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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 a long and unhappy history. These disappointments, we contend, stem largely from a prevailing theory that overlooks (a) the interdependence of 'policies', 'laws', and 'rules systems', (b) the cultural contexts in which all three are inherently embedded, (c) the political processes by which they acquire their institutional form and legitimacy, and thus (d) the complexities associated with undertaking judicial reform initiatives. We outline an alternative approach which centers on understanding what we call 'legal inequality traps', 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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Introduction

Development scholars and practitioners now widely accept the importance of an effectively functioning legal and regulatory system for achieving equitable and sustainable development outcomes. Strengthening the rule of law is explicitly identified both as a priority development goal in recent international declarations[*] and as one of the four pillars of development in the World Bank's Comprehensive Development Framework. The World 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 through the new Legal Modernization Initiative. Other bilateral development agencies and multilateral 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 kind of justice sector reform (Messick 1999).

This commitment is based on the ongoing belief that effective legal and regulatory institutions are essential for sustaining economic growth and crafting equitable development strategies.[†] For example, effective economic institutions have historically required (a) enforcement of property rights for a broad section of society and (b) equality of opportunity (including equality before the law) so that individuals have both the incentive and the opportunity to take part in economic activity.[‡] Well-functioning legal systems have served to reduce transaction costs and increase the predictability of behaviour and certainty of process (Matsuo 2004). The creation of formal property rights has been shown to reduce the time and costs of transacting by standardising a transferable title system. Also, countries that have succeeded in removing the fear of expropriation through enforceable rule systems have been associated with faster levels of economic growth.[§]

A well-functioning justice system has also been crucial for the effective delivery of public services and the distribution of socioeconomic and political rights. In many countries, the "rule of law" provides the fundamental constraint on executive power. A rule-of-law system is generally characterised by multiple arms of government (executive, legislature, and judiciary), with each branch holding the others accountable through differing "checks and balances."[**] The judicial branch, in particular, exists to protect citizens against the arbitrary use of political or economic power. Furthermore, predictable and fair "rules of the game" and secure legal rights are regarded 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, where legal systems in fact serve to perpetuate inequitable power relations

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[*] These include the Millennium Declaration (September 2000), the Monterrey Consensus (March 2002), and the World Summit on Sustainable Development (September 2002).

[†] This topic is explored in some detail in *World Development Report 2006: Equity and Development* (World Bank 2005).

[‡] These characteristics of and requirements for good economic institutions are discussed in detail in *World Development Report 2006: Equity and Development* (World Bank 2005).

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

[**] This system also arguably maintains competition within political institutions by establishing mechanisms for vetoes on power and sanctions for the misuse of power (see, for example, Haber 2003).

and discrimination, producing what we call “legal inequality traps”. In many more countries, the formal legal rules are reflected in neither policy nor practice, or they have no relationship to local rule-based systems and the social norms that underpin such systems. Formal rules that appear to protect the interests of the broader community are undermined by institutional practices, informal strategies, or conflicting rule-based systems and social norms. Structures of inequality affect both the creation of institutions in the justice sector 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.

If a consensus is emerging on the general importance of these issues, however, it has not yet translated into a successful programme of action for building “rule-of-law” systems in low-income countries. Indeed, attempts by development practitioners and policy makers to undertake judicial reform to build the rule of law and thereby enhance good governance have a long and rather unhappy history. This chapter outlines an explanation for this problematic history that builds on and refines previous approaches, while offering an alternative research-based policy agenda. First, it provides a summary of the literature that has assessed and attempted to explain the record of judicial reform initiatives over the past four decades. Then, it documents three central elements that have largely been absent from both these explanations and the models underpinning the judicial reform initiatives themselves. These elements can be summarised, loosely, as the missing law in policy, the missing rules in law, and the missing norms in rules. The concluding section shows how correcting these missteps has led—and might plausibly continue to lead—to strategies with (one hopes) a higher probability of success.

Assessing and explaining judicial reform initiatives since the 1960s: a brief survey

The insight that law is essential to development stems from a long history of jurisprudential and economic thought (Tamanaha 2004), but it was first clearly articulated in the law and development movement of the 1960s. More than a decade of legal reform projects and initiatives, funded primarily by the Ford Foundation and private U.S. donors, involved academics from leading universities in the United States in helping countries to reform their substantive laws and legal frameworks. The movement rested on the 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 (Messick 1999: 12). 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 (Trubek 2003).

A decade later, the movement was declared a failure, and those involved in the process attempted to understand its demise.[††] Arguably, the most significant criticism was of the underlying assumption—that American-style “legal liberalism” could be transplanted wholesale to developing countries—which was accused of bringing about the movement’s failure. Reformers found that local legal cultures were highly resistant to change and that, even when laws were changed, they often had little influence in practice. Of still greater concern to those involved, in some cases new

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

laws actually 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” (Trubek 2003: 6). Critics argued that the movement lacked the theoretical understanding of law, the role of justice systems, or the effect of law on development that could have informed this engagement with other types of justice systems. Local contexts and the systems of justice operating within them were largely ignored. Thus, the movement failed to acknowledge the systems by which many people (if not most poor people) in developing countries order their lives (Trubek and Galanter 1974).

The current legal and judicial reform (LJR) movement emerged in the late 1980s, with an understanding that the problems the law and development movement had attempted to address were still relevant—in other words, that legal and regulatory frameworks were crucial for effective development. Armed with the lessons of the previous movement, the new initiatives focused more on strengthening key legal and judicial institutions than on the laws themselves, with a number of predetermined institutions (courts, ministries of justice, bar associations, law schools) accepted by convention as the essential building blocks of a rule-of-law system.[‡‡]

In general, initiatives have aimed to make the judicial branch independent, speed up the processing of cases through the courts, increase access to dispute resolution mechanisms, and professionalise the bench and the bar (Messick 1999). Activities to accomplish these goals have ranged from reforming law school curricula, to training judges and legal professionals, to setting up specialised courts and introducing comprehensive case management systems into the courts. Accordingly, they have generally been designed as top-down technocratic solutions to (what are seen as) institutional gaps or weaknesses. In some instances, reform activities have included establishing legal aid clinics and legal information, awareness, and literacy programmes.

Unfortunately, however, the latest spate of LJR projects, programmes, and strategies has failed to report any significant increase in success over the previous law and development movement. Although little consensus exists on what a successful project entails, examples of significant, positive, and sustained impacts are few. At the same time, numerous surveys and evaluations have brought accepted approaches to reform into question again (see, for example, Faundez 1997; Gardner 1980; Gupta, Kleinfeld, and Salinas 2002; Hammergren 1998; Lawyers Committee for Human Rights 1996; Rose 1998; see also Chopra and Hohe 2004). As Thomas Carothers (1999: 170) notes, LJR projects “have fallen far short of their goals.” Regrettably, some of the explanations given for these disappointing results mirror the lessons of the 1960s: elite capture of the formal system and the reform process, lack of attention to local contexts and informal institutions, and an ongoing tendency to interpret the “rule of law” and the role of law and the judiciary on only a U.S. (or Western) model (Garth 2001). Other explanations of failure have included such related issues as the lack of political will within countries and pervasive corruption (for example, see Hammergren 1998).

[‡‡] World Bank (2003) provides a nice discussion of the different institutions that make up a rule-of-law system.

Reforms continue to lack a sound theoretical or empirical basis. Although more than 40 years have passed since the law and development movement[§§] and well 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.[***] Again, approaches have been criticised for their lack of 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.[†††] Critics argue that a centralised, top-down approach to law making and judicial reform has caused "social rejection of the formal legal system among marginalised segments of the populations in developing countries who perceive themselves as 'divorced' from the formal frameworks of public institutions" (Buscaglia 2001: 2). Moreover, state law is often at odds with informal or customary institutions, which frequently operate independently. At the same time, reforms that undermine existing informal institutions without providing viable alternatives can lead to power grabbing, lawlessness, or even violent conflict.

The framing of justice sector reform as technical assistance or infrastructure reform has 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. Frank Upham (2002: 7) 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" (see also Golub 2003). Policy and project design often neglects the distributional effects of reform and thus the fact that such processes will often be contested (Pistor 1999, Pistor and Wellons 1999). Although these possible tradeoffs may only be short term and may in fact even be necessary for the long-term prosperity of a country, they can still present difficulties in terms of gathering (and sustaining) the political support necessary for effective reform. Upham (2002) argues that much of the rule-of-law orthodoxy is based on myths: not only do such systems not exist anywhere in the industrial world, but attempts to transplant a template of rules and institutions into a developing country often undermine preexisting systems of regulation and conflict resolution.[‡‡‡]

It should be clear from the preceding passages that a major reason behind the consistently disappointing record of judicial reform initiatives by the international development community is the inadequate theory underpinning them. Given this, it would be reasonable to suggest that an alternative theory would give rise to alternative (and, at least potentially, superior) approaches. The next sections provide a companion analytical critique of the judicial reform initiatives, regarding them as emblematic of broader faults with development policy in general. This critique is organised around three central themes: the missing law in policy, the missing rules in law, and the missing norms in rules.

[§§] Further discussions about the "failure" of the law and development movement are provided in Burg (1975), Merryman (1977), and Trubek and Galanter (1974).

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

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

[‡‡‡] For a discussion of institutional myth making in other public sector development contexts, see Pritchett and Woolcock (2004).

Toward an alternative approach: three levels of understanding

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, unless, of course, the rules are transgressed or broken. Only in these transgressions is the reach and inherent power of the system laid bare, as is the interdependence of law and what is called "policy." Moreover, only in these transgressions is the need for a basic compatibility between social norms and laws highlighted. That is, through such transgressions, the law's dependence on broad, mutually agreed social norms (which, in turn, are shaped by legal institutions) for its legitimacy and authority becomes evident.

These concerns can be articulated more formally as follows. Cultural norms and social context crucially determine the content, legitimacy, and enforceability of rules systems. These rules systems, in all their heterogeneity, both underpin and are a constituent element of the prevailing legal system, and it is the legal system that underpins (and makes actionable) government policies. Therefore, any attempt to enact or change development policies (including social development policies) must engage with the legal system. Engaging with the legal system, in turn, means understanding the constituent rules systems, which, in turn, means understanding the social norms on which they rest. All three steps of this sequence are missing (or mostly missing). This observation applies most graphically (for present purposes) with respect to judicial reform initiatives but also more broadly in development discourse and practice. This chapter explores these steps by drawing on three simple examples from countries with arguably similar legal traditions based on the British common-law system: the United Kingdom, Australia, and South Africa.

(a) The missing law in policy

Consider a law student at a London university who is caught plagiarising on an assignment. It may seem obvious to many people that plagiarism attracts 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 response tells us about the source of their legitimacy.

When faced with such a student suspected of plagiarism, a lecturer has a number of sanctions at his or her disposal. Both possible sanctions and possible responses to these sanctions by an accused student are set out in law school policy. However, such a policy gains its authority and legitimacy from two areas of crosscheck, which are of equal importance: the broader university regulations and the normative understanding that makes such sanctions broadly acceptable to the university community.

The broader university regulations allow (in fact, often require) each faculty and school within the university to establish a set of policies consistent with (and gaining their authority from) the broader set of regulations. The university regulations, in turn, are given their authority by the act that established the university, which was most probably made possible by delegated powers outlined in the government's higher-education legislation. Finally, the Parliament is given authority to pass higher-

education legislation by constitutional principles, which set out the division of powers between each arm of government.[§§§]

It might thus be said that a lecturer's actions within his or her law class are indirectly governed by the highest law of the land. Moreover, this broader legal framework provides a pathway along which the student can challenge such behaviour: the vertical layers of authority legitimating a lecturer's actions, down to the law school lecture hall, provide corresponding mechanisms to challenge or appeal those actions upward. In this way, the overarching legal system 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 avenue fails, the student may then appeal to the external court system and, in principle, work his or her way all the way up the system to the House of Lords.

Hence, the rules governing interactions with the law school (as outlined in law school policy), and the adjudication processes that resolve disputes around these actions, are governed by an integrated, multilayered system that stems up to, and reaches down from, the highest law of the land. At the same time, all levels of this system depend on the system itself being broadly understood and accepted by the wider community.

Although law is clearly embedded in both policy and practice in such an industrial world context, development practitioners (arguably recognising the importance of law) tend to take it for granted, ignore it, or focus on isolated laws taken out of their institutional context (Decker, Sage, and Stefanova 2005). As previously indicated, those who do focus on the role of law in development have tended to focus on institutions seen as making up the justice sector in an isolated and disconnected way; thus, reforms of the justice sector are often disconnected from the broader policy environment that is, on the one hand, crucial to the translation of law into practice and, on the other hand, dependent on a legal framework and institutional system for legitimacy, authority, and ultimately enforcement. Understanding the interdependence of laws, policies, and norms is even more crucial when multiple normative and rule-based systems are at play, as is the case in most developing countries. The examples later in this chapter show that people's abilities to order their lives and resolve their disputes are often complicated by the existence of competing rule systems. In situations where an overarching legal framework conflicts with local rule-based systems, local systems tend to be either regulated (and thus generally suppressed) by the dominant system, or left unmediated, often creating either a void of interaction or potential conflict. Understanding these dynamics is key to understanding and supporting processes of change.

(b) The missing rules in law

If the efficacy of policies turns, ultimately, on their grounding in the law, the efficacy of the law is influenced by its compatibility with the broader rules systems of which it is a part. Consider, for example, human rights law in postapartheid South Africa. South

[§§§] The U.K. constitution is unwritten, unlike the constitutions of many other common-law countries. Instead, this uncodified constitution is found in a variety of documents and constitutional conventions. The supremacy of Parliament and the rule of law are the two basic principles of the constitution.

Africa's 1996 constitution has been touted as one of the developing world's most progressive national constitutions. In an attempt to combat years of oppression and dispossession, the government of South Africa made legal reform and the commitment to human rights and nondiscrimination a national priority. At the same time, in an effort to recognise the country's cultural heritage and respect the right to cultural self-determination, the government has maintained a dual system of law that explicitly recognises traditional systems of governance and customary law. Although an admirable approach to a complex history and a diverse set of interests, this approach is not without its difficulties for some of the most vulnerable in the community.

Colonial rule has arguably had a large (distorting) impact on the customary law systems of many African countries today (Mamdani 1996). As early as 1830, in a process now labelled "indirect rule," chiefs in the UK-administered Cape Colony were granted authority to enforce indigenous law, subject to colonial review. By 1927, the evolved dual system of law was formalised under the Black Administration Act, which formed the basis of the apartheid system. About 1,500 chiefs' and headmen's courts continue to operate in rural parts of the country and remain governed by the 1927 act (Bennett 1991).

Since 1994, South Africa has worked on bringing traditional systems into the state framework. Traditional institutions and laws are all officially recognized in the 1996 constitution and, after a long political process, the National Traditional Leadership and Governance Framework Act was promulgated in 2004. This act set out the roles and responsibilities of different levels of traditional leaders and institutions and described their relationships to the different levels of government. Many celebrated the constitutional and administrative recognition of customary law, but difficulties remain. For example, although the principles of equality and nondiscrimination are enshrined in the constitution and the right to culture is deemed secondary to the right to equal treatment, the dualistic system of laws still has the potential to discriminate against marginalised groups.

Historically, women have been discriminated against under customary law, which has denied them the right to own land, leaving them under the guardianship of their husband or male relative. In almost all tribes in South Africa, succession is based on the principle of primogeniture, whereby the estate is essentially passed down to the next male kin. Although the male heir is generally responsible for caring for the estate, which includes the widow and children, this responsibility is, in practice, often very difficult for the widow to enforce.

The formal protection of women's rights under the constitution meets numerous obstacles in practice. In general, women lack access to the formal court system to claim or enforce their rights. Any attempts to override the customary system may lead to further ostracism from the community. Furthermore, the formal system is often inconsistent in its attitude to discriminatory customary practices. It is often unclear to magistrates and judicial officers when they are bound to follow customary law and when they might consider such customs discriminatory.[****] For example, in the 1997 case *Mthembu v. Letsela*, the court ruled that the principle of primogeniture is not discriminatory given that women are entitled to maintenance out of the estate. However, in 2003, the High Court in the landmark *Bhe* case held that two girls, who were minors, had the right to inherit their deceased father's estate. In this case, the

[****] See Centre for Housing Rights and Evictions (2004) for discussion of the arbitrary nature of magistrate's decision making in relation to customary law.

court held that not only is primogeniture discriminatory, but also that any legislation allowing such discriminatory laws to be applied is unconstitutional. The case goes some way, arguably, to furthering the protection of women's constitutional rights, but it does not address the dominant pressures and constrictions that women face in terms of social norms and practices, nor the limitations they have in terms of access to justice.

Clearly, designing or reforming legal frameworks that are disconnected from (or in contradiction with) local rule systems is unlikely in practice to produce the types of changes that one might hope for. To be effective, law must be socially embedded. Yet for communities to gain access to broader political decision-making processes, economic markets, or public services, or if they need to resolve a conflict with a government official or another community or entity, a common, agreed-on set of "meta-rules" must exist within which people can operate.[††††] The question for development practitioners then becomes how such "compatible" or more widely accepted legal systems are developed.

(c) The missing norms in rules

If policies need to be grounded in the law, and the law, in turn, in an understanding of constituent rules systems, then rules systems themselves also need to be considered in the context of the political structures, social relations, and cultural norms from whence they arise and in which they are necessarily embedded. The failure (or perhaps, given the organisational logic and imperatives within which they operate, the inability) of the policy community to understand the importance of social norms for effective rules systems is graphically exemplified by the case of indigenous communities in Arnhem Land, in northern Australia.

Many Aboriginal communities in Australia live in "fourth-world" conditions (see Altman 2004; Halloran 2004). The encroaching modern world prompted the construction of towns such as Maningrida, where a variety of different clan groups are brought together to live and to benefit (arguably) from the provision of aid and modern services such as education and health care. These groups formerly maintained a subsistence lifestyle by moving across different parts of the country, now closed off by "modern" property rights. The importation of modern diseases, coupled with the breakdown of traditional social practices that may have provided alternative health care (or at least more healthy diets), has left 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 myriad health-related services, from vaccinations, to general health care clinics, to care facilities for the elderly.

Because the town is relatively isolated, most specialist medical needs are serviced from Darwin, a two-hour flight from Maningrida. In particular, prenatal care, birthing, and postnatal care are all provided in Darwin: expectant mothers are flown there for up to four months. Given the prevalence of disease and serious health problems, low life expectancies, and high levels of neonatal deaths among Arnhem Land communities (and the criticism faced by the Australian government in relation to these problems), the Australian health authorities see the provision of specialist services in Darwin 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

[††††] The concept of "meta-rules" comes from Barron, Smith, and Woolcock (2004).

community are referred to Darwin. If a woman does not want to go, local health care authorities persuade or cajole her 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, in the last instance, a woman refuses to go (as happened in a recent case), the local health care authorities present her with a suite of legal disclaimer documents, denying any legal responsibility or liability to the government.

In the face of the serious health care situation in Maningrida, this response may seem reasonable (and correspondingly serious) 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, the programme may seem extremely generous, progressive, and rights based (because it fulfils and protects people's right to health). In addition to possible issues with the general level of social control highlighted by this situation, however, this picture has another overwhelming problem: under indigenous law in Arnhem Land communities, the place of birth is a key cultural determinant of clan lines, rights, and authority.

Differing systems of law obtain among the different clan groups now residing in Maningrida, but birthplace is accorded some significance by all of them. Women who are expecting a child 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 it. This physical connection to the land provides the basis for a child's clan lineage and rights and responsibilities as an ongoing custodian of that land. For Australian health care authorities, however, these birthing practices are too difficult to regulate or to service. Also, servicing health care needs in some areas would actually transgress private property rights, where traditional lands have been transformed into private farms.

In practice, however, many women continue to travel back to their traditional lands to birth their children. Their actions are outlawed (or at least are outside the law), and so they are given no assistance by local health care providers, who are, in fact, obliged by law not to help them. Thanks to the breakdown of local communities and the movement of most communities into constructed towns such as Maningrida, even when traditional health care practitioners and midwives do exist, they tend not to be found in outlying areas. There, women continue to experience high levels of birth-related health problems and high levels of maternal and infant mortality. Conversely, although those women who agree to travel to Darwin do experience better health outcomes, the birth of many children "off country" serves to undermine traditional norms and increases the conflict between local communities and government services, or between local communities.

The conflict between these local cultural norms and the dominant regulatory framework tends to play out (and so reinforce inequitable social relations or influence social change) in a number of ways. First, to frame processes of birthing as a technical problem with a corresponding technical regulatory solution is to ignore—and thus to undermine—prevailing social norms within the community. The primacy of modern Australian law in these circumstances "outlaws" traditional practices. As a result, traditional laws are either eroded or forced underground. The breakdown of such practices at birth has cascading ripple effects through all other areas of traditional law.

Second, the conflicts that already existed between the laws of different clans, now forced to coexist in a newly constructed social space, are exacerbated. Rather than supporting the development of mediating institutions to assist communities in shaping

new shared normative institutions, these practices serve only to construct a distinction between "authentic" indigenous people and those who have "broken" with traditional law. This distinction leads 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 socioeconomic 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 socioeconomic relations is through the exchange of traditional knowledge and artefacts, which themselves are highly dependent on notions 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 as natural as giving birth to 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. Because of these conflicts, what might have been designed as a sensible, progressive, and well-funded development initiative may actually undermine the overall well-being of these women and children and decrease broader development aims despite (indeed, because of) the primacy of the dominant legal framework. Moreover, the problem occurs despite the plentiful resources that exist to support development activities in these communities. In fact, both government resources and aid workers are in oversupply in a town like Maningrida, which boasts a service provider or aid worker for every 12 indigenous people, a state-of-the-art school and health care clinic, and even a newly constructed outreach centre from Charles Darwin University (with a single indigenous student). Resources and intentions are not the problem. Rather, the problem is a misunderstanding of the nature and power of law.

Three questions

Three questions relevant to development practice arise from the preceding examples. 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 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 be) these incompatibilities managed? Third, what can 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?

The contemporary "justice sector reform" challenge

It is important to consider the nature and scope of the problems to be addressed. As already highlighted, the vast majority of human behaviour is shaped and influenced by rule-based and normative frameworks. Even in those societies with the most developed legal systems, only about five percent of legal disputes end up in court. (That is, five percent of situations are understood as "legal.") At the same time, nearly all aspects of our everyday lives are mediated by formal and informal legal systems, as well as normative frameworks.[‡‡‡‡]

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

Where state and nonstate or normative rule-based systems have developed in relation to each other, however, they often 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" (or shadow) for normative behaviour and interactions (see, for example, Ellickson 1991; Posner 2002). In contrast, in communities where the state systems lack legitimacy, political reach, or both, local-level rule-based systems often act completely independently from the state legal system, which may be rejected, ignored, or not understood. In many developing countries, rule-based systems operating outside the state regime are the dominant form of regulation and dispute resolution, with forms of customary law covering up to 90 percent of the population in parts of Africa.[§§§§] Real difficulties arise when the normative understandings embedded in local-level systems are at odds with the rights and responsibilities articulated by state law. In many communities, not only do traditional systems reflect prevailing community norms and values, but also the state systems lack legitimacy; they are seen as mechanisms of control and coercion for oppressive regimes.

Some Sub-Saharan 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 laws,[*****] and, as previously outlined, South Africa's 1996 democratic constitution recognises customary law explicitly (Bush 1979). Efforts to recognise customary rights have also been made in Latin America and Southeast Asia.[†††††] In practice, these systems generally continue to operate independently of the state system (and sometimes in uneasy tensions with prevailing religious and legal traditions).

Imposing formal mechanisms on communities without regard for the local-level processes and informal legal systems is not only potentially ineffectual but can also create major problems, for several reasons. First, the failure to recognise different systems of understanding may in itself be discriminatory or exclusionary and, hence, inequitable. Second, many people have very good reasons for choosing to use informal or customary systems (for example, because they are readily accessible, are understood, and are believed to have a legitimate jurisdictional mandate). Third, ample evidence shows that ignoring or trying to stamp out customary practices does not work and, in some cases, has 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 marginalised groups in the local context will go unchallenged. Finally, focusing purely on state regimes and access to formal systems involves implicitly assuming that such systems can be made accessible to all. This

[§§§§] In Sierra Leone, for example, approximately 85 percent of the population falls under the jurisdiction of customary law, which is defined under chapter XII, article 170(3) of the constitution as "the rules of law which, by custom, are applicable to particular communities in Sierra Leone."

[*****] Under article 34 of the Ethiopian constitution, 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.

[†††††] On Indonesia, for example, see Bowen (2003).

[‡‡‡‡‡] For example, numerous studies have shown that when neither formal nor informal mechanisms are functioning, human rights abuses and serious conflict are more likely to occur.

assumption, clearly, is not the case, even in the most industrial countries, and state institutions in many developing countries lack basic infrastructure or the capacity to turn “law in books” into “law in action” (see Buscaglia 1997).

Reimagining judicial reform initiatives: a different theory, a different strategy

Given the nature and scale of the problems outlined, what do they mean for contemporary justice sector reform and for policy initiatives that aim to enhance access to justice? Despite the accepted failures of past legal and judicial reform initiatives, effective legal and regulatory frameworks are still widely recognised as essential for sustainable economic development and poverty reduction. The question, therefore, is 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, theoretically grounded, iteratively sequenced reform package is needed to inform supportable strategies for designing, implementing, and assessing all 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 has been its focus on a predetermined ideal articulated in terms of its form, rather than based on an understanding of the socioeconomic and political functions played by rule-based systems in any given society.[§§§§§] Institutional myths surrounding the rule-of-law model are embodied in justice reform programmes. This approach reflects a theoretical model that starts with a perfect rule-of-law system, from which dysfunctional systems are deemed to have deviated.[******]

Perfect systems are regarded as useful starting points in orthodox economic models because they are considered reasonable approximations of reality that give practitioners a useful common point of departure and a shared language and understanding.[††††††] Furthermore, such models give us a basis for empirical work, providing categories, theorems, and proofs that can be measured and tested. For Rajan (2004), however, the complete market model used by many economists is too far distanced from reality to be useful. Rajan (2004: 56) argues that relying on orthodox economic models makes solutions to development problems seem far simpler than they actually are, with particular policy reform problems being addressed as if they occur in a world where everything else works. Ultimately, he contends, we might be better served by starting with an assumption that nothing works, “assuming anarchy as a starting point rather than a pristine world of complete contracts” (Rajan 2004: 57).

Current approaches to justice sector reform have been shaped by their starting point of a perfect rule-of-law system, from which countries deviate. This starting point helps support a technocratic approach to reform, in which technical experts try to fill “gaps” by replicating or importing the laws and legal institutions of industrial countries into the developing context. As with the approaches to economic reforms described by Rajan, this approach makes solutions seem easier than they are and leads to compartmentalised reforms that assume (and often, in fact, require) a working broader system. Not only does the broader system not work in many contexts; there

[§§§§§] See Pritchett and Woolcock (2004) for a more detailed discussion of this broader point beyond judicial reform initiatives.

[******] This argument draws on Raghuram Rajan’s (2004) critique of orthodox economic models.

[††††††] Rajan (2004) provides a most useful discussion of this issue; see also Dixit (2004).

is often no such system, or the one that exists is at odds with the assumptions underpinning the reform design.

This is not to say that the actual justice sector is not central to 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 function effectively. Clearly, it is and does. However, the justice sector relies on powerful normative and political institutions for its legitimacy, authority, and accountability. Although 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 those dynamics.

Intracountry 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 is in place, it can serve as a guiding principle by which parties can agree to disagree in a peaceful manner. This meta-rules system is defined as an overarching system of rules and processes designed to mediate differences (generally provided by the formal system) (Barron, Smith, and Woolcock 2004). In cases where the meta-rules do not cohere with local-level traditional laws, however, negative outcomes are averted with difficulty. This problem of incompatibility is prevalent between the formal and informal system, as well as between different customary systems operating in a shared geographic space, a process only intensified by contemporary globalisation and associated factors, such as transport and communications, which lower the barriers to both intra- and intergroup interaction.

Engaging with a multiplicity of systems operating in a particular context is extremely difficult, given the ever-changing nature of such systems and their complexity. The central difficulty for both state- and local-level systems is dealing with their potential or actual incompatibilities. Working with local institutions to create change has proved to be a more viable way of establishing and supporting the constituencies needed to make reforms sustainable. Furthermore, without engaging with these constituencies, local-level customary institutions continue to undermine the effectiveness of state-level reforms.

The Justice for the Poor programmes in Cambodia and Indonesia provide an alternative model for studying informal dispute resolution at the community level, as well as a fruitful strategy for assessing interactions between customary and state legal systems.[‡‡‡‡‡‡] In Indonesia, the initial research project was set up in 41 villages across four districts, within two very distinct provinces in Indonesia (East Java and East Nusa Tenggara), as a means to understand the trajectories followed by local-level conflict. Part of the objective was to evaluate the evolution of conflict by tracking it from beginning to end. The approach mixes qualitative with quantitative methods, combining hundreds of interviews of village leaders and stakeholders with key informant surveys, newspaper databases, and national surveys to inform a rigorous sampling framework.
The idea was to discern information on, and perceptions of, conflict at multiple units of analysis. Local village characteristics,[§§§§§§] obtained mostly from surveys, were

[‡‡‡‡‡‡] The information presented regarding the Indonesia case is based on Barron, Smith, and Woolcock (2004) and Barron, Diprose, and Woolcock (2007).

[§§§§§§] These factors included economic, psychological, social, political, institutional, cultural, and many other potentially influential characteristics specific to the village where the case takes place.

included in the analysis. The methods applied were also designed purposely to address a complementary concern: whether existing development efforts (through the Kecamatan Development Project) had affected the management of conflicts. The approach, in two environments with very different socioeconomic characteristics, allowed for comparison of the trajectories taken in dealing with conflict. Perhaps the study's most significant contribution derives from the possibility of replication. Conflict associated with economic and political transitions is a global phenomenon, and studies like this one help dissect its dynamics, provide operational value, and set the groundwork for future complementary research that can guide legal reform efforts on the basis of context-specific knowledge.

One consequence of this research on local conflict trajectories, and companion operational work on "justice for the poor" in Indonesia, has been the design of a new project, Support to Poor and Disadvantaged Areas (SPADA), for regions experiencing conflict. This project will include a specific component on access to justice (SPADA+). In SPADA+, judicial reform does not involve importing institutions from outside. Rather, it consists of using trained paralegal facilitators, with their extensive knowledge of local cultures and contexts, to help the poor (and other marginalised groups) to navigate their way more effectively and equitably between *adat* ("customary") law, religious law, and state law. Moreover, experience from Indonesia is being used to inform a spate of initiatives in a number of countries in East Asia and Africa, as part of a broader Justice for the Poor research and development program. A similar initiative has been under way in Cambodia for more than two years. Primary research on collective disputes between villagers and the state about land and labour is being used to inform the design of new social development projects. With support from the Australian government, similar operational research is being considered for other countries in the Pacific. Related operational research is being undertaken in Kenya and Sierra Leone. The overarching objective of this research will be to assess how prevailing customary legal systems interact with the state, how the poor navigate through these systems, and how development projects could facilitate more equitable processes and outcomes for the poor and marginalised.

Conclusions

The central call of this chapter is for a reexamination of the theoretical assumptions underpinning issues at the intersection of social development, policy, and judicial reform. The largely unhappy policy record of attempts to "build the rule of law" and undertake effective judicial reform is a function of a flawed ontological understanding of what norms, rules, and laws "are" and how their inherent interdependence renders problematic any attempt to focus solely on enhancing "the law" (property rights, contracts) and its associated institutions (courts, law schools) as part of a development strategy, no matter how well intentioned. Moreover, inadequate theory and prior social research—rather than misguided intentions, a surfeit of "political will", or insufficient resources—have undermined the capacity of practitioners to implement legitimate and sustainable legal reforms in low-income countries. These inadequacies become manifest in three specific analytical domains: the missing law in policy, the missing rules in law, and the missing normative and cultural understandings in rules. Put more formally, discussions of "policy" routinely overlook the fact that these are instruments whose content and enforceability is largely grounded in law; discussions of law tend to focus exclusively on formal manifestations and codifications of rules, rather than on 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—that is, cultural and normative understandings that establish and legitimise appropriate behaviour.

Although serious criticism is important to make sense of past failures and create space for new approaches, one would be remiss to enter that space without a coherent, supportable, and implementable alternative. The alternative this chapter proposes is self-consciously (but confidently) grounded in a social theory of local-level transformations and the modernisation of social relations, combined with an anthropological sensibility regarding 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-method (qualitative and quantitative) empirical studies in Africa and East Asia. The goal is to generate a rigorous, context-specific evidence base to boost understanding of prevailing local rule and dispute resolution systems; the nature and extent of their articulation with the state; and the efficacy of local interventions designed to improve the coherence, accessibility, legitimacy, and accountability of both.

As the word itself implies, *development* is a deliberate attempt to initiate or facilitate modernisation. Moreover, social relations and rules (formal and informal) underpin the basis of exchange in even the most advanced economies. Thus, attempts to "modernise" the legal systems of low-income countries must necessarily be undertaken as part of a broader strategy—that is, one that explicitly recognises that the judiciary is only 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 that gives them legitimacy. Finally, "modernising" rules systems is an uncertain and messy (even dangerous) business, not least because it entails shifting a prevailing equilibrium—one in which certain powerful groups have a vested interest or role that they are unlikely to relinquish without a struggle. As such, and because no development professional (from any disciplinary background) is formally trained to do any of this,[*******] project designers and researchers alike should undertake such ventures iteratively, with their own feedback and accountability mechanisms, and, not least, with a circumspection borne of direct personal engagement with the political economy and cultural challenges at hand.

[*******] 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.

References

Altman, J. 2004. “Economic Development and Indigenous Australia: Contestations over Property, Institutions, and Ideology.” *Australian Journal of Agricultural and Resource Economics* 18 (3): 513–34.

Barron, P., R. Diprose, and M. Woolcock. 2007. “Local Conflict and Community Development in Indonesia: Assessing the Impact of the Kecamatan Development Program.” Indonesian Social Development Paper 10, World Bank, Jakarta. http://www.conflictanddevelopment.org/page.php?id=60.

Barron, P., C. Smith, and M. Woolcock. 2004. “Understanding Local Level Conflict in Developing Countries: Theory, Evidence, and Implications from Indonesia.” Social Development Paper 19, Conflict Prevention and Reconstruction Unit, World Bank, Washington, DC.

Bennett, T. W. 1991. *A Sourcebook of African Customary Law for Southern Africa*. Cape Town, South Africa: Juta.

Bowen, J. 2003. *Islam, Law, and Equality in Indonesia: An Anthropology of Public Reasoning*. New York: Cambridge University Press.

Burg, E. M. 1975. “Law and Development: A Review of the Literature and a Critique of ‘Scholars in Self- Estrangement.’” *American Journal of International Law* 25 (3): 492–530.

Buscaglia E. 1997. *The Law and Economics of Development*. Greenwich: JAI Press

Buscaglia, E. 2001. “Justice and the Poor, Formal vs. Informal Dispute Resolution Mechanisms: A Governance-Based Approach.” Paper delivered at the World Bank Conference on Empowerment, Security and Opportunity through Law and Justice, St. Petersburg, FL, July 8–12.

Bush, R. 1979. “Access to Justice and Societal Pluralism.” In *Access to Justice*, vol. 3, ed. M. Cappelletti and B. Garth. Milan, Italy: Guiffre Editore.

Carothers, T. 1999. *Aiding Democracy: The Learning Curve*. Washington DC: Carnegie Endowment for International Peace.

———. 2004. “Promoting the Rule of Law Abroad: The Problem of Knowledge.” In *Critical Mission: Essays on Democracy Promotion*. Washington, DC: Carnegie Endowment for International Peace.

Centre for Housing Rights and Evictions. 2004. *Bringing Equality Home: Promoting and Protecting the Inheritance Rights of Women*. Geneva: Centre for Housing Rights and Evictions.

Chopra, J., and T. Hohe. 2004. “Participatory Intervention.” *Global Governance* 10 (3): 289–305.

Decker, K., C. Sage, and M. Stefanova. 2005. “Law or Justice: Building Equitable Legal Institutions.” Background Paper for *World Development Report 2006: Equity and Development*. Washington, DC: World Bank.

Dixit, A. 2004. *Lawlessness and Economics: Alternative Modes of Governance*. Princeton, NJ: Princeton University Press.

Ellickson, R. 1991. *Order without Law: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press.

Faundez, J. 1997. *Good Governance and Law: Legal and Institutional Reform in Developing Countries*. New York: St. Martin's Press.

Gardner, J. 1980. *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*. Madison: University of Wisconsin Press.

Garth, B. 2001. "What Makes a Successful Legal and Judicial Reform System? Rethinking the Processes and the Criteria for Success." Paper presented at the World Bank Conference on Comprehensive Legal and Judicial Development: Towards an Agenda for a Just and Equitable Society in the 21st Century, Washington, DC, June 5–7.

Golub, S. 2003. "Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative." Rule of Law Working Paper 41, Carnegie Endowment for International Peace, Washington, DC.

Gupta, P., R. Kleinfeld, and G. Salinas. 2002. *Legal and Judicial Reform in Europe and Central Asia*. Washington, DC: World Bank, Operations Evaluation Department.

Haber, S. 2003. "Political Institutions and Banking Systems: Lessons from the Economic Histories of Mexico and the United States, 1790–1914." Working Paper 123, Center for Research on Economic Development and Reform, Stanford University, Stanford, CA.

Halloran, M. 2004. "Cultural Maintenance and Trauma in Indigenous Australia." Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Perth, Australia, July 2–4.

Hammergren, L. 1998. *The Politics of Justice and Justice Reform in Latin America: The Peruvian Case in Comparative Perspective*. Boulder, CO: Westview Press.

Lawyers Committee for Human Rights. 1996. *Halfway to Reform: The World Bank and the Venezuelan Justice System*. New York: Lawyers Committee for Human Rights.

Knack, S., and P. Keefer. 1995. "Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures." *Economics and Politics* 7 (3): 207–27.

Mamdani, M. 1996. *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism*. Princeton, NJ: Princeton University Press.

Matsuo, H. 2004. "The Rule of Law and Economic Development: A Cause or a Result?" Keio Law School, Tokyo, Japan.

Merryman, J. H. 1977. "Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement." *American Journal of Comparative Law* 25 (3): 457–91.

Messick, R. 1999. "Judicial Reform and Economic Development: A Review of the Issues." *World Bank Research Observer* 14 (1): 117–36.

Pistor, K. 1999. "The Evolution of Legal Institutions and Economic Regime Change." Paper Presented at the Annual World Bank Conference on Development Economics: Governance, Equity, and Global Markets, Paris, June 21–23.

Pistor, K., and P. Wellons. 1999. *The Role of Law and Legal Institutions in Asian Economic Development*. New York: Oxford University Press.

Posner, E. 2002. *Law and Social Norms*. Cambridge, MA: Harvard University Press.

Pritchett, L., and M. Woolcock. 2004. “Solutions When the Solution Is the Problem: Arraying the Disarray in Development.” *World Development* 32 (2): 191–212.

Rajan, R. 2004. “Assume Anarchy? Why an Orthodox Economic Model Might Not Be the Best Guide for Policy.” *Finance and Development* 41 (3): 56–57.

Rose, C. V. 1998. “The ‘New’ Law and Development Movement in the Post–Cold War Era: A Vietnam Case Study.” *Law and Society Review* 32 (1): 93–140.

Tamanaha, B. 2004. *On the Rule of Law: History, Politics, Theory*. Cambridge, UK: Cambridge University Press.

Trubek, D. 2003. “The ‘Rule of Law’ in Development Assistance: Past, Present, and Future.” Paper given at Conference on Law and Economic Development: Critiques and Beyond. Harvard Law School, Cambridge, MA, April 12–13.

Trubek, D., and M. Galanter. 1974. “Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States.” *Wisconsin Law Review* 4: 1062–1101.

Upham, F. 2002. “Myth Making in the Rule of Law Orthodoxy.” Rule of Law Working Paper 30, Carnegie Endowment for International Peace, Washington, DC.

World Bank. 2003. *Legal and Judicial Reform: Strategic Directions*. Washington, DC: Legal Vice Presidency, World Bank.

———. 2005. *World Development Report 2006: Equity and Development*. New York: Oxford University Press.

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