

THE IMPERATIVE TO REALIGN THE RULE OF LAW TO PROMOTE JUSTICE

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1 Introduction

Justice is fundamental to human well being and core to any notion of development.

In this paper, I critique the global approach to promoting 'the rule of law' in official development assistance (ODA) – foreign aid - over the past fifty years. During this period, development agencies have spent billions of dollars around the world supporting reforms that grapple with the challenges of improving the rule of law for people, especially the powerless poor, who are routinely denied justice through impunity, corruption, abuse of power and the denial of rights. But the results of these endeavours have usually been underwhelming and sometimes dismal.²

International efforts to promoting justice and the rule of law have traditionally failed to address these problems effectively – and in this sense, the rule of law enterprise is now poised on the brink of development failure. At its essence, the unmet challenge of development is to address mounting concerns about equity and distribution.

Building on research and new evidence based in Asia published in '*Reforming Justice: a Journey to Fairness in Asia*', (Cambridge University Press: June, 2012), I argue that there is an immediate imperative to reposition justice more centrally in evolving notions of equitable development. This will require the international community to realign these endeavours to promote justice as fairness and equity.³

2 The rule of law in international development

In this paper, I argue that the rule of law and judicial reform should be realigned to promote justice which, at its essence, is the promotion of fairness and equity⁴. This is a hard-edged, pressing concern for reform-minded jurists which is neither abstract nor idealistic.

This argument focuses primarily on reforming justice in terms of rights that have been allocated in law - that is in the juridical sense - rather than in the executive sense of allocating political interests. While justice is clearly a political good, as much as it is juridical, I focus primarily on reforms which assist the judicial arm of the state -- being the courts, judges and related personnel – to adjudicate the law and administer justice and, secondarily, more broadly on development as a whole.

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² This paper extracts and adapts arguments from Armytage L, '*Reforming Justice: a journey to fairness in Asia*', published by Cambridge University Press, 2012. An earlier version of this paper has been published by the International Bar Association, 2013.

³ In this paper, I will focus in particular on the lack of any cogent theory with which to justify the purpose for promoting 'rule of law' reforms. In the book, I go further to examine the related lack of any established consensus on how to evaluate success, stemming in part from this confusion over purpose. These arguments are supported by three detailed case studies from the Asia Pacific experience. To address these shortcomings, I offer two solutions: first, the purpose of judicial reform should be to promote justice as fairness and equity. Second, the evidence of success should be measured using extant frameworks of law.

⁴ For a discussion of the meaning of 'the rule of law', see section, below.

There are infinite examples of injustices that blight people's lives, most recently as the result of the GFC. Too often, reform efforts have however been blind to these injustices in developing countries. An analysis of the history of development practice indicates that judicial reform has most commonly been charged to alleviate poverty through the promotion of economic growth, good governance and public safety. These are certainly worthy goals. But the evidence of this practice shows that success has been elusive. This is not to suggest that these reforms have failed altogether; rather that judicial reform has not worked as well as expected, as is indicated by the mounting chorus of disappointment in the literature. The judicial reform enterprise has been misdirected. The core critique of this paper is that these endeavours suffer from foundational conceptual, empirical and political deficiencies. Existing approaches are based on inadequate theory, selective evidence and insufficient evaluation. By realigning reform endeavour to focus on promoting justice, there is a much greater prospect of measurable improvement across all aspects of civic wellbeing.

The goal of development is to promote civic wellbeing, which is usually formulated in terms of reducing poverty. In order to achieve this goal, judicial reform must promote justice because justice is both foundational and constitutive to social wellbeing. Justice in development embodies fairness and equity. It involves the exercise of rights, which are the political allocation of interests in law. In this sense, reforming justice is primarily concerned with enabling the exercise of rights or civic entitlements. These rights are embodied in law whether at the international, domestic or customary levels. Measurement of the success of these reforms is demonstrable through visible improvements in the access to and exercise of these normative rights.

Analysis of the disappointing experience of development agencies in promoting the rule of law indicates that there is now an imperative to realign their policy approach to invest in judicial reform for the purpose of promoting justice -- that is, to promote outcomes that are more fair and just, rather than economic growth. By promoting justice, opportunities for economic growth and other benefits will improve. In a just society, there is equitable access to rights including the opportunity for economic wellbeing, accountable government and public safety. Crucially, the promotion of justice is as much the objective of development, where economic wellbeing may be seen as the consequence of equitable development, as it is a means of promoting it. This may not seem radical to the lay reader; but it will require a paradigm shift for those development agencies which have rendered justice as being instrumental to aggregate economic growth and indifferent to concerns about distribution to this point.

3 Context

An overview of the history of promoting the rule of law and, more specifically judicial reform, over the past fifty years indicates that it has grown from modest beginnings to become an increasingly substantial though still exploratory enterprise. This history starts after post-war reconstruction, and spans the post-colonial period of state-building, the thaw of the Cold War bringing democracy, and the 'Washington Consensus' era of free markets and structural adjustment, up to the current period of globalisation. This is a period of significant change in world politics and economic development, which saw massive increases in judicial assistance as a niche in international development assistance.

While niche -- at some 2% of total official development assistance -- judicial and legal reform has nonetheless grown rapidly and substantially over the past fifty years --

some hundred-fold in aggregate.⁵ Some indications are illuminating. Carothers describes this assistance as having ‘mushroomed’ in recent years, becoming a major category of international aid.⁶ Hammergren notes that court assistance started in Latin America in the 1960s valued in hundreds of thousands of dollars, typically climbing to around \$5 million by the mid-1990s.⁷ By 2001, Biebesheimer reports that the Inter-American Development Bank had conducted some 80 projects in 21 Latin American countries, valued at about \$461 million. During the 1990s, it is estimated that almost \$1 billion was spent in Latin America by the World Bank, the Inter-American Development Bank (IDB) and the United Nations Development Program (UNDP).⁸ In 2001-2, I participated in implementing a single justice program loan from the Asian Development Bank valued at \$350 million.⁹ In 2006, the global lending of the World Bank for law and justice and public administration was reported to be valued at \$5.9 billion.¹⁰ By 2008, IDLO estimates that a total of USD 2.6 billion in aid was devoted to legal and judicial development assistance supplied mainly by bilateral donors, representing a ‘remarkable’ increase from the USD 1.7 billion which it estimates was invested globally in 2007 and USD 841.5 million in 2006.¹¹ This is substantial growth on any measure.

Analysis of this history illuminates patterns of crisis, fragility, growth and stability which provide some explanation about what drives judicial reform in its different renderings. Throughout this period, the global political economy – the early 1980s debt crisis, the 1992 end of the Cold War and the mid-late 1990s global economic crises, and most recently the events of ‘9/11’ – provided the context for a huge sense of uncertainty, instability and most importantly ‘threat’ to the global-US economic order. In this context, the promotion of the ‘rule of law’ appeared as part of a suite of actions designed to instil a sense of certainty, not just in legal contracts, but at the highest levels of global policymaking. In a sense, this reform was largely US-hegemonic in its overarching liberal orientation. This historical perspective provides a framework for showcasing the work of two major development agencies, viz., USAID and the World Bank, as exemplars in judicial reform. Each is among the largest and longest operating bilateral and multilateral agencies in judicial reform.

Judicial reform has evolved throughout this period. Trubek and Santos describe this evolution as comprising three iterations or moments. The *first* moment emerged in the 1950-60s when development policy focused on strengthening the role of the state in managing the economy, when law was seen as an instrument for effective state intervention in the economy. In the *second* moment in the 1980s, law moved to the centre of development policy, influenced by neo-liberal ideas which stressed the primary role of markets in economic growth, limiting the power of the state. They discern a *third* moment which is still in a formative phase, which contains a mix of policy ideas, e.g., that markets can fail, and require compensatory intervention by the state, when development means more than just economic growth and must be redefined to include human freedom. The role of judicial and legal reform shifted profoundly during this period within the changing political and economic context of development and an evolving vision of the role of the state in supporting the market.¹²

⁵ Using OECD data, it is estimated that judicial and legal reform may represent about 2% of total ODA, comprising \$2.6 billion of \$119 billion total ODA, below n **Error! Bookmark not defined.**. In 2009, total net official development assistance (ODA) from members of the OECD’s Development Assistance Committee (DAC) rose slightly in real terms (+0.7%) to USD 119.6 billion; OECD 2010a.

⁶ Carothers 2006, 10.

⁷ Hammergren 2006; World Bank 2002, 34 and 55; and Messick 2002.

⁸ DeShazo & Vargas 2006, 1; see also Biebersheimer & Payne 2001, 3; and, Bhansali & Biebesheimer 2006, 303.

⁹ Armytage 2003.

¹⁰ World Bank 2006b, cited in Harris, 2007.

¹¹ IDLO 2010, 4 and 11.

¹² Trubek & Santos 2006, 7.

A study of two development actors is illuminating of what is both characteristic and distinctive in approaches to promoting the rule of law. USAID and the World Bank serve as exemplars of this endeavour in terms of leading the field as well as the size of their support. While their approaches vary, analysis reveals that their reforms have acquired an orthodoxy which has predominantly focused on promoting 'thin' or procedural notions of reform – as distinct from the substantive, qualitative or 'thick' aspects which are normative and values-based. These reforms have generally aimed to improve the efficiency of the judicial function and the administration of justice within the formal sector of the state, often featuring delay-reduction for example. Their foundational rationale has most commonly been grounded in judicial reform providing a means to support economic growth. Over the past twenty years, in particular, this rationale has cast judicial reform in an instrumental role to protect the institutions of property and contract as a means of promoting a neo-liberal (small state/free market) economic model of growth. This model is associated with the now largely discredited Washington Consensus. This instrumental approach to reform persists and has been variously conceptualised. More recently, the notion of promoting good governance through accountability has emerged in the political science discourse. The most recent rationales for reform aim to promote peace, security and civil empowerment. In sum, there has been an evolving range of justifications for judicial reform with various economic, political, social and humanistic renderings over this period. Sometimes these justifications are conflated and occasionally they compete.

a USAID's approach

The current phase of judicial reform commenced with American assistance to Latin American reform in the 'Law and Development' movement of the 1960s.¹³ The guiding assumption of the law and development movement was that law is central to the development process. A related belief was that law was an instrument that could be used to reform society and that lawyers and judges could serve as social engineers.¹⁴ The primary goal of 'Law and Development' was, according to Trubek and Galanter, to transform legal culture through legal education and the transplantation of select 'modern' laws and institutions, with an emphasis on economic or commercial law and the training of pragmatic business lawyers. They saw the movement as having rested on four pillars, all of which subsequently crumbled. These pillars were a cultural reform and transplantation strategy; an ad hoc approach to reform based on simplistic theoretical assumptions; faith in spill-overs from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution. This potent critique of USAID's hegemonic approach was influential in causing the movement to wane for some years.¹⁵

In the ever shifting political economy of the Latin American debt crisis, judicial reform was repackaged in the 1980s as a part of larger programs of legal reforms, usually as a component of what became termed 'structural adjustment'. This described the fiscal and monetary policy changes which were implemented by the International Monetary Fund and the World Bank to provide assistance to developing countries and promoted state disengagement from the economy. These policy changes were conditions, or conditionalities, for financial assistance to ensure that the money would be spent in designated ways with a view to reducing the country's fiscal imbalances.

¹³ See: Trubek & Galanter 1974, and Blair & Hansen 1994.

¹⁴ Messick 1999, 125.

¹⁵ Trubek & Galanter 1974; Trubek 1996; Trubek 2003; and Merryman 1977.

In general, these loans promoted 'free market' programs aimed at reducing poverty by promoting economic growth, generating income, and paying off debt.

As the years passed, there was mounting disillusionment at the lack of visible success of the 'structural adjustment' conditionality which, in due course, was reframed in the early 1990s and emerged as what has become known as the 'Washington Consensus', a term which is attributed to Williamson.¹⁶ It connotes a development approach based on a trifecta of neo-liberal 'free market' policies of privatisation, fiscal rectitude and deregulation. The piety of the International Monetary Fund, the World Bank and the US Treasury to these policies -- which are now in turn largely discredited -- was intrinsically hegemonic. The language of 'structural adjustment' evolved into a new discourse of poverty reduction which increasingly became the 'raison d'être' of development, notably after the 'Asian Financial Crisis' of 1997/8.¹⁷ Developing countries were now encouraged to draw up poverty reduction strategy papers which were intended to increase local participation and greater ownership. A number of commentators, such as Porter, argue that the poverty reduction discourse of the 1990s was little more than the earlier structural adjustment '*in drag*', referring to its lack of results and its top-down exclusion of participation.¹⁸

During this period, analysis of the history of USAID's approach to judicial reform shows that it was served as an appetiser of supporting efficiency-based improvements in the criminal courts and judicial independence within a broader menu of securing the state's function of good order and economic development. This approach rested on a particular approach to the 'rule of law' and is associated with promoting democratic notions of good government.

After some years, the United States resumed engagement in judicial and legal reform in El Salvador in 1981 to help the democratic government prosecute human rights abuses. This political economy context explains why USAID assistance sought to advance democratic development by exposing human rights violations, increasing access to justice, strengthening justice sector institutions and decreasing impunity. This was due both to the political, social and economic conditions of the region, and to the chronically debilitated state of judiciaries across the region being, according to Hammergren, the 'Cinderella' institutions of government.¹⁹ Biebersheimer describes this second wave of justice reform spreading 'like wild fire' across Latin America, usually centring on criminal justice reform linked to democratic institutions as much as to economic enhancement programs in the region.²⁰

The mantra of consolidating judicial independence became a focal point of USAID assistance at this time, being seen to lie at the heart of a well-functioning judiciary and the cornerstone of democratic society based on the 'rule of law':

If a judiciary cannot be relied upon to decide cases impartially, according to the law, and not based on external pressures and influences, its role is distorted and public confidence in government is undermined. In democratic, market-based societies, independent and impartial judiciaries contribute to the equitable and stable balance of power within the government. They protect individual rights and preserve the security of person and property. They resolve commercial disputes in a predictable and transparent fashion that encourages fair competition and economic growth. They are key to countering public and private corruption, reducing political

¹⁶ Williamson 1990.

¹⁷ See discussion below, n **Error! Bookmark not defined.** onwards.

¹⁸ Craig & Porter 2006, 5 and 63-94.

¹⁹ Hammergren 2003.

²⁰ Bhansali & Biebesheimer 2006, 306; see also, Hendrix 2003.

manipulation, and increasing public confidence in the integrity of government.²¹

In a related move, USAID developed an anti-corruption approach as a part of its broader governance strategies which focused on strengthening the capacity of the courts to serve as accountability mechanisms as well as to strengthen judicial integrity itself. USAID defined corruption as:

[t]he abuse of public office for private gain.... Corruption poses a serious development challenge. In the political realm, it undermines democracy and good governance by subverting formal processes.... Corruption also undermines economic development by generating considerable distortions and inefficiency.... and generates economic distortions in the public sector by diverting public investment away from education and into capital projects where bribes and kickbacks are more plentiful.... These distortions deter investment and reduce economic growth.²²

By the 1990s, USAID expanded its support for judicial and legal reform into the post-Soviet transitional economies of Europe in what has become termed the 'rule of law revival'.²³ This phase rested on what Carothers describes as the orthodoxy of two controlling axioms: that the 'rule of law' is necessary for economic development and necessary for democracy.²⁴ He defines the 'rule of law' as:

a system in which the laws are public knowledge, and clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the past half century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors and police, are reasonably fair, competent and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law abiding.²⁵

This relationship between development of the 'rule of law' and liberal democracy has been described as being profound:

The rule of law makes possible individual rights which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy, such as property rights and contracts are founded on the law and require competent third party enforcement. Without the rule of law, major economic institutions, such as corporations, banks and labour unions, would not function, and the government's many involvements in the economy – regulatory mechanisms, tax systems, customs structures, monetary policy and the like – would be unfair inefficient and opaque.²⁶

²¹ USAID 2002, 6.

²² USAID 1999, 5.

²³ Carothers 2006, 7.

²⁴ Carothers 2003, 6.

²⁵ Carothers 2006, 4; see also, Carothers 1998, 96.

²⁶ Carothers 2006, 4-5.

This promise to remove the chief obstacles on the path to democracy and market economics during an era marked by massive transitions in the global political economy explains for Carothers why Western policy-makers have seized on the 'rule of law' as an 'elixir' for countries in transition.²⁷

b But what is the rule of law?

Despite the centrality of this concept, there is a peculiar conceptual abstraction inherent to the notion of the 'rule of law' which contributes to confused and ultimately disappointed expectations. This abstraction is examined by various commentators. Upham, for example, argues that aiming to develop a 'rule of law', in both developed and developing countries, is an unproven myth which, nonetheless, has acquired that status of evangelical orthodoxy. He defines the core elements of this orthodoxy:

The rule of law ideal might be summarised as universal rules uniformly applied. It requires a hierarchy of courts staffed by a cadre of professionally trained personnel who are insulated from political or non-legal influences. The decision-making process must be rational and predictable by persons trained in law; all legally-relevant interests must be acknowledged and adequately represented; the entire system must be funded well enough to attract and retain talented people; and the political branches must respect the law's autonomy.²⁸

The notion of the 'rule of law' is at its heart both politically evocative and yet so technically ambiguous as to sometimes become meaningless. Others have attempted to pin down what it is supposed to mean. Kleinfeld-Belton describes the 'rule of law' as looking 'like the proverbial blind man's elephant – a trunk to one person, a tail to another.'²⁹ She discerns a range of definitions that serve different purposes: government bound by law; equality before the law; law and order; predictable and efficient rulings; and human rights. These purposes – which are manifold, distinct and often in tension – are usually conflated and confused in practice. She observes that development agencies tend to define the 'rule of law' institutionally, rather than by its intended purpose, as a state that contains three primary institutions: laws, judiciary and law enforcement. This conceptual confusion has encouraged a technocratic and sometimes counterproductive approach to reform:

By treating the rule of law as a single good rather than as a system of goods in tension, reformers can inadvertently work to bring about a malformed rule of law, such as one in which laws that overly empower the executive are applied and enforced more efficiently.³⁰

Others, like Kennedy, go further to observe that this ambiguity is no accident. It is precisely the vagueness inherent in this notion that renders it readily and conveniently amenable as a device to bridge over differences in the interests of development partners.³¹

This conception of judicial reform – embedded as it was in USAID promoting the political economy notions of the free market, democracy, good governance and the 'rule of law' – is to be compared with that of the World Bank.

²⁷ Carother 2006, 7; see also Carothers 1998, 99.

²⁸ Upham 2006, 83. Upham also observes: 'If such a model exists, however, I have not found it,' Upham 2002, 8. For a more juristic discussion, see: Bingham, 2011.

²⁹ Kleinfeld-Belton 2005, 5-6; and, Kleinfeld-Belton 2006.

³⁰ Kleinfeld-Belton 2005, 28.

³¹ Kennedy 2006.

c World Bank's approach

The approach of USAID is to be compared and contrasted to that of that World Bank. The Bank's current justice sector assistance and reform portfolio comprises nearly 2,500 justice reform activities with new lending valued at approximately US\$304.2 million in 2008.³²

The Bank started to support judicial reform later than USAID in Latin America in the 1980s. It initially framed its approach narrowly to conform to its mandate as a state-centric means of enabling economic development. This approach has subsequently expanded to become more comprehensive, embodying related notions of governance, institutions, safety, security, equity and empowerment.

As the Bank's chief counsel at that time, Shihata was influential in conceptualising the initial approach to reform. He framed judicial reform within the 'rule of law', which he treated as a precursor to economic stability, and as the means of protecting property rights and honouring contractual obligations. He saw law providing credibility to government commitments, and the reliability and enforceability of applicable rules leading to favourable market conditions for investors. Law supported the broader economic policy framework that guaranteed free competition.³³ The Bank adopted this economic approach because of the reading then possible of its charter. Shihata wanted to avoid drawing reform activities into what he described as the 'risky trap of politicising financial institutions'. Owing to these formal constraints which he stressed prohibited engaging in 'political' activities, he directed the Bank narrowly to take 'only economic considerations' into account:³⁴

Included amongst these provisions are the notions that: [t]he 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 1.³⁵

As a consequence, the Bank's reform strategy has historically been developed from a base of focusing tightly on promoting the 'rule of law' in an instrumentalist, 'thin' procedural manner. This base defined the 'rule of law' as: prevailing when the government itself is bound by the law; every person in society is treated equally under the law; the human dignity of each individual is recognised and protected by law; and justice is accessible to all. This concept of the 'rule of law' is built on the three pillars of rules, processes and well-functioning institutions. It comprised a well-functioning legal and judicial system which allows the state to regulate the economy and empowers private individuals to contribute to economic development by confidently engaging in business, investments, and other transactions. This concept was seen to foster domestic and foreign investment, create jobs, and reduce poverty.³⁶

The Bank's judicial reform strategy promoted three goals. These were: first to establish an independent, efficient and effective judicial system, and strengthening judicial effectiveness; second, to support the processes by which laws and regulations are made and implemented; and third, to improve access to justice by

³² World Bank 2009a.

³³ See, eg: Shihata 1995a; and Shihata 1997b.

³⁴ Shihata 1992, 37.

³⁵ Ibid, 30; also, *Articles of Agreement of the International Bank for Reconstruction and Development*.

³⁶ World Bank 2003, 2 and 16-18.

expanding the use of existing services and providing alternative dispute resolution mechanisms.³⁷ In terminology reminiscent of USAID's earlier rhetoric, the Bank described the 'rule of law' as being 'built on the cornerstone of an efficient and effective judicial system.'³⁸ This vision positioned judges as the key to an effective and efficient legal system. For such a system, judges had to be properly appointed, promoted and trained; observe high codes of conduct; and be evaluated and disciplined. Activities supporting such initiatives became common features in many of the Bank's projects.

While conceding its contestability, this institutionalist approach to justice reform was reaffirmed most recently by Leroy in 2011:

Though the precise channels of causation are complex and contested, there is broad consensus that an equitable, well-functioning justice system is an important factor in fostering development and reducing poverty....The World Bank has supported the creation of robust investment climates, underpinned by a sound rule of law, in order to encourage investment, productivity and wealth creation as part of its *main* approach to combating poverty (italics added).³⁹

The Bank positioned judicial reform centrally in its emerging conceptualisation of good governance. As with USAID, it increasingly framed judicial reform within a larger governance dimension of development, usually hinging on notions of transparency and accountability. This dimension is relevant not just because judicial reform is a means of implementing governance policy by strengthening the capacity of the courts as accountability mechanisms. The notion of governance is integral to the prevailing institutionalist approach which is concerned with the quality of relationships among the citizen, state and market.

The Bank's definition of governance is broad. It refers to the exercise of power through a country's economic, social, and political institutions that shape the incentives of public policymakers, overseers, and providers of public services. Within this approach, judicial reform and strengthening is both instrumentally and constitutively relevant. The Bank's *Governance and Anticorruption Policy* of 2007 proclaims that good governance is positively associated with robust growth, lower income inequality, and improved competitiveness and investment climate. This policy posits that a capable and accountable state creates opportunities for poor people, provides better services, and improves development outcomes. This approach is explained by President Wolfowitz to support the Bank's mandate to reduce poverty:

We call it good governance. It is essentially the combination of transparent and accountable institutions, strong skills and competence, and a fundamental willingness to do the right thing. Those are the things that enable a government to deliver services to its people efficiently.⁴⁰

This approach to governance is grounded in the vision of the capable and enabling state, articulated through the Bank's World Development Reports, first issued in 1978. These reports showcase the Bank's evolving policy approach and have, in the view of the *Economist*, made 'histories in miniature of development.'⁴¹ The World Development Report of 2002, for example, highlighted the role of institutions in

³⁷ Ibid, 6, and 19.

³⁸ Ibid, 27.

³⁹ Leroy 2011.

⁴⁰ Wolfowitz 2006.

⁴¹ Yusuf, Dervish & Stiglitz 2008; also World Bank ndb.

reform endeavours. More particularly, it articulated the governance rationale of institutionalism within which it conceptualised the role of judiciaries in development:

The judicial system plays an important role in the development of market economies. It does so in many ways: by resolving disputes between private parties, by resolving disputes between private and public parties, by providing a backdrop for the way that individuals and organizations behave outside the formal system, and by affecting the evolution of society and its norms while being affected by them. These changes bring law and order and promote the development of markets, economic growth, and poverty reduction. Judicial systems need to balance the need to provide swift and affordable – that is, accessible – resolution with fair resolution; these are the elements of judicial efficiency ... The success of judicial reforms depends on increasing the accountability of judges; that is, providing them with incentives to perform effectively, simplifying procedures, and targeting resource increases⁴²

By 1999, the Bank elevated legal and judicial reform to one of the main pillars of its new Comprehensive Development Framework, as part of its evolving approach. This framework was introduced by President Wolfensohn as a reformulation of the Bank's strategy to poverty reduction. This strategy emphasised the interdependence of all elements of development – the social and human among the structural, governance, environmental, economic, and financial:

The Comprehensive Development Framework...highlights a more inclusive picture of development. We cannot adopt a system in which the macroeconomic and financial is considered apart from the structural, social and human aspects, and vice versa.⁴³

This new approach strove for a good and clean government, a social safety net and social programs, and an effective legal and justice system in which judicial reform was reframed:

[W]ithout the protection of human and property rights, and a comprehensive framework of laws, no equitable development is possible. A government must ensure that it has an effective system of property, contract ... laws and other elements of a comprehensive legal system that is effectively, impartially and cleanly administered by a well-functioning, impartial and honest judicial and legal system.⁴⁴

At that point, the Bank described its approach to judicial and legal reform as having 'evolved significantly' to emphasise empowerment opportunity and security in order to promote ways in which judicial programs can 'distribute more equitably the benefits of economic growth' to the poor.⁴⁵ The potential significance of this emphasis on the social dimensions to development in the Comprehensive Development Framework should not be under-estimated.⁴⁶ As we have seen, Shihata had earlier stressed avoiding the use of the term 'human rights' because of the constraining effect of the Bank's mandate which prohibited 'political' reform.⁴⁷ Less than a decade later, this position had evolved markedly when Danino, then chief counsel, saw judicial reform as an indispensable component of alleviating

⁴² World Bank 2002a, 131-2.

⁴³ Wolfensohn 1999, 7.

⁴⁴ Ibid, 10-11.

⁴⁵ World Bank 2004b, 5.

⁴⁶ World Bank 2001; see also Narayan 1999; and Woolcock & Narayan 2000.

⁴⁷ Shihata 1997a, 642.

poverty through economic growth and social equity, which included a strong human rights dimension.⁴⁸ He built this argument on a broader interpretation of the Bank's 'evolving' mandate:

While governance is a crucial concept, my personal view is that governance does not go far enough: we must go beyond it to look at the issues of social equity alongside economic growth ... we should embrace the centrality of human rights to our work instead of being divided by the issue of whether or not to adopt a 'rights-based' approach to development.⁴⁹

The Bank's policy approach was further refined in the *World Development Report: Equity and Development* 2006 which focused on the issue of inequality of opportunity as a new or more important dimension of poverty reduction. This report built on the World Development Report of 2000 on poverty, and in particular on the work of Sen, below. It recommended addressing chronic 'inequality traps' by ensuring more equitable access to public goods, including improved access to justice systems and secure land rights among other initiatives. With a focus on 'equity gaps', this report highlighted the constitutive element of equity in poverty. Most importantly, it also introduced the notion of redistribution to the current discourse:

Given that markets are not perfect, scope arises for efficient redistribution schemes.... Equity and fairness matter not only because they are complementary to long-term prosperity. It is evident that many people – if not most – care about equity for its own sake.⁵⁰

This report reviewed modern theories of distributive justice to address the lack of concern with the distribution of welfare, and to adopt a notion of equity that focuses on opportunities.⁵¹ It distinguished equity from law and propounded that the overarching concept of *fairness* embodies a multicultural belief that people should not suffer before the law as a result of having unequal bargaining power.⁵² This focus on equity is consolidated by Sage and Woolcock who argue that a rules system that sustains an 'inequality trap' is a constituent element of such traps, and can perpetuate inequities.⁵³ The Bank's *Justice for the Poor* (J4P) program is presently researching a more equitably-focused approach.⁵⁴ This focuses on:

creating new mediating institutions wherein actors from both realms can meet – following simple, transparent, mutually agreed-upon, legitimate, and accountable rules – to craft new arrangements that both sides can own and enforce. That is, J4P (sic) focuses more on the process of reform than on a premeditated end-state.⁵⁵

Notions of safety and security provide another significant rendition of the rationale for the rule of law and judicial reform. While we have already seen that criminal justice has been a part of the reform menu since its inception in the law and development movement, concerns over state fragility, failing states, terrorism and the breakdown of the states' capacity to control crime have grown markedly over recent years. Most recently, the events of 11 September 2001 have galvanised the attention of governments and donors to the relationship between security and conflict and the development of political, economic and social goals. This has led to reform efforts

⁴⁸ Danino 2006, 305.

⁴⁹ Danino 2007, 523.

⁵⁰ World Bank 2005, 74-75.

⁵¹ Ibid, 78.

⁵² Ibid, 175.

⁵³ Sage & Woolcock 2006, 11.

⁵⁴ Sage, Menzies & Woolcock 2009, 1.

⁵⁵ World Bank 2007, 1; and, World Bank 2006d.

which consolidate the internal (criminal) and external (terrorist) capacity of the state to provide security. This rendition is evident in the *Guidelines on Terrorism Prevention* (2003) and the *Guidelines on Security System Reform and Governance* (2004) issued by the development's umbrella body, the OECD-DAC. These guidelines are directed to overcome state fragility and conflict by reducing armed violence and crime thereby creating secure environments which are conducive to other political, economic and social developments. This approach aims at achieving four intermeshing objectives: (a) establishing effective governance; (b) improved delivery of security and justice services; (c) developing local leadership and ownership of the reform process; and (d) sustainability of justice and security service delivery.⁵⁶

Most recently, growing recognition of the importance of improving justice reform is evidenced in the *World Development Report 2011*, which repositions justice more centrally in development. WDR 2011 focuses on exploring the links between security and development outcomes. Its central message is that strengthening institutions and governance to provide citizen security, justice and jobs is crucial to break cycles of state fragility, conflict or violence. Institutions and governance, which are important for development in general, work differently in fragile situations. Investing in justice is now seen as essential to reducing violence. It links security, justice and economic stresses to violence prevention and recovery, and advocates integrating justice with military and policing assistance in fragile situations. Justice sector reform should focus on the connections between policing and civilian justice, strengthening basic caseload processing; extending justice services and drawing on community mechanisms. Curiously, however, WDR 2011 is abstemious in withholding any definition of justice. This is significant because it clears a space to admit justice to the pantheon of political economy, and opens the dialogue on the role of justice and its relationship to development.⁵⁷

In sum, this history reveals first that judicial reform is at a formative phase of endeavour. Its growth has been recent, rapid and very substantial over the past twenty years, in particular. Second, this endeavour has been variously justified on the basis of economic, political, social and human rationales. These major justifications, which may be theoretically interconnected and conflated in practice, are on occasion ambiguous and sometimes in conflict:

- *Economic* – the oldest and most pervasive justification has two manifestations: first, the creation of wealth, based on notions such as 'trickle down economics' which involves the state supporting the markets to lift all boats, even the smallest; and second, more recently, the reduction of poverty, based on an alternative notion of empowerment by assisting the poor and the disadvantaged.
- *Political* – the promotion of democracy has been inextricably linked to enabling participation and inclusion in social affairs; freedom of opportunity; and self-destination; and more recently, to strengthening the governance and integrity of state institutions to oversee the polity through the 'rule of law', judicial independence, transparency and accountability.
- *Social* – this justification emphasises consolidating state capacity to provide the fundamental public goods of civic order, safety and security to citizens from internal threats of crime and, notably after 9/11, external threats of terrorism and state failure, sometimes termed securitisation.

⁵⁶ OECD 2003; and OECD 2007, 21.

⁵⁷ World Bank 2011b.

- *Humanistic* – this justification rests on the validation of promoting fairness and access to justice based on an emerging concept of poverty as deprivation of opportunity and the human rights of the individual.⁵⁸

4 Nature of reforms

Analysis of the nature of reform activities undertaken during this period reveals what has been described as a ‘standard package’ of activities that support efficiency-based improvements to the formal administration of justice.

At their core, most activities have typically consisted of measures to strengthen the judicial branch of government. Messick describes these as having generally included making the judicial branch independent; increasing the speed of processing cases; increasing access to dispute resolution mechanisms; and professionalising the bench.⁵⁹ Dakolias agrees that reform programs usually include judicial independence, appointment and evaluation systems, discipline; judicial, court and case administration; budgets, procedural codes, access to justice, ADR, legal aid and training.⁶⁰ Projects have commonly focused on training judges, introducing case management systems to the courts, and occasionally establishing legal aid clinics and legal awareness programs – in what Sage and Woolcock have described as generally being ‘top-down technocratic solutions’ to institutional deficiencies.⁶¹ The World Bank, for example, presently allocates 66% of the value of its ‘stand-alone’ justice reform projects to what it terms direct judicial process support administering cases and caseloads, on court infrastructure, buildings refurbishment and related facilities, and just one tenth of this (6%) on training judicial and legal actors.⁶²

Judicial reforms are classified by Carothers as falling into a class of activities aimed at increasing government compliance with law. These involve institutional reforms which centre on judicial independence, increased transparency and accountability; making courts more competent, efficient and accountable, often involving training.⁶³ In describing judicial and legal reform, Jensen refers to a ‘standard package’ of three elements: changing substantive laws; focusing on law-related institutions; and addressing the deeper goals of governance compliance with the law, particularly in the area of judicial independence. Donors have increasingly concentrated their assistance on making formal judicial institutions more competent, efficient and accountable, involving projects providing legal and judicial training.⁶⁴ Porter endorses this ‘standard package’ of court-centric reforms which he notes remain heavily supply-driven, with the focus on training judges, building more courtrooms, providing new equipment, and supporting case management. Training has often been treated as a cure-all for capacity-building, with little regard for educational effectiveness.⁶⁵

5 Critique of practice

There is now a chorus of disappointment in the performance of these reforms emerging in the academic commentary. This chorus intones mounting concerns over the performance of promoting the rule of law which have been described as being *less than promised, elusive, in crisis, sobering, impotent, inconclusive and in serious doubt*.

⁵⁸ This configuration is articulated in various ways in the literature; see, eg, Samuels 2006.

⁵⁹ Messick 1999. **Error! Bookmark not defined.**

⁶⁰ Dakolias 1995, 187 onwards.

⁶¹ Sage & Woolcock 2005, 12.

⁶² World Bank 2011c, 3.

⁶³ Carothers 1998, 99-100.

⁶⁴ Jensen & Heller 2003, 349.

⁶⁵ Porter 2005; see also, Armytage 2005.

Commentators offer a number of explanations for this disappointment. In essence, these relate to the conflation of the goals of reform, discussed above, that has confused expectations, dissipated resources and frustrated implementation; and the need for a considerably more nuanced approach to managing the change process. This critique reflects two major features: first, the insufficiency of knowledge to guide and support reform endeavours and, second, the lack of any cogent theory or justification for reform endeavour. In effect, there is a mounting concern that despite the provision of ever-increasing resources, we don't really know what we're doing.

In a critique of judicial reform performance over twenty years in Latin America, Hammergren acknowledges substantial changes in the sector's resources, composition and activities. These reforms -- which have provided improved salaries, enhanced independence, new governance systems, and monies for computers and innovations -- have transformed courts which were formerly the 'orphans' in what she calls the 'Cinderella branch of government'. But significantly they have not had any automatic impact on the quality of judicial output.⁶⁶ These judicial systems seem no closer to meeting citizen expectations of justice.⁶⁷ Change is one thing, but improvement is another. Her critique is essentially utilitarian, i.e., these reforms have failed to improve the situation. Two decades of reform had delivered a great deal less than promised. Despite some gains, basic complaints such as delay, corruption, impunity, irrelevance and limited access have not dissipated. Public opinion polls indicate no improvement in the courts' public image. As for contributions to the goals of reducing crime or poverty, or increasing economic growth, the best that can be said is that things would have been much worse without the reform.⁶⁸ This disappointing performance arises from the 'purely deductive conclusion' that there is a supposed -- but largely unproven -- connection between market-based growth and commercial law.

Hammergren endorses Carothers' metaphor that judicial reform has become an elixir for curing an increasing number of extra-judicial ills: poverty and inequality, democratic instability, and inadequate economic growth and investment:

[I]t should be evident that (this) contains internal contradictions. ... Mix and match different objectives; goals relating to costs, access, efficiency, efficacy, and basic fairness at some point come into conflict with each other.⁶⁹

Anyone wishing to contest or even explore these assumptions risks attacking numerous sacred cows and their associated lobbies.⁷⁰ The theoretical discourse on judicial reform is, Hammergren observes, dominated by economists who have a natural predisposition to emphasise courts' economic role by clarifying the rules of the game: enhancing predictability, reinforcing juridical security and reducing transitional costs. Political scientists have then focused on the role of courts in supporting existing power structures to emphasise their potential accountability function in providing checks-and-balances on that power.⁷¹

It is timely to observe how muted lawyers' voices have been in contributing to this discourse. While academic lawyers have clearly produced theories, their contribution seems largely ghettoised in academe. Consequently, it is bizarre that articulation of

⁶⁶ Hammergren 2007, 279.

⁶⁷ Ibid, 7.

⁶⁸ Ibid, 306.

⁶⁹ Ibid, 5.

⁷⁰ Ibid, 308.

⁷¹ Ibid, 313-5.

the prevailing theoretical model for judicial reform endeavour has been dominated by economists and political scientists to this point.

Many commentators endorse this critique of the dubious conceptual foundations of reform endeavour. Barron, for example, reviews the experience of the World Bank to argue that it would do well to temper its enthusiasm for promoting the 'rule of law', given that many of the factors affecting it seem to be either unreformable or at least very difficult to reform.⁷²

Some describe a crisis in law-and-development. They attribute this crisis to the inability of developmental theory to adequately account for reality. Tamanaha and Bilder believe its cause is the realisation that the ideals of development theorists are less than perfect and less than perfectly realised; that science does not have all the answers; and that the law simply cannot solve many problems confronting developing countries, causing a sense of mounting impotence. After thirty years of law-and-development studies, they observe that modern law is necessary, though not sufficient for economic development; that the 'rule of law' is helpful though not sufficient for political development; that beyond these minimums, the theoretical discourse is not of primary importance, beyond being 'largely a Western academic conversation'.⁷³

Others debate the efficacy of the relationship between judicial and legal reforms and development, and challenge the utility of many reforms on empirical grounds. Trebilcock and Davis describe much of the empirical evidence as 'inconclusive' and argue that this explains why current endeavours are destined to have little or no effect on social or economic conditions in developing countries.⁷⁴ Others argue that given the diversity of competing definitions and concepts of 'rule of law', serious doubts remain about whether there is such a thing as 'a rule of law field'. Peerenboom critiques the law and development industry as having sought universal solutions to diverse local problems which have often reflected the latest intellectual trend and adopted a 'magic-bullet' approach: first legal education, then legislative reform, now institutions and good governance.⁷⁵ What he terms the 'less than spectacular results' of promoting the 'rule of law', calls into question the reform function of the 'rule of law':

Despite a growing empirical literature, there remain serious doubts about the relationship, and often the causal direction, between rule of law and the ever-increasing list of goodies with which it is associated, including economic growth, poverty reduction, democratization, legal empowerment and human rights.⁷⁶

The upside of this mounting disquiet is that it is spurring the current moment of reflection and impelling a process of reinvention of approach. This reinvention comprises three major renditions: (a) convergence with human rights and empowerment characteristically evident in initiatives of UN agencies; (b) engagement in the informal and customary sectors, characteristically evident in the Bank's J4P exploration; and (c) a more integrated political-economy approach, which is characteristically evident in DFID's approach to 'drivers of change'.⁷⁷

⁷² Barron 2005, 35. See also: Carothers 1999, 2003, and 2006; Jensen & Heller 2003; and Trubek & Santos 2006, among others.

⁷³ Tamanaha & Bilder 1995, 484.

⁷⁴ Davis & Trebilcock 2001, 27.

⁷⁵ Peerenboom 2009, 13.

⁷⁶ *Ibid.*, 5.

⁷⁷ DfID (Department of Foreign and International Development) is the British aid agency. Dahl-Østergaard, Unsworth & Robinson 2005, ii; Unsworth 2009; see also: Moore, Schmidt & Unsworth 2009.

This opportunity for reinvention is presently open, but the stakes are very high. It is no-understatement to observe that the rule of law enterprise is poised at the brink of development failure. This is evidenced by the recent decision of the Asian Development Bank to 'mainstream' – that is, to dismantle -- its law and policy program after almost twenty years because the lack of visible results had rendered it under-competitive in the internal quest for funds.⁷⁸

6 Purpose: what is justice - and why is it important?

Any notion of the rule of law in international development without a clear focus on promoting justice is incomplete. Justice is fundamental to human wellbeing and is indivisible from development. Since Aristotle, justice has been recognised as core to any civilised notion of the good life, government and society: government without justice is tyranny; and society without justice is anathema to its citizens. Civic wellbeing is unattainable without justice. Justice is nonetheless routinely subverted in many countries. Citizens, usually the powerless poor, are routinely denied justice through the abuse of power, impunity, corruption and inefficiency. These are the usual challenges of reforming justice.

To address these challenges, international development and the rule of law must define justice – something which it has been loath to explicate to this point. While philosophers and political scientists may continue to debate the nature of justice and the role of judicial reform, even a four-year-old child will immediately recognise unfair treatment from its parents and know when justice is denied.⁷⁹

Justice is the notion of rightness built on law, ethics and values of fairness and equity which are foundational to civic wellbeing. The purpose of justice is to protect human wellbeing. Justice protects humanity from Hobbesian notions of anarchy, societal breakdown and the brutishness of life in nature.⁸⁰ It embodies an ordered community governed by the rule of law. While there are many renditions of justice, most of the principles of justice are universal. These renditions embody the norms enshrined in Universal Declaration of Human Rights, which are constituted the core covenants of the United Nations, among other international instruments.⁸¹

All societies comprise some basic structure of institutions that embody renditions of justice, whether formal or informal. These renditions may be *political* (governance, social affairs and the allocation of interests), *economic* (opportunities for livelihood), *social* (civic order and safety) or *humanistic* (fundamental individual rights). There are numerous expressions of justice. Justice may be primarily utilitarian – concerned with maximising social outcomes; egalitarian - concerned with equality of opportunity, individual rights and freedoms; distributive - concerned with allocating interests in wealth, power or privilege; retributive - concerned with punishing wrongdoing; or restorative - concerned with restoring social harmony. Justice may be variously seen in terms of equality, need, reciprocity or deserts. Expressions of justice are

⁷⁸ ADB IED 2009b, 24. See also: Armytage, L 2011, 'Judicial reform in Asia: case study of ADB's experience: 1990-2007,' *Hague Journal on the Rule of Law*, 3.1: 70-105.

⁷⁹ Our innate sense(s) of justice may vary, which gives rise to the need to articulate a theory of justice precisely to bring reason into play in the diagnosis of justice and injustice.

⁸⁰ Hobbes 1651.

⁸¹ The principal UN treaties comprise: the Universal Declaration of Human Rights (UDHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of Racial Discrimination (ICERD); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC), plus optional protocols. Other international standards include: Basic Principles on the Independence of the Judiciary; *Bangalore Principles of Judicial Conduct, 2002*; *Basic Principles on the Role of Lawyers*; *Guidelines on the Role of Prosecutors*; and *Basic Principles for the Treatment of Prisoners*.

sometimes distinguished from social justice. Potentially tautological, social justice is invoked in secular contexts to emphasise primacy of principles of equality and human rights to advocate more egalitarian opportunities and outcomes which are similar to the distributive expression above.

Justice embodies values which societies institutionalise through their laws and courts that administer those laws. Beyond the truism that law may not be just, promoting justice is concerned with enabling rights which are the political dispensation of interests in law. These rights are vested across the spectrum of human welfare, that is: political, civil, economic, social and cultural. For the purpose of this paper, justice is considered in two qualitative dimensions: judicial and developmental. In the judicial context, this argument focuses on the promotion of justice through the administration of law by the courts, being the rights-based or humanistic rendition above. In the developmental context, it focuses more broadly on the promotion of justice in its other political, economic and social renditions.

Justice in development should be concerned with bringing to life the rights which are enshrined in customary, domestic or international law. Development without a rights-based 'thick' concept of justice as fairness is not just insufficient, but perverse; focusing on improving the 'thin' efficiency of a captive court system does nothing more than accelerate the impunity of elite land-grabbing, as starkly evidenced in Cambodia.⁸²

I have argued that even the allegorical four-year child knows that justice is important. But why is this so? This foundational concept of justice is universal, a priori, even visceral. Justice is essential to maintain civic harmony and resolve conflict, sustain peace and safety, secure growth and good governance, and enable rights. The importance of justice becomes apparent as soon as it is denied. Society without justice is the antithesis of any notion of equitable opportunity. Recognition of the importance of justice is only now entering the discourse in other than economic terms, as evidenced in the *World Development Report 2011*.⁸³

This recognition creates the space to admit justice to the development pantheon of political economy, and frames a vital debate on the role of justice and its crucial relationship to promoting the rule of law.

7 Debate between institutionalism and humanism

Close analysis of the journey of judicial reform exposes an unresolved contest for an overarching theory for judicial reform. This contest exists between an economic or political instrumentalist justification and a more recent human-centred justification. The prevailing economic or political justification is based largely on the thinking of Weber and North, notable among others, which constitutes the 'new institutional economics' model.

⁸² 'Thin' definitions of justice are formal, minimalist and procedural. Raz and Fuller are leading exponents of 'thin' formal concepts of justice and thereby judicial reform. They argue that rational people need a predictable system to guide their behaviour and organise their lives. The precepts of the 'thin' approach are that law should be prospective, open, clear and stable. Raz 1979, 214-218; see also: Fuller L, 1958, and Fuller 1964. 'Thick' notions, on the other hand, equate the 'rule of law' as being elemental to a just society and are linked to concepts of liberty and democracy. 'Thick' reforms address substantive goals such as enhancing individuals' rights, strengthening political institutions and stabilising the economy. This concept guarantees basic individual freedoms, and civil and political rights while at the same time, requires the power of the state to be constrained. Dworkin is a noted proponent of this 'thick' approach, arguing in essence that justice and the 'rule of law' include universal moral principles, and are linked to freedom. Dworkin 1978.

⁸³ World Bank 2011b.

Weber has been directly influential on the formulation of judicial reform approaches. He stands for the key developmental proposition that the modern legal doctrines of property and contract enforced by a politically independent and technically competent judiciary are the best means of managing the risks of transactions with strangers.⁸⁴ North extends this thinking with the notion of the 'rules of the game'. He defines 'institutions' – not to be confused with organisations – as:

the rules of the game in a society, or, more formally, the humanly devised constraints that shape human interaction. In consequence, they structure incentives in human exchange, whether political, social or economic.⁸⁵

These rules of the game constitute the foundation for the school of institutionalism which has been pervasively influential of development, particularly in governance, over the past 20 years. This is an elegantly powerful and influential theory which has spawned a generation of empirical inquiry to determine the economic determinants of growth.⁸⁶ This theory has been used to cast the state in the role of supporting the market through key institutions such as courts to secure property and contract which are necessary for investment-based economic growth, and to promote good governance.

But, *does it work?* At best, the available evidence is ambiguous. There is little consensus that this institutionalist approach to the rule of law leads to growth. To the contrary, Polanyi and Chang show that history reveals that growth leads to the rule of law, rather than vice versa.⁸⁷ While there is clearly some empirical evidence of correlation to show that institutions do indeed matter, correlation is not causation. Rodrik cautions that we have as yet little understanding of *how* they matter for the purpose of formulating development policy.⁸⁸ This goes some way to explaining the underwhelming performance of judicial reform to this point.

This 'institutionalist' approach to development is now under increasing challenge for failing to sufficiently meet the needs of the poor. Building on the thinking of Rawls, and Sen, in particular, a more recent human-centred theory now offers a rights-based alternative that focuses on the constitutive importance of promoting justice. This theory casts development in the role of providing capacity to the poor – people who have rights to freedom and opportunity.

The concept of justice as fairness is powerfully expounded by Rawls in *A Theory of Justice*. This concept builds on Aristotle's notions of justice, and more recently on the notion of the social contract of the Enlightenment philosophers, in particular, Locke and Rousseau. Rawls argues that the principles of justice form the basic structure of society and are, moreover, the object of the original social contract. In effect, questions of justice precede questions of happiness -- that is, what is right precedes what is good. This he calls 'justice as fairness'. The notion of fairness may itself be variously defined in terms of equality, need, reciprocity or deserts.⁸⁹ For Rawls, justice as fairness is based on the idea that people were originally shrouded in a veil of ignorance, but were motivated by rational self-interest to collectively maximise opportunity to attain the good life.⁹⁰ This concept of justice as fairness is embodied in the '*difference principle*':

⁸⁴ Weber 1918, and Weber 1954, in particular.

⁸⁵ North 1990, 3.

⁸⁶ North 1990.

⁸⁷ Polanyi 2001; Chang 2002.

⁸⁸ Rodrik, Subramanian & Trebbi 2002, 4. Problems of endogeneity and reverse causality plague any empirical researcher trying to make sense of the relationships among these causal factors (at 3). And, Rodrik 2004, 10.

⁸⁹ See, eg: Sandel 2009.

⁹⁰ Rawl's veil of ignorance may be compared to Smith's notion of the impartial spectator. Smith asks instead, what would an 'impartial spectator', someone observing from the outside, make of a particular state of affairs? Smith 1759.

- i. Each person has an equal claim to a fully adequate scheme of basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only those liberties, are to be guaranteed their fair value.
- ii. Social and economic inequalities are to satisfy two conditions: first they are to be attached to positions and offices open to all under conditions of fair equality of opportunity; and second they are to be to the greatest benefit of the least advantaged members of society.⁹¹

Rawls' normative approach to rights is foundationally important in providing a contemporary notion of justice. Sen extends this thinking and is cardinally important for redirecting the development discourse away from the prevailing utilitarian paradigms with their economic concerns. He argues that the traditional economic focus on aggregate income and wealth shows a distributive indifference to notions of equality and a neglect of rights. An exclusive concentration on inequalities in income distribution cannot be adequate for an understanding of poverty and economic inequality. He treats poverty as an inability to develop and exercise one's personal capabilities, which reflect the actual freedoms and opportunities of a person.⁹² Hence, well-being is a function of how fully an individual exercises his/her human capabilities.

The ground-shifting significance of this thinking rests on its potential to go beyond the prevailing neo-liberal, market-based rationale for judicial reform advocated by Weber and North. Sen's advocacy of rights-based development supplements the theory for judicial reform and places the human being – rather than the state, the market or the development agency – as the key actor in the development process. Economic development cannot sensibly be treated as an end in itself. Development must be more concerned with enhancing the lives we lead and the freedoms we enjoy.⁹³ For this fundamental proposition, he invokes Aristotle's rationale for the polis to contribute to the good life of its citizens:

(Pursuit of) wealth is obviously not the good that we are seeking, because it serves only as a means – for getting something else.⁹⁴

In the seminal work, *Development as Freedom*, Sen initially builds on Rawls to position justice as a fundamental factor in improving the quality of life. This links closely with his view of the state's role to supply public goods such as health, education and effective institutions for the maintenance of local peace and order. In his latest work, *The Idea of Justice*, Sen expounds his theory of justice based on notions of liberty, equality and equity which he emphasises are not confined to the western 'enlightenment' canon. This consequentialist theory builds on a more recent critique of Rawls' theory of justice as fairness, in particular, as being overly concerned with just institutions, institutional libertarianism, and what he terms the 'contractarian' mode of thinking. Sen argues that 'utopian transcendental institutionalism' or absolute perfect justice is unattainable in the absence of any agreement on universal concepts of justice or global sovereignty. Instead, it is better to focus on how society can be improved from its current state, given its actual pattern of injustices. This inquiry addresses actual realisations of justice, rather than getting just institutions right, by asking: what international reforms do we need to make the world a bit less unjust? Sen's idea of justice is measurable in terms of

⁹¹ Rawls 1971, 13. See also: Rawls 1978, 1985 and 2001.

⁹² Sen 2010.

⁹³ Sen 1999, 14.

⁹⁴ Aristotle 1955, 9; 'The good life is the chief end, both for the community as a whole and for each of us individually.' Also, Aristotle 1958: Book 3, Constitutions, Chapter vi, at 111.

remediable injustice and comparative enhancement to human lives, freedoms, capabilities and wellbeing.⁹⁵ He integrates an imposing philosophic discourse which acknowledges more globally pluralistic notions of justice to focus on assessments of social realisations and comparative aspects of enhancing justice. This powerful articulation may in part be understood as seeking to replenish the concept of justice from the hegemonic strictures of its neo-liberal appropriation outlined above.

The major implication of this reasoning is to introduce a 'constitutive' justification for justice being core to promoting the rule of law, with the rights of the individual as its central focus. This reasoning is profound in reconsidering the theory of judicial reform. First, it provides an alternative paradigm to the institutionalist approach to judicial reform. Second, it visibly influences the evolution of endeavour in the rights-based and access-to-justice approaches such as that of United Nations agencies, and the more recent justice-for-the-poor initiatives of the World Bank. Underpinning both approaches is a reform rationale which is based on the notion of empowerment, a notion now being taken up by numerous commentators.⁹⁶

Economics cannot trump justice -- though it is remarkable that this has been accepted in the discourse to this point. The tension between utility and aggregate wellbeing on the one hand, and equity and individual wellbeing on the other, lies at the fulcrum of reform policy. To the extent that emerging notions of equitable development may be superseding aggregate growth as the current mantra of development, it is clear that promoting the rule of law is now lagging the discourse.

8 Empirical evidence on economic determinants of growth

Passing reference is required to the scant empirical evidence that judicial reform has attained an economic purpose. While this does not indicate that past endeavours have been altogether dismal, it does highlight the pressing need for an improved approach. The fragility of this empirical evidence compels both further inquiry and a fundamental reframing of policy approach.

Close analysis of the available empirical evidence affirms only some elements of the instrumentalist policy for the rule of law serving economic or political goals. A synthesis of the empirical inquiry indicates that there is sufficient evidence to establish the following propositions:

- Aid is an important tool for enhancing the development prospects of poor nations.
- Institutional development may contribute to growth, and growth may contribute to institutional development, multi-directionally.
- Good governance contributes to investment and growth; however, aid erodes governance, and is not correlated with democracy; and corruption is associated with ineffective government and low growth.
- Growth and investment are increased in the presence of institutions which protect property and contract rights, and aid assists growth where there are good policies, though this relationship is described as small and fragile within the expert commentary.
- Efficient, independent and accountable judiciaries are associated with growth; in effect, there is a linkage between judicial reform and economic development, but on all accounts this is yet to be fully understood.
- Domestic demand for change is more important than the origin of reform.⁹⁷

⁹⁵ Sen 2009, 6 and 25.

⁹⁶ See, eg: Anderson 2003; Golub 2006; and Brown & Stewart 2006, among others.

⁹⁷ For a more detailed discussion of the empirical evidence see, in particular, Armytage 2012, chapter 5.

For purposes of development policy-making, this evidence is however incomplete, qualified, often ambiguous and on occasion openly contested by its own adherents.

There is no consistent evidence available that judicial reform has attained its stated goal of alleviating poverty. Certainly, the global economy has grown. As many scholars including Stiglitz, Sachs and Collier emphasise, there has been unprecedented economic growth in many countries in the developing world.⁹⁸ But, equally, there is irrefutable evidence of a growing inequality gap which is highlighted in the *World Development Report* of 2006.⁹⁹ The rich have got richer, but the poor have either not got richer or they have got richer at a slower rate. Once the measurement of growth has been disaggregated, it becomes clear that the promotion of economic growth has failed to alleviate poverty. Moreover, it has had the perverse effect of exacerbating inequality.

The prevailing economic justifications for development policy do not rest on firm empirical foundations. The evidence is incomplete and increasingly internally contested. This is revealed in the researches of Dollar and Kraay, Knack and Keefer, Djankov, Feld and Voigt, La Porta, North and Rajan whose collective work has been particularly influential in the formulation of the development policy of the World Bank and other major donors¹⁰⁰. Over recent years, there has been extensive investigation of the key relationships between aid, government, the institutions of justice and growth. This inquiry validates the existence of some significant relationships between justice, good governance and economic growth. But, equally, it reveals that many important issues remain contested; much of the evidence is ambiguous; and there are numerous gaps in knowledge. As Rodrik stresses, fundamental questions over the chain of causation remain unanswered and centrally problematic.¹⁰¹ While Kaufmann, for example, insists that good governance, as an institution, is a predeterminant of growth, others including Arndt and Oman directly challenge the integrity of this claim¹⁰². Chang persuasively presents the reverse argument that development causes good institutions, reminiscent of Polanyi's earlier thesis which Stiglitz revisits. Evidently, much more empirical research is required before we can understand the key determinants of the good life, and the role of judicial reform in promoting it. Additionally, there is a stark lack of any corresponding research into the equitable and distributive dimensions of justice as a determinant of wellbeing, which is a missing dimension in the empirical inquiry of poverty alleviation.

Collectively, the lack of compelling empirical justification and record of underwhelming results create the imperative to realign our approach to the rule of law and promoting justice.

9 Way forward - realigning the rule of law to promoting justice

It is now clear that there are a range of unresolved philosophical, conceptual and technical challenges in judicial reform. The above survey of the literature and an analysis of practice, indicates that the prevailing approach to promoting the rule of law is manifestly insufficient.

⁹⁸ Stiglitz 2000 and 2002; Sachs 2005; and Collier 2008; in particular.

⁹⁹ World Bank 2005.

¹⁰⁰ Dollar & Kraay 2000; Knack & Keefer 1995 and 1997; Djankov, La Porta, Lopez-de-Silanes & Shleifer 2002 and 2003; Feld & Voigt 2003; La Porta, R, Lopez-de-Silanes, F, Shleifer, A & Vishny, R, 1998, 1999, 2003, 2004 and 2008 – among others.

¹⁰¹ Rodrik 2004.

¹⁰² For example, Kaufmann D, Kraay A & Mastruzzi M 2007, in particular; see also World Bank's Worldwide Governance Indicators; and Arndt & Oman 2006.

I redress this insufficiency by proposing a fundamental realignment in the purpose of the rule of law to promote justice as fairness and equity. This requires the inclusion of a human-centred, rights-based approach to improving justice constitutively. This realignment supplements the deficiency in the prevailing instrumental approach to judicial reform with a more 'thick' conception, and provides the powerless and poor with the means to exercise their substantive rights.

As a practitioner, it is important to stress that this proposed realignment is actionable in practice. Let me illustrate how this approach may be put into practice using a taxonomy for just development, which is outlined below. This taxonomy is indicative of injustices from the 'real world' of development practice which too often go unaddressed at the levels of either court-focused or broader development reform. It provides a sampling of common situations to illustrate their amenability to a justice-focused approach to development. It identifies rights and specifies indicators that measure justice across the major dimensions of development. These may involve crime (*social*), business and employment security (*economic*), good governance (*political*), and rights and opportunity (*humanistic*). It also nominates the data required to measure the relationships between justice-focused reform and its goal of improving civic wellbeing.

It provides examples of injustices affecting the rights of people – from Afghan girls, to Bangladeshi politicians, Nepali dalit women, Vietnamese businessmen, Palestinian labourers and Pakistani taxi drivers -- together with performance indicators. These indicators specify the means by which reform success can be measurable. These are variously measurable in terms of the enablement of rights, for example, to contract and title, physical safety and security, fair trial, resolution of disputes and bureaucratic caprice.

TAXONOMY OF JUST DEVELOPMENT

	Human situation	Injustice suffered	Right(s) to be exercised	Indicators of measurement	
				Development-wide	Court-focused
1.	Nepali dalit woman	Sexual assault	Actionable rights to physical safety and security of person – <i>sources</i> : domestic law, UDHR, ICCPR, CEDAW, CERD. ¹⁰³	Public standards of dignity, tolerance, and respect for rule of law.	Access to legal aid; rates of crime, conviction, compensation.
2.	Aboriginal Australian	Police harassment, and over-imprisonment	Actionable rights of Indigenous people to equal treatment and non-discrimination; <i>sources</i> - domestic law, UDHR, CERD.	Public / police standards of dignity, tolerance, and respect for rule of law.	Access to legal aid, convictions, diversion from arrest/prison.
3.	Vietnamese businessman	Breach of contract	Actionable rights to economic security, timely cost-effective redress; <i>sources</i> - domestic law, ICESCR.	Business productivity; business confidence.	Civil claims, compensation.
4.	Pakistani taxi driver	Extortion by public officials	Actionable rights to good governance, integrity and non-harassment; <i>sources</i> - domestic law, ICESCR, CAC.	Administrative redress; and disciplinary proceedings	Criminal prosecutions, compensation.
5.	Cambodian farmer	Dispossession	Actionable rights to habitat and economic security; <i>sources</i> - domestic law, ICESCR.	Political, media advocacy; public perceptions of governance.	Access to legal aid, repossession, compensation.
6.	Afghan girl	Barriers to education	Actionable rights to education; <i>sources</i> - domestic constitution / law, UDHR, ICESCR, CEDAW, CRC.	Educational enrolments; literacy; employment.	Judicial enforcement of constitution.
7.	Azerbaijani journalist	Detention and torture	Actionable rights of freedom of speech; <i>sources</i> - domestic law, UDHR, ICCPR, CAT.	Press freedom; political media advocacy; public perceptions of governance.	Complaints; judicial review and redress.
8.	Samoa villager	Banishment	Actionable rights to security of habitat; <i>sources</i> - domestic policy and law, UDHR, ICESCR.	Civic harmony, customary dispute resolution.	Complaints; judicial review and redress.
9.	Bangladeshi politician	Unfair trial	Actionable rights to fair trial, due process; <i>sources</i> - domestic law, UDHR, ICCPR, Bangalore Principles.	Democratic freedom; public perceptions of governance.	Complaints against judicial integrity.
10	Palestinian labourer	'Closures' causing dismissal	Actionable rights to work and freedom of movement; <i>sources</i> - domestic law, UDHR, ICESCR.	Employment data.	Civil claims, compensation.

¹⁰³ Sample of principal UN treaties.

Each of us can readily identify other examples of injustices that blight people's lives. Rights-based remedies to these injustices exist across the economic, political, social and cultural dimensions of human wellbeing. This taxonomy is an analytic tool to help policy-makers to see and address these injustices. Its purpose is to conceptualise development through the organising paradigm of promoting justice as fairness and equity. It can be used to focus on improving specific aspects of justice, address particular human situations of injustice and the rights to be enabled, and specify how the improvements will be measured. In doing so, it can address innumerable situations to promote developmental values of equality, efficiency, integrity, transparency, accountability, access, legitimacy, among others. It is *not* a litigators' guide to pro-poor claims; it is intended to illuminate how development can dynamically promote justice across the spectrum of civic wellbeing.

In sum, this paper argues that judicial reform should promote justice and that justice must be centrally concerned with fairness and equity. The core purpose of judicial reform is to enable those rights that are constituted in international, domestic and/or customary law. These rights span the spectrum of civic wellbeing, comprising the economic, political, social and humanistic dimensions of any society. Reaching a consensus on which rights to promote may be difficult where the interests of power-holders are jeopardised, which has often required donors to make pragmatic compromises in practice. It is for this reason that justice reforms should focus on enabling those rights which have already been dispensed politically into law.

This theory of rights-based development reframes the approach to the rule of law in international development and casts the human being – rather than the state, the market or the development agency – as the key actor in this process. To realise this vision of placing justice at the centre of development, promoting social wellbeing, requires a shift in paradigm. The prevailing focus on primarily promoting aggregate economic growth has put the cart before the horse. By emphasising utilitarian notions of efficiency, it has shown a distributive indifference to notions of equality and a neglect of rights. Economic development cannot sensibly be treated as an end in itself; markets are instrumental in providing social opportunity for transactions. But the pursuit of growth or wealth cannot be the goal of development. Development must provide the means to enhance the lives of people and improve civic wellbeing. To do this justice must lie at the heart of reform endeavour.

These propositions realign the rule of law to the immanence of justice and the quest to promote fairness -- notably for the poor who are most vulnerable to events such as the GFC -- which has been recognised as elemental to human society since Aristotle:

Man, when perfected, is the best of animals; but if he is isolated from law and justice he is the worst of all Justice which is his salvation belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association.¹⁰⁴

Justice and equity are neither absolutely identical nor generically different. This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality.... It is now clear what equity is, and that it is just, and superior to one kind of justice.¹⁰⁵

* * *

¹⁰⁴ Aristotle, 1958, (1253 a 15), 7.

¹⁰⁵ Aristotle, 1955, (1137a - 35) and (1137 b 25-35), 141.

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