

BREAKING LEGAL INEQUALITY TRAPS: NEW APPROACHES TO BUILDING JUSTICE SYSTEMS FOR THE POOR IN DEVELOPING COUNTRIES

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Abstract: There has long been broad agreement on the importance of building—and enhancing access to—"rule of law" systems in developing countries, but efforts to do either of these things have an unhappy history. These failures, we suggest, are largely a product of a flawed theory of what "law", "justice" and "institutions" are, how they come to take the form they do, and thus how they can be established elsewhere. This theory of institutional reform, however, and the assumptions on which it rests, is not confined to the legal "sector", but to this day pervades and is reinforced by our prevailing development discourse and practice, most obviously with respect to the status of categories such as "social development" and imperatives to seek straightforward "policy implications" of social research. We outline the core tenants and assumptions of this theory, and show how its deployment in "legal judicial reform" has underpinned successive waves of disappointing outcomes. We also outline an alternative theory, and show how it is informing a new generation of innovative efforts to improve the accessibility, legitimacy and effectiveness of justice systems for the poor.

Keywords: *justice sector reform, access to justice, institutional reform, policy reform, social policy*

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To even get to a space where we can think about the types of ‘policy reforms’ that might usefully be deployed to enhance the accessibility, legitimacy and efficacy of justice systems for the poor, we first need to understand what we mean by these concepts. That is, a concern with ‘justice sector reform’ or ‘access to justice’ needs to start with an analysis of first principles, which define and articulate the relationship between law, policy reform and development practice. *First*, why should we care about law and/or justice in the first instance? In particular, why should development practitioners (and development organizations) concern themselves with the legal and rule-based systems that underpin social relations? *Second*, once we have established that legal and rule-based systems are a key aspect of socio-political and economic life—and thus policy reform and development—what does this mean for how we understand different legal and rule-based systems, and how the reform of such systems might be approached? Put another way, how have understandings of legal and judicial systems shaped approaches to justice sector reform, and why have these programs so often failed to achieve their objective? In light of our focus in this paper, how have these approaches served to reinforce ‘legal inequality traps’? *Third*, how do these approaches to justice sector reform reflect current understandings of, and approaches to, ‘policy reform’ more generally? How might a different theory of law and development inform not only different approaches to justice reform, approaches aimed at breaking, rather than reinforcing, ‘legal inequality traps’, but also a different understanding of processes of reform in development more generally?

While these questions are difficult to separate, we explore each of them in turn below. It is our contention that the limited success of previous waves of judicial reform in low income countries have been less a function of inadequate effort, ‘political will’, or implementation ‘capacity’ (though these elements doubtless remain significant), but of a flawed theory of both the ontological status of ‘the law’, ‘policy’, and of institutions and institutional reform more generally. As such, any subsequent efforts at judicial sector reform must be grounded in an alternative (and putatively ‘better’) theory.

1. Imagining the ‘Rule of Law’: Understanding Legal Inequality Traps

The ‘modern’ justice system—‘imagined’ as a rule of law system—that exists in varied permutations in different developed countries around the world is indelibly a constituent element of (and both the result of *and* a pre-requisite for) the modernisation of socio-economic relations.

Such a statement may initially appear uncontroversial, but taken seriously it has broad and important implications for how one understands legal systems and in turn conceives and enacts judicial reform initiatives in low income countries.

The relationship between the modernisation of socio-economic relations and an effectively functioning legal and regulatory system is now widely accepted; such systems are thus seen as key for equitable and sustainable development. The emergence of effective economic institutions, for example, have historically required the enforcement of property rights for a broad-section of society and equality of opportunity—including equality before the law—so that individuals have the incentive and opportunity to take part in economic activity.² Well functioning legal systems have served to reduce transaction costs and increase the predictability of behaviour and certainty of process³; the creation of formal property rights has been shown to reduce the time and costs of transacting by standardizing a transferable title system; countries that have managed to remove the fear of expropriation via enforceable rule systems have been associated with faster levels of economic growth⁴. The agricultural sector in Thailand, for example, has benefited economically from land titling reform. Furthermore, a well-functioning justice system is also crucial for the effective delivery of public services and the distribution of socio-economic and political rights.

In contrast, poor economic institutions have emerged in situations where power resides in the hands of a narrow elite who may grant rights to themselves, but where the rights of most citizens are ignored. In these situations, achieving a more equitable distribution of political power, with constraints on executive power, is therefore seen as crucial to the emergence of sustainable institutions. In many countries, the 'rule of law' is the fundamental basis by which executive power is constrained and property rights are enforced.⁵ Within an idealized 'rule of law' system, equitable legal and regulatory institutions operate as safeguards against abuses of state and non-state power while well-functioning regulatory frameworks are crucial for the effective delivery of public services. A 'rule of law' system is generally characterized by

² These characteristics of and requirements for good economic institutions are discussed in detail in the World Development Report 2006 (World Bank 2005).

³ Matsuo (2004).

⁴ See, for example, the large literature inspired by Knack and Keefer (1995).

⁵ This system also arguably maintains competition within political institutions by establishes mechanisms for vetoes on power and sanctions for the misuse of power; see, for example, Haber (2001).

multiple arms of government—the executive, legislature and judiciary—with each branch holding the others accountable through differing ‘checks and balances’. The separation of powers principle aims to combat the dangers of investing state power in one person or group. The judicial branch, in particular, exists to protect citizens against the arbitrary or inequitable use of political or economic power. Further, predictable and fair ‘rules of the game’ and secure legal rights are seen as the basis for an effectively functioning society where people’s basic rights are protected and conflicts within and between communities are mediated.

Unfortunately, this ideal bears little resemblance to reality in many countries around the world. In many countries legal systems in fact serve to perpetuate inequitable power relations and discrimination, producing what we are calling ‘legal inequality traps’. Structures of inequality affect both the creation of justice sector institutions and the context within which they operate; they are embedded in the rules, practice and norms that perpetuate these institutions. Legal and regulatory institutions, in turn, affect the distribution of opportunities and the processes by which these opportunities can be leveraged to enhance well-being. In some countries, justice sector institutions by their very design perpetuate elite interests at the expense of the majority of the population. In many other countries, formal rules which seemingly protect the interests of the broader community are undermined by institutional practices and informal strategies. Whether understood as ‘elite capture’⁶ or corruption⁷, these systems and practices serve to increase the

⁶ Generally speaking, capture means that the equitable operation of legal, political and regulatory institutions is subverted by the wealthy and the politically powerful for their own benefit. This reference to the subversion of public sector institutions has led some people to refer to this phenomenon as ‘state capture’. Others use the term ‘elite capture’. Elite in this context means any economic, political, ethnic, social or other group trying to promote their interests at the expense of the interests of non-elite members. In the context of this paper, the terms ‘state capture’ and ‘elite capture’ will be used as synonyms. See Glaeser, Scheinkman, and Shleifer (2002) and Hellman and Kaufmann (2002) for a more detailed discussion of elite capture.

⁷ The definitions of corruption are as diverse as the forms corruption can take. For the purposes of this paper, we will understand corruption as the abuse of public power or public office for private gain, taken from You and Khagram (2005). So what is abuse of public power? The term ‘public power’ relates to the exercise of government functions. Their abuse can be imputable to two different perpetrators. The first one is the person who holds public office and exercises government functions. The abuse can be the deed of this public official without anybody else’s participation. The other perpetrator can be a person who seeks to influence by inappropriate means the exercise of government functions that he himself does not have. In this case, corruption is collusive behavior. As a consequence, the abuse of public power comprises both configurations. Private gain in this context is the change of the sound balance between public and private interests (common good) during the decision making process in favor of particular interests. As a consequence, neither the processes nor the outcomes are equitable.

power and wealth of a few at the expense of the majority of the community, leaving the poor suffering the harshest consequences.⁸

2. Norm, Rules, Policies, and Regulations: Understanding the ‘Shadow of the Law’ in a Modern ‘Rule of Law’ Culture

In the modern state, law permeates every aspect of our lives, from everyday transactions such as catching a bus to actions as ‘natural’ or ‘personal’ as having children. Yet social interactions are so embedded within dominant norm-based institutions that these guiding and controlling structures are barely recognised in their everyday functions—that is, of course, unless the rules are transgressed or broken. Only in these transgressions is the reach and inherent power of the system laid bare, as is the interdependent nature of law and what we call ‘policy’. Further, it is only in these transgressions that the need for a basic compatibility between social norms and laws is highlighted; the legitimacy and authority of law is dependent on broad, mutually agreed on social norms, which in turn are shaped by legal institutions. Take two simple examples from Australia that could not, at face value, seem more different: a law student accused of plagiarising a law school assignment, and the birth of a child in an indigenous community in Maningrida, northeast Arnhem land.

Case A. In the first example, it may seem obvious to many people that plagiarism faces tough sanctions within a law school. It may be less immediately obvious, if not thought through in detail, how and why such sanctions play out in practice, and what this tells us about the source of their legitimacy. We follow a generalised example from a university in the state of New South Wales.

When faced with a law student who one believes has plagiarised, a lecturer has a number of sanctions at his/her disposal. Both possible sanctions and possible responses to these sanctions

⁸ The poor, as well as small businesses, suffer most from paying the extra costs for having access to public services, which are associated with bribery, fraud, and the misappropriation of economic privileges. This is why corruption is sometimes compared to a regressive tax, which disproportionately affects small businesses and the poor. For example, Kaufmann’s (2001) discussion of bribes in Peru; the bribes paid do not only amount to a higher percentage of the poor’s income, but the average bribe payment in absolute amounts is also higher among the poor than among the rich. The poor are also most reliant on the provision of public services. However, corruption reduces the effectiveness of public administration and distorts public expenditure decisions, channeling urgently needed resources away from sectors such as health and education to corruption-prone sectors or personal enrichment. See discussion at <http://www1.worldbank.org/publicsector/anticorrupt/topic1.htm>.

by an accused student are set out in law school policy. However, such a policy gains its authority and legitimacy from two equally important cross-checking sources: the broader university regulations on the one hand, and, on the other, the normative understanding that make such sanctions broadly acceptable to the university community.

The broader university regulations allow—and in fact often require—each faculty and school within the university to establish a set of policies that are in line with (and gain their authority from) the broader set of regulations. The university regulations in turn are given their authority from the act that established the university in the first instance, which was more likely possible via delegated powers outlined in the state's higher education legislation. Finally, the state parliament is given authority to pass higher education laws by the Australian Constitution, which sets out the division of powers between the state and federal legislatures. While it might therefore be said that a lecturer's actions within their law class are indirectly governed by the highest law of the land, the broader legal framework also provides a pathway along which the student can challenge such behaviour: the vertical layers of authority down to the law school lecture hall, that legitimate a lecturer's actions, provide corresponding mechanisms to challenge or appeal those actions upwards. The overarching legal system thus provides for the distribution and articulation of corresponding rights and responsibilities, providing mediating institutions for human interactions and relationships, and the inherent distribution of power in those relationships. If an appeal has failed at the level of the law school, the student has a number of other avenues of redress within the university, often ending with an internal academic tribunal. If this fails, a student may then appeal to the external court system and, in principle, may work their way all the way up the system to the High Court.

Ultimately the rules governing interactions with the law school—as outlined in law school policy—and the adjudications processes that resolve disputes around these actions, are governed by an integrated, multi-layered system that stems up to and reaches down from the highest law of the land. At the same time, all levels of this system are also dependent on the system itself being broadly understood and accepted by the wider community, a point we explore in more detail below. As the next example shows, however, in a community as regulated as modern Australia, where the overarching legal framework conflicts with local rule based systems, alternative norms either remain regulated—and thus suppressed—by the dominant system or are left unmediated, creating either a void of interaction or potential conflict.

Case B. It has been said that the indigenous communities in Arnhem land, in northern Australia, live in 'fourth world' conditions. The encroaching modern world has resulted in the construction of towns such as Maningrida, where a variety of different clan groups—that used to carry out a subsistence lifestyle across different parts of the country now closed off by 'modern' property rights and ownership—are brought together to live, and to (arguably) benefit from the provision of aid and modern services such as education and health care. The importation of modern diseases, coupled with the breakdown of traditional social practices that may have provided alternative health care (or at the least more healthy diets), has made these towns a melting pot of diseases, many of which are unheard of in the rest of Australia. In response, the Australian government has attempted to provide a myriad of health-related services, from vaccinations to general health care clinics to aged care facilities.

Given their relative isolation, most specialist medical needs are serviced from Darwin, a two-hour flight from Maningrida. In particular, antenatal care, birthing, and postnatal care are all provided for in Darwin: all expectant mothers are flown to Darwin for up to four months. Given the prevalence of disease and serious health problems, low life expectancies and high levels of neo-natal deaths among Arnhem land communities—and the serious criticism the Australian government faces in relation to these problems—providing specialist services in Darwin is seen by the Australian health authorities and government services as a serious attempt to provide high level medical care and to increase the chances of healthy births. Growing criticism and declining health statistics have resulted in an extremely regulated health care regime: these natal services are not just provided, they are required. All pregnant women in the community are referred to Darwin; in the situation where a woman does not want to go, local health care authorities persuade and/or cajole, and ultimately provide no alternative. Traditional midwives, where they still exist, are not recognised by law, and are considered 'dangerous' by local health care authorities. If a woman ultimately refuses to go—as happened in a recent case—the local health care authorities present them with a tirade of legal disclaimer documents removing any legal responsibility or liability on the government's behalf.

Given the serious health care situation in Maningrida, this may seem like a reasonable (and correspondingly serious) response on the part of the Australian government. In fact, given that all these services are freely provided and that the level of care provided in Darwin is in line with world standards, this may seem like an extremely generous, progressive, rights-based

program (fulfilling and protecting people's right to health). However, besides possible problems with the general level of social control this situation highlights, there is one overwhelming problem with this picture: under indigenous law in Arnhem land communities, the 'place of birth' is a key cultural determinant in clan lines, rights and authority.

While differing systems of law exist among the different clan groups now residing in Maningrida, 'birth place' is accorded some significance in all of them. When expecting a child, women are obliged, under traditional law, to return to 'their country' to ensure the ongoing connection of their children to the land and to the laws that are seen to emanate from that land. This physical connection to the land provides the basis for a child's clan lineage and their rights and responsibilities as ongoing custodians of that land. For Australian health care authorities, however, these disperse birthing practices are too difficult to regulate or to service. It is also important to note that servicing health care needs in some areas would in some cases actually transgress private property rights, where traditional lands have been transformed into private farming lands. On the other hand, traditional health care practitioners and midwives have been disseminated by the breakdown of traditional lifestyles and the relocation and transformation of local communities.

In practice, however, many women still continue to travel back to their traditional lands to birth their children. Their actions are 'outlawed' (or at least outside the law) and thus they are given no help or assistance from local health care providers, who are in fact obliged (by law) not to help them. The breakdown of local communities and the movement of most communities into constructed towns such as Maningrida mean that even when tradition midwives do exist they are generally not in outlying areas. These women continue to experience high levels of birth-related health problems, and high levels of maternal and infant mortality. In contrast, while women who agree to travel to Darwin experience better health outcomes, the birth of many children 'off country' serves to undermine traditional institutions and increases the conflict between local communities and government services, or alternatively between local communities.

The conflict between these local level legal institutions and the dominant legal framework tends to play out—and thus reinforce inequitable social relations and/or influence social change—in a number of different ways. First, the primacy of modern Australian law in these circumstances ostensibly 'outlaws' traditional practices. As a result, traditional laws are

either undermined or forced underground. The breakdown of such practices at birth then has ripple effects through all other areas of traditional law. Second, the conflicts that already existed between the laws of different clans, forced to coexist in a newly constructed social space, are exacerbated. Rather than supporting the development of mediating institutions to assist communities to shape new shared normative institutions, these practices support the construction of 'authentic' indigenous people verses those who have broken with traditional law, leading to conflicts between different evolving notions of traditional rules at the local level. Yet those who have arguably 'broken' with traditional law do not have clear pathways into an alternative system; the space for them to enter into modern Australian life is limited by their socio-economic situations and their isolation, not to mention the ongoing racism faced by indigenous people in broader Australian society. Somewhat ironically, one of the few pathways into modern socio-economic relations is via the exchange of traditional knowledge and artefacts, which themselves are highly dependent on the notion of 'authenticity' and 'traditional culture'.

In short, given the conflicting legal norms faced by a pregnant woman in Maningrida, what may seem as simple and 'natural' as birthing a child, has far reaching consequences for her, her child, and the wider local community, as well as the relationship between this community and broader Australian society. These conflicts mean that what might seem like a sensible and well-funded development initiative may actually serve to undermine the overall wellbeing of these women and children and decrease broader development aims. This is despite (and clearly because of) the primacy of the dominant legal framework and the fact that the lives of such women are extremely regulated by government providers. Furthermore, this is despite the fact that plentiful resources exist to support development in these communities. In fact, both government resources and aid workers are in over supply in a town like Maningrida, which boasts one service provider or aid worker for every twelve indigenous people, and a state-of-the-art school, health care clinic, and even a newly constructed outreach centre from Charles Darwin University (that boasts one indigenous student!). Resources and intentions are not the problem. It is our contention, however, that a misunderstanding of the nature and power of law is.

Three questions that are relevant to development practice arise out of the examples outlined above. *First*, what can such a modern system of regulation tell us about the constituent elements and functions of a rule of law system, and the place and role of 'policy' within the overall framework? *Second*, what are the consequences of conflicting rule-based systems within

a modern legal framework, and how are (or might) these incompatibilities be managed? *Third*, what might the modern manifestation of social regulation tell us about the types of interventions that might or might not be useful in communities (or even countries) where such a mutually accepted and embedded system does not exist?

3. From Imagining a ‘Rule of Law System’ to Designing Justice Sector Reform: the Dominance of *Form over Function*

Given the centrality of rule-based systems, both to how societies function and to how policy reform takes shape, one would think that legal and regulatory considerations would be central to all development projects. While most economists and other development practitioners arguably recognize the importance of law, they tend to take it for granted, ignore it, or focus on isolated laws taken out of their institutional context. On the other hand, the justice sector reform movement could be criticised for taking it to the other extreme—i.e., promoting the design of rule based systems that have little relationship to socio-political and economic practice at the local level. This approach has been reinforced by the assignment of legal and judicial reform issues to a ‘sector’, with reforms of the ‘justice sector’ being abstracted from the broader frameworks of political governance and social norms that are central to its functioning.

Justice sector reform has emerged as a central concern of many development agencies, with strengthening the rule of law being explicitly identified as both a priority development goal in recent international declarations⁹ and as one of the four pillars of development in the Bank’s Comprehensive Development Framework. The Bank currently finances more than 600 projects relating to legal and judicial reform, including 30 freestanding projects in five regions, and has recently committed to ‘scaling up’ these efforts via the new Legal Modernization Initiative (LMI). This commitment is based on the ongoing belief that effective legal and regulatory institutions are essential to both sustaining economic growth and crafting equitable development strategies.¹⁰

The understanding that law is essential to development, while stemming from a long history of jurisprudential and economic thought, was first clearly articulated in the law and

⁹ Including the Millennium Declaration (September 2000), the Monterrey Consensus (March 2002), and the World Summit on Sustainable Development (September 2002).

¹⁰ This topic is explored in some detail in the World Development Report 2006 (World Bank 2005).

development movement of the 1960s. More than a decade of legal reform projects and initiatives, funded primarily by the Ford Foundation and private American donors, engaged academics from leading American universities to assist countries to reform their substantive laws and legal frameworks. The movement rested on a belief that law could be used to change society, “that law itself was an engine for change” and that “lawyers and judges could serve as social engineers” for change.¹¹ The primary goal was to transform ‘legal culture’ through legal education and the transplantation of select ‘modern’ laws and institutions, with an emphasis on economic (commercial) law and the training of pragmatic business lawyers.¹²

A decade later, the movement was declared a failure and those involved in the process made considered efforts to understand its demise.¹³ David Trubeck, a key participant in the movement, argues that the movement rested on four pillars, all of which crumbled. These pillars were

a cultural reform and transplantation strategy; an ad hoc approach to reform based on simplistic theoretical assumptions; faith in spillovers from the economy to democracy and human rights; and a development strategy that stressed state-led import substitution.¹⁴

Arguably, the most significant criticism and reason for the movement’s failure was the belief that American style “legal liberalism” could be transplanted wholesale to developing countries. Reformers found that local legal cultures were highly resistant to change and that even when laws were changed they often had little impact in practice. Of greater concern to those involved was the fact that in some cases new laws served to enhance the power of local elites, presenting “the frightening possibility that legalism, instrumentalism, and authoritarianism might form a stable amalgam so that their efforts to improve economic law and lawyering could strengthen authoritarian rule.”¹⁵

¹¹ Messick (1999)

¹² Trubeck (2003)

¹³ For a discussion of the law and development movement by those involved, see Trubeck and Galanter (1974), Merryman (1977), Gardner (1980), and Trubeck (2003).

¹⁴ Trubeck (2003)

¹⁵ Trubeck (2003)

Critics argued that the movement lacked any clear theory of law, the role of justice systems, or the impact of law on development that could have informed this engagement with other types of justice systems. Local level context and the systems of justice operating in these contexts were largely ignored. As such, the movement failed to acknowledge the systems by which many people (if not most poor people) in developing countries order their lives.¹⁶

The current 'legal and judicial' reform (LJR) movement emerged in the early 1990s, with an understanding that the problems the law and development movement attempted to address were still relevant, namely that legal and regulatory frameworks are crucial for effective economic development. Armed with the lessons of the previous movement, the new initiatives focus more on the institutions underpinning a given legal system rather than on the laws themselves.

Projects are generally designed to strengthen the capacity of key legal and judicial institutions at the state level, where a number of predetermined institutions (courts, ministries of justice, bar associations, law schools) are conventionally accepted as the essential building blocks of a rule of law system.¹⁷ In general, reform initiatives aim to make the judicial branch independent, speed the processing of cases through the courts, increase access to dispute resolution mechanisms, and professionalize the bench and the bar.¹⁸ Activities range from reforming law school curricula and training judges and legal professionals to setting up specialized courts and introducing comprehensive case management systems into the courts. As such, they have generally been designed as top-down technocratic solutions to (what are seen as) institutional gaps or weaknesses. In some cases, reform activities include establishing legal aid clinics and legal information, awareness and literacy programs.

In the past decade, the Bank has financed hundreds of legal and judicial reform initiatives and numerous stand alone projects. Other bi-lateral development agencies and multi-lateral donors have committed hundreds of millions of dollars to reforming judicial systems, with the majority of developing countries and former socialist states now receiving assistance for some

¹⁶ Trubeck and Galanter (1974)

¹⁷ See World Bank (2003) for a discussion of the different institutions that make up a rule of law system.

¹⁸ Messick (1999)

kind of justice sector reform.¹⁹ Unfortunately, however, the latest spate of legal and judicial reform projects, programs and strategies have not managed to report considerably more success than the previous law and development movement. While there is little consensus on what a successful project entails, there are few examples where major impacts have been reported; as Thomas Carothers correctly notes, “projects have fallen far short of their goals”.²⁰ Numerous surveys and evaluations of recent justice sector reform projects arguably bring current approaches to legal and judicial reform into question, once again.²¹

4. Learning Lessons Twice?

Regrettably, some of the explanations given for the disappointing results in Legal and Judicial Reform initiatives over the past decade mirror the lessons learnt from the law and development movement of the 1960s: elite capture of the formal system and the reform process, lack of attention to local contexts and informal institutions, and the ongoing tendency to understand the ‘rule of law’ and the role of law and the judiciary according to a U.S. (or ‘Western’) image.²² Other explanations have included related issues such as the lack of political will within countries and pervasive corruption.²³

As with the law and development movement, the reforms lack a sound theoretical or empirical basis. Despite the fact that it is over 40 years since the law and development movement²⁴ and over a decade since the revived interest in justice sector reform, there remains a dearth of systematic empirical research on the efficacy of justice sector reform programs.²⁵ Frank Upham argues that the ‘new conventional wisdom’—or ‘new rule of law orthodoxy’—within development circles is based on a belief in “regimes defined by their absolute adherence to established legal rules and completely free of the corrupting influences of politics”.²⁶ Upham argues that much of the rule of law orthodoxy is based on myths; not only do such systems not

¹⁹ *Id.*

²⁰ Carothers (1999)

²¹ See, for example, Faundez (1997); Gardner (1980); Gupta, Kleinfeld and Salinas (2002); Hammergren (1998); Lawyers Committee for Human Rights (1996); Rose (1998); US Agency for International Development (1994). See also Chopra and Hohe (2004).

²² Garth (2001)

²³ For example, see Hammergren (1998).

²⁴ For discussions about the ‘failure’ of the law and development movement, see Trubek and Galanter (1974); Merryman (1975); Burg (1975).

²⁵ For a discussion of the problem of knowledge in rule-of-law programs, see Carothers (2004).

²⁶ Upham (2002); see also Golub (2003).

exist anywhere in the developed world, but attempts to transplant a template of rules and institutions into a developing country often undermines pre-existing systems of regulation and conflict resolution.²⁷

Again, one of the major criticisms of LJR approaches over the past decade has been the lack of real engagement with local level contexts, circumstances, and value systems. Systematic research on the interface between informal or customary legal systems and the state regime is particularly limited.²⁸ Critics argue that a "centralized 'top-down' approach to law-making and judicial reform has caused social rejection of the formal legal system among marginalized segments of the populations in developing countries, who perceive themselves as 'divorced' from the formal frameworks of public institutions".²⁹ Moreover, state law is often at odds with informal or customary institutions, which often operate independently. At the same time, reforms that undermine existing informal institutions without providing viable alternatives can create conflict and uncertainty; the ensuing vacuum can lead to power grabbing, lawlessness, or even violent conflict. This is particularly important in highly heterogeneous and unequal communities where there are fewer shared systems of meaning, such as in parts of Africa and Indonesia, for example, where numerous different customary systems operate in a given region (e.g., Bowen 2003).

The framing of justice sector reform as technical assistance or infrastructure reform has also created a contrasting problem. Justice sector reform entails social and political change, and as such often involves realignments of the distribution of power and control over rights and responsibilities. Formal law is not neutral, but rather it articulates, protects and enforces sets of relationships, rights and responsibilities. Justice sector reform in many cases may aim to extend rights and protections to disadvantaged groups in the community, possibly at the expense of the elite. It is therefore crucial to take into account the 'distributional' affects of reform which are

²⁷ *Id.* For a discussion of institutional myth making in other public sector development contexts, see Pritchett and Woolcock (2004).

²⁸ For a survey of literature on the interplay between formal and informal dispute resolution mechanisms, see Messick (1999).

²⁹ Buscaglia (2001)

often neglected in policy and project design; it is essential to recognize that the very process of institutional and regulatory change will often be contested.³⁰

While these possible 'trade-offs' may only be short term, and in fact may be necessary for the long term prosperity of a country, they may still present difficulties in terms of gathering (and sustaining) the political support necessary for effective reform. Reforms intended to reach marginalized groups may be rejected by those who stand to lose power; the struggle to maintain or gain power in the process may mean that formal laws are not enforced or are supplanted by alternative rules or informal systems. In this way, customary institutions may actually hinder the reform process unless they are targeted as part of the reform strategy. While political and economic rights may be introduced into the formal systems, real change is unlikely to occur without a constituency that demands a certain level of service and accountability.

Attempts at institutional reform in other areas have had similar difficulties. Economists have found that while strong institutions provide great insight into the determinants of growth, they are not independent in the development process. Factors like norms, informal systems of dispute resolution, social networks, and tribal customs (among others) may help explain why some countries experience more rapid growth, even if their 'rule of law' scores (as measured by most indices) are the same. Institutional reform isolated from its context has not provided much success in the past; understanding local rules along with their relation to formal systems may provide a more comprehensive picture of the 'optimal' legal system and possibly an avenue toward sustainability.³¹ These wider difficulties with institutional reform highlight a broader problem with approaches to policy reform; namely, models of justice sector reform do not only lie in the imagined realm of 'the rule of law', but are also a clear reflection of accepted notions of 'policy reform' more generally.

5. So what is Policy Reform? 'Justice Sector Reform' as a Reflection of Broader Development Assumptions

In the standard academic and operational paper in development, a review of the literature and an analysis of empirical data (of some kind) give rise to a concluding section on 'policy

³⁰ Pistor (1999)

³¹ Matsuo (2004)

implications'. A number of key assumptions underpin this logic. One is that 'policy' is in fact able to be shaped by argument and evidence; another is that 'policy' is the most important (and, concomitantly, the most accessible and malleable) determinant of the resources, services, or decisions as experienced by citizens/clients: if we get the analysis and evidence right, and can use it to suitably influence 'policymakers', we will sooner or later see corresponding improvements in the welfare of a particular target group (e.g., the poor). A third assumption, on which the second rests, is that all elements of economy, society, and polity are coherently integrated, such that a 'policy change' in one domain can predictably be expected to generate a corresponding shift in another. More problematically, two alternative versions of this third assumption may exist: either that other domains are fully functioning—e.g., Dixit's (2004) idea of the presumed legal system in economics—or that different arenas of socio-economic life can be divided up into actionable arenas divorced from the other more messy elements of human existence. Interestingly, one of the great contradictions of the modernist vision is its obsession with, on the one hand, the separation and categorisation of interdependent variables of human existence (Latour 1993) and, on the other, its dependence on their very interdependence and coherence. Yet, the assumptions reign on: the existence of policy schools, research departments, and think tanks rests heavily of their veracity.

In some important senses and domains of public life, of course, these assumptions are more easily supported. Whether US interest rates should change or not, for example, is determined partially through political imperatives, legal frameworks and professional preferences, but for the most part a handful of smart macroeconomists make their important pronouncements on the basis of a vast assemblage of carefully compiled and rigorously analysed data. More and better data, ipso facto, can be expected to generate wiser 'policy'. But the very ability of one aggregate number, tweaked by a quarter of a percentage point, to influence the price of (and thus demand for) milk in Maine and cars in California depends not merely on pervasive "market forces" but a rich and coherently integrated set of institutions and rule-based systems, from property rights to banking laws to money itself. For a 'policy' to have effect, it must reside at a critical entry point into such an integrated system, whether one is talking about macroeconomic policy shaping top-level regulation, or a lecturer's actions based on law school policy at the bottom. This system, and the capacity to 'manage' it on the basis of (at least nominally) independent professional expertise, is one of the crowning achievements of

modernity; it is a defining characteristic, and a key determinant, of prosperity in the 'developed' world.

However, the coherence of the modernist vision is as dependent on socially accepted norms and practices as it is on manifest structures. The state of institutional arrangements has been socially constructed and politically negotiated over the course of numerous decades (even centuries). This is not to say that the roads to 'modernisation' are necessarily all heading in the same direction to the same destination, with countries merely arrayed at different points along it, as has been claimed by early modernization and Marxist theorists (the legacy of which endures to this day). Rather, our vision is instead one of parallel roads to multiple, largely unknown (at the outset) destinations, the common characteristic being that each country embraces the modernist challenge, but in its own (culturally appropriate, politically legitimate) way. Over time, and as the development process unfolds, the institutions of each country thus come to perform similar *functions* but to display quite idiosyncratic *forms*. Indeed, even a cursory examination of so-called "Western" institutions such as democracy, law and capitalism in today's high-income nations reveal them to have precisely these characteristics: the banking systems of Austria, Canada, and New Zealand, for example, perform very similar tasks for their citizens and sustain broadly comparable standards of living, though their precise histories, institutional forms and regulatory foundations are vastly different.³² Most developing countries are at various points along this road, and as such there is considerable heterogeneity with respect to the capacity and coherence of their institutions and 'systems'; efforts to "fast track" the modernization process in low-income countries by merely transplanting institution designs from high-income countries have routinely been unsuccessful (Scott 1998).

Yet, the image of the benign technocratic 'policymaker' presiding over a coherently integrated system is so powerful and widespread, that we implicitly assume that merely softer variations of it are—or if they are not, should be—in play elsewhere. It is our contention, however, that this model (and the logic on which it rests) has a number of important flaws, and that it is especially problematic to defer to it when considering many of the issues that are at the heart of the social development and legal/judicial 'reform' agenda. Indeed, we posit that not only

³² The interdependent manner in which these processes first unfolded around the globe in the nineteenth century and gave rise to the "birth of the modern world" is deftly outlined by Bayly (2004).

are the terms of this debate problematic in the first instance, but that if social development professionals enter—and thus reinforce—‘policy debates’ cast in these terms, they will routinely lose, and be further marginalized. To see why, it is important to understand that there are two distinctive characteristics of the realms over which social development has ‘policy’ jurisdiction. First, the manner in which social ‘policies’ and ‘programs’ are actually experienced by citizen/clients turns heavily on the discretion of front-line providers, while the very act of delivering them necessarily requires large numbers of face-to-face transactions (Pritchett and Woolcock 2004). Treating AIDS patients, teaching children, resolving local disputes and building farmers’ cooperatives are inherently tasks that cannot be mechanized (and are not, even in high-income countries); improving them is only in the most limited sense a matter of crafting ‘better policy’.

Second, all ‘policies’, but most especially those displaying the characteristics just cited, are mediated in and through a vast assemblage of rules, from informal norms governing everyday interaction to formal contracts underpinning commercial life to statutes documenting the procedures that determine the transfer of political power. In the interest rates example cited above, the workings of the micro-economy depend heavily on trust and shared social norms that enable numerous and complex exchanges to take place between complete strangers (Seabright 2004). In the law school example, shared social norms and multiple layers of laws and rule-based processes enable the lecturer to take action and the dispute to be resolved. In both cases, the very legitimacy of these rules and a willingness to abide by them depends on the presence of a coherent overarching normative order. In this sense, all ‘policies’ have purchase to the extent they are embedded in a binding and legitimate set of rules and agreements between various parties; one can sensibly speak of ‘policy implications’ only to the extent that any such ‘policies’ can enter this space of shared agreements.³³

As approaches to justice sector reform illustrate, lawyers and legal scholars, for their part, are no less imbued with their own variation on these assumptions, believing that achieving just and desirable social outcomes is largely a matter of “getting the laws right” or establishing an “independent judicial branch”. Whether approached from an orthodox ‘social development’ or

³³ The recent film ‘Crash’, set in modern-day Los Angeles, powerfully depicts what happens to these everyday exchanges when the normative order, even just incrementally, begins to break down.

'legal reform' standpoint, then, the ontological status of 'policies' generally, and thus the specific epistemological basis on which one can meaningfully derive 'policy implications' from research and/or contribute to 'policy deliberations', is far more complicated than the seemingly straightforward formulations that permeate contemporary development discourse, and that the modernist imperatives of large bureaucracies tend to require and reward. Recognizing this does not suggest or excuse retreat from such deliberations, but should rather inform a new and broader strategy for thinking about and enacting 'policy', especially as it pertains to social development and the role of rule-based institutions in this and other development arenas.³⁴

What might such a strategy look like? How might such a strategy (or, more accurately, the absence of such a strategy) help explain the unhappy history of attempts to address inherently relational development issues in law reform or the delivery of legal services. Past approaches to justice sector reform demonstrate how flawed assumptions about both 'theory' and 'policy' led to frequent and repeated failure. We do not claim, of course, that better theory alone will solve these complex problems or that our outline of a theory of rules and transitions is necessarily the best available. And it is always easy to be wise after the fact. Our claim, rather, is that it is essential to engage with the (often conflicting) local level legal and rule based systems that exist in a given community, and to understand the cross-cutting influences that these systems, and their interactions with other rule based systems, have of broader socio-economic and political relationships.

6. Rule-Based Realities: The Multiple Faces of Law

Forms of non-state or customary law operate in the majority of nations across the globe.³⁵ Informal institutions range from dispute resolution systems operating in different markets across

³⁴ While we talk about 'social development' in this paper, the irony of this does not escape us. Clearly the sectorization of the 'social' and its separation into a distinct category of development is just as problematic as the sectorization of 'law' (and/or any of the other standard 'sectoral' categories in development). The realm of social development is clearly an artificial construction which at best may demand that development practitioners take social relations seriously, while at worst may serve to further marginalize thinking that falls outside of the 'economic' realm. Either way, we engage with this category because in current manifestation of development practice it exists and, as such—social construction or not—it has real impacts on the way development is currently conceived and practiced.

³⁵ It is important to note that a vast array of practices, systems, traditions have been defined as informal, traditional or customary law, all existing within vastly differing contexts. The use of 'informal' is used in contrast to 'formal' state systems and is not meant to imply that such institutions are procedural informal.

the globe to customary ways of ordering life in remote villages and communities. As highlighted above, the vast majority of human behaviour is shaped and influenced by rule-based and normative frameworks. Even in societies with the most developed legal systems, only about 5% of legal disputes (that is, 5% of situations that have been understood as 'legal') end up in court. At the same time, nearly every aspect of our everyday lives is mediated by both formal and informal normative frameworks, with both institutional and non-legal or social sanctions. However, where state and non-state or normative rule-based systems have developed in relation to each other, they often serve to complement and reinforce socially accepted codes and rules; it is well documented that in countries with more developed legal systems the formal law acts as a backdrop for normative behaviour and interactions in both the private and governmental spheres.³⁶ In contrast, in communities where the state systems lack legitimacy and/or political reach, local level rule-based systems often act completely independently from the state legal system, which may be rejected, ignored or not understood. Real difficulties arise where the normative understandings embedded in local level systems are at odds with the rights and responsibilities articulated in state law.

In many developing countries, rule-based systems operating outside of the state regime are often the dominant form of regulation and dispute resolution, with forms of customary law covering up to 90% of the population in parts of Africa. In Sierra Leone, for example, approximately 85% of the population falls under the jurisdiction of customary law, defined under the Constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone".³⁷ Customary tenure covers 75% of land in most African countries, affecting 90% of land transactions in countries like Mozambique and Ghana.³⁸ Further, customary justice differs depending on the locality and local traditions, as well as the political history of a particular country or region. Ethiopia officially recognizes over 100 distinct "nations, nationalities, or peoples" and more than 75 languages spoken within its territorial borders, although many more exist without official recognition. In many of these countries, systems of justice seem to operate almost completely independently of the official state system.

³⁶ See, for example, Ellickson (1991) and Posner (2002).

³⁷ *The Constitution of Sierra Leone* (1991) Chapter XII Article 170(3).

³⁸ Augustinus (2003)

Some states have tried to integrate traditional systems into wider legal and regulatory frameworks, often with little success. For example, the Constitution of Ethiopia permits the adjudication of personal and family matters by religious or customary laws³⁹ and South Africa's 1996 democratic constitution explicitly recognizes customary law.⁴⁰ Many other countries in sub-Saharan Africa have also made attempts to recognize customary tenure and customary marriage arrangements within their state laws. Efforts to recognize customary land rights have been made in countries in other regions as well, such as Latin America and South East Asia. It is important to note, however, that in countries like Indonesia and the Philippines where customary systems are formally recognized, in practice these systems generally continue to operate independently of the state system (and/or in uneasy tensions with prevailing religious and legal traditions⁴¹).

Imposing formal mechanisms on communities without regard for the local level processes and informal legal systems may not only be ineffectual, but can actually create major problems. First, the failure to recognize different systems of understanding may in itself be discriminatory or exclusionary, and hence inequitable. Second, there are often very good reasons why many people chose to use informal or customary systems which should be considered and understood. Third, there is ample evidence that ignoring or trying to stamp out customary practices is not working, and in some cases is having serious negative implications. Fourth, ignoring traditional systems and believing that top-down reform strategies will eventually change practice at the local level may mean that ongoing discriminatory practices and the oppression of marginalized groups in the local context goes unchallenged. Finally, focusing purely on state regimes and access to formal systems in some ways assumes that such systems can be made accessible to all, while clearly even in the most developed countries this is not the case.

Legal and regulatory institutions gain authority and legitimacy in as much as they reflect social norms and values. In many communities, traditional systems not only reflect prevailing community norms and values, but the state systems lack legitimacy; they are seen as mechanisms of control and coercion used by oppressive regimes. State systems are often seen as vehicles for

³⁹ Under Article 34, *Constitution of the Federal Democratic Republic of Ethiopia*, both parties must consent to have the case heard in a traditional forum. In practice, however, there are no formal links between the traditional and the formal system and no mechanisms to monitor the consent of parties.

⁴⁰ Bush (1979)

⁴¹ On Indonesia, for example, see Bowen (2003).

elite political or economic interests, with fragile institutions and the lack of an empowered citizenry in many developing countries leaving institutions open to corruption and elite capture.⁴² State law may be seen as a repressive tool used by a series of oppressive regimes.

In countries where the state is considered corrupt, working through non-state systems may have better returns for those involved. Even if state systems do not lack legitimacy, they may be at odds with prevailing systems of conflict mediation within a particular community and/or be predominantly inaccessible due to geographical and socio-economic barriers, or alternatively due to a lack of knowledge or awareness of the system on the part of political leaders. Further, state institutions in many developing countries lack basic infrastructure or the capacity to turn law-in-books into "law-in-action".⁴³

Moreover, in many cases state regimes do not have the capacity or legitimacy to fill the gaps in social ordering and conflict resolution when local level systems are undermined. Numerous studies have shown that when neither formal nor informal mechanisms are functioning, human rights abuses and serious conflict are more likely to occur. Formal systems may not only be rejected because they are considered inaccessible or oppressive; they may also threaten traditional power bases by reallocating socio-economic and political rights. In some cases, formal processes can dramatically increase transaction costs, which in turn render market relations less efficient.⁴⁴ In these situations, people often opt out of the formal economic system in order to evade state intervention and/or taxes, and hence must also opt out of the formal legal system.⁴⁵ The process of economic development does not, therefore, automatically increase the demand for formal systems. A clear example of this is provided by the development experience of the so called "East Asian Miracle", in which formal law only played a marginal role, supplanted by negotiations between governments and business elites, government rules and decrees and customary rules and dispute resolution processes.⁴⁶ Informal and customary institutions were arguably underpinning the process of growth and development in these

⁴² For a discussion of political and economic elite capture of state institutions, see Glaeser, Scheinkman, and Shleifer (2002), and Hellman, Jones, and Kaufmann (2003).

⁴³ See Buscaglia (1997)

⁴⁴ Mattei (1998); see also Kranton and Swamy (1999).

⁴⁵ Pistor (1999)

⁴⁶ See Pistor and Wellons (1999).

countries during this period.⁴⁷ At the same time, since the 1980s questions have been raised about the sustainability of such informal arrangements for ongoing development (as evidenced by the manner in which the 1997 financial crisis exposed and exacerbated the limits of institutional arrangements based predominantly on informal mechanisms).

Finally, not engaging with the array of non-state systems of social organization and dispute resolution may mean that informal mechanisms provide an adequate means of dealing with certain types of conflicts, while other types of disputes remain unresolved.

7. Re-imagining Law and Policy: Reintegrating the Rules and Processes of Social Change

So what does all this mean for justice sector reform and policy initiatives that aim to enhance access to justice? Despite the accepted failures of past legal and judicial reform initiatives, it is still widely recognized that effective legal and regulatory frameworks are essential for sustainable economic development and poverty reduction. The question is therefore not whether justice sector reform interventions can or should occur, but rather: What does experience tell us about how best to approach, design, implement and assess policy and project initiatives that attempt to build more equitable justice systems for the poor?

A coherently integrated and iteratively sequenced reform package comprising story, theory, evidence, and practice is needed to inform supportable *strategies* for designing, implementing, and assessing social development projects, especially those that entail trying to improve the quality of justice systems for the poor. One of the main problems with the justice sector reform movement, however, is its focus on a predetermined ideal that is articulated in terms of its *form*, rather than being based on an understanding of the socio-economic and political *functions* that rule-based systems play in any given society (Pritchett and Woolcock 2004); these institutional myths surrounding the 'rule of law' model are embodied in justice reform programs. This approach reflects a theoretical model that starts with a perfect 'rule of law' system, from which dysfunctional systems have deviated.⁴⁸

Rajan (2004) explores the reasons why such theoretical models of perfect systems are considered useful starting points in his discussion of orthodox economic models. He argues that

⁴⁷ Evans (1998)

⁴⁸ This argument draws on Raghuram Rajan's (2004) critique of orthodox economic models.

they are considered reasonable approximations of reality, which give practitioners a useful common point of departure and a shared language and understanding within particular disciplinary circles. Further, such models give us a basis for empirical work, giving us categories, theorems and proofs that can be measured or tested. Rajan, however, argues that the complete market model used by many economists is too far distanced from reality to be useful.⁴⁹ He argues that relying on orthodox economic models makes solutions to development problems seem far simpler than they actually are; particular problems are addressed as if they occur in a world where everything else works. Ultimately, he argues that perhaps we would be better served by starting with an assumption that nothing works:

(For example) Instead of analyzing the effects of introducing contracts in a world where everything else works, a better approach might be to investigate the effects of introducing a legitimate contract in a world where nothing works. Our analysis would be better informed by assuming anarchy as a starting point rather than a pristine world of complete contracts.⁵⁰

Starting with a model of a perfect 'rule of law' system, from which countries deviate, has shaped current approaches to Justice Sector Reform; it helps support a technocratic approach to reform, whereby technical experts try to replicate or import the laws and legal institutions of developed countries in the developing context. As with the approaches to economic reforms that Rajan describes, it makes solutions seem easier than they are and leads to compartmentalized reforms that assume, and in fact often require, that the broader system works. The problem is that not only does the broader system not work in many contexts; it often does not even exist.

This is not to say that the actual justice sector is not a central part of the overall institutional framework of a given society, or to deny that it plays an important role in designing, maintaining, and enforcing the different rights and responsibilities necessary for other institutions to effectively function; it clearly is and does. However, the justice sector in turn relies on powerful normative and political institutions for its legitimacy, authority and accountability.

⁴⁹ Rajan (2004: 56)

⁵⁰ *Id.*, 57.

Rather than starting from a ‘rule of law’ model from which deviations can be measured and targeted, it may be more helpful—and realistic—to ‘assume anarchy’.⁵¹ While political, economic and social rights for disadvantaged people may be introduced with legal reforms, real change is unlikely to occur without attention to broader social dynamics and the effects of reforms on these dynamics. Further, reform processes themselves may be captured if attention is not given to building a civic constituency that can demand a certain level of equity, performance and accountability.

Intra-country differences in legal systems, much like cultural diversity, are part of most societies and do not always result in conflict. When a clear and enforceable system of ‘meta-rules’—defined as an overarching system of rules and processes designed to mediate differences⁵²—is in place, it can serve as a guiding principle by which parties can agree to disagree in a peaceful manner. In some developing countries the formal legal system is not compatible with the law practiced at the village level. In cases where the meta-rules do not cohere with local level traditional laws, it becomes difficult to avert negative outcomes. This problem of incompatibility is not only prevalent between the formal and informal system but also between different customary systems operating in a shared geographic space, a process only intensified by contemporary ‘globalization’ and associated factors (transport, communications) lowering the barriers to both intra- and inter- group interaction.

When different systems of rules and regulations are sufficiently compatible and operate within the same set of accepted ‘meta rules’ (generally provided by the formal system), this multiplicity of rules creates few problems in practice. Engaging with the multiplicity of systems operating in a particular context is an extremely difficult task given the ever-changing nature of such systems and their complexity. Far from being static and/or shrouded in “the mists of antiquity”⁵³, customary systems are shaped by their socio-historical context and the normative responses of a particular community to that context. The central difficulty for both state and local level systems is dealing with their potential and/or actual incompatibilities. Working with local

⁵¹ Rajan (2004)

⁵² The concept of ‘meta-rules’ comes from Barron, Smith and Woolcock (2004).

⁵³ Max Gluckman’s phrase is drawn from his edited volume *Ideas and Procedures in African Customary Law* (1969), published during a period of intense legal reform in the countries under study in this paper.

level institutions to create change has proved to be a more viable way of establishing and supporting the constituency needed to make reforms sustainable. Further, without engaging with this constituency, local level customary institutions continue to undermine the effectiveness of state level reforms.

The Justice for the Poor program in Indonesia, and a parallel research project on understanding local conflict trajectories, provides us with an alternative model for studying informal dispute resolution at the community level, and with it, a fruitful strategy for assessing interactions between customary and state legal systems.⁵⁴ The research project was set up in forty-one villages across four districts within two very distinct provinces in Indonesia (East Java and East Nusa Tenggara) as a means to help us understand the trajectories that local-level conflict follow. Part of the objective of the study was to evaluate the evolution of conflict by tracking its pathway from beginning to end. The approach taken mixes qualitative (i.e., hundreds of interviews of village leaders and stakeholders) and quantitative methods (i.e., key informant surveys, and use of national surveys to inform a rigorous sampling framework) in order to discern information and/or perceptions at multiple units of analysis. Local village characteristics⁵⁵ obtained mostly via surveys, were included in the analysis. The methods applied were also purposely designed to address a complementary concern, namely, whether existing development efforts in place (i.e., the Kecamatan Development Project) had had an impact on the way conflicts were managed.

The approach of using two environments with some shared socio-economic characteristics allowed for comparability between the trajectories taken when dealing with conflict. Studying the pathway of disputes at the lowest geographic unit—sub-district or village—and applying theoretical and empirically based methods generated some clear results. Three analytical realms in understanding patterns and trajectories of conflict emerged from the project.⁵⁶ First, the 'rules of the game' (laws and norms by which disputants and other participants interact); second, the 'dynamics of difference' (norms and politics affecting the

⁵⁴ The information presented regarding the Indonesia case is based on Barron, Smith and Woolcock (2004) and Barron, Diprose, Madden, Smith, and Woolcock (2004).

⁵⁵ These factors could range from economic, psychological, social, political, institutional, cultural, and many other potentially influential characteristics specific to the village where the case takes place.

⁵⁶ See Barron, Smith, and Woolcock (2004).

groups engaged); and third, the 'efficacy of intermediaries' (the willingness, capacity and legitimacy of third-party actors and institutions). Perhaps the most significant contribution of the project is the possibility of replication. Conflict is a global phenomenon and studies like this one help dissect the dynamics of it, provide operational value and set the ground-work for future complementary research that can guide legal reform efforts on the basis of context-specific knowledge.

One consequence of this research and companion work on 'justice for the poor' in Indonesia has been the design of a new project—Support to Poor and Disadvantaged Areas (SPADA), intended for regions experiencing conflict—which will include a specific component on access to justice (called SPADA+). Research conducted as part of the 'Breaking Legal Inequality Traps' Study (BLITS) will endeavour to assess, in a rigorous empirical manner, whether and how such interventions work. A similar initiative has been underway in Cambodia for over a year, where primary research on collective disputes (around land and labour) between villagers and the state is being conducted in preparation for a new IDA grant in 2007. Most recently, funding has been secured for companion studies in Africa, in countries with different colonial legal legacies: Sierra Leone (British), Mozambique (Portuguese), Rwanda (French), and Ethiopia ('neutral'). The overarching objective of this research will be to assess how prevailing customary legal systems interact with the state, and to explore how projects might be designed to better articulate them.

8. Conclusions

The central call of this paper is for a focus on issues at the intersection of social development, 'policy', and judicial reform that we believe have been seriously neglected, and that have undermined both the intellectual stature of social development and the capacity of practitioners to implement legitimate and sustainable legal reforms in low-income countries. These issues can be neatly summarized as: the missing law in policy, the missing rules in law, and the missing normative/cultural understandings in rules. That is, discussions of 'policy' routinely overlook the fact that such instruments whose content and enforceability are largely instruments grounded in law; discussions of law tend to focus exclusively on formal manifestations and codifications of rules rather than the much broader array of rules systems of which 'the law' is a (small) part; and discussions of rules too often ignore the fact that they are

social constructions—cultural and normative understandings that establish and legitimize appropriate behaviour.

Whilst serious critique is important for making sense of past failures and creating space for new approaches, we would be remiss if we did not also seek to enter that space with a coherent, supportable, and implementable alternative. The alternative we propose is one self-consciously (and, we hope, confidently) grounded in a social theory of local level transformations and the modernization of social relations, combined with an anthropological sensibility with respect to the social construction of rules systems, both formal and informal. This approach has informed, is informing, and will continue to inform a new generation of in-depth mixed methods (qualitative and quantitative) empirical studies in East Asia and Africa, with the goal of generating a rigorous and context-specific evidence base on which to better understand (a) prevailing local rules (and dispute resolution) systems, (b) the nature and extent of their articulation with the state, and (c) the efficacy of local interventions designed to improve the coherence, accessibility, legitimacy, and accountability of both.

'Development', as the very word implies, is a very deliberate attempt at initiating and/or facilitating modernization. As such, and because rules (formal and informal) and social relations underpin the basis of exchange in even the most 'advanced' economies, attempts at 'modernizing' the legal system in low income countries must necessarily be undertaken as part of a broader strategy that explicitly recognizes that the judiciary is but one (very) small part of the broader set of decision-making, priority-setting, and dispute resolution mechanisms in society. Put most starkly, judicial reform is bound to fail if it focuses only on the formal, codified aspects of those mechanisms, ignoring (by design or default) the broader system of rules which gives them legitimacy. Finally, 'modernizing' rules systems is a dangerous and messy business, not least because it entails shifting a prevailing equilibrium which certain powerful groups quite enjoy, and are unlikely to relinquish without a struggle. As such, and because no 'development professional' (from any disciplinary background) is trained in how to do any of this⁵⁷, project designers and researchers alike should therefore undertake such ventures iteratively, with their own feedback and accountability mechanisms, and, not least, with suitable circumspection.

⁵⁷ Development professionals have, at best, a driver's license, their training primarily preparing them to 'operate' (or at most tinker with) an existing, well-functioning system rather than design one from scratch.

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