition of human rights, has contributed to the assertion by some people that human rights are relative, not universal. Attempts to resolve the universalism debate were made at the 1993 U.N. World Conference on Human Rights in Vienna. The declaration that emerged from these negotiations reaffirmed the universality of human rights but also acknowledged contextual aspects. It declared that “all human rights are universal, indivisible and

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<sup>17</sup> *Charter of the United Nations*, preamble, June 26, 1945, 59 Stat. 1031, available on the website of the Human Rights Library, University of Minnesota, Minneapolis, MN, <http://www1.umn.edu/humanrts/instree/aunchart.htm> (accessed May 2006).

<sup>18</sup> For a thorough listing of currently acknowledged human rights, see Human Rights Library (online library), University of Minnesota, Minneapolis, MN, <http://www1.umn.edu/humanrts/links>.

interdependent and interrelated ...” while also noting that “... the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind.”<sup>19</sup> In the 1993 Bangkok NGO Declaration on Human Rights, more than 100 non-governmental organizations (NGOs) reaffirmed the universality of human rights and undermined the claims of many authoritarian governments of the need to understand so-called “Asian values.”<sup>20</sup> While by no means resolving the argument, the *Bangkok NGO Declaration* did weaken some of the opposition to universality, although the debate has continued.

The other aspect of universality is whether rights apply to everyone equally. While this is much less controversial in theory than whether we all define a particular human right the same way, in practice the problem is significant and bears directly on environmental justice. In 1995, at the Fourth World Congress on Women held in Beijing, the international community recognized that women’s rights are human rights,<sup>21</sup> formally resolving one issue in favor of universality. It is also clear that discrimination on the basis of ethnicity or skin color violates human rights.<sup>22</sup> Yet, as Barbara Rose Johnson has noted, “[H]uman environmental rights abuse occurs because it is socially, culturally, and legally acceptable to protect the health of some people while knowingly placing other humans at risk.”<sup>23</sup> This aspect of the

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<sup>19</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, para. 5, U.N. Doc. A/CONF.157/23 (1993), Vienna, June 14–25, 1993.

<sup>20</sup> Regional Meeting for the Asia-Pacific Governments, *Bangkok NGO Declaration on Human Rights*, joint statement of 110 human rights and development NGOs at the preparatory meeting for the U.N. World Conference on Human Rights, Bangkok, Thailand, March 29, 1993.

<sup>21</sup> See United Nations, *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, Beijing, China, September 15, 1995, U.N. Doc. A/CONF. 177/20 (1995) and A/CONF. 177/20/Add.1 (1995), available at Human Rights Library (online library), University of Minnesota, Minneapolis, MN, <http://www1.umn.edu/humanrts/instree/beijingmu.htm> (accessed May 2006).

<sup>22</sup> See, for example, *International Covenant on the Elimination of All Forms of Discrimination (ICERD)*, 660 UNTS 195, entered into force January 4, 1969, available at Human Rights Library (online library), University of Minnesota, Minneapolis, MN, <http://www1.umn.edu/humanrts/instree/d1cerd.htm> (accessed May 2006).

<sup>23</sup> Barbara Rose Johnson, “Human Environmental Rights,” in *Who Pays the Price? The Sociocultural Context of Environmental Crisis*, ed. Barbara Rose Johnson (St. Louis, MO: Island Press, 1994), 101. Johnson has contributed to the work of the Special Rapporteur on Human Rights and the Environment.

problem is clear from the World Bank's infamous memo on toxic industries,<sup>24</sup> the international dumping of hazardous wastes,<sup>25</sup> and the prevailing tendency to locate polluting industries in minority and economically disadvantaged neighborhoods<sup>26</sup> or in the Global South.<sup>27</sup>

The universality of human rights reinforces the conclusion that environmental justice needs to be a universal phenomenon, especially since environmental injustices are largely perpetuated on the basis of differentiation. Emphasizing that environmental justice is a prerequisite for sustainable development serves, among other things, to challenge unfair discrimination in the treatment of human beings.

*Building on the linkage between human rights and the environment*

Evidence around the world supports the claim that environmental and human rights issues are closely linked and often exist simultaneously. In addition, human rights abuses often have ramifications that translate into environmental abuses as well. For instance, in Burma, the ruling military regime continues to use slave labor and wreak havoc on the country's vast teak forests. Money from timber sales reportedly goes to support military assassinations of ethnic and religious minorities opposed to the destruction of their land and communities.<sup>28</sup> Similarly, abuses against the environment generally affect the human rights of people who live in those environments. The World Bank-financed Chad-Cameroon oil pipeline project threatens local communities and fragile ecosystems (the rainforests of Cameroon and agricultural farming land in Chad). There are also serious concerns about the

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<sup>24</sup> Internal memo to the staff of the World Bank entitled "Dirty Industries," from Larry Summers (then Chief Economist of the World Bank), dated December 12, 1991. The memo said, "just between you and me, shouldn't the World Bank be encouraging more migration of the dirty industries to the LDCs (less-developed countries)?"

<sup>25</sup> See, for example, Gustavo Capdevila, "Dumping of Toxic Waste Is a Human Rights Issue," Inter Press Service, April 18, 1998, available on the Activist website, <http://users.westnet.gr/~cgian/toxwaste.htm> (accessed May 2006).

<sup>26</sup> See, for example, Asghar Ali, *A Conceptual Framework for Environmental Justice Based on Shared but Differentiated Responsibilities* (Norwich, UK: University of East Anglia School of Environmental Sciences and Centre for Social and Economic Research on the Global Environment), 14.

<sup>27</sup> Capdevila, 1998, "Dumping of Toxic Waste."

<sup>28</sup> See web page describing abuses committed by the Burmese government in support of Unocal's and Total's oil pipeline project, Sierra Club website, San Francisco, CA, n.d., <http://www.sierraclub.org/human-rights/Burma/> (accessed May 2006).

capacity of both national governments to uphold basic human rights standards in the pipeline region. By late 2002, security forces in Chad had already killed more than 200 people in skirmishes in the oil field region.<sup>29</sup> Another report, "Forests of Fear," published by the UK-based environmental group, Fern, clearly links the disappearance of the world's forests with the horrifying catalogue of human rights abuses taking place within forests as a result of conflicts between forest peoples and powerful government and corporate interests. The report calls for prioritizing the defense of human rights as the primary solution to solving the forest crisis.<sup>30</sup> It is probably the case that environmental injustices are generally more prevalent in nations where human rights protection mechanisms are weak.

The United Nations has initiated efforts to raise the profile of human rights and environmental issues to that of international "soft" law, including the creation of a Special Rapporteur on Human Rights and the Environment in 1994. In January 2002, the U.N. High Commissioner for Human Rights and the Executive Director of the UNEP organized a "Meeting of Experts on Human Rights and the Environment." The "Conclusion of the Final Text" emphasizes the need to

... recognize the environmental dimension in the effective enjoyment of human rights protection and promotion, and the human rights dimension in environmental protection and promotion, in part by developing rights-based approaches to environmental protection and promotion of sustainable development...<sup>31</sup>

The 1994 "Draft Declaration of the Principles on Human Rights and the Environment," prepared in Geneva by an international group of experts on human rights and environmental protection, also sought to highlight the inextricable linkage between these two areas. The Draft Declaration emphasizes the environmental dimensions of established human rights, including the rights to life, health, and culture. It likewise describes the procedural rights necessary for realization of

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<sup>29</sup> See web page describing the human rights and environment situation surrounding the construction of the Chad Cameroon pipeline, Sierra Club website, San Francisco, CA, n.d., <http://www.sierraclub.org/human-rights/Chadcam/index.asp> (accessed May 2006).

<sup>30</sup> Jessica Wenban-Smith, ed., "Forests of Fear: The Abuse of Human Rights in Forest Conflicts," Fern report, Fern, Moreton-in-Marsh, UK, 2001, <http://www.fern.org/pubs/reports/fear.pdf>.

<sup>31</sup> OHCHR, "Meeting of Experts on Human Rights and the Environment," sec. 18, final text, January 14–15, 2002, OHCHR, Geneva, Switzerland, 2002, <http://www.unhcr.ch/environment/conclusions.html> (accessed May 2006).

substantive rights, including the right to participation.<sup>32</sup> While the linkage between human rights and the environment is being recognized as an obvious one and has been gaining international support over the last decade, the equally important relationship between sustainable development and environmental justice has not been explored as much. As has already been demonstrated by definition, sustainable development—an encompassing concept that leads to overall development and justice—cannot be attained unless environmental justice is also realized. The attainment of environmental justice is thus a fundamental prerequisite—a necessary condition for the realization of true sustainable development. Protecting human rights requires preserving the environment, and safeguarding the environment requires respecting human rights. Meeting these goals leads to environmental justice. The pursuit of environmental justice will strengthen the realization of sustainable development while stressing that the economic, social, and cultural rights of citizens are integrally linked to their civil and political rights, such as the right to freedom of speech and association and the right to life.

### **Expounding on Legal Relationships between Sustainable Development and Environmental Justice**

Recognition of the linkages between sustainable development and environmental justice is fairly recent, especially in international and national laws. The past ten years, in particular, have witnessed an increasing willingness by global, regional, and national bodies to re-interpret procedural rights to due process, political participation, and access to information<sup>33</sup> with reference to environmental justice, as well as other

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<sup>32</sup> “Draft Declaration of Principles on Human Rights and the Environment,” May 16, 1994, available at World Policy Institute website, The New School, New York, NY, <http://www.worldpolicy.org/globalrights/environment/envright.html> (accessed May 2006).

<sup>33</sup> See, for example, UNECE (United Nations Economic Commission for Europe), *Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (hereafter, Aarhus Convention), U.N. Doc. ECE/CEP/43, 4th UNECE Ministerial Conference, Aarhus, Denmark, June 25, 1998, UNECE, Geneva, Switzerland, <http://www.unece.org/env/pp/documents/cep43e.pdf> (accessed May 2006).

more specific or substantive rights.<sup>34</sup> These rights include minority rights;<sup>35</sup> freedom from racial discrimination;<sup>36</sup> the right to self-determination, subsistence, and free disposal of natural resources;<sup>37</sup> the right to own property;<sup>38</sup> religious rights;<sup>39</sup> the right to life;<sup>40</sup> the right to health;<sup>41</sup> and the rights to protect the home, family, and private life.<sup>42</sup> Among the areas that highlight the legal nexus between sustainable development and environmental justice, three are key:

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<sup>34</sup> Such a reinterpretation reflects a growing global consensus in agreement with the statement of International Court of Justice Vice President Weeramantry that “protection of the environment is *sine qua non* for numerous human rights, such as the right to health and the right to life itself.” *Judgment in the Case Concerning the Gabcikovo-Nagymaros Project*, 37 I.L.M. 201, para. 206 (1997) (P. Weeramantry concurring).

<sup>35</sup> See *International Covenant on Civil and Political Rights* (ICCPR), Dec. 16, 1966, art. 27, 993 UNTS. 3 (1976), available on the UNCHR website, Geneva, Switzerland, [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (accessed May 2006); and *Convention on the Rights of the Child* (CRC) (which makes special mention of indigenous peoples), November 20, 1989, Art. 3, 1577 UNTS. 3 (1990), available on the UNCHR website, Geneva, Switzerland, <http://www.unhchr.ch/html/menu3/b/k2crc.htm> (accessed May 2006).

<sup>36</sup> See ICERD, art. 2.

<sup>37</sup> See ICCPR, art. 1.

<sup>38</sup> See *Universal Declaration of Human Rights* (UDHR), 1948, Art. 3, General Assembly Res. 217A (III), U.N. Doc. A/810, 71, UNCHR website, Geneva, Switzerland, <http://www.unhchr.ch/udhr/lang/eng.htm> (accessed May 2006); *African Charter on Human and Peoples' Rights* (African Charter), 1981, Banjul, June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, art. 14 (1982); *American Convention on Human Rights* (American Convention), “Pact of San Jose, Costa Rica,” 1978, Art. 21, June 18, 1978, OAS Treaty Series no. 36, 1144 UNTS 123, <http://www.oas.org/juridico/english/Treaties/b-32.htm> (accessed May 2006; this treaty includes the right to compensation if involuntarily disposed).

<sup>39</sup> See UDHR art. 18; ICCPR, art. 14; *African Charter*, art. 18; *American Convention*, art. 12.

<sup>40</sup> See UDHR, art. 3; ICCPR, art. 6; CRC, art. 6(1); *African Charter*, art. 4; *American Convention*, art. 4.

<sup>41</sup> See UDHR, art. 25; *International Covenant on Economic, Social and Cultural Rights* (ICESCR), art. 12, 993 UNTS 3, UNCHR website, Geneva, Switzerland, [http://www.unhchr.ch/html/menu3/b/a\\_ceschr.htm](http://www.unhchr.ch/html/menu3/b/a_ceschr.htm) (accessed May 2006); CRC, art. 24.

<sup>42</sup> See UDHR, art. 16; ICCPR, art. 23; ICESCR, art. 10; *African Charter*, art. 18; *American Convention*, art. 17; *European Convention for the Protection of Human Rights and*

- the right to life, including the right to a healthy environment;
- the traditional and customary property rights of indigenous and other local communities, especially those in the Global South; and
- participatory and procedural rights.

### ***Right to a Healthy Environment***

The right to life is the most basic human right and is *jus cogens*, i.e., a peremptory norm that takes precedence over other international law. By its nature, it must, at least implicitly, include the right to a healthy environment. If it did not, the right to life could be freely abrogated by way of environmental contamination and degradation. In this context, therefore, the right to a healthy environment is binding on all states, and the environment must be construed as the broad physical environment upon which human well-being depends. The right to a healthy environment implicitly emphasizes adequate access to “vital needs,” which are those needs that provide the necessary conditions for reaching and maintaining a decent standard of living. The constitutions of many countries now recognize the right to a healthy environment.<sup>43</sup>

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*Fundamental Freedoms* (hereafter, European Convention), art. 8, September 3, 1953, art. 8, 213 UNTS 222, as amended by protocols nos. 3, 5, 8, and 11, entered into force September 21, 1970, December 20, 1971, January 1, 1990, and November 1, 1998, respectively, available on the website of the Human Rights Library, University of Minnesota, Minneapolis, MN, <http://www1.umn.edu/humanrts/instree/z17euroco.html> (accessed May 2006).

<sup>43</sup> More than 60 nations have adopted constitutional provisions recognizing the right to a healthy environment. See Fatma Zohra Ksentini, “Draft Principles on Human Rights and the Environment,” E/CN.4/Sub.2/1994/9, Annex I, 1994, available on the website of the Human Rights Library, University of Minnesota, Minneapolis, MN, <http://www1.umn.edu/humanrts/instree/1994-dec.htm> (accessed May 2006).

For instance, the constitution of South Africa explicitly states in section 24, chapter 2, that “everyone has a right (a) to an environment that is not harmful to their health or well being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. See Constitution of South Africa, 1996, available on the website of Polityorg.za, South Africa, <http://www.polity.org.za/govdocs/constitution/saconst.html> (accessed May 2006).

Several countries have established judicial precedents that extend the fundamental right to life to encompass the right to a healthy environment.<sup>44</sup> Environmental rights include the right to a clean and safe environment and the concomitant right to act to protect the environment through the right to organize; the right to a safe and healthy workplace; the right to an adequate standard of living; and the right to information, access to justice, and to participate in environmental decision making.

An early mention of the relationship between sustainable development and environmental justice in an international instrument is in Article 12(2)(b) of the 1966 *International Covenant on Economic and Social Rights*. It calls on states to improve “all aspects of industrial and environmental hygiene” in order to help people realize their right to “the enjoyment of the highest attainable standard of physical and mental health.”<sup>45</sup> The 1972 *Stockholm Declaration on the Human Environment* recognizes the link between human rights and environmental protection, stating that, “[m]an has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.”<sup>46</sup>

The 1981 *African Charter on Human and Peoples' Rights* expressly recognizes that “all peoples shall have the right to a generally satisfactory environment favourable [*sic*] to their development.”<sup>47</sup> The Organization of American States introduced

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Article II, sec. 16, of the Philippine constitution, mandates that “the State shall protect and advance the right of the people to a balanced and healthful ecology in accord with the rhythm and harmony of nature.” See Constitution of the Philippines, 1987, official website of the Republic of the Philippines, <http://www.gov.ph/aboutphil/constitution.asp> (accessed May 2006). See also Carl Bruch, Wole Coker, and Chris VanArsdale, *Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa* (Washington, DC: Environmental Law Institute, 2000), available at the website of the Environmental Law Institute, [http://www.elistore.org/reports\\_detail.asp?ID=527](http://www.elistore.org/reports_detail.asp?ID=527) (accessed May 2006).

<sup>44</sup> For example, in India, in *Subhash Kumar v. State of Bihar*, the supreme court affirmed that the “right to life ... includes the right of enjoyment of pollution-free water and air.” (Sup. Ct. of India, WP 381/1988 [1991.01.09] 420); and in Pakistan, *Human Rights Case (Environment Pollution in Baluchistan)* 1994 P.L.D. 102 (Sup. Ct. of Pakistan), the court declared that dumping nuclear waste in coastal areas could violate the right to clean environment, included in right to life.

<sup>45</sup> ICESCR, art. 12.

<sup>46</sup> United Nations Conference on the Human Environment, “*Stockholm Declaration*,” 1972, U.N. Doc. A/Conf.48/14.

<sup>47</sup> African Charter, art. 2.

the right to a healthy environment in its 1988 *Protocol of San Salvador*. Article 11 of the *Protocol* recognizes that “everyone shall have the right to live in a healthy environment.”<sup>48</sup> The 1994 Draft Declaration of Principles on Human Rights and the Environment stressed the intrinsic link that exists between the preservation of the environment, development, and the promotion of human rights. Principle 2 of the Draft Declaration states, “All persons have the right to a secure, healthy, and ecologically sound environment. This right and other human rights, including civil, cultural, economic, political, and social rights, are universal, interdependent, and indivisible.”<sup>49</sup>

In Europe, the OECD has stated that a “decent” environment should be recognized as one of the fundamental human rights.<sup>50</sup> Furthermore, the United Nations Economic Commission for Europe (UNECE) has drafted the “Charter on Environmental Rights and Obligations,”<sup>51</sup> which affirms the fundamental principle that everyone has the right to an environment adequate for general health and well-being. The World Commission on Environment and Development proposed that as a fundamental legal principle, “all human beings have the fundamental right to an environment adequate to their health and well-being.”<sup>52</sup>

More than any declaration or judicial decision, the murders of Chico Mendes, a Brazilian environmentalist, and Ken Saro Wiwa of Nigeria, a novelist and activist for the oil-producing region of the Niger Delta, drew international attention to the inextricable interrelationships between sustainable development and environmental justice.<sup>53</sup> These tragedies highlighted the immediate human toll of environmental

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<sup>48</sup> Additional protocol to *American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, “Protocol Of San Salvador,” art. 11, O.A.S. Treaty series No. 69 (1988), entered into force Nov. 16, 1999, available on the website of the Inter-American Commission on Human Rights, Organization of American States, Washington, DC, <http://www.cidh.oas.org/Basicos/basic5.htm> (accessed May 2006).

<sup>49</sup> *Draft Declaration of Principles on Human Rights and the Environment*, 1994.

<sup>50</sup> OECD, “Responsibility and Liability of States in Relation to Transfrontier Pollution,” reprinted in *Environmental Policy and Law* 13 (1984):122.

<sup>51</sup> UNECE, *Charter on Environmental Rights and Obligations*, adopted by the Experts Meeting held in October in Oslo, Norway, October 29–31, 1990.

<sup>52</sup> WCED, 1987, *Our Common Future*, 348.

<sup>53</sup> For more information on Chico Mendes, see Andrew Revkin, *The Murder of Chico Mendes and the Fight for the Amazon Rain Forest* (St. Louis, MO: Island Press, 2004), and “From the Ashes: Reflections on Chico Mendes and the Future of the Rainforest,”

destruction and showed how this toll has usually been borne disproportionately by the people least able to cope with it—people already on the margins of society who lack sufficient resources to defend themselves. As noted above, the area of human health also demonstrates the connection between sustainable development and environmental justice. UNICEF estimates that over 40,000 children aged 12 and under die every day of preventable causes, including water-borne diseases.<sup>54</sup> Water pollution is conventionally seen as an environmental issue, while health is a human rights issue; it is almost glaringly evident, therefore, that the right to clean drinking water is an environmental human right.

Article 24 of the 1989 *Convention on the Rights of the Child* provides that a child has the “right to enjoy the highest attainable standard of health” through the “provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution.”<sup>55</sup> The Inter-American Commission on Human Rights specifically recognized in the Yanomami case in Brazil that negative environmental effects connected with deforestation violate the right to health and well-being of affected indigenous peoples.<sup>56</sup> International environmental instruments, such as the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989)<sup>57</sup> and the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa* (1991),<sup>58</sup> protect the right to health

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posted June 1, 1999, Environmental Defense Fund website, New York, NY, <http://www.environmentaldefense.org/article.cfm?ContentID=1563> (accessed May 2006); and Remember Saro-Wiwa website, London, UK, <http://www.remembersarowiwa.com> (accessed May 2006).

<sup>54</sup> UNICEF, *World Summit for Children Declaration*, Sept. 30, 1990, UNICEF, New York, NY, <http://www.unicef.org/wsc/declare.htm> (accessed May 2006).

<sup>55</sup> CRC, art. 24(2)(c).

<sup>56</sup> For more information on the decision, see *La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*, case 79, Inter-Am. Ct. H.R. (Aug. 31, 2001), Spanish-language website of Inter-American Commission on Human Rights, Costa Rica, [http://www.corteidh.or.cr/serieepdf/mayagna\\_se\\_01.pdf](http://www.corteidh.or.cr/serieepdf/mayagna_se_01.pdf) (accessed May 2006).

<sup>57</sup> *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes*, March 22, 1989, 1673 UNTS 57, available on the website of the Secretariat of the Basel Convention, United Nations Environmental Programme (UNEP), Geneva, Switzerland, <http://www.basel.int> (accessed May 2006).

<sup>58</sup> *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, Jan. 30, 1991, 30 I.L.M.

by prohibiting or regulating the transportation and disposal of toxic substances.<sup>59</sup> The recent *Stockholm Convention* of 2000 is a global treaty to protect human health and the environment from persistent organic pollutants (POPs).<sup>60</sup> The *Convention* calls on governments to take measures to eliminate or reduce the release of POPs into the environment.<sup>61</sup>

### *Community-based property rights*

The rights of individuals and indigenous and other local communities to the natural resources on which they depend is another fundamental issue linking sustainable development and environmental justice. The *International Covenant on Economic, Social, and Cultural Rights* unequivocally states in Article 1 that:

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.<sup>62</sup>

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773 (1991), available on the website of the Basel Action Network, Seattle, Washington, [http://www.bank.org/Library/bamako\\_treaty.html](http://www.bank.org/Library/bamako_treaty.html) (accessed May 2006).

<sup>59</sup> International trade regimes, however, often facilitate the transfer of toxic waste around the world. Officially, only a small amount of toxic waste is exported to developing countries, but there is evidence of widespread unofficial movement. Trade in European waste to India, for example, is particularly brisk, due to disposal costs in India being US\$2,500 per ton cheaper. India, however, presently lacks the environmental standards and/or inspection capacities over its hazardous waste sites to ensure reasonably safe disposal. See Vandana Shiva, "The World on the Edge," in *Global Capitalism*, ed. Will Hutton and Anthony Giddens (New York: New Press, 2000).

<sup>60</sup> Persistent organic pollutants, or POPs, are chemicals that remain intact in the environment for long periods, become widely distributed geographically, bio-accumulate in the fatty tissue of living organisms, and are toxic to humans and wildlife. POPs circulate globally and can cause damage wherever they travel.

<sup>61</sup> See UNEP, "Final Act of the Conference of Plenipotentiaries on the Stockholm Convention on Persistent Organic Pollutants" Stockholm, May 22–23, 2001, available on the website of Stockholm Convention on POPs, Geneva, Switzerland, [http://www.pops.int/documents/meetings/dipcon/25june2001/conf4\\_finalact/en/FINALACT-English.PDF](http://www.pops.int/documents/meetings/dipcon/25june2001/conf4_finalact/en/FINALACT-English.PDF); *Stockholm Convention on POPs* is included as Appendix II, December 10, 2000, Stockholm Convention, [http://www.pops.int/documents/convtext/convtext\\_en.pdf](http://www.pops.int/documents/convtext/convtext_en.pdf) (accessed May 2006).

<sup>62</sup> See ICESCR, art. 1(2). While Agenda 21 is not considered to be hard law in the international

Despite this fundamental mandate of international law, natural resource-dependent populations, while comprising large majorities in many developing countries, are often still legally marginalized by national governments and neglected by international institutions. Many nation states claim ownership over all or most land and other natural resources, while ignoring the rights of people who live in closest proximity to natural resources. These states typically fail to recognize indigenous and other local communities as rightful owners of the natural resources they have cultivated and managed, often over many generations.

National laws (many of which originate in colonial times) continue to be mostly hostile to rural constituencies directly dependent on natural resources in the Global South, while international law still largely overlooks them. Moreover, rural constituencies often lack knowledge of state-created legal rights and legal processes that they can avail themselves of. Similarly, they typically do not have access to lawyers, research materials, or the corridors of power in their countries. As such, indigenous and other local communities have little, if any, say in law and policy-making processes that directly impact their lives and livelihoods.

The concept of community-based property rights (CBPRs) was purposefully developed to contribute to more effective advocacy on behalf of local communities and their rights to manage and control natural resources. It is intended to be more pro-community and equitable than widely used terms, such as “common property” and “community-based natural resource management” (CBNRM). The concept of CBPRs provides an intentional and strategic conceptual contrast to CBNRM, common property, and other concepts, such as co-management and joint management.<sup>63</sup> The objective is to help indigenous and other qualified local communities gain formal legal recognition by the state of the natural resources they consider to be theirs, in the belief that this will contribute to sustainable development and environmental justice.<sup>64</sup>

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sense, chapter 26 states that “the lands of indigenous peoples and their communities should be protected from activities that are environmentally unsound or that the indigenous peoples concerned consider to be socially and culturally inappropriate ...”

<sup>63</sup> For more background on CBPRs, see Owen J. Lynch and Emily Harwell, *Whose Natural Resources? Whose Common Good? Towards a New Paradigm of Environmental Justice and the National Interest in Indonesia* (Washington, DC: Center for Environmental Law—CIEL, 2002), especially chap. 1.

<sup>64</sup> A map prepared by the World Wildlife Fund that lists identifiable ethno-linguistic groups shows significant overlap of the world’s richest biodiversity areas and high concentrations of indigenous cultures. See Gonzalo Oviedo, Luisa Maffi, and Peter Bille

Community-based property rights, by definition, originate in and are enforced by communities. The distinguishing feature of CBPRs is that their exercise derives its authority from the community in which they exist, not from the state where they are located. Formal legal recognition or grant of CBPRs by the state, however, is generally desirable because it removes any doubt about their existence and can help ensure that CBPRs are respected and used in pursuit of the public interest. References to CBPRs (as well as CBNRM) should be used only with regard to initiatives that are primarily controlled and authorized from within a community. Externally initiated activities with varying degrees of community participation should not be referred to as community-based, at least not until the community exercises primary decision-making authority. Unfortunately, the term “community-based” is loosely used and too often applied to initiatives that have limited involvement and support of local communities. In contrast to widely used and largely uniform western concepts, CBPRs within a given local community typically encompass a complex, and often overlapping, bundle of rights that are understood and respected by a self-defined group of local people. As with common property, CBPRs are not equivalent or even similar to “open access” regimes that, by definition, are subject to no management rules and are therefore non-exclusionary.

CBPRs often include, but are not limited to, common property. They can also encompass various kinds of individual and kinship rights, such as inherited rights to agricultural and fallow fields, gardens, planted or tended trees, or rattan clusters. These rights can also include rights to land, wildlife, water, forest products, fish, marine products, or intellectual property. CBPRs may vary in time and place to include rights to seasonally available resources, such as fruit, game, fish, water, or grazing areas. They often specify under what circumstances, and to what extent, certain resources are available to individuals and communities to inhabit, harvest, hunt and gather on, or inherit.

Some positive moves towards the development of norms for legally recognizing CBPRs are underway, but much more work is needed.<sup>65</sup> The leading global instru-

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Larsen, *Indigenous and Traditional Peoples of the World and Ecoregion Conservation: An Integrated Approach to Conserving the World's Biological and Cultural Diversity*. (Gland, Switzerland: World Wild Fund for Nature, 2000), available on the website of Terra Lingua, Salt Spring Island, Canada, <http://www.terralingua.org/EGinG200rep.pdf> (accessed May 2006).

<sup>65</sup> See Andy White and Alejandra Martin, *Who Owns the World's Forest?* (Washington, DC: Forest Trends and Center for International Environmental Law, 2002); and J. Mayers and

ments with provisions that deal explicitly with the property rights of indigenous and other local communities and considered to be legally binding are the International Labour Organization's (ILO) *Convention No. 169 on Indigenous and Tribal Peoples* (1989); the *Convention on Biological Diversity* (1992); the *Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa* (1994); and the *International Treaty on Plant Genetic Resources for Food and Agriculture* (2001).<sup>66</sup> Only ILO *Convention No. 169* and the *Conven-*

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S. Vermeulen, *Company-Community Forestry Partnerships: From Raw Deals to Mutual Gains?* (London: International Institute for Environment and Development, 2002).

<sup>66</sup> An analogous trend can be seen in the debate over intellectual property and the protection given to it under the "Agreement on Trade-Related Aspects of Intellectual Property" (TRIPs), "Agreement amending the General Agreement on Tariffs and Trade and Creating the World Trade Organization," Annex 1c, 33 I.L.M.1, April 15, 1994, ILO website, Geneva, Switzerland, [http://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](http://www.wto.org/english/docs_e/legal_e/27-trips.pdf) (accessed May 2006).

In the days running up to the failed World Trade Organization (WTO) conference in Seattle in 1999, industrialized countries voiced their intention to push for greater protection of patents for plant varieties under TRIPs article 27(3)(b). Article 27(3) provides for states parties to create a *sui generis* system for the protection of plant varieties. Developing countries, however, in reaction to a generalized perception that TRIPs favored the interests of developed-world investors and encouraged biopiracy, strongly objected to these efforts. In the run-up to the meeting, a number of different states issued statements in opposition to the developed-countries proposals, often emphasizing the rights of local communities guaranteed by the *Convention on Biological Diversity Article (CBD)*, art. 8(j), 31 I.L.M. 818 (1992), *Convention on Biological Diversity website*, Geneva, Switzerland, <http://www.biodiv.org/convention/articles.asp> (accessed May 2006); as well as the "International Undertaking on Plant Genetic Resources." See the *International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR)*, FAO resolution 3/2001 (2001), FAO website, Rome, Italy, <ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/iu/ITPGR.pdf> (accessed May 2006).

The Venezuelan delegation to the 1999 WTO conference expressed the feeling of these groups most clearly in their call for an establishment of a system of intellectual property protection "with an ethical and economic content, applicable to the traditional knowledge of local and indigenous communities, together with recognition of the need to define the rights of collective holders." Such systems, which embody the content of CBD Article 8(j), are already part of the national regulations of Australia, Bolivia, Brazil, Cameroon, Colombia, Ecuador, Fiji, Guatemala, India, Malaysia, Peru, Philippines, and Venezuela. See Traci McCellan, "The Role of International Law in Protecting the Traditional Knowledge and Plant Life of Indigenous Peoples," *Wisconsin International Law Journal* 19 (2001): 249, 264.

*tion to Combat Desertification*, however, articulate broad normative frameworks that include protections for CBPRs to land, forests, and natural resources, but even these instruments are minimalist in nature. Perhaps the most promising recent development concerning CBPRs in the realm of international law, at least within the western hemisphere, occurred in a 2001 decision by the Inter-American Court of Human Rights. The court found that Nicaragua violated the human rights of the Mayagna (Sumo) Awas Tingni community when it granted a timber concession to a foreign company on the community's traditional land. The court accordingly ordered the government to recognize and protect the community's collective legal rights to its traditional lands, natural resources, and environment.<sup>67</sup>

Another positive development in international law regarding CBPRs, as well as local rights to participation, has been the emerging concept of prior informed consent. While the definition of PIC for local communities varies by context, it is generally described as a consultative process whereby potentially affected communities engage in an open and informed dialogue with individuals interested in pursuing activities in the area(s) occupied or traditionally used by the affected community. Discussions should occur prior to, and continue throughout, the time the activity is conducted, and communities should have the right to withhold consent at decision-making points during the project cycle.<sup>68</sup> At no time should consent be coerced or anything other than voluntary.

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<sup>67</sup> See *La Comunidad Mayagna (Sumo) Awas Tingni v. Nicaragua*.

<sup>68</sup> This general definition of "Free Prior Informed Consent" is derived from the following definitions specific to each term:

*Free:* Decision making and information gathering by potentially affected people(s) and/or communities must in no way be limited by coercion, threat, manipulation, or unequal bargaining power. Consent must be entirely voluntary. See Robert Goodland, "Free, Prior and Informed Consent and the World Bank Group," *Sustainable Development Law and Policy* 4, no. 2 (Summer 2004), 66; and Fergus MacKay, "Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review 2004," *Sustainable Development Law and Policy* 4, no. 2 (Summer 2004), 43.

*Prior:* To be meaningful, informed consent must be sought sufficiently in advance of any decisions by the state or third parties, or any commencement of activities by a project proponent that will affect people(s) and/or communities and their lands, territories, and resources. See MacKay, 2004, "Indigenous Peoples' Right;" and UNESCO, "Inter-agency Support Group on Indigenous Issues; Report on Free Prior and Informed Consent," (hereafter, UNESCO 2004) May 2004, United Nations website, New York, NY, <http://daccessdds.un.org/doc/UNDOC/GEN/N04/270/92/PDF/N0427092.pdf?OpenElement> (accessed May 2006).

### *Participation and Procedural Rights*

The fundamental procedural principle that forms the basis for both sustainable development and environmental justice is that all human beings, by virtue of being human, have a right to a meaningful say in decisions that directly affect their lives and livelihoods. This principle is especially relevant for the hundreds of millions of human beings living in indigenous and other local communities in the Global South, who are directly dependent on natural resources, but all too often have little, if any, voice in official decision-making processes concerning how those resources are to be used. Poor people in urban areas, whose numbers seem to grow almost inexorably, are also in most instances grossly underrepresented and overlooked in processes that address problems related to sanitation, access to potable water, and air pollution.

The realization of environmental justice and sustainable development will require the active involvement and support of those people most affected by the absence of environmental justice and sustainable development. The best strategy for encouraging and sustaining their active involvement and support would be the effective promotion of participatory democracy. This requires the establishment and

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*Informed:* Disclosure of information concerning the nature, purpose, expected impacts, risks, and benefits of the proposed development must be made fully and accurately, in a form that is both accessible and understandable to the affected people(s) and/or communities with an understanding of how they specifically will benefit, and how these benefits compare to projected impacts and potential worst-case scenarios (and alternatives). Furthermore, potentially affected people(s) and/or communities must be fully informed of their own rights and understand the legal process guiding implementation of the project. See MacKay, 2004, "Indigenous Peoples' Right to Free, Prior and Informed Consent;" Goodland, 2004, "Free, Prior and Informed Consent;" Lyla Mehta and Maria Stankovitch, "Operationalisation of Free Prior Informed Consent," paper prepared by the Institute of Development Studies for the World Commission on Dams, 2000.

*Consent:* Consent does not necessarily mean that every member of affected people(s) and/or communities must agree, but rather that consent will be determined pursuant to customary law and practice, or in some other way agreed on by the community. The affected people(s) and/or communities need to specify which person/entity will represent them, and the project proponents must respect the representative(s) chosen by the community as the only legitimate provider(s) of consent. For many persons, the term "consent" connotes that the consent must be uncoerced and entirely voluntary; for these persons, the term "free" is redundant. See Goodland, 2004, "Free, Prior and Informed Consent;" MacKay, 2004, "Indigenous Peoples' Right to Free, Prior and Informed Consent;" UNESCO 2004; Mehta and Stankovitch, 2000, "Operationalisation of Free Prior Informed Consent."

implementation of procedural rights, such as the right to receive and disseminate information, the right to participate meaningfully in planning and decision-making processes, and the right to effective remedies in administrative or judicial proceedings. Meaningful consultation and participation are basic tenets of liberal democracies are an essential foundation for guaranteeing human rights. In their absence, the underlying rationale of rights is defeated, as the people whom these rights are supposed to protect are excluded from decision-making processes that directly concern them. Democracy supports the procedural guarantee of human rights, at least in theory. There is a plurality of virtues here, including (1) the intrinsic importance of political participation and freedom in human life; (2) the instrumental importance of political incentives in keeping governments responsible and accountable; and (3), the constructive role of democracy in the formation of values and in the understanding of needs, rights, and duties.<sup>69</sup>

The right to assemble and to participate politically,<sup>70</sup> the right to information,<sup>71</sup> and the right to fair adjudication of one's rights<sup>72</sup> are well-established fundamental human rights protected by binding global and regional agreements. It is, therefore, not surprising that along with what the International Court of Justice referred to as "new scientific insights and ... a growing awareness of the risks for mankind for present and future generations"<sup>73</sup> would come an application of these rights in an environmental context. This application has been articulated in international and regional environmental instruments,<sup>74</sup> the laws of nations,<sup>75</sup> and the policies of

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<sup>69</sup> Amartya K. Sen, "Democracy as a Universal Value," *Journal of Democracy* 10, no. 3 (1999):3–17.

<sup>70</sup> UDHR, art. 21; ICCPR, art. 25, ICERD, art. 5(c); *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW), Sept 3, 1981, 1249 U.N.T.S. 13 art. 7, available on the United Nations website, <http://www.un.org/womenwatch/daw/cedaw> (accessed May 2006); *African Charter*, art. 13; *American Convention*, art. 23.

<sup>71</sup> ICCPR, art. 19; ICERD, art. 5(d)(vii); CEDAW, art. 10; CRC, art. 13; *African Charter*, art. 10; *American Convention*, art. 13; *Charter of Fundamental Rights of the European Union* (hereafter *European Charter*), art. 11, 2000/C 364/01, Dec. 7, 2000, available on the website of the European Union, <http://ue.eu.int/uedocs/cmsUpload/CharteEN.pdf> (accessed May 2006).

<sup>72</sup> UDHR, art. 10; ICCPR, art. 14; *African Charter*, art. 7; *American Convention*, art. 8; *European Charter*, art. 47.

<sup>73</sup> *Case Concerning the Gabčíkovo-Nagyamaros Project*, para. 314.

<sup>74</sup> See footnote 77, below.

<sup>75</sup> See footnotes 84–85, below.

international and regional development organizations.<sup>76</sup> It has also been adjudicated in a regional human rights tribunal<sup>77</sup> and recognized as customary international law.

Principle 10 of the *Rio Declaration* clearly articulates the substance of these rights in the environmental context: “Environmental issues are best handled with the participation of all concerned citizens, at the relevant level ...”<sup>78</sup> Although the *Rio Declaration* was non-binding, following its proclamation, numerous binding global and regional<sup>79</sup> legal instruments have reaffirmed the principles it embodied.

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<sup>76</sup> See footnotes 86–90, below.

<sup>77</sup> The European Court of Human Rights held in *Lopez Ostra v. Spain*, 20 EHRR 277 (1994) and *Guerra v. Italy*, 26 EHRR 357 (1998) that the respective state’s failure to enforce existing environmental laws constituted a violation of the plaintiffs’ rights under Article 6(1) of the *European Convention*. In both *Guerra*, 20 EHRR 277 (1994) and *LCB v. United Kingdom*, 27 EHRR 212 (1999), the Court held that the respective state was under an obligation to inform the plaintiffs of any environmental risks about which they were aware.

<sup>78</sup> *Rio Declaration*, princ. 10. The text goes on to mention: “At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

<sup>79</sup> See, for example, *Convention on Environmental Impact Assessments in a Transboundary Context* (CEIATB), art 2(2), 1989 UNTS 309, September 10, 1997, website of the UNECE, Geneva, Switzerland, <http://www.unece.org/env/eia/eia.htm#article4> (accessed May 2006); ITPGRE, art. 9.2(c); United Nations, CDD, preamble, art. 3, 5(d), 10, 17(f), 18(2), 19, 21, annexes I, II, III, IV, December 26, 1996b, website of U.N. Convention to Combat Desertification, Bonn, Germany <http://www.unccd.int/convention/text/convention.php> (accessed May 2006); CBD, preamble, art. 14; Aarhus Convention; *Council of Europe Convention on Civil Liability for Activities Dangerous to the Environment*, “Lugano Convention,” art. 14–16, open for signature June 21, 1993; *North American Agreement on Environmental Co-operation* (NAAEC), art. 6 (gives persons with a legally recognized “interest” the right to bring proceedings to enforce environmental laws and remedy harms), art. 7 (provides for due process in these proceedings), arts 13 and 14 (provides for both individuals and NGOs to complain to the Secretariat that a state party is not following its legislation, but there is, however, no provision in the document guaranteeing access to information and participation in decision making), 32 I.L.M. 1480, November, 1993

One of the most significant is the Convention on Access to Information, Public Participation in Decision-Making [*sic*] and Access to Justice in Environmental Matters (*Aarhus Convention*) of 1998. The *Aarhus Convention*, which covers much of the European Union as well as countries of the former Soviet Union, backs up a broad guarantee to individuals of a “right to an environment adequate to her or his well-being” in the preamble,<sup>80</sup> with strong procedural rights applicable to both individuals and NGOs. These include rights of access to information,<sup>81</sup> rights to participation in decision making,<sup>82</sup> and strong provisions for access to justice in environmental matters, including the enforceability of rights conferred by the convention in a national court or independent tribunal and guarantees of due process in challenges related to national environmental laws.<sup>83</sup> This last provision is very similar in form to Article 6(1) of the *European Convention of Human Rights*, in effect reaffirming the applicability of already guaranteed fundamental procedural human rights in the context of environmental matters.<sup>84</sup>

At the level of state practice, the legislation of many nations, as well as European Community directives, guarantees rights to information similar to those embodied in the U. S. Freedom of Information Act.<sup>85</sup> Additionally, as of 1995, an estimated 86 countries had enacted legislation requiring environmental impact assessments, which generally provide some level of public participation and notification.<sup>86</sup> The

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Can-Mex.-USA, website of the Commission for Environmental Cooperation of North America, Montreal, Canada, [http://www.cec.org/pubs\\_info\\_resources/law\\_treat\\_agree/naaec/index.cfm?varlan=english](http://www.cec.org/pubs_info_resources/law_treat_agree/naaec/index.cfm?varlan=english) (accessed May 2006).

<sup>80</sup> *Aarhus Convention*, preamble.

<sup>81</sup> See, generally, *ibid.*

<sup>82</sup> *Ibid.*, art. 3(9).

<sup>83</sup> *Ibid.*, art. 9.

<sup>84</sup> *European Convention*, art. 6(1). Also see International Law Association (ILA), “Pre-conference Report of the Committee on Transnational Enforcement of Environmental Law,” New Delhi, 2002, ILA website, London, UK, <http://www.ila-hq.org/pdf/Transnational%20Enforcement%20of%20Environmental%20Law/Transnational%20Enforcement%20of%20Environmental%20Law%202002.pdf> (accessed May 2006), describing the proliferation of national legislation and EC directives similar to US Freedom of Information statutes.

<sup>85</sup> See International Law Association, “Pre-conference Report,” 9.

<sup>86</sup> See Erika Preis, “The International Obligation to Conduct an Environmental Impact Assessment,” *New York University Environmental Law Journal* 7 (1999): footnote 40.

last ten years have also seen an increase in provisions for the procedural rights of peoples affected by projects of multilateral development banks. Beginning with the World Bank in the late 1980s, various banks have devised slightly differing policies on environmental impact assessments involving local participation and consultation;<sup>87</sup> on indigenous peoples requiring broad community support,<sup>88</sup> and on involuntary resettlement policy, which in the case of the World Bank is geared toward land-for-land exchange.<sup>89</sup> The level of enforcement of these policies, however, makes their significance questionable. In 1994, the World Bank also established an inspection panel to hear complaints from people affected by projects of the International Development Association and International Bank for Reconstruction and Development. The panel allows affected people to essentially bypass their national government ministries and appeal directly to the lending institution. Unfortunately, while the panel has been reasonably effective in promoting internal reform at the Bank, it has not been so effective in remedying situations presented to it.

The International Finance Corporation (IFC) established the Compliance Advisor and Ombudsman (CAO) during 2000. The CAO is empowered to receive direct complaints from affected peoples, but has greater flexibility in the types of remedies it can fashion, as well as the sources from which it can draw, which presumably include international human rights norms. Enforcement mechanisms among regional development banks are either non-existent or ineffective, although there is continuing effort at reform, particularly at the Asian Development Bank (ADB).<sup>90</sup>

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<sup>87</sup> See, for example, World Bank, "Environmental Assessments," Operations Policy 4.01 (OP 4.01) (Washington, DC: World Bank, 1999).

<sup>88</sup> See, for example, World Bank, "Revised Operational Policy (OP) and Bank Procedure (BP) on Indigenous Peoples 4.10" (Washington, DC: World Bank, 2005).

<sup>89</sup> See, for example, World Bank, "Involuntary Resettlement," Operations Policy 4.12 (OP 4.12) (Washington, DC: World Bank, 2002), principle 9 ff.

<sup>90</sup> ADB, "Inspection Procedures: Processing of a Request for Inspection," in "Inspection Policy: A Guidebook, II," ADB, Manila, Philippines, <http://www.adb.org/Documents/Guidelines/Inspection/inspect260.asp> (accessed May 2006); see also "NGO and Civil Society Center, ADB website, <http://www.adb.org/NGOs/ngocenter.asp>; IADB, "Independent Investigation Mechanism," IADB, Washington, DC, <http://www.iadb.org/cont/poli/mecanism.pdf> (accessed May 2006); AfDB, *Environment and Social Assessment Procedures for Public Sector Operations* (June 2001), AfDB, Cote D'Ivoire, [http://www.afdb.org/pls/portal/docs/PAGE/ADB\\_ADMIN\\_PG/DOCUMENTS/ENVIRONMENTALANDSOCIALASSESSMENTS/ESA%20PROCEDURE%2C%20PUBLIC%20SECTOR%20OPERATIONS.PDF](http://www.afdb.org/pls/portal/docs/PAGE/ADB_ADMIN_PG/DOCUMENTS/ENVIRONMENTALANDSOCIALASSESSMENTS/ESA%20PROCEDURE%2C%20PUBLIC%20SECTOR%20OPERATIONS.PDF) (accessed May 2006); IFC, "Procedure for Environmental and Social Review of

On the issue of access, both the World Trade Organization (WTO) Appellate Body and the International Centre for the Settlement of Investment Disputes (ICSID) arbitration panels have shown some willingness to entertain comments from a wider range of stakeholders. In a significant case regarding environmental standards in the United States, for example, the WTO Appellate Body upheld a domestic U.S. law that banned imports of shrimp harvested in ways that were unduly harmful to turtles; prior to its decision, the appellate body agreed for the first time to receive *amicus* briefs from NGOs.<sup>91</sup> Similarly, an ICSID arbitration panel convened to adjudicate a complaint by a Canadian chemical producer that a California order banning the sale of gas containing MTBE (methyl tertiary-butyl ether) violated North American Free Trade Agreement provisions. Over strenuous protestations of the Mexican government and the private party directly involved, the panel held that the board was free to accept *amicus* briefs from NGOs.<sup>92</sup>

These developments within international institutions are another indication of a growing global consensus regarding certain fundamental rights to public participation in environmental and human rights matters. They establish supranational mechanisms by which individuals and communities can enforce their rights as independent or collective subjects of international law. In order to create an effective enabling environment for more voices to be heard and amplified, however, individual and community participation, as a broad-based political and legal phenomenon, needs to be more clearly provided for and enforced.

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Projects,” annex C, “Types of Environmental Assessment,” IFC, Washington, DC, 1998, [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/ac\\_ea/\\$FILE/AnC\\_typesofEA.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/ac_ea/$FILE/AnC_typesofEA.pdf) (accessed May 2006); and EBRD, *Environmental Policy* (London: EBRD, 2003), <http://www.ebrd.com/about/policies/enviro/policy/index.htm> (accessed May 2006).

<sup>91</sup> See, for example, WTO, 1998, “Report of the Panel on United States-Import Prohibition of Certain Shrimp and Shrimp Products,” case no. 58 (and 61), WTO, Geneva, Switzerland, November 6, 1998. The World Trade Organization Appellate Body used sustainable development to interpret the General Agreement on Tariffs and Trade (GATT) in the Shrimp-Turtle case.

<sup>92</sup> For more information, see the NAFTA Claims website, <http://www.naftaclaims.com> (accessed May 2006), and “NAFTA Citizen Submissions on Enforcement Matters Mechanism,” website of the Commission for Environmental Cooperation of North America, Montreal, Canada, <http://www.cec.org/citizen/index.cfm?varlan=english> (accessed May 2006).

## Obstacles and Recommendations

The U.N. Conference on Environment and Development (Earth Summit) in 1992 highlighted the severity of the global environmental crisis, urged restraint on consumption and waste, and helped initiate better north-south dialogue. Despite a decade of effort by governments, businesses, and civil society, and large expenditures of financial resources, far too little has been achieved in tangible terms. A decade later, on the eve of the World Summit on Sustainable Development in Johannesburg in 2002, the overall global situation had deteriorated on several environmental, human rights, and developmental fronts. The ideals and benefits of sustainable development and environmental justice remain a distant reality for billions of the world's citizens. The reasons are varied and multifaceted and include an array of obstacles that have yet to be overcome.

### *Obstacles*

The obstacles merit more in-depth identification and analysis.<sup>93</sup> Some obvious ones include, among others, differences in perceptions and needs between the Global South and the industrialized North; the growing preoccupation with market strategies; the rise of corporate globalization, including increasing control over mass media; growing disparities in income, wealth, and educational opportunities; widespread corruption; and over-consumption.

Among the foremost challenges are the enduring prejudices that divide us. These prejudices are often reflected in and reinforced by excessive nationalism. The ideology of nations and nationalism continues to be strengthened in many political, social, environmental, and economic spheres of life. Nationalism, however, can be a barrier to the realization of a globally shared sense of purpose and responsibility, especially when "competitive nationalism" becomes the modus operandi of governments and citizens. National sovereignty has been eroded in many respects by the growing trend of corporate globalization, including dramatic increases in international flows of private capital and the sheer size and scope of multinational corporations. Yet some nations remain much more powerful than others, and they strive in various ways to maintain and enhance their power and privileges, including, on occasion, intentionally inflaming prejudice and inter-ethnic tensions. The unilateralism and

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<sup>93</sup> CIEL (the Center for Environmental Law) is conducting research and analysis on these and other obstacles towards realizing sustainable development and environmental justice. CIEL welcomes comments and suggestions (info@ciel.org and geneva@ciel.org).

militarism exhibited by certain nation states in the past and present are evidence of such unhealthy tendencies.

The lack of gender sensitivity and the failure to pay adequate attention to the rights and needs of women results in women being frequently overlooked in decision-making processes, including those related to natural resources. This led to the reiteration at the U.N. Fourth World Conference on Women in Beijing (1995) that women's rights are human rights.<sup>94</sup> Women also tend to bear a disproportionate burden of environmental and natural resource degradation, especially in societies where they are responsible for collecting firewood and water and providing food for the family. Deforestation, water pollution, and resource scarcity result in women having to walk longer distances and work much harder to collect life-sustaining resources for their families. Environmental justice, therefore, has particular significance for women.

Other very divisive and difficult obstacles are prejudice and discrimination based on skin color, ethnicity, religion, and national origin. These remain formidable barriers to the realization of a globally shared sense of purpose, responsibility, and future. Too frequently, they cause us to forget or fail to appreciate fully the simple fact that human beings comprise one species on an environmentally fragile planet.<sup>95</sup> Despite some positive trends in the twentieth century, prejudice and related discrimination still pose a great global threat to achieving true environmental justice and sustainable development.

### ***Recommendations***

Attaining sustainable development in a broad-based and structural manner will require a much greater focus on efforts to attain environmental justice. This focus must entail specific actions, including the development of laws, policies, procedures, programs, and projects that strive to harmonize and integrate natural resource protection and management initiatives with efforts focused on promoting equitable and wise use of the natural environment.

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<sup>94</sup> United Nations, 1995, *Beijing Declaration and Platform for Action*.

<sup>95</sup> Insights being generated by research on genetics and DNA corroborate this by demonstrating that there is no gene unique to one so-called race or another, no set of traits that define a particular ethnic group, and that as a species, human beings are more or less genetically homogenous. Paradoxically, research on human genetics and DNA has been severely criticized as being unethical and discriminatory in its approach. See, for example, the website of the U.S. National Human Genome Research Institute, Bethesda, MD, at <http://www.genome.gov> (accessed May 2006).

The close and profound relationships that many local communities share with the environment must be respected and recognized. This will require creating holistic and integrated approaches that include the meaningful participation of directly affected individuals and constituencies, while simultaneously promoting their rights to information and transparency. New paradigms to address current problems must likewise reflect sensitivity to gender issues and differences in language and culture. Similarly north-south sensibilities need to be taken into consideration and attempts to reach fair and mutual decisions given greater support. This involves efforts aimed at building trust and establishing transparent communication channels. Strengthening the independence of the media and providing more diverse and balanced reporting is crucial in this endeavor.

Encouraging sustainable lifestyles in overly consumptive societies is an absolute imperative to ensuring that we achieve levels of development that can support the Earth's current and future populations and equitably address growing inequalities in material wealth and human well-being. With the rise of corporate globalization and the dominance of free-market ideology, measures to enforce accountability of corporations, international financial institutions, donor agencies, and private individual investors also need to be strengthened and enforced,<sup>96</sup> especially since voluntary observance of such norms has proven inadequate.<sup>97</sup> With specific regard to environmental justice, the performance of these institutions must be measured

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<sup>96</sup> So far, only two international procedures exist that can directly scrutinize the degree to which companies respect human rights. These are the implementation principles of the ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 1977, OB Vol. LXI, 1978, Series A, No. 1, ILO International Training Center, Turin, Italy, <http://www.itcilo.it/english/actrav/telearn/global/ilo/guide/triparti.htm> (accessed May 2006); and the OECD, "Guidelines for Multinational Enterprises," rev. 2000, OECD, Paris, 2000, <http://www.oecd.org/daf/investment/guidelines/> (accessed May 2006). Although officially endorsed by governments, these procedures rely on the voluntary cooperation of multinationals and remain rather weak.

<sup>97</sup> The growing concern regarding corporate accountability is reflected in the preamble to the draft U.N. *Fundamental Human Rights Principles for Business Enterprises*, which states that "... transnational corporations and other business enterprises, their officers, and their workers are further obligated directly or indirectly to respect international human rights and other international legal standards." United Nations, *Human Rights Principles and Responsibilities for Transnational Corporations and Other Business Enterprises*, U.N. Doc. E/CN.4/Sub.2/2002/XX, E/CN.4/Sub.2/2002/WG.2/WP.1, February 2002, for discussion July/August 2002, <http://www1.umn.edu/humanrts/principlesW-OutCommentary5final.html> (accessed May 2006).

and monitored in terms of adherence to human rights and environmental standards. This includes global institutions, such as the World Trade Organization.

With the strengthening of international financial institutions and corporate power, civil society needs, more than ever before, to network and coalesce its efforts towards promoting democracy, environmental justice, and sustainable development. Governmental and inter-governmental agencies need to work closely with and understand the needs, demands, and struggles of local communities and civil society institutions striving to amplify their voices. The World Summit on Sustainable Development provides an excellent venue to learn, network, coalesce, and take steps toward these objectives.

Developments in international and national law during the past 60 years have created certain spaces for promoting sustainable development and environmental justice. Despite these and other positive developments, much more remains to be done. Throughout much of the world, environmental degradation continues to worsen, and in many places, human and environmental rights continue to be violated. Legal rights can help advance the cause of human rights, but they are not guarantees for the attainment of environmental justice and sustainable development. These rights need to be supported by accessible procedures, as well as good governance, political will, and effective implementation.

The strengthening and promotion of a rights-based approach to sustainable development deserves concentrated attention and efforts by all actors. Such an approach would reinforce the human rights principles of non-discrimination, gender equality, non-retrogression, and the right to remedy. As U.N. Secretary-General Kofi Annan said in his 1998 *Annual Report on the Work of the Organization*, “[T]he rights-based approach describes situations not simply in terms of human needs, or of development requirements, but in terms of society’s obligations to respond to the inalienable rights of individuals.”<sup>98</sup> It is only by shifting the current focus from a market-based approach to a rights-based one that some hope for sustainability and justice can be upheld. Existing trends in international law serve to affirm this.

We are but one species living on Earth, albeit a very special one. The sooner we realize and better respond to our common humanity and integrate a deeper understanding and appreciation of this simple truth into our actions, the sooner we will be able to achieve environmental justice and sustainable development.

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<sup>98</sup> United Nations, “Report of the Secretary-General on the Work of the Organization—1998,” UN, New York, <http://www.un.org/Docs/SG/Report98/introd.htm> (accessed May 2006).

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**OWNING CULTURE?  
PURSUING EQUITY: FROM INTERNATIONAL  
LAW TO ENTERPRISE DEVELOPMENT**

RICHARD KURIN

*Who owns culture? The question might be confusing to an economist, puzzling for a lawyer, absurd for an anthropologist, but is increasingly important to cultural advocates across the planet. This article looks at how serious the question has become, generating new cultural treaties on one hand and innovative forms of cultural economic development on the other. It also examines cultural enterprise in relationship to international law and economic development. A review of post-World War II cultural treaties shows that these treaties follow two tracks in conceptualizing culture: the first, rather diffuse, sees it as a form of collective identity; the second is specifically concerned with the rights of those who create particular products. These two tracks have merged in recent treaties in which nation states seek equity in a global economy by asserting more control over their patrimony, largely in the hope of expanding their own cultural industries. Since the legal resolution of collective, national ownership of culture is intractable, the development of cultural enterprises has become a more likely way of attaining the benefits of cultural ownership. Given the critiques of globalization and top-down development projects, such enterprises might best succeed if they encourage the use of local resources, generate benefits reaped by local people, enable those people to assert their identity and values, and bring them into a global marketplace for ideas as well as products. Smithsonian Global Sound, an online world music website that enables musicians worldwide to assert intellectual property rights over their music, is an example of such an enterprise.*

**The Culture Concept: Post-World War II**

A brief outline of how “culture,” in the context of international law and development, arrived at the question of ownership is useful here. Historians of anthropology have spent more than a century debating the concept of culture, but have reached no unifying consensus on its definition and have had only a diffuse impact upon

*The World Bank Legal Review: Law, Equity, and Development: 483-501.*

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Printed in the Netherlands.

international development and policy.<sup>1</sup> A reasonable benchmark for the current discussion of culture within a development and policy framework is the seminal Universal Declaration of Human Rights (UDHR), agreed to by the United Nations General Assembly in 1948. The UDHR incorporated certain nuanced scholarly and public discourse on the nature and definition of “culture” and proposed the idea of “cultural rights.”<sup>2</sup> While making the term internationally acceptable, it also subjected the concept to legal scrutiny, elaboration, and debate—a process that continues to this day. Two distinct, disarticulated notions of culture are embodied in Article 27 of the UDHR:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts, and to share in scientific advancement and its benefits; [and]
2. everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author.<sup>3</sup>

In the first notion, culture is a collective phenomenon—the outcome of collective effort through history, like religion, language, and nationality. It is to a large degree seen as the object of individual choice and freedom. It may be enjoyed or discarded. It is not something owned, but rather something that a person participates in, partakes of, or perhaps belongs to. This is consistent with the view of “cultural rights,” which, while unnamed in the UDHR, are associated with the right to nationality (Article 15), the right to freedom of thought and religion (Article 18), the right of expression (Article 19), the right of association (Article 20), and even the right to education (Article 26). The idea that culture might belong to a specific group of people, say, a cultural community, is not recognized, although it was debated at the time.

The other notion of culture in the UDHR, expressed in the second clause of Article 27, is the creative product of an individual. All individuals, as cultural creators, are presumed to have a moral stake in their creations and the legal right to benefit materially or economically from those creations. Such an idea has had a

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<sup>1</sup> Arne Martin Klausen, “Our Creative Diversity: Critical Comments on Some Aspects of the World Report,” in *Our Creative Diversity: A Critical Perspective*, 27–35 (Oslo: Norwegian National Commission for UNESCO, 1998).

<sup>2</sup> United Nations, *Universal Declaration of Human Rights*, article 22, General Assembly res. 217 A (III), December 10, 1948. <http://www.un.org/Overview/rights.html> (accessed May 28, 2006).

<sup>3</sup> *Ibid.*, article 27.

long history, particularly in western thought. The concept of copyright, for example, is specifically included in the United States Constitution.<sup>4</sup> International law, including the Berne Convention and the subsequent treaties it has spawned, recognize that particular cultural creations—for example, publications, films, recordings, performances, artistic works, even computer programs—could be owned, at least for a time, after which they would become part of the public domain, available to free unfettered use by all, presumably for the benefit of all.<sup>5</sup>

Keeping these two “tracks” separate made sense while experts wrestled with the difficulties of where they might be combined. For example, fixing ownership in situations where cultural productions were created by diffuse collectives in unknown past times was a problem. Complications over collective ownership—traditional knowledge, songs, tales, and other cultural products—arose in the first international discussions of culture and have long been debated by the World Intellectual Property Organization (WIPO).<sup>6</sup> Similarly, the attribution of economic value to the more diffuse type of culture that gives people a sense of identity was seen as either irrelevant or questionable. Recall that, in the 1950s (as well as during the decades that followed), many of the world’s cultures were regarded by both the west and the communist bloc as either deprived, inferior, or irrational. Indeed, most culture was seen from the perspective of modernization theory as a barrier to development—more a liability than an asset with economic value.

There were some notable exceptions to this type of thinking. Japan, for example, faced tremendous changes in its society in the early 1950s due to the U.S. post-World War II occupation. This led the Japanese government to pass benchmark cultural legislation, known as the Law for the Protection of Cultural Properties.

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<sup>4</sup> *United States Constitution*, Article 1, sec. 8. The Congress shall have the power “to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” (Website of the U.S. National Archives, Washington, DC. <http://www.archives.gov/national-archives-experience/charters/constitution.html> – accessed July 3, 2006.)

<sup>5</sup> WIPO (World Intellectual Property Organization), *Berne Convention for the Protection of Literary and Artistic Works* (proclaimed September 9, 1886, revised numerous times, and last amended September 28, 1979).

<sup>6</sup> After years of work, a WIPO Intergovernmental Committee published “Draft Provisions on the Protection of Traditional Cultural Expressions/Folklore” and “Draft Provisions on the Protection of Traditional Knowledge” in early 2006. See WIPO website, [http://www.wipo.int/tk/en/consultations/draft\\_provisions/draft\\_provisions.html](http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html) (accessed August 6, 2006).

This law was an effort to protect Japanese culture at the very moment it was felt to be ebbing away. The legislature thus made adherence to or valuation of “old ways”—perceived as a liability to the new Japan—into an asset. Sites, repositories of significant items, and practices were turned into cultural property. Buildings, shrines, and locales were consequently designated as treasures to be managed by the state, as private ownership was considered inappropriate for such collective goods. This practice resonated with other international protections for cultural property as enshrined, for example, in the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.<sup>7</sup> As in Japan, buildings, sites, repositories, and significant moveable properties were subsequently increasingly regulated and subject to international scrutiny.

From the 1950s through the 1970s, the antiquities, sites, monuments, and memorials that defined a nation’s cultural heritage won increasing recognition. Throughout the world, this trend had much to do with nation building and provided the historical and civilizational base that helped legitimate the state and construe the identity of its people—never mind that in many cases, the people and cultures heralded as part of a nation’s heritage may have had little to do with, and no continuity with, the state’s present inhabitants and citizens. The 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage,<sup>8</sup> which recognized buildings, archeological and historical sites and monuments, as well as outstanding natural landscapes of scientific and aesthetic value, was the culminating achievement of this movement.

In the 1970s, the Heritage Convention and additional conventions and protocols regulating the movement of cultural property were associated with tangible heritage. These legal arrangements helped inspire a parallel movement in what eventually came to be called intangible cultural heritage. The Japanese, for example, added to their cultural heritage living cultural treasures—that is, people who practiced esteemed traditions—and provided them with state recognition, stipends, and other rewards. Other nations followed suit in an effort to recognize the stories, tales, songs, dances, celebrations, culinary and work traditions, as well as various forms

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<sup>7</sup> UNESCO (United Nations Educational, Scientific, and Cultural Organization), *Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict* (proclaimed 1954, entered into force, 1956), <http://www.icomos.org/hague> (accessed May 28, 2006).

<sup>8</sup> UNESCO, *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 17th session (adopted November 16, 1972), [http://whc.unesco.org/world\\_he.htm](http://whc.unesco.org/world_he.htm) (accessed May 28, 2006).

of folk knowledge—from medicine to pharmacopeia, artistry to cosmology—that helped define their culture and its living practice. Many anthropologists and cultural scholars—such as those at Cultural Survival, an indigenous culture advocacy organization based at Harvard University; the Smithsonian; and in university programs, cultural centers, archives, and museums the world over—worried that modernization programs might in their zeal sweep away the wisdom, knowledge, and artistry embodied in these traditions. As a result, they undertook various types of cultural documentation and recovery projects.

At the international level, a 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore sought to encourage government attention and action with regard to preserving living cultural heritage,<sup>9</sup> but was virtually ignored and therefore totally ineffective.<sup>10</sup>

### **The 1990s: Culture and Globalization**

Two major issues heated up in the 1990s. One was the striking, almost worldwide, awareness of globalization and its impact on local, national, and regional cultures. This trend was largely seen as negative by those in the cultural sector.<sup>11</sup> Globalization not only affected the ability of marginalized, so-called “exotic,” cultural communities to survive, but was perceived as threatening the mainstream of diverse national and urbane societies. Foods, music, fashion, books, movies, and television programs—largely, but not exclusively identified with U.S. popular consumer culture, along with the English language—were viewed as invading countries around the world. It was precisely because these cultural products were

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<sup>9</sup> See Samantha Sherkin, “A Historical Study on the Preparation of the 1989 Recommendation on the Safeguarding of Traditional Culture and Folklore,” report for the Smithsonian Center for Folklife and Cultural Heritage and UNESCO (Washington, DC: Smithsonian Center for Folklife and Cultural Heritage and UNESCO, 2001), <http://www.folklife.si.edu/resources/Unesco/sherkin.htm> (accessed August 5, 2006).

<sup>10</sup> See Richard Kurin, “Safeguarding Traditional Cultures: Global Policy and Practice,” in *Safeguarding Traditional Cultures: A Global Assessment of the UNESCO Recommendation*, ed. Peter Seitel, 20–35 (Washington, DC: Smithsonian Center for Folklife and Cultural Heritage and UNESCO, 2001).

<sup>11</sup> See, for example, Don Adams and Arlene Goldbard, “Creativity under Pressure,” in *Community, Culture, and Globalization*, ed. Don Adams and Arlene Goldbard, 368–375 (New York: The Rockefeller Foundation, 2002).

so well received among young, urban, upper middle-class and wealthy elites that they were seen as so threatening.

The external threat to national cultures was coupled with internal threats. Regional, ethnic, sectarian, and communal movements within many countries—both large and small, post-industrial and agricultural, powerful and weak—challenged the unity of nation states. Separatist movements used cultural characteristics such as language, religion, and heritage, to justify political independence, while others argued for autonomy or special programs based on identity politics. Complicating these diverse developments were increased movements of people across national borders as immigrants, diasporas, and refugees, so that the correspondence of cultural group and nation, in many cases imperfect to begin with, was further skewed.

The second issue that came to prominence in the 1990s was the rising awareness of the dominance of a post-industrial economy that was increasingly based on cultural production. Tourism, the media industries, and the music and publishing industries were growing, attaining broader global scope and generating increasing revenues and jobs. Especially important was the U.S. consumer market for cultural products from other parts of the world—whether world music, tasty food, exotic fashion, or tourist experiences. The worry was that a nation's cultural resources, whether songs, designs, stories, or systems of folk botanical knowledge, would be expropriated and used by foreigners for their economic gain without due recompense to the local people who created or nurtured these resources. Cultural workers around the world accordingly began to revise their view of culture. It was now not only property to take care of, or heritage to pridefully treasure, but an asset that could be economically exploited and protected from undo or unfair exploitation by others.<sup>12</sup>

In 1998, for example, the government of Iceland agreed to compile a national genealogy and the medical records of its citizens, which it licensed to the company deCode, and through them, to the pharmaceutical giant Hoffman-LaRoche. The license is for the purpose of understanding genetic traits and disease and presumably to develop drug therapies to treat them. In dramatic fashion, this license brought together the two strands of cultural ownership. Genealogy—the intangible basis for the Icelandic identity and nation, a cultural product that is diffusely and collectively held—became owned and licensed by the government, on behalf of its people, for economic gain.

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<sup>12</sup> See Elie Cohen, "Globalization and Cultural Diversity," in *World Culture Report 2000: Cultural Diversity, Conflict, and Pluralism*, 66–91 (Geneva: UNESCO, 2000).

The cultural product here, the genealogies of hundreds of thousands of people, was not the simple ancient song of some marginalized group living at the edge of society. The rights holder was not this or that elder, or the ancestors of this or that village—it was now a national government. Would others follow this model of combining national ownership of cultural products for legally protected economic gain?

### Toward New Cultural Treaties

Concerns over cultural globalization and cultural economics, as well as certain recent developments—such as the Icelandic case—have led to two new international treaties in the last three years. In 2003, the UNESCO General Conference voted overwhelmingly to adapt the International Convention for the Safeguarding of Intangible Cultural Heritage.<sup>13</sup> That treaty was followed in 2005 by the Convention on the Diversity of Cultural Contents and Artist Expressions,<sup>14</sup> which was adopted by an even more overwhelming vote. The former entered into force as international law for its signatories on April 20, 2006; as of this writing, 59 nations have ratified it. The second Convention will likely take two or three years to be ratified and gain the same status.

The former treaty calls for nations to preserve their intangible cultural heritage through a variety of means, from public programs to education to integration into development schemes.<sup>15</sup> A good deal of argument about legal protection was essentially deferred to the second treaty. The implication for the question of cultural ownership was that states would take the leading role: the Convention directs all states to develop inventories of their intangible cultural heritage. Many cultural scholars, particularly those from the west, saw this directive as a misguided effort to recreate the bureaucratic regimens of colonialism by recording the numerous

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<sup>13</sup> UNESCO, *International Convention for the Safeguarding of the Intangible Cultural Heritage* (approved October 17, 2003, entered into force April 20, 2006), <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf> (accessed May 28, 2006).

<sup>14</sup> UNESCO, *International Convention on the Diversity of Cultural Contents and Artist Expressions* (adopted October 20, 2005), <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf> (accessed May 28, 2006).

<sup>15</sup> See Richard Kurin, "Safeguarding Intangible Cultural Heritage in the 2003 UNESCO Convention: A Critical Appraisal," in "Views and Visions of the Intangible Heritage," a special double issue, *Museum International*, no. 221/222 (2004):66–76.

“customs” found in individual countries. It was bad social science as it tended to treat culture as an amalgamation of atomistic practices or traits, or in this case, instances of heritage. It was also ineffective social programming because it falsely assumed that because governments inscribed, listed, or registered these items in a cultural inventory, the inventory would somehow assure their continuity in society. Others, mainly lawyers, economists, and diplomats, as well as interested parties worldwide, argued that such inventories provided a tool for the rational management of cultural resources and would provide the first step for asserting ownership of those resources. Some observers even imagined that a nation could thus own Russian proverbs, the tango, the blues, the Melanesian knowledge of navigation, Dogon astronomy, Vedic chants, and so on!

This orientation came to a head in the more recent treaty. The Convention on the Diversity of Cultural Contents and Artist Expressions admirably, but only rhetorically, encourages respect for worldwide and intra-state cultural diversity in the face of globalization. More to the point, the treaty charges governments with defining tangible products as cultural goods and intangible social traditions as cultural services. It also directs them to assemble inventories of such cultural goods and services so they may be subject to national ownership, guardianship, or stewardship. Government actions are then encouraged to facilitate cultural production at home through programs and subsidies, thus resulting in a richer, more culturally diverse world. French wines, Canadian magazines, Ghanaian *kente* cloth patterns, Bollywood films, Russian literature, Cuban cigars, Bolivian music—all such products are potentially able to be supported and subsidized by their respective governments and even by an international fund administered by UNESCO. Furthermore, national governments can, by invoking the convention, declare their own cultural goods or services to be endangered and thus restrict the importation of outside products and practices perceived as threatening the ongoing viability of home-grown ones, to wit:

A Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.

Parties may take all appropriate measures to protect and preserve cultural expressions referred to in paragraph 1 in a manner consistent with the provisions of this Convention.<sup>16</sup>

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<sup>16</sup> UNESCO, *International Convention on the Diversity of Cultural Contents*, Articles 8.1 and 8.2.

These provisions are of broader scope than those found in earlier treaties and go well beyond the “cultural exceptionalism” currently provided for in many international and bilateral trade agreements.<sup>17</sup> They are broadly seen as a corrective to the perceived unfair, U.S.-biased World Trade Organization (WTO) and bilateral trade agreements. On the basis of these provisions, a nation can stop television programs, radio broadcasts, books, magazines, newspapers, Internet sites, music recordings, and other cultural items from entering its territory by using the justification of preserving “cultural diversity.” Nations and UNESCO are expected to establish cultural observatories and an international committee to monitor the results of such cultural policies. The Convention even provides a procedure for setting up commissions to mediate bilateral disagreements over the cross-border regulation of cultural goods and services.

Advocates for this Convention hope that it will help nourish home-grown cultural industries and provide opportunities for diverse peoples throughout the world to economically benefit from their cultural products. But will government subsidies, programs, promotional activities, and legal protective mechanisms actually achieve this desirable result? Detractors argue that the Convention may instead promote larger, more elite-oriented, nationalized forms of cultural enterprise and could even undercut internal diversity by encouraging unitarian, standardized forms of national culture.

Further, the Convention could spawn a series of cultural protectionist measures, whereby the movement of cultural goods and services around the world would become restricted. Austria for example, might find its national cuisine threatened by Turkish food and undertake policies to encourage the former and discourage the latter. Saudi Arabia might restrict the importation of feminist novels and studies, believing that such works compete with locally produced literature, while also

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<sup>17</sup> The General Agreement on Tariffs and Trade (GATT) of 1947, for example, generally regards all products, even cultural ones, as equivalent, and therefore subject to similar treatment in the marketplace and by governments. It does, however, recognize some exceptions. Article 3.8 allows for subsidies of domestic products under certain conditions. Article 9.6 prevents “the use of trade names in such manner as to misrepresent the true origin of a product, to the detriment of such distinctive regional or geographical names of products of the territory.” Article 20 allows exceptional treatment for a nation’s products where such is “necessary to protect public morals,” as well as for the “protection of national treasures of artistic, historic or archaeological value.” (*The General Agreement on Tariffs and Trade*, 1947/1994, entered into force on January 1, 1948, updated in 1994, website of the World Trade Organization, Geneva, Switzerland, [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#top](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#top)—accessed August 6, 2006).

undermining national cultural values and practices. The treaty could even become a cultural excuse for getting around trade agreements. Imagine, if you will, Ford and General Motors claiming that the automobile is an American invention, plays a distinctive role in U.S. culture, and is economically endangered. Under the convention, the U.S. government could potentially then restrict Japanese, Korean, German, and Swedish imports on the grounds that if it did not do so, the diversity of cultural products in the world would be diminished. One can imagine the head of General Motors coming to an epiphany with the realization that he manages not a car company, but rather, a cultural enterprise with a strong interest in urging the United States to endorse the Convention.

### ***Building Cultural Industries***

Building up the cultural industries of people from every nation on earth is broadly accepted as a highly desirable aim.<sup>18</sup> The question is whether it will happen through government and international regulatory mechanisms, as embodied in the UNESCO cultural treaties. Between restrictive protectionism on one hand and *laissez-faire* free market economics on the other, there is perhaps a more pragmatic approach that would encourage both local-level creativity and global connections. Why not develop local-and regional-level cultural industries around the world in nations economically rich and poor? Why not encourage forms of local cultural production and enterprise in a way that the local people who create and sustain the cultural forms benefit from them—not only spiritually, but economically?

Rather than restrict the stimulating and useful flow of cultural products between societies, or invest the responsibility for cultural creation in government agencies, it seems sensible to encourage the development of cultural industries, invest in local cultural capacity building, and support a more robust, diversified world cultural market.<sup>19</sup> Hotels and restaurants belonging to the tourism industry can serve visitors local cuisine and sell locally produced goods, handicrafts, textiles, and other skills and items. Arts and artisanal goods can be made, marketed around the world and earn income—increasingly over the Internet. Teachers in local and regional schools can use storytellers in classrooms, books and audiovisual programs. Some

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<sup>18</sup> See James D. Wolfensohn, Keynote Address, “Culture Counts: Financing, Resources, and the Economics of Culture in Sustainable Development,” conference convened by the World Bank, the Government of Italy, and UNESCO, Florence, October 4–7, 1999.

<sup>19</sup> See James Bau Graves, *Cultural Democracy: The Arts, Community & the Public Purpose* (Champaign, Illinois: University of Illinois Press, 2005).

of these storytellers will go on to author books or become the subjects of films and television programs and other media products for broader distribution. Local universities and centers can work with indigenous medical practitioners, local residents with botanical knowledge, and so on, to help develop products and ideas that can have greater impact on the well-being of their own and other societies. Basically, people have to figure out how to turn local knowledge and skills—that is, their cultural resources—into productive, life-improving, revenue-generating goods and services. Effective, practical programs are needed for this purpose, not more protective legislation and government control and regulation.<sup>20</sup>

#### *An Alternative Model: Smithsonian Global Sound*

Many organizations, from governmental bodies to non-governmental organizations (NGOs), from community cooperatives to small businesses, are involved in the creation of cultural industries that share the cultural concerns and embody the values discussed above. The Smithsonian Institution is one of several organizations engaged in developing such an approach to the cultural industry. This effort provides a dramatic example of what can be done and how.

Smithsonian Folkways Recordings is a collection of a number of historical record labels that embody some of America's recorded sound heritage. It has been designated a U.S. national treasure through the "Save America's Treasures" program. Its product—Folkways Records—is the life's work of 20th-century sound documenter and producer Moses Asch.<sup>21</sup> Featured in the Folkways collection are such songs as—"This Land is Your Land" by Woody Guthrie, the first recording of "We Shall Overcome," the "I Have a Dream" speech of Rev. Martin Luther King Jr., and thousands of recordings of American Indian songs and stories, Appalachian ballads, cowboy poetry, jazz, blues, poetry, the oral history of diverse American immigrants, as well as music from everywhere else in the world. In addition to Folkways, the Smithsonian has acquired other additional independent labels, not as mere archival relics, but as collections amassed by serious individuals who have documented the recorded heritage of contemporary societies.

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<sup>20</sup> Ismail Serageldin, "Culture and Development at the Millennium: The Challenge and the Response," remarks at the opening of the Cultural Heritage Exhibition, World Bank, Washington, DC, September 28, 1998.

<sup>21</sup> See Peter D. Goldsmith, *Making People's Music: Moe Asch and Folkways Records* (Washington, DC: Smithsonian Institution Press, 1998).

Smithsonian Folkways is daily involved in ongoing projects to document community-based culture in the United States and around the world, including the Smithsonian Folklife Festival held on the National Mall of Washington, D.C., every summer. The festival involves hundreds of contemporary artists and musicians and serves as a vehicle for new recordings. Smithsonian Folkways operates not only as an archive, but also as a non-profit business that issues new recordings, reissues old ones—all with extensive liner notes—and generates US\$4 million in annual income through wholesale, retail, and mail order sales. And, of course, it pays royalties and licenses to recording artists and writers. The operation has even garnered Grammy awards and nominations—five in 2005, for example, including those awarded to community-based musical groups from Puerto Rico, Uganda, and Colombia. The liner notes and recordings of the enterprise facilitate the cultural education of a broad public, boost the recognition and income of cultural creators, and thus help preserve a living, dynamic cultural heritage.<sup>22</sup> The Smithsonian Institution has used the Folkways project to help train people from many countries to document and produce their own educational recordings, as well as to develop their own recording industries. In Indonesia in the early 1990s, for example, the Smithsonian, in partnership with the Indonesian Society for Indonesian Performing Arts, started a 10-year project to do just that with support from the Ford Foundation.

Over the years, the Smithsonian Folkways staff has had to tackle a number of thorny issues related to the question, “Who owns culture?” For one, Folkways has to deal with the concept of cultural products as individually created and owned. The organization is subject to contracts with artists, writers, and compilers, and abides by agreements with various agencies that handle the rights of performers and composers, and accordingly pays out hundreds of thousands of dollars in royalties and licenses. At the same time, Folkways finds its own recordings pirated by companies in other nations that recognize a shorter period of copyright or cultural ownership than that recognized in the United States. This practice hurts international sales and cuts into royalties that might otherwise be enjoyed by artists. At home, certain material that the Smithsonian desires to use for the purposes of public cultural education is locked down by major recording companies. That is, popular songs and tunes that have become part and parcel part of America’s cultural heritage through previous distribution may not be voluntarily licensed anymore by the companies that own them. What seemed “public” is now legally privatized and thus cannot be shared.

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<sup>22</sup> See Anthony Seeger, “Folkways Records,” in *American Folklore: An Encyclopedia*, ed. Jan Brunvand, 298–99 (New York: Garland Publishing Company, 1996).

The Smithsonian also gets into complicated dialogues with communities and governments concerning “traditional” music. Such engagements touch on the issue of cultural ownership, but also shade into the arena of culture in the broader sense, involving the collective creation, identity, and sustenance of a given historical community. Because of continuing lack of resolution at the international level (specifically by WIPO) regarding, for example, traditional, community-generated and nurtured music, it becomes difficult to establish intellectual property rights for such material.<sup>23</sup> Sometimes a specific community and its musicians will have an issue. Regarding a lovely recording done for Smithsonian Folkways by MacArthur Fellow Stephen Feld, the people of the Bosavi rainforest in Papua New Guinea said something to the effect that, “We don’t own this music or song—the ancestors or spirits do.”<sup>24</sup> What then is the response—do we tell them that their music might be ripped off and make money for someone else if it is not copyrighted? And what of the duty to future generations who might want a school or health clinic built with those royalties as they accumulate? In this case, the Smithsonian copyrighted the current arrangements of songs and tunes and formed an escrow account for the community and its musicians.

Dealing with governments who claim to own their cultural patrimony, as envisioned, in the 2005 Convention on the Diversity of Cultural Contents and Artist Expressions, is more complex. In certain former communist countries, the idea of state ownership, say in the Soviet Union through Melodia Records, was quite formal and intricately tied to a legal and theoretical system. Artists seeking to extricate their recordings or exerting their “rediscovered” rights to such material find themselves so entangled in the restructuring of such systems as to drive them to distraction. Because pragmatism trumps theory, the Smithsonian has, in some cases, paid double for the same license or royalty, one payment going to the government, another to the artist. In other cases, Smithsonian Folkways has resisted efforts to pay governments royalties for the songs and music of people whom they are persecuting and cultures that they are actively and deliberately destroying, preferring instead either to put funds into escrow accounts or pay a third-party NGO that works with the community. Singer and social activist Pete Seeger has strongly advocated such a policy for the big record companies, which often claim that they cannot locate

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<sup>23</sup> Anthony Seeger, “Traditional Music Ownership in a Commodified World,” in *Music and Copyright*, 2nd edition, ed. Simon Frith and Lee Marshall, 157–71 (Edinburgh: Edinburgh University Press, 2004).

<sup>24</sup> The recording in question is *Bosavi: Rainforest Music from Papua New Guinea* (various artists), 2001, Steven Feld, comp., Smithsonian Folkways Recordings SFW40487.

rights holders of the world music they publish, recommending that they send royalties to the nearest cultural center, library, museum, or other such institution. It's good advice. Local people have a better shot at getting their due from places closer to home than from Hollywood, New York, or Nashville.

In 2005, the Smithsonian added a new endeavor, launching a digital music website called Smithsonian Global Sound ([www.smithsonianglobalsound.org](http://www.smithsonianglobalsound.org)), with support from the Rockefeller Foundation and the Paul Allen Foundation. Smithsonian Global Sound is a virtual encyclopedia of the world's musical traditions that offers digital downloads, (typically for 99 U.S. cents apiece), as well as subscriptions for educational institutions that run from US\$2,000 to US\$10,000 each. The operation gained almost 200 subscribers within its first year and is expected to increase that number fivefold in the next two to three years largely in the United States, and then increasingly abroad.

As the *New York Times* put it, "Smithsonian Global Sound is the ethnographic equivalent of *iTunes*."<sup>25</sup> It enables the amazing range and diversity of the planet's music and cultural expression to be heard around the world allowing people to listen to and appreciate their fellow human beings. This gives many of the world's cultures equity in representation, that is, a fair opportunity to be heard. This is no small matter when most forms of cultural representation are enjoyed only by a few, mainly people from more wealthy and powerful societies.

It is possible to search and access tens of thousands of tracks in the varied collections of Global Sound on its website, as well as to read extensive liner notes, see photos, watch videos, get translations, view maps, find transcriptions, and so on. These online searches are not limited solely to Smithsonian music collections. Partner archives, for example, the International Library of African Music in South Africa and the Archives Research Center for Ethnomusicology in India—among the first to join Global Sound—are also included in the searchable database. The Smithsonian helped these organizations digitize their collections and put a system and process in place so that their material can make it to the global marketplace. If their materials are downloaded or accessed as part of a subscription, the Smithsonian pays royalties to them and they do the same for their artists. In the years to come, the inclusion of additional holdings from other archives is expected to expand exponentially.

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<sup>25</sup> Jon Pareles, "This is the Sound of Globalization," *New York Times*, April 15, 2005, section E, 1.

As a practical matter, issues of cultural ownership still loom large. For example, it took time to get one archive to agree that the musicians who created their archival content actually had a claim—moral, if not precisely legal—to its ownership and were thus due royalties. Another very interesting case involved material differentially “owned” by a cultural community. Folkways’ recordings of western Australian aboriginal music contain men’s sacred music. When the recordings were first made in the 1960s, adequate permissions were obtained. There was no issue of who could and could not hear the music, and any member of the public could buy the recordings. Recently, however, a reputable anthropologist came to the Smithsonian asserting that the men are concerned that their women might now be able to venture into Internet cafes and hear the men’s music, which they claim should not be permitted. It is difficult to say whether this claim represents a long-lived tradition in the community or rather, a new development whereby men are using “tradition” to argue against the contemporary attainments of women in their society. The case also raises the question: Can culture be used to justify limiting women’s rights to access information that is available to the general public?

While grappling with such cases, the digital music operation nonetheless helps artists and archives establish claims to the cultural material that they have created and hold—a worthwhile exercise in the protection of intellectual property rights. The Smithsonian is, in fact, using the web, e-commerce, and sophisticated software—the very means of production and delivery of the contemporary U.S. cultural industry—to encourage others around the world to participate in and gain from their creative endeavors.<sup>26</sup> Finally, Smithsonian Folkways is encouraging archives, museums, and cultural centers—literally scores of future partners are lined up—to engage in a form of cultural enterprise. These institutions, sometimes regarded as somewhat archaic and immune from contemporary trends, and often seen by their own governments or within their own organizations as liabilities or frozen assets, can now become more dynamic resources for revenue generation and, at the same time, more powerful engines for sharing knowledge and fostering appreciation of their cultures.<sup>27</sup> In short, they can become vehicles for investing in and helping achieve cultural equity.

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<sup>26</sup> Tony Stanley, “Let’s Get Digital: Using Multimedia and the Internet in Community Cultural Development,” in *Community, Culture and Globalization*, ed. Don Adams and Arlene Goldbard, 139–56 (New York: The Rockefeller Foundation, 2002).

<sup>27</sup> See Anthony Seeger, “Traditional Music in Community Life: Aspects of Performance, Recordings, and Preservation,” in *Cultural Survival Quarterly* 20, no. 4 (1997):20–22.

## Conclusion

Culture in general, and any culture in particular, only retains vitality and dynamism through practice. That means that cultural exemplars and producers must extend their own cultural traditions through ongoing, contemporary creativity in response to changing circumstance and situations. Freezing culture and placing it the domain of national government ownership and regulation, as the more recent international cultural treaties have tended to do, is problematic. Projects and programs that encourage actual cultural production and broad distribution and bring just rewards back home are more beneficial to local people.

Organizations such as the Smithsonian and its endeavors in digital music, as well as many others in various spheres of culture—from crafts and medicine to architecture and fashion—can work cooperatively with local groups and networks to build appropriate cultural industries. These organizations need capital, a need that could be filled by help from the World Bank, governments, foundations, and/or philanthropists. Equipped with funding, sound plans, and appropriate cultural products, such organizations can help build the means and modes of cultural production and distribution, enable the world's diverse cultural communities to flourish in their home countries, as well as interact internationally. In short, they can facilitate both the civil expression of social identities and the generation of income for contemporary peoples. Investing in cultural production and distribution—the actual use of culture—offers a meaningful and practical strategy for working through the more problematic and intellectually unsolvable matter of who owns culture, even if such investments do not resolve this conundrum in any definitive way.

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**PART III**

**RECENT DEVELOPMENTS**



## THE WORLD BANK'S POLICY ON PHYSICAL CULTURAL RESOURCES

CHARLES E. DI LEVA

*This article summarizes the history and content of the World Bank's operational policy on physical cultural resources.*

### Global Context

There has been strong and renewed interest in the World Bank and the international community in preserving the world's physical cultural resources. With the end of the twentieth century, the international development community expanded its commitment to identifying and protecting the world's cultural properties. Of the 690 sites currently included on the World Heritage List, 370 sites were added between 1990 and 2000. Approximately 55 percent of these new sites are located in the countries of World Bank borrowers. In a recent publication, the World Bank identified the importance of incorporating physical cultural resources into its overall development strategy, stating:

The increased recognition now being given to culture is part of the broad changes that have taken place in development thinking in the 1990s generally. Today, the World Bank is promoting a more encompassing development paradigm, as outlined in the Comprehensive Development Framework (CDF), which places the inducement of economic growth within its social context. This is why the Bank now recognizes, and advances the idea, that the cultural sector contributes to effective economic growth rather than just consuming budgetary resources. Furthermore, developmental assistance is not a narrow pursuit of economic growth alone but aims at broad social development. Culture and cultural heritage cannot be left out of development assistance programs. The Bank's deepening grasp of what makes nations prosper leads, among other initiatives, to including investments for culture in development lending.<sup>1</sup>

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<sup>1</sup> World Bank, "Cultural Heritage and Development: A Framework for Action in the Middle

Unfortunately, in many situations inadequate resources from the global community have inhibited successful management of physical cultural resources. This unfortunate scarcity follows from the allocation of limited resources by governments, civil society, and international institutions to other commitments. For example, international institutions have channeled their resources to poverty reduction, health, and education as set forth in the Millennium Development Goals (MDGs).<sup>2</sup>

Moreover, the international community's recognition of the demand for critical infrastructure has required more funds for construction of roads and other facilities. It has become apparent that private-sector support for infrastructure services in the poorest countries has been flagging, falling from US\$128 billion in 1997, to US\$58 billion in 2002—although this seems to have increased somewhat during fiscal year 2003. More than this, governments have directed funding to enhance national security and to finance the war on terrorism. As a result, the World Bank intends to increase its project lending for infrastructure.<sup>3</sup> This increase has the potential to significantly impact physical cultural resources.

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East and North Africa," *Orientations in Development Series*, no. 22559 (Washington, DC: World Bank, Middle East and North Africa Region, 2001), 3.

<sup>2</sup> In September 2000, the leaders of 189 member states of the United Nations unanimously adopted fundamental principles of developmental needs in the U.N. Millennium Declaration. Following the Millennium Declaration, the MDGs were developed by the U.N. Secretariat, along with the World Bank, the Organization for Economic Cooperation and Development (OECD), and the International Monetary Fund (IMF) to harmonize reporting on the development goals set forth in the declaration. The MDG initiative aspires to reduce by half the number of people living in poverty and without access to basic needs such as water. More specifically, they establish precedent-setting specific targets to achieve a more sustainable world. See United Nations, "Millennium Development Goals" (New York: UN, 2000). The eight MDGs address extreme poverty, hunger, primary education, the rights of women, child mortality, maternal health, pandemic disease, environmental sustainability, and the development of a global partnership for development. The eighteen specific targets established to meet the MDGs include halving the number of people in abject poverty and hunger, reducing mortality in children under five by two-thirds, and halving and beginning to reverse the spread of Acquired Immunodeficiency Syndrome (AIDS) and the incidence of malaria.

<sup>3</sup> For more information on infrastructure investments, see the Private Participation in Infrastructure (PPI) database of the World Bank, <http://ppi.worldbank.org> (accessed July 31, 2006).

## World Bank Context

In the aftermath of World War II, along with the creation of the Bretton Woods organizations, there was a limited degree of focus on restoring the world's cultural property. Ironically, this prevailing sentiment did not find authoritative force in any particular policy instrument. It took nearly three decades before the entry into force of the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention),<sup>4</sup> the key international document that defines and supports cultural heritage. More than 160 of the World Bank's member states are parties to the convention, and the World Bank's lending operations are guided by the policy that such lending shall not contravene the borrower's treaty obligations or national laws.<sup>5</sup> At the national level, many member countries also have laws to protect physical cultural resources. Generally, these national laws prescribe specific conduct in the course of development activities, which include: (1) requiring surveys that account for physical cultural properties, (2) demanding the stoppage of construction work upon the discovery of antiquities, and (3) encouraging mitigation in case of chance finds.

The World Bank is the first development bank to incorporate the international community's commitment to protecting physical cultural resources into its operations. Approximately 250 Bank-funded projects have included at least a component of physical cultural resources. Equally important, the Bank has supported 35 stand-alone projects with funding between US\$300 and US\$400 million, including a US\$4.5 million loan to Georgia (the Georgian Cultural Heritage Project) and a US\$4 million loan to Bosnia and Herzegovina (Bosnia and Herzegovina Pilot Cultural Heritage Project) to ensure the management and maintenance of physical cultural resources.<sup>6</sup>

Beyond the international and domestic legal frameworks that preserve and manage physical cultural resources, the World Bank set out to develop its own internal

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<sup>4</sup> UNESCO (United Nations Educational, Scientific, and Cultural Organization), *Convention Concerning the Protection of the World Cultural and Natural Heritage*, General Conference, 17th session (adopted November 16, 1972).

<sup>5</sup> Borrowers of World Bank funds have to be members of the World Bank and the IMF.

<sup>6</sup> See further "Summaries of Investment Projects under Implementation and in Preparation," available online at the World Bank website, Washington, DC, <http://siteresources.worldbank.org/INTCHD/Resources/summaries-invest-projects-under-implementation.pdf> (accessed August 8, 2006).

policies. Initially, the operational policy note, “Managing Cultural Properties in Bank-Financed Projects” (OPN 11.03),<sup>7</sup> was prepared. It recommended that certain measures be devised to avoid harming physical cultural properties and be included in any World Bank-financed project. In 1989, the World Bank first formalized a policy tool that supported physical cultural resources with its policy on environmental assessment, together with an Environmental Assessment Sourcebook for the use of Bank staff and borrowers.<sup>8</sup> These documents also incorporated consideration of post-conflict reconstruction through precautionary measures and proper management. Among other environmental and social concerns, the environmental assessment policy addressed issues of indigenous peoples, natural habitats, and involuntary resettlement. The new policy on environmental assessment implicitly encouraged review of potential impacts to physical cultural resources and the development of mitigation plans to avoid and/or minimize damage to these resources.

The World Bank has continued to pursue a more definitive operational guideline to underscore the importance of protecting physical cultural resources through the preparation of a new operational policy that has been presented to the Bank’s Board of Executive Directors for consideration and approval. Concurrently, one can further point to the Bank’s efforts with other multilateral development banks to harmonize approaches toward environmental and social safeguard policies, including cultural resources, as well as the collaboration between the World Bank and the International Finance Corporation to promote and support the Equator Principles,<sup>9</sup> which have been adopted by more than 25 commercial banks and include provisions for the evaluation of physical cultural resources in the environmental assessment process.

Reflecting on OPN 11.03 (1999), the governing document for the World Bank’s previous work with a cultural heritage component, it asserted and presented a

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<sup>7</sup> World Bank, “Management of Cultural Properties in Bank-Financed Projects,” Operational Policy Note 11.03, reprint (Washington, DC: World Bank, 1986).

<sup>8</sup> World Bank, “Environmental Assessment,” Operational Policy 4.01 (Washington, DC: World Bank, 1999a, rev. 2004), and “Environmental Assessment Sourcebook and Updates,” World Bank, Washington, DC, 1991.

<sup>9</sup> “Equator Principles,” June 2003, [www.equator-principles.com/principles.shtml](http://www.equator-principles.com/principles.shtml) (accessed June 29, 2006). These principles are financial industry guidelines developed by banks for managing social and environmental issues related to the financing of development projects.

general set of principles and guidelines in preserving physical cultural resources.<sup>10</sup> The overarching objective of the policy was to “do no harm” with regard to cultural properties. The policy stated that projects should be planned in a manner that recognized and supported important cultural sites and emphasized several other issues:

1. The World Bank should assist in the preservation of cultural properties and seek to avoid their elimination.
2. If any significant damage of cultural sites were to be a product of project activities, then the Bank should scale back its funding of the project.
3. Bank lending would provide training on the protection and management of physical cultural resources.
4. If the World Bank provided any financing, then the principle of preserving physical cultural resources would apply, despite the financing of the cultural component by another entity.
5. Bank staff should support identification of all cultural property issues, although the borrower has the primary responsibility to protect physical cultural resources that could be affected by project activities.

Beyond the recommendations of the Note is the World Bank's commitment to the principle that the Bank should “do no harm” in carrying out its development planning and financing of projects around the globe.

The move toward the development of a new policy for physical cultural resources was made more concrete in 1999. At that time, the World Bank's Board of Executive Directors identified a need for the Bank's Operation Evaluation Department (OED) to assess Bank work in the field to bring the lessons of experience with cultural heritage to bear on the revisions of OPN 11.03. Importantly, the OED study called attention to a perceived weakness of the operational policy in its lack of a clear “do good” affirmative obligation with regard to preserving and managing cultural heritage. “The ambiguous approach to cultural heritage has led to high variability in Bank-financed work.”<sup>11</sup>

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<sup>10</sup> OPN 11.03 was converted to Operational Policy 4.11 in August 1999 to fit the new format of World Bank operational policies and bank procedures.

<sup>11</sup> World Bank, “Cultural Properties in Policy and Practice: A Review of World Bank Experience,” vol. 1, Operations Evaluation Study, no. 23369, Operations Evaluation Department, World Bank, Washington, DC, 2001, vii.

OPN 11.03 and the World Bank's approach place the primary responsibility for management of cultural assets on the borrower. Borrowers, however, have often not recognized the economic and other values of physical cultural resources to development. Moreover, institutional capacity for protecting and managing physical cultural resources remains notably weak. There is a need to revive legal and institutional structures under which development projects proceed, and it remains important for implementing agencies to involve members from the ministries of antiquities in the project planning and implementation process.

In the future, the World Bank will continue to expand its partnerships to foster commitments to protecting physical cultural resources and establishing synergies that bring more support to preservation initiatives. To an important extent, this will include demonstrating to often-impooverished local communities the link between poverty reduction and the effort to preserve physical cultural resources. This is especially important, given the difficulty in demonstrating any increase in overall overseas development assistance.

### **Strategy**

Although it is clear that the World Bank and other members of the development community need to continue to ensure their projects do not harm physical cultural resources, they also need to improve the institutional capacity of national ministries and agencies and train their staffs how to better preserve and manage these historic resources. More must be done to incorporate the principle and practice of the management of cultural resources in regional, national, and local development strategies. There is an increased demand from World Bank members throughout the world for support in this area. In the Bank's Middle East and North Africa Region, a framework for action codifies these nations' agreement that cultural resources contribute to growth. For example, the Moroccan Country Assistance Strategy encourages investment in decaying urban historic enclaves.<sup>12</sup> Interest in these issues also exists in the Africa Region, Europe and Central Asia Region, and East Asia and Pacific Region.

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<sup>12</sup> World Bank, "Moroccan Country Assistance Strategy, 2005–2009," World Bank, Washington, DC, 2005. <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/MENAEXT/MOROCCOEXTN/0,,contentMDK:20195011~pagePK:141137~piPK:141127~theSitePK:294540,00.html>. Accessed June 29, 2006.

### **New Operational Policy**

The World Bank has now adopted a new operational policy entitled "Physical Cultural Resources" (attached hereto in its entirety).<sup>13</sup> The new draft policy emphasizes the importance of cultural resources as economic and social assets. The policy continues to apply to all components of a project, whether or not it receives direct funding from the World Bank. The policy addresses impacts and mitigation measures through the use of the environmental assessment process, and requires both an overall management plan and a plan to manage chance finds. Importantly, the policy also requires assessment of the status of relevant national laws and their coverage of cultural resources.

The aforementioned new draft policy was presented to the World Bank's Board of Executive Directors and approved by them on April 17, 2006. The World Bank made this draft policy publicly available, along with its appreciation of the members of the public who submitted comments on the draft. All of the comments were considered in the process of finalizing the new policy.

### **Contributor's Note**

The World Bank introduced a policy on management of cultural property in Bank-financed projects in 1986.<sup>14</sup> Other specific safeguard policies of the Bank apply to particular situations. Where the "natural, unique" category of cultural property contains natural habitat, rare or endangered living species, or other sources of biological diversity (for example, the Galapagos Islands), the Bank's policy on natural habitats also applies.<sup>15</sup> Where the cultural property in question is a tribal sacred site, the Bank's policy on management of cultural property in Bank-financed

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<sup>13</sup> World Bank, "Management of Cultural Property in Bank-Financed Projects," Operational Policy 4.11 (Washington, DC: World Bank, 1999).

<sup>14</sup> See footnote 7. The contributor's note is derived from an earlier presentation by Joseph D. Harbaugh, "Committee Y Abstract," International Bar Association, Business Law International Conference, Cancun, Mexico, October 28–November 2, 2001.

<sup>15</sup> World Bank, "Natural Habitats," Operational Policy 4.04 (Washington, DC: World Bank, 2001).

projects and the policy on indigenous peoples are applicable.<sup>16</sup> The preservation and handling of cultural property encountered in the Bank's work are important subsets of the broad environmental concerns addressed in the Bank's policy on environmental assessment. The Bank's safeguard policy, "Management of Cultural Property in Bank-financed Projects," will soon be reissued under the title "Physical Cultural Resources." This policy will be implemented as an integral part of the environmental impact assessment process.

The International Finance Corporation (IFC) promotes private-sector investment, both foreign and domestic, in developing member countries. Its investment and advisory activities are designed to reduce poverty and improve people's lives in an environmentally and socially responsible manner. Its work includes activities in some of the riskiest sectors and countries. The IFC serves as an investor and an honest broker to balance each party's interest in a transaction, reassuring foreign investors, local partners, other creditors, and government authorities. The IFC advises businesses entering new markets and governments trying to provide a more hospitable business environment to create effective and stable financial markets or to privatize inefficient state enterprises.<sup>17</sup> The IFC does continue to fund tourism projects, for example, the Abercrombie and Kent Hotels and Resorts:

This is a Category B project, according to IFC's Procedure for Environmental and Social Review of Projects because a limited number of specific environmental [and social] impacts may result which can be avoided or mitigated by adhering to generally recognized performance standards, guidelines or design criteria. The review of this project consisted of appraising technical and environmental [/social] information submitted by the project sponsor...<sup>18</sup>

See the IFC's Environmental and Social Policies at <http://www.ifc.org>.

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<sup>16</sup> See footnote 13 and World Bank, "Indigenous Peoples," Operational Policy 4.10 (Washington, DC: World Bank, 2005).

<sup>17</sup> IFC adopted a new Performance Standard "Cultural Heritage," effective April 30, 2006.

<sup>18</sup> IFC, Project Report 10851, IFC, Washington, DC, April 27, 2001.

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**OP 4.11 – PHYSICAL CULTURAL RESOURCES**

July 2006

These policies were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject

**Note: OP and BP 4.11 are based on *Revised Draft Operational Policy/Bank Procedure 4.11: Physical Cultural Resources – Issues and Proposals (R2006-0049)*, approved by Executive Directors on April 17, 2006. OP and BP together replace OPN 11.03, *Management of Cultural Property in Bank-Financed Projects*, dated September 1986. OP and BP 4.11 apply to all investment projects for which a Project Concept Review takes place on or after April 15, 2006. OP and BP 4.11 should be read in conjunction with OP and BP 4.01, *Environmental Assessment*. Questions may be addressed to the Senior Adviser, Quality Assurance and Compliance Unit.**

**Introduction**

1. This policy addresses physical cultural resources,<sup>1</sup> which are defined as movable or immovable objects, sites, structures, groups of structures, and natural features and landscapes that have archaeological, paleontological, historical, architectural, religious, aesthetic, or other cultural significance. Physical cultural resources may be located in urban or rural settings, and may be above or below ground, or underwater. Their cultural interest may be at the local, provincial or national level, or within the international community.
2. Physical cultural resources are important as sources of valuable scientific and historical information, as assets for economic and social development, and as integral parts of a people's cultural identity and practices.

**Objective**

3. The Bank<sup>2</sup> assists countries to avoid or mitigate adverse impacts on physical cultural resources from development projects<sup>3</sup> that it finances. The impacts on physical cultural resources resulting from project activities, including mitigating measures, may not contravene either the borrower's national legislation, or its obligations under relevant international environmental treaties and agreements.<sup>4</sup>

### **Physical Cultural Resources within Environmental Assessment**

4. The borrower addresses impacts on physical cultural resources in projects proposed for Bank financing, as an integral part of the environmental assessment (EA) process. The steps elaborated below follow the EA sequence of: screening; developing terms of reference (TORs); collecting baseline data; impact assessment; and formulating mitigating measures and a management plan.<sup>5</sup>

5. The following projects are classified during the environmental screening process as Category A or B, and are subject to the provisions of this policy: (a) any project involving significant excavations, demolition, movement of earth, flooding, or other environmental changes; and (b) any project located in, or in the vicinity of, a physical cultural resources site recognized by the borrower. Projects specifically designed to support the management or conservation of physical cultural resources are individually reviewed, and are normally classified as Category A or B.<sup>6</sup>

6. To develop the TORs for the EA, the borrower, in consultation with the Bank, relevant experts, and relevant project-affected groups, identifies the likely physical cultural resources issues, if any, to be taken into account by the EA. The TORs normally specify that physical cultural resources be included in the base-line data collection phase of the EA.

7. The borrower identifies physical cultural resources likely to be affected by the project and assesses the project's potential impacts on these resources as an integral part of the EA process, in accordance with the Bank's EA requirements.<sup>7</sup>

8. When the project is likely to have adverse impacts on physical cultural resources, the borrower identifies appropriate measures for avoiding or mitigating these impacts as part of the EA process. These measures may range from full site protection to selective mitigation, including salvage and documentation, in cases where a portion or all of the physical cultural resources may be lost.

9. As an integral part of the EA process, the borrower develops a physical cultural resources management plan<sup>8</sup> that includes measures for avoiding or mitigating any adverse impacts on physical cultural resources, provisions for managing chance finds,<sup>9</sup> any necessary measures for strengthening institutional capacity, and a monitoring system to track the progress of these activities. The physical cultural resources management plan is consistent with the country's overall policy framework and national legislation and takes into account institutional capabilities in regard to physical cultural resources.

10. The Bank reviews, and discusses with the borrower, the findings and recommendations related to the physical cultural resources aspects of the EA, and

determines whether they provide an adequate basis for processing the project for Bank financing.<sup>10</sup>

### **Consultation**

11. As part of the public consultations required in the EA process, the consultative process for the physical cultural resources component normally includes relevant project-affected groups, concerned government authorities, and relevant nongovernmental organizations in documenting the presence and significance of physical cultural resources, assessing potential impacts, and exploring avoidance and mitigation options.

### **Disclosure**

12. The findings of the physical cultural resources component of the EA are disclosed as part of, and in the same manner as, the EA report.<sup>11</sup> Exceptions to such disclosure would be considered when the borrower, in consultation with the Bank and persons with relevant expertise, determines that disclosure would compromise or jeopardize the safety or integrity of the physical cultural resources involved or would endanger the source of information about the physical cultural resources. In such cases, sensitive information relating to these particular aspects may be omitted from the EA report.

### **Emergency Recovery Projects**

13. This policy normally applies to emergency recovery projects processed under OP 8.50, *Emergency Recovery Assistance*. OP/BP 4.01, *Environmental Assessment*, sets out the application of EA to such projects.<sup>12</sup> When compliance with any requirement of OP 4.11, *Physical Cultural Resources* would prevent the effective and timely achievement of the objectives of an emergency recovery project, the Bank may exempt the project from such a requirement, recording the justification for the exemption in the loan documents. However, the Bank requires that any necessary corrective measures be built into either the emergency recovery project or a future lending operation.

### **Specific Investment Loans and Financial Intermediary Loans**

14. The physical cultural resources aspects of subprojects financed under Bank projects are addressed in accordance with the Bank's EA requirements.<sup>13</sup>

### Country Systems

15. The Bank may decide to use a country's systems to address environmental and social safeguards issues in a Bank-financed project that affects physical cultural resources. This decision is made in accordance with the requirements of the applicable Bank policy on country systems.<sup>14</sup>

### Capacity Building

16. When the borrower's capacity is inadequate to manage physical cultural resources that may be affected by a Bank-financed project, the project may include components to strengthen that capacity.<sup>15</sup>

17. Given that the borrower's responsibility for physical cultural resources management extends beyond individual projects, the Bank may consider broader capacity building activities as part of its overall country assistance program.

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1. Also known as "cultural heritage," "cultural patrimony," "cultural assets," or "cultural property."
  2. "Bank" is as defined in OP/BP 4.01, *Environmental Assessment*.
  3. The project is described in Schedule 2 to the Financing Agreement. This policy applies to all components of the project, regardless of the source of financing.
  4. This includes the Convention concerning the Protection of the World Cultural and Natural Heritage, 1972 (UNESCO World Heritage Convention).
  5. See OP 4.01, *Environmental Assessment*.
  6. For definitions of project categories A and B, see OP 4.01, *Environmental Assessment*, paragraph 8.
  7. See OP 4.01, *Environmental Assessment*.
  8. If there is an Environmental Management Plan, it incorporates the physical cultural resources management plan. See OP 4.01, *Environmental Assessment*, Annex C.
  9. For the purposes of this policy, "chance finds" are defined as physical cultural resources encountered unexpectedly during project implementation.
  10. See OP 4.01, *Environmental Assessment*, paragraph 5.
  11. See *The World Bank Policy on Disclosure of Information*, 2002.
  12. See OP 4.01, *Environmental Assessment*, paragraph 12.
  13. As set out in paragraphs 9, 10, and 11 of OP 4.01, *Environmental Assessment*. The relevant requirements in these paragraphs apply also to physical cultural resources aspects of other

projects which are similarly designed to finance multiple sub-projects that are identified and appraised during the course of project implementation (e.g., social investment funds (SIFs) and community-driven development projects (CDDs)).

14. OP/BP 4.00, *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguards Issues in Bank-Supported Projects*, which is applicable only to pilot projects using borrower systems, includes requirements that such systems be designed to meet the policy objectives and adhere to the operational principles related to physical cultural resources identified in OP 4.11, *Physical Cultural Resources*.
15. See OP 4.01, *Environmental Assessment*, paragraph 13.

**BP 4.11 – PHYSICAL CULTURAL RESOURCES**

June 2006

These policies were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject

**OP and BP 4.11 are based on Revised Draft Operational Policy/Bank Procedure 4.11: Physical Cultural Resources – Issues and Proposals (R2006-0049), approved by Executive Directors on April 17, 2006. OP and BP together replace OPN 11.03, Management of Cultural Property in Bank-Financed Projects, dated September 1986. OP and BP 4.11 apply to all investment projects for which a Project Concept Review takes place on or after April 15, 2006. OP and BP 4.11 should be read in conjunction with OP and BP 4.01, Environmental Assessment. Questions may be addressed to the Senior Adviser, Quality Assurance and Compliance Unit.**

**Introduction**

1. Physical cultural resources may not be known or visible; therefore, it is important that a project's potential impacts on physical cultural resources be considered at the earliest possible stage of the project planning cycle.

**Physical Cultural Resources within Environmental Assessment**

2. The task team (TT) advises the borrower on the provisions of OP 4.11 and their application as an integral part of the Bank's environmental assessment (EA) process as set out in OP/BP 4.01, *Environmental Assessment*. The steps elaborated below follow the project cycle processes of screening, developing terms of reference (TORs) for the EA, preparing and reviewing the EA report, and project appraisal, supervision and evaluation.

*Environmental Screening*

3. As part of the environmental screening process, the TT determines whether the project (a) will involve significant excavations, demolition, movement of earth, flooding or other environmental changes; or (b) will be located in, or in the vicinity of, a physical cultural resources site recognized by competent authorities of the borrower; or (c) is designed to support management of physical cultural resources. If the project has any of the characteristics set out in (a) or (b), it is assigned to

either Category A or B, in accordance with OP 4.01, *Environmental Assessment*. If the project has the characteristic set out in (c), it is normally assigned to either Category A or B. The procedures set out below are followed for all projects so categorized.<sup>1</sup>

4. The TT requests that the borrower inform the Bank of the relevant requirements of its legislation and of its procedures for identifying and mitigating potential impacts on physical cultural resources, including provisions for monitoring such impacts, and for managing chance finds.<sup>2</sup>

#### *Terms of Reference for the EA*

5. The TT advises and assists the borrower, as necessary, in drafting the TORs for the physical cultural resources component of the EA. In preparing the TORs, the borrower identifies the likely major physical cultural resources issues, if any, to be taken into account in the EA. This identification of the possible presence of physical cultural resources is normally conducted on-site, in consultation with relevant experts and relevant project-affected groups.

6. The TORs propose spatial and temporal boundaries for the on-site collection of baseline data on physical cultural resources potentially affected by the project, and specify the types of expertise required for the physical cultural resources component of the EA.

#### *Consultation*

7. Since many physical cultural resources are not documented, or protected by law, consultation is an important means of identifying such resources, documenting their presence and significance, assessing potential impacts, and exploring mitigation options. Therefore, the TT reviews the mechanisms established by the borrower for consultation on the physical cultural resources aspects of the EA, in order to ensure that the consultations include meetings with project-affected groups, concerned government authorities and relevant non-governmental organizations.

#### *Baseline and Impact Assessment*

8. The TT ensures that the physical cultural resources component of the EA includes (a) an investigation and inventory of physical cultural resources likely to be affected by the project; (b) documentation of the significance of such physical cultural resources; and (c) assessment of the nature and extent of potential impacts on these resources.

*Mitigating Measures*

9. When the project may have adverse impacts on physical cultural resources, the EA includes appropriate measures for avoiding or mitigating these impacts.

*Capacity Assessment*

10. The EA assesses the borrower's capacity for implementing the proposed mitigating measures and for managing chance finds, and where appropriate, recommends capacity building measures.

*Management Plan*

11. The EA involves the preparation of a physical cultural resources management plan<sup>3</sup> that includes (a) measures to avoid or mitigate any adverse impacts on physical cultural resources; (b) provisions for managing chance finds;<sup>4</sup> (c) any necessary measures for strengthening institutional capacity for the management of physical cultural resources; and (d) a monitoring system to track the progress of these activities.

**Review**

12. When reviewing the findings and recommendations of the EA, the TT discusses with the borrower the physical cultural resources components of the EA, including the physical cultural resources management plan, and determines whether these components provide an adequate basis for processing the project for Bank financing.

**Disclosure**

13. The TT consults with the borrower and persons with relevant expertise on whether disclosure of the findings of the physical cultural resources component of the EA would jeopardize the safety or integrity of any of the physical cultural resources involved. In addition, the TT consults the borrower to determine whether disclosure could endanger the source of information regarding the physical cultural resources. In such cases, sensitive information relating to these particular aspects, such as the precise location or value of a physical cultural resource, may be omitted from the EA report.<sup>5</sup>

**Project Appraisal**

14. As appropriate, the appraisal team includes relevant physical cultural resources expertise.

15. During appraisal, the TT ensures that the findings and recommendations of the physical cultural resources components of the EA, including the physical cultural resources management plan, are adequately reflected in project design, and are recorded in the Project Appraisal Document (PAD).

16. The TT ensures that the estimated cost of implementing the physical cultural resources management plan is included in the project budget.

#### **Supervision and Evaluation<sup>6</sup>**

17. For projects in which the physical cultural resources management plan incorporates provisions for safeguarding physical cultural resources, supervision missions include relevant expertise to review the implementation of such provisions.

18. During project supervision, the TT monitors the implementation of the physical cultural resources management plan, including provisions for the treatment of chance finds. The TT also ensures that chance finds procedures are included in procurement documents, as appropriate. The TT monitors the treatment of any chance finds and any other impacts on physical cultural resources that may occur during project implementation, and records relevant findings in the Implementation Status and Results Reports (ISRs).

19. Implementation Completion Reports (ICRs) assess the overall effectiveness of the project's physical cultural resources mitigation, management, and capacity building activities, as appropriate.<sup>7</sup>

#### **Capacity Building**

20. The TT reviews the need, if any, for enhancement of the borrower's capacity to implement this policy, particularly in respect of information on physical cultural resources, on-site training, institutional strengthening, inter-institutional collaboration, and rapid-response capacity for handling chance finds. The TT then considers the need for such capacity enhancement, including project components to strengthen capacity.<sup>8</sup> When the needs extend beyond the scope of the project, the TT draws the attention of the relevant Country Director to the possibility of including such capacity building within the overall country assistance program.

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1. For definitions of project categories **A** and **B**, see OP 4.01, *Environmental Assessment*, paragraph 8.

2. For the purposes of this policy, chance finds are defined as physical cultural resources encountered unexpectedly during project implementation.
3. If there is an Environmental Management Plan, it incorporates the physical cultural resources management plan. See OP 4.01, *Environmental Assessment*, Annex C.
4. If a chance find occurs for a project that does not require an EA report, the borrower will prepare a timely chance find management plan, satisfactory to the Bank.
5. See the World Bank Policy on the Disclosure of Information, 2002.
6. See OP/BP 13.05, *Project Supervision*.
7. See OP/BP 13.55, *Implementation Completion Reporting*.
8. See OP 4.01, *Environmental Assessment*, paragraph 13.

## THE WORLD BANK'S NEW POLICY ON INDIGENOUS PEOPLES, 2005

SALMAN M. A. SALMAN

*This article provides an overview of the World Bank's new Policy on Indigenous Peoples which was issued in May 2005, replacing an earlier Operational Directive on Indigenous Peoples issued in 1991.*

### Introduction

On May 10, 2005, the Executive Directors of the World Bank approved the new Policy on Indigenous Peoples (Operational Policy "OP" and Bank Procedures "BP" 4.10). The approval followed a lengthy preparatory work that started in 1997, and extensive global consultations that dated back to 1998.

The new Policy was preceded by two earlier policies issued in 1982 and 1991, respectively. In 1982 the World Bank became the first multilateral financial institution to adopt an operational policy on tribal people.<sup>1</sup> Operational Manual Statement (OMS 2.34) "Tribal People in Bank-financed Projects" issued in that year aimed at safeguarding the rights and interests of tribal people and protecting them from adverse impacts from Bank-financed projects. The OMS required that

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<sup>1</sup> It should, however, be noted that in 1957, the International Labor Organization (ILO) adopted Convention 107 "Indigenous and Tribal Populations Convention 1957." This Convention was the first international legal instrument to deal exclusively with indigenous and tribal populations. Although Convention 107 includes provisions on the protection of the rights of indigenous and tribal peoples, the Convention basically calls for "national integration" and "progressive integration" of those groups "into the life of their respective countries." The Convention has been ratified by 27 countries, but 9 of those countries later denounced it and became parties to ILO Convention 169 (see footnote 2 below). Eighteen countries are still parties to ILO Convention 107. See ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, ILO Convention 169, adopted 1989 (Geneva: ILO), <http://www.ilo.org/public/english/standards/norm/whatare/standards/indig.htm> (accessed August 26, 2006).

development projects affecting tribal people include either a “tribal component or parallel program” specifically targeted to them. In 1991 the Bank replaced OMS 2.34 with Operational Directive 4.20 (OD 4.20) on Indigenous Peoples, which remained in force until 2005. The OD went beyond the safeguard provisions of the OMS. It required that Indigenous Peoples receive culturally compatible social and economic benefits, and that local preferences be identified through direct consultations. The OD thus included a strategy for meaningful consultation with, and informed participation of, Indigenous Peoples, and required that Bank-financed projects provide culturally appropriate benefits to Indigenous Peoples.

### **Objectives and Requirements of the New Policy**

The new Policy contributes to the Bank’s mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples. The Policy recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease. Gender and intergenerational issues among Indigenous Peoples are also complex. As social groups with identities that are often distinct from dominant groups in their national societies, Indigenous Peoples are frequently among the most marginalized and vulnerable segments of the population. As a result, their economic, social, and legal status often limits their capacity to defend their interests in and rights to lands, territories, and other productive resources, and/or restricts their ability to participate in, and benefit from development. At the same time, the Policy recognizes that Indigenous Peoples play a vital role in sustainable development and that their rights are increasingly being addressed under both domestic and international law.

For the purposes of the Policy, the term “Indigenous Peoples” is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees: (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others, (ii) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories, (iii) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and (iv) an indigenous language, often different from the official language of the country or region. The use of the

term "Indigenous Peoples" by the World Bank is consistent with the international practice where this term has been in use since the 1980s.<sup>2</sup>

The Policy has retained the main requirements of OD 4.20 that Bank-financed projects are designed not only to avoid adverse impacts, but also to provide culturally appropriate benefits. The Policy mandates the preparation of a social assessment and an Indigenous Peoples Plan, and also requires carrying out free, prior and informed consultation with Indigenous Peoples, leading to their broad community support, for all projects affecting them. The purpose of the social assessment is to evaluate the project's potential positive as well as adverse effects on the Indigenous Peoples, and to examine project alternatives where adverse effects may be significant. On the basis of the social assessment and in consultation with the affected Indigenous Peoples' communities, the borrower prepares an Indigenous Peoples Plan that sets out the measures through which the borrower will ensure that (i) Indigenous Peoples affected by the project receive culturally appropriate social and economic benefits; and (ii) when potential adverse effects on Indigenous Peoples are identified, those adverse effects are avoided, minimized, mitigated, or compensated for.

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<sup>2</sup> ILO Convention 169, adopted in 1989, deals with both indigenous and tribal peoples and is entitled "Convention Concerning Indigenous and Tribal Peoples in Independent Countries," <http://www.ilo.org/public/english/standards/norm/whatare/standards/indig.htm> (accessed August 20, 2006). It purports to revise ILO Convention 107. Currently, it is ratified by 17 countries, 13 of which are in Latin America, three in Europe and one in the Pacific. It is noteworthy that this Convention is the last international legal instrument to use both the terms "indigenous" and "tribal" peoples, and soon thereafter, use of the term "indigenous peoples" prevailed. In 1982 the Economic and Social Council of United Nations (UN) established the "Working Group on Indigenous Populations" <http://esa.un.org/coordination/ngo/bodies/bodies.asp?body=Working%20Group%20on%20Indigenous%20Populations&item=open&language=English> (accessed August 20, 2006). The Working Group started preparing in 1985 a draft declaration on the rights of indigenous people, which was completed in 2006, and subsequently adopted by the United Nations Human Rights Council on June 29, 2006, <http://www.ohchr.org/english/issues/indigenous/declaration.htm>. In 1993, the U.N. General Assembly proclaimed the period 1994–2004 as "The International Decade of the World's Indigenous People." In July 2000, the United Nations Economic and Social Council issued a Resolution establishing the "Permanent Forum on Indigenous Issues" as a subsidiary organ of the Council, <http://www.un.org/esa/socdev/unpfii/>. A number of U.N. agencies, such as UNDP and IFAD, as well as other regional financial institutions, including the Asian Development Bank and the Inter-American Development Bank, all use the term "Indigenous People." Thus, the term "indigenous peoples" is now widely used instead of "tribal people."

Project-affected Indigenous Peoples are afforded a stronger voice through a process of free, prior and informed consultation.

The carrying out of free, prior, and informed consultation with affected communities about the proposed project is required throughout the project cycle, taking into consideration the following:

- (i) free, prior, and informed consultation is consultation that occurs freely and voluntarily, without any external manipulation, interference, or coercion, for which the parties consulted have prior access to information on the intent and scope of the proposed project in a culturally appropriate manner, form, and language;
- (ii) consultation approaches should recognize existing Indigenous Peoples Organizations (IPOs), including councils of elders, headmen, and tribal leaders, and pay special attention to women, youth, and the elderly;
- (iii) the consultation process starts early, since decision-making among Indigenous Peoples may be an iterative process, and there is a need for adequate lead time to fully understand and incorporate concerns and recommendations of Indigenous Peoples into the project design; and
- (iv) a record of the consultation process is maintained as part of the project files. The Bank will provide financing for projects affecting Indigenous Peoples only where free, prior and informed consultation results in broad community support for the project.

## **Land Rights**

Land rights are protected through the new and over arching principle of the need for broad community support of Indigenous Peoples for projects affecting them. Moreover, if the project involves activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned, or customarily used or occupied, the Indigenous Peoples Plan sets forth an action plan for the legal recognition of such ownership, occupation, or usage. This recognition may take the form of (i) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or (ii) conversion of customary usage rights to communal and/or individual ownership rights. If neither option is possible under domestic law, the Plan includes measures for legal recognition of perpetual or long-term, renewable custodial or use rights. Physical relocation of Indigenous Peoples can only take place if there is a broad community support for such relocation,

following free, prior and informed consultation.<sup>3</sup> In such cases, the resettlement plan should include land based strategies. Where possible, the resettlement plan should allow the affected Indigenous Peoples to return to the lands and territories they have traditionally owned, or customarily used or occupied, if the reasons for their relocation cease to exist.

### **Natural and Cultural Resources**

Indigenous Peoples are entitled to share in the benefits derived from the use of natural resources (such as minerals, hydrocarbon resources, forests, water or hunting/fishing grounds) on lands or territories that they have traditionally owned, or customarily used or occupied, following the process of free, prior and informed consultation with them. As part of this process, affected Indigenous communities are informed of (i) their rights to such resources under statutory and customary law, (ii) the scope and nature of the proposed commercial development and the parties interested or involved in such development; and (iii) the potential effects of such development on Indigenous Peoples' livelihoods, environments, and use of such resources. The Indigenous Peoples Plan must include arrangements to ensure that the Indigenous Peoples receive, in a culturally appropriate manner, benefits, compensation and rights to due process at least equivalent to that to which any landowner with full legal title to the land would be entitled to, in case of commercial development of their land. However, commercial development of affected Indigenous Peoples' cultural resources and knowledge (such as pharmaceutical and or artistic) is conditioned upon their prior agreement to such development. The Indigenous Peoples Plan reflects the nature and content of such agreements and includes arrangements to enable the affected Indigenous Peoples to receive benefits in a culturally appropriate manner and share equitably in the benefits to be derived from such commercial development.<sup>4</sup>

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<sup>3</sup> ILO Convention 169, Article 16, requires, where relocation of indigenous people is considered necessary as an exceptional measure, that "such relocation shall take place only with their free and informed consent. Where their consent can not be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations."

<sup>4</sup> The Bank Policy on Indigenous Peoples goes beyond Article 8 (j) of the Convention on Biological Diversity that addresses this issue. That Article requires each State Party to the Convention, "Subject to its national legislation, (to) respect, preserve and maintain

### **Other Policy Considerations**

In furtherance of the objectives of the new Policy, the Bank may, at a member country's request, support the country in its development planning and poverty reduction strategies by providing financial assistance for a variety of initiatives designed to:

- (i) strengthen local legislation, as needed, to establish legal recognition of the customary or traditional land tenure systems of Indigenous Peoples;
- (ii) make the development process more inclusive of Indigenous Peoples by incorporating their perspectives in the design of development programs and poverty reduction strategies, and providing them with opportunities to benefit more fully from development programs through policy and legal reforms, capacity building, and free, prior, and informed consultation and participation;
- (iii) support the development priorities of Indigenous Peoples through programs (such as community-driven development programs and locally managed social funds) developed by governments in cooperation with Indigenous Peoples;
- (iv) protect indigenous knowledge, including by strengthening intellectual property rights; and
- (iv) strengthen the capacity of Indigenous Peoples' communities and organizations to prepare, implement, monitor, and evaluate development programs.

For further reference, the full text of OP and BP 4.10 are attached hereto.

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knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices" <http://www.biodiv.org/default.shtml> (accessed August 26, 2006). Paragraph 19 of the Bank Policy does not subject the right of Indigenous Peoples to provide prior agreement to the development of their cultural resources to national legislation, and mandates, rather than encourages, the equitable sharing of benefits.

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**OP 4.10 – INDIGENOUS PEOPLES**

July 2005

These policies were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject

OP and **BP 4.10** together replace OD 4.20, *Indigenous Peoples*, dated September 1991. These OP and BP apply to all projects for which a Project Concept Review takes place on or after July 1, 2005. Questions may be addressed to the Director, **Social Development Department**.

1. This policy<sup>1</sup> contributes to the Bank's<sup>2</sup> mission of poverty reduction and sustainable development by ensuring that the development process fully respects the dignity, human rights, economies, and cultures of Indigenous Peoples. For all projects that are proposed for Bank financing and affect Indigenous Peoples,<sup>3</sup> the Bank requires the borrower to engage in a process of free, prior, and informed consultation.<sup>4</sup> The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples.<sup>5</sup> Such Bank-financed projects include measures to (a) avoid potentially adverse effects on the Indigenous Peoples' communities; or (b) when avoidance is not feasible, minimize, mitigate, or compensate for such effects. Bank-financed projects are also designed to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate and gender and inter-generationally inclusive.

2. The Bank recognizes that the identities and cultures of Indigenous Peoples are inextricably linked to the lands on which they live and the natural resources on which they depend. These distinct circumstances expose Indigenous Peoples to different types of risks and levels of impacts from development projects, including loss of identity, culture, and customary livelihoods, as well as exposure to disease. Gender and intergenerational issues among Indigenous Peoples also are complex. As social groups with identities that are often distinct from dominant groups in their national societies, Indigenous Peoples are frequently among the most marginalized and vulnerable segments of the population. As a result, their economic, social, and legal status often limits their capacity to defend their interests in and rights to lands, territories, and other productive resources, and/or restricts their ability to participate in and benefit from development. At the same time, the Bank recognizes that

Indigenous Peoples play a vital role in sustainable development and that their rights are increasingly being addressed under both domestic and international law.

3. *Identification* Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of "Indigenous Peoples," this policy does not define the term. Indigenous Peoples may be referred to in different countries by such terms as "indigenous ethnic minorities," "aboriginals," "hill tribes," "minority nationalities," "scheduled tribes," or "tribal groups."

4. For purposes of this policy, the term "Indigenous Peoples" is used in a generic sense to refer to a distinct, vulnerable, social and cultural group<sup>6</sup> possessing the following characteristics in varying degrees:

- (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories<sup>7</sup>
- (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (d) an indigenous language, often different from the official language of the country or region.

A group that has lost "collective attachment to geographically distinct habitats or ancestral territories in the project area"; (paragraph 4 (b)) because of forced severance remains eligible for coverage under this policy.<sup>8</sup> Ascertaining whether a particular group is considered as "Indigenous Peoples" for the purpose of this policy may require a technical judgment (see paragraph 8).

5. *Use of Country Systems* The Bank may decide to use a country's systems to address environmental and social safeguard issues in a Bank-financed project that affects Indigenous Peoples. This decision is made in accordance with the requirements of the applicable Bank policy on country systems.<sup>9</sup>

### **Project Preparation**

6. A project proposed for Bank financing that affects Indigenous Peoples requires:

- (a) screening by the Bank to identify whether Indigenous Peoples are present in, or have collective attachment to, the project area (see paragraph 8);
- (b) a social assessment by the borrower (see paragraph 9 and Annex A);

- (c) a process of free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project (see paragraphs 10 and 11);
- (d) the preparation of an Indigenous Peoples Plan (see paragraph 12 and Annex B) or an Indigenous Peoples Planning Framework (see paragraph 13 and Annex C); and
- (e) disclosure of the Indigenous Peoples Plan or Indigenous Peoples Planning Framework (see paragraph 15).

7. The level of detail necessary to meet the requirements specified in paragraph 6 (b), (c), and (d) is proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether adverse or positive.

#### *Screening*

8. Early in project preparation, the Bank undertakes a screening to determine whether Indigenous Peoples (see paragraph 4) are present in, or have collective attachment to, the project area.<sup>10</sup> In conducting this screening, the Bank seeks the technical judgment of qualified social scientists with expertise on the social and cultural groups in the project area. The Bank also consults the Indigenous Peoples concerned and the borrower. The Bank may follow the borrower's framework for identification of Indigenous Peoples during project screening, when that framework is consistent with this policy.

#### *Social Assessment*

9. *Analysis.* If, based on the screening, the Bank concludes that Indigenous Peoples are present in, or have collective attachment to, the project area, the borrower undertakes a social assessment to evaluate the project's potential positive and adverse effects on the Indigenous Peoples, and to examine project alternatives where adverse effects may be significant. The breadth, depth, and type of analysis in the social assessment are proportional to the nature and scale of the proposed project's potential effects on the Indigenous Peoples, whether such effects are positive or adverse (see Annex A for details). To carry out the social assessment, the borrower engages social scientists whose qualifications, experience, and terms of reference are acceptable to the Bank.

10. *Consultation and Participation.* Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the borrower:

- (a) establishes an appropriate gender and inter-generationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples' communities, the Indigenous Peoples Organizations (IPOs) if any, and other local civil society organizations (CSOs) identified by the affected Indigenous Peoples' communities;
- (b) uses consultation methods<sup>11</sup> appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits; and
- (c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation.

11. In deciding whether to proceed with the project, the borrower ascertains, on the basis of the social assessment (see paragraph 9) and the free, prior, and informed consultation (see paragraph 10), whether the affected Indigenous Peoples' communities provide their broad support to the project. Where there is such support, the borrower prepares a detailed report that documents:

- (a) the findings of the social assessment;
- (b) the process of free, prior, and informed consultation with the affected Indigenous Peoples' communities;
- (c) additional measures, including project design modification, that may be required to address adverse effects on the Indigenous Peoples and to provide them with culturally appropriate project benefits;
- (d) recommendations for free, prior, and informed consultation with and participation by Indigenous Peoples' communities during project implementation, monitoring, and evaluation; and
- (e) any formal agreements reached with Indigenous Peoples' communities and/or the IPOs.

The Bank reviews the process and the outcome of the consultation carried out by the borrower to satisfy itself that the affected Indigenous Peoples' communities have provided their broad support to the project. The Bank pays particular attention to the social assessment and to the record and outcome of the free, prior, and informed consultation with the affected Indigenous Peoples' communities as a basis

for ascertaining whether there is such support. The Bank does not proceed further with project processing if it is unable to ascertain that such support exists.

*Indigenous Peoples Plan/Planning Framework*

12. *Indigenous Peoples Plan.* On the basis of the social assessment and in consultation with the affected Indigenous Peoples' communities, the borrower prepares an Indigenous Peoples Plan (IPP) that sets out the measures through which the borrower will ensure that (a) Indigenous Peoples affected by the project receive culturally appropriate social and economic benefits; and (b) when potential adverse effects on Indigenous Peoples are identified, those adverse effects are avoided, minimized, mitigated, or compensated for (see Annex B for details). The IPP is prepared in a flexible and pragmatic manner,<sup>12</sup> and its level of detail varies depending on the specific project and the nature of effects to be addressed. The borrower integrates the IPP into the project design. When Indigenous Peoples are the sole or the overwhelming majority of direct project beneficiaries, the elements of an IPP should be included in the overall project design, and a separate IPP is not required. In such cases, the Project Appraisal Document (PAD) includes a brief summary of how the project complies with the policy, in particular the IPP requirements.

13. *Indigenous Peoples Planning Framework* Some projects involve the preparation and implementation of annual investment programs or multiple subprojects.<sup>13</sup> In such cases, and when the Bank's screening indicates that Indigenous Peoples are likely to be present in, or have collective attachment to, the project area, but their presence or collective attachment cannot be determined until the programs or subprojects are identified, the borrower prepares an Indigenous Peoples Planning Framework (IPPF). The IPPF provides for the screening and review of these programs or subprojects in a manner consistent with this policy (see Annex C for details). The borrower integrates the IPPF into the project design.

14. *Preparation of Program and Subproject IPPs* If the screening of an individual program or subproject identified in the IPPF indicates that Indigenous Peoples are present in, or have collective attachment to, the area of the program or subproject, the borrower ensures that, before the individual program or subproject is implemented, a social assessment is carried out and an IPP is prepared in accordance with the requirements of this policy. The borrower provides each IPP to the Bank for review before the respective program or subproject is considered eligible for Bank financing.<sup>14</sup>

*Disclosure*

15. The borrower makes the social assessment report and draft IPP/IPPF available to the affected Indigenous Peoples' communities in an appropriate form, manner, and language.<sup>15</sup> Before project appraisal, the borrower sends the social assessment and final IPP/IPPF to the Bank for review.<sup>16</sup> Once the Bank accepts the documents as providing an adequate basis for project appraisal, the Bank makes them available to the public in accordance with *The World Bank Policy on Disclosure of Information*, and the borrower makes them available to the affected Indigenous Peoples' communities in the same manner as the earlier draft documents.

**Special Considerations***Lands and Related Natural Resources*

16. Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply if the project affects such ties. In this situation, when carrying out the social assessment and preparing the IPP/IPPF, the borrower pays particular attention to:

- (a) the customary rights<sup>17</sup> of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods;
- (b) the need to protect such lands and resources against illegal intrusion or encroachment;
- (c) the cultural and spiritual values that the Indigenous Peoples attribute to such lands and resources; and
- (d) Indigenous Peoples' natural resources management practices and the long-term sustainability of such practices.

17. If the project involves (a) activities that are contingent on establishing legally recognized rights to lands and territories that Indigenous Peoples have traditionally owned or customarily used or occupied (such as land titling projects), or (b) the acquisition of such lands, the IPP sets forth an action plan for the legal recognition of such ownership, occupation, or usage. Normally, the action plan is carried out before project implementation; in some cases, however, the action plan may need to be carried out concurrently with the project itself. Such legal recognition may take the following forms:

- (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or

- (b) conversion of customary usage rights to communal and/or individual ownership rights.

If neither option is possible under domestic law, the IPP includes measures for legal recognition of perpetual or long-term renewable custodial or use rights.

*Commercial Development of Natural and Cultural Resources*

18. If the project involves the commercial development of natural resources (such as minerals, hydrocarbon resources, forests, water, or hunting/fishing grounds) on lands or territories that Indigenous Peoples traditionally owned, or customarily used or occupied, the borrower ensures that as part of the free, prior, and informed consultation process the affected communities are informed of (a) their rights to such resources under statutory and customary law; (b) the scope and nature of the proposed commercial development and the parties interested or involved in such development; and (c) the potential effects of such development on the Indigenous Peoples' livelihoods, environments, and use of such resources. The borrower includes in the IPP arrangements to enable the Indigenous Peoples to share equitably in the benefits<sup>18</sup> to be derived from such commercial development; at a minimum, the IPP arrangements must ensure that the Indigenous Peoples receive, in a culturally appropriate manner, benefits, compensation, and rights to due process at least equivalent to that to which any landowner with full legal title to the land would be entitled in the case of commercial development on their land.

19. If the project involves the commercial development of Indigenous Peoples' cultural resources and knowledge (for example, pharmacological or artistic), the borrower ensures that as part of the free, prior, and informed consultation process, the affected communities are informed of (a) their rights to such resources under statutory and customary law; (b) the scope and nature of the proposed commercial development and the parties interested or involved in such development; and (c) the potential effects of such development on Indigenous Peoples' livelihoods, environments, and use of such resources. Commercial development of the cultural resources and knowledge of these Indigenous Peoples is conditional upon their prior agreement to such development. The IPP reflects the nature and content of such agreements and includes arrangements to enable Indigenous Peoples to receive benefits in a culturally appropriate way and share equitably in the benefits to be derived from such commercial development.

*Physical Relocation of Indigenous Peoples*

20. Because physical relocation of Indigenous Peoples is particularly complex and may have significant adverse impacts on their identity, culture, and customary

livelihoods, the Bank requires the borrower to explore alternative project designs to avoid physical relocation of Indigenous Peoples. In exceptional circumstances, when it is not feasible to avoid relocation, the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process. In such cases, the borrower prepares a settlement plan in accordance with the requirements of OP4.12, *Involuntary Resettlement*, that is compatible with the Indigenous Peoples' cultural preferences, and includes a land-based resettlement strategy. As part of the resettlement plan, the borrower documents the results of the consultation process. Where possible, the resettlement plan should allow the affected Indigenous Peoples to return to the lands and territories they traditionally owned, or customarily used or occupied, if the reasons for their relocation cease to exist.

21. In many countries, the lands set aside as legally designated parks and protected areas may overlap with lands and territories that Indigenous Peoples traditionally owned, or customarily used or occupied. The Bank recognizes the significance of these rights of ownership, occupation, or usage, as well as the need for long-term sustainable management of critical ecosystems. Therefore, involuntary restrictions on Indigenous Peoples' access to legally designated parks and protected areas, in particular access to their sacred sites, should be avoided. In exceptional circumstances, where it is not feasible to avoid restricting access, the borrower prepares, with the free, prior, and informed consultation of the affected Indigenous Peoples' communities, a process framework in accordance with the provisions of OP 4.12. The process framework provides guidelines for preparation, during project implementation, of an individual parks and protected areas' management plan, and ensures that the Indigenous Peoples participate in the design, implementation, monitoring, and evaluation of the management plan, and share equitably in the benefits of the parks and protected areas. The management plan should give priority to collaborative arrangements that enable the Indigenous, as the custodians of the resources, to continue to use them in an ecologically sustainable manner.

#### **Indigenous Peoples and Development**

22. In furtherance of the objectives of this policy, the Bank may, at a member country's request, support the country in its development planning and poverty reduction strategies by providing financial assistance for a variety of initiatives designed to:

- (a) strengthen local legislation, as needed, to establish legal recognition of the customary or traditional land tenure systems of Indigenous Peoples;

- (b) make the development process more inclusive of Indigenous Peoples by incorporating their perspectives in the design of development programs and poverty reduction strategies, and providing them with opportunities to benefit more fully from development programs through policy and legal reforms, capacity building, and free, prior, and informed consultation and participation;
- (c) support the development priorities of Indigenous Peoples through programs (such as community-driven development programs and locally managed social funds) developed by governments in cooperation with Indigenous Peoples;
- (d) address the gender<sup>19</sup> and intergenerational issues that exist among many Indigenous Peoples, including the special needs of indigenous women, youth, and children;
- (e) prepare participatory profiles of Indigenous Peoples to document their culture, demographic structure, gender and intergenerational relations and social organization, institutions, production systems, religious beliefs, and resource use patterns;
- (f) strengthen the capacity of Indigenous Peoples' communities and IPOs to prepare, implement, monitor, and evaluate development programs;
- (g) strengthen the capacity of government agencies responsible for providing development services to Indigenous Peoples;
- (h) protect indigenous knowledge, including by strengthening intellectual property rights; and
- (i) facilitate partnerships among the government, IPOs, CSOs, and the private sector to promote Indigenous Peoples' development programs.

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1. This policy should be read together with other relevant Bank policies, including *Environmental Assessment* (OP 4.01), *Natural Habitats* (OP 4.04), *Pest Management* (OP 4.09), *Physical Cultural Resources* (OP 4.11, forthcoming), *Involuntary Resettlement* (OP 4.12), *Forests* (OP 4.36), and *Safety of Dams* (OP 4.37).

2. "Bank" includes IBRD and IDA; "loans" includes IBRD loans, IDA credits, IDA grants, IBRD and IDA guarantees, and Project Preparation Facility (PPF) advances, but does not include development policy loans, credits, or grants. For social aspects of development policy operations, see OP 8.60, *Development Policy Lending*, paragraph 10, below. The term "borrower" includes, wherever the context requires, the recipient of an IDA grant,

the guarantor of an IBRD loan, and the project implementing agency, if it is different from the borrower.

3. This policy applies to all components of the project that affect Indigenous Peoples, regardless of the source of financing.
4. "Free, prior, and informed consultation with the affected Indigenous Peoples' communities" refers to a culturally appropriate and collective decision-making process subsequent to meaningful and good faith consultation and informed participation regarding the preparation and implementation of the project. It does not constitute a veto right for individuals or groups (see paragraph 10).
5. For details on "broad community support to the project by the affected Indigenous Peoples," see paragraph 11.
6. The policy does not set an *a priori* minimum numerical threshold since groups of Indigenous Peoples may be very small in number and their size may make them more vulnerable.
7. "Collective attachment" means that for generations there has been a physical presence in and economic ties to lands and territories traditionally owned, or customarily used or occupied, by the group concerned, including areas that hold special significance for it, such as sacred sites. "Collective attachment" also refers to the attachment of transhumant/nomadic groups to the territory they use on a seasonal or cyclical basis.
8. "Forced severance" refers to loss of collective attachment to geographically distinct habitats or ancestral territories occurring within the concerned group members' lifetime because of conflict, government resettlement programs, dispossession from their lands, natural calamities, or incorporation of such territories into an urban area. For purposes of this policy, "urban area" normally means a city or a large town, and takes into account all of the following characteristics, no single one of which is definitive: (a) the legal designation of the area as urban under domestic law; (b) high population density; and (c) high proportion of nonagricultural economic activities relative to agricultural activities.
9. The currently applicable Bank policy is OP/BP 4.00, *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects*. Applicable only to pilot projects using borrower systems, the policy includes requirements that such systems be designed to meet the policy objectives and adhere to the operational principles related to Indigenous Peoples identified in OP 4.00. (See Table A1.E below.)
10. The screening may be carried out independently or as part of a project environmental assessment (see OP 4.01, *Environmental Assessment*, paragraphs 3, 8).
11. Such consultation methods (including using indigenous languages, allowing time for consensus building, and selecting appropriate venues) facilitate the articulation by Indigenous Peoples of their views and preferences. The "Indigenous Peoples Guidebook" (forthcoming) will provide good practice guidance on this and other matters.

12. When non-Indigenous Peoples live in the same area with Indigenous Peoples, the IPP should attempt to avoid creating unnecessary inequities for other poor and marginal social groups.
13. Such projects include community-driven development projects, social funds, sector investment operations, and financial intermediary loans.
14. If the Bank considers the IPPF to be adequate for the purpose, however, the Bank may agree with the borrower that prior Bank review of the IPP is not needed. In such case, the Bank reviews the IPP and its implementation as part of supervision (see OP 13.05, *Project Supervision*).
15. The social assessment and IPP require wide dissemination among the affected Indigenous Peoples' communities using culturally appropriate methods and locations. In the case of an IPPF, the document is disseminated using IPOs at the appropriate national, regional, or local levels to reach Indigenous Peoples who are likely to be affected by the project. Where IPOs do not exist, the document may be disseminated using other CSOs as appropriate.
16. An exception to the requirement that the IPP (or IPPF) be prepared as a condition of appraisal may be made with the approval of Bank management for projects meeting the requirements of OP 8.50, *Emergency Recovery Assistance*. In such cases, management's approval stipulates a timetable and budget for preparation of the social assessment and IPP or of the IPPF.
17. "Customary rights" to lands and resources refers to patterns of long-standing community land and resource usage in accordance with Indigenous Peoples' customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State.
18. The "Indigenous Peoples Guidebook" (forthcoming) will provide good practice guidance on this matter.
19. See OP/BP 4.20, *Gender and Development*.

## **Annexes**

### **OP 4.10, Annex A**

July 2005

#### **Social Assessment**

1. The breadth, depth, and type of analysis required for the social assessment are proportional to the nature and scale of the proposed project's potential effects on the Indigenous Peoples.
2. The social assessment includes the following elements, as needed:
  - (a) A review, on a scale appropriate to the project, of the legal and institutional framework applicable to Indigenous Peoples.
  - (b) Gathering of baseline information on the demographic, social, cultural, and political characteristics of the affected Indigenous Peoples' communities, the land and territories that they have traditionally owned or customarily used or occupied, and the natural resources on which they depend.
  - (c) Taking the review and baseline information into account, the identification of key project stakeholders and the elaboration of a culturally appropriate process for consulting with the Indigenous Peoples at each stage of project preparation and implementation (see paragraph 9 of this policy).
  - (d) An assessment, based on free, prior, and informed consultation, with the affected Indigenous Peoples' communities, of the potential adverse and positive effects of the project. Critical to the determination of potential adverse impacts is an analysis of the relative vulnerability of, and risks to, the affected Indigenous Peoples' communities given their distinct circumstances and close ties to land and natural resources, as well as their lack of access to opportunities relative to other social groups in the communities, regions, or national societies in which they live.
  - (e) The identification and evaluation, based on free, prior, and informed consultation with the affected Indigenous Peoples' communities, of measures necessary to avoid adverse effects, or if such measures are not feasible, the identification of measures to minimize, mitigate, or compensate for such effects, and to ensure that the Indigenous Peoples receive culturally appropriate benefits under the project.

**OP 4.10, Annex B**

July 2005

**Indigenous Peoples Plan**

1. The Indigenous Peoples Plan (IPP) is prepared in a flexible and pragmatic manner, and its level of detail varies depending on the specific project and the nature of effects to be addressed.
2. The IPP includes the following elements, as needed:
  - (a) A summary of the information referred to in Annex A, paragraph 2, (a) and (b).
  - (b) A summary of the social assessment.
  - (c) A summary of results of the free, prior, and informed consultation with the affected Indigenous Peoples' communities that was carried out during project preparation (Annex A) and that led to broad community support for the project.
  - (d) A framework for ensuring free, prior, and informed consultation with the affected Indigenous Peoples' communities during project implementation (see paragraph 10 of this policy).
  - (e) An action plan of measures to ensure that the Indigenous Peoples receive social and economic benefits that are culturally appropriate, including, if necessary, measures to enhance the capacity of the project implementing agencies.
  - (f) When potential adverse effects on Indigenous Peoples are identified, an appropriate action plan of measures to avoid, minimize, mitigate, or compensate for these adverse effects.
  - (g) The cost estimates and financing plan for the IPP.
  - (h) Accessible procedures appropriate to the project to address grievances by the affected Indigenous Peoples' communities arising from project implementation. When designing the grievance procedures, the borrower takes into account the availability of judicial recourse and customary dispute settlement mechanisms among the Indigenous Peoples.
  - (i) Mechanisms and benchmarks appropriate to the project for monitoring, evaluating, and reporting on the implementation of the IPP. The monitoring and evaluation mechanisms should include arrangements for the free, prior, and informed consultation with the affected Indigenous Peoples' communities.

**OP 4.10, Annex C**

July 2005

**Indigenous Peoples Planning Framework**

The Indigenous Peoples Planning Framework (IPPF) sets out:

- (a) The types of programs and subprojects likely to be proposed for financing under the project.
- (b) The potential positive and adverse effects of such programs or subprojects on Indigenous Peoples.
- (c) A plan for carrying out the social assessment (see Annex A) for such programs or subprojects.
- (d) A framework for ensuring free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of project preparation and implementation (see paragraph 10 of this policy).
- (e) Institutional arrangements (including capacity building where necessary) for screening project-supported activities, evaluating their effects on Indigenous Peoples, preparing IPPs, and addressing any grievances.
- (f) Monitoring and reporting arrangements, including mechanisms and benchmarks appropriate to the project.
- (g) Disclosure arrangements for IPPs to be prepared under the IPPF.

**BP 4.10 – INDIGENOUS PEOPLES**

July 2005

These policies were prepared for use by World Bank staff and are not necessarily a complete treatment of the subject

Note: **OP** and BP 4.10 together replace OD 4.20, *Indigenous Peoples*, dated September 1991. These OP and BP apply to all investment projects for which a Project Concept Review takes place on or after July 1, 2005. Questions may be addressed to the Director, **Social Development Department (SDV)**.

1. For all investment projects in which Indigenous Peoples are present in, or have collective attachment to, the project area, the Bank's task team (TT) consults with the Regional unit responsible for safeguards and with the Legal Department (LEG) throughout the project cycle.<sup>1</sup>

2. *Free, Prior, and Informed Consultation*. When a project affects Indigenous Peoples, the TT assists the borrower in carrying out free, prior, and informed consultation with affected communities about the proposed project throughout the project cycle, taking into consideration the following:

- (a) "free, prior, and informed consultation" is consultation that occurs freely and voluntarily, without any external manipulation, interference, or coercion, for which the parties consulted have prior access to information on the intent and scope of the proposed project in a culturally appropriate manner, form, and language;
- (b) consultation approaches recognize existing Indigenous Peoples Organizations (IPOs), including councils of elders, headmen, and tribal leaders, and pay special attention to women, youth, and the elderly;
- (c) the consultation process starts early, since decision-making among Indigenous Peoples may be an iterative process, and there is a need for adequate lead time to fully understand and incorporate concerns and recommendations of Indigenous Peoples into the project design; and
- (d) a record of the consultation process is maintained as part of the project files.

### **Project Identification**

3. *Screening.* Early in the project cycle, the task team leader (TTL) initiates a process to determine whether Indigenous Peoples (see OP 4.10, paragraph 4) are present in, or have collective attachment to, the project area. In doing so, the TTL seeks technical advice from qualified social scientists with expertise on the social and cultural groups in the project area. If adequate information is not available, the TTL holds direct consultations with the Indigenous Peoples who would be affected by the proposed project.

4. *Consultation with the Borrower.* If the screening indicates that Indigenous Peoples are present in, or have collective attachment to, the project area, the TTL:

- (a) informs the borrower that the Indigenous Peoples policy applies to the project and brings the provisions of OP/BP 4.10 to the borrower's attention;
- (b) discusses with the borrower its policies and institutional and legal arrangements for Indigenous Peoples;
- (c) reaches agreement with the borrower on how the policy will be implemented under the project;<sup>2</sup> and discusses any technical assistance to be provided to the borrower.

5. *Documentation, Review, Clearance, and Disclosure.* The TT summarizes in the Project Concept Note (PCN) and Project Information Document (PID) the results of the screening and the agreements reached with the borrower to comply with policy requirements, and notes in the Integrated Safeguards Data Sheet (ISDS) that OP 4.10 is triggered. The TTL seeks comments on and clearance of the PCN, PID, and ISDS from the Regional unit responsible for safeguards. Once the PID is cleared, the TTL sends it to the InfoShop.

### **Project Preparation**

6. *Social Assessment.* Where screening reveals that Indigenous Peoples are present in, or have collective attachment to, the project area, the TTL asks the borrower to undertake a social assessment (SA) in accordance with the requirements of paragraph 9 and Annex A of OP 4.10 to evaluate the project's potential positive and adverse effects on Indigenous Peoples and, where adverse effects may be significant, to examine project alternatives. The TT:

- (a) reviews the terms of reference for the SA, ensuring in particular that they provide for the affected Indigenous Peoples to participate in the SA through a process of free, prior, and informed consultation (see paragraph 2 of this BP); and

- (b) comments on the qualifications and experience of the social scientists who will carry out the SA.

7. *Broad Community Support.* When the borrower forwards to the Bank the documentation on the SA and the consultation process, the TT reviews it to verify that the borrower has gained the broad support from representatives of major sections of the community required under the policy. The TT proceeds with project processing once it confirms that such support exists. The Bank does not proceed further with project processing if it is unable to ascertain that such support exists.

8. *Decision on Instruments.* Taking into account the nature of the project and a review of the relevant Indigenous Peoples issues, the TTL agrees with the Regional unit responsible for safeguards on the type of Indigenous Peoples instrument (Indigenous Peoples Plan or Indigenous Peoples Planning Framework) and other instruments (Resettlement Action Plan, and/or process framework for national parks and protected areas) to be prepared by the borrower and on the scope and level of detail required. The TTL conveys this decision to the borrower, discusses with the borrower the actions necessary to prepare the instrument(s), and agrees on a timeline for preparation and delivery to the Bank.

- (a) *Indigenous Peoples Plan (IPP).* The borrower prepares the IPP in accordance with the requirements of Annex B of OP 4.10 and integrates it into the design of the project. The IPP has a level of detail that is proportional to the complexity of the proposed project and commensurate with the nature and scale of the proposed project's potential effects on Indigenous Peoples (see OP 4.10, paragraph 7). If project activities are contingent on establishing legally recognized rights to lands or territories that Indigenous Peoples have traditionally owned, or customarily used or occupied, the IPP outlines the steps and timetable for achieving legal recognition of such ownership, occupation, or usage (see OP 4.10, paragraph 17). For projects involving the commercial development of natural resources on such lands or territories or of the cultural resources and knowledge of Indigenous Peoples, the IPP includes arrangements to enable the Indigenous Peoples to share equitably in the benefits to be derived and to receive these benefits in a culturally appropriate way (see OP 4.10, paragraphs 18-19). Additionally, for projects involving commercial development of Indigenous Peoples' cultural resources and knowledge, the IPP documents the agreement reached with the affected communities for such development. When Indigenous Peoples are the sole or the overwhelming majority of direct project beneficiaries, a separate IPP is not required and the borrower includes elements of an IPP in the overall project design. The TT prepares a brief summary of how the project complies

with the policy, in particular the IPP requirements, as an annex to the Project Appraisal Document (PAD).

- (b) *Resettlement Action Plan (RAP)*. If the borrower proposes the physical relocation of Indigenous Peoples, the TT ascertains specifically that (a) the borrower has explored alternative project designs to avoid physical relocation; and b) the borrower has obtained broad support from the affected communities as part of the free, prior, and informed consultation process, and has documented it. The borrower also prepares a RAP in accordance with the requirements of OP 4.12, *Involuntary Resettlement*, and of OP 4.10, paragraph 20.
- (c) *Process Framework for Parks and Protected Areas*. When the access of Indigenous Peoples to legally designated parks and protected areas is restricted, the borrower prepares a process framework with the free, prior, and informed consultation of the affected Indigenous Peoples' communities, and in accordance with the provisions of OP 4.12, *Involuntary Resettlement*, and of OP 4.10, paragraphs 20 and 21.
- (d) *Indigenous Peoples Planning Framework (IPPF)*. For projects that involve the preparation and implementation of annual investment programs or multiple subprojects, the borrower prepares an IPPF in accordance with the requirements of Annex C of OP 4.10 and integrates it into the project design.
- (e) *Preparation of Program and Subproject IPPs*. If the screening of an individual program or subproject identified in the IPPF indicates that Indigenous Peoples are present in, or have collective attachment to, the area of the program or subproject, the TT ensures that the borrower carries out an SA and prepares an IPP and other relevant instrument(s) in accordance with the requirements of OP 4.10. The borrower provides each relevant instrument to the Bank. The TTL forwards the instrument(s) to the Regional unit responsible for safeguards for review and clearance before the respective program or subproject is considered eligible for Bank financing. Where the Regional unit responsible for safeguards considers the IPPF as adequate for policy compliance, the TTL may agree with the borrower that the Bank's prior review of IPPs or other instrument(s) for individual programs or subprojects will not be needed. However, the TT supervises the preparation of the SA (see paragraph 6 of this BP), and the formulation of any IPPs and other instrument(s) and their implementation by the borrower (see OP 4.10, paragraph 14 and footnote 15).

9. *Instrument Review and Disclosure*. When the borrower submits the draft instrument(s) to the Bank, the TT reviews each instrument to ensure that it complies with the policy set out in OP 4.10; has been made available to the affected Indigenous

Peoples' communities at an accessible place and in a culturally appropriate form, manner, and language; has been appropriately reflected in the project design; and can serve as the basis for project appraisal. The TT forwards the draft instrument(s) to the Regional safeguards unit for comments and clearance. Once the documents are cleared, the TT makes them available to the public in accordance with *The World Bank Policy on Disclosure of Information*.

### **Project Appraisal**

10. The TTL ensures that appraisal includes appropriate social science expertise to assess the feasibility and sustainability of specific measures reflected in the relevant Indigenous Peoples and other instrument(s) and appropriate legal expertise to assess the country's legal and policy framework related to the project. The TT reflects the provisions related to Indigenous Peoples in the PAD and attaches the relevant instrument(s) to the PAD as an annex. When Indigenous Peoples are the sole or the overwhelming majority of direct project beneficiaries, the annex to the PAD includes a summary of how the project complies with the policy. In addition, when the borrower proposes the physical relocation of Indigenous Peoples or restrictions of their access to resources, the RAP or process framework is included as an annex to the PAD. The TTL seeks comments on and clearance of the PAD package (which includes the IPP, IPPF, or summary, together with any RAP or process framework, if applicable) from both the Regional unit responsible for safeguards and LEG.

### **Negotiations and Disclosure**

11. Prior to negotiations, the TT confirms that the responsible authority of the borrower has provided final approval of the relevant IPP, IPPF and other instrument(s). The Loan Agreement provides for the borrower's obligation to implement the relevant instrument(s). After the borrower and the Bank agree to the final instrument(s) and the project has been approved, the Bank makes the PAD and the final instrument(s) available to the public in accordance with the Bank's policy on disclosure. The borrower makes the documents available to the affected Indigenous Peoples' communities at a locally accessible place and in a culturally appropriate form, manner, and language, in the same manner as for the draft instruments (see paragraph 9 above).

### **Supervision**

12. The Regional vice president, in coordination with the relevant country director, ensures the availability of resources for effective supervision of projects affecting Indigenous Peoples. Throughout project implementation, the TTL ensures that Bank supervision includes appropriate social science and legal expertise to carry out the

provisions of the Loan Agreement. The TT also ascertains whether the relevant legal covenants related to the Indigenous Peoples and other instrument(s) are being implemented. When the instruments are not being implemented as planned, the Bank calls this to the attention of the borrower and agrees with the borrower on corrective measures (see OP/BP 13.05, *Project Supervision*).

### **Implementation Completion Report**

13. Upon completion of the project, the Implementation Completion Report (see OP 13.55, *Implementation Completion Reporting*) evaluates project compliance with OP 4.10 and assesses:

- (a) the degree of Indigenous Peoples' participation in the project cycle;
- (b) the impact of the project, both positive and adverse, on the affected Indigenous Peoples;
- (c) the achievement of the objectives of the relevant instrument(s), as relevant; and
- (d) lessons for future operations involving Indigenous Peoples.

If the objectives of the relevant instrument(s) have not been realized, the Implementation Completion Report may propose a future course of action, including, as appropriate, continued post-project supervision by the Bank.

### **Country Assistance Strategy and Policy Dialogue**

14. In countries with a series of operations affecting Indigenous Peoples, the ongoing country and sector dialogue with the government includes any issues pertaining to the country's policy, institutional, and legal framework for Indigenous Peoples, including the groups to whom this policy applies. Outcomes of this dialogue are reflected in the Country Assistance Strategy.

- 
1. The *Indigenous Peoples Guidebook* (forthcoming) provides good practice advice to staff on application of the policy.
  2. If there is disagreement with the borrower on the application of the policy, the TTL seeks advice from the Regional unit responsible for safeguards and LEG for a final technical judgment.



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