

Legal Empowerment: An Impossible Dream?¹

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This paper takes a critical look at the concept of Legal Empowerment, tracing its genesis and differences with the earlier concepts of Rule of Law and Rule of Law Orthodoxy. It then examines the problems emanating from applying Legal Empowerment as a strategy to post-colonial states such as Pakistan and identifies two particular problems: the existence of parallel systems and the imposition of an alien system of law, i.e. the British law, in India. The introduction of English law, its practice and the values that they espoused, although essential to the system they were trying to set in place, were alien and therefore disruptive and robbed the courts that used them of their authority. It argues that the disruption of an evolutionary process in legal developments in India impeded an integrated legal system with legitimacy amongst the people the law is applied to. Attempting to institute a legal empowerment strategy – as currently used in development discourse – ignores this critical issue of legitimacy, the existence of parallel legal systems operating as well as the existing power structures underlying the process of law making and application (whether formal law or customs).

This paper will attempt to highlight the variables that are at play within a developing society like Pakistan that make the implementation of such an idea difficult and maybe even counter productive.

From Rule of Law to Legal Empowerment

A disproportionate burden of poverty is experienced by women and disadvantaged groups within the developing world. Women, in particular, do not often have access to basic facilities like education and are burdened by being the sole caregiver for their families. They are not able to make a living wage, are disenfranchised, and have limited access to credit and land. This cycle of poverty continues through unemployment, lack of education and gender disparity that pervades every aspect of their social interaction. Such groups are also affected by discrimination within the legal system which is further compounded by the fact that the poor often have no legal identity and they may lack birth and marriage certificates or deeds to their assets. Thus they live in fear of being displaced and have no legal recourse at their disposal.

Development strategies are seen as a way of addressing the gender inequity that is partially responsible for the epidemic of poverty and to that end the strategy's focus should be on the connection that exists between poverty and the lack of legal protection for the disadvantaged. A large percentage of the developing world's population does not enjoy legal protection today due to various factors ranging from lack of legal identity to inadequate legal infrastructure. This means that people are vulnerable to exploitation and violation of their rights including security of person and property. This proves to be detrimental, for it leaves the governments of such

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societies less able to provide basic services. The result is a social fabric that remains unwoven, leading in extreme cases to instability and strife.

The adoption of a purely legal strategy to address the problem of poverty and discrimination with regard to women and disadvantaged groups is not in itself sufficient, even though legal systems and adequate legal infrastructure guaranteeing the protection of legal rights are necessary. A purely economic approach to the problem does not suffice either because, in states such as Pakistan, the informal sector accounting for a large portion of the economy operates outside the available legal framework. This increases the chance of exploitation by powers and vested interests that abuse the informality to build a separate, non-democratic power base in many of these economies.

‘It is a known fact that...if you exclude women from economic structures, you exclude more than 50 per cent of the talent, the driving force, the organizational power and the entrepreneurship of humankind. Still, statistics show that women, who produce 90 per cent of the world’s food, own only 2 per cent of the world’s land. And women are three times as likely as men to work in the informal economy... Mainstreaming a gender perspective into economics will not in itself open up markets for women. Systems of power, agents of change and impediments to change must be considered. Who are the strategic partners in the struggle for power in the economic sphere, and who are in a position to impede empowerment?’²

Gender disparity manifests itself in various forms like social stereotyping and violence at the domestic and societal levels. Discrimination against girl children, adolescents and women still persists in most parts of the world. The underlying causes of gender inequality are related to social and economic structures, based on informal and formal norms, and practices. Consequently, the access of women- particularly those belonging to weaker sections, the majority of whom are in the rural areas and in the informal, unorganized sector – to education, health and productive resources, amongst others, is inadequate. Therefore, they remain largely marginalized, poor and socially excluded.

The concept of Legal Empowerment has been forwarded in the context of reducing poverty and revolves around the idea of disadvantaged groups being able to wield more control over their lives and dictate its terms. Legal Empowerment, when achieved, would allow such disadvantaged groups to be in a position to primarily help them move out of a situation like poverty. Legal Empowerment as a concept is put forward as an alternative that could displace the dominant concepts in the development discourse of the ‘Rule of Law’ and the ‘Rule of Law Orthodoxy’. The idea of Legal Empowerment has gained momentum in recent years with the establishment of ‘The Commission on Legal Empowerment of the Poor’³ and numerous studies and reports being published on the subject. The Commission ‘aims to make legal protection and economic opportunity not the privilege of the few but the right of all’⁴ and is working with states

²Excerpt from the Key note by Ambassador Mona Brother from Norway at the Women’s Economic Empowerment as Smart Economics Conference in Berlin, Germany (February 2007).

³ The Commission on Legal Empowerment of the Poor was established in 2005. It is a UN affiliated initiative working in close cooperation with the UNDP and the UN Economic Commission for Europe; it has a mandate to complete its work by 2008.

⁴ www.undp.org/legalempowerment

to develop incentives enabling legal recognition. Their premise is that helping governments and grassroots organizations would create an environment that would help people work themselves out of poverty and attain a higher standard of living.

To be able to tackle the issues of poverty and discrimination there needs to be a workable strategy capable of implementation and producing results. The dominant approach pursued by aid agencies has been the promotion of the value of Rule of Law for development. Rule of Law stands for the notion of equality before the law and considerable effort has been geared towards trying to garner support for the promotion of this legal value. This dominant paradigm envisages working in close collaboration with state institutions especially the Judiciary in a bid to strengthen the latter so as to ensure the equal treatment of all citizens within a state. It concentrates on the ties of law with the state and its institutions as a means of addressing the aforementioned issues. It is contended that the application of this strategy would result in the growth and availability of legal protection for all and set the stage for the introduction and implementation of widespread reform. Rule of Law, in the view of the World Bank, "prevails where i) the government itself is bound by the law, ii) every person in society is treated equally under the law, iii) the human dignity of each individual is recognized and protected by law and iv) justice is accessible to all"⁵.

Rule of Law Orthodoxy (ROLO), on the other hand, is a set of ideas and strategies that aim to promote the Rule of Law within a society as a medium for achieving developmental goals as diverse as building better business environments, economic growth, good governance and poverty alleviation. The main contention of the proponents of Rule of Law Orthodoxy is that Rule of Law is essential for long term development. Regardless of whether the organization in question is a multilateral financial institution looking to promote economic growth or whether it's an aid agency implementing legal awareness/good governance programs, these varied goals are achieved by employing the Rule of Law Orthodoxy as a strategy. Proponents of this approach feel that Rule of Law can only be upheld by state institutions, which is why they are taken up as partners by these organizations. Within the economic sphere such a strategy would guarantee security of investments, property rights, trade and other mediums of advancing economic growth. Aid programs supported by international agencies emphasize state institutions as the vehicle for promoting change that would also encompass the safety, security of property and access to justice of the poor. There is, therefore, a need for a legal order that is fair, efficient, accessible and predictable.

The Judiciary is the cornerstone of an effective legal system. It is considered the state organ best able to uphold the Rule of Law or the idea that all persons are treated equally before the law. Armed with this core value, the legal system becomes an important actor in terms of development; an integration of the two (i.e. the legal system and development) is seen as necessary to tackle a whole range of problems from poverty alleviation to good governance. With this purpose in mind, aid agencies are investing in the legal system to be better able to serve the needs of society and its disadvantaged groups. The dominant paradigm (Rule of Law

⁵ The World Bank definition of Rule of Law cited by Stephen Golub, *Working Papers; Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative* p.7 (Rule of Law Series, Democracy and Rule of Law Project 2003).

Orthodoxy) takes a "top down, state centered"⁶ approach through which development agencies align themselves with state institutions and implement developmental projects and policies in the belief that they would trickle down to the lowest grassroots level, thereby engineering change. The focus is on law reform and on strengthening governmental institutions, especially the Judiciary.

Critics of Rule of Law Orthodoxy contend that support for the promotion of the traditional idea of Rule of Law as a stepping stone towards the alleviation of poverty is lacking, in terms of substance, and falls short of delivering the desired result. Rule of Law Orthodoxy draws support from a number of assumptions that critics such as Golub believe to be questionable. He disputes the very foundation of this paradigm that dominates thinking on the need for and how best to integrate law and development. Critics maintain that success of the dominant paradigm, Rule of Law Orthodoxy, must be measured according to its impact on the poor and in that respect there is insufficient evidence to show that Rule of Law reduces poverty⁷. While historical evidence exists to make a case for there being a link between Rule of Law and overall development in Europe, there is insufficient ground to suggest that the same pattern would yield results for developing nations where there is a considerable gap in terms of culture, political set-up and economic prosperity. Moreover, Golub asserts there is paucity of evidence with regard to whether legal reform encourages development or whether such reform is the consequence of development spurred by other factors. He points out countries like China⁸ that have managed to achieve and sustain economic growth in the absence of western values like Rule of Law. Such examples negate the assumed link between Rule of Law and development.

Even if it assumed that Rule of Law helps reduce poverty, Golub is critical of intentional foreign efforts to develop this value in isolation. Rule of Law and its possible benefits should be the consequence of a society's internal change and evolution as opposed to being imposed by an external source⁹. A USAID commissioned study of Rule of Law assistance in Latin American and Asian countries conducted by Blair and Hansen advises against a "legal system strengthening/institution building" strategy unless there are a number of elements already in place within that society¹⁰. They argue that regardless of how much money is pumped in to prop up the idea of Rule of Law, it would not be sustainable if elements such as rampant corruption, major human rights abuses and the lack of political will to pursue reform are present within society. Additional pressures can emanate, for example, from an uncooperative bureaucracy and powerful external elements that can impede large scale change. There doesn't seem to be much sense in focusing on state institutions as the medium for introducing reform and overlooking the anti reform attitudes within those institutions. One can therefore conclude that even when there

⁶ *ibid* p. 8.

⁷ Golub cites Amanda Perry's case study on foreign enterprises in Sri Lanka that disputes the link between Rule of Law and poverty alleviation (p. 10-11 of the Working Papers).

⁸ Along with China, Golub mentions Indonesia, Thailand and South Korea as economic success stories rooted in good policy decisions and other factors but not the Rule of Law.

⁹ Golub supports this by referring to Thomas Carothers assessment of the US government's work with judiciaries across the globe that he classifies as 'difficult and disappointing' (p.11 of the Working Papers).

¹⁰ Harry Blair and Gary Hansen, *Weighing In on the Scales of Justice: Strategic Approaches for Donor Supported Rule of Law Programs*, USAID Development Program Operations and Assessment Report Number. 7 (Washington D.C. :USAID Center for Development Information and Evaluation, February 1994).

are advancements within Rule of Law Orthodoxy, such as better training, more resources etc, they don't necessarily translate into developmental advances. The point is that working with state institutions like the Judiciary may not be the most effective way of addressing the legal needs of the disadvantaged in ways that reduce poverty or encourage other development goals.

An assumption relied upon by Rule of Law Orthodoxy is that the Judiciary is central to serving the legal needs of the people and that legal reform will fail if the court system is not improved through funding. This again is considered flawed, as this assumption automatically rejects the existence of any alternatives to the formal justice system. But the majority of the population, especially within a country like Pakistan, is not in a position to access the justice system for a variety of reasons. Within developing countries a sizeable proportion of legal matters are settled through informal dispute resolution forums and the access to justice¹¹ depends on the existence of such systems. Emphasis on the development of the judicial system needs to be re-evaluated in light of the perspective of disadvantaged groups. There are groups that argue that judicial reform should be an end in itself, as a functional Judiciary is the need of any modern society. Be that as it may, it is submitted that it would be more helpful to place the achievement of that goal lower down the list of priorities.

Rule of Law is also supported on the basis of the conviction that state institutions would be successful in bringing about sustained state wide impact despite obstacles. But sustained impact can only come about as a result of sustained political support that is lacking in most developing countries. This, coupled with elements of corruption and favoritism, results in over-estimating the potential that Rule of Law Orthodoxy has in the face of such obstacles. Where problems are deeply entrenched, reforms, instead of bringing about positive change, may have the effect of aggravating the problem¹². Even where Rule of Law Orthodoxy succeeds in putting basic procedures in place, there is no guarantee that they would result in a more efficient system or that the improvements would be able to sustain themselves once the aid ends. Additionally, with regard to political support, there is no way of gauging the intention of state officials that become the local partners of foreign aid agencies. The problem is not just that of corruption, but of whether they are committed to the program of reform. Rule of Law Orthodoxy gives the impression of being preoccupied with procedural aspects and the idea of bringing in reform through state institutions that might need overhauling along the way. But an overhaul cannot possibly be the panacea to the bigger problems that plague developing countries. The adoption of new laws, putting in place new efficient procedures or the training of judges is not going to have much of an impact if those rules are not going to be implemented, if attitudes are going to remain fixed and if the situation on the ground is not going to change.

Within Rule of Law Orthodoxy there is also a "clear imbalance in the international development community's use of resources. Many development agencies that profess pro-poor priorities invest far more in building up government legal institutions and elites, than in fortifying impoverished populations' legal capacities and power"¹³. More often than not, the priorities of the poor are

¹¹ In this context 'access to justice' should be taken to mean the resolution of a dispute.

¹² An example of this is the Indonesian court system where a judicial independence law, instead of improving the court's performance had the effect of insulating the institution from accountability (p.18 of the Working Papers).

¹³ Stephen Golub, *Working Papers; Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative* p.6 (Rule of Law Series, Democracy and Rule of Law Project 2003).

overlooked along with the need to build up civil society so that governments and legal systems can become responsive and accountable to citizens. Furthermore, there are constraints on taking a political approach to development work and such factors are divorced from the bigger picture. Projects that have a lot of time and resources invested in them leave little room for flexibility and maneuver when faced with new developments. Follow-up research is lacking and there is no evidence to show whether the work in question is actually doing some good.

The idea of Legal Empowerment is put forward as a workable alternative to Rule of Law Orthodoxy, which is more balanced in its approach towards development and poverty alleviation. It is more involved with civil society and NGO's etc, as opposed to concentrating solely on state institutions like the Judiciary in bringing about the necessary shift in focus and enable disadvantaged groups to help themselves. Implicit in the notion of empowerment is the idea of greater accountability on the part of state institutions since civil society would have a more active role to play.

Legal Empowerment, as mentioned earlier, relates to the idea of the poor and disadvantaged groups able to exert more control over their lives through the use of legal services and development activities. "In its broadest sense, empowerment is the expansion of freedom of choice and action"¹⁴. The point of divergence between Rule of Law and Legal Empowerment is that the former concentrates on state institutions especially the Judiciary as mediums of reform, whereas the latter employs a more integrated approach that would include not just the legal system, but informal forums working alongside other activities that would advance change. Such activities would include strengthening the role, capacities and power of the disadvantaged and civil society, selecting issues flowing directly from the needs of the poor rather than a top down approach, broaden the focus from the legal sector to include other forums like the media, informal systems etc, forge a partnership between civil society and the government and draw from the experiences of other countries.

“Legal Empowerment both advances and transcends Rule of Law”¹⁵. It advances Rule of Law in the sense that where the poor have more power they are better able to make government officials implement the law. This power would enable disadvantaged groups to play a greater role in local and national law reform. Some research¹⁶ suggests that Legal Empowerment has helped advance poverty alleviation, good governance and other development goals. In addition, it has, in collaboration with NGOs, propelled community driven and rights based development into effect by offering concrete mechanisms, involving legal services and advancing the rights of the poor which is why it merits increased financial and political support¹⁷.

It is possible to identify four ways in which Legal Empowerment differs from Rule of Law Orthodoxy; “1) attorneys support the poor as partners, instead of dominating them as proprietors of expertise; 2) the disadvantaged play a role in setting priorities rather than government officials

¹⁴ General concept of Empowerment used by the World Bank cited by Golub at p.25 of the Working Papers.

¹⁵ *ibid* p.7.

¹⁶ Based on a seven nation, year-long examination of Legal Empowerment conducted by The Asia Foundation for the Asian Development Bank (p.29 of the Working Papers).

¹⁷ Manning, *Role of Legal Services Organisations*.

and donor personnel dictating the agenda; 3) addressing these priorities frequently involves non judicial strategies that transcend narrow notions of the legal system, justice sectors and institution building; 4) even more broadly, the use of law is often just part of integrated strategies that include other development activities”¹⁸

Poverty alleviation is the primary goal of Legal Empowerment. Defined narrowly, poverty alleviation would entail “improving material standards of living”¹⁹. Consequently, a right to work or laws that guarantee inheritance would have the desired impact and such groups, especially women, would be less poor monetarily. Broadly speaking however, poverty alleviation should include not just the means of addressing the lack of economic resources and assets, but also the lack of power within one's own life. To combat this, Legal Empowerment would have to develop the role of groups within society, increase their capacity and participation in governmental decisions that affect their lives along with the opportunities that are made available to them. Gaining this control would automatically help in the achievement of other related goals like Human Rights and freedom. According to Stephen Golub, Legal Empowerment “is a right based approach. It uses legal services to help the poor learn, act on, and enforce their rights in pursuit of development's poverty alleviating goal”²⁰. Legal Empowerment therefore is more about freedom and power than it is about the law.

Within the idea of Legal Empowerment, legal services is only just part of an integrated strategy that involves other development activities to allow disadvantaged groups the opportunity to take control. Even within the sphere of legal services, Legal Empowerment would not restrict itself to traditional forms of dispute resolution but would take into account different forms of informal representation²¹, along with greater emphasis being placed on legal awareness through training programs. Legal services would still have a part to play in realizing developmental goals but it would be working in collaboration with other complimentary areas of interest to achieve this goal. Empowerment can be seen both as "a process and a goal"²². It's the process of helping people gain more control over their lives to attain the goal of actual empowerment. To that end, the idea of empowerment depends for its success upon the involvement of civil society and NGOs. This in no way implies that governments are incapable of playing a proactive role but studies indicate that civil society groups show more commitment and dedication.

Even though Empowerment depicts a more community based work model that does not restrict it from having a national impact. There are documented examples where Legal Empowerment programs have resulted in macro level reform²³. These examples depict the ability of civil society to generate change both at the grassroots level and have an effect in terms of national

¹⁸ Stephen Golub, *Working Papers; Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative* p.6 (Rule of Law Series, Democracy and Rule of Law Project 2003).

¹⁹ *ibid* p.27.

²⁰ *ibid* p.29.

²¹ Meaning alternative dispute resolution mechanisms like Panchayat and Jirgas.

²² Stephen Golub, *Working Papers; Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative* p.26 (Rule of Law Series, Democracy and Rule of Law Project 2003).

²³ Golub cites the example of the Alternative Law Groups set up in the Philippines that have contributed to national regulations and laws centered primarily on violence against women, indigenous people's rights, environmental protection and agrarian reforms.

impact. NGOs do help enforce social and economic rights, supervise interaction with local governance structures and assist disadvantaged groups in raising awareness about and changing laws that restrict their participation in development programs. This research linking development with Empowerment should still be taken with a pinch of salt as even though civil societies and NGOs can manage to bring about desired changes, they won't amount to much if they aren't going to be enforced in favor of the groups that were the rallying call for such change; and enforcement is the exception and not the general rule in most developing countries.

A model Legal Empowerment program, according to Golub, would consist of the following features: "prioritizing the needs and concerns of the disadvantaged; emphasizing civil society, including legal services and development NGOs as well as community based groups; using whatever forums (often not the courts) the poor can best access in specific situations; encouraging a supportive rather than a leading role for lawyers; cooperating with government whenever possible, but pressuring it where necessary.." ²⁴. It may be possible to highlight the general elements that should exist within any empowerment program but the reality is that such programs will vary from country to country, issue to issue and even community to community as different systems present different sets of problems. Any strategy that is undertaken would then have to be molded in accordance with the situation specific to the country concerned. Even though the critics of Rule of Law Orthodoxy do not look to dismiss the role played by state legal institutions completely, the bottom line is that the government isn't always the problem and civil society isn't always the solution.

For a strategy of Legal Empowerment to have a realistic chance of success social, legal, economic and political conditions need to be considered. Empowerment depends heavily upon the legal system of a country along with other factors, as the law can help people use their resources more effectively and therefore achieve prosperity and welfare. However, formal rights would not amount to much if there is no enforcement mechanism in place to back it up. The legal guarantee of rights would have to be the result of a non corrupt system as to have a right also means one should have the capacity to enforce that right and to that end a well structured Judiciary working in consonance with state institutions is needed. The flaw in this is that equality and non discrimination cannot be guaranteed and there are social biases, gender inequalities that need to be taken into account. The legal system may face serious limitations in terms of accessibility and costs along with weak social institutions, low trust in public authorities and paternalistic societies that could have the effect of disempowering women and other marginalized groups. A development model would require respect and guarantee of different rights, their formalization and a system based on Rule of Law that is fair, not corrupt and encourages reform. Within the developing world and specifically in a country like Pakistan this is a model that would be difficult to sustain because it presupposes certain factors that are themselves in need of attention.

Legal Systems: evolution, disruption and parallel systems

Within the sub continent the legal system that was in place was centrally administered by the

²⁴Stephen Golub, *Working Papers; Beyond Rule of Law Orthodoxy, The Legal Empowerment Alternative* p.37 (Rule of Law Series, Democracy and Rule of Law Project 2003).

Mughal Empire. The Mughal courts had the support of effective²⁵ local mechanisms of dispute resolution as even within the Mughal period, with its highly centralized system of governance, most disputes were settled outside the framework of the formal legal system maintained by the ruling power. Mughal laws rarely ever engaged with the everyday life of the population within the villages. Interaction with the law and law enforcement personnel only occurred in rare situations where there was a grave breach or where a revenue matter was involved. This is primarily because the Mughal Empire lacked resources in terms of man power and a system of communication that would ensure a court structure that was effective, extensive and easily accessible.

Mughal rules and its justice, with respect to rural areas featured at a lower rung within the hierarchy of dispute resolution mechanisms, as the rural areas relied on customary law and their own particular brand of conflict resolution. The formal justice system catered to the needs of the towns' people as they did not have a fully developed alternative to fall back upon. There is a possibility that if the local systems had been allowed to develop along with the support of the central formal system the end result could have been a cohesive system applicable uniformly within the entire region. An analogy can be drawn with common law to explain and support this contention. At the time of the Norman Conquest, England was being governed by local laws and customs that normally had their origin in manor laws applied by the lords of the manor to the people that worked on their lands, much like the feudal system in place in Pakistan. A system was devised whereby traveling judges went to different parts of the country resolving disputes according to the local laws of that particular area and picked up as it were the best customs and practices that over a period of 200 years resulted in the birth of the common law system. Any chance at similar development within the subcontinent was however interrupted by colonization and the introduction/imposition of foreign values and principles that gave village dispute resolution mechanisms the status of being the 'parallel' system with British law occupying centre stage. This disruption also had the effect of rendering such systems stagnant resulting in the perverse application of customs and rules that supposedly had the backing of religion as opposed to a situation where they should have been allowed to grow and develop to keep up with the constant change and evolution within society.

After the colonization of the sub continent by the British an attempt was made to allow the status quo to stand and to have the natives governed by their own law. This strategy would have allowed for the least amount of disturbance but it eventually broke down for a number of reasons. There was the difficulty in ascertaining what exactly constituted native law. The British divided the population of the sub continent into two main factions, the Muslims and the Hindus with a body of law that would apply to both classes respectively. This arbitrary division was not reflective of the various other classes that did not fall within either categorization. Moreover, local tribe, caste and family usages that play an equally important role were unfortunately overlooked by the British. They disregarded oral traditions and customary laws and practices

Where there was no guidance to be gleaned from any source, judges were usually directed to act in accordance with the principles of "justice, equity and good conscience"²⁶. It is natural for an

²⁵ The term effective is being used with respect to the accessibility and the interactive nature of such forums that proved to be a speedier method of dispute resolution.

²⁶ Sections 60 and 93 of the Regulation of 5 July 1781.

Englishman to interpret these words as meaning the rules and principles of English law. Consequently, under the influence of English judges, native law and its usage was supplemented, modified and eventually superseded by English law without the intervention of legislation. The unsatisfactory condition of the law in British India led to the appointment of the Indian Law Commission under the Charter Act of 1833 with Macaulay at its helm. This Commission produced reports that in some cases formed the basis of Indian Legislation but its greatest achievement was the Indian Penal Code which applied to all persons within British India and had the effect of wholly displacing and superseding native law relating to such subjects as were covered under the Indian Penal Code.

This led to the systematic erosion of custom and consequently a way of life and being administered that were particular to and exclusive not just to different regions but also to varying ethnicities. As things stood, criminal law and the law of civil and criminal procedure were wholly based on English principles and barring certain exceptions, the law of contract and tort also fell within the aforementioned domain. Within the sphere of family law, succession and inheritance on the other hand, the natives still retained their personal law but which was either modified or formulated by Anglo Indian legislation.

Furthermore, some aspects of the prevalent law in India were difficult to reconcile with the morality of the colonial rulers²⁷ and thus native law was systematically replaced by English case law and Indian legislation. All of the above factors played a part in the consequent codification that ensued and resulted in the Anglo Indian Codes. The codification of laws brought with it some measure of uniformity, certainty and predictability and the Rule of Law was viewed as the most notable achievement of the British. This is something that was reaffirmed by Thomas Macaulay when he stated that “the principle is simply this; uniformity when you can have it; diversity when you must have it; but, in all cases certainty”²⁸.

Through codification, the British took pride in their ability to have managed to remedy a system laden with uncertainty, disorder and discrimination. According to James Fitzjames Stephen, "Under the old despotic systems, the place of law was taken by a number of vague and fluctuating customs, liable to be infringed at every moment by the arbitrary fancies of the ruler"²⁹. This view of things however is not shared by commentators on the other side of the spectrum who believe that the law had become “less meaningful and useful because of its distance, expense and impersonality”³⁰. These differing opinions are reflective of the divide that existed over the question of what process is best suited in governance and the settlement of disputes. The clash was between traditional laws and the modern version of it as introduced by the British.

Customary law was well versed in the art of dispute resolution. Even though the law in question varied from village to village there was a degree of acceptability by the people to whom the law

²⁷ These included practices like retaliation for murder, stoning for sexual immorality or of mutilation for theft.

²⁸ Quote taken from his address to the House of Commons on 10th July 1833, *Complete Works of Thomas Babington Macaulay* (London: Longmans, Green and Co., 1898).

²⁹ Barristers and Brahmins in India: Legal Cultures and Social Change, Lloyd. I. Rudolph and Susanne Hoeber Rudolph.

³⁰ Quote by Sir Thomas Munro cited in Barristers and Brahmins at p. 24.

applied. Such knowledge was not available to the British, with the result that their “legal system often produced results which were experienced and understood as injustice, not because they desired or intended such a result but because most Indians did not appreciate its morality and logic”³¹. Our concern here is not to debate which system is better able to deliver but which system was better understood by the litigants. There are many differences that one can point to which would support the above contention. Within English law, the core value of justice treats everyone as equal before the law whereas the reverse is true in the Indian context. Societal differences are central to legal identity. Furthermore in the English context a judge is not to have any ties with the litigants to preempt any perception of bias and to maintain the integrity of the court. Integrity is just as important within the Indian context but rather than stemming from anonymity or isolation, integrity arises from the honor and authority of the individual in question along with his reputation within the village. The elders of a village are usually-or at least considered to be- cognizant of a dispute from its commencement and are sensitive towards any cultural and societal factors that can have a bearing on how the dispute is settled. This first hand knowledge makes ascertainment of the facts relatively easy.

Another important difference between the two systems is the nature of the proceedings itself. The English system is adversarial in nature with the judge playing the role of a disinterested arbiter and the outcome producing a 'winner' and a 'loser'. An adversarial system has the effect of isolating the case from its social context. In contrast, a village dispute resolution mechanism would strive to achieve a compromise so that both parties concede some ground with fault being admitted on both sides and some semblance of dignity and harmony is maintained. These differences highlight the different values that are considered the linchpin of both mechanisms of dispute resolution. The English system is preoccupied with the idea of justice which is to be attained regardless of the cost, whereas the Indian tribunal is more geared towards reducing the conflict and promoting harmony.

The rise of the British system was accompanied by “expense and delay in the administration of justice, the so called rise litigation, and the prevalence of false witness”³². This was a consequence of the shift in procedure that now dictated the cumbersome task of hiring representation, physically accessing a court outside the village, paying additional costs and supporting witnesses that had to travel to the city along with the litigant. The village tribunal on the other hand had the distinct advantage of being swift in administering justice that was understood and more importantly accepted. There is probably some truth in the notion that the new courts were being used by the villagers to skirt traditional forms of justice where it was believed that a considerate view of their grievance would not be taken.

M.N Srinivas is of the view that in rural India even today “taking disputes to local elders is considered to be better than taking them to the urban law courts. Disapproval attaches to the man who goes to the city for justice. Such a man is thought to be flouting the authority of the elders

³¹Quote by Percival Spear cited in Barristers and Brahmins at p. 26.

³² Barristers and Brahmins in India: Legal Cultures and Social Change, Lloyd. I. Rudolph and Susanne Hoeber Rudolph.

and therefore acting against the solidarity of the village”³³. This gives the impression of villages being completely self contained units where the dispute resolution mechanisms are a regime within themselves and that too without requiring the need for centralization and uniformity of applicable law. It is possible to draw a parallel with the development of common law and the native process the development of which was disrupted due to colonialism.

The clash between these two systems further substantiates the premise that societies are a product of the values and beliefs of the individual. The native Indian law revolved around the idea of particularism where the legal identity of the person was determined along the lines of lineage, sex, family associations, caste, religion, etc. “Under traditional law, rights and privileges, obligations and duties, property and even punishments for crimes varied with an individual's corporate identity”³⁴. On the other hand British law focused on universalism, disregarding artificial categorizations imposed on an individual by society but which were not to hamper his status as an equal in the eyes of the law.

The British Raj not only implemented codified English law, it imported lawyers and judges suited to this system. These people brought their own unique English perspective to an indigenous system which was alien to them. Any given legal system and the drafting of legislation is dictated by societal norms and customary practices that evolve over time and crystallize into mature legal systems. Any attempt at fusion requires an understanding of the existing structures and its intricacies. An imposition of alien thought that did not evolve from within the sub continent, could only have resulted in the clash of two independently developed systems.

Not only did scholars such as James Mill, James Stephen and Marc Galanter perceive the "indigenous" law as primitive, but they also felt that in general the introduction of English Law was beneficial to the Indians. However, Bernard Cohn disagreed. He justified his disagreement by the Government of India Act, which promised the equal and impartial protection of law *within the parameters of local custom and practices*. Cohn identified the discrepancy within this promise. He argued that both these goals could not be achieved simultaneously. The fulfillment of one meant the sacrifice of the other i.e. modernizing India meant compromising India's diverse culture, religion and customs³⁵. Moreover, with reference to the Indian Penal Code the intriguing aspect was the enthusiasm of the British to apply a criminal code to India which did not seem to be modern enough to apply to their own legal framework. India can be considered as an extensive experiment in codification as that is how common law was transferred to the sub continent.

Within every society there are bound to be differences. They can span an entire range and require distinct mechanism for resolution. Every society therefore evolves its own methods of dispute resolution and historically this is considered the process of evolution. Disputes are bound to

³³ M. N Srinivas is an Indian Anthropologist who recorded this observation in his book titled *The Social System*, cited in *Barristers and Brahmins*.

³⁴ *Barristers and Brahmins in India: Legal Cultures and Social Change*, Lloyd. I. Rudolph and Susanne Hoeber Rudolph p.39.

³⁵ *Macaulay and the Indian Penal Code of 1862: The Myth of Inherent Superiority and Modernity of the English Legal System compared to India's Legal System in the Nineteenth Century*, David Skuy.

arise; the question is how society proposes to settle them. Acceptance is a part of the law and dispute resolution. Whatever is acceptable to society is implemented and society reinforces that acceptance through adhering to the law. Within the English Legal System, common law was developed by society itself and thus had the requisite legitimacy. This acceptance of systems developed from within is key within the concept of Legal Empowerment.

Mughal India was a centrally administered empire with the courts being headed by the Qazi's but alongside this there was a functional system of community mechanisms that included *panchayat*, *jirgas*, etc., and these were accepted by society because they were a product of the system. Societal ownership of these mechanisms increased their effectiveness. The systems were communal whereby the elders approached by the disputants would give a decision and enforcement of such decision was guaranteed through social sanction.

Had these systems continued to evolve, society would have been in a position to meet its own needs. Development was disrupted by colonialism and the consequent Macaulay mind set³⁶. A voluminous amount of substantive law was being enacted during the 1860's through to the 1880's (such laws included the Indian Contract Act, the Indian Penal Code, the Trust Act and the Specific Relief Act). This disrupted the evolutionary process through the forced imposition of a system that had evolved in a different societal and cultural context and environment. Within that system notions of space and privacy are valued culturally and this reflects in their judicial system where the individual is the focal point for everything. This was a system that took its time to evolve and was specific for their society. When it was transplanted to the sub continent it lacked societal acceptance as society did not own the system and consequently suffered from a strong credibility deficit.

Legal Systems and Justice in Pakistan

In Pakistan even today, many disputes continue to be resolved through the old dispute resolution mechanisms, the reason being that they are more communal in nature. In Sindh, for example, the feudals (*waderas*) have a direct involvement with regard to the dispute that is brought before them. They are familiar with the context of disputes and have a better understanding of how to negotiate a resolution between the parties. The justice that is dispensed is personalized and disputing the feudal is virtually unheard of. There is the perception that such methods of dispute resolution are arbitrary in nature, but it can be argued that the focus of one's analysis should not be on the arbitrariness of the decision but on the important element of acceptance that lends legitimacy to that forum.

Within Pakistan, the legal system cannot be considered a cohesive unit because it is supplemented by multiple subsystems that cater to different regions, different communities, castes, etc., and "many of these are disjunctive in their relations to others"³⁷. Broadly speaking, for the sake of convenience, three categorizations can be identified. The first is what has been

³⁶ This phrase is indicative of the self proclaimed superiority by the British over their Indian subjects.

³⁷ Fundamental Cultural Postulates and Judicial Lawmaking in Pakistan, E. Adamson Hoebel, *American Anthropologist*, New Series, Volume. 67, No. 6, Part 2: The Ethnography of Law (Dec., 1965), p.44.

referred to as 'Formal National Law'³⁸ which is the law that is the legacy of the British. This law is administered through the municipal, district, provincial and national courts. The second is what is referred to as 'Real National Law'³⁹ which is inseparable from the first and is what clothes the first, so to speak. It is what the courts, lawyers and the police actually do. The third is what has been termed 'Folk Law'⁴⁰, which as the name suggests is the customary law embedded within the village and tribal areas that governs diverse groups of people that do not come in contact with the formal legal system. Villagers refrain from getting involved with the courts and generally avoid contact with the police as both can result in discomfort and expenditure. Disputes are normally resolved through village councils or elders or are allowed to run their course. This lack of accessibility impedes redress for disadvantaged groups and women; the latter not even being able to be present at the village council level. The court system is viewed by many as an institution far removed from their everyday lives and intimidating, making it even more difficult to approach. This is the reason why a lot of legal disputes that would normally fall within the jurisdiction of the court are resolved through informal decision making bodies like the *Jirga*, the *Panchayat*, *Biradari*, etc. More often than not, such forums do not entertain disputes dealing with violence against women as social norms dictate incidents classified as domestic issues should be resolved within the private sphere of the home. In most forums, women are not allowed to attend, to represent themselves, or even attend in the capacity of a spectator. This has proven to be fairly damaging to the women's rights agenda and shows that 'justice' systems, be they formal or informal are dependent on power relations insofar as representation is concerned. Since tribal areas or villages have evolved custom and practices that tend to exclude women, it is not surprising that the same is reflected in the methods used to settle disputes. There have been court rulings that have had the effect of outlawing the *jirga* system⁴¹. However, such rulings have not been able to yield much by way of result. This is so because the government does not place any real restrictions on the influence of the *jirga* while it has not done enough to enable easy access to the courts.

The village set up in Pakistan is still very communal with a great deal of reliance still being placed upon alternative dispute resolution mechanisms. The question that arises then is whether the *panchayat/jirga* should be branded as the parallel system whereas in fact these mechanisms have existed in South Asia since even before the time of the Mughals and have acceptance and ownership. Still the fact is that their continued existence has become an obstacle in the implementation of the idea of Legal Empowerment. The historical development described above indicates how instead of complimenting these pre-existing local systems, the formal legal system is proving to be counter-productive.

State law was superimposed upon existing sub structures of authority and as these did not complement each other; they ended up undermining each other's authority and prevented any one structure from becoming dominant. Even during the Mughal era, citizens had accepted and relied on indigenous dispute resolution mechanisms that were a product of their own experiences

³⁸ Ibid. Formal National Law meaning 'A series of codes enacted between 1866 and 1881 and subsequently amended or enlarged through hundreds of enactments before and since partition'.

³⁹ Ibid

⁴⁰ Ibid

⁴¹ 2004, Sindh High Court, Shazia Manghi case.

and beliefs. The British system, by virtue of being foreign was completely alien to them. The mistrust with which this system was viewed resulted in citizens adhering to their local set ups. This lack of integration with the formal justice system was carried forward and the formal legal system was unable to displace traditional reliance upon indigenous forms of dispute resolution. This is one of the main reasons why parallel systems still manage to sustain themselves in Pakistan today.

An analysis of the situation of Pakistan depicts the problems that Pakistan faces with respect to Legal Empowerment. Availability and protection of rights poses a major challenge for the Pakistani citizens. Factors affecting availability and awareness of rights include the lack of accountability on the part of government departments, lack of democratic values, vested interests of influential families and bureaucratic inefficiencies. Lack of accessibility to good education limits the choices for job opportunities and attaining a higher standard of living. Citizens are more vulnerable to a loss of assets and property due to the lack of financial resources to secure them in the first place. Moreover, the widespread corruption in institutions responsible for protection of rights, such as the police, court structure and redress mechanisms do not provide access to justice to the disadvantaged groups of society. Their inability to access institutions which could stop these injustices perpetuates the cycle of poverty and vulnerability.

The effective application of the concept of Legal Empowerment is considered to be directly linked to the importance given to legal identity⁴². The idea is that recognition of one's legal identity by the state leads to the recognition of an individual's protection and enjoyment of basic rights vis-à-vis enforcement of those rights through state institutions and law enforcement agencies.

The most important aspect of this identity is its documentation, which essentially needs to be state-issued and acts as a confirmation of the holder's age, identity, legal relationship etc. Examples of these are birth certificates, identity cards, passports etc. Without such documentation an individual cannot be recognized as a citizen and cannot therefore have access to the protection of the law of the land⁴³.

The importance of various identification documents differ from country to country. Internationally, however, stress is placed upon birth certificates since such documents are able to register vital information. But to promote such documentation requires an efficient civil registration system which is followed up to ensure maximum productivity. The lack of registration systems or weak registration systems results in the exploitation and abuse of rights such as child abuse, trafficking and child marriages.

Birth certificates, it is contended, not only help in the protection of human rights, access to benefits, services or opportunities but also make distribution of public resources an easier task. However, a research conducted in Bangladesh, Nepal and Cambodia under the auspices of the

⁴² 'Legal identity allows persons to enjoy the legal system's protection and to enforce their rights or demand redress for violations by accessing state institutions such as courts and law enforcement agencies'.

Legal Identity for Inclusive Development, Law and policy Reform at the Asian development Bank 2007.

⁴³ Although citizens that do not possess identity documentation have been known to access the judicial system in Pakistan.

Asian Development Bank has proven that in the context of developing countries documented birth on its own has not granted access to the abovementioned rights and benefits⁴⁴. Therefore it would be incorrect to say that documentation is the only or sufficient prerequisite of enforcing rights. To agree with such a statement would mean presupposing the existence of such services, benefits and opportunities provided by the law. The ground reality is that some developing countries fail to offer such benefits irrespective of the existence of the birth documentation which could be due to numerous reasons

Moreover, within a developing society like Pakistan there are various obstacles to registration of identity documents. For most disadvantaged groups registration fees are too expensive⁴⁵. Other expenses include official fees, fines for late registration, transportation expenses and bribes. Nevertheless it must be understood that registration is not the ultimate goal which needs to be achieved. It acts as a means to an end, the end in this case being improvement of access to services, opportunities and benefits. However, this end can only be achieved when complementary reforms reducing poor governance are introduced within the legal and administrative system which would then lend value to identity documentation.

Another major issue hampering the application of the concept of Legal Empowerment is the lack of legal literacy⁴⁶ and access to affordable legal services. The majority of the public is unaware of their rights, the functioning of the legal system and how to access these systems. With reference to awareness of rights the most important aspect is the accessibility to legal information. "Some NGOs do produce pamphlets, posters and other 'communication products' but these by definition have limited distribution. Most are written in English and Urdu-very few are in vernacular languages such as Pushto or Punjabi. This limits their utility"⁴⁷. Moreover the media hardly plays a role in creating awareness about the legal rights of individuals.

Affordable legal services are rare and the availability of legal aid is difficult. In Pakistan, legal aid, which includes free or low cost legal representation, is required to be provided by the Bar Councils. In practice, such aid is rarely available to the masses and is only extended to those with personal connections in the Bar council. Only in cases of capital punishment, is the state responsible for providing legal aid. In practice, the quality of such legal assistance is low. NGOs also fund and provide legal services, however, these services are very limited. Most NGOs involved in legal assistance, restrict their interventions to running free legal clinics where the public can have access to legal advice and information rather than aid in the form of legal representation.

Moreover, the lack of public confidence in the institutionalized court structure has promoted the use of alternative dispute resolution mechanisms. Headed by local feudal lords and tribal leaders, the *jirgas* and *panchayats* normally deal with disputes ranging from water disputes to murder and 'honor'-killings and crimes. In contrast with the formal court structure, there is lack of procedural certainty, there is no system of precedent and the standing of the parties involved can

⁴⁴ Legal Identity for Inclusive Development, Law and policy Reform at the Asian development Bank 2007.

⁴⁵ The Pakistani Government announced free National Identity Cards on 21-06-08.

⁴⁶ The adult literacy rates (over the age of 15) for Pakistan between 2000-2004 stand at 49% (www.ilo.org).

⁴⁷ Legal Empowerment in Pakistan, UNDP Report, Dr. Iffat Idrees.

heavily influence decision making. This mechanism is definitely speedier than the court structure but at the cost of sometimes being a blatant violation of the natural laws of justice. Women in particular, have had to suffer a lot at the hands of these *panchayats* and *jirgas*.

With respect to the enforcement of property rights in Pakistan, the most vulnerable group comprises primarily of women. Even though Pakistan is a signatory to CEDAW, that guarantees equality for all and women rights, its implementation is deficient. Women continue to lack political power, decision making and access to justice. This is hardly surprising given the societal norms women are expected to adhere to. A society that perpetuates their second class status would be unable to provide basic rights let alone rights that are more technical like land ownership and possession. Women are excluded from exercising these rights in ways that include a perverse interpretation of the rules of inheritance that blatantly overlooks shares that have been prescribed by Shariah⁴⁸. This practice is especially prevalent in Balochistan and the NWFP with the situation in Punjab being only marginally improved since inheritance rights are recognized formally. But formalization does not guarantee actual usage and women under strong social pressure are expected to forfeit their inheritance in favor of the male members of the family. A refusal to do so can put their family ties in jeopardy and in extreme cases can also result in being ostracized from the family unit. The primary motivating factor behind this is to prevent fragmentation of the family property and an extreme reflection of this is where women are married off to the Quran so that even if they are given their share, the property remains within the family. There are numerous obstacles which come in the way of entitlement and they include factors like social pressure and custom, lack of awareness with regard to guaranteed rights, segregation that results in restricted mobility of women, and an inability to access the justice system or other officials for the enforcement of their rights.

The focal point of Legal Empowerment is women and other disadvantaged groups. It is possible for there to be two interpretations of disadvantaged groups. The first is where women and the poor are categorized as being disadvantaged with reference to men. However another interpretation of disadvantaged groups could be individuals who are disadvantaged within their own groups because of their social standing or position within the family. Within social groups not everyone is equally placed. This is a point that can be overlooked and thus have an effect on the implementation of the concept of Legal Empowerment. This point is expanded by Ranjani Murthy⁴⁹ who says that, “two key aspects of diversity among women are marital status and their position within the family”. The distribution of work within a family is dependent on access to power and position within that sphere. An illustration of this point is the status of widows, or women that have been deserted or divorced as they generally occupy a lower status within the family structure. Should they become embroiled in a dispute concerning their late / ex husband's property. the women of the marital home will invariably align themselves with their male relatives, leaving the woman litigant isolated and without support.

Conclusion

⁴⁸ ‘Shariah is a technical term taken to mean the Cannon Law of Islam. It embraces all human actions and for that reason it is not ‘law’ in the modern sense’ (Fyzee, Asaf A.A (2003) Outlines of Muhammadan Law, 4th Edition OUP).

⁴⁹ Organisational Strategy in India and Diverse Identities of Women: Bridging the Gap, Ranjani K. Murthy, *Gender and Development*, Vol. 12, No. 1, Diversity. (May 2004).

To be able to assess the impact of empowerment initiatives it is important to see the extent to which its ideology and practice coincide. In other words, does the system manage to deliver what it promises? The ideology of the concept of Legal Empowerment is to present an integrated development strategy with a distinct gender perspective. Such a notion can be deceptive as it can conceal the dependence of implementation on existing power relations. Any mechanism for the empowerment of groups can only be understood in the context within it operates with attendant political and economic inequalities reflected in it. This context has the effect of transforming the way these mechanisms function and the effects they produce.

The wide departure between ideology and practice depicts that there are other variables at play that have the effect of distorting the application of these objectives with the result that practical application on the ground fails to benefit the poor and instead ends up maintaining the status quo. One example of this wide point of departure is the empowerment scheme through literacy training that was implemented in Nepal⁵⁰. The objective of this scheme was to create greater consciousness amongst poor women through education but the need for accountability within these programs required something more quantifiable than the abstract concept of self actualization. The program changed over time in response to pressure from donor agencies along with becoming involved in local Nepali politics and power struggles that had the effect of transforming what started of as an "empowerment through literacy" scheme into a program that promoted health and discouraged drinking, gambling, gossiping and smoking.

Another example depicting the same is the micro credit programs initiated by NGO's in Bangladesh⁵¹ that now find themselves compelling poor women for repayment of loans that forces them to sell their possessions. They have moved from the stated intent of supporting women's empowerment through enhanced economic resources to becoming - at least in some cases - a part of women's economic disempowerment (that is by confiscation of assets women have). Moreover, the cultural set up ensures that the money taken under the credit scheme in fact goes to the husband to invest as he pleases and not to the women it was intended for. This relationship of dependency also induces women to abide by the wishes of the donors.

The efficacy of the tools employed to bring about change within society need to be placed in and analyzed from the cultural perspective. It is not enough to critique an ideology in isolation as its success will ultimately depend on local power relations. If a given system were a blank canvas then ideologies could be successfully converted into reflective practice because it would not have to shoulder the strain of external forces and pressure. Unfortunately, however, developing countries cannot provide empowerment initiatives with such a blank canvas as they come laden with their own specific set of thought processes, distribution of resources, etc., that have a bearing on how power relations are molded which in turn perpetuate institutional biases and discrimination and preserve social political and economic inequalities.

⁵⁰ Review by Lauren Leve (2001) cited by Sally Engle Merry in "Moving Beyond Ideology Critique to the Analysis of Practice".

⁵¹ A study conducted by Lamia Karim (2001) cited by Sally Engle Merry in "Moving Beyond Ideology Critique to the Analysis of Practice".

The legal system can not be expected to engineer social reform in isolation. It would be naïve to think of the legal system as an institution that is removed from the everyday lives of the people whose relationships it seeks to regulate and on the basis of that disassociation it would be able to recommend and implement reforms based solely on an objective determination. The ground reality is that the legal system cannot be taken out of its cultural context as the law can be considered a reflection of the social values that exist within society. Laws develop as a result of a community's need to govern and regulate interaction and ensure the smooth running of the society. Behavior patterns and norms that prescribe and prohibit come about as a result of the evolution of custom that is initially kept in place through social sanction and once it has been formalized as law, derive its legitimacy from the sources that already enjoy wide spread acceptance. Custom is a reflection of behavior developed as a response to existing social and economic inequalities and it in turn serves as the source of formalized law.

Another factor that restricts the legal systems ability to successfully implement reform initiatives is the relationship between law and power. It is inevitable for the law to be molded by the ruling class to perpetuate and best serve their own interests. The existence of a strong feudal structure precludes the participation of groups that lack economic and political power, it would therefore be safe to assume that their interests/rights are not represented or protected. Furthermore, it is very difficult for women to cross cultural boundaries because custom in itself functions as a self-sufficient regime that is not dependent on codification to give its rules the legitimacy required for unqualified acceptance to remain in force. It depends instead on social acceptance and cultural/historical legitimacy.

Even where the law has aspired to overcome differences and become an institution that armed with the core value of Rule of Law would employ an objective standard; the interpretation of that law is unfortunately still according to moral and cultural values and biases that have the effect of distorting the application of that law. The challenge then is to reconcile moral, cultural traditions with the ideals espoused in the values of Legal Empowerment.

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