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Introduction

> Night after night, in the long hours of the pre-dawn, I awake in Port Moresby, jolted by panic at the enormity of the justice problems, and what at those hours seems the almost laughable insufficiency of $100 million to address them. Why is this? What is wrong? What can I do to help fix them?[1]

In this book, I search for answers to these questions: is judicial reform failing? If so, what can be done to improve it? My central argument is that judicial reform should promote justice. This book calls for justice to be repositioned more centrally in evolving notions of equitable development. This hard-edged, pressing concern is neither abstract nor idealistic. Justice is fundamental to human wellbeing and essential to official development assistance (ODA). Over the past fifty years, however, development has grappled with the challenge of improving the 'rule of law' around the world with often underwhelming and sometimes dismal results. It is now time to realign the approach to promoting justice. This book explains why and how.

There are infinite examples of injustices that blight people's lives. Too often, reform has been blind to these injustices in developing countries. Judicial reform is commonly charged to alleviate poverty through the promotion of economic growth, good governance and public safety. These are certainly worthy goals. But the evidence of 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 book is that these endeavours suffer from foundational conceptual, empirical and political deficiencies. It is now amply clear that

1 Note from my diary, 23 March 2004, Port Moresby, PNG; see below, Chapter 9. In this study, money is denoted in US dollars ($ = US$) unless otherwise specified.

existing approaches are based on inadequate theory, selective evidence and insufficient evaluation.

In particular, I will show that these reform endeavours suffer from two principal shortcomings. First, there is no cogent theory with which to justify their purpose, to date. Second, there is a lack of any established consensus on how to evaluate success, stemming in part from this confusion over purpose. To address these shortcomings, I will 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.

By realigning reform endeavour to focus on promoting justice, there is a much greater prospect of measurable improvement across all aspects of civic wellbeing. I will explain why development agencies should invest in judicial reform for the purpose of promoting justice – that is, to promote outcomes that are more fair and just, rather than to promote 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. 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 that have rendered justice as being instrumental to aggregate economic growth and indifferent to concerns about distribution.

I will explain that the goal of development is to promote civic wellbeing. In order to achieve this goal, judicial reform must promote justice because justice is foundational 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, otherwise known as entitlements. These rights are embodied in law whether at the international, domestic or customary levels. Measurement of the success of these reforms is then demonstrable through visible improvements in the access to and exercise of these normative rights.

This book 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. It focuses on reform as a distinct endeavour in assisting the judicial arm of the state – being the courts, judges and related personnel – to adjudicate the law and administer justice. It will shortly be seen that 'judicial reform' is often

associated – sometimes inseparably – with the more generic endeavour of 'legal reform', and is variously described as 'law and development', 'rule of law' or 'law and justice sector-wide reform'. It will also be seen that this concept is evolving, in terms of encompassing customary as much as formal dimensions, and is increasingly seen through a broader political economy lens. This term is, therefore, to some extent imprecise and its boundaries may be contested. Development is an interdisciplinary enterprise, and there is an overarching need to integrate and reposition notions of justice and law more centrally within it. I will explain why justice must be elevated from its existing instrumental role of supporting economic growth or good governance to a constitutive role in development. Suffice for this introduction to highlight that my focus is primarily on those reforms which promote justice by supporting the courts and the administration by the state of justice for citizens, and secondarily and more broadly on development as a whole.

I will present three case studies from the emerging reform efforts in Asia to address the mounting criticism in the scholarly commentary on the disappointing performance and results of judicial reform over the past fifty years. This disappointment is variously attributed to many causes: among them, the absence of any systematic accumulation of knowledge about what is needed and what works, confusion over stakeholder expectations, and the lack of a compelling theory for reform approach. I will critique this commentary in the context of the particular reform experience in Asia, which, with a population of some 4 billion people, contains 60 per cent of the global population but has received surprisingly little scholarly analysis to this point. While endorsing much of the commentary, I will show that it is itself limited by substantial deficiencies in evaluating judicial reform. In effect, deficiencies in evaluation affect judgements on deficiencies in performance.

This book makes a number of contributions to the literature. It combines an analysis of the philosophical justifications for reform with a critique of the available empirical evidence of what works in practice as a way to appraise the validity of those theories. By combining an analysis of the literatures of judicial reform and of development evaluation, I will offer new insights into the nature and causes of the perceived deficiencies in practice, and the means to address them. I will then contribute a substantial body of empirical evidence from three case studies on the Asian reform experience with which to reassess the existing academic commentary on global reform practice. Finally, on the basis of these contributions, I will propose refinements to the theory and practice of this endeavour.

This research was impelled by my concern about the limited impact of my work as a reform practitioner. I am convinced of the importance of justice; reforming justice systems is my vocation. But, over the years, I found myself confronting growing doubts about the efficacy of most reform activities which seem to miss the injustices that have surrounded me in daily practice. I have observed that people in many developing countries in Asia routinely go without justice. In Port Moresby, Papua New Guinea (PNG), I worked with colleagues whose physical safety was threatened on a daily basis by extremely violent crime which regularly fell beyond the control of the justice system. In Multan, Pakistan, I met litigants whose grandparents' dispute remained entangled in the courts for sixty years. In Ramallah, on the West Bank, I worked with court staff so poorly paid that they openly procured commissions. In Panjshir, Afghanistan, I worked with judges untrained in even the basics of secular law. In Phnom Penh, Cambodia, I worked with judges who knew that confronting the government for stealing land from customary owners had career-terminating consequences. In Ulaanbaatar, Mongolia, I worked with courts unfamiliar with the notions of enforcement of contract. In Dhaka, Bangladesh, I worked in courthouses without electricity or any wherewithal to keep records.

Justice cannot be administered under these circumstances. While the courts are only one focal point for redressing injustice, and many people in developing societies live in the traditional or customary domain beyond the remit of formal justice systems, they are nonetheless the key mechanism of the state to do so. Despite increasingly substantial quantities of development assistance, I found these problems often continued unabated. The best efforts of reform practitioners seemed to go awry, and I found myself constantly grappling with the challenge of being more effective.

So I started to reflect on how to improve my understanding of justice reform. I wished to make sense of the central riddle of why the best efforts in these reforms so often produced anaemic results – sometimes leaving no trace just months later. There must be a better way! What followed was my search for solutions to real problems, so this book is far from being a dusty academic study. The quest for improvement drove me back to the foundations of philosophical thinking and out to the edges of empirical research to deepen my understanding of this endeavour. In doing so, I was humbled by the limits of my own knowledge but enthralled by the extent of existing inquiry. The multidisciplinary dimensions of development – whether of economics, political science or law and

justice – is immensely enriching. I was exhilarated by discovering the elegance and persuasion of the thinking of North, Sen, Weingast, Harvey and Leftwich, among so many others. This quest for knowledge provided me with a space for critical reflection and sheltered me from the insistent demands of daily practice. I had expected to discover clarity. But instead I found myself surrounded by a conundrum of uncertainty, divergent disciplinary inquiries and debates over truth. I challenged these utopian ideas with my experience of 'the real world' of practice in places like Afghanistan, Haiti and Palestine, to ask, *but does it work?* This was at once disconcerting and fascinating. Grappling with and trying to make sense of these mysteries characterised this heuristic journey. It is profoundly daunting to acknowledge the complexity, nuance, ambiguity and contradiction of this enterprise.

Ultimately, we must accept that there may be no meta-truth or 'silver bullet' for perfect justice reform. There is no trite resolution to the contest between a priori 'knowing' and empirical validation. Our understanding remains limited, and we must persevere as best we can in this realisation. In addressing the often dystopian conditions that confront us in development practice, each of us has a choice to be believer, pragmatist, dogmatist, sceptic or seeker. Notwithstanding the uncertainties of the unknown, our collective challenge is to make better sense of this endeavour; to find some order in chaos, reduce complexity to simplicity, and offer practical solutions to immediate problems encountered along the way. I hope that this book will do that.

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.[2] Realigning my reform practice to this innate sense of knowing has impelled this research which embodies the ongoing journey to improve justice reform.

1 Roadmap

In this opening chapter, I provide an overview of the arguments to be presented and a roadmap that describes its structure and content.

2 As we shall see, 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; see below, Chapter 4, text at n. 63.

This book is structured in three parts. Part 1, comprising Chapters 2–5, addresses the issue of the *purpose* of judicial reform. Chapter 2 provides an overview of the history of judicial reform efforts over the past fifty years, commencing in Latin America in the 1960s with the work of USAID and later that of the World Bank. Chapter 3 undertakes an analysis of the nature of these reforms and the commentary on performance. Chapter 4 reviews the philosophic foundations of reform to examine its theoretical justifications. Chapter 5 then scrutinises the available economic evidence on the relationship between justice reform and development as a means of assessing the sufficiency of those justifications.

Part 2, comprising Chapters 6 and 7, links purpose with results by refocusing analysis on the issue of *evaluation*. Chapter 6 examines the state of development evaluation generally. Chapter 7 assesses the evaluation of judicial reform in particular for the purpose of drawing conclusions on the efficacy of those evaluative efforts.

Part 3, comprising Chapters 8–10, presents the empirical segment of the book, being the evidence from practice found in three *case studies* from the Asia Pacific reform experience. Chapter 8 focuses on the law and policy reform program of the Asian Development Bank (ADB) between 1990 and 2007. Chapter 9 deals with AusAID's Papua New Guinea law and justice-sector program between 2003 and 2007. Chapter 10 reviews the experience of practitioners across the Asia Pacific region over the past decade.

Finally, in Chapter 11, I will conclude by gathering the major propositions established throughout the book to show how an alternative approach may be put into practice.

2 Reform purpose

Part 1 will establish a number of key points to support the overarching proposition that the purpose of judicial reform should be realigned to promote justice, which, at its essence, is the promotion of fairness and equity.

Chapter 2 addresses the question 'what is judicial reform?' through a historical survey of the past fifty years, which will show that it has grown from modest beginnings to become an increasingly substantial but still exploratory enterprise.

I will analyse the particular approaches of USAID and the World Bank which serve as exemplars of judicial reform in practice to identify the key features and issues of recent reform approaches. While these vary from

donor to donor, this analysis will reveal that these reforms have acquired an orthodoxy which has predominantly focused on promoting 'thin' or procedural notions of reform – as distinct from the substantive or 'thick' aspects. These reforms generally aim to improve the efficiency of the judicial function and the administration of justice within the formal sector of the state. From the outset, their foundational rationale has been grounded in judicial reform, providing a means to support economic growth. This economic 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 economic model of growth. This model is associated with the now largely discredited 'Washington Consensus'. The instrumental rationale 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. This analysis will show that there has been a range of justifications for judicial reform with economic, political, social and humanistic renderings over this period. Sometimes these justifications are conflated and occasionally they compete. I will demonstrate that judicial reform is still evolving in a formative state, and is yet to formulate any coherent justification or theory.

In Chapter 3, I will extend the survey of reform experience through an analysis of the nature of reform activities. I will show that up to this point there has been a 'standard package' of activities that tends to support efficiency-based improvements to the formal administration of justice, and reflects a broad homogeneity in approach. I will then move on to provide a synthesis of the academic commentary. Building in particular on the works of Trubek, Carothers, Jensen and Hammergren, I will reveal a mounting perception of disappointment in the performance of these reforms, which I will call the 'performance gap'. I use this commentary of disappointment as the hypothesis for this book – in effect that judicial reform has failed to this point. I will endorse much, but by no means all, of this commentary in my analysis in Parts 2 and 3, offering a number of explanations for this disappointment. I do not attempt to assess this disappointment, many of whose causes are managerial and operational. Rather, I focus on and critique those aspects of the commentary which relate to the sufficiency of the theory or justification for these reforms. In this respect, the commentary finds that a lack of cogent theory has confounded judicial reform practice and it calls for a more knowledge-based approach. I identify the significance of this mounting disappointment

as a driving force in refocusing reform efforts. There is some growing recognition of the importance of improving justice reform that is evident in the latest *World Development Report* for 2011, which repositions justice more centrally in development. Indeed, there is emerging evidence that judicial reform may now be undergoing a process of reinvention which offers a potential to transform approach. Collectively, this new wave of reinvention emphasises four themes: empowering the poor, convergence with the human rights literature, legal pluralism and engagement in informal/customary justice, and a political economy approach which integrates justice as a moderating mechanism for competing interests.

Political economy analysis explains the significance of many precepts of justice reform, notably the sovereignty of law and the notion of rights. It also provides a cogent explanation for the role of justice reform within the broader institutional process of supporting development. There is now a more open acknowledgement of the critical role of political power in development. It is in this recognition that constitutionalism addresses the endemic challenge of controlling executive power by providing the mechanism to moderate competing interests of the state. The doctrine of separation of powers severs the agglomeration of political power through the independent function of courts enforcing constraints and accountabilities. For this reason, in any political economy discourse justice is indispensable to formulate an integrated developmental approach.[3] Repositioning justice reform within the development discourse does not, however, answer the key question, what is the role of judicial reform in development? For this reason, I will then address the core issue of defining the purpose of justice.

In Chapter 4, I will focus on the theory of judicial reform and address the question, 'what is the purpose of judicial reform?' I will analyse the philosophical justifications for this enterprise through a study of classical, Enlightenment and modern philosophies from Aristotle to North and Sen. This analysis is foundational in setting the stage for all that follows. In particular, it illuminates tensions in liberal concepts of the state and the role of justice, and enables me to frame the key debates which should determine the formulation of development policy and practice.

3 Political economy is defined here to generally describe the interdisciplinary study of economics, law and political science in explaining how political institutions, the political environment and the economic system influence each other; see detailed discussion in Chapter 3, below, n. 73.

Most significant, this analysis reveals the centrality of the social contract which binds the state to maximising the liberty of the individual in a reasoned trade-off for the common good. Equally significant, it will identify justice as a core function – or public good – of the state in promoting the Aristotelian concept of the good life. Within this liberal conception, justice embodies fundamental notions of fairness and equity which have been long recognised as fundamental to civilised society. This central idea of justice as fairness is not synonymous with equality. Justice as fairness is distinctive in building on notions of equity which have a corrective distributional dimension; that is, restoring rights recognised in law which would otherwise go awry. Self-interest is recognised within this liberal tradition as the engine of economic growth. This analysis will then illuminate the preoccupation of the state in its regulatory relationship to the market, economic development and the alleviation of poverty. This preoccupation underpins the role of judicial reform in development. It will reveal deeply ingrained tensions within the liberal philosophic tradition between the collective and individual good, aggregate growth versus individual equity, and the economic versus the humanistic goals of development.

Any notion of international development without 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. Nonetheless, justice is routinely subverted in many countries. Citizens, usually the powerless poor, are denied justice through impunity, corruption, inefficiency and the abuse of power. These are the usual challenges of reforming justice.

3 What is justice – and why is it important?

To address these challenges, development must define justice. 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. 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 are reflected in the Universal Declaration of Human Rights and are constituted the core covenants of the United Nations.

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 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 the 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 book, justice is considered in two qualitative dimensions: judicial and developmental. In the judicial context, this book 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, this book focuses more broadly on the promotion of justice in its other political, economic and social renditions.

This book explains why justice is central to the quality of development as well as to the work of the courts. Justice in development is 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. As already seen, notions of justice are pluralistic and can be understood to have different meanings and purposes. Pluralism does not, however, eclipse the imperative to specify what is meant by justice, though lawyers have been surprisingly muted in addressing this imperative at development's high table of political economy. This will change as justice