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"Expériences sur l'élaboration de nouvelles lois de développement de la biosécurité et de la biotechnologie: perspectives de réformes légales en Afrique de l'Ouest"

Frison, Christine; Joie, Thomas

ABSTRACT

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Legal and Governance Reform: **Lessons Learned**

No. 1 2006

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Legal and Governance Reform: Lessons Learned No. 1 2006

SEARCHING FOR SUCCESS

NARRATIVE ACCOUNTS OF LEGAL REFORM IN DEVELOPING AND TRANSITION COUNTRIES

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Thomas F. McInerney Rome, 2006



FOREWORD

William T. Loris Director-General International Development Law Organization

he International Development Law Organization (IDLO) has been invested in the discourse surrounding the rule of law since its founding in 1983. Over the years the boundaries of the 'rule of law field' have expanded to the point where it appears unspecific and even unmanageable at times. This volume adds constructively to the ongoing dialogue by bringing together voices from several countries with unique perspectives on legal reform and how it can effect positive change in transition and developing countries.

Our mission at IDLO also speaks to the larger call for good governance in these same countries. The rule of law is a key element of good governance. A well functioning legal system is required to facilitate economic relationships and to unleash the universal potential for self-improvement. The absence of such a system presents a fundamental barrier to economic development.

Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries looks primarily at legal reform within the framework of international assistance, focusing on ways to achieve success. Although the full impact of these recent projects may be difficult to gauge for some time, the contextual sensitivity of their approaches seems to be of particular import. It is the first of what will be a series of volumes on governance, law and development published by IDLO.

IDLO is grateful to the leading international practitioners and academics who contributed their work and to the editor of this volume and the IDLO General Counsel, Thomas F. McInerney, for conceiving and bringing this project to fruition.



Introduction

Thomas F. McInerney

eform of law and legal institutions is at the forefront of many discussions of contemporary international affairs. I say international affairs rather than international development because the debate has broadened significantly. While development remains a central focus, other reasons for improving law and legal institutions are increasingly being recognized. Such reasons will affect the focus and design of reform programs, the level of support donors provide, and the prospects for success. The diverse rationales and approaches to legal and associated institutional reform raise the question of whether we can consider all of these areas as a single field.¹

WHY LAW REFORM?

In contemporary parlance, efforts to improve law and related institutions are frequently referred to as rule of law promotion.² Discussions of rule of law promotion have focused on rule of law assistance (ROLA) programs, which are typically considered the provenance of bilateral development agencies and multilateral development banks (MDBs).³ By conceiving of these activities in such a limited way, one may fail to consider the true breadth of international efforts to bring about improvements in legal, regulatory and judicial systems in developing and

transition countries.⁴ While development is certainly one important policy goal for which legal reform has been prescribed, in the contemporary context there are a variety of policy goals legal reform has been called to advance. Among these goals, six stand out. These include legal and judicial reform to (1) promote economic development, (2) uphold the rights of poor people and reduce poverty, (3) improve security, (4) protect human rights and enhance criminal justice, (5) further harmonization and achievement of international regulatory standards, and (6) contest globalization or advance the aims of popular social movements. These categories are not iron clad and may overlap in certain instances, however, they are useful in identifying the different rationales that have generated international legal and judicial reform activities.

Efforts to promote the rule of law have addressed a variety of state and social institutions. To illustrate concretely the way law reform programs differ depending upon the ends they serve, in discussing each of the goals cited above, I highlight how actors seeking to advance such goals approach the reform of the judiciary. Analyzing the diverse rationales also helps refine and temper the conception of a "rule of law movement" by pointing out the different interests and diverse constituencies supporting particular legal reform activities and the potential incommensurability of different agendas when it comes to implementation.

Economic Development

The importance of rule of law to economic development is probably the most cited justification for promoting law reform. In popular accounts the link between strong legal systems and economic development has become an article of faith. The centrality of economic justifications for promoting legal reform owe much to developments in the field of institutional economics by thinkers such as Douglass North, Mancur Olson, and Barry Weingast. Bilateral development agencies and international financial institutions have united around the concept of rule of law and have been among the principal supporters of international assistance for this purpose.⁵ Because the mandate of these institutions is rooted in economic development, they have tended to view legal reform as part of a package of reforms oriented to the development of market economies. Given the scale of assistance provided to this sector by these agencies, it is wrongly perceived that economic development is the foremost rationale for legal reform assistance, when, as described in this chapter, it is one of many. To advance economic development goals, donors fund reform of regulations, regulatory institutions, commercial courts, and commercial and investment law. Judicial reform programs tend to address general improvements in the competency of judiciaries and the speed of procedures. In certain instances they directly target commercial courts and their competency to address commercial cases. The emphasis on judicial reform in these areas is on property and contract enforcement.

Poverty Reduction and Pro-Poor Legal Reform

In recent years, thinking on economic development priorities has led to the emergence of a new policy goal that emphasizes legal reforms that serve the poor directly. Proponents of this approach disavow the logic implicit in market-led development policies that a rising tide lifts all boats. Instead, proponents of pro-poor or poverty reduction legal reform put the immediate needs of the poor front and center to advance reforms that can benefit poor people directly. Such approach is sometimes referred to as a "human" or "rights-based" version of development.⁶ The emergence of this model results from increasing recognition that human rights violations such as the denial of access to resources, services, or opportunities and overt discrimination constitute root causes of poverty. Generally speaking, programs employing this approach privilege formal dispute resolution procedures, such as courts, over less formal alternatives, such as alternative dispute resolution (ADR) or customary mechanisms.8 While some observers dispute the degree to which this approach has redirected the priorities of the MDBs, it does represent a distinct policy goal that has led to new types of legal reform programming.9 Examples of legal reforms that take such an approach include projects designed to allow poor or indigenous peoples to bring legal actions to uphold their rights and programs to allow poor people to secure tenure over their land. In the judicial reform context, efforts have centered on access to justice, involving removal of impediments to bringing legal actions without legal representation and providing access to free or inexpensive legal services, including legal aid programs for indigent criminal defendants.

International Security

The third policy goal arises from concerns over international security given international terrorism, transnational criminality, and military conflict. As a result of such threats, states and international institutions are devoting greater attention to strengthening domestic legal institutions to enhance international and domestic security. The report of the Secretary General's High Level Panel on Threats, Challenges and Change offers a clear exposition of this policy goal. According to this report, the most significant threats to peace and security in the modern world are transnational organized crime, terrorism, and civil conflict. Criminal justice and policing institutions can serve as the best mechanisms for controlling groups seeking to undertake terrorist acts or other international crimes. Yet given the frequent cross-border dimension of such criminality, cooperation between national authorities themselves and with international law enforcement actors is vital. For state authorities to fulfill this role, the report posits that states must achieve levels of competency, reliability, and integrity such that other states and international actors may rely on their abilities to investigate, incarcerate, prosecute, and transfer suspected offenders. Consistent with this rationale, bilateral and multilateral organizations have sought to improve state capac-

ity in institutions ranging from prosecutor's offices and courts to customs authorities and coast guards. In the area of judicial reform, attention is devoted to improving processes of mutual legal assistance, forensics, asset tracing and recovery, criminal law standards, and general competency of judges.

This policy goal also explains in part the growth in peacekeeping operations. Since the end of the Cold War, the number of such operations undertaken by the UN has skyrocketed. One can no longer speak of the role of law in development without considering experience in peacekeeping operations. In contrast to earlier peacekeeping operations in the post-World War II era, which were focused primarily on preventing hostilities from occurring, today's peacekeeping operations involve broader development goals of building institutions to protect human rights and support rule of law, including training police forces, providing electoral assistance, and creating the basic institutions of self-government. In addition to the judicial reform programs cited above in relation to transnational criminality, post-conflict judicial reform has involved efforts to clarify the relevant body of law in new states, basic skills training for new cadres of judges, building physical court facilities, creation of national training institutions, and subject-specific education.

International Legal Obligations

A fourth policy goal for which legal reform has been employed arises from obligations states incur through international legal instruments, harmonization processes, or mutual recognition accords. The influence of international norms driving domestic reform is critical to understanding the environment in which legal reform takes place today. Indeed, under conditions of globalization the number and scope of international legal instruments have grown substantially. As Kahler and Lake have written, "globalization rests on the decisions of national governments to open their markets to others and to participate in a global economy." Such decisions hold implications for nearly all areas of states' legal, regulatory and judicial systems. Decisions to open domestic economies to outside investment and reconfigure regulatory and legal systems to align with international legal obligations, have dramatically altered the incentives that bear on state receptivity to legal and judicial reform. To understand the environment and prospects for legal, judicial and regulatory reform in developing countries, we must move away from the narrow consideration of law and development or rule of law assistance and embrace a wider conception of this space.

Examples of the influence of international legal obligations on states include the requirement that states implement specific legal norms such as those arising from the OECD or United Nations conventions on bribery. ¹⁶ In these and treaties on subjects ranging from human rights to nuclear safety, states have become subject to monitoring and peer review procedures to verify their compliance. ¹⁷ In the context of the European Union, compliance with the Acquis Com-

munautaire drives regulatory harmonization and requires states to undertake significant legal reforms and institutional restructuring. Also important are mechanisms by which the European Commission and European Court of Justice push states to fulfill their obligations to implement and enforce EU directives and regulations.

Similarly, the World Trade Organization and regional trade agreements prescribe principles that prohibit discriminatory and trade distorting measures and require states to eliminate laws violating those standards as a condition for membership or in response to a challenge from another state. Finally, in certain instances, instead of outright harmonization, states have defined broader standards for mutual recognition. Implicit in such mechanisms is the requirement that a given regulation satisfy minimum standards of substantive acceptability to the respective states. Yet while international legal norms and regulations in themselves necessitate changes in domestic legal orders, policy-makers ought to also factor in the influence of such mechanisms on defining the overall governance and legal environment in which states currently operate. As posited by many contemporary legal scholars, the international community is witnessing the creation of a new global legal order in which states constitute one level in a more complex network of governance relationships. The development of this global system means that the development of domestic legal systems is inherently affected by global influences. Judicial reform to facilitate harmonization has focused on the capacity to engage in domestic enforcement of international legal norms in the diverse areas to which such norms relate.¹⁹

Human Rights and Criminal Justice Reform

Legal reform has also been employed to promote adherence to international human rights standards and reform of criminal justice institutions. Improving the practices of domestic judiciaries, law enforcement, penal institutions, and militaries is seen as crucial for protecting human rights. Efforts must be directed to preventing violations and encouraging enforcement of human rights standards. Previous techniques ranged from capacity building to, as Jim Goldston highlights in this volume, public interest litigation and advocacy. Although civil society groups and international institutions may share an underlying commitment to human rights, they generally differ in their approaches. The former are more likely to make demands and further popular resistance to state human rights practices, while the latter are likely to take more diplomatic approaches involving training and technical assistance. Areas in which reforms have been directed include criminal justice institutions, criminal courts, and police and law enforcement institutions. Judicial reform to advance human rights and criminal justice standards includes efforts to educate judges on such matters, improve judicial skills to deal with professional tasks such as assessing evidence and taking testimony, and implement process improvements to reduce delay and pretrial detention. Likewise, civil society groups have used public interest litigation to force courts to uphold human rights norms.

Advancing Popular Social Movements

The use of law and legal reform in struggles connected to globalization is an interesting addition to the dominant focus in the rule of law promotion field on working with state institutions collaboratively to achieve legal reform. In contrast to previously discussed approaches, which tend to assume the legitimacy of existing political authorities, social movements frequently gain their identities through opposition to such authorities and actively work to change and even undermine them. As applied by social movements, law becomes a tool of resistance. Such groups may seek to employ law as a tool for political as well as legal change, use law outside of traditional legal fora, or employ untraditional tactics of agitation in presenting their claims before formal tribunals. Examples of such use of law include public interest litigation, contestation before media, direct appeals to state authorities, and information campaigns designed to stimulate a desire for the full attainment of universally-recognized human rights among local populations. Groups seeking to use law in this manner target courts through advocacy and media campaigns, campaign against judicial corruption, and seek to educate judges through the advancement of novel legal theories or new interpretations of the law.

One aspect of social groups' use of legal instruments to effect political and legal change is attributable to the unique circumstances surrounding the emergence of multiple legal orders under conditions of globalization. The shift of the locus of political decision making to international fora has created opportunities for political minorities to achieve victory by changing venues. Activists can use legal mechanisms at one level to effect change on another one. Further, the opportunities for such contestation have increased as a result of vertical and horizontal growth of international legal norms in such areas as human rights, indigenous people's rights, and environmental and sustainable development. In addition to such substantive enactments, new fora, such as the inspection panels of the international financial institutions, the internet, NGO watchdogs, and specialized panels set up by international agreement, are now available to hear legal grievances. By working at both international and domestic levels, these movements may compel state actors to adhere to international or domestic legal norms, thereby affecting the development of domestic legal orders.

PROBLEMS

There are a number of problems raised by these diverse approaches. I will highlight four.

1) Effectiveness

Lingering doubts have been raised with respect to the effectiveness of international development

efforts and how they coincide with rule of law promotion specifically. To understand the efficacy of rule of law promotion we must address two issues: (a) how does legal reform occur in general, and (b) can it occur through exogenous intervention? The essays in this volume address these questions. As the conclusion to this volume suggests, unraveling the causal chains and isolating causal factors in something as complex as legal reform may require further work to achieve both the breadth and depth of understanding needed to answer these questions definitively.

2) Hard Choices: Form over Substance

Problems arise from the tension between form and substance in the economic development and human rights and criminal justice legal reform agendas. Understanding this conflict requires a review of thinking on economic development and law. According to much current thinking on the role of law in economic development, predictability is a hallmark virtue of any legal system. Since it is frequently posited that foreign direct investment is responsive to the extent to which legal systems function in accordance with known standards, predictability becomes a critical priority in this analysis. Studies such as the International Finance Corporation's *Doing Business* series rank the conduciveness of countries' environments for private sector development by placing significant emphasis on predictability of courts and bureaucracies.²⁴ In a different context, the American Supreme Court Justice Antonin Scalia captured the essence of this understanding when he wrote that "there are times when it is better to have a bad rule than no rule at all." On this view, efficiency and predictability are considered the chief elements of successful economies.

Playing out the logic of this view, uncovers significant implications. By reducing the attributes of a legal system to standards of predictability and expectation interests of contracting parties, we risk relegating the question of substantive justice to second-class status. If predictability becomes the hallmark virtue of a legal system, do we imply that a society could maintain substantively unjust policies? So long as procedural regularity was maintained, would we deem the legal system acceptable? By viewing legal systems primarily through the eyes of an economist, we may be neglecting the demands of substantive morality. Human rights and criminal justice concerns come to be seen as subsidiary to goals of efficiency.

Here we arrive at the familiar philosophical problem of consequentialist versus duty or rights-based theories of justice. Are individual civil liberties of secondary importance when weighed against property and contractual rights?²⁶ How do we sort out the relative priorities? Does the right precede the good (efficiency) or vice versa? Even a cursory reading of the literature of human rights organizations and international financial institutions shows that they are focused on different priorities. While these priorities may not be mutually exclusive, one can also envision cases where competing concerns result in greater emphasis being placed on efficiency over human rights.

Both the High Level Panel's and the Secretary General's In Larger Freedom reports deal with

the efficiency versus human rights problem by arguing for the reciprocal interdependence of security, human rights, and development. The reports are important for articulating an emergent unified agenda of development, security, and human rights. Cutting across the *In Larger Freedom* report's core agendas—cast as Freedom from Want, Freedom from Fear, and Freedom to Live in Dignity—is an emphasis on law. Indeed, the report makes the claim that the Millennium Development Goals (MDGs) will be indefinitely jeopardized if collective action is not imminently taken on the security, rule of law, and human rights fronts. As evidenced by the prevalence of ongoing violent conflict in lesser-developed countries, the report points to chronic poverty and the phenomenon of weak judicial and security institutions as fundamentally linked. The discussion of legal norms, a hallmark of international justice, is essentially divided between international peacebuilding mechanisms and the development of sound judicial and law enforcement institutions within states. The former encompasses compliance with international conventions on trade, human rights, arms control, law enforcement activities to counter terrorism and organized crime, and growing peacekeeping capacities.

In the chapter of the *In Larger Freedom* report entitled "Freedom to live in Dignity", the Secretary-General references the UN Member States' stated commitment in the Millennium Declaration to spare no effort to promote democracy, strengthen the rule of law, and promote respect for all internationally recognized human rights and fundamental freedoms.²⁷ Legal reforms take on a multitude of purposes in the context of the MDGs. Foremost is the judiciary's role in maintaining peaceful political interactions and normalizing state institutions in post-conflict environments. Likewise, effective and transparent judicial and law enforcement institutions are held as fundamental to the protection of individual human rights and the predictable practice of justice. In this respect the document enshrines human rights as morally imperative as well as fundamental to prosperity in all societies. The main tenet of this argument is that it is indefensible to pursue an agenda of eradicating poverty and enhancing global security while human rights violations go unchecked.

These discussions represent a turning point in defining a more holistic basis for promoting the rule of law. Whether the diverse agendas can be reconciled in practice remains to be seen. Clarifying and resolving the tension between these goals must be a priority henceforth for the international community.

3) Resource Constraints

An additional question that affects the prospects of international rule of law assistance is the question of resources. As arguments for "good enough" governance suggest, the great should not become an enemy of the good.²⁸ Similarly, in recognition of the impossibly broad range of substantive and formal legal concepts falling under the rubric of rule of law, Randall Peerenboom has advanced a distinction between a "thin" and "thick" rule of law.²⁹ Thin rule of law involves

ensuring formal consistency, procedural fairness, security, and some legitimacy for the state, whereas thick rule of law pertains to defining the details of the arrangements of the economic and political systems and the choice between more individualistic and more collective notions of human rights.³⁰ The notion is analogous to the Ronald Dworkin's distinction between a concept, such as equality, and a particular conception of such concept, such as programs to accord preferences to persons suffering the effects of latent discrimination.³¹ Peerenboom argues that distinguishing between these two notions of rule of law can help clarify areas in need of reform and observe the relationships between the various elements.³² In states with scarce resources, requirements to devote great efforts to comply with international economic treaties, such as the WTO TRIPs Agreement, may compromise their abilities to address issues of more pressing concern such as protection of fundamental human rights.³³ Likewise, some scholars have argued for prioritizing the establishment of clear rules (a relatively low cost affair) as opposed to building effective institutions (a more costly affair) to enable economic development to take hold.³⁴ Moreover, as Tom Carothers has noted, there is a threshold problem insofar as every state experiences problems of corruption, dishonesty, and inefficiency. It is thus difficult to identify the point at which such shortcomings undermine development. Arguments for accepting less than perfection are consistent with the sensible notion that conditions of radical insecurity and injustice can certainly impede growth prospects but that "getting growth going" 35 can occur under less than perfect conditions. Such view does not require that standards be lowered but only that pragmatism and realism require a recognition of the inability to achieve large scale systemic change overnight. While helping us to refine judgments about the relation of institutions to development, these views also bear particular relevance when approaching the reestablishment of law and institutions in post-conflict settings.

4) Politics

The question of politics (or "political will") and power configurations are just beginning to be given adequate attention among aid agencies. Achieving high standards in a legal system requires equilibrium to exist in the political realm and further requires leaders to view it as within their interest to adhere to the law and apply power within formal systems of justice. Failure to achieve a working equilibrium and balance of political power makes it virtually impossible to create a legal system with the degree of autonomy necessary to ensure fidelity to the law. As I. Sánchez-Cuenca has written, "institutional facts" (e.g. that one becomes President by achieving the requisite number of votes) must become sufficiently unquestionable to prevent the raw application of power or brute force from determining political outcomes. For the impact of rule of law assistance to be adequately studied and understood, there must be clear criteria for distinguishing between futile and feasible engagements. If donors become increasingly serious about achieving demonstrable results from rule of law assistance, then it seems likely that over time they may become more se-

lective as to the countries in which they will fund legal and institutional reform activities. Given the varied rationales supporting rule of law assistance discussed above, it appears unlikely that support for legal reform will simply dry up across the board.

SUMMARY

here are many challenges in reconciling these competing objectives and addressing these problems, yet there is an overriding sense in international affairs of the necessity to strengthen legal and governance systems in today's world. Realizing the goal of strengthening such institutions represents a challenge for existing and emergent governance institutions. While today's world differs from the Westphalian interstate system as understood even in the Twentieth Century, "the state remains the locus of governance in a galaxy of increasingly interlinked institutions of governance above and below it." State institutions are indeed key building blocks for the international system. In recent years such understanding has received validation in international policy settings, particularly in the UN. Despite the centrifugal force towards vertical structures for international decision making and governance today, the international community finds itself in the paradoxical position of turning our attention back towards states in carrying out the work arising from such structures. Domestic actors and institutions provide domestic anchors to international institutions.

Support for this view derives in part from international relations scholarship. In debunking some of the more hyperbolic claims about globalization—such as the view that nation states are declining in importance or constrained in their ability to formulate policy—such scholarship has provided further evidence for the continued importance of states.⁴⁰ It is thus becoming apparent that the integrity of the interstate system rests on strong states as does the maintenance of conditions favorable to material well-being and human rights. This understanding is particularly evident when considering the work of the UN in rebuilding legal systems in countries recovering from armed conflict.

CONTRIBUTIONS

he starting point of this book is the seemingly simple proposition that legal reform has already taken place. Contrary to the skepticism with which some have greated the so-called "rule of law movement", history—even contemporary history—tells us of numerous examples of legal reform that have worked. The rationale for this book was to identify legal reform success stories and to try to understand what accounts for such favorable outcomes. The cases compiled offer interesting insights from leading practitioners in the field. They also show the diversity of approaches, methodologies, and factors contributing to legal change. The pieces

speak to all six of the rationales for law and legal institutional reform described at the outset to: (1) enhance economic development, (2) reduce poverty, (3) improve security, (4) promote implementation of international legal instruments, (5) uphold justice and human rights, and (6) advance social movements' objectives.

The piece by Goldston shows how an activist approach, designed to use legal institutions to promote social justice and human rights, can be highly effective. He shows how public interest legal advocacy organizations, often overlooked by the institutional focus of much development assistance, constitute key players in the effort to promote legal reform. He concentrates his discussion on litigation as a tool for effecting legal change. Indeed, experience drawn from litigation in contexts as diverse as the U.S. civil rights struggle to Indian property rights struggles offer some precedent for such approach. As experience shows, using legal resources to effect change in this manner, requires creative thinking. It requires questioning the seemingly "plain meaning" of statutory or constitutional texts or precedents. Goldston identifies how, in addition to enforcing rights claims or changing legal precedent, litigation can catalyze broader social forces. Because recourse to the judiciary requires litigants to make clear arguments regarding the interests of specific individuals, it can focus public attention on issues in a powerful manner. To ensure that public interest litigation achieves this broader impact, Goldston highlights the need to engage local communities and media outlets.

Michel Nussbaumer highlights the manner in which information in the form of metrics gauging the status of law reform efforts can mobilize political and technocratic efforts to undertake such reforms. He describes the European Bank for Reconstruction and Development's (EBRD) methodology for ranking the status of countries' law reform efforts in terms of the law on the books and the functioning of the law, which in turn are used to generate combined country ratings. He highlights the manner in which the publication of negative information on the status of Poland's law and procedures relating to secured credit galvanized Polish technocrats to seek international assistance to undertake related law reform. The lesson from this experience is that, with the requisite political will, state actors may attempt to undertake legal reform in response to objective analyses that expose deficiencies in existing law and institutions.

When dealing with entrenched prejudices or widespread misconceptions, which exist in the area of racial or gender discrimination, seeking to address state institutions directly may be an inappropriate way to bring about legal reform. Lelia Mooney Sirotinsky documents a program of graduate education on gender and the law designed to address discrimination against women in Guatemala. Through legal education, this program sought to create a community of legal practitioners and state officials who could take leadership roles in promoting wider understanding of women's rights within their institutions or among society more broadly and thus ensure support for such rights in their work. While gender violence and injustice persists in Guatemala, the program's success in changing curricula in law schools holds the possibility of long term social and legal change.

Raza Ahmad and Doug Porter's piece situates the significant judicial reform program for

Pakistan in the broader context of the policies of international financial institutions over the past 20 years. At \$300 million, the Pakistan program was significant for its scale and ambitiousness. Ahmad and Porter trace the intellectual history of international assistance for legal reform up to the present day. Situated in the context of international development policy today, the authors draw important lessons from this work. Specifically, they show that despite the application of massive resources, embedded actors resistant to change may thwart reform efforts. They implicitly ask, if \$300 million in external support to justice sector reforms in Pakistan could not overcome institutional opposition to certain reforms, what could?

Erica Harper describes the legal and institutional constraints in developing effective dispute resolution procedures growing out of significant human rights and humanitarian law violations. Using the experience of transitional justice in East Timor between 1999 and 2002, Harper provides an overview of the three judicial and quasi-judicial mechanisms established to respond to the human rights violations and breaches of international law that occurred there. She argues that experience with other international criminal justice tribunals has shown the need to utilize domestic adjudicatory mechanisms, particularly where there are a significant number of perpetrators involved. At the same time, using domestic mechanisms to respond to such cases, may burden fragile domestic legal systems. How to build capacity in legal systems with poor human capital endowments presents a significant challenge for this approach. Harper contends that teamwork and mentoring between international and local criminal justice professionals involved in prosecuting international crimes in such situations may allow the fulfillment of both short term priorities of ensuring swift and proper justice for international crimes and long term development goals.

Ahmad Kumar Hazra describes deficiencies in the current Indian court system and recent efforts to improve case flow management and overall performance. His piece reflects a law reform practitioner's understanding and experience and offers a roadmap for addressing the particular issues giving rise to delay in Indian courts. He draws from international experience in judicial reform, particularly in relation to efforts to reduce backlog and delay in common law countries. To the extent that these issues have been faced by most if not all common law judiciaries, there is reason to believe that such reforms can work in the context of developing countries.

Understanding the dynamics and processes by which legal norms developed in international agreements are implemented domestically is important to understanding prospects for legal reform today. This volume offers three contributions that speak to this phenomenon in the fields of biodiversity, gender equality, and biosecurity. While each piece deals with the question of implementation of international agreements, they also touch on the application of international legal norms by domestic groups seeking to contest or shape globalization.

Marjan Radjavi takes domestic implementation of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) as the focus of her chapter. She uses Argentinian and Pakistanian experience to illustrate how domestic conditions affecting such implementation may differ widely. Of particular interest is the interaction and influence of state and

civil society actors in promoting the creation of institutions that will ensure that implementation occurs. Rajavi shows the complex interplay of two of the legal reform rationales described at the outset, harmonization and global justice.

The piece by Kathryn Garforth and Jorge Cabrera describes the different factors influencing the extent to which states undertake legal reforms needed to implement the provisions on access and benefit sharing (ABS) under the Convention on Biological Diversity. These factors include (1) the extent to which ABS is a political priority, (2) the extent to which intra-governmental cooperation occurs, (3) as a result of pressure from NGOs, and (4) domestic demand. These factors suggest that, while it is unlikely that many states would have taken action on ABS had the Convention not come into existence, the mere existence of the Convention is not sufficient for state implementation to occur. The Convention serves as a catalyst for improving state practice in biodiversity. Rather than functioning in a self-executing manner, however, the chapter suggests that the Convention's role lies in mobilizing domestic political forces.

The chapter by Christine Frison and Thomas Joie deconstructs the challenges and embry-onic successes of implementing the Convention on Biological Diversity and the Cartagena Protocol on Biosafety in West African states. There is much to learn from the authors' insights in the context of the necessary administrative restructuring, technical assistance, and regional cooperation needed to implement international law. They discuss prominent problems including the lack of interest among government officials and among local populations, a severe deficit of technical know-how, well-connected political rent-seekers principally in the agriculture sector, and a political apparatus ill-suited for executing the demands of the treaty. Often, these impediments prevented significant improvement from the *status quo*. The most successful strategies, however, were a combination of education, technical assistance programs, and collaborative arrangements to pool resources regionally and within nations.

- ¹ Promoting the Rule of Law Abroad: Are We There Yet?, Carnegie Endowment for International Peace, February 1, 2006, available at http://www.carnegieendowment.org/events/index.cfm?fa=eventDetail&id=849&&prog=zgp&proj=zdrl ² See, e.g., Thomas Carothers, ed., Promoting the Rule of Law Abroad: In Search of Knowledge (2006).
- ³ See, e.g. Eric G. Jensen and Thomas C. Heller, Beyond Common Knowledge: Empirical Approaches to Rule of Law (2003).
- ⁴ Hence, in this chapter I will refer to legal, regulatory and judicial reform programs as opposed to rule of law assistance, which tends to be focused on a narrower range of activities, specifically judicial reform. See supra note 3 at 2. In addition to traditional aid agencies, there are a number of other institutions and actors actively seeking to influence and change legal systems in developing and transition countries. To understand the true scope of activity, consider experience with capacity building programs, often considered central to international development programming. Capacity building is undertaken by domestic regulators and multilateral organizations to further implementation all major international regulatory regimes. See John Braithwaite and Peter Drahos, GLOBAL BUSINESS REGULATION 546 (2000). As an example of variety of governmental bodies in OECD states that link with developing and transition countries, in a 2005 report, the US Government Accountability Office found that of the US\$2.9 billion in trade capacity building assistance the US Government had provided to over 100 countries between 2001 and 2004, the U.S. Agency for International Development had disseminated 71% of the funds, GAO Report, US Trade Capacity Building Extensive but Its Effectiveness Has Yet to be Evaluated, GAO-05-150 available at http://www.gao.gov/htext/ d05150.html. The rest of the aid had been disseminated by other agencies such as the U.S. Trade Representative. As such, focusing only on programs of legal and judicial reform funded by aid agencies or MDBs will provide us with a partial picture of the full scale of efforts to promote legal, regulatory and judicial reform. Such narrow focus will thus limit the lessons we can draw from activities that seek to influence similar actors and institutions through similar mechanisms.
- ⁵ Jeremy Perlman, *Book Review: Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, 47 HARV. INT'L L. J. 531, 534 (2006).
- 6 Id.
- ⁷ Andre Frankovits, *Rules to Live by: The Human Rights Approach to Development*, 17 Praxis: The Fletcher Journal of Development Studies 9, 12 (2002).
- ⁸ Stephen Golub, *The Legal Empowerment Alternative*, in *supra* note 2 at 161.
- ⁹ Perlman, *supra* note 5 at 540 ("if pro-poor access-to-justice programs are mere lip-service today, they were almost completely absent from MDBs' standard packages a decade ago").
- ¹⁰ See Anne Marie Slaughter and William Burke White, *The Future of International Law is Domestic (or, the European Way of Law)*, 47 HARVARD INTERNATIONAL LAW JOURNAL 327, 331 (2006)("the external security of many states depends on the ability of national governments to maintain internal security sufficient to establish and enforce national law").
- ¹¹ United Nations, Secretary General's High Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility* (2004), A/59/565.
- ¹² Similar views are expressed in The Report of the Secretary-General: *In larger freedom: towards development, security and human rights for all* submitted to the General Assembly for the Millennium Summit in 2005, A/59/2005.
- ¹³ Slaughter and Burke White, *supra* note 10.
- ¹⁴ Balakrishnan Rajagopal, International Law from Below: Development, Social Movements and Third World Resistance 139 (2003).
- ¹⁵ Miles Kahler and David A. Lake, *Globalization and Governance* in eds. Miles Kahler and David A. Lake, Governance in a Global Economy: Political Authority in Transition 4 (2003).
- ¹⁶ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997); United Nations Convention against Corruption (2004).
- ¹⁷ See generally, Paul. C. Szasz, ed., Administrative and Expert Monitoring of International Treaties (1999). See also Hilary Charlesworth and Christine Chinkin, Regulatory Frameworks in International Law, in eds., Christine Parker, et al., Regulating Law 246 (2004).
- ¹⁸ A. Wiener, The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance, 4 European Law

JOURNAL 294 (1998), and JHH Weiler, THE CONSTITUTION OF EUROPE (1999).

- ¹⁹ L.A. Mistelis, Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform Some Fundamental Observations, 34 Int. Lawyer 1055 (2000).
- ²⁰ Balakrishnan Rajagopal, The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India, 18 Leiden Journal of International Law 345-387, 348 (2005).
- ²¹ *Id*.
- ²² Id.
- ²³ Id.
- ²⁴ World Bank Group, Doing Business (2006) available at http://www.doingbusiness.org.
- ²⁵ Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. CHI, L. REV. 1175, 1175–81 (1989).
- ²⁶ Merilee S. Grindle, Good Enough Governance: Poverty Reduction and Reform in Developing Countries, 17 GOVER-NANCE 525 (2004).
- ²⁷ See supra note 12.
- ²⁸ See generally, Grindle, supra note 26.
- ²⁹ Randall Peerenboom, Varieties of Rule of Law: An Introduction and Provisional Conclusion from Randall Peerenboom, Asian Discourses on Rule of Law (2004), available at SSRN: http://ssrn.com/abstract=445821 at 13. Further discussion of this distinction can be found in Erik G. Jensen The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses, in supra note 3 at 338–342.
- ³⁰ Peernboom, supra note 29.
- ³¹ See Ronald Dworkin, Taking Rights Seriously 134–136 (1977).
- ³² Id. at 13 ("the elements of a thin (or even thick) theory may be used to clarify and prioritize areas in need of reform and to see the relationships between the various elements").
- 33 J. Michael Finger and Phillip Schuler, Implementing the Uruguay Round Commitments: The Development Challenge, World Bank Working Paper Series 2215 (October 1999)(cited in Grindle, *supra* note 26).
- ³⁴ Richard Posner, Law and Economics in Common-Law, Civil-Law and Developing Nations, 17 RATIO JURIS 66, 77–78 (2004).
- 35 Dani Rodrick, Getting Institutions Right, Working Paper, Harvard Kennedy School of Government, April 2004, at 10.
- ³⁶ Steven Holmes, *Lineages of the Rule of Law*, in eds. José Maria Maravall and Adam Przeworski, Democracy and the Rule of Law 24-25 (2003).
- ³⁷ Ignacio Sánchez-Cuenca, Power, Rules, and Compliance, in eds. José Maria Maravall and Adam Przeworski, DE-MOCRACY AND THE RULE OF LAW 90 (2003).
- ³⁸ Braithwaite and Drahos, *supra note* 4 at 485.
- ³⁹ See Slaughter and Burke White, supra note 10.
- ⁴⁰ See generally Linda Weiss, ed., States in the Global Economy (2005).
- ⁴¹ For a comprehensive account of the critique to rule of law movement, see T. Carothers, *The Rule of Law Revival*, in supra note 2 at 3.



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OPEN SOCIETY JUSTICE INITIATIVE STRATEGIC LITIGATION AND LAW REFORM

James A. Goldston

THE OPEN SOCIETY JUSTICE INITIATIVE

he Open Society Justice Initiative is an operational program of the Open Society Institute (OSI) that pursues transnational, rights-based law reform, and contributes to the development of legal capacity for open societies worldwide. The Justice Initiative designs and carries out its own projects, in partnership with, and to complement and enhance the efforts of, non-governmental organizations (NGOs), governments, and OSI regional and national foundations. We aim to bring about broad acceptance and effective implementation of international legal rules by mobilizing public opinion, political support, and legal actors.

Since its birth at the end of 2002, the Justice Initiative has undertaken a broad range of activities. We have provided technical assistance to international and hybrid tribunals prosecuting perpetrators of mass atrocities. We have pursued pathbreaking litigation and legal advocacy on racial discrimination and access to citizenship before regional courts in Europe, the Americas, and Africa, and have contributed to the promulgation of a major set of United Nations principles outlawing discrimination against non-citizens. We have helped obtain trigger ratification of a new African Court of Human and Peoples' Rights, have placed the question of Charles Taylor's impunity squarely in the floodlight of world attention, and have established regional NGO coalitions throughout

Africa to work effectively on matters of international justice and human rights. We have persuaded one European government to overhaul its system of legal aid delivery, and have planted the seed of institutional reform in several other countries. We have propelled forward national debates on freedom of information in several countries; have helped governments and civil society groups in other countries comply with, and use, newly-enacted freedom of information (FOI) legislation; and have forged a growing global network of activists committed to using FOI as a tool for democratic governance. We have contributed to the capacity development of dozens of human rights lawyers, and have helped create or improve university-based legal clinics throughout much of Central and Eastern Europe, the former Soviet Union, Africa, and parts of Southeast Asia.

In each of *four priority areas* — national criminal justice reform, international justice, freedom of information and expression and equality of citizenship — we pursue a series of *thematic goals*. These goals are as follows:

National criminal justice reform

Improving civilian police oversight mechanisms; rationalizing and developing alternatives to pretrial detention; and increasing access to competent legal representation for indigent criminal defendants.

We have ongoing national projects in several countries in Eastern Europe and the former Soviet Union, Mexico, and Nigeria, as well as comparative initiatives that span broader regions. One emerging area is community prosecution, which seeks to make prosecution tactics and strategies more responsive to the communities they serve.

International justice

Reinforcing mechanisms of accountability for international crimes and breaches of state obligations, including international and hybrid criminal tribunals and regional human rights courts.

Major efforts combine hands-on technical assistance with broad public advocacy to support the International Criminal Court (ICC), the Khmer Rouge tribunal being created to try surviving perpetrators of the Cambodian genocide, and the new African Court of Human and Peoples' Rights.

Freedom of information and expressionæ

Facilitating government transparency, expanding access to information and contesting undue restrictions on print and broadcast media.

We have pioneered a global tool for monitoring access to information, and are promoting

the development of legal standards to address the pervasive problem of financial interference with freedom of the press.

Equality and citizenship

Combating racial discrimination, arbitrary denationalization and statelessness; and defending the rights of those most vulnerable to abuse, including racial and ethnic minorities and non-citizens.

We are pursuing research, litigation and advocacy aimed at strengthening legal protection for non-citizens at the global level; are completing a multi-country study of citizenship and discrimination issues in Africa; and are working with partners to heighten public awareness of statelessness and citizenship deprivation, and to fortify local and regional advocates working on these issues.

We also pursue three *cross-cutting programs*:

- Developing the capacity of lawyers and law students to pursue legal advocacy supportive of a global open society, including through support for clinical legal education and human rights fellowships.
- Documenting and remedying the practice of ethnic profiling by law enforcement with respect to ordinary crime and the fight against terrorism.
- Securing legal remedies for natural resource-related corruption.

In each of these substantive fields, the Justice Initiative's *modus operandi* is characterized by a number of defining principles.

- First, we focus primarily on legal remedies for rights problems. While we recognize that law
 reform is about far more than lawyers, we have made a decision to concentrate Justice Initiative resources on legal redress and methods.
- Second, we seek practical results court rulings that are enforced; reports that are not simply read, but acted upon; projects that are studied, debated and ultimately taken over by others because they respond to genuine needs. We pursue long-range goals, but only where we can achieve tangible progress in a reasonable period of time. Where we engage in training or convene conferences, we do so in a hands-on manner and as part of a concrete,

collaborative venture aimed at one or more of our thematic objectives.

- Third, we operate at the intersection between two spheres of activity which, though closely related, are often considered distinct: (i) human rights promotion and (ii) rule of law reform. On the one hand, we explicitly make use of public advocacy, including, where necessary, criticism of governments. On the other hand, we deploy other tools litigation, technical assistance, capacity-building to develop practical solutions for rights-related problems. These tools are most effective if used synergistically so that each reinforces the other to maximum effect. Fostering the institutional transformation needed to trigger lasting changes in justice systems often requires a mix of techniques that straddle what are often seen as separate realms.
- Finally, whether a project targets the development of legal capacity among a group of human rights NGOs, or one of our thematic objectives (reduction of pre-trial detention, promotion of effective racial equality, etc.), we are ourselves active agents of legal change. Thus, we are not only supporters of others (though we provide financial, technical and political support), but rather we act in partnership with as we nourish and strengthen a broad network of allies.

LITIGATION AS A TOOL FOR CHANGE²

hile far from the only weapon in our arsenal, litigation is a major component. This reflects our belief that, in certain circumstances, litigation is an effective — if underused — tool to bring about needed reform.

At its most fundamental level, litigation may seek to secure concrete, enforceable remedies for breaches of law. Such results will often consist of judicial declarations that certain rights have been violated and/or that existing law should be enforced, orders to pay compensation to victims, and/or — where a crime has been committed — prosecution and trial of the perpetator(s).

Litigation may also aim to improve the state of the law by generating judicial precedent on an issue of significance. Rulings by constitutional and supreme courts often are legally binding and carry political influence. Even in civil law systems, higher courts may be called upon to interpret or apply the broad protections contained in constitutional text and in some legislation to a particular set of facts.

Litigation may also be used to pursue broader goals that do not necessarily require — though they may benefit from — victory in the courtroom. A lawsuit based on a claim of public interest may galvanize popular and political attention, or reinforce other means of spotlighting problems such as advocacy, monitoring and research. Further, litigation may serve as a fulcrum for common action by a class of victims to improve their condition. In this way, it may complement and

give added impetus to ongoing efforts to organize certain communities. Litigation may also help change the terms of public debate about a problem. Thus, the very process of articulating legal claims for court action may require a reformulation of the question — as one involving legal rights and remedies, rather than only historical causes, social attitudes, or political barriers – that is potentially transformative.

Where certain legal arguments are unlikely winners in court today, litigation may help preserve them for future generations of judges by sparking dissenting decisions that provide a written record of injustice, and of the claims explaining why it should end.³

In a more general but not unimportant sense, one of the principal contributions of litigation and those who engage in it is "to strive by example to change the way that law is thought about and practiced. This means acting as if judges were independent, did know and relied on comparative and international case law, and had the courage to vindicate individual rights in the face of public criticism and state authority.... In short, it means acting as if the rule of law already existed, and by doing so, challenging others ... to do so as well."

To be sure, litigation has its limits. One is time. If "justice delayed is justice denied," litigation's impact can be significantly diminished by the length of the judicial process. It can take several years for a case to wind its way through all the instances of a national court system. If review is sought before an international or regional tribunal, it may take several more years to obtain a final judgment.

Second, judicial outcomes are notoriously uncertain, particularly where substantial segments of the bench and bar are ignorant of applicable legal standards. Thus, victims of human rights violations are often hesitant to register formal complaints, press charges, or seek redress. This reluctance is often exacerbated by widespread distrust of the legal profession and disbelief — bred by the absence of example — that law can contribute to positive reform.

Third, litigation is expensive. Research and documentation of systematic patterns of wrong-doing — the kinds of evidence that often forms the basis of successful litigation — take time, money, and skilled human resources. Lawyers too are costly, and many potential beneficiaries lack the funds to retain private counsel. Moreover, in many countries, "loser pays" rules for cost allocations deter indigent plaintiffs from seeking to vindicate claims. In addition, in many regions the lack a tradition of pro bono publico limits the pool of available cooperating counsel.

For these and other reasons, litigation must be deployed in a manner that takes account of concerns outside the courtroom and makes use of complementary tools, which reinforce and build upon its impact. Litigation can be most effective when its pursuit is considered as one of a number of tools for change. In this way, alternative and/or intermediate objectives — for example, awareness-raising or community empowerment — may be pursued prior to, or notwithstanding an adverse, final judgment.

Other factors may help maximize litigation's value for public interest minded objectives:

• A litigation strategy designed and pursued in collaboration with local communities is more likely to succeed. NGOs and issue-oriented activists have time and energy that lawyers of-

ten lack to devote to public education about particular cases. Timing litigation to coincide with other activities outside the courtroom — the publication of a report on the topic, the introduction of a bill in a legislature, the convening of a public hearing — may help focus attention on the case in a beneficial way. And when the case is decided, it will often be interested communities of non-lawyers who have the interest and perseverance to ensure that the judgment is not forgotten.

- Work with the media. Judicial decisions have enhanced meaning if people know about them, understand their significance, and enforce them. Explaining to the media why a ruling matters, what are its implications for ordinary people, and how the government can comply in a reasonable manner may be crucial to ensuring greater public acceptance and support. Given the length of some litigation, it is often important to use different stages along the way a hearing, the filing of an application, a lower court decision that will be appealed as an opportunity for public education. In this way, even if the end result is less than everything desired, the public interest litigation will have provided a number of opportunities for raising awareness about the issue as it proceeds.
- Be creative and flexible in making use of available legal resources. In the absence of clear legislative rules expressly governing the conduct at issue, it may be necessary to argue that more general provisions, which no one has ever thought to apply, should be considered. Similarly, even in a jurisdiction which does not treat court rulings as legally binding precedent, it may be possible to rely upon the persuasive force of a decision's reasoning in maximizing its significance in other settings. Where court rules do not provide for collective remedies through a "class action," it may still be possible, and desirable, to join together into one legal action the complaints of several similarly situated individuals. In the event of protracted litigation, joinder may protect against the risk that one or more complainants drops out. It may also lay a foundation for presenting evidence of harm to more than one complainant, which can be helpful in establishing the existence of a systemic problem.
- A sense of realism coupled with humility about litigation is useful. On the one hand, this requires recognizing that litigation in any environment is a long-term process. It may be necessary to temper undue expectations of quick success. On the other hand, significant results are possible, notwithstanding the numerous obstacles confronting those who seek to use it as a tool. Though the "public interest bar" in some countries may be counted on one hand, even one talented lawyer working in collaboration with local communities and an effective NGO can accomplish a great deal.

THE EXPERIENCE OF THE JUSTICE INITIATIVE TO DATE

In the three years since the Justice Initiative's establishment, we have commenced or joined a number of cases in the fields of international justice, racial discrimination, freedom of expression, and access to information. Given the duration of litigation, it is not surprising that many cases are still pending and have yet to produce definitive results. Nonetheless, several matters have proceeded far enough along to generate results.

Anyaele and Egbuna v. Charles Taylor — International Justice

IN MARCH 2003, CHARLES TAYLOR, former president of Liberia, was indicted by the Special Court for Sierra Leone on seventeen counts of war crimes and crimes against humanity. In August, as part of a political deal urged by western powers, the President of Nigeria granted Taylor asylum in Nigeria, where resided through the spring of 2006. The Justice Initiative helped forge a coalition of human rights organizations in Liberia, Nigeria and Sierra Leone to call upon Nigeria's government to turn Taylor over to the Special Court for prosecution and trial. The coalition launched a campaign of media and public awareness in Nigeria and abroad to secure justice for Taylor's victims. In the spring of 2004, David Anyaele and Emmanuel Egbuna — two Nigerian businessmen who suffered torture and mutilation by Taylor-backed rebel forces in Sierra Leone — filed suit in Nigeria's High Court seeking revocation of Taylor's asylum. In November 2004, the Justice Initiative filed a brief as amicus curiae with the court addressing the duty of states to prosecute or extradite, and to withhold asylum from perpetrators of war crimes and crimes against humanity. In November 2005, the High Court ruled, over the government's objections, that the claimants had a right to sue for redress so long as Taylor enjoyed asylum. The ruling would have allowed the plaintiffs to invoke Nigerian legislation barring asylum for war criminals to challenge the decision to harbor Taylor. Hearings were pending before the Court when, in late March 2006, Taylor fled from his Nigerian compound, then was recaptured and taken into custody at the Special Court in Freetown. As of April 2006, the UN Security Council was considering the possibility of moving Taylor's trial to The Hague for security reasons. The litigation in the Nigerian court, coupled with advocacy by a broad range of civil society throughout west Africa, helped keep Charles Taylor's continued impunity in the public spotlight and thereby contributed to his ultimate arrest.

Herrera Ulloa v. Costa Rica — Freedom of Expression

IN NOVEMBER 1999, COSTA RICA'S PENAL COURT OF THE FIRST JUDICIAL CIRCUIT convicted the publisher and a journalist of the daily *La Nacion* of criminal defamation. The charges stemmed from a se-

ries of articles published in 1995 that cited European reports alleging corruption by former Costa Rican diplomat Felix Przedborski. The courts ordered the defendants to pay a criminal fine as well as damages of about \$150,000. The name of the journalist, Mr. Herrera Ulloa, was entered in the register of criminals, and he sought review in the Inter-American regional system.

In May 2004, the Justice Initiative, working with assistance from a major New York law firm, submitted an amicus brief urging the Inter-American Court of Human Rights to set a high standard of protection for political speech in defamation cases. That standard, generally known as the "actual malice" rule, requires public figures to prove that the speaker acted with knowledge of falsity or reckless disregard for the truth.

On July 2, 2004, the Court overturned Herrera Ulloa's libel conviction. In setting aside the conviction, the Inter-American Court of Human Rights noted that public officials and others who "enter the sphere of public discourse" must tolerate a greater "margin of openness to a broad debate on matters of public interest." This, the Court added, was essential to the proper functioning of democracy. The judgment marked the first time that the Inter-American Court clearly embraced this fundamental principle of modern free speech law, thus echoing the case law of other leading human rights bodies. The special protection enjoyed by political speech, the Court noted, does not flow from the status of the individuals involved, but from the public interest in the discussion of their activities and performance.

While the Court chose not to adopt a specific standard of proof, the importance of the general principle established by the Court cannot be understated in a region where personal honor and reputation have too often prevailed over legitimate expression. The judgment confirms the global relevance of special protection for political speech, and will empower free expression groups to push more forcefully for defamation law reform in Latin America.

Claude v. Chile — Access to Information

In May 1998, Members of the Terram Foundation, a Chilean environmental NGO, filed a request for information with the Chilean Foreign Investment Committee regarding a major logging undertaking, known as the Condor River project. Although the Committee is required by law to vet and approve investors and gather relevant information, the requests were ignored and subsequent appeals by the victims were dismissed as "manifestly ill-founded," including by the Chilean Supreme Court. In December 1998 a number of South American rights groups filed a petition with the Inter-American Commission of Human Rights on behalf of the requestors. This was the first case before the Commission involving the right of general access to state-held information. Although more than fifty states have adopted freedom of information legislation in recent years, there is as yet no clearly-recognized public right of access to government information. Accordingly, in February 2005, the Justice Initiative and three other groups — Article 19, Libertad de Informacion Mexico (LIMAC) and the Lima-based Press and Society Institute (IPYS) — filed

jointly an amicus brief with the Commission in support of the petition. The brief argued, first, that Article 13 of the American Convention on Human Rights guarantees everyone's right to access information held by public authorities; and also, that the Chilean government failed to give effect to this right in domestic law, and violated the requestors' Article 13 rights ignoring the information requests in the case at issue.

In late 2005, following the amicus brief's reasoning, the Commission issued its opinion recognizing a general right of access to government information under Article 13 of the American Convention. It also concluded that Chile's freedom of information legislation falls short of Article 13 requirements. The case has now been referred to the Inter-American Court of Human Rights, which will have the opportunity to establish for the first time a binding right to information under international law. The case has already helped galvanize a growing movement for expanded access to information in Chile.

Nachova v. Bulgaria — Racially-Motivated Violence

IN 1996, BULGARIAN MILITARY POLICE officers shot and killed two Roma conscripts. The victims, who had recently absconded from a military construction crew, were known to be unarmed and not dangerous. The killing, by automatic weapon fire, took place in broad daylight in a largely Roma neighborhood. Immediately after the killing, a military police officer allegedly yelled at one of the town residents, "You damn Gypsies!" while pointing a gun at him. Relatives of the victims sought redress.

In February 2004 the First Section of the European Court of Human Rights, unanimously found that both the shootings and a subsequent investigation, which upheld their lawfulness, were tainted by racial animus. At the request of the Bulgarian government, the Court's Grand Chamber agreed to review this decision. The Justice Initiative filed an amicus brief arguing that states have a heightened duty to investigate racially-motivated crimes.

In July 2005, the Grand Chamber affirmed the First Section's first-ever finding of racial discrimination in breach of Article 14 of the European Convention of Human Rights. The Court's ruling made clear that governments have an obligation to investigate possible racist motives behind acts of violence. In holding that the Bulgarian government's failure to investigate the fatal police shooting of two Romani men infringed the European Convention, the Court observed:

"Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction. It is for this reason that the authorities must use all available means to combat racism and racist violence, thereby reinforcing democracy's vision of a society in which diversity is not perceived as a threat but as a source of its enrichment."

In affirming in part the earlier finding of racial discrimination in breach of Article 14, the Grand Chamber broke new ground in European human rights law. The Grand Chamber unanimously held that the prohibition of discrimination under Article 14 has a procedural component, which required the state to investigate whether discrimination may have played a role in the killings. The failure to do so in this case, despite indications of racial motivation, amounted to discrimination. The judgment affirmed several important principles that should guide domestic authorities in future cases involving violence arguably motivated by racial hatred. These include the following:

- Acts of racially induced violence and brutality are "particularly destructive of fundamental rights."
- Where there is suspicion that violence is racially motivated, "it is particularly important that the official investigation is pursued with vigor and impartiality."
- When investigating violent incidents and, in particular, deaths at the hands of state agents, "State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not racial hatred or prejudice may have played a role in the events." In this respect, regard should be had "to the need to reassert continuously society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence."
- Failure to accord such incidents the investigative care required may constitute unjustified treatment at odds with Article 14 of the Convention.
- Where evidence of racist verbal abuse being uttered by law enforcement agents in connection with an operation involving the use of force against persons from an ethnic or other minority comes to light in the investigation, it must be verified and if confirmed a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives.
- The positive duty on the authorities is to "do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence."

Yean and Bosico v. Dominican Republic — Racial Discrimination in Access to Nationality

For Decades the Dominican Republic has denied citizenship — and all the public benefits that flow from it — to tens of thousands of Dominican-born (and often darker-skinned) ethnic Haitians. Hospital staffs and municipal officials have long conspired to flout the Dominican Constitution's promise of citizenship to all native-born residents. Several years ago, two girls of Haitian descent, denied Dominican birth certificates and the right to attend public school, brought a legal challenge. Denied redress by the Dominican Republic courts, the girls appealed to the Inter-American system.

The Justice Initiative filed an amicus brief with the Inter-American Court of Human Rights. The submission argued that racial discrimination in access to nationality breaches long-standing provisions of international law. The brief demonstrated that the Dominican Republic systematically discriminates both directly and indirectly against persons of Haitian descent in access to nationality, in contravention of the Dominican Constitution. It further offered evidence that racial discrimination in access to nationality is a global problem, and highlighted the contribution the Court could make in this case.

In October 2005, the Court issued a landmark decision affirming the human right to nationality as the gateway to equal enjoyment of all rights as civic members of a state. The Court's ruling marked the first time that an international human rights tribunal unequivocally upheld the international prohibition on racial discrimination in access to nationality.

The Court concluded that the Dominican Republic's discriminatory application of nationality and birth registration laws and regulations rendered children of Haitian descent stateless and unable to access other critical rights such as the right to education, the right to recognition of juridical personality, the right to a name, and the right to equal protection before the law (all enshrined in the American Convention and numerous other international human rights instruments).

In its ruling, the Court observed that:

- Nationality is the legal bond that guarantees individuals the full enjoyment of all human rights as members of the political community.
- Although states maintain the sovereign right to regulate nationality, states' discretion
 must be limited by international human rights standards that protect individuals against
 arbitrary state actions. States are particularly limited in their discretion to grant nationality by their obligations to guarantee equal protection before the law and to prevent, avoid,
 and reduce statelessness.

- In granting nationality, states must abstain from producing and enforcing regulations that are discriminatory on their face or that have discriminatory effects on different groups within a population.
- States have an obligation to avoid adopting legislation or engaging in practices with respect to the granting of nationality whose application would lead to an increase in the number of stateless persons. Statelessness makes impossible the recognition of a juridical personality and the enjoyment of civil and political rights, and produces a condition of extreme vulnerability.
- States cannot base the denial of nationality to children on the immigration status of their parents.
- The proof required by governments to establish that an individual was born on a state's territory must be reasonable and cannot present an obstacle to the right to nationality.

The Court ordered the Dominican Republic to reform its birth registration system and create an effective procedure to issue birth certificates to all children born on the territory regardless of their parents' migratory status; open its school doors to all children, including children of Haitian descent; publicly acknowledge its responsibility for the human rights violations within six months of the sentence date; widely disseminate the sentence; and pay monetary damages to the applicants and their families.

hese court rulings are significant. They have demonstrated that law as applied by capable judges can vindicate important rights. They have also underscored the power of civil society. Each of these cases was made possible by the determined persistence of victims, private aid groups, and lawyers working for little pay and at substantial risk. Finally, they have articulated — with the full legal authority that only independent courts possess — basic principles that guide government behavior. The challenge is to enforce such principles. The Justice Initiative is working with litigants and other NGOs to join out-of-court advocacy efforts with these individual cases in order to secure compliance with the judgments and broader changes in governmental conduct in accord with the court-ordered standards.

- ¹ Executive Director, Open Society Justice Initiative.
- ² This section draws upon J. Goldston, *Public Interest Litigation in Central and Eastern Europe: Roots, Prospects, and Challenges*, Human Rights Quarterly, Vol. 28 (May 2006).
- ³ See J. Lobel, Losers, Fools and Prophets: Justice as Struggle, 80 Cornell Law Review 1331 (1995).
- ⁴ J. Goldston, Race Discrimination in Europe: Problems and Prospects, 5 European Human Rights Law Review 462, 463 (1999).
- ⁵ With respect to the killings themselves, the Grand Chamber, by an 11–6 vote, overturned the prior ruling that they had been motivated by racial hatred. In doing so, the Grand Chamber elaborated the following principles concerning the standard and burden of proof:
 - The "beyond reasonable doubt" standard of proof for determining whether a state has violated the European Convention is distinct from standards employed in national legal systems to rule on criminal guilt or civil liability.
 - In proceedings before the Court, "there are no procedural barriers to the admissibility of evidence or predetermined formulae for its assessment." Instead, "the level of persuasion necessary for reaching a particular
 conclusion and, in this connection, the distribution of the burden of proof, are intrinsically linked to the
 specificity of the facts, the nature of the allegations made, and the Convention right at stake."
 - In certain circumstances, where the events lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory explanation. In cases of discrimination, the Court may require the respondent government to disprove an arguable allegation of discrimination and if they fail to do so find a violation of Article 14 of the Convention on that basis.

However, the Grand Chamber declined to reverse the burden of proof in this case, where it was alleged that a violent act was motivated by racial prejudice. Reversing the earlier panel decision, the Grand Chamber held that the authorities' failure to carry out an effective investigation did not justify shifting to the government the burden of proof on the issue of discrimination. Six judges dissented from the majority's finding of no substantive violation of Article 14 finding that the government's conduct taken as a whole disclosed a breach of Article 14.



THE EBRD LEGAL ASSESSMENT WORK: AN EFFECTIVE TOOL FOR PROMOTING CHANGE

Michel Nussbaumer

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In a statement issued in 2002 in Monterrey (the "Monterrey Declaration"), the presidents of the multilateral development banks called for better "measuring, monitoring and managing of results" in development assistance. They highlighted the need for country capacity building in doing these three things. One effective way of assisting transition countries in this context is by providing them with reliable, scientific data on the quality and functioning of their legal systems. The EBRD, through its Legal Transition Programme, is committed to providing such assistance.

INTRODUCTION

ince the mid-1990s the European Bank for Reconstruction and Development (EBRD, or the Bank), has been developing a Legal Transition Programme (LTP). The Bank sees this initiative as its contribution to the improvement of the investment climate in the transition countries of central and eastern Europe and the

Commonwealth of Independent States (CIS).² The LTP focuses primarily on areas most relevant to the EBRD's investment strategies: concessions, corporate governance, insolvency, secured transactions, securities markets, and telecommunications. The objective is to assist in the development of the legal institutions and culture on which a vibrant market-oriented economy depends.

In its LTP, the Bank has been guided by a systematic methodology. First, the Bank aims to define what should be considered as a desirable state of legislation and related institutions for a given legal area. In order to do this, it considers whether internationally recognised standards of best practice exist already, or whether these need to be created.³ Second, the Bank makes a diagnosis for each specific country, by analysing to what extent such country's legislation and practice comply with the relevant international standards. Lastly, the EBRD proposes and, if requested, delivers, the appropriate assistance in the form of direct technical cooperation or other direct action.

The second step mentioned above, i.e. the diagnosis made by the Bank, has over the years developed into a unique collection of analytical tools relating to the commercial and financial laws of these countries. All assessment results are available on the Bank's web site at www.ebrd. com/law. This article intends to make the point that the EBRD assessment work has been instrumental in the development of successful legal reform projects in transition countries.

HOW GOOD IS THE "LAW ON THE BOOKS"?

ssessing legal transition in the countries of central and eastern Europe and the CIS is a two-step process. First the EBRD evaluates the level of compliance of local legislation (the "law on the books") with relevant international standards of best practice. This first criterion is referred to as "extensiveness" of the legal framework. To date such extensiveness as-

CHART 1: COMPLIANCE OF LEGISLATION WITH OECD PRINCIPLES OF CORPORATE GOVERNANCE

VERY HIGH	HIGH	MEDIUM	LOW	VERY LOW
COMPLIANCE	COMPLIANCE	COMPLIANCE	COMPLIANCE	COMPLIANCE
(none)	Armenia Hungary Kazakhstan Latvia Lithuania FYR Macedonia Moldova Poland Russia	Albania Bulgaria Croatia Czech Republic Estonia Kyrgyz Republic Serbia & Montenegro Slovak Republic Slovenia Uzbekistan	Bosnia & Herzegovina Georgia Romania Turkmenistan	Azerbaijan Belarus Tajikistan Ukraine

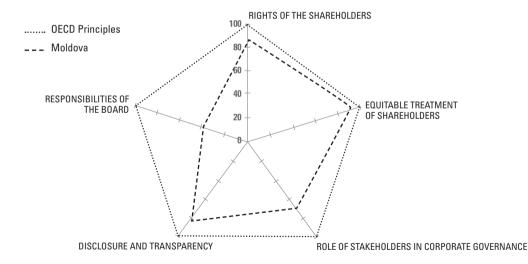
Source: EBRD Corporate Governance Assessment 2004

sessments have been carried out and published for concessions, corporate governance, insolvency, secured transactions, and securities markets. A similar assessment of telecommunications regulatory frameworks is planned for 2006.

The extensiveness analysis is conducted on the basis of a checklist of questions, which reflect the contents of the relevant international standards. Countries are given scores and put in different categories ranging from "very low compliance" to "very high compliance." Below is an example of such ranking in the corporate governance assessment published in 2004, using as a benchmark the Organisation for Economic Cooperation and Development (OECD) Principles of Corporate Governance.

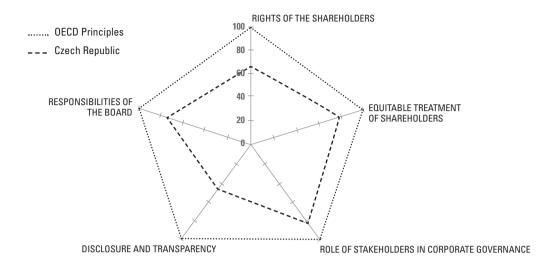
The assessment goes beyond the mere ranking of countries into categories. Using the answers provided to the checklist, the Bank is able to pinpoint areas of strength or weakness within the legal framework applicable to a given area. Again, using the corporate governance sector as an example, Chart 2 below presents the profiles of three different countries. The external line in the graphs represents an ideal score, i.e. full compliance with the OECD Principles of Corporate Governance. The internal line depicts the actual country's compliance with the various dimensions of corporate governance legislation.

CHART 2A: QUALITY OF CORPORATE GOVERNANCE LEGISLATION — MOLDOVA



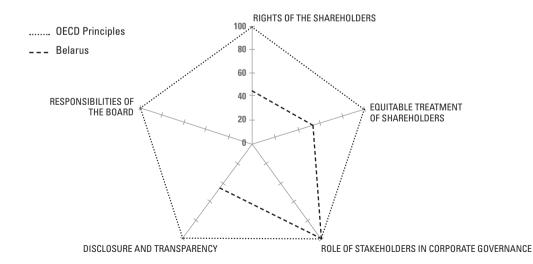
Note: The extremity of each axis represents an ideal score, i.e., corresponding to OECD Principles of Corporate Governance. The fuller the 'web', the more closely the corporate governance laws of the country approximate these principles. Source: EBRD Corporate Governance Assessment 2004

CHART 2B: QUALITY OF CORPORATE GOVERNANCE LEGISLATION — CZECH REPUBLIC



Note: The extremity of each axis represents an ideal score, i.e., corresponding to OECD Principles of Corporate Governance. The fuller the 'web', the more closely the corporate governance laws of the country approximate these principles. Source: EBRD Corporate Governance Assessment 2004

CHART 2C: QUALITY OF CORPORATE GOVERNANCE LEGISLATION — BELARUS



Note: The extremity of each axis represents an ideal score, i.e., corresponding to OECD Principles of Corporate Governance. The fuller the 'web', the more closely the corporate governance laws of the country approximate these principles. Source: EBRD Corporate Governance Assessment 2004

The charts highlight the fact that each of the three countries suffers from deficiencies in different areas of the corporate governance legislation. In Moldova (Chart 2a), where the corporate governance legislation is generally of good quality, the graph shows, however, that there is room for improvement in the rules relating to responsibilities of the board. Alternatively, in the Czech Republic (Chart 2b), the main shortcomings are to be found in the disclosure and transparency area. Finally, in Belarus (Chart 2c), where the law is in very minimal compliance with international standards, the graph reveals that the role of stakeholders is well regulated, whereas other areas, in particular relating to the responsibilities of the board, are seriously deficient. This type of more detailed evaluation helps us to understand where exactly the legal regime fails to comply with the relevant international standards.

FUNCTIONING OF THE LAW

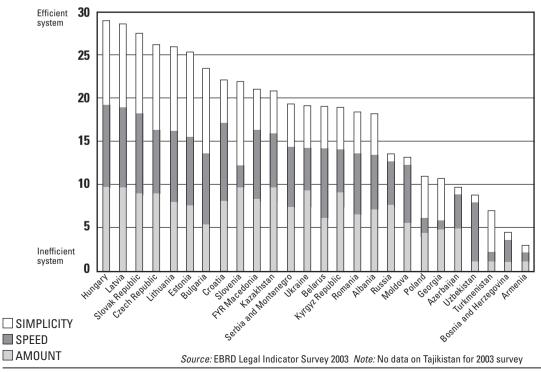
Interested observers are likely to argue that although an assessment of the "laws on the books" provides a good overview of progress in legal reform, it is not sufficient to give a full picture of the impact of those reforms, because what actually matters in order to support a vibrant market economy is the way these laws are implemented by courts and other state institutions. This is absolutely true. The EBRD is dedicated to obtaining a full picture of legal transition in its region by also assessing the level of implementation of laws. This is the second step of the assessment process: an analysis of law "effectiveness", i.e. the actual practice developed in the countries. This part of the process is methodologically very challenging, as it is designed to capture facts, rather than rules, and to reflect a multitude of individual practices that may have developed within a given jurisdiction.

Following recent trends in the international legal community,⁴ the EBRD has based its assessment of law effectiveness on case studies, which serve as proxies for the functioning of the relevant area of law. The first evaluation focused on secured transactions laws and was conducted in 2003, in collaboration with local lawyers in the region. It addressed the enforcement of charges. Based on a simple scenario (a bank trying to enforce its security against a defaulting debtor), the study revealed how the systems worked in practice in each country: how much money could a creditor recover through realisation of charged assets, how quickly and how simply? Countries were ranked on the basis of these three variables (see Chart 3). Similar case studies were conducted on insolvency law in 2004 and on corporate governance in 2005. Concessions and securities markets are scheduled for 2006 and 2007 respectively.

OVERALL COUNTRY LAW RATINGS

oing one step further, the EBRD has combined the two parts of its legal assessments available to date, i.e. the quality of "laws on the books" and the effectiveness of their implementation, to arrive at an overall score for each of its countries of operation (see Chart 4). The chart gives an idea of the general state of legal transition in 2005 in the commercial and financial law sector of the EBRD region. Generally, central European countries appear to be more advanced than the countries of Central Asia and the Caucasus, confirming the broad correlation between progress in rule of law and in economic transition. In that sense, European Union (EU) integration has played a positive role in pushing reform agendas. There are some less intuitive results however: Poland comes last out of all central European countries, the likely consequence of an over-burdened court system which makes it difficult for investors to process their claims expeditiously. Early transition countries such as Moldova and the Kyrgyz Republic, on the other hand, fare relatively well, probably reflecting the substantial amount of technical assistance they received to upgrade their written laws. But despite these anecdotal points, the most striking feature of the chart is the huge transition challenge that remains for the entire region. Graphically that challenge can be seen in the lighter top part of the bars, i.e. the gap that these countries need to bridge in order to approximate international standards advocated by the EBRD. There remains a lot of work to be done.

CHART 3: ENFORCEMENT OF CHARGED ASSET (SIMPLICITY, SPEED, AMOUNT RECOVERABLE)



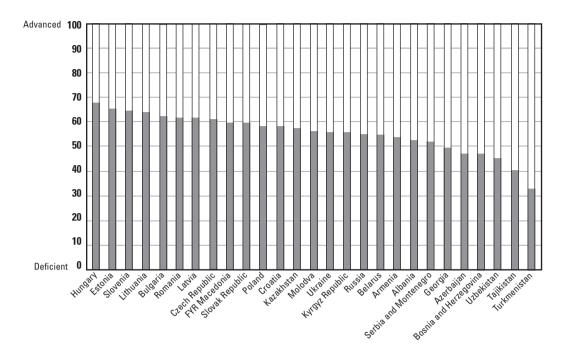


CHART 4: GENERAL STATE OF LEGAL TRANSITION (COMMERCIAL AND FINANCIAL LAWS)

Source: EBRD 2005 Composite Country Law Index

IMPACT OF EBRD LEGAL ASSESSMENT WORK

ssessing domestic law in every country in the region is a colossal enterprise that requires substantial resources, both human and financial. Why does the EBRD engage in this huge effort? The rationale is three-fold:

- Firstly, the EBRD can make use of its domestic law knowledge to inform its own investment decisions.
- Secondly, by publishing country ratings and related information, the Bank can encourage
 other investors to venture into this part of the world by providing them with the information
 necessary to make informed decisions.
- Thirdly, and most importantly, legal transition assessments can be a formidable tool for
 policy dialogue with local governments. In other words, in accordance with the objectives
 of the Monterrey Declaration mentioned above, the publication of studies on legal systems
 is likely to encourage national governments to address the issues highlighted in the assessments and take appropriate steps.

From a legal reform perspective, the last point above — the encouragement of legal reforms in the region — is crucial. The measure of its success raises the issue of causation between the publication of EBRD's legal assessments and the advance of legal reforms in the region. It is problematic to establish such causation in a scientific way. Governments are unlikely to confirm that they have embarked on new reforms precisely after having reviewed the EBRD assessments and their country's score in them. However, it remains that the charts and tables mentioned above are routinely used by Bank representatives when meeting with local officials to discuss reform priorities. In many instances, officials have adopted a very positive attitude towards the Bank's analytical products and have concurred with the diagnoses.

Within the LTP, the area of secured transactions can be viewed as a pioneering use of legal assessment, with the publication for the first time in 1999 of the EBRD Regional Survey of Secured Transactions. An empirical review shows that secured transactions law is also the area where the Bank has conducted the largest number of projects over the years.⁵ A particularly successful example of EBRD legal technical assistance is the Slovak reform. In 2000, the Bank provided assistance to the Office of the Deputy Prime Minister and the Ministry of Justice 1) to develop new legal provisions on secured transactions adapted to a modern market economy in the Slovak Republic based on the EBRD Core Principles for Secured Transactions Law; 2) to successfully implement the principles by taking the apposite measures, including the development of a centralised pledge registry; and 3) to encourage the wide use of the principles by raising public awareness. Entirely new Civil Code provisions were drafted, approved by the government, and voted by parliament in August 2002. The new law was welcomed by the international community.⁶ The registry started operating as planned on 1 January 2003. A number of materials were produced to inform potential users of the changes (practical guide, legal commentary on the law). The EBRD is currently assisting in the monitoring of the registry functioning and is also collecting statistical data with a view to measuring the impact of the new regime on the credit market in the country.

A recent example will illustrate the motivational effect of the Bank's legal assessment work in the secured transactions area. When the case study on charges enforcement was published in the Bank's 2003 Transition Report, the fact that Poland scored poorly did not go unnoticed (see Chart 3). The case study highlighted the challenges that existed in that country when trying to enforce a pledge: secured lenders were likely to be faced with a long, complex, and expensive process. The procedure was described as more challenging than in any (then) EU candidate country and even than in a number of early transition countries. This view was compounded by the World Bank *Doing Business in 2004* and *Doing Business in 2005* reports concluding that it would take on average 1000 days to enforce a simple contract, and that the legal rights of borrowers and lenders scored 2 on an index of 1 to 10.8 Following these publications, the National Bank of Poland approached the EBRD with a request for assistance in assessing the impact of the legal framework on the credit sector in Poland and for provision of recommendations to improve the situation. EBRD technical assistance was provided, in conjunction with a World Bank project on "Reducing Legal Barriers to Contract Enforcement." A detailed report was

prepared, identifying a number of issues that contribute to the unsatisfactory situation. The point of the exercise was not to make a detailed review of relevant laws and regulations and to point out every aspect where improvement could be made, but instead to help Poland to prepare a selective agenda for reform which, if properly conducted, would radically change the use of pledge and mortgage in the country. The issues listed will surprise no one vaguely familiar with the subject matter. They are well known: delays associated with registration of a pledge or a mortgage, excessive formalism, ineffective procedures leading to the pledge or mortgage providing little value in practice, and lack of the necessary flexibility required by market-based transactions. A number of specific recommendations were made to improve the regime, such as, for example, a change of the pledge registration procedure with a view to introducing a 'notice' system enabling immediate registration of information as presented by the parties and immediate access to all registered information by any member of the public. As the recommendations of the report conveyed, changes to the system must be profound, radical, and built on a broad consensus to ensure full and constructive implementation. Following the publication of the report in January 2006, it remains to be seen how a consensus and a commitment to change can be built among participants in the Polish credit market. If it can, borrowers and lenders in Poland may be able to look forward to the greater availability of credit on improved terms, already enjoyed in other Central European countries.

MAINTAINING THE LEGAL REFORM MOMENTUM

he EBRD assessments reveal a need for the pursuit of legal reforms in the countries of central and eastern Europe and the CIS. Although legal frameworks have been substantially upgraded since the early 1990s, much work remains to be done in order for these countries to approximate international standards of best practice. In addition, and more significantly, implementing legal provisions remains fraught with uncertainties in a majority of countries. Investors cannot, in many instances, rely sufficiently on the ability of local courts to uphold their contractual rights. Significant efforts are still required to build legal institutions and increase judicial capacity in the commercial sector. By publishing detailed assessments highlighting the areas that need overhauling, the EBRD seeks to encourage policy makers in the region to take appropriate steps. If requested, the Bank is also able to offer its technical assistance to conduct the necessary reforms.

- ¹ See http://www.ebrd.com/new/pressrel/2002/02sep03x.htm.
- ² The EBRD countries of operations are Albania, Armenia, Azerbaijan, Belarus, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Georgia, Hungary, Kazakhstan, Kyrgyz Republic, Latvia, Lithuania, FYR Macedonia, Moldova, Poland, Romania, Russian Federation, Serbia & Montenegro, Slovak Republic, Slovenia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.
- ³ The international standards used by the EBRD in its assessment work include, among others, the OECD Principles of Corporate Governance, the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, the UNCITRAL Working Group on "Legislative Guidelines for Insolvency Law," the EBRD Model Law on Secured Transactions, the IOSCO Objectives and Principles of Securities Regulation and the UNCITRAL Legislative Guide for Privately Financed Infrastructure Projects.
- ⁴ See, in particular, the World Bank's Lex Mundi project. Simeon Djankov, Rafael La Porta, Florencio Lopez De Silanes, and Andrei Shleifer, "Courts: The Lex Mundi Project" (March 2002) available at www.ssrn.com.
- ⁵ Projects have been or are being developed in Azerbaijan, Georgia, Hungary, Kyrgyz Republic, Latvia, Moldova, Mongolia, Poland, Russia, Serbia & Montenegro, Slovak Republic, Tajikistan.
- ⁶ The 24 January 2003 edition of The Economist referred to the Slovak law as the "world's best rules on collateral."
- ⁷ See EBRD Transition Report 2003, p.38.
- ⁸ The countries on the top of the index are the UK, Hong Kong Special Administrative Region (SAR), and also Albania and Slovakia. Poland, with an index of 2, ranks alongside Brazil, China, Haiti, and Morocco. See World Bank, Doing Business (2005), p. 45.
- 9 Available at www.ebrd.com/st.
- ¹⁰ An example of this focus on judicial capacity building is the recent project launched jointly by the EBRD and IDLO to increase capacity in the commercial law sector of the Kyrgyz judiciary.

GENDER AND THE LAW: EDUCATION AS A TOOL to promote and improve Women's rights

Lelia Mooney Sirotinsky

THE INADEQUATE IMPLEMENTATION OF THE PEACE ACCORDS has precluded women and indigenous groups from benefiting from its provisions and has contributed to the atmosphere of insecurity and violence that still characterizes Guatemalan society.

The problems of socio-economic inequality and exclusion that sparked the civil war remain unresolved, leaving women, particularly those of indigenous descent, at risk of violence due to the compounded discrimination they face based on sex, ethnicity, and class. Violence against women is met with impunity as authorities fail to investigate cases, and prosecute and punish perpetrators.

The Special Rapporteur calls on the Government of Guatemala to take action under six broad categories: end impunity for violence against women through legislative, investigative, and judicial reform; provide protective and support services to women facing actual or a risk of violence; create a gender-sensitive information and knowledge base; strengthen institutional infrastructures; promote training, operational and awareness-raising programs.

> Yakin Erturk, UN Special Rapporteur on Violence Against Women, after her 2004 visit to Guatemala

INTRODUCTION

nadequate protection of women's rights remains an unfortunate reality in many countries today. Broad conditions of social and economic inequality are noxious in their own right; however, they raise more acute concerns insofar as they contribute directly to violence against women. As a recent report of the UN Special Rapporteur on Violence against Women stated, gender based violence (GBV) remains a "universally pervasive phenomenon...that results [from] the manifestation of historically rooted unequal relations between men and women." In the past decade GBV "has gained international recognition as a grave social and human rights concern affecting virtually all societies." Efforts to control GBV encounter particular difficulties in that the very institutions charged with enforcing and adjudicating cases involving the phenomena, reflect and reinforce broader conditions of inequality themselves.

Background social conditions, including traditional practices, cultural insensitivity, gender bias and colonial legacies may become intertwined with the administration of justice such that they impede women's efforts to seek justice and legal redress." These sociological realities are further responsible for the "disconnect that exists in many Latin American countries between the declarations of rights that their constitutions proclaim and the practical application, acknowledgement and enforcement of those rights."

These phenomena are particularly evident in Guatemala. The lack of understanding and respect for women's legal rights in Guatemalan society has had a broad and negative impact on the administration of justice. Not only are the lives of women adversely affected, but social, legal, and economic institutions are challenged and undermined. A number of factors converge to create an environment where the absence of gender equality and GBV prevail. In addition to widely shared values that countenance inequality and discrimination against women, technical factors such as poorly trained justice sector officials and the inability of the legal and judicial system to enforce laws are also at work. Remedying these wide ranging problems constitutes a significant challenge.

This article explores how 'gender and the law' education can contribute to the specific goal of reducing GBV by simultaneously addressing both general social attitudes that contribute to broader gender injustice as well as the practical skills-based forces that perpetuate these conditions. This approach is based on the experience of devising and running a graduate program on gender and the law for justice sector professionals and civil society advocates in Guatemala⁵ through the development of a strategic partnership with the University of San Carlos Law School (USAC). The program involved a number of elements: the development of local stakeholder partnerships, capacity building, strong monitoring and evaluation mechanisms to evaluate impact and prospects for sustainability, and the design of methods to extend the program's impact more widely in Guatemalan society.

This article draws from the author's experience in implementing this graduate program on gender and the law. The article first focuses on the importance of analyzing the challenges arising from the social context in which this program was framed. Secondly, it describes the specific international development project undertaken and assesses its elements, design, and implementation. It concludes with reflections of a development practitioner based on the lessons learned and program results.

THE GUATEMALAN CASE

uatemalan women have endured high levels of violence in recent years. During her 2004 visit to Guatemala, former Inter-American Human Rights Special Rapporteur on the Rights of Women, Susana Villaran, declared domestic violence one of the major causes for the recent increase in femicides in Latin America. However, during recent years there have also been improvements to the legal framework in support of women's rights such as reforms of criminal codes to criminalize forced labor, slavery, and sexual exploitation.

The process of trying to understand the complexity of GBV and the everyday challenges women face while trying to access the justice system, led the project team to conduct a baseline exercise that evaluated both the justice system and the manner in which Guatemalan legal education dealt with gender issues. This baseline study⁶ shed new light on conditions victims face when encountering the criminal justice system. We found that Guatemalan criminal procedure law directly contradicts human rights standards because women and indigenous women victims are frequently denied access to justice. In many cases, interpreters⁷ are not available throughout the different institutions, do not have a permanent post, and so end up collaborating on a voluntary basis. The lack of proper interpretation facilities effectively denies many indigenous women access to justice, as most do not speak Spanish and can only communicate in their indigenous language. There is also confusion regarding the procedures to be followed when processing the claims of victims of domestic violence. This, in turn, results in a tendency to encourage reconciliation between aggressor and the victim, an approach that runs contrary to the law on domestic violence.

Another crucial factor in understanding the lack of knowledge of the legal sector in gender-related issues is the absence of up-to-date, complete, or nationally acknowledged academic curricula in Guatemalan universities (both public and private) on 'gender and the law' for civil society, lawyers, and justice sector officials. A major weakness identified by the baseline study was the limited number of legal professionals and civil society advocates in Guatemala who, as a result of undergraduate and graduate legal training with gender and multicultural analysis, fully understand women's legal rights and who can therefore advocate and promote social change on behalf of these disadvantaged segments of Guatemalan society.

This situation is reinforced by the fact that "the methodologies used to prepare legal professionals in the classroom heavily rely on the traditional and authoritarian model where the professor lectures" and the student listens (well rooted in the context of Latin American higher education institutions of which law schools are no exception). These educational methodologies fail to foster the critical analytical skills required to look at the law in action (*el derecho en accion*) with a view to realizing reforms. As a result of these educational shortcomings, Guatemala has not been able to draw from a cadre of judges, prosecutors, police, and policymakers knowledgeable in making gender-equitable decisions, and in interpreting and applying the law

in a manner sensitive to gender and multicultural equity issues⁹ (or without gender and multicultural biases).

From a development perspective, an understanding of both the historical and cultural context and the present needs of society becomes critical if the ultimate goal is not merely to provide short term technical assistance, but rather to facilitate a process in which local actors can ultimately maintain high standards through their own initiative. This approach is applicable to the Guatemalan experience where the disregard for women's rights is a complex and pervasive problem. A viable and effective response needs to go beyond technical solutions that are limited in scope, drawing instead on a wide variety of local actors including those from universities, justice sector institutions, and civil society advocates. Such people need to commit themselves to working for increased respect, enforcement, and acknowledgement of women's legal rights as well as becoming agents who promote gender mainstreaming at the institutional levels.

THE STRATEGY PROPOSED AS A POTENTIAL SOLUTION

ased on the understanding of the complexity of both GBV and the challenges different actors and society were facing, we saw a need to develop a response that could unlock the capacity of local stakeholders to create transformation and generate impact. Local stakeholders had to accomplish the necessary reforms themselves. Given its possibility for addressing latent bias and discriminatory attitudes together with practical skills needed to improve the administration of justice, we chose to promote the use of legal education.

OBJECTIVES OF THE PROGRAM

he objective of the program was to use graduate education in gender and the law to create an expanding cadre of justice sector professionals, civil society advocates, and policymakers, who would be fully knowledgeable about making gender-equitable decisions, capable of interpreting and applying the law in an unbiased manner, and able to effect change within their institutions.

The program, which was aimed at mainstreaming gender and cultural diversity, relied on multi-stakeholder approaches and strategies that could promote social integration, create a more inclusive and democratic public space, and provide opportunities for traditionally excluded voices — namely women and indigenous women — to participate in public discourse on the issues.

METHODOLOGY

he methodology of the program was comprised of six interconnected phases. Phase I focused on developing the previously-referenced baseline analysis exercise that provided the necessary background information and identified challenges and opportunities. Phase II laid down the foundation of inter-institutional relationships and terms of cooperation with the USAC, other institutional partners and students. Phase III focused on a strategy for recruiting the multi-disciplinary cadre of professors needed to implement the program. Phase IV concentrated efforts on the development of an innovative curriculum together with partner institutions and the cadre of multi-disciplinary experts, who, in turn, would teach at the program. Phase V involved the actual instruction within the graduate program. Lastly, Phase VI established a comprehensive monitoring and evaluation strategy to secure ongoing feedback and incorporate lessons learned that could inform and support the sustainability of the program.

Phase I Development of a social context assessment analysis and a baseline

The program emerged as the result of an assessment and analysis process. It involved the earlier-referenced gender based analysis, a carefully designed consultation process with all the actors representing both state and civil society institutions.

Phase II Developing strategic alliances

Essential to the program's success was the selection of an implementing partner and local strategic stakeholders committed to achieving the goal of extending the impact of the program to the wider Guatemalan community.

The program chose to work with the USAC. As implementing partner, USAC was positioned to allow the program to achieve its objectives. USAC is not only the oldest public law school in Central America, but also the largest, enrolling the most students in this region. The university also sets national standards for legal education. Furthermore, in the context of gender issues, diversity, and the development of the legal and judicial profession — all crucial factors for the program — USAC appeared to be particularly well positioned: "USAC...had (and still [has]) the highest numbers of female and indigenous students. Further, ninety percent of all prosecutors, judges, and public defenders were graduates from that institution." ¹⁰

The process of building alliances consisted of the following steps:

First Step

The program entered into a memorandum of understanding with USAC where the institution committed itself to implementing two graduate programs in gender and the law: a Diploma in Gender and the Law (*Diploma de Estudios de Actualizacion en Derechos de las Mujeres y Genero, hereinafter Diploma*) and a Masters in Women's Rights, Gender, and Access to Justice (*Maestria en Derechos de las Mujeres, Genero y Acceso a la Justicia, hereinafter Masters*).

Second Step

The next step was to begin developing a second tier of agreements with the most critical institutional stakeholders. The graduate programs were not publicly advertised for open and wide enrolment. Instead, they were offered by USAC to key stakeholders who showed interest and commitment to strengthening their institutional capabilities to address women's rights and gender issues from a variety of angles. They were as follows: (a) Justice Sector Institutions: the Judicial Branch, the Judicial School, the Institute of the Public Defenders, the Attorney General's Office and its Training Academy (UNICAP), the National Office of Victim's Assistance (OAV), the Office of Permanent Assistance (OAP), the Special Prosecutor for Crimes Against Women among others; (b) Government Agencies: Presidential Secretary for Women's Issues (SEPREM), the Special Ombudsman for Indigenous Women (DEMI), the Ministry of Labor, the National Academy of Maya Languages; and (c) Women and Indigenous Women Civil Society Organizations (CSOs).

Third Step

Following the completion of the inter-institutional strategic partnerships, the next step was the recruitment — through the institutional partners — of the students for the graduate programs in gender and the law. The program aimed to create a critical mass and a new cadre of legal practitioners, justice sector professionals, civil society advocates, and policymakers knowledgeable about making gender-equitable decisions, interpreting and applying the law in an unbiased manner while also promoting gender mainstreaming processes back in their home institutions. The students in the program were recruited based on their institutional affiliations and had made a clear and formal commitment to returning to their institutions and organizations to teach, advocate, and integrate gender perspectives into their institutional programs to advance the legal status of women. They also came from different backgrounds. While the majority were lawyers, many psychologists, sociologists, social workers, and communication experts were also included. Specific effort went into recruiting indigenous women. Another distinctive element was that all were granted fully funded scholarships that covered their academic tuition.

Phase III

Recruitment of Professors

One of the program's most important guiding principles was to contribute to the development and capacity building of local institutions and experts. Thus, it relied heavily on local multi-disciplinary technical expertise to build its group of experts.

Because the gender and the law graduate program was designed to foster critical legal thinking and gender analysis of Guatemalan law, instructors' doctrinal expertise alone was not enough. What was needed was a law and society orientation that involved awareness of how law can promote social change to further rule of law, development, and social inclusion.

In order to realize this approach to teaching and conceptualizing the law, the program worked with a group of multi-disciplinary experts from the fields of human rights, gender and women's rights, law, sociology, psychology, anthropology, adult education as well as social activists. This cadre of multi-disciplinary instructors was able to facilitate a deliberative process based on the Socratic method that also combined case study analysis with active student participation in the class. In this way, the program developed a group of professionals with the ability to think beyond stereotypes and academic hierarchies and begin formulating strategies to advance gender justice.

Phase IV Gender and the Law curriculum

The implementation of Phase I revealed a serious lack of understanding of the complexity of issues relating to women's rights among justice sector professionals and policymakers. That is why the curricula for both the Diploma and Masters programs emphasized the development of critical legal thinking with gender analysis as a cross-cutting theme. The Diploma program for instance, focused on three major pillars: developing critical legal analysis with a gender perspective, adult education techniques for teaching gender and the law (andragogy) and advocacy for and awareness of women's legal rights and gender mainstreaming. The Masters program was designed under three major components: legal theory and constitutional law, gender and the law, and legal research and writing for institutional strengthening.

Another key element of the curricula (which became an academic requirement for graduation) was that the students themselves would have to design specific advocacy, awareness, and gender mainstreaming programs, which they would implement back in their sponsoring institutions. Even though they were selected to attend the programs based on their professional and academic qualifications, they had all been nominated by their home institutions. The program thus took into account the need to advance reforms in actual practice.

Phase V

Implementation Process

The program went beyond the mere implementation of a series of academic courses and workshops. As part of the process, the program fostered a dialogue between men, women, indigenous women, prosecutors, judges, civil society leaders, and institutions providing access to justice for women who suffer from domestic violence and other types of violence. It challenged the students to dialogue among themselves so they could identify their own ways of understanding the consequences of the different types of GBV to which women were exposed and the responses they themselves identified as part of a solution.

Another distinctive factor of the program was the teaching technique used by the multidisciplinary instructors. The process challenged traditional ways of approaching legal education by relying heavily on the Socratic method of case analysis in place of the conventional 'professor lecturing and students listening' model. This approach ensured the engagement of the students as the principal actors and promoted ownership of the whole process, from beginning to end.

Part of this deliberative dialogue and process also included extra-curricular engagements between students on the one hand and national policymakers and international experts from a wide variety of academic backgrounds and regional expertise on the other. In the context of the promotion of women's rights and gender mainstreaming projects, the students were again confronted with the connections between law and society, as well as public policymaking and ways of promoting social change and inclusion.

Phase VI **Evaluation**

Evaluation was a central element of the program from the very beginning. This involved acknowledging that for any international development program to succeed, strong local partnerships were not enough. There had to be clear standards and mechanisms that could make the program accountable, track its progress along the way, and identify and correct impediments. These standards and mechanisms would rely heavily on quantitative as well as qualitative data and analysis.

In practical terms, the implementation of this strategy had two chief consequences. At the institutional level it required strong coordination and communication efforts with stakeholders. They had to be partners on both lessons learned and accomplishments. Again, the strategy underlying this requirement was the need to promote program ownership and accountability.

At the student's level, strong coordination and communication was also important. Their commitment went beyond the need to pass tests and exams. They were aware that the technical and multi-disciplinary teams were carefully monitoring student progress during their implementation of advocacy and gender mainstreaming projects or writing their thesis. Mechanisms and

systems of verification were clear from the outset and again, the students themselves were partners in the process of learning from results, challenges, and mistakes.

This strategy proved to be successful by providing a constant and regular flow of feedback to the implementation teams that was also transparent to all stakeholders. This in turn, helped the gender and the law programs achieve high levels of legitimacy and accountability among USAC, participating partners, and other groups.

An internal and external participatory evaluation was also conducted throughout the entire process with the purpose of identifying the best practices, lessons learned, and future activities.¹¹ The fact that these evaluations were conducted with the involvement of all partners and stakeholders was highly appreciated, as they provided further insights and learning about the results and impact that the program was achieving.

RESULTS AND IMPACT

quantitative analysis of the program already demonstrates significant results. As a result of the two-year intervention, seventy-two justice sector professionals, academics, policy-makers, and civil society advocates attended the graduate gender and the law Diploma and Master programs; twenty-six advocacy and gender mainstreaming projects were implemented by the forty-seven Diploma graduates back in their home institutions; 500 justice sector professionals and civil society and grassroots advocates were trained as part of the replication process and multiplier effect that derived from the implementation of the twenty-six advocacy for women's rights and gender mainstreaming projects; twenty university level professors (from a wide variety of social science backgrounds) were teaching in the gender and the law graduate programs; and nineteen institutions (justice sector, higher education, government agencies, civil society organizations) were working on the implementation of this project as partners and stakeholders.

The participatory evaluation process was able to identify different level of impact among participants. Indeed, for a psychologist this process was an opportunity to "make friends with the law"; a justice sector professional said that "this program gave me the opportunity to reflect on our daily practice and to understand that it is critical to implement the domestic violence law without any bias if we want to provide access to justice to women and indigenous women." For the justices of the peace, this program represented a landmark moment. As one stated, "it was the best thing that has happened to me in my life." Another participant was able to integrate her own cultural identity as an indigenous woman, a trained lawyer, and a judge with a more complex analysis of the challenges indigenous women face within their own communities and how these cultural and traditional practices become intertwined with other levels of discrimination when they try to access the justice system. For a lawyer from the OAP the most important knowledge he gained from the program was "the difference between equality and equity when it comes to enforcing women's rights."

After improving their legal analytical capabilities and expanded knowledge, both men and

women were able to generate change within their home institutions. They began by sharing their new understandings and knowledge with their colleagues as a means of confronting stereotypes and promoting change from within (i.e. at the agent levels). As an example, psychologists from the National Office of Victim's Assistance said: "the major challenge was to confront the patriarchal model that saw violence as the woman's fault. If she would just "behave," the violence would stop." By being able to understand the complexities of these issues and apply gender analysis, a lawyer at the Public Defender's Office was able to identify that a judge was convicting a woman of murder based on the use of false gender stereotypes instead of hard evidence. This incident became part of the baseline she used to begin developing a set of gender standards that Public Defenders are beginning to use today as part of their defense strategies.

Alumni of the 'gender and law' curriculum, together with their colleagues were able to operate in new ways in terms of their understanding of the laws and the actual enforcement mechanisms that are in place. After participating in a process facilitated by one of the Judges from the Diploma, a Judge of First Instance Court acknowledged "many laws are passed without taking into consideration the different realities within which they will have to be enforced. By participating in this process, I have been able to understand that we need to place ourselves where we are, within our realities and see what are the constraints that do not allow us to provide women and victims of domestic violence with the proper measures they need to stop with that violence at home."

This whole process generated impact at the institutional level as well. For instance, the Judicial School is developing a curriculum on gender issues and human rights that is mandatory for all entry-level magistrates. Some sessions are being taught by the Justices of the Peace who graduated from the gender and the law program. Another example is the Public Ministry's training academy, which now provides continuing legal education courses for prosecutors and administrative staff on the implementation of the domestic violence law without gender and multicultural biases. Another graduate of the program leads this effort. In addition, the Public Defender's Office is reaching out to all of its Public Defenders with new and integrated gender based strategies in defense of women who have committed crimes. Civil society organizations were also able to begin a community empowerment process consisting of leaders providing direct shelter and legal support to women who suffer from GBV and have also begun building bridges and increasing interaction with justice sector institutions.

CONCLUSION

B ased on a specific experience that challenged both legal education and traditional patterns of international development projects, the findings in the present paper demonstrate that gender and the law education can promote rule of law, development, and women's rights. Through the process of designing, implementing, and evaluating gender and the law graduate programs in a particular social context — a process and strategy far from perfect — the program

was able to reach its original objective and generate different levels of results and impact. Still, many challenges remain.

Indeed, GBV remains a phenomenon that continues to affect Guatemalan women and threatens their livelihood. However, the fact that the partners involved throughout the program are highly committed to carrying it on, demonstrates that it represents one strategic and successful way of contributing to the long-term goal of changing attitudes among justice sector professionals. These professionals were consequently able to achieve high levels of impact through gender mainstreaming projects they undertook in their home institutions. This in turn, has lead to generating an institutional awareness and demand for additional similar programs, in pursuit of the goal of improving women's access to justice. In the end, this is what sustainability is all about.

One of the major traps that the development community tends to fall into is to quickly conclude that an experience in one social context can easily be replicated in another, particularly when dealing with a "universal phenomenon" such as GBV. Even though this approach can be very successful, it can sometimes lead to negative reactions within local communities, precisely because the initiative promoted is neither locally rooted, nor the product of careful consultation with local or national stakeholders. Hence, there is a lack of buy-in to the program. This program (even though it represented an external top-down development intervention approach) was aware of this challenge and addressed it from the start. During the design process, previous efforts in gender and the law were carefully reviewed and considered both at the local and international levels. As a result, a stronger approach emerged: a strategy that could provide added value through strong local buy-in, capacity building, leadership, and ownership.

The range of instances in with violence against women is manifest precludes consideration of it as solely a technical issue. From a human rights perspective, it is the major perpetrator of different types of violations targeting engendered relationships and generating the "deprivation of women as human beings." It does not allow for the full development of their capabilities and prevents women from actively participating in the public realm. From a socioeconomic point of view, violence against women creates "a major loss not only for the victim but for society as a whole." ¹⁴

Tackling a broad social problem such as GBV requires more than technical approaches, such as strengthening technical capacity in the justice sector or constructing shelters for battered women. At the policy level, "development policies cannot be limited to isolated women's projects aimed at meeting basic needs or expanding women's access to resources. In order to have a holistic, integrated approach, policy and implementation have to be grounded in strategies that effectively target gender status through normative, institutional and structural change at all levels of society." ¹⁵

Years of exclusion and marginalization have prevented both women, and particularly indigenous women, from actively participating in the public realm. In practical terms, this has resulted in deeply-rooted discriminatory practices at all levels of Guatemalan society and institutions. These conditions call for a society to come to terms with its own problems by engaging in deliberative processes that welcome diversity, inclusion, and multicultural interactions. The use of a scale up strategy¹⁶, which aimed to promote public deliberation on highly controversial issues, a

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cascade model of replication to bring about institutional change, and the use of other strategies designed by local stakeholders proved to be successful in this case. It was successful precisely because it emerged as the result of locally-designed processes and responses with clear monitoring and evaluation strategies that provided feedback and lessons learned to all parties involved from beginning to end.

The links between law and society and between theory and practice were crosscutting elements of the gender and law graduate program. This process facilitated the provision to justice sector professionals and civil society advocates of "new sensibilities and awareness without imposing the views of any particular interest group or the feminist agenda." This way of approaching legal education did not generate resistance—even though the issues at stake were highly sensitive for the students and their respective institutions. Furthermore, it also transformed them from passive recipients in the classroom to agents of social and institutional change.

This whole process attests to the value of, capacity building, opportunities for sustainability, and institutions that are strong enough to promote the rule of law by administering justice without gender and multicultural biases. In the long run, programs such as the one at hand stand for societies that are willing to become truly democratic with citizens who participate fully in the public realm and are not influenced by stereotypes, gender, and multicultural biases.

- ¹ Yakin Erturk, Considering Violence against Women as a Development Concern within a Human Rights Framework, Statement presented by, UN Special Rapporteur on Violence against Women, to the World Bank, 24 October 2005, Washington DC.
- ² Andrew Morrison, Mary Ellsberg and Sarah Bott, Addressing Gender-Based Violence in the Latin American and Caribbean Region: A Critical Review of Interventions, Policy Research Working Paper 3438, The World Bank Latin America and the Caribbean Region Poverty Sector Unit, October 2004.
- ³ See Women's Legal Rights Initiative, Guatemala Assessment and Analysis (2003) available at http://www.usaid.gov/our work/cross-cutting programs/wid/pubs/wlr guatemala.pdf (last visited Sept. 10, 2005).
- ⁴ Paulo Sergio Pinheiro, La efectividad de la ley y los desvaforecidos en America Latina, in Mendez, J.E., O'Donnell, G. AND PINHEIRO P.S., eds, LA (IN) EFFECTIVIDAD DE LA LEY Y LA EXCLUSIÓN EN AMERICA LATINA (THE (UN) RULE OF LAW AND THE UNDERPRIVILEDGED IN LATIN AMERICA), (Buenos Aires: Paidos, 2002) at 15.
- ⁵ The Women's Legal Rights Initiative (hereinafter the "program") is a USAID (United States Agency for International Development) worldwide initiative implemented by Chemonics International in partnership with Partners of the Americas, CEDPA, DTS, Metametrics, and Turning Point. The opinions expressed herein belong to the author and do not necessarily reflect the views of USAID or the program implementing and partner organizations. Special thanks go to Mary Hill-Rojas for her review and insightful comments to this article.
- ⁶ See Guatemala: Women's Legal Rights Initiative of the Women in Development IOC Activity Report: Implementing the Domestic Violence Law from gender and Multicultural Perspectives, July 2004.
- ⁷ Guatemala is an inter-cultural and multi-linguistic country. Aside from Spanish, there are twenty-four Maya languages spoken throughout the country.
- ⁸ The Guatemala Justice Commission Report (hereinafter Justice Commission Report) highly recommends the need to use a methodology that challenges the status quo of Guatemala legal education. See Comision Nacional para el Seguimiento y Apoyo al Fortalecimiento de la Justicia, Una nueva justicia para la Paz y su proceso de implementacion 1998-2004, 3rd ed., at 274 (Guatemala, 2005).h
- ⁹ The Justice Commission Report highlights the link that exists between law schools and the Justice System, particularly when the former ones are in charge of preparing lawyers to become justice sector professionals. *Ibid* at 27.
- ¹⁰ Steven E. Hendrix, Restructuring Legal Education in Guatemala: A Model for Law School Reform in Latin America? 2005 JOURNAL OF LEGAL EDUCATION 54.
- 11 The internal participatory evaluation was conducted by the author of this paper and the Guatemala based Program Coordinator. The Director of the International Women's Human Rights Clinic at Georgetown University Law Center, Professor Susan Deller Ross conducted the external participatory evaluation of the program on July 2005 with the assistance of the author and the Guatemala based Program Coordinator.
- ¹² Erturk, *supra* note 1.
- 13 Martha C. Nussbaum, Women and Human Development: The Capabilities Approach, (New York: Cambridge University Press, 2001) at 3.
- 14 Andrew R. Morrison and Maria Beatriz Orlando, Social and Economic Costs of Domestic Violence: Chile and Nicaragua in Morrison, A.R. and Biehl, M.L. eds., Too Close to Home: Domestic Violence in the Americas, (Washington DC: Inter-American Development Bank Publications Section, 1999) at 51.
- 15 Erturk, supra note 1.
- ¹⁶ For larger and more complete discussions on Scaling- Up, see HIV/AIDS Alliance Expanding community action on HIV/AIDS, NGO/CBO strategies for scaling-up, London 2000 and Fundacion SES Aprendizajes sobre Escala, available at http://www.fundses.org.ar/archi/aprendizajes_sobre_escala.pdf (last visited September 16, 2005).
- ¹⁷ See Buckley in Ann Stewart, Implementing Gender Justice Through the Judiciary: a Case Study of Judicial Training in India, in Faundez, J., Footer, M. & Norton, J., eds., Governance, Development and Globalization, (London: Blackstone Limited, 2000) at 91.



BUILDING AND IMPROVING INSTITUTIONS: EXPERIENCE WITH JUDICIAL REFORM



JUSTICE SECTOR REFORMS AND POLICY CONDITIONALITY: SYMBIOSIS OR MUTUAL DENIAL?

Raza Ahmad and Doug Porter¹

ABSTRACT

he renewal since the late 1990s in support by multilateral development institutions for poor country governance reforms rests on liberal 'rule of law' principles that have a long provenance. Most recently, the 1997-98 Asian financial crisis prompted the keen advance of 'rule of law' through the specific rubric of legal and judicial (broadly defined as justice sector) reform programs. As this paper shows, renewed justice sector policy ambitions have increasingly been supported by policy-based lending instruments. This paper examines the impact of this approach to supporting justice reforms on the reform process itself. Does policy conditionality help or hinder domestic reform processes, in what ways, and under what conditions? Section 1 reviews what is new in the recent round of justice sector reforms, and the conclusions of research on policy conditionality as an instrument to support reforms in developing countries. Section 2 then turns to the experience of the Asian Development Bank with respect to Pakistan's Access to Justice Program, a \$350 million package of loan and grant financing approved in 2001. The Pakistan case is useful in two important ways. First, this large and ambitious policy-based lending operation includes both features of past structural adjustment lending operations and new features which explicitly attempt to address the lessons of past failures. Second, the period 2001 to 2005 in Pakistan, whilst politically tumultuous, nonetheless can be used to illustrate many of the wide range of political and economic, domestic and international factors that bear on the success or otherwise of policy based lending instruments.

INTRODUCTION

entral to recent support by development institutions for poor country governance reforms have been 'access to justice' programs hinged on liberal 'rule of law' principles. While their ambitious scope and prodigious funding can suggest something unprecedented is underway, the association drawn between law and development is a hardy perennial whose contours were marked out during the colonial period. Today's efforts are headlined as pre-requisites for both economic growth and poverty reduction. But it is by no means certain that a thorough analysis of access to justice programs will in the future find a clear relation with either. Certainly, the empirical relation between the wider set of neoliberal adjustment reforms they belong to and economic growth/poverty reduction is far from direct or robust.

Nevertheless, future assessments of current efforts will remark on two things. First, that compared with earlier legal and judicial reform efforts, the policy scope, ambition, financial and programmatic armatures of the present resurgence are breath-taking. The reinvented access to justice reforms have moved from their earlier supply side emphasis on law reform and judicial administration to deal with the wider sets of incentives and sanctions that bear on judicial performance and independence, restructuring prosecution and police services, introducing new budget, expenditure and audit practices, linking up access to information, administrative justice, arbitration, alternate dispute resolution systems, and promoting a wide range of professional and civil society organizations to mobilize and sustain the 'demand' side of the reform. Second, future assessments will also show that despite the much heralded new era of 'post-conditionality' in relations between aid givers and receivers, the more embracing compass of today's access to justice programs face many of the same kind of difficulties encountered during the 1980s heyday of Structural Adjustment Programs. Thus, any assessment of access to justice reforms needs to first disentangle the 'reform intent' from the 'instrument', today called policy based lending, through which they are supported. This paper considers the impact of the instruments used to support poor country reforms on the passage, success and otherwise of those reforms. It looks at how policy conditionality helps or hinders domestic justice reform processes, in what ways, and under what conditions.

The first section reviews what is new in the recent round of justice sector reforms and recaps the conclusions of research on policy conditionality as an instrument to support developing country reforms. Section 2 summarises experience of the Asian Development Bank (ADB) with policy lending in general, and then reviews aspects of Pakistan's Access to Justice Program (AJP), a \$350 million package of loans and grants approved in 2001. While this paper does not purport to evaluate the AJP³, the Pakistan case is useful in two important ways. First, the AJP, arguably the most ambitious and certainly the largest justice sector policy based lending operation ever supported by a multilateral development bank, includes features of past structural adjustment lending operations – tranches released on compliance with prior policy achievements – and new

features which explicitly attempt to address the lessons of past failures. Second, while it is premature to judge AJP's long term outcomes, the politically tumultuous period 2001 to 2005 in Pakistan illustrates many of the wide range of political and economic, domestic and international factors that bear on the success or otherwise of policy-based loans. Thus, we argue in conclusion that the interaction of the instruments available to support governance reforms and the particular context in which they are deployed, the central theme of this paper, suggest lessons regarding both policy-based lending in general, and legal and judicial reforms in particular.

ACCESS TO JUSTICE: REFORM INTENT, AND REFORM INSTRUMENTS

Law and Development Revisited

aw and development's hardy perennial took root from the moment nineteenth century English and French liberal law makers began to catch up with and codify the propertied interests of early traders, ivory pirates, slavers, land and other resource plunderers as they scoured what are today's poor developing countries.⁴ Nowadays, their urgent need to protect the accumulation of property and wealth, to legitimate their foreign adventures and gloss this with humanitarian concern for protecting the interests of abused locals seems so evidently part of an excuse for what became the edifice of colonialism. It remains to be seen whether hindsight will similarly judge the present efforts to protect the interests of global capital and bring growing global and local instability and insecurity within a 'rule of law' laced with humanitarian concern with the poor and their 'empowerment'.

The law and development movement is however best remembered for the chronicle of failed ambition in the 1960s and 1970s when an alignment was sought between Western, largely US, lawyers and jurists and the political and economic program of strong states and national economies of the Cold War. Propelled by the evolutionary theories of Walt Rostow, but lacking the sharp doctrinal consensus of today's economic theory, it was soon found that US 'legal liberalism' was not easily transplanted. Pushed through badly crafted and under-resourced projects, beset by early signs that development policy fashion was about to radically shift, and domestically undermined by the authoritarian politics and patrimony of recipient governments, professionals' retrospectives of this period typically lament the narrow focus on the courts, their training and equipping, and conclude justice reform must be incremental, embrace the legislature and executive, and requires considerable high level country and donor commitment and domestic political support. These lessons aside, the law and development movement was washed up in the flotsam of the end of the American war in Vietnam, the collapse of the gold standard, the first oil shocks and signs of what became the 1980s anti-statist, 'end of development decade', never to return intact. Fundamental revision was in the offing.

From end of 1970s began a decade long 'counter-revolution' in which what mattered, at least until the next round of Latin American debt-induced crises in the early 1990s, was developing country macro-economic policy settings, debt repayment and fiscal solvency prescriptions that were later all marvelously rendered as the Washington Consensus.⁷ But this was to prove short lived. The economic shock therapy that induced the collapse of the Soviet Union and the emergence of states variously described as 'criminal' and 'failed', and widening inequalities and social unrest across swathes of the under-developing world soon saw structural adjustment's policy makers and economists at the forefront of a law and justice revival. As Heinrich Mathes, Deputy Director-General for Economic and Financial Affairs of the Commission for European Communities noted in 1993, "it was too easily assumed that the liberalization of prices, the introduction of private ownership, the State's abandonment of its foreign trade monopoly and interference in business decisions, and the establishment of a western-style monetary and fiscal policy were synonymous with the introduction of a market economy and thus guaranteed the success of the entire experiment". This approach proved to be "a terrible error of judgment which threatened to discredit the entire transformation process."8 Early calls for developing countries to address 'corruption' soon morphed into all-out demands that the state be 'reinvented' around rule of law principles. The predictability of price movements, the supply and demand responses, the sanctity of private ownership and contract depend on the construction by states of a market economy the "essential attributes (of which) are the statutory rules and general framework within which all players must operate. These are very frequently overlooked by politicians and economists, who tend to be result-oriented, and their existence is, as it were, taken for granted".9

The rest, especially after the Asian financial crisis of 1997-98, is familiar history. With responsibility for crises of various kinds, financial, social, security — firmly laid again at the door of poor country governments, the rule of law framework was embraced by any developing country embarking on radical changes to globalise their production, promote legalized forms of private enterprise, sell off state owned enterprises and promote the accumulation of private wealth. Cambodia's Finance Minister shows how legal reform has become part of poor country's global re-branding and positioning:

We want a market economy, but we need to put laws in place. Without laws, we will have just a jungle economy... The international donor community should help us, advise us, push us to establish a transparent and enforceable legal system.¹¹

Meanwhile, these commitments were being given added gravitas by international financial agencies. From initial hesitancy about whether their Charters permitted them to engage in what became 'second generation' governance reforms, concern with anticorruption and market security and transparency measures have grown over the past decade into unprecedented lending and technical assistance operations in which legal, judicial and variously defined access to justice reforms were 'mainstreamed' in core practices. Central to all these 'good governance' efforts, as

we will see in Pakistan's case, have been globally familiar prescriptions to separate powers at the local level (judicial, executive, legislative), and to reassign central state functions, to the market, to lower levels of government, and to various kinds of private/civil society associations. All these efforts bespeak the central tenant of NIE; namely, to lower 'transaction costs' and the well-known North-esque dictim of 'inform', 'compete' and 'enforce', whereby uncertainties will be reduced, discretionary powers (of the state) curbed, and the reinvented state is disciplined to focus its coercive powers on protecting property, contractual and other rights. All this, despite clear evidence documented by Rodrik and others that there is no unique, context-free way to achieve desirable institutional outcomes; it is, rather, gradual, path-dependent, and seems particularly resistant to being externally imposed.

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Conditionality and Ownership: the search for the magic bullet

The IFIs' use of conditionality to achieve compliance by poor, security fraught and fiscally dependent countries with external policy prescriptions has a long provenance, both in application and critical commentary. The SAP experience of the 1980s, the so-called "lost development decade", is often used to show the mixed and perverse results of policy conditionality. Yet, the common and profound failure of the original precepts of neoliberalism has remained hardly noticeable in debates about conditionality. Similarly, neither Tony Killick's conclusion following careful examination of the evidence, that conditionality is unable "to create an incentive system sufficient to induce recipient governments to implement policy reforms they otherwise would not undertake, or would undertake more gradually" nor the World Bank's public skepticism about the ability of conditionality to promote reform in countries with weak "local movement in that direction" seem to shift internal IFI debates beyond quantitative aspects of policy conditionality (how much to apply, and how intrusively). Two concerns did become clear after the 1997 Asian crisis, an apparent interest in political economy, which triggered concern with 'ownership' and 'selectivity'.

Characteristic of reform programs advanced through policy conditionality, then and now, is the 'executive shortcut'; the hatching of reform programs in closed door sessions with the executive wing of governments largely without parliamentary scrutiny. The failure "to create an incentive system sufficient to induce recipient governments to implement policy reforms they otherwise would not undertake, or would undertake more gradually" was often attributed to this "deeply technocratic bias" and to its corollary, the neglect of what is often referred as the 'political economy factor. This factor was seen to undermine commitment to stay the course with adjustment conditionalities, and this, rather than the 'reform content', was regarded as the reason why reforms failed. Thus whilst garnering wider 'ownership' was understood as the *sine qua non* to over-ride the strictures of political economy, the larger conviction developed that the challenge was not simply to induce policy reforms, but to "focus more explicitly and more rigorously on issues of power, politics and democracy" in other words to act directly on poor countries' gov-

erning arrangements, as both prerequisite and outcome of the reform process itself. Free of the much chastised straitjacket approach of conventional policy based conditionality, this conviction coalesced around the idea of 'aid selectivity' in which aid allocations would from around 2001 deliberately favour better governed countries, or countries that, by signing up for the World Bank/ IMF Poverty Reduction Strategy Papers, or their Comprehensive Development Frameworks, had signaled their ownership of the governance policies researched and referenced by the World Bank Institute and similar agencies keenly establishing good governance doctrine.

With an operational approach to 'political economy' comfortably proxied by good governance policies, ownership and selectivity on the part of major donors, a dramatic increase in policy lending in the service of good governance programs quickly got underway. In the five years to 2001, the World Bank funded over 600 governance-related programs and initiatives in 95 countries. ²² During the same period ADB approved 65 program loans and 13 sector development program loans using the policy based lending approach. Between 2000–2004 ADB approved 19 governance loans costing nearly \$2 billion. ²³ We turn now to illustrate how this new, post-conditionality approach fared in one of the most challenging political economies where new-era governance policies were applied.

PAKISTAN'S ACCESS TO JUSTICE PROGRAM

n November 2001, ADB's Board approved a \$350 million contribution to Pakistan's AJP. A central feature was a \$330 million policy loan to be released in four tranches to the federal government on compliance with 64 conditions to be achieved over three years. Although the Board's decision was fully consistent with ADB corporate governance policy approved in 1995, this was a bold and new venture, both for ADB and a Developing Member Country. The decision was triggered, as so often, by a heady mix of crisis and opportunity. The reforms supported by AJP had long been proposed in Pakistan, but all of them had eluded Pakistani governments since 1947. The catalyst for what became AJP was provided by the October 1999 military coup that brought General Pervaiz Musharraf to power.²⁴ Declaring that Pakistan faced a crisis of 'governance', Musharraf appointed himself Chief Executive, suspended the Constitution, established a National Security Council and invited the judiciary to take a new oath of allegiance. The new government's *de jure* legitimacy was secured within months when the Supreme Court once again invoked the 'doctrine of necessity' which states that the integrity of the state is of paramount importance such that when a constitutional government is overthrown, the usurping authority must be recognized so as to avoid anarchy.²⁵

The Supreme Court granted Musharraf three years to deliver on his reform package before handing power back to elected representatives by October 2002. Earlier, Musharraf had announced a seven point agenda that included rebuilding national confidence and morale, strengthening the federation, and reviving the economy. He promised to depoliticize state institutions,

'devolve power to the grassroots level', ensure swift accountability and anticorruption measures, and deliver 'justice to the doorstep' of the common citizen. This appealed, by design and consequence, to an international community that had largely abandoned the government following nuclear testing during May 1998. Musharraf faced a fiscal crisis; more than 60 percent of government revenue was tied to pay the debt and the military. Foreign exchange reserves were low, and the terms of trade were deteriorating due to rising oil prices.²⁶

On the heels of coup, and laments that Pakistan had failed to honour any of its previous structural adjustment agreements, the donor community responded quickly with unprecedented increases in aid and concessional lending.²⁷ Undoubtedly, events following the aftermath of 9/11 were important. But important also was the evident scope and scale of the governance reforms announced by the military government. These included five key policy shifts: devolution, namely the creation of three levels of elected local governments; the local separation of powers, thus ending the 150 year old office of the executive magistracy; efforts to shift power from the executive to elected representatives; significant 'opening' of the state to engagement with civil society interests; and high profile commitments to gender empowerment. Each of these came to feature in the AJP.

A much narrower but still ambitious AJP had been the subject of the policy dialogue between the ADB and the Government of Pakistan since 1997 during implementation of innovative technical assistance projects for legal and judicial reforms.²⁸ Aware of the mixed record of court-centric legal and judicial reforms to date²⁹, the program as finally approved entailed a far greater policy scope than earlier efforts; including not just core judicial reforms, but also law reform for alternate dispute resolution and administrative justice, police and public safety reforms, improvements in legal education and legal empowerment. Also included were justice sector administrative reforms, (budget and finance management, case flow management, strategic planning, human resources and training)30 and other fiscal reforms and promotion of a range of civil society engagements with the police, the courts and administration responsible for delivery of justice. As the scope increased in response to perceived opportunities, and as the imperatives mounted after 9/11, the size of ADB's commitment grew to a \$350 million funding package for policy loans including a Technical Assistance loan of \$20 million, provision for a \$25 million endowment called the Access to Justice Development Fund (AJDF), and associated grant financing for capacity development that attracted co-financing from bilateral donors. ADB was clear the AJP would be only the first in a long series of financing commitments for a reform agenda spanning at least ten years.

The program's enlarged scope also reflected shifts in how poverty was understood: from a static view, centered around 'poverty head counts' and minimum income levels, to the concept of vulnerability. Vulnerability to poverty, a situation faced by the majority of the population, was clearly linked to their access to primary entitlements — land, irrigated water, public safety and security, livelihood, employment, business — that depended on a functioning 'public realm'. Justice became central. "Justice" said the staffs' presentation to the ADB Board, "is a function of the relationship between institutions responsible for delivering entitlements (public goods and services) predictably, affordably, and accountably, and the ability of citizens to secure and sustain their

access to key sets of assets". Thus, a Board unaccustomed to this kind of analysis was persuaded about AJP's central rationale. "The pro-poor rationale of this Program assumes that efforts to limit the vulnerability of the poor to the vagaries of systems of administrative, political, civil, and criminal justice are at least as important as macroeconomic performance in poverty reduction" remarked the Board paper, adding the more familiar rider that "the present legal framework and the performance of judicial institutions significantly constrain market-based economic growth, and in particular hinder foreign direct investment as well as the growth of small and medium-sized enterprises".

AJP was cast around four key objectives of improving access to justice so as to (i) provide security and ensure equal protection under the law to citizens, in particular the poor; (ii) secure and sustain entitlements and thereby reduce the poor's vulnerability; (iii) strengthen the legitimacy of state institutions; and (iv) create conditions conducive to pro-poor growth, especially by fostering investor's confidence.³³ Aspects of these reform efforts will be discussed below. However, of particular interest to the Board and other observers was how this structural adjustment program, recast as a policy-based lending program, sought to avoid the well known difficulties faced by this kind of instrument. It was well understood that the success rate of policy-based loans had been far short of expectations, that too many conditionalities and excessive details should be avoided and that flexibility was of paramount importance.³⁴ Nonetheless, many in ADB's management were anxious that detail was necessary, if only to provide a record of the full ambition of the program. Four features of AJP are relevant here. First, unlike most other justice sector reforms, and unlike most adjustment lending operations, AJP was avowedly concerned with all three organs of the state. Reforms around the formal judiciary remained central, but the policy conditions agreed with Government would require serious engagement with the legislatures — national and subnational — and the executive whose powers were set to be radically curtailed by the larger reforms announced by Musharraf.

Second, arguing that "while a comprehensive approach is not guaranteed to succeed, piecemeal efforts are likely to fail", the policy reform approach was novel. Referred to as the 'cascade approach', the program intended to promote outcomes only where there was a prior policy commitment. Early tranche release conditions therefore highlighted enactment of laws to give a durable affect to policy commitments. Where this had been achieved, the program would support establishment of institutions at the federal, provincial, and local levels that had been provided for in law. And, finally, where these needed support to become functional, the program would aim to ensure that sufficient fiscal and technical resources were available for long term sustainability; thus, for example, fiscal reforms were also included. More will be said about this cascade approach shortly.

Third, recognizing the inherent constraints of the kind of policy blueprints that had been a feature of earlier SAPs³⁵, it was argued that the conditions for releases of tranches were best understood as "working hypotheses to focus a domestic dialogue within government, and between government and a diverse range of civil society and private agencies". This was a novel approach for policy based lending instruments. The central focus for this dialogue would be an annual perfor-

mance review process, starting from the point at which 'justice was dispensed', the local courts and police, local governments, and range of special purpose civil society/state agencies that were to be provided for in the new laws. The intention was, then, to calibrate policy conditions to changes in the political environment in which the program was being implemented. Again, more on this shortly. Finally, unlike most policy condition programs, AJP's policy loan was supported by other financing instruments. As mentioned, a \$20 million technical assistance loan was made available to support the 29 government agencies at central, province, and local levels which were implicated in these reforms. Alongside, the AJDF had five 'funding windows' for judicial development, legal education, judicial training, research and a unique facility to fund civil society initiatives for legal empowerment. Grant-funded domestic and some international technical experts were available to each agency to assist them identify their priorities, draw on these funding sources, and sustain the process of policy dialogue.

AJP's designers were well aware that the risks facing this program were formidable and listed no fewer than 16 'key constraints' that would need to be dealt with during implementation. Critical would be 'constituency building', that is, negotiating and building commitments to the reforms amongst executive and judicial agencies whose unbridled privilege and insularity would be challenged, amongst newly elected local government officials, with elected province and federal representatives set to be returned to office after October 2002, and with a largely supportive, but justifiably skeptical civil society at large.

It was furthermore evident that AJP's implementation would run hard against deeply embedded features of Pakistani governance. It has been said that Pakistan is burdened with an 'overdeveloped state^{'36}; distant from citizens' interests, arbitrary in its actions, ruling by order rather than justice. These were a colonial legacy, but had been thoroughly reinforced by post-colonial experience. Many have reflected on the 'praetorian' nature of the contemporary Pakistani state³⁷ and its roots in popular endorsement of authoritarian rule in the rural areas of its most populous province, the Punjab.³⁸ Since its creation, Pakistan's governance has been dominated by a cabal of patrimonial-territorial rural elites, the so-called 'feudals', who had maintained the colonial governance institutions inherited and sustained by a relatively well trained civil-military bureaucracy. Any semblance of a social change agenda, for instance land reform, has been unable to move beyond rhetoric due to this powerful alliance. Political mobilization even at the level of populist rhetoric was seldom tolerated. Hence the democratic institutions and processes were time and again contained by an overarching executive consensus. Pakistan's AJP focused on reforms around the thana and kutchery — the local offices of the police and the magistracy, which represented, negotiated and enforced the 'writ of the state'. Since the unstable coalitions of the 1950s, politics was mediated by elite coalitions of convenience, shifting overnight, but always without a social agenda. Relations between representatives and citizens were never able to replace the dominance of patrons over clients. Since 1958, at least eight law reform commissions had been constituted to review the administration of justice in Pakistan — and few if any of their recommendations had been implemented.39

Thus, the third military coup in 1999, had features both historically familiar and unique. All military rulers expressed similar ambitions of reforming the state and society, but Musharraf's seven point agenda and its initial implementation made a radical departure from earlier efforts by undoing the executive magistracy at the local level and moving towards 'separation of powers', that is, acting directly on thana and kutchery politics. The historical legacy was the constant backdrop for AJP's implementation, but Pakistan's external environment changed dramatically after 9/11 2001. This initially added pressure for reforms, then lessened dramatically once security interests took precedence over liberal reforms. Internally, major changes also occurred, especially after October 2002, and this too impacted directly on how the reforms supported by AJP rolled out. By 2004, the government was diluting the pace of decentralization and police reform, recentralizing powers earlier assigned to local government, and reaching accommodations with provincial governing elites so as to sustain the military/civilian alliance of the day.

During the first two years of AJP implementation, the fiscally strapped and legitimacy starved executive acted to fulfil AJP policy commitments. The first two tranches were released, following enactment of new and amended laws and policy declarations which could be achieved through executive ordinances. The military government promulgated at least 44 ordinances directly concerning governance reforms. Then, the second phase in AJP policy dialogue got underway, during which the institutional implications of new laws (regulations and rules, new local justice-related agencies, human resource capacities and incentives working at all scales of government, and across both judiciary and executive) were to be implemented. This coincided with the October 2002 return of political elites to the national and province legislatures, and stiff opposition to the legal framework order (LFO) promulgated by the Musharraf government just before the elections which aimed to protect the bulk of reformist legislation. This became the rallying point for opposition to the military regime around which unstable political coalitions sought identity by stymieing and undermining implementation of any changes included in the LFO. We will turn to this story later after an overview of progress on AJP outcomes.

AJP Policy outcomes and experiences

AJP design identified 48 policy actions on legal/judicial reforms and 16 on police reforms. The first tranche of \$100 million was released in December 2001 upon enactment of laws and policy commitments on independence of the judiciary, police reforms, full local separation of powers, arbitration law, alternate dispute resolution, legislative transparency, and gender equity and legal empowerment. In November 2002, the second tranche of \$50 million was released following compliance with 18 policy conditions that included the establishment of \$25 million AJDF and new legislation fulfilling the policy commitments announced in December 2001. By late 2004, the Government had reported substantial progress

on largely second generation institutional reforms enabling the release of a third tranche of \$100 million. Little progress had however been achieved in utilizing the \$20 million technical assistance loan, in large measure because of managerial weaknesses in ministries and departments concerned with law and justice, as well as reluctance by the elected political leaders responsible for these agencies. The AJDF was set up in a formal sense; however there is little or no capacity, or will, within the Law and Justice Commission (LJC) to administer the endowment. Given its wide ranging reform ambit, AJP attracted technical assistance grant resources from a number of bilateral agencies, including in the first years, Canada and the Netherlands. Ironically this support, coursed largely through national consultants, substituted the capacity of the government to manage the reform agenda and for a time hid the full extent of reluctance within the executive to move ahead with the reforms.

After four years of implementation, AJP's experience accords with evidence from elsewhere about the difficulties facing second generation policy reforms for public services outcomes. 40 Translating legal and policy instruments into institutional development outcomes is neither formulaic nor predictable. By design, the cascading approach of AJP policy and institutional outcomes, meant that as the program moved from support for law reform, to actually establishing the new institutional arrangements prefigured in laws, it would become increasingly transaction intensive. The transit from policy or law into far more complex institutional 'rules of the game' involves multiple actors and often competing forces. In the case of Pakistan, as the reforms supported by AJP moved into policy actions which focused on regulations, rules of business, new agencies and working arrangements at federal, province and local levels, they had to engage political contests amongst typically unstable, reform-averse political alliances, disparate and contesting organs of the state (legislature, judiciary, executive), and the uneven commitments of factional and politicized non-state actors such as the bars and other organized elements of civil society. Within the executive, factional struggles and administrative turf battles abounded. One popular reform promoted by AJP to establish an independent prosecution service (IPS) was mired in contest around the meaning of 'independence', or, more to the point, which administrative agency of the province government should be the arbiter of that 'independence' in practice. Decisions, when eventually made, were uneven across the four provinces, and frequently recinded, well before the administrative and budgetary armatures needed to put the IPS into practice could be marshaled. Results were often counter-intuitive: as witnessed in the north western frontier province (NWFP) which elected an alliance of Islamic parties, yet showed impressive results vis-à-vis some critically important liberal justice reforms. The context in which the reforms were implemented therefore always ensured that the 'traveled formalism' of AJP's policy conditions had diverse and often unexpected outcomes.

In what follows, we briefly review four key policy outcomes of AJP, to show different aspects of this complex process of implementing a policy-based loan in a rapidly changing domestic and international environment.

1) Law reform for increased access to justice

AJP's key outcome was to improve policy making for an efficient and citizen-oriented justice sector. To this end, AJP underwrote substantial law reform. A statutory national judicial policy making body was created, amendments were made to the law governing the Law & Justice Commission (LJC) to broaden its membership and scope by inclusion of non-judicial members, engagement with civil society and AJDF management. New laws on freedom of information, defamation, contempt of court, small causes court with alternate dispute resolution provisions were also enacted. To further increase the citizen orientation of existing laws, family laws were amended to provide for speedy dispensation and facilitate judgments with overtly gender equity bias, and the writ of *habeas corpus* (illegal detention) was devolved to the district judge level. Most of these achievements were triggers for a tranche release that coincided before the end of direct military rule and partial transfer of power to federal and province legislatures.

In the post-2002 political milieu, implementation of institutional reforms was confronted by new imperatives and their pace and direction was hostaged to political contests between federal and province governments, and internal struggles within each government. The enactment of consumer protection laws by all four provinces was delayed; and when these were passed the institutional arrangements had to be developed by the provinces rather than the central decrees issued from the capital. The legislation on alternative dispute resolution and inexpensive small causes courts promulgated by the military government remained unimplemented for the lack of institutional measures such as rules, budget and human resources. It became evident that the multiple transactions required to convert the policies into public services would take longer than envisaged in 2001. The executive shortcut route could not be applied, and in important respects the adoption of this approach before October 2002 to create an 'enabling legal environment' made it more difficult to gain support for subsequent actions.

2) Separation of powers

AJP supported the move towards full separation of the judiciary from the executive at all levels to strengthen 'judicial independence'. Concurrently, separation of powers was central to the Government's devolution plan. The local government ordinances promulgated in 2001 provided for the abolition of the executive magistracy and reassignment of all judicial powers to the district judiciary. This was a major policy shift mandated by the 1973 Constitution. Earlier, the judicial ruling of 1996 had resulted in partial separation but the 2002 reforms provided a comprehensive legal framework for complete separation.

As noted earlier, the historical tradition in South Asia through the Mughal and colonial periods has been the existence of territorial-patrimonial kingdoms to govern. All post-independence

efforts in Pakistan to effect 'separation of powers' had failed. Given this backdrop, achieving full separation of powers was a major shift; however, its transition to improved local justice services remains elusive due to inadequate investments in judicial capacities, slow growth of subordinate judiciary's budgets, particularly non-salary resources, and inadequate regimes of incentives and sanctions. In addition, the demise of executive magistracy has complicated local governance since the quasi judicial and pre-trial functions of the executive relating to 'social regulation' and ensuring public entitlements still require clarity. For instance, issues of environmental and public nuisances that had been handled in an executive manner are now in the formal 'adjudicatory' domain. Another key function of police oversight, although far from problematic when performed by the executive magistracy, has not been achieved by the newly created public safety commissions which have, since amendments to the Police Order in 2005, become increasingly politicised. The sheer scale of reform implementation requires a daunting range of multiple transactions to be mediated by judges, local elected officials and citizenry. And, AJP by device and design could not have led these complex processes.

The technical assistance project under AJP designed to deliver technical support to identify and develop sub-national capacities remained ineffective. First, its steering also required a centre-province compact that was difficult to achieve as the election results produced quite diverging priorities in these two levels. Second, with the military-executive still in driver's seat, historical legacies of executive-judicial tension dominated the consultations and preparation of proposals for the judiciary. Lastly, the need to tailor technical support to multiple, diverse local requirements proved beyond the ability of implementing agencies who were simultaneously aware of conflicting political agendas of elected representatives. These constraints are true across all areas that AJP's technical assistance support aimed to deliver during the implementation.

3) Judicial reforms

With the policy ambition of ensuring inexpensive and efficient justice to the citizens, AJP articulated a wide-ranging judicial reform agenda that included improvements in judicial governance and human resource development in addition to re-aligning incentives with performance. The primary objective was to reduce delay in subordinate courts, through establishment of small causes courts, improvement of judicial administrative and performance systems, transparency and changes in governing arrangements between high courts' and lower courts. As a study of seven districts shows, selective application of case management techniques, leadership, incentive realignment and effective monitoring actually resulted in considerable delay reduction in the lower court, particularly in NWFP.⁴² However, in other three provinces reforms could not be embedded. In part the formalism of issuing 'delay reduction guidelines' under the second tranche conditions, was not able to be articulated with appropriate incentives for judges. In spite of national judicial agreement, the Chief Justice of Punjab's Lahore High Court resisted reform

implementation until he was elevated to the Supreme Court. NWFP's relative success could be attributed to the informal reform consensus articulated through bench-bar compacts, continuity of strong leadership and cultural egalitarianism where the high court administrators could interact with the chief justice and high court decision-makers.

At the national level, AJP's bid to improve judicial governance through the NJPMC and LJC achieved little success. NJPMC headed by Chief Justice of Pakistan (CJP) remained locked in domestic controversy surrounding legitimizing the military rule under the doctrine of necessity. NJPMC ownership of judicial reforms ebbed and flowed with changes in the CJP. The LJC, now with an expanded statutory mandate, was similarly reluctant to risk actions that would raise the ire of the senior judiciary it reported to. In October 2004, the Mukhtaran Mai case presented the dilemma on ownership of the NJPMC. Three superior courts battled in public view over jurisdiction to hear the appeal against a Lahore High Court order that acquitted the alleged gang rapists on the basis of insufficient evidence. Earlier, a Supreme Court Chief Justice had resorted to judicial activism by taking *suo motto* notice of this horrendous gang-rape incident in 2003. However, his successor eschewed judicial activism. In Mukhtaran Mai's case the Supreme Court was forced under public opinion and international outrage to intervene after days of wrangling by Lahore High Court and Federal Shariat Court over the issue of jurisdiction.

However, policy dialogue concerning budgetary allocations for the judiciary resulted in unprecedented increases (up to 300%) at all levels of the system. Compared to 2000-01, Punjab High Court in 2004-05 receives 85% more resources, Sindh 22%, NWFP 61% and Balochistan 79%. There were noticeable increases (ranging from 5 to 17%) in the non-salary budgets but it proved difficult to transfer additional budgets to the lower courts, where the bulk of case load exists. Provincial transfers of AJP loan resources resulted in expansion of judicial infrastructure with over 500 new brick and mortar schemes leading to a perception in the bars and civil society that AJP was an infrastructure loan.⁴³

Recent studies have also shown increased provision of *habeas corpus* relief at the district level since the 2002 reform. 44 Similarly, the disposal of family cases has also registered a sharp increase with a certainty of outcome within the new time limits. 45 This is likely to impact female litigants in the long term. Currently, family law reform also suffers from the weak capacities of the family courts to deal with judicial workload under the new policy. Interestingly, a comprehensive proposal to amend the antiquated civil and criminal procedural laws (prepared in the nineteenth century) for efficient judicial outcomes was tabled in 2004 before the legislature. This draft bill has been developed, in large measure, outside the AJP conditionality box.

AJP aimed to foster investors' confidence through judicial reform. AJP underwrote the executive commitment of functional specialization within the Sindh and Lahore High Courts that adjudicate the bulk of commercial disputes. But by 2002, the economic turnaround had diluted the earlier focus on the necessity of improved commercial dispute resolution and attracting foreign direct investment. High Courts issued formalistic directives creating separate benches but these were neither exclusive nor full time. Despite the announcement of a new arbitration policy,

the draft arbitration law remains entangled in closed door discussions within the executive.

The trajectory of AJP judicial reforms echoed the classic law and development movement failure in bypassing the legal profession, less by design than by default. The political question of courts' legitimizing the military coup and General Musharraf's simultaneous holding the two offices of chief of the army staff and the Presidency resulted in a protracted bench-bar standoff that has still not been resolved. The initial triumvirate consensus between the executive, the judiciary and the bars worked out during the inception phases of AJP collapsed as constitutional controversies surrounding the military rule became more heated.

4) Police reforms

The scope of police reforms under AJP exemplifies how PBLs driven through an executive short cut approach are prone to 'policy overreach'. AJP included four policy outcomes: ensuring an independent, accountable, police service free of political interference, establishment of an independent prosecution service, strengthening police-citizen relations and raising gender and human rights awareness. The organization of police in British India was driven by the imperial need of rule through 'law and order'. The Police Act 1861 that underwrote the colonial state's priorities was replaced by an AJP supported Police Order of 2002. The AJP reform package contained all features of the wider governance policy shifts: vertical reassignment of accountability, entry of elected officials into external accountability of the police; horizontal functional separations at the local level (investigation, enforcement and prosecution) and outsourcing aspects of executive accountability to unelected 'civil society', and emphasis on 'gender' equity.

The story of police reforms under AJP is paradoxical: the initial, major law reform achievements of 2002 have proven to be a near failure in practice. The 2002 Police Order introduced the Japanese concept of public safety commissions (PSC) at national, province and district levels. Whilst PSCs were notified at the district level, the creation of provincial and national commissions could not be achieved. Laws were passed by provincial legislatures to create 'independent' prosecution services, but in effect the police continue patrols, lodge crime reports, investigate and prosecute offences. Provisions for functional specialization were never implemented and even before these acquired the status of a formal 'norm', the provinces reversed the legislation. An independent police complaints authority is yet to be established.

Building consensus around these newly promulgated decrees was difficult within the police as the new structures potentially attacked the rent-seeking, particularly at the thana (police station level). At higher levels, the prospect of independent PSCs making appointments was a direct challenge to the provincial political-executive for it potentially undermined their control of the coercive arm of the state through which 'order' is maintained. Each of the policy shifts noted above conflicted with long established patrimonies essential to the maintenance of territorial power. Thus the Musharraf government weakened by the election results, traded stability for

amendments to the Police Order that would return to provinces complete control over police appointments and discipline. By late 2004, functional specialization had ended, PSCs were merged with police complaints authorities and the commissions were stacked in favour of the ruling party by reducing civil society representation. True to the tradition of executive-led decision making, there was little debate at any level save a handful of civil society and media groups highlighting increased police excesses since the reforms were launched.⁴⁷ The political underpinnings of reform are still contested as the "lack of legitimacy"⁴⁸ is cited as a major reason for the skepticism over the Police Order, despite the irony of the 1861 legislation employing the similar executive shortcut.

Police reforms evolved with insufficient policy dialogue. The centralized National Reconstruction Bureau that designed the devolution and police reform prescriptions was overshadowed by provincial governments by 2004 in policy debates and decisions. In any case, the formalistic prescriptions remained external to the endogenous patterns of governance and appeared redundant with the return of the provincial legislatures and executives that successfully bargained to reintroduce patrimonial-territorial controls in exchange for support to the ruling coalition at the centre.

LESSONS AND CONCLUSIONS

n many respects, AJP's implementation experience to date is by no means unique. Many developing countries are beset by weak and unstable political coalitions which fail to articulate citizens' majority interests in the legislative process, in which any semblance of a 'progressive social agenda' is stymied by an over-extended executive working in concert with patrimonial elites to both compromise the judiciary and reinforce its inherent insularity. Similarly, the 'policy articulation' envisaged in AJP has much in common with general market-oriented governance reforms promoted in developing countries. Thus it should not be surprising that justice sector reforms aided by lending/financing instruments, despite their increasing sophistication, will appear quite puny and clumsy in the face of a conflicted political environment that by definition is deeply embedded in the patterns of privilege and power which make the workings of government appear to be so 'path dependent'.⁴⁹

While not exceptional, many of Pakistan's 'problems of governance' are however much exacerbated, by history, present domestic politics and its geo-political position on the frontlines of the US war on terror. Thus exacerbated, the lessons to be drawn from this experience of deploying program-based lending instruments in support of an already conflicted justice reform environment are put into sharper relief. Here we survey a few of these lessons in a way we think has currency beyond Pakistan.

First, as others have observed, liberal governance reforms face the inherent tension of being at the same time the intended outcome and the prerequisite for their effectiveness.⁵⁰ This point is often lost in analyses that focus on specific factors constraining access to justice and then dictate the precise sequencing of reforms. It is the case that developing country judicial and policing sys-

tems are politicized, that appointments lack merit, that case management, court administration and quality control procedures need reform, or that better appointment, career promotion and training arrangements are required and need to be introduced in a sequenced manner – to mention just a few of the elements carefully addressed in AJP design and 'cascaded' through the policy matrix. But underlying all these prescriptions is the common assumption of a 'normal polity'. Herein, citizens' interests, resting on a constitutional framework, are expected to be articulated into laws by their representatives working through the checks and balances of a legislative process. These laws mandate various institutional arrangements — rules, norms, organizational set-ups and sufficient financing — in return for which an executive is made accountable to deliver whatever services or regulatory results are anticipated in law. While citizens, as consumers or clients of services, may interact directly to hold the executive accountable, it is principally through their relations, as citizens, with elected representatives that their interests and the primary accountability of government is to be achieved.

AJP has many innovative features that set it apart from most policy based loan financed programs, but it was designed through an unusually severe case of 'executive short-cut' that was substantially in tension with the conditions of 'normal polity'. The military arm of the executive had suspended the constitutional process of citizen-representative relations and had arrogated to itself the right to speak for the 'common man' and contrive a slew of what at face value appear liberal laws. These appeared in the AJP policy matrix, as did the institutional arrangements necessary to bring them into reality. And many opportunities were provided in these laws for the people of Pakistan, not as citizens, but as clients of service, to articulate directly with the executive - namely the various committees for police accountability (district PSCs), local justice (insaaf committees)51, the conciliation committees (anjuman-i-masalihat)52, citizen police liaison committees⁵³ and so on. Thereafter, once elected representatives were returned to federal and province assemblies, not surprisingly they sought to 'recover' the right to articulate citizens' interests⁵⁴ and in many ways challenged the laws, articulating executive arrangements and the powers and functions of special purpose local authorities. This process was not triggered by a clear social justice agenda amongst political parties, but by political gamesmanship that had the effect of reducing parliamentary process at all levels to near farce for at least two years after October 2002. In AJP's case is was further exacerbated by the fact that some key members of the superior judiciary were still smarting from yet again being called to a new oath by the military government, and being required yet again to invoke the doctrine of necessity to legitimate a military coup.

This hostility between executive and judiciary, and of both with newly returned legislatures, hobbled by the maintenance of military power at the centre of government, of course undermined 'ownership' of the larger reforms promoted by AJP. This, despite that they were, largely, consistent with the recommendations of eight judicial reform commissions, various police reform commissions and committees, and calls made by the Federal Ombudsman in each annual report since its inception in 1984 regarding the urgent need to curtail executive power. That is, despite that they articulated the principles enshrined in the constitution regarding citizenship rights and rule of

law. The lesson, not surprisingly, is that an executive short cut approach will most likely undermine a reform process regardless of how well these reforms articulate a 'reasonable consensus' of opinion. But there is more.

Second, AJP indeed reflects a new kind of policy lending. From the start, it was agreed that the policy conditions were to be 'working hypotheses' around which to sustain a long term policy dialogue, that is, a political process of negotiation and compromise along dimensions of reform for which there was, at least at a formal level, historical agreement. But the policy conditions could never act in practice as working hypotheses for constructive dialogue, despite that AJP contained nothing fundamentally at odds with what had been proposed in domestic politics over many years. First, for ADB management, such an approach was far too novel to be easily accepted. Second, and more importantly, when placed in the real political situation described above, political contest made these policy conditions appear to be 'hyper-formalistic'; a series of bare and externally imposed conditions which seemed out of kilter with domestic politics or at worst rallying points for implacably opposed positions regarding the legitimacy, not so much of the reforms per se, but of the government. In this particular process the central conceit of liberal rule of law reforms was exposed. That is, the idea that the bullet pointed principles of the policy matrix could be articulated into laws and then institutional arrangements that could be used to 'drive social change' through 'capacity building' in a way that would create a consensus in practice. This, in contrast to a social democratic view that would require such policy actions to first express and then codify through a parliamentary process a consensus that if not already existing, could be forged as a result of the legitimacy of the process of law making.

Thereafter, once the first tranches of AJP's policy loan had been released, the legal reforms accomplished at formal level had to be articulated through institutional arrangements in federal, province and local authorities and in both executive and judicial domains. But with the primary legal reform element being contested by unstable political coalitions with populist pretensions, it became all the more convenient for the executive and judiciary to resist, foot-drag and delay any measures to open their domains to reform or engagement with public representatives. Thus, the transaction intensive phase of AJP's second generation reforms became even more diffused. Unlike earlier generations of policy based lending programs, AJP was designed to provide technical and other resources to sustain a policy dialogue — the \$20 million technical assistance loan, the \$25 million AJDF endowment, along with grant financed technical assistance financing. Converting these resources into action would even in 'normal polity' circumstances have been complex. Whereas government agencies concerned with finance, health, education or rural development have in most developing countries at least some familiarity with the arcane workings of aid and development projects, the ministries and departments of law and justice, the police or judiciary were completely unfamiliar with implementation of foreign assisted projects, far less with use of such resources to promote public and inter-governmental dialogue around a complex reform program. The circumstances of 2001-02 furthermore contrived to distance them further from any desire to learn how this might be achieved, and after October 2002, they felt those in charge at the ministerial level would penalize them for any halting effort to do so. We have recounted exceptions to this, and many others have accumulated over the past four years. But there is sufficient experience also to argue that the mere existence of the AJP and its accompaniment of technical assistance resources sometimes became in these particular circumstances handy grist for a counter-reaction, far less a set of resources to advance a reform process.

Third, there remains another possibility, one equally well referenced in experience from other countries; namely that the social outcomes of policy reform programs cannot be anticipated with any great confidence. While many policy actions, however well intentioned, can be consigned to the detritus of failed experiment, law reforms and the mandate they give for new institutional arrangements can become points of leverage in political processes. Indeed, this was a key rationale used by AJP's designers. For instance, OECD experience with freedom of information, consumer or environment laws shows them seldom appearing in their 'finished form', but rather constantly being contested, refined and enlarged through social mobilization, the accumulation of case law and public debate located in the representative process. Thus, alongside the rather chaste assessment just made, there is ample evidence that AJP is well placed to support this on-going social recovery from the executive short cut. Reforms promoted by AJP (e.g., in freedom of information, family law, administrative justice) may yet become a key reference point for political action which may foster long term transformation towards improved access to justice in Pakistan. But it will always be the case that questions of political transformation in Pakistan will in the main be negotiated on broader political terrains such as federalism, continued economic development and above all the geo-politics that has been a source of stability and instability in its recent history. That said, AJP and devolution reform have opened several windows for the fragile reform coalitions to take the agenda forward. The continued economic growth and demographic transformations within the next decade or so will in large measure determine the course of politics and change in Pakistan thereby impact directly on the long term trajectory of justice reforms.

- ¹ The authors are thankful for the advice of Thomas McInerney, and the insightful comments of Hamid Sharif, Sandra Nicoll, Peter Robertson and an anonymous peer reviewer. The usual disclaimers apply: the views expressed in this paper are the views of the authors and do not necessarily reflect the views or policies of the Asian Development Bank (ADB), or its Board of Governors, or the governments they represent. ADB does not guarantee the accuracy of the data included in this paper and accepts no responsibility for any consequence of their use. The countries listed in this paper do not imply any view on ADB's part as to sovereignty or independent status or necessarily conform to ADB's terminology.
- ² The term 'access to justice' is used here to refer to various reforms supported under the rule of law, legal and judicial reforms as "law and policy reforms" or "justice and security," etc.
- ³ A thorough evaluation of AJP is both premature and clearly beyond what can be attempted here.
- ⁴ Craig, D. and Porter, D. Development Beyond Neoliberalism? Poverty Reduction, Governance and Political Economy, London, Routlege, 2006, Chapters 3 & 4.
- ⁵ See Tamanaha, B. 'The Lessons of Law—Development Studies', The American Journal of International Law, 89, 2003, 470; Trubek, D. and Galanter, M. 'Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States', Wisconsin Law Review: 1974,1062; Carothers, T., 'Promoting the Rule of Law Abroad—The Problem of Knowledge', Carnegie Endowment for International Peace Working Papers (34), 2003; and, Jensen, E. 'The Rule of Law and Judicial Reform' in E. JENSEN AND T. HELLER, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW, Stanford University Press, 2003.
- ⁶ Toye, J., Dilemmas of Development: Reflections on the Counter-Revolution in Development Theory and Policy, Oxford: Blackwell, 1987.
- Williamson, J., What Washington means by Policy Reform', in Williamson, J. (ed.) Latin American Adjustment: How much has happened? Washington DC: Institute for International Economics, 1990, pp. 18–23.
- ⁸ Commission of the European Communities, 'Shaping a Market-Economy Legal System.' 1993
- ⁹ *Ibid.*, emphasis added.
- ¹⁰ This period of transformation in access to justice is discussed in Porter, D., Access to Justice Reforms Revisited, Paper presented at International Conference on Peace Justice and Reconciliation in the Asia-Pacific Region, University of Queensland, Brisbane, 1-3 April, 2005.
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- 16 World Bank. Assessing Aid: What Works, What Doesn't, and Why, 1998, Oxford: Oxford University Press
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- 19 Bolt, R. and Fujimura, M., 'Policy Based Lending and Poverty Reduction: An overview of processes, assessment and options', Economic Research Division (ERD) Working Paper Series No. 2, Manila: Asian Development Bank, January 2002.
- 20 Santiso, loc. cit.
- ²¹ Dollar D., and V. Levin, 'The Increasing Selectivity of Foreign Aid, 1984–2002', World Bank Policy Research Working Paper 3299, Washington DC: World Bank, May 2004.

- ²² Santiso, loc. cit.
- ²³ Of the 19 loans, 13 were program (PBL) loans, three were project loans, and three were sector development programs (SDPs). For further details see "Review of the Implementation of ADB's Governance and Anticorruption Policies", February 2006 available online http://www.adb.org/Governance/Review/default.asp
- ²⁴ ADB long debated what would be the 'right' time to introduce AJP. By 1999 the program was already two years in the making and, for many ADB staff, prospects for the program beyond 1999 looked bleak, precisely because of the political fall-out of the military coup.
- ²⁵ The apex court had invoked the doctrine of necessity to legitimize the military takeovers by Field Marshal Mohammad Ayub Khan and General Zia ul Haq in 1958 and 1978 respectively.
- ²⁶ 2001, debt and defence amounted to two-thirds of public spending—257bn rupees (\$4.2bn) and 149.6bn rupees (\$2.5bn) respectively, compared to total tax revenues of 414.2bn rupees (\$6.9bn). Reflecting consolidated fiscal deficits (including grants) that averaged close to 6.5 % of GDP during the 80s and 90s, the ratio of public debt to GDP rose from 66 % of GDP in 1980 to 101 % by 2000. The interest burden of public debt grew even more sharply, quadrupling from a little less than 11 % of total revenues over 1980—85 to 46 % by 1999—2000. World Bank, Poverty in Pakistan: Vulnerabilities, Social Gaps, and Rural Dynamics, Washington DC: World Bank, 2002, p. 3.
- ²⁷ The IMF increased assistance by 237% from 1998 to 1999 as the Economic Stabilization Adjustment Facility was relabelled the Poverty Reduction Growth Facility and topped up by \$1.3 billion. In December 1999, the holders of Pakistani eurobonds approved a restructuring of their assets, and a further \$12 billion in debt was restructured. When co-joined with the security imperatives after the events of 9/11 when Pakistan joined the War on Terror, aid receipts, having declined by 70% following the nuclear tests in 1998, jumped 88% from \$621 million to just on \$1.17 billion in fiscal year 2000-01, and again, by 196%, to \$3.4 billion the following year. For detail on this period, see Craig and Porter, Loc Cit., Chapter 7.
- ²⁸ These included: TA 2979-PAK: Strengthening Government Legal Services and the Subordinate Judiciary, for US\$150,000, approved on 31 December 1997; TA 3015-PAK: Legal and Judicial Reform Project, for US\$995,000, approved on 7 May 1998; TA 3433-PAK: Strengthening of Institutional Capacity for Judicial and Legal Reform, for US\$2,900,000, approved on 27 April 2000 and TA 3640-PAK: Supporting Access to Justice under the Local Government Plan (US\$150,000), approved on 19 March 2001.
- ²⁹ Buscaglia, E. and M. Dakolias 1999: A Comparative International Study of Court Performance Indicators: A Descriptive and Analytical Account. Legal and Judicial Reform Series. World Bank, Washington DC, provide a useful summary of the kinds of factors addressed by these TA projects.
- ³⁰ See Baar, C. 1999: 'The Development and Reform of Court Organization and Administration', Public Administration and Development, 19: pp. 48–82 for summary of activities associated with the domain of 'judicial administration'.
- ³¹ ADB, Report and Recommendation of the President to the Board of Directors on Proposed Loans and Technical Assistance Grant to the Islamic Republic of Pakistan for the Access to Justice Program, November 2001. Manila: ADB. 32 Ibid.
- 33 These were articulated in five areas of focus: (i) providing a legal basis for judicial, policy, and administrative reforms; (ii) improving the efficiency, timeliness, and effectiveness in judicial (including administrative justice) and police services; (iii) supporting greater equity and accessibility in justice services for the vulnerable poor; (iv) improving predictability and consistency between fiscal and human resource allocation and the mandates of reformed judicial and police institutions at the federal, provincial and local government levels; and (v) ensuring greater transparency and accountability in the performance of the judiciary, the police and administrative justice institutions.
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State, London; Rizvi, H. 1998: Civil-Military Relations in Contemporary Pakistan Survival, vol. 40, no. 2, 96-113 and http://epress.anu.edu.au/mdap/mobile devices/ch06.html

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- ⁴⁰ Pritchett, L. and Woolcock, M. 2004: Solutions When the Solution is the Problem: Arraying the Disarray in Development; World Development, 32, (2), pp. 191-212.
- ⁴¹ However, at the time of integration of the Provinces and States into One Unit (Province of West Pakistan), in October 1955, in three districts of former Bahawalpur State there was already complete separation of the judiciary from the executive. This ended with the imposition of Martial Law in October 1958.
- ⁴² Unpublished "Delay Reduction in Subordinate Judiciary The Pakistan Experience: Did Reforms Work Under Access to Justice Program?", July 2005, Pakistan Resident Mission, ADB
- ⁴³ President, Supreme Court Bar Association, Pakistan, 19 November 2005; available online http://www.dawn. com/2005/11/19/nat9.htm
- 44 Unpublished study conducted by Aurat Foundation, Pakistan, "Impact Assessment Of Devolved Habeas Corpus In Model Districts Of Access To Justice Programme, (2002 to 2005), August 1, 2005, ADB.
- ⁴⁵ The findings of the unpublished AJP annual performance review 2005 has confirmed this trend.
- ⁴⁶ Interestingly, a small group of 'pro-refom' senior police officials were the architects of the reform package. However, as events proved, they did not have a system-wide support for change.
- ⁴⁷ Center for Peace and Development Initiatives is a civil society organization that has undertaken advocacy on this issue. Details on amendments to Police Order and related debates can be found on http://www.cpdi-pakistan. org/rol.htm. For extra-judicial killings see Oneworld South Asia (2003) In Pakistan, the Police Shoots to Kill: http:// southasia.oneworld.net/article/view/65493/1/ as on 15 May 2005; and the annual reports of Human Rights Commission of Pakistan at www.hrcp.web.net.
- ⁴⁸ Based on interviews with selected bar members, NGOs and media professionals. Anonymity is being maintained
- ⁴⁹ Path dependency is highlighted by the fact that international agency practice in governance reform appears to converge at the policy level, but varies considerably at the operational level largely as a result of the fact that opportunities for change are shaped by country-specific historically set institutional and political arrangements. Other country experiences show similar conclusions: see e.g., Hayllar, M 2003: 'The Philippines: paradigm lost or paradise retained?', in Cheung A. and Scott, I. 2003: Governance and the Public Sector Reform in Asia: Paradigm shifts or business as usual, London, Routledge, pp. 227-47. Montinol, G. 1999: 'Politicians, parties, and the persistence of weak states: lessons from the Philippines', Development and Change, 30, pp. 739-44, for the Philippines, or Sri Lanka, Knight-John, M. and Peruma, A. 2003. 'Regulatory impact assessment in Sri Lanka: bridges that have to be crossed', paper to CRC-NCPAG Conference, Manila, October.
- 50 Cf. Santiso, loc. cit.
- ⁵¹ Mandated under the Local Government Ordinance[s] of 2002.
- ⁵² Mandated under the Local Government Ordinance[s] of 2002 to resolve minor disputes at the grassroots levels.
- ⁵³ Building on the successful Karachi model, the Police Order 2002 aims to establish such bodies in all districts. For Karachi model, see Anuradha J. and Moore, M. 'Institutionalised Co-production: Unorthodox Public Service Delivery in Challenging Environments', Institute of Development Studies, Sussex, 28 May 2003.
- ⁵⁴ This does not imply that the elected representatives necessarily advance the social democracy agenda. As noted earlier, the historical fiefdoms of power at the province level suddenly seemed challenged by the increased powers and functions of local governments and reducing the patrimonial status of the provincial and national assemblies members.

POSSIBILITIES, DYNAMICS, AND CONDITIONS FOR REFORM OF THE JUDICIARY IN INDIA

Arnab Kumar Hazra

INTRODUCTION

mong the most important attributes of the notion of "rule of law" are the procedural and institutional characteristics of a country's legal system. The benefits of a good judicial system are many, covering economic, political, and social spheres. The importance of the judiciary lies in checking abuses of government power, enforcing property rights, enabling exchanges between private parties, and maintaining public order. A balanced, swift, affordable (accessible), and fair justice delivery system — besides promoting law and order — aids in the development of markets, investment (including foreign direct investment), and affects economic growth positively. Good economic policies need strong and accountable institutions to support and implement them. Strong justice institutions thus form the basis of lasting social order.

The positive linkage between "rule of law" and economic growth is difficult to deny. The overall level of confidence in the institutions of government, including the judicial system, correlates positively with the level of investment and measures of economic performance. This view is exemplified in the work of the "New Institutional Economics" school, which emphasizes the protection of private property rights and the facilitation and enforcement of long-term contracts as essential ingredients for raising levels of investment and hence economic growth. A number of cross-country econometric studies provide compelling evidence in support of this thesis. An inefficient and non-transparent

legal system increases transaction costs for economic actors, including foreign investors, who tend to gravitate toward states with more "effective" or "efficient" legal regimes.

There is a debate as to whether law reform should be designed to facilitate market transactions, or instead whether emphasis should be placed on promoting good governance and alleviating poverty. Without getting into the nuances of the debate, it is widely understood that many measures to promote judicial efficiency can improve access to justice for the relatively poorer sections of the population. Both Eyzaguirre (1996) and Blair and Hansen (1994) note that inefficiencies in court procedures and management often provide opportunities for rent-seeking by attorneys, judges, and judicial support personnel.³ Invariably, the poor are disadvantaged by such inefficiencies.

Enforcement of property rights is one of the important functions of fair and accessible judiciaries. In India and in most developing countries, where land titles are poorly recorded, the poor find it almost impossible to establish their claims and wade though a treacherous judicial system beset by endemic delays.

Yet, the poor in India face particularly great perils when involved in criminal cases. In India, the workloads of both the investigating authority (the police) and the dispute resolution authority (the courts) are overwhelming. This capacity constraint has serious implications for justice, especially justice for the poor. It is now a well-established fact that the jail population of prisoners awaiting trial in India is huge. Such persons may be incarcerated pending trial simply because they have not been able to procure bail. They may have been unable to procure bail because they either lacked the means to hire legal counsel to represent them in requesting bail or they have been unable to furnish the necessary funds.

The Indian judiciary is chronically swamped with an enormous number of pending cases. This apparently insurmountable problem increases inefficiencies in the system and jeopardizes the efficacy of other legal reform measures initiated. The judiciary has also remained relatively untouched by more general state reforms undertaken in the last fifteen years. Inefficiency in the judicial system also leads to frivolous litigation with the aim of harassment or delay, crowding out litigants with legitimate claims and forcing them to seek solutions through quasi-legal mechanisms.

There is a genuine need to clear the dockets of the courts. Addressing this need usually involves a multi-pronged strategy, and the full range of the initiatives involved therein can together be grouped under the umbrella of judicial reforms. In this paper, when judicial reforms are discussed, the reforms will relate generally to the District and Subordinate Courts in India.

The issues within the context of judicial reform necessitate at least a three-pronged approach. The first concerns court strength. Second is judicial or court productivity, and the third, court information technology systems particularly in reference to access to justice. The strength of a court essentially pertains to sufficient judicial staffing (referred to here as "judicial strength"), although non-judicial staff and their skill sets are equally important factors. The main question pertains to the efficacy of enhancing legal competency as purely a supply side

solution to clearing pending cases, or whether improvements in infrastructure and administration are required to improve productivity.

Court productivity enhancements can come about through a variety of approaches. The first is judicial education (through training and continuing education) as a way of increasing judicial efficiency. A second is better management of court dockets, a central aspect of any judicial reform initiative. Alternate dispute resolution (ADR) mechanisms, which if successfully developed and implemented, are important to reduce the burden on court dockets. In addition to ADR, back office court functions performed by non-legal staff, such as process serving agencies, also need to be reformed. A final component of the reform process is enhancing non-legal staff competence to ensure that they keep pace with their judicial counterparts. Reforms in court administrative governance are associated with training of non-judicial staff, better human resource practices, workforce planning, and infrastructure planning. Closely associated with case-flow management practices is the issue of court information systems, and particularly the use of information technology (IT) by developing or modifying case management information technology systems for the courts. This leads to simplified, harmonized, and transparent functionalities through which cases proceed to their logical conclusion. Enhancing IT capabilities of both the workforce as well as the courts helps to usher in transparency in processes and court information dissemination.

COURT STRENGTH

n India, a lack of judges has generally been cited as the main reason for court congestion and delays. Indeed, the number of judges per capita has historically been low compared to other countries. For instance, data on thirty selected countries from the World Bank Justice Sector at a Glance database indicates that in 2000 the average number of judges per 100,000 inhabitants worldwide was 6.64.⁵ The corresponding number for India is approximately 2.7.⁶

Moreover, vacancies have been a historical problem. The district and subordinate courts on average have 10–15 percent of positions vacant with some states like Delhi experiencing vacancy levels as high as 30 consistently over the last twelve years (since data has been available). The situation in the High Courts is marginally worse.

There are two questions that pertain to the relationship between judicial strength, court congestion, and judicial reform in India. I list each of them below and seek answers to them one at a time.

The first question that arises, given the backdrop of low judicial strength per capita as well as the persistent vacancy situation in India, is whether there exists a policy for judicial workforce planning and what kind of reform measures are needed.

Currently, there are almost no systems in any of the District Courts in India for workforce planning, i.e. planning for recruitment, career management, personal development or job-related skills training, whether for judges or non-judicial staff. The consequence is that decisions about

the deployment of staff are made without the benefit of accurate human resource records or consideration of the competencies required. There are usually no persons qualified to advise District Court leadership on personnel management or training, either with respect to administrative staff or judges.

While the establishment of a Human Resource Unit in the District and subordinate courts throughout the country is an important judicial reform initiative, the process of recruitment also needs careful reconsideration since the high number of vacancies is a consistent and persistent problem, which has been observed in many states and for long periods of time.

The judicial appointment and promotion process in India is by default in the hands of the judiciary, whether the process involves judges in the High Courts or the District Courts.⁷ This judicial control of appointments is unusual in common law jurisdictions outside of the subcontinent. The responsibility for appointments and discipline places an added administrative burden on courts already overburdened with cases. The fact that recruitment for judicial service officers is highly irregular throughout the country despite high vacancy rates is a reflection of the difficulty the High Courts have in finding time for this administrative function.

Perhaps the initiation of the recruitment process should not begin from within the judiciary. There should also be mechanisms for judge rostering and workforce planning, making knowledge of future vacancies available in advance and thereby enabling the process of recruitment to begin automatically. Unfortunately, the judiciary in India seems to be quite reluctant to put in place a system of judge rostering. Further, the recruitment process should become an annual exercise. These might seem simple steps, however, in reality, there remain significant obstacles to their realization.

The second question that arises is whether raising judicial strength is a necessary and sufficient condition to solve the problem of court congestion, thereby rendering other judicial reform initiatives less significant.

Micevska and Hazra (2004) explore the problem of court congestion in Indian lower courts, using several measures to quantify court congestion, including caseload per capita and per judge, the number of cases older than a year per capita and per judge, and congestion rates calculated as the ratio of cases older than one year to cases disposed. The authors conclude that Indian state judiciaries differ with respect to the nature and the level of congestion. The authors also identify the reasons why some judiciaries are more congested than others. The results show that the large number of judges per capita is negatively related to congestion rates, while judgeship vacancies have a positive effect on caseload per judge. Court productivity captured by clearance rates has a significant and negative effect on both caseload and congestion rates and seems to be crucial for the effectiveness of congestion-reduction programs. Finally, judiciaries with lower litigation rates display relatively better performance with respect to current caseload, but are not efficient in addressing the backlog of cases pending for more than a year.

In summary, the paper demonstrates that a "one-size-fits-all" approach is faulty. While increasing the number of judges might lead to a reduction in congestion rates, this solution is not

likely to contribute to an improvement of the situation in court systems facing large caseloads. On the other hand, filling vacancies seems particularly relevant for judiciaries with large caseloads per judge. Clearance rates have a well-defined, negative effect on both caseloads and congestion rates. Together these conclusions suggest that improvements in court productivity are crucial to reduce the congestion in all state judiciaries. Finally, a reduction in cases filed, coupled with an increased emphasis on resolving cases that are pending for a long time, is also likely to assist lower courts in every state in addressing their backlogs.

COURT PRODUCTIVITY

Ithough judicial efficiency (court productivity) is not a traditional characteristic of the rule of law, like judicial independence, it is grounded in the ideal of fairness. Protracted case processing times and overburdened administrative staff may lead to resource-privileged individuals to dominate courts' time to the detriment of those who have fewer resources with which to exert influence. Those with limited access to justice may resort to extra-legal or illegal means of resolving conflict such as coercion or physical violence.

As mentioned before, Micevska and Hazra (2004) demonstrate that clearance rates have a significant and negative effect on caseload per capita and per judge, as well as on congestion rates. This means that court productivity is a very important factor in reducing court backlogs and congestion. The effect on the backlog of cases older than a year is insignificant, indicating that courts are focusing mainly on the new cases filed each year rather than their pending cases. Indeed, during the 1995–99 period, the courts tended to adjust their productivity only in relation to the number of cases filed, not to their full caseloads. Essentially, the paper reveals that improving efficiency of the judiciary so as to dispose of more cases using existing resources, is also important in reducing court congestion. Accordingly, simple supply side solutions, such as increasing the number of judges, might not entirely solve the problem.

Court productivity can be increased in four ways: (1) through judicial education/training, (2) better administration of courts in terms of their non-judicial functions, (3) the increased use of alternate dispute resolution (ADR) mechanisms, and (4) better case and case flow management. Each element will be treated in turn.

- (1) Judicial education is very important in the Indian context, but it is too vast a subject to be covered here, given the fact that continuing education and training is quite *ad hoc* in India, with little harmonization in curricula across states, and the judicial academies that conduct such programmes are still at an early stage of institutional development.
- (2) Better administration of the courts in terms of their non-judicial functions and court administration governance-related reforms are equally important. The judicial hierarchy in India has become an administrative hierarchy, in the sense that most subordinate courts do not have the managerial skills, personnel, processes, and institutions to govern their own affairs. The sys-

tem of court administration in India also differs from state to state. For example, the number of branches in courts differ, or the number and formats in any particular branch (say the Nazarat or the process serving agency) used for reporting and record keeping might differ. Moreover, the recruitment processes for non-judicial courtroom and branch level staffs are ad hoc, and therefore do not usually mandate predefined skill sets. In addition, the educational qualifications required are also quite rudimentary. Therefore, reforms in this area need to follow certain basic rules. First, it is essential to perform training needs analysis and design detailed training programs for a variety of jobs through a training of trainers model, and mandate follow-up skill set enhancements from time to time. Basic computer literacy must also be ensured. Second, harmonization of forms and functions are needed to improve the governance process. Third, basic infrastructure support needs to be provided. For example, motorcycles are needed to allow process servers to deliver summons quickly (in certain states in India they are still expected to deliver summons on foot). Fourth, courts usually lack the capacity for budget management, audits, and information technology-enabled fee management systems. The accounts and budget arms of the courts in almost every state thus need substantial capacity building. Finally, the courts need to develop separate, well-equipped and trained human resource, accounting, information technology systems, and infrastructure management departments.

(3) In India there is a debate over the use and efficacy of ADR. There can be no doubt that the judicious use of ADR mechanisms can be an effective tool for clearing the backlog of dockets. However, ADR mechanisms can in no way substitute or even supplement formal court procedures. While a large number of disputes being resolved through mediation and conciliation are no doubt a relief to the Indian courts, it is important to create conditions for their effectiveness, which are lacking in many scenarios. Cases related to family matters, motor accidents, and commercial cases where parties bind themselves to resolve disputes through arbitration, are some examples where the use of ADR has been largely successful in India and it is in these areas that substantial backlog reduction can be obtained.

However, experience in other countries suggests that notwithstanding tangible benefits, there exist several limitations to ADR. In particular, the state must facilitate its adoption. The present euphoria over Lok Adalats (an example of ADR used in India) is exclusive to selected areas. There are also a number of limitations faced by Lok Adalats, such as no obligatory mediation (nullifying the advantages of early neutral evaluation in terms of saving time). And a number of Lok Adalats are facing backlog problems themselves.

(4) Case and case flow management can be easily diagnosed and addressed. These reforms can be analyzed on two levels. At the macro level one looks at the institutional characteristics of the legal system vis-à-vis other legal systems that incorporate best practices within a similar framework. At the micro level, one looks at the strategies for improving efficiency and effectiveness of court processes. I first look at the institutional aspects at the macro level.

Case and case flow management practices and associated expectations of participants in the Indian court system are significantly different from most other countries that also have legal systems derived from the British. These differences help to identify the strategies that may be pursued in overcoming the case backlog and delay problem in India.⁸

First is the question of excessive trials in India. Outside the Indian sub-continent, judges conduct fewer trials. Overwhelmingly, the dominant means by which civil cases are disposed of in these jurisdictions is by voluntary settlement of the parties, rather than by a judge-adjudicated verdict. In best practice systems, 70 percent or more of civil actions can be expected to settle before a trial begins. In contrast, in Indian trial courts the settlement of a case by voluntary agreement between the parties is a rarity. In civil matters the typical proportion of cases that settle is around 5 percent and most of those settlements reportedly occur after a trial begins. The causes of these low settlement rates in India are not well researched; however, the uncertainty associated with case completion and the associated verdicts does not provide the right incentives since one of the parties is more often than not interested in prolonging the process.

Likewise, criminal plea rates are low in India. Plea rates are the proportion of criminal cases in which the accused person pleads guilty and thereby avoids a trial. Sentencing a person who pleads guilty requires fewer resources for a court and the prosecution; and it avoids the uncertainty of having a trial. It also enables the decision on sentencing to take into account factors that may mitigate a sentence, such as contrition of the accused. Accused persons are motivated to plead guilty when they believe that a finding of guilt by trial is likely and when they believe they will get a lighter sentence by pleading guilty. Best practice common law criminal justice systems endeavour to give accused persons ample incentive and opportunity to plead guilty and they often do this by conducting efficient prosecutions that have a high probability of a guilty verdict, providing outcome date certainty, and assuring consistency in sentencing.

To reverse this trend it is necessary to offer more certainty of outcome and to deny advantage to litigants who procrastinate. For courts this means being able to ensure that trials are finished within a certain period known to the parties. Case and case flow management can work to achieve this end, decreasing uncertainty and simultaneously injecting greater transparency into the process.

Next is the question of frequent adjournments. In India, most cases are adjourned multiple times and in unpredictable ways, even after a trial begins. On the contrary, in Australian state courts, the reduction of the average number of case adjournments has been a major managerial priority in backlog and delay reduction for the last twenty years. Criminal case attendance rates for most courts range from 0.3 to 6.3 adjournments per disposed case. Civil attendance rates are in the range of 1 to 5. In India, attendance rates appear to be unrecorded by any court. Estimates offered by individual Indian judges and advocates, however, put the rate of adjournments in Indian trial courts as typically between twenty and forty over the life of a case. Some cases are adjourned many more times.

Third is the phenomenon of fragmented trials as opposed to continuous trials. It is widely accepted that continuous trials provide a more efficient way of conducting trials than fragmented ones. In the former, there appears to be more certainty about the trial completion date and there-

fore a greater incentive for settlement between the parties.¹³ Evidence also suggests that continuous trials reduce the duration of trials overall.¹⁴ Cases that are frequently adjourned are unruly and unpredictable in addition to being costly. However, in India, continuous trials have become largely non-existent. There appear to be two distinct causes. First, it is a well established practice that there be a separate hearing for each of the main stages of a prosecution or civil action. A second evident cause is the effect of rising backlogs and case delays. Given that courts already routinely fragment trials into separate formal stages, the response to rising caseloads has been to subdivide them even further. Generally, as case lists have grown, individual cases have been listed for hearing no less frequently; but less time is available for them at each hearing by reason of there being more cases in general. There is a commonly held view among judges and advocates alike, for example, that it is better to take the evidence of one available witness and then adjourn, rather than risk that witness not being available on the next occasion.

Another important characteristic of the Indian judiciary is the filing of multiple suits in connection with a single case. The Indian justice system offers ample opportunity for a litigant to evade court decisions, or to intimidate opposing parties by appealing or lodging an interlocutory application. A high proportion of pendencies comprise such applications resulting in new opportunities for litigants to evade court decisions. This behavioural trend needs to be deterred.

Finally, there is the question of recording evidence. Oral evidence in most Indian courts tends to be taken slowly and incompletely. Voice recognition technology is still unreliable in a court environment. Consequently, the preferred technology in courts that apply best practice is audio recording of court proceedings and full or partial text transcription from the recordings by typists (transcribers) working outside the courtroom. The introduction of audio recording in Indian courts, however, would not be a simple matter of installing new courtroom hardware. It would demand radical changes in the dynamics of a trial. It would require, for example, that courtrooms become relatively noiseless.

The principal micro aspects of case and case flow management which do not get covered under the macro aspects are summarized below:

- Identify, in order to reduce backlog and delay, reliable statistical information necessary to
 monitor and evaluate the effectiveness of reform efforts. Automatic generation of these
 reports in a harmonized format is a key step in designing micro improvements in case
 management.
- Distinguish between backlogged cases and pending cases. The former needs to be targeted
 specifically through case management techniques that include the removal of inactive cases
 by summary administrative means such as dismissal rules.
- Adhere to time standards. For example, use of specialized tracks with time standards appropriate for those cases and automatic monitoring and generation of appropriate notices to en-

sure that cases that are outside time standards are identified and acted upon, are important case flow management measures.

- Reduce the amount of judge-time spent on a case by the use of case flow management techniques like the removal of unnecessary procedural steps.
- Introduce new processes to perform key tasks in a more cost-effective manner, like early case conferences in complex cases.
- Smooth the flow of cases through improvements in core court processes like differentiated case management through the use of specialized tracks and a strict adjournment policy that encourages litigants and counsel to be prepared to appear at scheduled times.
- Improve the efficiency with which specific processes are performed, like the use of video remand instead of transportation to court for hearing bail applications.
- Encourage clear vision and leadership by the judiciary in backlog reduction and judicial reform programs.
- Facilitate more effective planning, management, and coordination among courtroom staff, branch level staff, and judges.

CASE MANAGEMENT SYSTEMS

he trend in the world's leading courts is to develop robust case management systems that are multi-tiered, multi-platform, and web-based. A typical Case Management System (CMS) collects, organizes, processes, stores, and retrieves information. A CMS can record events from payment of process fees to change of jurisdiction, as well as execution of judgments, etc. Introduction of IT can automate the process and help the courts in ways that reduce redundancy in data entry, avoid delays, improve the clarity of hearings and trials, and improve the quality of sentencing by providing better information to judges.

A fully developed IT-enabled CMS will be able to reduce case delays through more accurate and timely reporting on case status. An automated CMS can improve upon a system of manual files by offering real-time updates on the status of cases, and it can generate data for the specialists known as Information Analysts (IA) to ascertain the exact bottlenecks in the courts and the sources of delay. The reasons for case delay may vary from transfer of cases between the courts and jurisdictional problems or due to the absence of lawyers. Use of an automated CMS may help identify defense lawyers who use frequent delay tactics, or judges who may be inherently slow in

disposing of cases.

The use of IT-enabled CMS systems conforming to international best practice standards is still quite rare in the Indian context, barring a couple of states like Karnataka and Delhi. Such a system could make a very useful contribution in the following basic fields:

Process Serving

A fully automated CMS is usually linked with the process serving branch of a court. A Process Serving Module of a CMS permits tracking the progress of each individual process issued by the court in each case. The processes can be tracked not only by case but also by process server, area, jurisdiction type, etc.

Listing and Attendance

Technology can help the judges to maintain better control of their calendars to process cases with more effective hearings and fewer adjournments. One of the major causes of adjournment in the courts is the poor level of attendance at court hearings by advocates, witnesses, and/or parties. With the advent of mobile phones and Short Messaging Service (SMS), a court can send alerts to lawyers and litigants as to the expected time when a case will come up for hearing. Publishing the status of court hearings live on the Internet is another option. Such a facility has already been implemented in the Supreme Court.

File Tracking

Within the courts, a typical case file is taken out and returned to the file room numerous times during its processing. Sometimes it also gets transferred to other courts or other jurisdictions. Keeping track of these huge volumes of case files has been an issue and a cause of concern among court staff. Bar Coding Technology is one answer to tracking files but it is not without problems. With emerging new technologies such as RFID (Radio Frequency Identification), it is now possible to have embedded chips on the file covers which will enable the RFID readers to track a file inside a file cabinet without even opening the cabinet.

Court Communication

Communication within the court and between the courts is very important. Normal physical channels of communication are time consuming and slow. Technology provides the option of the courts becoming linked via Local Area Network (LAN) or Wide Area Network (WAN). LAN/WAN enable courts to continuously update data from different courtrooms and the various court-complexes in the jurisdiction. It is possible to connect courts through wires or use new and emerging technologies such as Wi-Fi and Wi-FiMax.

Incorporating Workflow Systems

Having these technologies in courts makes it possible to trigger reminders and assign actions

to other staff. Such systems can generate alerts automatically for the judge and/or court officials, especially for cases that require special attention or accelerated case management. This added functionality will enable any CMS to carry out automatic workload assessments.

On-line Payment Gateway

Making payments is a time consuming and cumbersome process. Most courts at the District level have not yet reached a stage where they can manage their records and/or payments electronically. Such systems will enable the introduction of facilities including e-filing, e-services, e-transaction, as well as substantially benefit the user in reducing costs, managing time (working at convenient hours), increasing transparency, and improving efficiency. On-line Payment Gateways are also closely linked with fee management systems (manage and record payments into and out of court).

Data warehousing of Key Performance Indicators

The importance of collecting and analyzing data cannot be stressed enough. A good case monitoring system enables courts to plan and budget in real-time, improve performance, make events more predictable, improve control processes, and help in administrative decision making.

Organizational MIS development

Setting up such a system will enable the Court Administrator to better manage staff and deploy staff for optimum utilization.

CONCLUSION

fforts towards judicial reform worldwide can be divided into two general categories: material assistance and procedural reform. Material assistance consists of resource contributions ranging from management training to computer technology and forms a significant part of funding expenditures in judicial reform projects worldwide.

The speed with which the same case is adjudicated in different countries can vary enormously and a large part of this difference can be explained by the procedural structure of the judicial system. This includes the prevalence of oral versus written procedures; the existence of specialized courts (including small claims courts); the possibility for appeal during or after the trial; and the permissible number of appeals. Procedural reform is focused on the law itself and involves the rewriting of rules of procedure and promoting efficient case management in order to reduce or eliminate duplicative or otherwise inefficient rules and practices. These types of reforms contribute to the overall quality and accessibility of the judiciary.

Overall, a well-conceived delay reduction program can improve the quality of the justice

system even if it ultimately has little effect on case processing times. A World Bank Study (1999) highlighted five lessons from the United States. Foremost among these is the fact that delays cannot be legislated away. Commitment among the full range of stakeholders was essential. No program can succeed without the active participation of those directly involved in administering justice. Courts are governed by a complex set of formal rules and informal practices. Judges, lawyers, and others who work in the court system know these norms far better than any outsider and can use this information advantage to defeat reforms with which they disagree. Solid empirical analysis is also crucial. Empirical studies have again revealed that delays varied enormously across courts with almost identical structures, caseloads, and personnel levels. These studies established that delay was not an external phenomenon forced on unwilling participants but a consequence of the behavior of judges, lawyers, litigants, and other participants in the judicial system. Changing behaviour requires changing incentives, the fourth crucial element. One of the primary factors affecting incentives is information on judicial performance, which facilitates effective monitoring of judges. However, when cases take a long time, as in India, it is difficult to know who is responsible. Finally, experience in the United States found that successful programs might not result in reducing delays. Instead, by increasing the efficiency of the courts, more litigation may arise. However, as courts become more efficient and their judgments sufficiently predictable, the use of out-of-court settlements may increase relative to the number of court filings.

The World Bank (2002) has more recently identified three key themes that run through successful initiatives (essentially in Latin American countries) to improve judicial efficiency: (1) increased accountability of judges (which can also be increased through pressure from civil society and availability of hard statistics on judicial performance); (2) simplification of legal procedures (three main types of simplification or structural reform are the creation of specialized courts like the specialized tribunals in India, ADR mechanisms like the *Lok Adalats* in India, and the simplification of legal procedures, which cumulatively can lead to more efficient outcomes); and (3) increased resources (that enable computerization, for example). However, in most cases, increased resources for the judiciary enhance efficiency only if they complement more fundamental reforms, such as eliminating all easily identifiable redundancies and inefficiencies in the judicial system.

Some characteristics of judicial systems are more likely to be associated with superior judicial performance, like the existence of oral procedures and continuous court cases. Where most procedures are in written form rather than oral, access is limited. A move toward oral procedures has produced positive results in Italy, Paraguay, and Uruguay. Written procedures predominate in many industrial countries like Norway and Japan. Nevertheless, evidence suggests that complex procedures are especially problematic in poorer countries, where they may facilitate corruption or be unsuitable given the existing levels of administrative capacity.

Access to the judicial system, particularly among the poorer members of society, can be limited by factors such as procedural complexity, whether or not legal representation is required, and high financial costs. Again, generating accurate statistics reduces delays since judges care about

their reputations. Such an effect has been reported in Colombia and Guatemala.

Implementing judicial databases that make cases easy to track and hard to manipulate or misplace can enhance accountability and thus the speed of adjudication. Individual calendars make explicit the link between a judge's case management record and his or her reputation. The provision of such statistics, even without any enforcement mechanism, has been found to reduce delays. Statistics are most effective when information on clearance rates is individualized and when they are available to the media. Finally, partially delegating the mechanics of procedural reform to the judicial branch can accelerate the process of reform. Where procedures are transparent, allowing some degree of innovation and experimentation by judges can help increase judicial efficiency. Evidence also shows that in the case of judicial systems that rely excessively on written procedures, a shift toward oral hearings tends to make trials simpler, faster, and cheaper, without an appreciable loss in fairness, since the judge has direct contact with the evidence.

The legal systems in most developing countries, including countries in South Asia, follow complex written legal procedures, have fragmented hearings and trials, suffer from resource constraints, and have almost no databases. These countries are therefore in dire need of judicial reform.

Court congestion, legal costs, and delays are the problems most often cited by the publics in most countries, and are thus often perceived as the most pressing (Buscaglia & Dakolias, 1996; Brookings Institution, 1990). India is not an exception. More than 20 million cases are pending in the District and Subordinate Courts alone and another 3.2 million are pending in the High Courts. The popular press and court administrators repeatedly describe the condition of the Indian judiciary as "beyond redemption," "distressing," or "a huge problem." Therefore, the need for and utility of judicial reform is unquestionable.

Yet such reform initiatives have been absent in India. The only efforts thus far have been in the area of computerization of the court system, including records and the posting of daily listings on the Internet. In this respect only two states in India — Karnataka and Delhi — have achieved certain degrees of success, but overall the implementation of an information technology system along the lines mentioned above has been absent. The fiercely independent judiciary has resisted reform initiatives in the past. This paper has tried to provide a framework for the issues that would be involved and are somewhat specific to the Indian context. They are not an exhaustive list but have highlighted the principal issues. These include court strength, planning procedures, court productivity (and ways of improving it through judicial education), court administrative governance, ADR mechanisms and case flow management, and case management systems with a variety of efficiency-enhancing functions.

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- ¹ Thomas Carothers defines "Rule of Law" as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding. See Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFFAIRS, 95 (1998).
- ² For a detailed discussion on the issue see Ronald J. Daniels and Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 36 (2004) at www.wdi.bus.umich.edu/global_conf/papers/revised/Trebilcock_Michael.pdf
- ³ Richard Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14(1) The World Bank Research Observer, 117–36 (1999).
- ⁴ Arun Jatley, the previous Union Law Minister commented that "[i]f there is one sector which has kept away from the reforms process it is the administration of Justice", *R. N. Malhotra Memorial Lecture on "India's Judicial Reforms*," *India International Centre*, New Delhi, February 14, 2001.
- ⁵ The number of judges per 100,000 inhabitants ranged from 0.13 in Canada to 23.21 in the Slovak Republic, not showing significant correlation with GDP per capita. It should be noted, however, that for some of the countries the statistics covered only the federal court system.
- ⁶ The *actual* number of judges is even lower since the calculation is based on the sanctioned judge strength, not accounting for vacancies.
- ⁷ There are five main methods of appointing judges: 1) election, as used in some parts of the United States, 2) political, as used in Australia, 3) fettered political as used in Canada, 4) judicial as used in some civil jurisdictions in Europe and South America and in India, and 5) selection bodies making recommendations to the political appointment authority. These latter selection bodies, often called judicial service commissions, have come in the past half-century into common use in many jurisdictions. They vary in their composition, manner of member selection, powers and functions.
- ⁸ For a detailed discussion, see Barry Walsh, *Pursuing Best Practice Levels of Judicial Productivity An International Perspective on Case Backlog and Delay Reduction in India* in Arnab Kumar Hazra and Bibek Debroy (ed.) Judicial Reforms in India: Issues and Aspects, Academic Foundation, New Delhi (forthcoming).
- ⁹ The proportion of instituted cases that went to trial in the trial courts in the Canadian province of Ontario was consistently below 10% in the period 1978 to 2000. This, of course, is a practical settlement rate of 90%. Source: *Ontario Courts Annual Report 2002–2003*.
- 10 See Barry Walsh op. cit.
- ¹¹ *Ibid*.
- 12 Average attendance rates can be less than 1 because many cases are disposed before being listed before a judge.
- ¹³ This convention probably stems from the jury system, which demands that evidence be presented to jurors as quickly as possible.
- 14 See Barry Walsh op. cit.

NEW APPROACHES TO TRANSITIONAL JUSTICE IN EAST TIMOR

Erica Harper

INTRODUCTION

t is the United Nations' experience that long-run peace and stability is contingent upon the development of legitimate structures through which populations recovering from conflict can fairly resolve disputes.¹ Equally important is the need to assist societies in obtaining solutions for past grievances, to ensure justice and accountability, and to promote reconciliation. The importance of this link has been demonstrated by the growth of and importance attached to 'transitional justice' in United Nations (UN) peacekeeping missions.² As defined by the Secretary General, transitional justice 'comprises the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses' and may include '... individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination thereof.'3 This article concerns the development and application of a transitional justice strategy by the UN Transitional Administration in East Timor between 1999 and 2002.

BACKGROUND

n 25 October 1999, in response to widespread violence, destruction and civilian displacement, the UNSC passed Resolution 1272 (1999), creating the United Nations Transitional Administration in East Timor (UNTAET).⁴ Endowed with the authority 'to exercise all legislative and executive authority, including the administration of justice'⁵, UNTAET was mandated to restore governance, create an effective administration, develop civil and social services, and undertake capacity building initiatives for future self-government.⁶

One of UNTAET's most challenging tasks was to reconstruct a collapsed and dysfunctional judicial system. UNTAET had to decide what law was applicable as well as the method by which laws were to be amended. The court system had to be reconstructed, necessitating the appointment of international judges, prosecutors, and public defenders. Ways to resolve complex and protracted disputes over land and property needed to be devised. Finally, a national police force had to be created and trained to take over from international civilian police, as did a correctional and rehabilitation system that conformed to international standards.

East Timor's progression to independent statehood also required that the international crimes perpetrated against civilians during the 1999 violence and the Indonesian occupation be recognised and, if possible, resolved. According to the International Commission of Inquiry on East Timor, these crimes included human rights violations and breaches of international law, in the form of systematic and widespread intimidation, humiliation and terror, planned and coordinated destruction of property, sexual abuse and rape of women, and violence resulting in injuries and deaths in large numbers.⁷ Many East Timorese argued that a judicial mechanism capable of bringing those responsible to justice was the only solution. How these crimes would be dealt with, however, was not a matter simply for the transitional administration. The UN (as both a victim of the violence and a protector of human rights), Indonesia (whose citizens were deemed responsible for the majority of the crime), and the international community, all had an interest in how the issues would be resolved.

Balancing these interests led to the establishment of three judicial and quasi-judicial mechanisms: an Ad Hoc Human Rights Court in Indonesia, Special Panels within the Dili district court, and a Commission for Reception, Truth and Reconciliation. Each of these forums were devised, constructed and operated by different entities in relative independence of each other. This article begins with a description of each of these forums and the legal-political environment that influenced their development. It then goes on to discuss the operation of these models during the transitional period; specifically, what was accomplished and what impediments were encountered.

THE INSTITUTIONAL STRUCTURE OF THE TRI-FORUM MODEL

The Indonesian Human Rights Court

The Ad Hoc Human Rights Court in Indonesia was created to balance the need to bring the perpetrators of the East Timor violence to justice with other geopolitical imperatives.

In the wake of the 1999 violence there were growing demands by the East Timorese population, international agencies, and from within the United Nations itself, for an international tribunal similar to the ICTR [International Criminal Tribunal for Rwanda] or ICTY [International Criminal Tribunal for the former Yugoslavia]. On 31 January 2000, the International Commission of Inquiry on East Timor recommended to the UN Secretary General that a tribunal be formed with jurisdiction over human rights and international humanitarian law violations committed in the territory from January 1999.⁸

Indonesia fiercely opposed such a move, arguing that it should be permitted to deal with the perpetrators of international crimes within its geographical jurisdiction internally. President Wahid officially requested a domestic rather than an international solution, and the Indonesian government gave assurances that those responsible would be dealt with quickly and without regard to rank or status.⁹

With insufficient political will within both the Security Council and the Office of the Secretary General to ignore the request of a powerful member state, the idea of an international tribunal was rejected in lieu of Indonesia's undertaking to bring those responsible to justice. This undertaking was realised with the creation of the Ad Hoc Human Rights Court in April 2001.

The Serious Crimes Model

With Indonesia committing only to process suspects within its geographical jurisdiction, it soon became clear that a supplementary model would need to be established to prosecute the perpetrators of serious crimes located within East Timor. As the de facto government, responsibility for this task lay with UNTAET.

The first constituent of the Serious Crimes Model was the Special Panels for Serious Crimes. This model was based upon two previously untried systems of international justice designed for domestic utilisation. First, the tribunal developed by the Cambodian government and the UN for the prosecution of crimes committed by the Khmer Rouge. Second, the War Crimes and Ethnic Crimes Court model devised, but subsequently abandoned, by the United Nations Interim Administration in Kosovo.¹¹

This model came to fruition with the promulgation of UNTAET Regulation 2000/15 On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences (2000). This regulation provided for special panels of judges within the Dili district court with exclusive jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offences and torture. With respect to genocide, war crimes, crimes against humanity and torture, the panels were granted 'universal' jurisdiction. This meant jurisdiction regardless of where the crime took place, the nationality of the victim or the nationality of the perpetrator. With respect to murder and sexual offences, however, the panels had jurisdiction only insofar as the offence was committed between 1 January 1999 and 25 October 1999. The Special Panels for Serious Crimes (Special Panels) heard its first case in June 2000 and delivered its first verdict on 25 January 2001.

The second constituent of the Serious Crimes Model was a specialist prosecutorial and investigative body named the Serious Crimes Investigation Unit (SCIU). The SCIU comprised prosecutors, the majority of whom had experience in the prosecution of international human rights-related crimes, together with a team of Civpol investigators.

In contrast to the domestic courts, UNTAET chose to staff the SCIU and the Special Panels with a mixture of national and international professionals weighted heavily towards the latter.

This decision suggests that at this nascent stage UNTAET felt that the value of using experienced and impartial international judges outweighed the importance of local participation and human capacity building.

The Commission for Reception, Truth and Reconciliation

Within months of establishing the Serious Crimes Investigation Unit, the extent of the criminality that occurred during the Indonesian occupation began to be revealed. It soon became obvious that the Special Panels, with their limited resources, would not be able to process all cases of serious crime. To complicate matters, the population was becoming increasingly impatient for justice and reconciliation and there was pressure on UNTAET to repatriate those East Timorese still in West Timor.

This situation prompted contemplation of a further forum to supplement the operations of the Special Panels. In August 2000 the National Council of Timorese Resistance endorsed a proposal to establish a truth and reconciliation commission. In response UNTAET mandated the formation of a steering committee to examine the viability and utility of such an initiative. The result was UNTAET Regulation 2001/10 On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (2001), promulgated on 13 July 2001.

The Commission for Reception, Truth and Reconciliation (CRTR) was designed as an essentially East Timorese controlled and operated project. Among its functions, the Commission was mandated to facilitate community based reconciliation procedures in order to assist in the recep-

tion and reintegration of the perpetrators of less serious criminal and non-criminal acts committed between 25 April 1974 and 25 October 1999.¹⁷ Participation in such reconciliation procedures was voluntary, the perpetrator being required to submit a statement detailing, *inter alia*, the acts committed, an admission of responsibility, and a request to reconcile with a specified community.¹⁸

If the acts referred to in the statement were deemed to be within the jurisdiction of the CRTR,¹⁹ a regional commissioner would convene a panel and a public hearing would be conducted.²⁰ After considering testimony from the alleged perpetrator, victims, and other members of the community, the panel would decide on an appropriate act of reconciliation such as community service or a public apology.²¹ If the deponent agreed to undertake this act a reconciliation agreement would be drawn up and registered by the relevant district court as a court order.²² Perpetrators that fulfilled the conditions of the reconciliation agreement were immune from future prosecution with respect to the acts resolved by the panel, while those who failed to comply faced a fine of US\$3,000 and/or one year of imprisonment.²³

THE OPERATION OF THE TRI-FORUM MODEL DURING THE TRANSITIONAL PERIOD

The Indonesian Human Rights Court

Despite Indonesia's undertaking to establish a domestic mechanism through which to prosecute the perpetrators of serious crimes within its own jurisdiction, the first trial in the Human Rights Court did not commence until 19 March 2002 and no verdicts were handed down during the transitional period.²⁴

Indonesia withdrew from East Timor on 6 November 2000. It was more than one year after this that Law 26/2000 (6 November 2000) was adopted by the Indonesian Parliament. This law permitted the establishment, on Parliament's request, of Ad Hoc Human Rights Courts empowered to try (retrospectively if necessary) cases involving gross violations of human rights. Six months later on 23 April 2001, President Wahid issued Presidential Decree 53/2001 accepting the Parliament's recommendation to establish a court with specific reference to East Timor. President Wahid, however, limited the court's jurisdiction to events that took place after the popular consultation on 30 August 1999.²⁵ On 1 August 2001 President Megawati, responding to wide international criticism, issued Presidential Decree 96/2001. This decree amended Presidential Decree 2001/23, extending the temporal jurisdiction of the court to events that occurred between April and September 1999, but restricting it to crimes perpetrated within the districts of Covalima, Liquicia and Dili. This amendment prevented the trial of 'several egregious crimes committed in 1999'. It also restricted the prosecution's capacity to examine the degree to which the violence was systematic and the role of the Indonesian military. Following these amendments it was another eight months

before the first trial commenced.

During the transitional period Indonesia did little to fulfil its undertaking to prosecute the perpetrators of serious crimes, doing just enough to placate the international community and avert further demands for an international tribunal. As a result, the accomplishments of this judicial forum were negligible. Suspects in Indonesia remained free and unaccountable, and the court's limited jurisdiction provided little hope that the most culpable perpetrators would be brought to justice in the future.

The Serious Crimes Model

The establishment of Serious Crimes Investigation Unit and the Special Panels for Serious Crimes was a significant accomplishment for UNTAET. During the transitional period the SCIU issued thirty-nine indictments (fourteen of which involved crimes against humanity)²⁷ and the Special Panels conducted pre-trial proceedings in thirty-one cases and completed trials in seventeen cases (one of which involved crimes against humanity).²⁸

However while much was achieved, institutional, legal and political impediments directly impacted upon the capacity of the Special Panels and the SCIU to fulfil their mandates.

Resource and Personnel Constraints

The SCIU was not provided with sufficient human resources (investigators, prosecutors, forensic experts, interpreters²⁹ and support staff)³⁰, or adequate material resources (such as office equipment, vehicles and the specialised forensic equipment necessary to conduct thorough investigations).³¹

Adding to this, SCIU management came under internal and external criticism, with allegations of incompetence, mismanagement and highly publicised resignations resulting in low morale and high staff turnover.³² Staff argued that from its inception the SCIU lacked a clear, well-defined or consistent prosecutorial policy, as well as a coherent framework governing how the SCIU operation fitted into the UNTAET mission as a whole.³³ Management also failed to develop a strategy with respect to the jurisdictional relationship between the Special Panels and the Human Rights Court in Indonesia.³⁴

Evidentiary Constraints

Investigators and prosecutors were often unable to gather sufficient evidence to warrant issuing an indictment. Much physical evidence could not be located or had been destroyed, either

purposefully or due to lengthy exposure in tropical conditions.³⁵

Prosecutors also had difficulty obtaining sufficient eyewitness evidence. This was primarily due to the nature of the crimes perpetrated. Many of those present at the massacres only survived because they did not see the perpetrators. Those that did witness the violence or possessed other evidence were killed. As a result most survivors could provide only limited information.³⁶

Of those that did survive many were reluctant to provide evidence. Scantly acknowledged post-traumatic stress disorders, a legitimate fear of reprisal, and the population's general mistrust of the judicial system and international workers were all contributing factors.

Finally while many militia, members of the Indonesian armed forces, police and civilian administration staff would have been able to provide evidence, most had fled to Indonesia. SCIU's efforts to interview or compel testimony from such persons were largely frustrated by lack of cooperation by either the witnesses themselves or the Indonesian government.³⁷

Political Constraints

A further impediment to the investigation and prosecution of serious crimes cases was UN-TAET's well-publicised trade-offs aimed at securing the repatriation of refugees from Indonesia. UNTAET, through its Chief of Staff, other high ranking officers within the executive, and members of the East Timorese political elite, were widely regarded as having made 'deals' with various militia leaders. Such leaders, some of whom were suspected of committing serious crimes, were thought to be preventing the repatriation of thousands of East Timorese refugees from Indonesia.38 These deals allegedly led to informal arrangements being made between the Chief of Staff and the Prosecutor General who delayed or otherwise prevented the issuance of arrest warrants and indictments against key militia leaders. When such deals became public they attracted much criticism, particularly from prosecutors who stated that the Chief of Staff's political agenda was undermining efforts to bring the perpetrators of serious crimes to justice.³⁹

While negotiations with militia leaders did take place at the expense of justice, it is important to note that facilitating repatriation was regarded by many as an equally important objective. Most obviously, for East Timor to have so many of its citizens held against their will by pro-integration militias was all too reminiscent of the pro-autonomy-pro-independence situation.⁴⁰ Until resolved, this would be an impediment to the formation of a politically and socially stable East Timor. Further the refugee situation, due to its political nature and potential to result in cross-border instability, could have jeopardised East Timor's already tenuous relationship with Indonesia.⁴¹ Finally, promoting the return of refugees through reconciliation with militia leaders was the path advocated by many of the East Timorese political elite, particularly future President Xanana Gusmão.42

Extradition Constraints

Neither law nor policy precluded the Special Panels from hearing cases involving persons residing outside East Timor or not of East Timorese nationality. At the beginning of the transitional period it even appeared that Indonesia supported bi-lateral prosecutions. A Memorandum of Understanding (MOU) between UNTAET and Indonesia was signed on 6 April 2000 that agreed to the 'widest possible measure of mutual assistance in investigations or court proceedings'. However, soon after the first indictments were issued against persons within Indonesia's jurisdiction, it became obvious that Indonesia was not going to cooperate. Unable to legally enforce the MOU or otherwise secure extradition, those indicted, including many persons charged with command responsibility, remained free in Indonesia for the entire transitional period. Health of the security of the entire transitional period.

It must be noted that UNTAET did have the political power to negotiate with the Indonesian government regarding extradition. It did not do so however for three important reasons. First, the international community, through the United Nations, had agreed to give Indonesia primary responsibility for bringing the perpetrators of serious crimes within their jurisdiction to justice. As part of the UN system, UNTAET was politically obliged to respect this decision. Thus to the extent that Indonesia denied extradition requests on the grounds that they were in the process of investigating the same criminals, the transitional authority had little scope to exert political pressure.

Second, the UN may not have wanted to be seen by Indonesia as attempting to weaken its hegemonic position in the area by placing it under pressure over matters of extradition. Indonesia was important for ongoing regional stability and aggressive political manoeuvring may have risked confrontation, perhaps jeopardising important geopolitical relationships.⁴⁵

Third, UNTAET was under pressure to observe the importance of the relationship between Indonesia and the soon-to-be independent East Timor. To East Timor, Indonesia represented a geographically close military power with the potential to instigate a new round of instability. If UNTAET had used its political power to facilitate extradition, this already fragile relationship may have been further jeopardised. It is important not to overlook the essential role of the East Timorese political elite, specifically Xanana Gusmão, in this process. Gusmão — who even before being elected President wielded significant political power — consistently and publicly favoured national reconciliation over trials as the primary means of dealing with the crimes committed against the East Timorese population.⁴⁶ This position, which was in no small part related to the importance he attached to East Timor's relationship with its former occupier, undoubtedly influenced UNTAET's strategy towards Indonesia.⁴⁷

Conclusion

The above impediments determined the essential elements of the SCIU's prosecution policy and the manner in which this policy was implemented.

First, the insufficient human and material resources made available to the SCIU vis-à-vis the massive number of crimes committed during the 1999 violence led to a decision that the SCIU would focus its energies on ten priority cases. These cases were seen as most typical of the political criminality that occurred in East Timor in 1999 and covered most of the thirteen districts. While this policy did not preclude other cases from being investigated and prosecuted, the reality was that given the SCIU's limited resources and the political embargo on certain investigations, the majority of reported serious crimes outside the priority cases could neither be investigated nor prosecuted. 49

Second, insufficient resources and quality personnel, evidentiary impediments and the absence of a clear prosecutorial strategy resulted in initial investigations being undertaken as if the criminality was a series of individual incidents as opposed to a coordinated and strategic campaign of violence and destruction.⁵⁰ As a consequence, most cases heard during the Special Panels' first year were prosecuted as murder or sexual offences under the Indonesian Penal Code as opposed to international crimes.⁵¹ This prevented the nature and extent of the criminality from being exposed, creating an inaccurate historical record and diminishing the significance of the events that took place.⁵² It must be noted, however, that as time progressed and the resource situation improved, the prosecutorial strategy was amended to reflect the true nature of the crimes, and more indictments were issued citing charges of command responsibility, crimes against humanity and other international crimes.⁵³

Third, being unable to secure the extradition of suspects from Indonesia, the cases that were taken to trial almost exclusively involved low ranking, East Timorese militia. Those suspected of planning and facilitating the larger pattern of violence remained free and unaccountable in Indonesia.

Finally, insufficient numbers of strategically located staff, inadequate skills and resources, political bottlenecks and the difficulty of gathering evidence meant that the investigations and prosecutions that did take place were slow and subject to frequent delays.

The Commission for Reception, Truth and Reconciliation

Planning for the Commission for Reception, Truth and Reconciliation began more than one year before UNTAET Regulation 2001/10 was promulgated on 13 July 2001. In August 2000, the CRTR's interim office was established and the CRTR steering committee undertook its first tasks — comprehensive community consultations in all of East Timor's thirteen districts, and discussions with national non-government organisations, religious institutions and political leaders.⁵⁴

By 20 September 2001 a panel mandated to select the CRTR's national commissioners had been convened and had held its first meeting. This panel conducted further community consultations in the districts and in West Timor to collect nominations for the national and regional commissioners. Of the 300 nominations received, the panel recommended seven persons to the SRSG for appointment. The seven national commissioners were sworn in on 21 January 2002, marking the CRTR's official inauguration.⁵⁵

In terms of necessary preparation for the CRTR, much was accomplished. The disparity between what the Special Panels could achieve and what the population expected had been identified, a mechanism to fill this gap was developed, the regulation setting up the CRTR was promulgated, and national commissioners took up their positions. It must be noted, however, that no community reconciliation procedures took place during the 32-month transitional period and awareness of the CRTR in the rural populations studied remained low.⁵⁶

CONCLUSION

s stated in the Report of the Secretary General on The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (23 August 2004), the lessons of past transitional justice efforts should serve as a guide as the UN seeks to improve future interventions.⁵⁷ The East Timor experience is no exception. UNTAET's construction and administration of a transitional justice model has particularly important implications for international post-conflict management theory, for although the serious crimes project was founded on pre-existing models, the use of a domestic mechanism for trying international crimes had not been tested.

First, the right to state sovereignty and the principle of complementarity provide important protections under international law. The operation of Indonesia's Ad Hoc Human Rights Court demonstrates, however, that such doctrines can also be used to shelter individuals and states from responsibility in situations involving international crimes. This 'double edged sword' is a problem rooted in the current state of international law and the geopolitical environment rather than the circumstances of an individual post-conflict situation. Such problems need to be resolved before the victims of international crime can consistently receive justice, and the population at large receives an increased level of protection against future violations.⁵⁸

A further lesson involves the high cost of delivering justice. International tribunals, such as the ICTR and ICTY are expensive and the international community has made it clear that these are not long-term solutions. Domestic mechanisms for trying international crimes — like that seen in East Timor and now in Cambodia and Sierra Leone — are the most likely options for future post-conflict administrations. However, even where domestic mechanisms are utilised, justice will be expensive. Key examples include the price of forensic equipment and the high salaries demanded by legal professionals with the experience and qualifications necessary to try international crimes cases.⁵⁹ The fact that the serious crimes model was chronically under-funded was highlighted during the Security Council's mission to East Timor in 2000.⁶⁰ UNTAET reacted quickly and by 2001 the resource situation improved and changes in management had been effected. This experience has led to better understanding on the part of the UN's Department of

Peacekeeping Operations and the international community regarding the amount and type of resources required for exercises in transitional justice to produce results, as reflected in recent missions with rule of law mandates such as Liberia and Sierra Leone.

A related issue is that when designing models for processing international crime, decision-makers must take into account local institutional capacity. During Indonesia's occupation of East Timor between 1974 and 1999, only a handful of East Timorese were permitted to practice law. As a result, there were very few qualified and experienced legal professionals available for judicial appointment. In terms of experience, less than 10% of legal professionals appointed by UNTAET had practised law. Of this 10%, only one had practical experience as a judge and one as a prosecutor. Most were between the ages of 30 and 35. Such inexperience had to be weighed against the benefits that would accrue from a 'Timorised' bench in terms of capacity building and the symbolic importance of having East Timorese staff such a politically sensitive area of governance. The Serious Crimes Model's mixture of international and indigenous judges, prosecutors and defence lawyers, provides a model for overcoming such difficulties, and illustrates the potential that systems of mentoring and on-the-job training may hold for the future.

A final lesson is that when developing a prosecutorial strategy, providing justice to every victim is often impossible, and that a population's right to justice will often have to be balanced with other equally important imperatives. In East Timor, such imperatives included the need to promote a positive relationship with Indonesia and to secure the repatriation of refugees. The UNTAET experience demonstrates that a mission's prosecutorial strategy will be most successful when it is clear, consistent, and driven by an appreciation of local needs and expectations. In East Timor, the population's priority was that the masterminds behind the 1999 violence be tried and jailed. For non-leaders who committed relatively minor crimes, however, non-judicial methods could be used to facilitate reintegration and reconciliation. Understanding this, UNTAET and local authorities jointly devised the CRTR — a mechanism that responded to the population's unique conception of justice, promoted repatriation, and facilitated the physical rehabilitation of communities. The CRTR thus provides an example of how non-judicial mechanisms can be used as effective complements to trials in post-conflict situations, and highlights the importance of local knowledge and ownership over transitional justice strategies.

- ¹ UNSC, 'Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (2004) UN Doc S/2004/616 [2–3], E. Harper, *Delivering Justice in the Wake of Mass Violence: New Approaches to Transitional Justice*, 10 (2) J of Conflict and Security L 1, 1, (2005).
- ² J.C. Beauvais, Benevolent Despotism: A Critique of UN State-Building in East Timor 33 New York U J of Intl Law and Politics, 1101, 1148–1150 (2001).
- ³ UNSC, supra note 1 at [8].
- ⁴ UN Doc S/RES/1264. See generally, Conflict, Security, and Development Group (King's College London) Review of Peace Operations: A Case for Change East Timor (Report) (28 February 2003) 10–17; 23–24. See generally, International Crisis Group, Indonesia: Impunity Versus Accountability for Gross Human Rights Violations (Asia Report No 12) (2 February 2001); J. Dunn, Crimes Against Humanity in East Timor, January to October 1999: Their Nature and Causes, (unpublished paper 14 February 2001), UNGA, Question of East Timor, UN GAOR 54th Session UN Doc A/54/726, S/2000/59.
- ⁵ UNSC Res 1272 (25 October 1999) UN Doc S/RES/1272 [1].
- ⁶ *Id.* at [2] [3].
- ⁷ UNGA 'Identical letters dated 31 January 2000 from the secretary-General addressed to the president of the General Assembly, the president of the Security Council and the Chairperson of the Commission on Human Rights' UN GAOR 54th Session UN Doc A/54/726, S/2000/59 31 January 2000 [120-133].
- ⁸ UNGA, Question of East Timor, UN GAOR 54th Session UN Doc A/54/726, S/2000/59 [153-156].
- ⁹ W.W. Burke-White, A Community of Courts: Toward a System of International Criminal Law Enforcement, 24 Michigan J of Intl. L 1, 44 (2002).
- ¹⁰ *Id.* at 45–46. Further disincentives were the high cost of an international tribunal and the need for local justice and capacity building.
- ¹¹ S. Linton, *Cambodia, East Timor, and Sierra Leone: Experiments in International Justice,* 12 CRIMINAL L FORUM 185, 188–189, 203, (2001).
- 12 UNTAET reg 2000/15 (2000) s 1.
- ¹³ UNTAET reg 2000/15 (2000) s 2. A second Special Panel began operating in October 2001.
- ¹⁴ S. De Bertodano, East Timor: Trials and Tribulations, in CPR ROMANO, A. NOLLKAEMAPER AND J.K. KLEFFNER (EDS.) INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA (Oxford U Press 2004) 85; see also S. Chesterman, M. Ignatieff and R. Thakur, Making States Work From State Failure to State Building (IPA and United Nations University, July 2004) 15.
- ¹⁵ CRTR 'Summary of the Regulation' (2001).
- ¹⁶ CRTR 'Funding Proposal' (September 2001) 10.
- ¹⁷ UNTAET reg 2001/10 (2001) s 3, s 22.1.
- ¹⁸ *Id.* at ss 22–23.
- 19 Id. at Schedule 1.
- ²⁰ Id. at ss 24, 26.1.
- ²¹ *Id.* at s 27.
- ²² Id. at ss 27-28.
- ²³ Id. at ss 30, 32.
- ²⁴ The first verdicts were handed down in August 2002.
- ²⁵ International Crisis Group, *supra* note, 4 at 14–15; Amnesty International *East Timor: Justice Past, Present and Future* (Report) (July 2001) AI-Index ASA 57/001/2001; 54.
- ²⁶ UNSC 'Report of the Secretary General on the United Nations Transitional Administration in East Timor' UN Doc S/2001/983, [31].
- ²⁷ Three of these cases were discontinued.
- ²⁸ Judicial System Monitoring Programme, *Special Panels for Serious Crimes: Case Information*, available at http://www.jsmp.minihub.org/Trialsnew.htm (30 April 2003).
- ²⁹ De Bertodano, *supra* note 14 at 88. Difficulties stemming from inadequate numbers of trained interpreters were exacerbated by the fact that there was no common language in which proceedings could take place. The four official

languages of the Special Panels are Indonesian, Tetun, Portuguese and English. Because most defendants speak either Indonesian or Tetun, and most prosecutors and judges speak either Portuguese or English, evidence is often translated 'in relay across three or more languages.' Such difficulties, according to De Bertodano, cast doubt on whether defendants are receiving fair trials.

- ³⁰ Amnesty International, *supra* note 25 at 51–52.
- 31 UNSC 'Report of the Secretary General on the United Nations Transitional Administration in East Timor' UN Doc S/2002/80 [8]; S. Linton, New Approaches to International Justice in Cambodia and East Timor (2002) 84, REVUE Internationale de la Croix-Rouge 93, 109–111.
- ³² Linton, *supra* note 31 at 110–11.
- ³³ Conflict, Security, and Development Group, *supra* note 4 at 94, 99.
- ³⁴ Interview with Alias INT-UNTAET (Dili, East Timor 24 July 2003).
- 35 Interview with Alias INT-INVSCIU (Covalima, East Timor 10 May 2003). The international Commission of Inquiry on East Timor (2000) concluded that there had been 'a systematic attempt to destroy evidence, including the removal of bodies...' UNGA, supra note 4 at [134].
- ³⁶ Interview with Alias INT-INVSCIU (Dili, East Timor 27 July 2003).
- ³⁷ S. Frigaard (Head of Serious Crimes Investigation Unit and Deputy Prosecutor General), *Symposium in Justice for* International Crimes Committed in the Territory of East Timor, The University of Melbourne, 16 January 2003.
- ³⁸ Conflict, Security and Development Group, *supra* note 4 at 97–99; Linton, supra note 31 at 112.
- ³⁹ Conflict, Security and Development Group, *supra* note 4 at 99.
- ⁴⁰ See also X. Gusmão, Reconciliation The Challenge for All, (paper presented at the Stockholm International Forum, Conference on Truth, Justice and Reconciliation 23 April 2002).
- ⁴¹ J. Teme (Representative of the East Timor Ministry of Foreign Affairs), Symposium in Justice for International Crimes Committed in the Territory of East Timor, The University of Melbourne, 16 January 2003.
- 42 Gusmão, supra note 40.
- ⁴³ Memorandum of Understanding Between the Republic of Indonesia and the United Nations Transitional Administration in East Timor Regarding Cooperation in Legal, Judicial and Human Rights Related Matters, available at <www.jsmp.minihib.org/Reports/MOU.htm> (14 March 2003).
- ⁴⁴ Frigaard, supra note 37; Amnesty International, supra note 25 at 53–54; International Crisis Group, supra note 4 at 27.
- ⁴⁵ See, e.g., UNTAET and Serious Crimes, (2001) 2 La'o Hamutuk Bulletin 6, 8.
- 46 See generally, Gusmão's Views on Justice, available at <www.easttimor-reconciliation.org/Gusmao Justice-E.htm>.
- ⁴⁷ De Bertodano, *supra* note 14 at 84–85. At times, Gusmão's strong views have brought him into direct conflict with the SCIU and, as a result, UNTAET. For example, in February 2003 the SCIU issued an indictment against seven high ranking Indonesian officers (including General Wiranto, former Minister of Defence and Commander of the armed forces) and Abilio Soares — the former Governor of East Timor. Gusmão immediately went on public record stating that he had not been consulted prior to the issuing of the indictment, and that he did not consider it within the nation's interest 'to hold a legal process such as this one in East Timor'. The SRSG responded by issuing a press statement confirming that the indictments were issued under the legal authority of the East Timorese Prosecutor General. These events indicate that neither the UN nor the East Timorese were willing to take lead responsibility in cases involving high-ranking Indonesian officers which had the potential to 'rock the political boat.'
- ⁴⁸ Interview with Alias INT-NGO (Dili, East Timor 21 May 2003).
- ⁴⁹ Interview with Alias INT-INVSCIU (Covalima, East Timor 10 May 2003).
- ⁵⁰ Conflict, Security, and Development Group, supra note 4 at 93.
- ⁵¹ Interview with Alias INT-NGO (Dili, East Timor 2 May 2003).
- ⁵² S. Linton, Cambodia, East Timor and Sierra Leone: Experiments in International Justice, (2001) 12 CRIMINAL L FORUM
- ⁵³ N. Belo and C. Ranheim, Judicial System Monitoring Programme, *Prosecuting Serious Crimes in East Timor*, (2001) 6-7.
- ⁵⁴ CRTR, supra note 16 at 6.

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- ⁵⁵ Comissao de Acolhimento, Verdadee Reconcilicao de Timor Leste, *The Search for Commissioners Begins Today* Press Release (2 October 2001); interview with Alias INT-NGO (Dili, East Timor 25 June 2003).
- ⁵⁶ There are several explanations for the time it took the CRTR to become operational. Primary factors were the communication difficulties and cultural differences that existed between the international and indigenous staff of the Steering Committee. Other factors included contrasting perceptions as to law, solutions, and timeframes, frequent staff turnover, lack of infrastructure, the inexperience of East Timorese staff, and UN bottlenecks.
- ⁵⁷ UNSC, supra note 1 at 16.
- ⁵⁸ E. Harper, *supra* note 1 at 32.
- ⁵⁹ *Id.* at 32-3.
- 60 UNSC, Report of the Security Council Mission to East Timor and Indonesia, UN Doc S/2000/1105 [8].
- ⁶¹ H. Strohmeyer, Collapse and Reconstruction of a Judicial System: The United Nations Missions in Kosovo and East Timor, (2001) 95 AJIL 46, 53–54.
- 62 UNTAET Human Rights Unit (Report) (20 June 2001), 3.
- 63 Strohmeyer, supra note 61 at 54–55; Conflict, Security, and Development Group, supra note 4 at 80.

DOMESTIC IMPLEMENTATION OF INTERNATIONAL LEGAL NORMS



GENDER AND ECONOMIC SOCIAL AND CULTURAL RIGHTS (ESCR): INSTITUTIONS PROMOTING NON-DISCRIMINATION IN EDUCATION IN ARGENTINA AND PAKISTAN¹

Marjan Radjavi

INTRODUCTION

his paper explores the dynamics and experience of state legal reform efforts designed to implement obligations under the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW" or the "Convention") using Argentina and Pakistan as two case studies. To answer the question of whether or not a given state has begun to implement its CEDAW obligations, this article will address institution-building and institutional change, with a cursory look at whether the definition of *de facto* equality and discrimination has been adopted in the national constitution or other relevant laws. This survey is a first step in a multi-year project that aims to examine domestic reform initiatives in relation to standards set out in international treaties regarding non-discrimination against women. At this point, the particular focus of this study is on reforms that have led to the establishment or modification of institutions that either enhance women's rights in education or facilitate the realization of enhanced rights concerning non-discriminatory education.

True gender equality means that women can enjoy all the fundamental rights provided for in national and international law on the same basis as men. An enabling environment to achieve gender equality and empowerment comprises a set of connected and interdependent conditions such as policies, laws, institutional mechanisms, and

resources, which facilitate the promotion of gender equality and empowerment. Vague laws, government inaction, concessions to power, culture, religion or economic restrictions can all perpetuate discrimination. Likewise, high degrees of illiteracy also undermine efforts to reduce discrimination. High rates of female illiteracy can be primarily attributed to government inaction², and to cultural limitations that have affected women more than men³. Fortunately, statistical research suggests that states that are signatories to international agreements, such as the Convention on All Forms of Discrimination Against Women (CEDAW)⁴, are more likely than others to ensure women's human rights such as access to literacy and health services. Considering these facts, it is clear that while law alone cannot ensure enhanced women's rights, lasting improvements in the protection of such rights will likely occur through law. A positive international legal framework for women's rights can do much to assist women's claims for equality, equity, and empowerment⁵. While ratification of CEDAW in itself creates obligations on the participating state parties to align domestic law and practice with the Convention, it also creates opportunities for new forms of advocacy directed towards interpreting concepts of equality and implementing and monitoring local and national initiatives, policies, and programmes in accordance with international standards. State implementation of CEDAW principles, when coupled with civil society lobbying for government adherence to these principles, can together serve to establish informed and qualified constituencies among government and civil society actors.

Non-discrimination in education is an important contributor to improvements in access to and enjoyment of women's human rights. While each educational system operates within its own larger political, economic, and social context, every educational system reflects societal and institutional legacies of hierarchy and power in gender relations. Therefore, while an understanding of specific contexts and relevant customs are integral to understanding gender-oriented educational reforms, this understanding is only indispensable at the moment the custom exists. Custom is constantly in flux, always renegotiated and realigned, and sometimes reflects non-discriminatory principles, and sometimes not.

STATES AND CIVIL SOCIETY ACTORS COLLECTIVELY PROMOTE STATE ADHERENCE

EDAW is one outgrowth of a larger international movement to achieve gender equity⁶, a movement that has diffused ideas of commitment to gender equity and equality widely⁷. Ratification of international treaties can result in traceable concrete initiatives taken by governments. It is difficult however to empirically prove a causal link between ratifying international treaties and broader improvements in women's human rights. Part of the difficulty in identifying the causal mechanisms at work is due to the fact that favourable conditions of political will, institutional mechanisms, and resources may predate ratification as in the case of Argentina, or may be present but superseded by other factors after accession as in the case of Pakistan. Nev-

ertheless, these norms and the institutions which respond to their provisions, may still make a difference in the status of women in CEDAW Party countries.

Therefore, while it is difficult to monitor the direct implementation of CEDAW in each country, one can examine the challenges of instantiating its principles through the establishment and reform of institutions. In examining whether human rights standards on gender have been applied to education in ways consonant with CEDAW, this paper sketches out the institutions established and the policies and programmes developed by states, as well as civil society efforts to reform them. Civil society actors use ratification of CEDAW as a mobilizing point for conceptualizing gender equality, and to advocate for implementation of women's rights at the state level, as well as in forming NGO coalitions nationally and internationally. This binding Convention offers a shared framework for institutions that engage in research, analysis, and collaborative advocacy to empower women and influence policy in signatory states such as Argentina and Pakistan.

BASIC TERMS OF CEDAW

EDAW signatories are bound by a convention which affirms the importance of non-discrimination and equality of the sexes⁸. Adopted in 1979 and to date ratified by over 180 countries, CEDAW Articles 7 and 8 require that states ensure women's equality with men, while Article 13 demands the end of discrimination in various areas of economic and social life⁹. CEDAW came into force in 1981 as the first international agreement to address women's rights systematically and substantively. It establishes state obligations, guarantees rights to individuals and creates mechanisms to monitor state implementation. It has been used to define national and local norms, to mandate programmes and policies, and to actively challenge discrimination based on gender. On December 22, 2000 the Optional Protocol (OP-CEDAW) to CEDAW came into force after ten ratifications, adding enforcement measures, including a communications procedure that allows women to present complaints before the CEDAW Committee and an investigative procedure that permits the Committee to launch investigations.¹⁰

CEDAW defines discrimination as both policy that differentiates on the basis of sex without reason or results in treatment "impairing or nullifying the recognition, enjoyment, or exercise by women — of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field". Equality is thus measured by access to rights (formal, *de jure*), as well as the real ability to exercise these rights (substantive, *de facto*). It demands substantive equality for women, not only formal legal equality, or neutrality, but also equality of outcomes. Neither intentional discrimination nor actions that have discriminatory impacts are permitted. If, in the absence of overtly discriminatory laws, women are still not considered equal, this is recognized as a violation of the Convention. Accordingly, laws and policies, as well as practices, should not permit discrimination, and must also alleviate it. 13

CEDAW's implementation and enforcement on the national level has been impeded by a number of important factors. Reporting is central to monitoring women's rights under the Convention, but relies on state submission of accurate and timely reports. States often do not report progress in a timely fashion causing a backlog of complaints, and until the very recent 2000 OP-CEDAW, there was no formal enforcement mechanism for individual complaints. Further, CEDAW meets for two weeks a year, less than other human rights bodies.¹⁴ While some of these difficulties are alleviated by the work of the UN Commission on the Status of Women that investigates violations, 15 CEDAW is also weakened by the number of state reservations to certain articles¹⁶ although by the terms of the Convention, reservations cannot be incompatible with the object or purpose of the agreement. (Article 2 removing discriminatory laws and enacting legal prohibitions against gender discrimination and Article 16 providing for equal rights for women in marriage and family life, are currently the focus of many reservations on the basis of cultural or religious incompatibility). Moreover, even when state parties do not voice reservations to the Convention, many do not implement its provisions. Thus, it is clear that signatures and ratifications of such conventions alone cannot empower women and enforce non-discrimination. They can, however, create a tool and legitimating instrument that can be used by actors pressing for national reforms and law enforcement in favour of women's human rights.

COUNTRY PROFILES

tates are required by CEDAW to enable women to enjoy and exercise all human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other sphere on the basis of equality with men. CEDAW also requires the elimination of laws and practices that have an unintentional discriminatory impact. The means by which such legal reform is set forth in Articles 1 through 5, includes the following obligations to:

- incorporate the principle of equality and non discrimination of men and women in the legal system, abolish all discriminatory laws and practices, and adopt appropriate ones (Articles 2a, 2b, f and g);
- establish tribunals and other public institutions to ensure the effective protection of women against discrimination (Article 2c);
- ensure elimination of all acts of discrimination against women by the public sector as well as by the private sector including persons, organizations, or enterprises (Articles 2d and e);
- implement programmes, make relevant institutional arrangements, and any other laws necessary that will enable women to exercise equal rights (Article 3);

- accelerate the achievement of *de facto* rights by implementing temporary special measures such as affirmative action (Article 4); and
- eliminate cultural and traditional practices and attitudes including stereotypical roles for women and men (Article 5).

Argentina and Pakistan are at different stages in achieving gender equality and equity, and this difference may, in part, be related to when they became signatories to CEDAW. Argentina has more years of experience in international gender commitments as it became a signatory to CEDAW in 1980 (which it ratified in 1985) and included the Convention in the drafting of the 1994 Constitution. Pakistan acceded to CEDAW in 1996 with reservations. While Argentina signed the OP-CEDAW in 2000, it has yet to ratify. Neither country has ratified OP-CEDAW.

ARGENTINA—SIGNED, RATIFIED, AND IMPLEMENTED CEDAW PARTIALLY BUT LACKS CERTAIN KEY RESOURCES

rgentina became a signatory to CEDAW in 1980, which it ratified in 1985, and has already signed the OP-CEDAW. Further, the Argentine Constitution guarantees the right to education. Relevant provisions include: Chapter 1, Art 14 "All inhabitants of the Nation enjoy the following rights, (...), namely: (...) of teaching and learning" and Chapter IV, Art 75, 19 whereby the Congress has the power to "To pass laws on the organization of and basis for education (...), which guarantee the principles of free and equitable public education by the State and the autonomy and self-sufficiency of the National Universities." In Argentina, Article 75 of the 1994 Constitution gives human rights treaties such as CEDAW the force of law.

The illiteracy rate in Argentina is negligible, and there are no differences in literacy rates between the sexes. Evaluated on the basis of enrolment rates, formal school attendance is high at the primary level, with no significant differences between the sexes. ¹⁸ In higher education, the country is slowly "de-gendering" universities. While stereotypes are still reflected in women's career and lifestyle, they are closely linked to the changes in labour patterns, labour demand, and labour conditions including the distribution of family responsibilities. ¹⁹ In Argentina over the past twenty years, massive transformations have taken place including an influx of women into the labour market, a movement towards non-discriminatory access to all levels of education, and an increase in women's participation in decision-making. Corollary changes in law, family structures, and in attendant cultural values have meant a rise of economic independence for both men and women. Issues of non-discrimination in education do not focus on access but rather on segregation of careers; science and technology for men

and humanities and literature for women.²⁰ To overcome stereotypes, the government has undertaken two initiatives: one at the national level to modify textbook materials in 1984 and another at the municipal level in 1997.

In terms of civil society actors, women played an integral role in critiquing the military dictatorship prior to its demise in 1983. Although women's groups were factionalized, the focus on democratization unified women temporarily in pursuit of a common cause, while subsuming women's issues under the rubric of human rights.²¹ In Argentina, the most visible group working against the dictatorship was the Madres de la Plaza de Mayo, which was a non-partisan group held together by gender solidarity.²² Directly after 1989 under the first democratic government, NGOs expanded with encouragement from the Women's Subsecretariat that was promptly replaced by the National Women's Council (Consejo Nacional de la Mujer). This new body also furnished financing for NGO fora and additionally requested the participation of gender experts in the drafting of the national reports for regional preparatory meetings, until 1993 when the relationship between these groups and the state became tense due to state support for anti-abortion legislation.

In 1991, the creation of the National Program on the Promotion of Equal Opportunity of Women in Education (PRIOM, Programa Nacional de Promocion de la Igualdad de Oportunidades para la Mujer en el Area Education) constituted the first official response by Argentina to the commitments made following the ratification of CEDAW in 1985. The National Program was established by agreement between the National Women's Council and the Ministry of Education. The principal objective of this program was to generate an educational renaissance to develop women's capacities and interests and to incorporate them into the new and demanding international labour market on equal footing with men, in all social and political institutions. The specific objectives pursued by PRIOM included:

- the transformation of school knowledge to incorporate the contributions made by women in the demanding world of economics;
- their contribution to the evolution of the culture and society of Argentina based on history,
- the problems that arise from women's position in society;
- the generation of an educative experience that motivates understanding gender, based on appreciation of equality, solidarity and mutual respect;
- the participation of both sexes in equal responsibilities for the family environment and of raising children; and
- the integration of women in decision-making.²⁶

These objectives were addressed and implemented through innovation of curricula; improving teaching capacities; engaging in communication and cultural activities; and carrying out research, teaching, and professional orientation in the universities. Special education needs were flagged for specific groups of women, especially those in lower income groups, pregnant women and teen mothers, illiterate girls, women in rural areas, and women intending to return to the labour market. Measures were suggested to integrate all women into formal education programmes. This programme only lasted from 1991–1995, and was not renewed thus allowing cultural prejudices and customs to persist in many cases.

In 1991, Argentina passed the Quota Act (Ley de Cupo), aimed at ensuring equal access of women to elected offices. Argentina became the first country in the world to legislate that women must comprise 30 percent of all candidates on electoral lists. Achieving such level of representation is important in that it has been found that women legislators place a higher priority on women's rights issues than men.²⁷ (Unfortunately, at times this 30 percent quota has been understood as a ceiling rather than a minimum, and often women are designated as candidates due to their relations with men in power.) Still, in 1992 with the establishment of the National Women's Council the government demonstrated its intent to develop programmes to promote opportunities for women in social, political, and economic arenas. The Council, attached to the Office of the President, was set up to monitor and facilitate the implementation of guidelines adopted pursuant to the CEDAW, through assessment of policies and drafting of bills. However, the Council met with some difficulty as it was not empowered to take measures to ensure compliance with government policy. As a result of perceived government inaction, an NGO, the Social and Political Institute of Women (Instituto Social y Político de la Mujer), was founded soon after in 1993 to advocate for a gender perspective in education.

At the same time, the Federal Education Act (Ley federal de education, No 24.195) of 1993 promoted equal opportunity and the need to overcome discrimination in teaching materials. Close on the heels of international commitments to non-discrimination of women, with participation by PRIOM and the National Women's Council, this was the first Argentine law to employ non-sexist language, stating in Article 5 that the state shall reform educational policy with the aim of realizing concrete equality of opportunity for all inhabitants and refusing any kind of discrimination and surmounting discriminatory stereotypes in educational material. Article 6 of the law guarantees permanent and integral education aimed at personal fulfillment of men and women in cultural, social, aesthetic, ethical, and religious dimensions. Article 8 states that the educational system shall guarantee all inhabitants of Argentina the effective exercise of their right to learn, through equality of opportunity and the prevention of discrimination.

Also in 1993, Argentina adopted an equality plan, a framework which provided guidelines for action binding on the different departments of public administration called the Plan on Equal Opportunities for Women (Plan de igualdad de oportunidades para las mujeres, 1993–1994). The state set forth its policies to promote gender equality within government, and encouraged civil society to act in kind. In 1994, the National Women's Council drew up a second Plan, for 1995–1999,

to continue this work. In order for this directive to have real weight in the future, however, it has been suggested that hiring and promotion be dependent on gender training.

The reform of the Constitution began in 1994, and led to advances in the recognition of women's rights, since all the international human rights treaties to which Argentina was a Party, including the CEDAW, were given constitutional status in Article 75 of the Argentine Constitution.³⁰ In the area of human rights, women had already secured protection under Argentine law, and with the 1994 constitutional reform, the Convention and human rights agreements were regarded as complementing these guarantees.³¹ The new Constitution, buttressed by CEDAW, outlawed *de facto* discrimination against women.³²

An Equality Plan was elaborated in 1998, but was never discussed with civil society and was not implemented. Of the twenty-four federal districts, six are reputed to lack offices to protect the rights of women or address gender equality, while only one third of the two thousand municipalities have offices to protect women's rights. This shortcoming is in large part due to the lack of administrative efficiency and budget of the National Women's Council.³³ State agencies and women's organizations still lack coordination and liaison capacities, and there has been no gender perspective incorporated into either the national or provincial budget as of yet. One problem that contributes to the lack of establishing an enabling environment for women's human rights is the opposition of the Senate to the ratification of OP-CEDAW. Although Argentina signed the protocol, and in 2001 the government sent the project of ratification to the Senate, in April 2002 the government requested its withdrawal, stating that this instrument would counter national sovereignty in the area of contraceptive policies, including the status of abortion. While implementation of CEDAW in Argentina relies on the self-reporting of the country to measure adherence with the Convention, cases could be brought to courts that rely on the provisions of CEDAW due to its status in the Constitution. Thus far, however, CEDAW has very rarely been used as a basis for legal decisions in Argentina.

Stemming from the 2001 economic crisis, the advancement of women and of gender equality under the present circumstances is marred by the stereotype of women as beneficiaries, rather than equal actors in development programmes. In 2002, in response to Argentina's CEDAW report, the Committee noted "that the crisis has affected access by women, particularly girls, to public education because they lack the resources needed either to begin or continue their studies". Likewise, it voiced its concern regarding "the attempt to downgrade the National Women's Council and the lack of a formal strategy for coordination of the different State agencies." Specifically, the 2002 Shadow CEDAW report drafted by a coalition of NGOs³⁴ asked the National Women's Council to clarify its role regarding state decision-making; to specify its budget and budget priorities; explain why national reports were not collaboratively drafted with NGO actors; and to confirm whether there were departments or budgets designated for the creation of instruments, mechanisms, or indicators for women's human rights, signaling that statistics were not sex-disaggregated.³⁵

Between 2001 and the 2004 shadow CEDAW report, the Argentine economic crisis fueled

women's organizing and social participation to support each other. This activity boosted awareness of rights and of the need to exercise rights. Slowly the National Women's Council began to enter institutional agreements providing training and technical assistance to the provincial and municipal women's offices and to assist NGOs in promoting equal rights in relation to paid and unpaid work, to combat violence, to address health concerns, and to recognize the value of domestic work. Thus, the original relationship of women as beneficiaries and dependents of development programmes became one in which women were increasingly considered wageearners by both the state and NGOs.

In 2004, the CEDAW Committee recommended further adoption of a women's empowerment approach incorporating gender perspectives in all its social and economic policies, programmes, and projects as well as a monitoring process to ensure support for the goal of gender equality and women's human rights. In 2004, in its assessment of Argentina's follow-up report³⁶ the Committee again expressed concern about the National Women's Council and its lack of "sufficient financial and human resources to effectively promote the advancement of women and gender equality in the present phase of political, economic and social renewal." The Committee also noted that the National Women's Council still had a limited role in the governmental structure, and that it would request that the next periodic report contain information on the status of women's educational situation and opportunities open to them.³⁷ At the moment, rights literacy remains more a matter of NGO and women's networks using non-formal streams of education, than addressing formal education through official government channels. Civil society has played a key role in this work, as well as in the planning and implementation of welfare promotion and training programmes.³⁸ CEDAW is used by NGOs to supplement materials on non-discrimination, on the need to change cultural patterns and gender roles in education. Women's groups cite CEDAW at every possible opportunity.

In the time since the country became Party to CEDAW, the nature of women's organizing has changed in Argentina. Starting in the 1980s, Argentine women's groups met at "international encounters" where they shared experiences, and where there was little lobbying of states with regards to their obligations to women. Instead the encounters focused on building collective feminist identities in the Latin American context.³⁹ Thus, the groups were very autonomous, but they did not have an impact, nor did they aim to impact, national legislation. In the 1990s these encounters were supplanted by advocacy which lent some legitimacy to women's human rights claims, as well as to negotiations between civil society actors and the state. However, actors that emerged had new credentials in lobbying, and the nature of their relations with state actors changed. While women's groups may have gained some space for a gender perspective with this transformation, they also lost some of their autonomy from the state.⁴⁰

PAKISTAN ACCEDES TO CEDAW WITH RESERVATIONS

Pakistan acceded to CEDAW in 1996 with reservations. The 1973 Pakistani Constitution requires non-discrimination in education. In particular, Chapter 1, Article 22.3 reads "Subject to Law no citizen shall be denied admission to any educational institution receiving aid from public revenues on the ground only of race, religion, caste, or place of birth." Article 25, considered the equality clause of the Constitution, articulates the interdiction against discrimination on the basis of 'sex alone' which is sometimes interpreted to mean that discrimination on the basis of sex in conjunction with other factors is permissible. It is followed by Article 25.3 which states that "Nothing in this Article shall prevent the State from making any special provision for the protection of women and children." This provision suggests that while affirmative action or positive discrimination is permitted by the state, it is not obligatory, thereby positioning women and children in a discourse where they figure as beneficiaries at the discretion of the state. The Constitution does not describe gender discrimination beyond these provisions, therefore CEDAW has the potential to become a powerful advocacy tool to fill this gap.

While Pakistan's Muslim Family Laws Ordinance 1961 (MFLO) protects the human rights of women, it was challenged as recently as 2000 in the Federal Shariat Court, which directed the President to amend the MFLO, "So as to bring the provisions into conformity with the injunctions of Islam." This decision permits CEDAW obligations to be interpreted in accordance with Islamic legal sources, as Pakistan's judiciary currently does. ⁴³ In fact, Pakistan's Instrument of Accession commits to CEDAW, subject to the following *General Declaration*: "The accession by the Government of the Islamic Republic of Pakistan to the Convention on the Elimination of All Forms of Discrimination Against Women is subject to the provisions of the Constitution of the Islamic Republic of Pakistan."

Since the state's 1979 Islamization program, women's groups have been active in ensuring that women's rights are included in national political discourse. Women's groups that emerged in the 1980s were qualitatively different from their predecessors in that they preferred local empowerment projects and critiques of the government's restrictions on women's legal rights to traditional welfare activities. Women's groups became involved in legal aid, opposing the gendered segregation of universities and detailing cases of discrimination against women. In 1982 the Women's Action Forum was established as a platform for lobbying and advocacy. Several women's NGOs then emerged to implement projects and programmes for women's rights across the country, cautioned by the state against the enmity of Islamic conservatives.

Despite this tradition of women's organizing, Pakistan's report to the CEDAW Committee is recent and therefore NGO participation in the reporting process has not yet been developed. However, women's NGOs such as Shirkat Gah Women's Resource Centre (est. 1975) and the Aurat Publication and Information Service Foundation (est. 1986) have been working collectively to promote women's access to decision-making and control over resources and institutions for

two decades. Just as with many Pakistani women's groups however, although they are national bodies, each has generally restricted their work to improving women's rights mainly at the local level. More recently, however, Shirkat Gah and the Aurat Foundation has set up a joint initiative to investigate the functioning of the autonomous National Commission for Women established in 2002, signaling a change in focus.⁴⁴

In Pakistan just as in Argentina, a third of municipal seats are reserved for women. Another recent affirmative action measure arose when Pakistan's Supreme Court upheld a decision to reserve a minimum number of seats for women at the medical colleges. Unlike Argentina, Pakistan has not embedded the provisions of CEDAW in its constitution. In Pakistan, the application of CEDAW can be altered by the country's existing administrative and political bodies. The lack of definition of discrimination against women and the Constitution's frequent references to 'protection' of women, 'morality', and 'public interest' permit strict cultural or religious readings that exclude women. A United Nations' *Human Development Report* indicates the complexities of Islamic societies with respect to gender equality by noting: "In general women have been more successful in overcoming cultural barriers to *building* their capabilities than in overcoming the barriers to using these capabilities." It would appear the adoption of CEDAW has had less direct impact on the Pakistani state than on the women's groups whose work it has invigorated.

Initially, one of the key areas of dispute of the state with CEDAW was with reference to coeducation. Coeducational institutions operated in higher education in Pakistan until their expansion in the 1970s, when students from various backgrounds were admitted and they were disbanded. After treaty accession, the state reintroduced coeducation in primary schools, increasing female enrollment considerably. MGO pressures led the state to attempt to narrow gender disparities by requiring new primary schools to hire 70 percent female teachers, who, if unavailable on equal conditions as men, were offered special incentives, including enhanced financial benefits. Indeed, this complex situation spawned subtle gender analyses of the curriculum. Some examining everyday messages, while others focused on religious messages conveyed through Islamic school texts.

Pakistan's female youth literacy rate is currently approximately 44 percent. To reach 95 percent of the population will require twenty-five years.⁵⁰ Reasons to explain lower female attendance include little incentive for girls destined for marriage, school distance, childcare and farming burdens, privileging of boys' diet and health, lack of female role models, the threat of sexual harassment, and gender bias in curricula, which then impact women's linguistic literacy and rights literacy later in life. Worse still are statistics for adult women. Only half of all adult urban women are literate, and less than a quarter in rural areas.⁵¹ The overall female adult literacy rate is 27.9 percent, compared to a male adult literacy rate of 57.5 percent.⁵² To respond to these disparities, the Society for the Advancement of Education (SAHE, est. 1982) has established forty-one community-based primary schools for disadvantaged rural and urban communities. Over one thousand two hundred children, primarily girls, attend these schools where they are taught by female teachers. In communities where reading and writing by girls is often prohibited, children from

SAHE schools organize local Child Rights Day where training is held for teachers on the Universal Declaration of Human Rights and CEDAW.

In 1994, the Pakistani Senate established a Commission of Inquiry for Women to review laws as 'a step toward ending the grosser iniquities against women'. At the time, the state's Council of Islamic Ideology had been mandated to suggest measures to bring laws in conformity with Islamic principles. The Shariat Court, operating in parallel with the state judiciary, exercised powers to review laws and remove those that contravened Islamic law. The Commission report noted that "Muslim scholars are agreed that Islam accords women virtually the whole gamut of rights, including the rights to property, to work and wages, to choice of spouse, to divorce if marriage does not prosper, to education and to participation in economic, social, and political activity. These are guaranteed to Muslim women by Shariat." Further, it suggested that state institutions tended towards conservative readings of women's rights, and therefore advocated the abolition of the Federal Shariat Court. The state neither implemented this recommendation, nor the corollary recommendation to repeal discriminatory laws against women.

As for state apparati addressing gender discrimination, there was a great deal of shuffling of governmental bodies directly before and after Pakistan's accession to CEDAW in 1996. The Women, Welfare and Development Center was established in 1993. In 1996, the Social Welfare and Special Education Division and Women's Development Division were merged into the Ministry of Women's Development, Social Welfare and Special Education. Two years after the establishment of the National Commission for Women in 2002, the Ministry of Women's Development, Social Welfare and Special Education was divided into two separate ministries: the Ministry of Women's Development and the Ministry of Social Welfare and Special Education. Civil society actors had hoped this last move would serve to refocus women's human rights efforts, but according to the 2005 CEDAW Report, there remains a general lack of resources for the Ministry of Women's Development, the National Commission on the Status of Women, and also generally for women's rights organizations.

Although Pakistan acceded to CEDAW in 1996, it only submitted its first report to the Committee in 2005. Since this mandatory reporting obligation is the Convention's only active enforcement mechanism, evaluation of the factors promoting and preventing the implementation of CEDAW principles in education are still very recent and have not been thoroughly evaluated in the case of Pakistan. Notably, the CEDAW Committee pointed out the lack of definition in the Constitution regarding discrimination against women. Definitional quandaries result in a situation in which "there does not exist a comprehensive policy of affirmative action cutting across the work of all entities of the Government." Currently, the gap between *de jure* gender equality in law and *de facto* realities of women's lives is wide, and "a specific mechanism for inclusion of the concerns of women [...] has yet to be institutionalized." Policies and programmes to address women's human rights are thus sporadic and often voluntary, including upgrading women's centres to university departments, establishing human rights centres, and revising curricula in schools.

NGO participation in the reporting process, through shadow reports and other initiatives,

has yet to be developed. In the current context, it is far more likely that the impetus for enhancement of women's human rights will come from within Pakistani society itself than from the state. The stresses and pressures placed upon the state to address women's rights are evident in the following statement made by the Commission of Inquiry for Women: "No community or nation is an island anymore, and Pakistan cannot remain unwashed by the rising global currents. It needs to address its domestic issues in ways that are in some harmony with the international perspective and universally accepted norms. If it does not do it now, it will be compelled to do it later, after much damage."56

As with the case of Argentina, NGO initiatives for government accountability, legislative reform, and the dissemination of information promote enhanced women's rights in Pakistan. In the future, this women's human rights agenda may be furthered through international and regional processes harnessing the vibrant women's NGO movement in a more systematic manner, linking treaty obligations to a methodology for implementing CEDAW locally and nationally. Already women's groups comment on proposed legislation and lobby for ratification of OP-CEDAW.

CONCLUSION

nternational regulatory frameworks are integral elements of an interconnected set of standards and conditions that promote gender equality, equity, and empowerment. In the case of Argentina, institutional mechanisms and resources such as strong women's NGOs that opposed the former dictatorship predated ratification, their work reinforced by ratification and embedding international legal norms in the state constitution. In Pakistan, CEDAW principles are not considered absolute and this requires principles of gender equity to be advanced within a framework of Islamic jurisprudence. Therefore, while in the case of Pakistan, there has been improvement in the official discourse regarding women's human rights, Islamic jurisprudence still presents challenges to implementation of CEDAW standards. These norms are fully implemented only when accompanied by political will, adequate organization and resources, as well as attendant value shifts.

While direct state enforcement often remains difficult when states become Party to CEDAW, states are still accountable to emerging national expectations, and to the continued exposure of their constituencies to international norms. Already, civil society actors in conjunction with domestic and international institutions have begun challenging the embedded practices and customs that perpetuate women's inequality in both Argentina and Pakistan. Concretely, this has meant clarifying concepts regarding women's rights, equality, and non-discrimination within a human rights framework; enhancing national women's state and non-state actors capacity and expertise; designing methods and instruments to measure discrimination and the implementation of CEDAW at the national and local levels; and connecting national concerns to international norms and expectations.

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LEGAL REFORM FOR THE DEVELOPMENT AND IMPLEMENTATION OF MEASURES ON ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING

Kathryn Garforth and Jorge Cabrera Medaglia

s envisioned by the Convention on Biological Diversity, access to genetic resources and benefit-sharing (ABS) is to be regulated at the national level with states empowered to control access and negotiate benefit-sharing terms. Four factors can influence a country's ability to undertake the necessary legal reforms to create and implement law and policy on ABS. Legal reform is facilitated where ABS is a political priority, as has been the case in Costa Rica. Lack of intra-governmental cooperation, either among different departments and ministries at the national level — common previously in Kenya and still existing in Brazil — or between national and sub-national levels of government — common in Nigeria — tends to hinder legal reform for ABS. Pressure from non-governmental actors for states to address the issue of ABS can also contribute to legal reform, as witnessed in the Philippines. Finally, demand for access to genetic resources can also lead to ABS legal reform. In Malaysia, demand for access led the state of Sarawak to create rules on ABS, while in Brazil, demand for access raised alarm in non-governmental communities which pressured the government to act. While these factors should not be interpreted as the sole causes of legal reform for ABS in the countries discussed, they are nevertheless useful to enable governments and organizations to initiate such reforms to achieve successful outcomes.

The conclusion of the *Convention on Biological Diversity*¹ (CBD) in 1992 represented a fundamental shift in both international law and the approach taken to conserve biological diversity. Whereas genetic resources had previously been considered the common heritage of humanity, the CBD changed this approach and granted states sovereignty over the genetic resources found within their borders. The thinking was that this would allow states to control access to genetic resources, setting terms that would allow them to profit from the potential value of these genetic resources and their diversity thus creating incentives to conserve and use the resources in a sustainable manner.

Progress since 1992 in implementing this vision of the CBD has been somewhat slow. An increasing number of developing countries are creating systems for regulating ABS, however, the complexity and cross-cutting nature of the issue makes this no easy task.

Challenges to the legal reforms needed to create and implement ABS are present at both the national and international levels. Our focus here will be on national reforms, and, in particular, on four factors that affect reform programs: whether ABS is a political priority, the degree of intra-governmental cooperation, the level of involvement from non-governmental actors, and the demand for access to genetic resources. First, we begin with a quick background of ABS.

WHAT IS ACCESS TO GENETIC RESOURCES AND BENEFIT-SHARING?

he roots of ABS can be traced to colonialism and efforts by colonial powers to gain control of the trade in key commodities such as rubber, tea, and cinchona for their own benefit and with little regard to the communities and economies from whence these resources originated. More recently, over the course of the twentieth century, the scope of intellectual property protection — including patents and plant breeders' rights — has been extended to cover living organisms and parts thereof, making biodiversity and genes a potentially lucrative resource. Biodiversity-rich countries, primarily from the developing world, became increasingly frustrated with the one-way flow of resources, genetically diverse resources from the South were being used in research in the North generating patents but no returns to the country of origin.

As mentioned above, the solution to this problem as adopted in the CBD is to grant states sovereignty over genetic resources thus allowing them to control access to genetic resources and negotiate terms for benefit-sharing. Indeed, the third objective of the CBD is: "the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over these resources and to technologies, and by appropriate funding." According to Article 15 of the CBD, access is to be on mutually agreed terms with the prior informed

consent of the country providing access.

In addition to the CBD, negotiations at the Food and Agriculture Organization have resulted in the *International Treaty on Plant Genetic Resources for Food and Agriculture*³ (IT). The IT creates a Multilateral System of Access and Benefit-Sharing to a set of thirty-five food crops and twenty-nine forages. In contrast to the bilateral, contract negotiation approach of the CBD, access to the varieties in the Multilateral System of the IT is based on uniform rules of access and benefit-sharing set out in the Treaty.

The IT has only recently entered into force and therefore experience with its implementation is still quite minimal. Progress in implementing the ABS provisions of the CBD, however, has been somewhat slow. As will be discussed below, some countries have created national systems for regulating access and benefit-sharing but their numbers are relatively few and problems remain with finding the resources to implement these systems, including the monitoring of gene flows and the enforcement of laws and contract provisions. To this end, negotiations for an international regime on access and benefit-sharing are taking place at the CBD. Regardless of the outcome of these negotiations, however, the national sovereignty approach of the CBD means countries must undertake legal reform at the domestic level in order to create specific rules on ABS. To this end, we now turn to examining four factors that can influence the ability of countries to successfully undertake these reforms.

IS ABS A POLITICAL PRIORITY?

Perhaps the most general factor affecting legal reform for the development and implementation of ABS measures is whether or not the issue is a political priority. All governments, whether in developed or developing countries, have limited time, financial and human resources to address all the pressing issues of the day. In developing countries, where the basic survival needs of the population may be at stake, regulating ABS may not be considered a high priority. To a certain extent, the discussions in the sections that follow all relate to this factor. The drivers and drags on legal reform that are described are in some way all concerned with either making ABS a political priority or else hindering it from becoming one.

Costa Rica has one of the longest histories with ABS. The country's experience first with the National Biodiversity Institute (*Instituto Nacional de Biodiversidad* or INBio) and then with the Biodiversity Law illustrates what can happen when significant political will to undertake relevant legal reforms exists.

The creation of the Costa Rican Ministry of Natural Resources, Energy and Mines (MIRE-NEM) in 1986 was instrumental in raising environmental concerns to the cabinet level – a significant step in putting biodiversity on lawmakers' agendas. From there, MIRENEM established a Biodiversity Office in 1987. The Ministry also developed a new conceptual framework for conservation in Costa Rica, which included "[i]ntegrating the non-destructive use of ... biodiversity

into the intellectual and economic fabric of national and international society." It was up to the Biodiversity Office to consider the means to address this objective.

Through national meetings organized by the Biodiversity Office, the need for a single institution was identified that could compile information on past research concerning Costa Rican biodiversity and coordinate future efforts. A Planning Commission for the creation of a National Biodiversity Institute was enthusiastically endorsed by the Minister of Natural Resources and the President. INBio was formally established in October 1989 as a private, non-profit organization to "promote a new awareness of the value of biodiversity in order to achieve its conservation and use it to improve the quality of life."

In response to the conservation framework, "INBio developed the concept and practice of "bioprospecting" as one of the answers to the need for the sustainable use of Costa Rican biodiversity to benefit society." Bioprospecting was seen as a way to generate income to support the conservation of biodiversity through the sustainable use of the biodiversity itself. Since its creation, INBio has entered into a number of bioprospecting contracts with organizations from industry and academia. The potential for biodiversity to generate income can also help to raise political interest in undertaking legal reform.

While the Costa Rican experience is largely positive, we should not assume that all legal reform for ABS in Costa Rica has been easy and without problems. In 1996, the government developed a draft Biodiversity Law, which was criticized by a number of sectors. A revised draft was produced in 1997 and this led to the creation of a Special Commission in the Legislative Assembly with the mandate to produce a new draft.⁷

The Special Commission encountered problems in its work. Not all participants in the Commission had the same level of capacity or expertise on ABS issues that at times hindered deeper debate. In addition, the Commission was operating under time constraints that "prevented a real discussion of some of the most controversial and relevant aspects." Nonetheless, the Special Commission produced a new draft law that, after minor modifications, was enacted in 1998. The difficulties were not over, however, as the Attorney General's Office has brought a constitutional challenge against the Law. The suit is still pending, and while it should not suspend the execution of the Biodiversity Law, it has impeded its implementation.

The difficulties faced in the development and implementation of the Biodiversity Law can also be seen as reflecting the importance in getting legal reform for ABC on the political agenda and generating sufficient will to support it. The government of Costa Rica was committed enough to the development of the Biodiversity Law that it was willing and able to follow through on a process that produced multiple drafts. Furthermore, the government has implemented the Biodiversity Law to the extent possible despite constitutional challenges. Faced with these hurdles, many other governments with less political interest in ABS would have abandoned the project. Given the complex nature of ABS, the development and implementation of law and policy on the subject is rarely going to be without differences of opinion. The political will and stamina to negotiate compromises and reach agreement is crucial if ABS legal reform is to be successful.

IS THERE INTRA-GOVERNMENTAL COOPERATION?

ccess to genetic resources and benefit-sharing is a very broad issue that implicates environmental conservation, different resource sectors (fisheries, forestry, etc.), science and technology policy, intellectual property, and indigenous peoples' rights, among others. For this reason, legal reform for the development and implementation of ABS measures requires cooperation among a number of different government departments in order to be successful. Among the factors that can facilitate intra-governmental cooperation are a clear mandate for regulating ABS vested in one department and/or at one level of government (versus a number of departments competing for authority); interest by other departments in participating in the development of ABS law and policy; and a shared vision of how ABS should be governed across departments.

Lack of intra-governmental cooperation is a common problem hindering ABS legal reform. The wide spectrum of issues implicated in ABS governance means that there is not always a sole government department with the clear authority to take the lead on the subject. In Kenya, for example, authority for ABS was, until recently, divided among a number of different agencies. Under a broad interpretation of its mandate, the Kenya Wildlife Service administered an authorization process for commercial and non-commercial research in the country's parks system while the Office of the President and the National Council for Science and Technology administered a permitting system for any research to be conducted in the country. 10 More recently, the Environment Management and Coordination Act (1999) created the National Environmental Management Authority (NEMA) and gave it the authority to "issue guidelines and prescribe measures for the sustainable management and utilisation of genetic resources of Kenya for the benefit of the people of Kenya" including the import and export of germplasm and benefit-sharing. 11 NEMA issued the Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2005, which position NEMA as the focal point for receiving all applications for access to genetic resources. These new regulations should resolve the lack of clarity over which part of the Kenyan government has the authority and responsibility for ABS.

Nigeria is an example of a state in which there is a lack of clarity over the lead authority on ABS and at which level of government jurisdiction for ABS is vested. The federal structure of the country — comprising thirty-six states and the Federal Capital territory — creates challenges for the general governance of the country, including in the field of ABS. Existing laws "already give significant authority to the states over natural resources within their respective territories. ... However, the extent of the powers of the component states generally to enact laws related to genetic resources remains uncertain because of overlaps in jurisdiction." ¹²

A frequent source of tension between government departments concerns the relationship between ABS and intellectual property rights. This is an exceedingly controversial subject at the international level, with calls for mandatory disclosure of patent applications to help monitor the flow and use of genetic resources and prevent biopiracy or misappropriation of resources. Some countries have taken matters into their own hands and instituted disclosure requirements in their national ABS systems. In Brazil, for example, Article 31 of the Brazilian Provisional Measure¹³ implementing ABS in the country makes the granting of intellectual property rights over the products or processes obtained from a sample of a component of the genetic heritage of Brazil conditional on compliance with the Provisional Measure and, where appropriate, the applicant is to provide information on the origin of the genetic material and associated traditional knowledge. According to Rodrigues, however, the Brazilian intellectual property office (INPI) has never enforced these requirements, arguing that the provision is not clear enough.¹⁴ For Rodrigues, this is an example of the contradiction between Brazilian rhetoric and actual practice. It may also, however, be an example of a lack of a shared vision of how ABS should be regulated in the country and an unwillingness on the part of INPI to participate in the implementation of ABS measures. While there is great pressure on the government to prevent the biopiracy of Brazilian genetic resources and to ensure that any access results in fair and equitable benefit-sharing, there is also a desire on the part of INPI to avoid any measures that may actually hinder or could be perceived as hindering the development of the domestic biotechnology industry.

WHAT IS THE LEVEL OF INVOLVEMENT OF NON-GOVERNMENTAL ACTORS?

he development and implementation of national ABS measures is not always initiated by governments. In some instances, it is the scientists conducting research on genetic resources or the local communities and the organizations that represent them. These non-governmental actors may work with bioprospectors first-hand or uncover instances of misappropriation of resources and put pressure on their national governments to address ABS. This has been the case in the Philippines.

The Philippines is credited with being the first country in the world to adopt an ABS law, which it did in 1995. Executive Order 247 (EO 247), "Prescribing Guidelines and Establishing a Regulatory Framework for the Prospecting of Biological and Genetic Resources, Their By-Products and Derivatives, for Scientific and Commercial Purposes, and for Other Purposes" created a comprehensive system for governing ABS in the Philippines.

The impetus for developing EO 247 came from the scientific community. In 1992, the Southeast Asia Network for the Chemistry of Natural Products held its seventh Asian Symposium on Medicinal Plants, Spices and Other Natural Products in the Philippines. The meeting issued the Manila Declaration on "The Ethical Utilization of Asian Biological Resources" along with a Code of Ethics for Foreign Collectors of Biological Samples and Contract Guidelines. "Scientists had long recognised that the exploitation of Asian biological resources, notably medicinal plants, had rarely been of direct benefit for the scientific or economic development of the region" and the

Declaration was developed in response to this situation.¹⁵ The Symposium as a whole "was largely instrumental in heightening awareness among Asian scientists on the issue of bioprospecting."¹⁶

Two years later, the Philippines Network for the Chemistry of Natural Products (PNCNP) undertook a process to develop legislation on ABS. An initial draft of what became EO 247 was prepared "by a small group of chemists of the PNCNP from the University of the Philippines (UP) Diliman, Ateneode Manila University and the University of Santo Tomas." A lawyer, who was working for a non-governmental organization (NGO), was commissioned to help revise the draft and from there, the legislation underwent extensive consultations with scientists, academics, NGOs, government, community organizations, and the business sector.

The Executive Order entered into force on May 18, 1995 and implementing rules and regulations were issued the following year. Although the development of the Executive Order was "initiated by the scientific community, the process managed to gain sufficient interest from government agencies and other actors to ensure the eventual adoption of the regulation." The success of the non-governmental actors may be due in part to the political landscape in the Philippines. With the overthrow of President Marcos in 1986 and the move to a democratic system of government, civil society in the Philippines became very active, vocal, and assertive. Subsequent governments facilitated the involvement of NGOs in politics and in the administration of the country including by recruiting individuals from NGOs to join the civil service. Furthermore, administration of natural resources was decentralized to local government units (LGUs) in 1992.¹⁹

Experience with EO 247 led to calls for its reform, with the scientific community again being among the most vocal groups. The reform was achieved in 2001 when the Philippine Legislature enacted the *Wildlife Resources Conservation and Protection Act* (Wildlife Act). The Wildlife Act was subject to committee hearings where representatives of different government departments, the academy, business, and NGOs participated in the discussions. According to Benavidez, the bioprospecting provisions of the Wildlife Act addressed most of the concerns with EO 247, so discussions in committee meetings were not overly heated: "It would appear that the participants who were the implementers of existing laws shared their experiences and offered solutions to the problems that they encountered in the enforcement of these laws." ²⁰

Non-governmental actors, and local and indigenous communities in particular, are also involved in the implementation of the Wildlife Act and its associated measures. In order to receive permission to access resources, an applicant must receive prior informed consent "from the concerned indigenous cultural communities, local communities, management board under Republic Act No. 7586 or private individual or entity"²¹ in the case of commercial research, or prior informed consent from the indigenous peoples or prior clearance from the relevant LGUs in the case of non-commercial research. During the prior informed consent process, communities can negotiate benefit-sharing terms with the applicant. Under the Act, civil society is also encouraged to participate in monitoring the Bioprospecting Undertakings for commercial research. Furthermore, German funder GTZ has actively supported NGOs in the Philippines resulting in local implementation of EO 247 and local monitoring of bioprospecting activities. ²²

The benefits of participation in ABS policy-making that are identified by Swiderska include that law and policy on ABS will only be effective and equitable if they are "developed with the active participation of all key stakeholders, including different government agencies, scientific and commercial users and indigenous and local communities", and that the participation of these stakeholders "builds awareness, capacity and consensus so that, when a country is approached, the relevant actors are ready to establish an ABS agreement without incurring delays which could deter a potential partner." ²³ With the recent reforms to ABS law in the Philippines it remains to be seen whether the involvement of non-governmental actors in the reform process will facilitate the conclusion of access agreements. What is certain, however, is that their involvement was a significant factor in the development of ABS rules in the first place.

IS THERE DEMAND FOR ACCESS?

he final factor in legal reform to implement ABS that will be discussed here is the role of the demand for access to a country's genetic resources. In countries where there is little demand for access to genetic resources (or perhaps a lack of awareness of any demand), there is less of an incentive to invest in creating ABS mechanisms. This point is related to two of the factors discussed above: whether ABS is a political priority and the level of involvement of non-governmental actors. Governments faced with demands for access but no legal framework within which this access may take place may well be spurred to address ABS as a political priority. Similarly, if non-governmental actors become aware of demands for access or access that is taking place in the absence of a legal framework for ABS, they may well be motivated to campaign for legal reform in the country. These two situations are well-illustrated by the development of ABS measures in Malaysia and Brazil.

In the mid-1980s, the National Institutes of Health in the United States through the Natural Products Branch of the National Cancer Institute (NCI) began bioprospecting in the state of Sarawak in Malaysia. Neither the country nor the state had ABS laws in place but NCI did receive permits to engage in its collection activities. Subsequent research by NCI led to the isolation of calanolide compounds from *Calophyllum* species which were found to be active against HIV. NCI awarded a research grant to MediChem Research to undertake further investigations on calanolides. The company was successful and NCI awarded MediChem an exclusive license to their patents on condition of negotiating an agreement with the Sarawak government. A joint venture agreement between the government and the company was concluded in 1996.²⁴

In 1994, prior to the joint venture agreement, the experience with *Calophyllum* prompted the Sarawak government to amend its Forest Ordinance to include specific provisions on access to genetic resources. Subsequently, the state implemented the 1997 Biodiversity Centre Ordinance and the 1998 Access, Collection & Research Regulations. The former creates the Sarawak Biodiversity Centre which became the focal point for access and benefit-sharing in the state.²⁵

The demand for access to genetic resources in Sarawak that led the state government to develop ABS measures stands in contrast to the situation in Brazil. In March 1999, a Brazilian Presidential Decree recognized the private organization Bioamazônia as the manager of the country's genetic resources. At the end of May 2000, Bioamazônia signed a contract with pharmaceutical company Novartis for the latter to have access to genetic resources in the Amazon region. The contract became public in June of 2000 and prompted a public outcry. Brazilian scientists argued that they should be the ones undertaking the research rather than a foreign company and that the benefit-sharing terms of the contract were unfair. NGOs similarly felt that the contract was unfair and were also concerned about the privatization of the resources. Finally, indigenous peoples' organizations felt excluded and wanted the potential role of their traditional knowledge recognized. The public reaction to the contract "was so strong that the Executive Power was led to approve immediately a Provisional Measure regulating the issue." Since this time, however, the federal government has not enacted a more permanent law to regulate ABS.

CONCLUSION

he factors in ABS legal reform that have been described above should not be interpreted as the sole mechanisms at work in the case studies used to illustrate them. Legal reform for the development and implementation of ABS law and policy is exceedingly complex with multiple drivers to and drags on reform at play at any one time. Furthermore, differing social, political, and geographical contexts mean that no two countries are the same and factors that may precipitate legal reform in one context could serve to hinder it in another.

Despite these caveats, there are undoubtedly some common factors involved in legal reform for ABS. We have described four: ABS as a political priority, intra-governmental cooperation, involvement of non-governmental actors, and demand for access to genetic resources. There are likely others. For governments or organizations seeking to initiate legal reform, these factors can be useful in planning how to proceed and ultimately how to achieve a successful outcome.

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- ² Id. at Article 1.

 ³ International T
 - ³ International Treaty on Plant Genetic Resources for Food and Agriculture, FAO Res. 3/2003, 3 November 2001 (entered into force 29 June 2004).

¹ Convention on Biological Diversity, 5 June 1992, 31 I.L.M. 818 (entered into force 29 December 1993).

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- 7 Id. at 108.
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- ¹⁸ *Id*.
- 19 Id. at 11-12.
- ²⁰ Benavidez, *supra* note 16 at 166.
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EXPERIENCES SUR
L'ELABORATION DE NOUVELLES
LOIS DE DEVELOPPEMENT DE
LA BIOSECURITE ET DE LA
BIOTECHNOLOGIE:
PERSPECTIVES DE REFORMES
LEGALES EN AFRIQUE DE L'OUEST*

Christine Frison et Thomas Joie

INTRODUCTION

a mise en œuvre des conventions internationales constitue souvent un défi majeur pour les pays d'Afrique de l'Ouest, désavantagés par la faiblesse de leurs capacités. Les contraintes auxquelles ils sont confrontés se révèlent encore plus substantielles lorsque les conventions portent sur des questions aussi récentes que la biotechnologie moderne et la biosécurité.²

L'ambivalence des biotechnologies est à l'origine d'une prise en compte spécifique dans les instruments juridiques internationaux. En effet, bien que les découvertes recèlent des espoirs extraordinaires d'exploitation au profit du bien-être de l'humanité et présentent une chance toute particulière pour les pays en développement, les biotechnologies sont cependant également sources d'inquiétudes particulièrement vives quant aux risques potentiels pour la préservation de la diversité biologique et de la santé humaine et animale.

La Convention sur la diversité biologique (CDB) insiste sur la nécessité pour les États Parties d'assurer la maîtrise des risques afin de garantir la conservation de la diversité biologique et de la santé humaine.³ En vertu des dispositions de la CBD,⁴ les États ont adopté, le 29 janvier 2000, à Montréal, le Protocole de Cartagena sur la prévention des risques biotechnologiques relatif à la CDB (ci-après dénommé le Protocole ou PC).⁵

Le Protocole tente d'accorder les impératifs économiques et commerciaux à ceux de la protection de l'environnement, de la santé et des traditions des populations grâce à la mise en place d'un système réglementaire international fondé sur l'adoption de standards minimums de biosécurité. Pour ce faire, il prévoit une collaboration étroite entre les États Parties et institue un mécanisme de soutien financier et technique en faveur des pays en développement ou en transition Parties, dans la mise en œuvre des dispositions.

Participant au mécanisme de financement de la CDB, le Fonds pour l'Environnement Mondial (FEM) joue également le rôle d'organisme financier dans le cadre du Protocole. Le Programme des Nations Unies pour l'environnement (PNUE) a été chargé de la mise en œuvre de l'assistance technique aux pays en développement. Cette assistance technique s'est traduite par la création d'un projet sur la Biosécurité, dont la phase 1 s'articule principalement autour de l'établissement de cadres nationaux de biosécurité (CNB),8 étape préliminaire à l'adoption de mesures nationales de biosécurité.

A ce jour,⁹ plus de 120 pays participent au projet biosécurité du PNUE-FEM. 56 d'entre eux ont terminé le développement de leur cadre national de biosécurité. Ce projet, conçu comme une initiative de développement de capacités pour permettre une application effective des règles de biosécurité, a apporté une contribution considérable, notamment aux pays d'Afrique de l'Ouest concernés.

D'après un rapport du PNUE-FEM, la notion de «capacité» fait référence à «l'aptitude des individus et des institutions à prendre et appliquer des décisions et à remplir des fonctions de façon effective, efficace et durable.» Toujours selon ce document, il existerait trois niveaux de développement des capacités, sur lesquels le présent article s'appuiera: individuel, institutionnel et systémique.

L'ampleur du projet fait qu'il ne peut pas être conduit sur la base des demandes de chaque pays. C'est pourquoi une approche globale a été instituée au travers de documents de travail communs et d'ateliers régionaux et sous-régionaux. Dans la mesure où les besoins en développement de capacités varient significativement d'un pays à l'autre, le projet n'a pas toujours apporté une assistance appropriée à la situation de chacun. En revanche, les pays d'Afrique de l'Ouest présentent des situations et des besoins assez similaires. Dès lors, ils ont connu des difficultés semblables lors du processus d'élaboration de leur CNB. Les contraintes principales et récurrentes que rencontrent ces pays pour la mise en place d'un cadre de biosécurité sont d'ordres financier, humain, matériel et technique. Cependant, les difficultés auxquelles ceux-ci sont confrontés ne se résument pas simplement à ces contraintes.

L'objet de notre article n'est pas de formuler des conclusions prématurées en matière de mise en place de mesures de biosécurité car aucun des États visés n'a encore adopté de législation nationale en la matière. Nous tenterons plutôt de dégager les perspectives de réglementation ainsi que les difficultés rencontrées par ces pays dans la conception d'un cadre de biosécurité.

Pour ce faire, notre article abordera la conception des CNB à travers quatre problématiques. Il traitera tout d'abord des questions relatives aux acteurs de la biosécurité, c'est-à-dire de leur

rôle dans la conception des CNB et des perspectives de participation du public à la sécurité biologique. Dans un deuxième temps, il examinera la nécessaire adaptation des institutions chargées de la gestion politique et administrative des questions liées aux biotechnologies. Il abordera ensuite la problématique des règles élaborées dans les CNB et de leur applicabilité dans les pays étudiés. Enfin, la question de la cohérence interne et externe du système de biosécurité dans son ensemble sera posée.

LES QUESTIONS RELATIVES AUX ACTEURS DE LA BIOSECURITE EN AFRIQUE DE L'OUEST

a phase d'élaboration des CNB a été l'occasion de développer les capacités des personnes, autorités ou groupes, appelés à jouer un rôle dans la biosécurité. Cependant, cette phase a mis en évidence des degrés différents d'implication des acteurs selon les pays. Malgré ce constat, les perspectives de réglementation dégagées dans les CNB laissent pressentir une participation forte du public, même si le niveau de normativité de celle-ci reste souvent flou.

L'exigence de développement de capacités individuelles en Afrique de l'Ouest

Le développement de capacités au niveau individuel fait référence au processus visant un changement des attitudes et des comportements par la transmission de connaissances et le développement de compétences, tout en tirant les avantages de la participation, de l'échange des connaissances et de l'appropriation du sujet. En ce qui concerne la biosécurité, ce type de capacité englobe l'expertise humaine dans le domaine légal, scientifique ou technique, par exemple dans l'évaluation et la gestion des risques. Il comprend également la sensibilisation et l'éducation du public aux questions relatives à la biosécurité. Le comprend également la sensibilisation et l'éducation du public aux questions relatives à la biosécurité. Le comprend également la sensibilisation et l'éducation du public aux questions relatives à la biosécurité. Le comprend également la sensibilisation et l'éducation du public aux questions relatives à la biosécurité. Le comprend également la sensibilisation et l'éducation du public aux questions relatives à la biosécurité. Le comprend également la sensibilisation et l'éducation du public aux questions relatives à la biosécurité. Le comprend également la sensibilisation et l'éducation du public aux questions relatives à la biosécurité.

Dans le cas des pays ouest africains, le projet PNUE-FEM ainsi que d'autres initiatives apportent une assistance essentielle dans ce domaine. Ce travail est apparu nécessaire dans la mesure où ces pays ne disposent que d'une faible quantité de personnel qualifié dans une discipline aussi récente que la biotechnologie. C'est ainsi que le Coordonnateur National du Projet du Mali, Bather Koné, souligne qu'il y a «un besoin réel de capacités humaines.» ¹⁵ Il ajoute que «le cadre national de biosécurité a été conçu dans un exercice d'apprentissage pour tout le monde, y compris les consultants qui ont été utilisés à cet effet.» Le développement des capacités humaines s'est notamment matérialisé dans l'organisation d'ateliers régionaux et sous-régionaux en Afrique afin d'améliorer la compréhension des questions clés de biosécurité. Ces ateliers s'adressaient aux Coordonnateurs de Projet Nationaux ainsi qu'à d'autres acteurs tels que les organisations de la société civile ou les acteurs privés. On note que le développement de capacités a eu un impact considérable dans

certains cas. Au Ghana par exemple, le Coordonnateur National a formé une équipe de quatre ou cinq jeunes experts lors de la création du CNB ghanéen pendant la phase 1 du projet PNUE-FEM. Lorsque le Coordonnateur National s'est vu attribuer des fonctions au sein même de l'équipe du PNUE, ces personnes ont pu se substituer à lui grâce à l'excellente formation reçue. Depuis lors, ces mêmes personnes sont fortement impliquées dans les formations destinées aux experts en biosécurité dans les pays anglophones d'Afrique.

Cependant, les formations se sont avérées insuffisantes dans la mesure où elles ne durent que quatre jours en moyenne. Des aspects aussi techniques ne peuvent être traités en profondeur dans ces délais. Certains délégués ont d'ailleurs souligné la nécessité d'une formation approfondie sur des questions telles que l'évaluation et la gestion des risques.

L'implication des acteurs concernés dans le processus d'élaboration des CNB

Pour l'ensemble des pays d'Afrique de l'Ouest, l'élaboration des CNB a été l'occasion de mieux sensibiliser et éduquer le public aux questions liées aux biotechnologies. Cependant, la tâche représente un défi souvent difficile à surmonter dans ces pays qui souffrent de carences continuelles dans le domaine des technologies de l'informatique et de la communication. En outre, les moyens classiques d'information restent également très sous-développés et, bien souvent, n'atteignent pas les populations rurales. De manière générale, l'information y circule faiblement et elle est également souvent à prendre avec précaution. De plus, la biotechnologie moderne est une science dont l'appréhension s'avère délicate ; ceci pose un handicap sévère dans ces pays où une portion importante de la population est analphabète. Des pays tels que le Togo ou la Guinée ont bien réussi à surmonter ces contraintes en organisant de nombreuses rencontres en milieu rural, en utilisant largement les dialectes locaux et en faisant preuve d'inventivité pour sensibiliser et impliquer les populations les plus défavorisées.

Enfin, la participation du public, des organisations de la société civile (OSC) et des acteurs économiques lors de la phase d'élaboration des CNB s'est avérée faible dans des pays comme le Burkina Faso. Or celle-ci a été expressément prévue dans le Protocole. Dans leur rapport final sur l'atelier de Dakar auquel elles étaient invitées comme observatrices, les organisations de la société civile ont mentionné ce défaut de participation effective : «pour que les participants aient une large vision de ce que pourraient être ces cadres nationaux, il aurait fallu tenir compte des différents travaux et des différentes propositions déjà avancés par les OSC dans ces pays. Cela aurait permis de comprendre la diversité des situations dans les pays et l'état du débat public national.» De même, l'absence des acteurs économiques lors des réunions a été fortement ressentie dans plusieurs pays. Certains ont contourné cette carence en organisant des rencontres privées avec les dirigeants. C'est ainsi que, parallèlement à un atelier sous-régional, une société productrice d'organismes génétiquement modifiés (OGM) a tenu une réunion avec le chef d'État du pays

d'accueil afin d'obtenir son accord pour la mise en culture de coton transgénique.

En revanche, dans d'autres pays, la participation du public à l'élaboration du CNB s'est avérée substantielle. Au Togo par exemple, plus d'une centaine de personnes ont été invitées à participer aux réunions nationales. Leur représentativité a été prise en compte avec notamment l'implication des chefs traditionnels. En outre, toujours au Togo, l'implication des ONG a été forte car elles ont procédé à des sondages d'opinion pour juger de la nécessité ou de l'opportunité d'un moratoire de cinq ans sur les OGM. Cette action s'est révélée d'une grande utilité pour la sensibilisation du public. Elle a également apporté une base solide et une grande légitimité au cadre national de biosécurité.

Dans plusieurs pays, le manque d'implication au plus haut niveau de l'État a constitué un obstacle de taille. Bien souvent, il est apparu que les questions liées à la biosécurité ne constituaient pas une priorité pour l'ensemble de ces pays, préoccupés par des questions plus immédiates. Cependant, le projet PNUE-FEM leur a permis d'appréhender les enjeux liés aux biotechnologies et à la biosécurité. Mais dans certains cas, cette prise de conscience n'a pas encore eu lieu, comme l'illustre l'anecdote suivante : la participation de trois ou quatre ministres concernés était prévue lors d'un atelier de validation du cadre national de biosécurité. Or au bout d'une attente d'une heure, les participants ont été informés que ces ministres ne pourraient pas venir en raison d'une réunion interministérielle prévue au même moment... Dans le même sens, un pays s'est contenté de reproduire le CNB d'un autre sans aucune adaptation des institutions constituant le cadre administratif. C'est ainsi que pour certaines dispositions de son CNB, le nom du pays copié n'avait pas même été modifié en conséquence. Ces exemples témoignent d'une absence d'implication flagrante de certains responsables nationaux dans le processus de conception de leur CNB.

L'expérience de l'élaboration des CNB a révélé qu'une forte implication des responsables nationaux d'un projet est indispensable à sa réussite et à sa qualité. Ceci est d'autant plus vrai lorsque le projet est conduit par les instances supérieures de l'État, permettant ainsi une facilité d'accès aux différentes autorités gouvernementales concernées et une meilleure coordination.

Les perspectives de mécanismes de participation du public à la biosécurité

Globalement, la place accordée à la sensibilisation et la participation du public dans les CNB est révélatrice de l'importance de la question pour ces pays. La controverse que suscitent les OGM est sans doute déterminante dans ce constat. L'obligation de sensibilisation du public requiert une adaptation aux spécificités socioculturelles locales. Pour y répondre, nombreux sont les CNB qui prévoient, au-delà des outils classiques de sensibilisation, des moyens originaux tels que les pièces de théâtre, les chants, les dessins, l'intégration des questions de biotechnologie dans les programmes scolaires ou encore l'intervention des autorités coutumières ou religieuses.

La disposition essentielle sur cette question est l'obligation pour les pays de consulter la population lors de la procédure d'autorisation d'importation ou d'exploitation d'un OGM et de la tenir informée de la décision finale. Le Mali, par exemple, y a accordé une grande importance en prévoyant une implication effective et substantielle du public tout au long de la procédure de décision. Cette position est garante d'une bonne acceptabilité de la politique nationale de biosécurité.

LA NECESSAIRE ADAPTATION DES INSTITUTIONS NATIONALES

l'effectivité et l'efficacité des mesures de biosécurité exigent des adaptations institutionnelles importantes dans les pays étudiés. Les modalités de ces aménagements diffèrent selon les pays mais les fonctions requises dans le cadre du Protocole sont respectées.

Le renforcement des capacités institutionnelles

Dans ce cadre, l'accent est mis sur les performances organisationnelles globales aussi bien que sur l'aptitude d'une organisation à s'adapter au changement. L'objectif est de développer l'institution comme un système global, comprenant des individus, des groupes et l'organisation elle-même. En matière de biosécurité, cela comprend les capacités institutionnelles telles que les laboratoires ou les capacités de recherche, ou l'administration des réglementations, ou des lignes directrices de biosécurité. 19

Bien souvent, on constate une inadéquation des institutions ou des mécanismes dans les pays ouest africains par rapport aux exigences des traités internationaux qu'ils ratifient. Ce décalage est encore plus frappant dans le domaine relativement nouveau des biotechnologies. Pour l'ensemble de ces pays, les structures et mécanismes restent à créer. C'est pourquoi l'assistance apportée par le PNUE-FEM s'est avérée cruciale. Nombreux sont les Coordonnateurs de Projet Nationaux à reconnaître que sans elle, il aurait été autrement plus «difficile de concevoir un projet comme celui-ci, depuis le début.»²⁰

Pour ce qui concerne le système administratif de traitement des demandes d'importation d'OGM, le PNUE a élaboré une «boîte à outils» à l'usage des pays qui détaille les exigences du Protocole et les moyens de s'y conformer sur le plan procédural. Cependant, le problème de la pérennité des structures administratives se pose dans ces pays. Il s'agit d'une difficulté récurrente lors de la mise en place d'organismes nouveaux qui occasionnent des charges importantes pour de tels États. L'après PNUE-FEM s'annonce donc très délicat pour l'ensemble de ces pays qui vont avoir du mal à maintenir ou renforcer les capacités. En outre, le manque de personnel compétent ainsi que le caractère souvent secondaire des questions de biosécurité risquent de compromettre la pérennité des structures et mécanismes en place.

Quant aux capacités de recherche, elles sont extrêmement faibles dans les pays visés. Le renforcement de ces capacités est souvent prévu dans les CNB mais sa concrétisation risque d'être longue et coûteuse. Il est notamment envisagé, en Afrique de l'Ouest, qu'une coopération sousrégionale dans ce domaine soit mise en place. Cette solution serait de nature à répartir les charges entre des pays qui n'ont pas les moyens financiers, humains, matériels et techniques suffisants pour développer et pérenniser seuls leurs outils de recherche.

Malgré ce déficit indéniable en matière de capacité de recherche, certains Etats ont été tentés d'assombrir la réalité afin de bénéficier de plus d'aides financières. Le CNB d'un pays par exemple, a fortement insisté sur l'absence de laboratoire de recherche et de matériel scientifique. Or, au cours de l'atelier de validation du CNB, un responsable de laboratoire a vivement critiqué cette affirmation, tout en reconnaissant la faiblesse des techniques liées aux OGM. Il a souligné qu'il en allait de la confiance des bailleurs de fonds et de la communauté internationale de s'en tenir à la réalité. En l'espèce, la crédibilité du pays et le caractère constructif de son CNB sont mis en cause dans la mesure où l'Union Européenne avait accordé des crédits au gouvernement pour développer les capacités nationales en la matière.

Les perspectives de réformes institutionnelles

La structure retenue par un pays dépend de l'existence préalable d'organismes jouant un rôle similaire dans d'autres domaines et des ressources disponibles pour assurer la régulation de la biosécurité.²² Une des difficultés lors de la mise en place des structures nationales est de déterminer quelles sont les autorités qui vont avoir le rôle d'autorités responsables de la biosécurité. En effet, la sécurité biologique est un domaine transversal pouvant impliquer plusieurs organismes gouvernementaux.²³ La cohérence de la structure administrative est primordiale pour atteindre les objectifs de biosécurité mais également pour recueillir la confiance des acteurs, notamment économiques.

Au Mali par exemple, les organismes suivants sont chargés de gérer les activités biotechnologiques:

- le Ministère de l'Environnement remplit la fonction d'Autorité Nationale Compétente (ANC) et est chargé à ce titre de la politique nationale en matière de biosécurité et de la délivrance des autorisations pour les activités biotechnologiques ;
- le Secrétariat Technique Permanent du Cadre Institutionnel de la Gestion des Questions environnementales assure le rôle de Secrétariat de l'ANC, de Correspondant National du Protocole et de Point de Contact des Notifications ;
- · le Comité National de Biosécurité et de Biotechnologies, composé de membres de différents

départements ministériels, de la société civile et des acteurs privés, est chargé d'examiner les demandes d'autorisation et de fournir des recommandations à l'ANC sur la base des travaux des Commissions spécialisées ;

- les Commissions spécialisées conduisent les études et les recherches dans leur domaine de compétence et fournissent des rapports au Comité national de Biosécurité. Trois Commissions sont prévues : la Commission d'Evaluation et de Gestion des Risques, la Commission Participation du public et la Commission Juridique et de Réglementation ;
- le Comité Public de biosécurité est chargé de veiller à la transparence des décisions et d'exercer une bio-surveillance/biovigilance;

L'ensemble de ces fonctions se retrouve dans tous les CNB. En revanche, un seul organisme peut remplir plusieurs des rôles mentionnés ci-dessus. Par exemple, dans le CNB du Sénégal, seules deux institutions remplissent ces fonctions,²⁴ alors que le Togo prévoit sept organismes nationaux pour répondre aux exigences du Protocole.²⁵

LA QUESTION DE L'ADEQUATION ENTRE LES REGLES ELABOREES ET LEUR APPLICABILITE DANS LES PAYS D'AFRIQUE DE L'OUEST

ans l'ensemble, les pays visés ne disposent pas de cadre réglementaire spécifique aux biotechnologies. Sur la base des études effectuées au cours de la phase 1, plusieurs options se présentent selon l'état de la législation nationale et des intérêts nationaux. Un pays peut décider soit d'élaborer une réglementation entièrement nouvelle, ²⁶ soit d'adapter la législation existante. ²⁷ Le cadre réglementaire peut être contenu dans divers instruments normatifs (loi, règlement, décret ou directive, etc.). Cependant, il ne faut pas porter une attention démesurée à la dénomination de l'instrument normatif. L'essentiel réside dans la fonctionnalité, la faisabilité et la pérennité des instruments utilisés et dans leur niveau d'acceptabilité ou de légitimité dans le pays concerné. Leur adaptabilité est également importante dans la mesure où la biotechnologie est en constante évolution.

Bien que tous les pays n'aient pas suivi toutes ses préconisations, le Protocole a apporté une contribution substantielle sur certains points en élaborant des règles relativement précises. Il a notamment mis en place deux procédures distinctes de demandes d'autorisation d'importation d'organismes vivants modifiés (OVM) et des règles en matière d'évaluation et de gestion des risques.

Cependant, il reste largement «sous-développé» dans certains domaines tels que la procédure applicable aux OVM en transit ou destinés à être utilisés en milieu confiné. D'autres points ont été reportés à des négociations ultérieures (concernant la manipulation, le transport, l'emballage

et l'identification ou encore la responsabilité et la réparation) ou purement et simplement ignorés par le Protocole car ils ne rentraient pas dans son champ d'application (comme les OGM produits localement). Bien que respectant les règles minimales instaurées par le Protocole, les pays ont élaboré des mesures différentes sur de nombreuses questions dans leurs CNB. Ces derniers recèlent des divergences notoires notamment sur la question des procédures d'autorisation ou celle du caractère contraignant des considérations socio-économiques.

La question cruciale est donc de savoir dans quelle mesure les pays visés vont réussir à appliquer de manière effective les mesures qu'ils adopteront au plan national. Par exemple, Bather Koné affirme que le Mali n'a pas pour le moment les capacités pour assurer l'évaluation et la gestion des risques prévue dans son CNB: «nous avons des capacités individuelles, humaines et structurelles qu'il faudra certainement renforcer pour l'évaluation et la gestion des risques.» De même, l'intervention pertinente de l'un des chefs traditionnels invités à l'atelier de validation du CNB du Togo a été révélatrice des difficultés auxquels ces pays seront confrontés: lors de la réunion, ce chef a souligné que le contrôle des mouvements transfrontières terrestres d'OGM était impossible à réaliser sur le terrain à cause de la porosité de la frontière « sous son autorité. » Cette remarque est valable pour tous les pays d'Afrique où le manque de moyens pour assurer le respect des lois est ostensible. Néanmoins, le Coordonnateur du Mali souligne que les règles élaborées seront certainement amendées suivant le contexte pour une application plus efficace. Il affirme que «le cadre du Mali a été qualifié d'inapplicable par certaines voix extérieures. Or ce n'est pas un instrument figé, et il appartient aux acteurs de le revoir en temps réel selon les intérêts du pays. Cela est mieux que d'avoir une passoire au départ.»

LA QUESTION DE LA COHERENCE GLOBALE DU SYSTEME DE BIOSECURITE

e niveau systémique représente le cadre politique global dans lequel les individus et les organisations opèrent et interagissent avec l'environnement extérieur. Ce niveau inclut également les relations formelles et informelles entre les institutions.²⁸

Cela exige d'élaborer des règles en accord avec la politique nationale de biosécurité et requiert une bonne coordination globale au niveau interne et international entre les mécanismes de biosécurité.

La coordination interne

Dans ce cadre, le défi pour les pays d'Afrique de l'Ouest est de mettre en place un dispositif de réglementation national cohérent afin d'éviter tout chevauchement, conflit ou vide juridiques en matière de biotechnologies. C'est pourquoi le projet PNUE-FEM incite les États à effectuer un

inventaire des règles nationales applicables ou susceptibles d'être appliquées en la matière. Cependant, pour ces pays, cette étape a été difficile à accomplir car les documents y font souvent défaut. Le Coordonnateur du Mali considère que la difficulté principale rencontrée lors de l'inventaire des réglementations et organismes existants est «l'accessibilité des documents d'archive.»

En ce qui concerne la coordination de la recherche, Bather Koné explique que «les laboratoires concernés ont des activités biotechnologiques ciblées sur des problèmes précis dans le domaine agricole ou sanitaire. Mais ces activités ont besoin d'être moulées dans une politique spécifique de biotechnologie, compte tenu de l'importance de la question aujourd'hui. Ceci n'est réellement pas le cas aujourd'hui, bien que les ambitions soient réelles.»

En outre, il apparaît nécessaire pour la cohérence du CNB de préciser quelle est la politique nationale en matière de biosécurité avant d'élaborer les règles. Or, cette logique n'a pas toujours été respectée. Par exemple, dans le cas du Mali, les responsables du projet ont été amenés à faire un cadre et des lois sans la détermination préalable d'une politique de biotechnologie; ceci parce que la biotechnologie est submergée par la seule question des OGM dans la plupart des esprits et que cela en fait un sujet politiquement délicat qui incite les dirigeants à une extrême prudence.

De plus, une bonne coordination entre les organismes gouvernementaux est parfois difficile à obtenir dans la mesure où les mandats ne sont pas toujours clairs dans ces pays. Le risque de chevauchements des compétences est réel d'une manière générale et est particulièrement important dans le domaine multisectoriel de la biosécurité. Le système administratif conçu dans les CNB apparaît bien souvent comme approximatif et nécessite davantage de rigueur afin de prévenir les lacunes.

La coordination internationale

Sur le plan international, le Protocole a mis en place un mécanisme commun d'échange d'informations appelé Centre d'échange sur la prévention des risques biotechnologiques. C'est un outil essentiel dans la mise en œuvre des dispositions du Protocole. Les autorités nationales compétentes doivent communiquer au Centre plusieurs types d'informations, notamment en vertu de l'article 20 §3 du Protocole. Du point de vue des pays étudiés qui souffrent de carences importantes en matière d'expertise scientifique, le Centre peut se révéler d'une grande utilité, à condition que les informations publiées soient plus complètes. En effet, ceux-ci pourraient se fonder sur les études menées par d'autres États pour prendre leur décision d'autorisation. Aussi, un projet visant à répondre aux besoins urgents des pays en matière d'accès et de participation au Centre d'échange a été mis en place par le PNUE-FEM: il s'intitule « Renforcement de capacités pour une participation efficace des Parties au Centre d'échange sur la prévention des risques biotechnologiques. » Ce projet supplémentaire permet de développer les capacités de participation de ces pays principalement par la formation de personnel et la fourniture

d'équipement informatique.²⁹

Bien que le Protocole s'adresse particulièrement aux États, la biosécurité requiert également une coopération entre les États sur le plan régional pour faire face aux défis communs. Cet aspect a été pris en compte dans le Protocole ainsi que dans le projet PNUE-FEM notamment avec l'organisation d'ateliers régionaux et sous-régionaux pour favoriser l'échange des expériences et l'harmonisation des législations et des mécanismes. Cependant, cette approche sous-régionale est restée très limitée, comme en témoigne cette assertion du Coordonnateur National du Chili : «Il n'y a pas de mécanismes sous-régionaux de biosécurité et d'évaluation des risques. Ceci est un point faible du projet.»³⁰ Aussi, dans le cadre de certaines organisations régionales (Union Africaine) et sous-régionales (notamment la CEDEAO), on assiste à une tentative d'harmonisation des règles de biosécurité. Mais comme le souligne Bather Koné, le processus est long et délicat : «Le Mali est membre de la CEDEAO, qui a déjà choisi d'avoir une approche sous-régionale en matière de biotechnologies et de biosécurité. Mais il est encore trop tôt pour que cela influence sa politique en la matière.»

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a coopération régionale ou sous-régionale apparaît comme un moyen efficace et abordable d'assurer la gestion de la biosécurité dans le contexte des pays ouest africains. Il est cependant regrettable que ces États n'aient pas davantage mis l'accent sur des mécanismes communs de biosécurité. Les défis auxquels ils sont confrontés individuellement dans la mise en place d'un cadre de biosécurité fonctionnel paraissent insurmontables à bien des égards. Le problème n'est pas tellement de mettre en place des cadres de biosécurité dans la mesure où les pays développés apportent une assistance conséquente. La difficulté réside surtout dans la pérennité des systèmes nationaux de biosécurité. La biotechnologie est un domaine en progrès constants et rapides, qui nécessite une adaptation permanente des politiques, réglementations et techniques. Les faiblesses individuelles de ces pays ne pourront être surmontées sur le long terme que grâce à une coopération régionale ou sous-régionale plus approfondie.

*Cet article s'appuie principalement sur l'étude de plusieurs pays d'Afrique de l'Ouest ayant terminé la phase d'élaboration de leur cadre national de biosécurité : le Mali, le Togo, le Ghana, le Sénégal, le Bénin, le Burkina Faso, le Niger, la Guinée et la Côte d'Ivoire. Il est le fruit de la collaboration de *Christine Frison*, Juriste en Droit International Public, Chercheuse, Membre du Centre de Droit International pour le Développement Durable et Consultante Biodiversité/Biosécurité, et de *Thomas Joie*, Doctorant en Droit International Public, Associé au Centre de Droit International pour le Développement Durable, à laquelle s'est ajoutée la précieuse contribution de *Bather Koné*, Consultant auprès de l'Union Africaine (Département des Ressources Humaines, des Sciences et de la Technologie), Coordonnateur National du Mali pour la phase 1 du Projet PNUE-FEM sur le développement de Cadres Nationaux de Biosécurité.

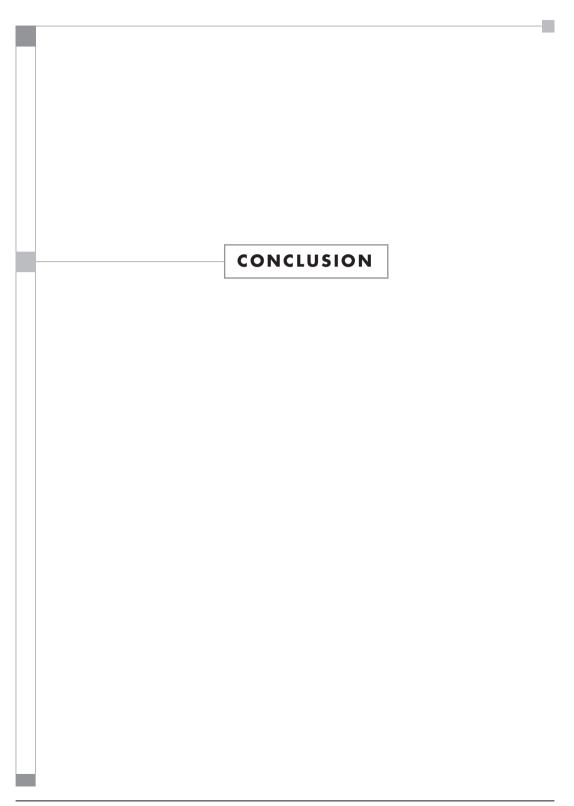
- ¹ La Convention sur la diversité biologique (CDB, Rio de Janeiro, 5 juin 1992) définit la biotechnologie à l'article 2 comme: «toute application technologique qui utilise des systèmes biologiques, des organismes vivants, ou des dérivés de ceux-ci, pour réaliser ou modifier des produits ou des procédés à usage spécifique». Cette définition englobe aussi bien la biotechnologie traditionnelle que moderne.
- ² La biosécurité (ou sécurité biologique) est un concept se définissant comme étant «la nécessité de protéger la santé humaine et l'environnement contre les effets potentiellement défavorables des produits liés aux biotechnologies.» Voir Secrétariat de la Convention sur la diversité biologique, «Protocole de Cartagena sur la prévention des risques biotechnologiques relatif à la Convention sur la diversité biologique : texte et annexes», Secrétariat de la CDB, Montréal, 2000, p.1. Disponible sur http://www.biodiv.org/doc/legal/cartagena-protocol-fr.pdf.
- ³ L'article 8 (g) de la CBD prévoit que: «Chaque Partie contractante, dans la mesure du possible et selon qu'il conviendra: [...] Met en place ou maintient des moyens pour réglementer, gérer ou maîtriser les risques associés à l'utilisation et à la libération d'organismes vivants et modifiés résultant de la biotechnologie qui risquent d'avoir sur l'environnement des impacts défavorables qui pourraient influer sur la conservation et l'utilisation durable de la diversité biologique, compte tenu également des risques pour la santé humaine.»
- ⁴ CBD, article 19§3.
- ⁵ Le Protocole est entré en vigueur le 11 septembre 2003, et compte 130 États parties au 08/01/2006.
- ⁶ L'objectif du Protocole est de: «contribuer à assurer un degré adéquat de protection pour le transfert, la manipulation et l'utilisation sans danger des organismes vivants modifiés résultant de la biotechnologie moderne qui peuvent avoir des effets défavorables sur la conservation et l'utilisation durable de la diversité biologique, compte tenu également des risques pour la santé humaine, en mettant plus précisément l'accent sur les mouvements transfrontières.»

 Article Ler du Protocole.
- ⁷ PC, article 22 §2, 28 et CDB article 20.
- ⁸ Pour une définition du CNB, voir PNUE, «Renforcement des capacités pour la mise en œuvre du Protocole de Cartagena sur la Prévention des risques biotechnologiques», PNUE, mars 2002, p. 21. Disponible sur http://www.unep.ch/biosafety/development/devdocuments/capbdgbrochFR.pdf.
- ⁹ Chiffres relevés le 8 janvier 2006 sur http://www.unep.ch/biosafety/parcountrieslist.htm. La liste des pays ayant terminé cette première phase est disponible sur http://www.unep.ch/biosafety/news.htm
- ¹⁰ Zakri A.H. et al., Capacity Development Initiative. Country Capacity Development Needs and Priorities. Regional Report for Asia and the Pacific. GEF UNDP Strategic Partnership, 2000, p.1. Notre traduction.
- ¹¹ Navajas H. et Seyani J.H., *Development of National Biosafety Frameworks. Mid-Term Evaluation of a Global Initia*tive, PNUE-FEM, août 2003, p.18. Notre traduction.
- 12 Zakri A.H. et al., note 10, p.1.
- ¹³ PNUE-FEM, «Building Biosafety Capacity in Developing Countries: Experiences of the UNEP-GEF Project on Development of National Biosafety Frameworks», p.6.
- ¹⁴ *Id*.
- ¹⁵ Extraits tirés d'une interview réalisée par les auteurs en février 2006.
- 16 PC, article 23
- ¹⁷ Voir «Commentaires des représentants des ONG, observateurs aux ateliers sous-régionaux du projet PNUE/FEM relatif au développement des structures nationales de biosécurité. Dakar, Sénégal 22-25 avril 2003.», p.2, Version définitive diffusée le 28 mai 2003. Disponible sur http://www.bede-asso.org/ogm_espace_public/biosecurite_afrique/place_

publique/ateliers formations/dakar 2003/CR PNUE Dakar.pdf.

- 18 PC, article 23 §2: «Les Parties, conformément à leurs lois et réglementations respectives, consultent le public lors de la prise des décisions relatives aux organismes vivants modifiés et mettent à la disposition du public l'issue de ces décisions [...]»
- ¹⁹ PNUE-FEM, note 13, p.6.
- ²⁰ Navajas H. et Seyani J.H., note 11, p.12.
- ²¹ Voir PNUE-FEM, «Projet PNUE-FEM sur le développement de Cadres nationaux pour la biosécurité. Module de la boîte à outils pour la phase 3, Partie II : Systèmes administratifs de traitement des demandes». Disponible sur http://www.unep.ch/biosafety/development/devdocuments/ToolkitBSF3iiFR.pdf.
- ²² *Id.*, p.6.
- ²³ CNB du Burkina Faso, qui dénombre 7 Départements ministériels concernés, p.21.
- ²⁴ CNB du Sénégal, p.8. Disponible sur http://www.unep.ch/biosafety/development/Countryreports/SNNBFrep.
- ²⁵ CNB du Togo, pp.72-82. Disponible sur http://www.unep.ch/biosafety/development/Countryreports/TGNBFrep-FR.pdf.
- ²⁶ CNB du Sénégal, p.7.
- ²⁷ CNB de la République Islamique d'Iran, p.15. Notre traduction. Disponible sur http://www.unep.ch/biosafety/development/Countryreports/IRNBFrep.pdf.
- ²⁸ PNUE-FEM, note 13, p.6.
- ²⁹ Les informations sur ce projet sont disponibles sur http://www.unep.ch/biosafety/BCH.htm.
- ³⁰ Voir Navajas H. et Seyani J.H., note 11, p.16. Notre traduction.







CONCLUSION

Thomas F. McInerney

he Essays that comprise this book are intended to provide a snapshot of legal reform in the contemporary context. They represent history of the present. Rather than being definitive, the cases and studies collected here are in some sense provisional.

They offer lessons that may be applicable to other contexts, yet require further testing and study before more definitive conclusions may be drawn. As noted in the Introduction to this volume, the difficulty of drawing such conclusions rests in large part on the complexity of the processes in question. Mapping the history of legal reform, even involving discrete areas, brings in a multiplicity of factors. Legal reform is not just a discrete phenomenon; rather it is a social and political process.

Understanding the topic as a process goes a long way in preparing us to examine legal reform. First, it allows us to situate legal reform in the context of broader historical developments. While the project-based nature of international legal reform initiatives has fed a short term frame of reference, there is always a story—involving vested interests, experience with other reforms, institutional impediments—that precedes and follows any legal reform project. Second, it allows us to see the dynamic nature of reform, in particular, the role that agents and institutions play in conditioning and bringing about change. Third, it draws us away from an unrealistic notion of causality and towards a form of causality appropriate to the complexity of the subject matter. Path dependency in the form of legal traditions and doctrine requires a tempered notion of causality in relation to specific initiatives to reform law or institutions. Similarly, taking the broad view of historical

change can help reorient debate from the endless search for proof that law and institutions cause economic development. While it seems undeniable that the two correlate in some degree, the more interesting questions are how and why? Understanding these questions requires a more nuanced analysis of processes of historical change over time, which will uncover the more complex, dynamic, and reciprocal interaction of these distinct phenomena. In this regard, we need also consider the possibility of reverse causality—the notion that economic growth may contribute to legal and institutional reform rather than vice versa. By seeing legal reform from this broader vantage, we can better understand the mechanisms underlying it and thus draw better conclusions to inform actual practice.

The grounds for such an understanding have been laid in the social sciences. In recent years, there has been resurgence in the study of social processes in ways that recall historical and qualitative political, economic, and social theorists ranging from Mill to Weber. Scholars working in the tradition of comparative historical institutional analysis have taken important steps in defining an alternative qualitative approach to understanding economic, political and social change, which challenges the dominant empirical social scientific methodology. While subject to debate and disagreement within the social sciences, there appear to be ample grounds for accepting the relevance and validity of narrative and interpretative comparative studies as complements to more quantitative work.

What are the key attributes of this tradition? For the purpose of this essay, I will highlight four. First is a non-functionalist orientation. By this I mean that comparative historical scholars do not see the outcomes of institutional change as necessarily explaining why particular changes were undertaken. Scholars working in this tradition distinguish themselves from the predominant rational choice, functionalist orientation in the study of institutions that tends to assume a direct relationship between functions and effects of institutions and the intent of designers. The comparative historical tradition is more open to the idea that institutions may function in ways unintended by designers through processes of adaptation and change. By examining specific experiences of institutional change, it further avoids the tendency, prevalent in contemporary studies of globalization's effect on institutions, to view globalization as driving one sort of institutional variation designed to maximize efficiency.

Functionalist thought is evident in the international development field's treatment of governance concerns. It is reasoned that because countries that are economically and politically developed have certain types of institutions configured in certain ways, countries must adopt the same institutions and configure them similarly to develop politically or economically. What this type of analysis leaves out is any sense of the process—involving stops and starts, multiple incarnations of the same institutions, conflict—through which institutions unfolded over time. As Merilee Grindle put it, "there is a difference between being developed and *getting* developed."⁴ This shortcoming is not incidental given that improvements in governance take a long time.⁵

Examples of how institutions develop in ways never foreseen by their creators are widespread in the law. Interpretivist jurisprudential theorists, for one, have devoted much attention to the is-

sue of how to deal with the fact that the framers of particular constitutional provisions may never have intended them to mean what subsequent judicial decisions say they mean. Ronald Dworkin's notion of law as integrity, which advances the normative claim that judges should read the legal corpus in a manner that is best from the standpoint of political morality, is precisely designed to provide a normative basis upon which to justify changing interpretations of legal principles over time. It is thus widely recognized that such development of the law, witnessed in many jurisdictions, deserves to be considered legitimate.

A second and related focus of comparative historical institutional analysis is a more limited role for path dependence in shaping outcomes. While path dependencies certainly play a role in conditioning and orienting legal reform initiatives, comparative historical studies can examine the particulars of how change is influenced by existing or prior institutions. The comparative historical tradition allows for more nuanced analysis of the extent to which institutional configurations are capable of undergoing change. Examples from OECD countries, such as the Dutch experience in revising its civil code over a 45 year period suggests that changing an existing legal order is a protracted process. At the same time, there may be periods when changes in the broader political environment render widespread change possible.

Third, comparative historical scholarship treats institutional change in dynamic rather than linear terms. This means that the methodology is open to considering a more complex set of factors that stimulate change. In particular, it also allows for bi-directional influences and mechanisms. On this view, a given legal, institutional, or policy mechanism may, in turn, influence or bring about further change. Examples of such feedback mechanisms include improvements in court procedures that increase numbers of cases or result in litigation that overturns an existing law. Laws that protect the property of persons acquiring land from the state at cut rate prices may become the focal point for challenges by the landless, while banking law reform may ease access to credit for consumers, thereby increasing consumer demands for more favorable consumer protection laws. New law or precedent may in turn create rights to bring suit against the state and thus be used by citizens to compel the state to undertake reform. Understanding the importance of change in its various instances allows us to see how seemingly unimportant intermediate steps may themselves be key turning points in bringing about more far-reaching change. As Theda Skocpol has written, "comparative historical analysis is especially well suited to untangling the complex and often recursive causal configurations we now see in world history." Indeed, as with studies of social and political change generally, part of the problem of understanding legal reform processes results from their manifestation in what Skocpol has referred to as "temporally protracted causal chains."10

Such understanding allows us to make sense of the lived experience of how law develops through reinterpretation over time. Examples include the work of Bruce Ackerman that shows the evolving nature of collective understandings of key constitutional provisions in the United States. In the U.S. experience, legal understandings of constitutional provisions such as equality have changed fundamentally over time. Thus, in some sense, the founding act of drafting a constitution

is only the opening act in a longer project. Similar processes are evident in the constitutional law of South Africa¹¹, India, and many other jurisdictions. These experiences suggest that the failure of a particular legal system to adopt (or enforce) principles that meet international standards today may not prevent interpretations from evolving towards improved legal standards. In this regard, activities like public interest litigation may play important roles in driving change. This insight is important for international legal reform efforts because while a given policy or legal change might not have brought about what might be considered international best practice or international human rights standards, it may nevertheless have contributed to more ambitious goals by securing the basis upon which actors can exert influence such that more far-reaching change becomes possible later.

This dynamic approach departs from the evolutionary understanding of legal history that emerged in the 19th Century. Taking a historical institutional approach does not commit one to reading legal history as an inexorable journey towards a more rational legal order. By factoring in path dependencies and the strategic objectives of actors involved in the maintenance and development of legal systems, it suggests that legal change may not lead towards maximally rational Weberian models. Because they may be disadvantaged by the change, important actors may oppose even changes that would seem rational. The legal profession, for example, may resist changing court rules because they wish to avoid learning new rules, while political elites or judiciaries may resist efforts to curtail graft or improve accountability. It similarly does not endorse the more contemporary versions of the evolutionary tradition, exemplified by law and economics, which envisions law evolving towards optimally efficient solutions.

Particularly problematic is that the ultimate consequence of institutional change may be unknown, for better or for worse. To paraphrase Zhou Enlai when asked whether he thought the French Revolution had been a success, it may be too early to tell whether the effect of the legal reform activities of the past 30 years have generated on the whole positive effects. Will we find that attempts of international actors to drive particular reforms end up backfiring due to political backlash on account of the failure to reconcile competing political agendas or achieve consensus before instituting the reforms? Will far worse consequences develop as suggested by the writing of Amy Chua?¹² Does the longevity of reforms depend on the extent to which strong growth follows closely on the footsteps of reforms? How frequently will we find that legal reforms undertaken at the national level have negative consequences at the local level?¹³

Finally, by taking a comparative approach to examining diverse phenomena, the limitations of individual case study analysis can in part be transcended. Processes of social and political change can thus be examined side by side, thus allowing researchers to isolate particular phenomena to help us understand the causal mechanisms at work. Further, and particularly important to legal change, is the wide angle view that macrohistorical analysis allows. By studying the way in which power configurations affect political outcomes in different contexts, one can identify the role of law and processes of legal change within a broader perspective.

This understanding is critical to addressing the issue of the political basis upon which re-

form may be grounded. As Skopcol has written, the comparative historical tradition is preferable to dominant rational choice models that conceive of elite bargaining as occurring on a *tabula rasa*, leaving aside "entrenched understandings and power relations" that may drive the direction of such bargains. ¹⁴ Failure to attend to this issue is particularly problematic for law reform in that dominant "elites work from power positions and understandings embedded in inherited arrangements" and then may "seek to encode those older meanings and power relations into seemingly new structures." ¹⁵ Understanding this dynamic in detail may hold significant implications for donor-sponsored legal reform initiatives that frequently take existing elites as a starting point. As one scholar has noted, "legal reform that merely strengthens claims to unequal distributions derived from preexisting unfairness will not have permanence or will undergo challenge in the political arena." ¹⁶ Such understanding may shed greater light on path dependencies insofar as it suggests more purposeful than inertial forces at work. It is thus important to consider whether continuities in legal traditions are the result of strategic choice among entrenched interests or the convenient acceptance of much of a legal tradition. Processes of legal reform are thus not just about law.

Przesworski et al. have analyzed rule of law in terms of the emergence of some equilibrium whereby governing elites come to see maintenance of an independent and credible legal system as within their interests.¹⁷ In other words, elites come to see that the virtues of a system beyond their control are sufficiently great that they become willing to forego that control. It is likely that the comparative historical method can help test this proposition and see under what conditions it might hold.

IMPLICATIONS FOR STUDY OF LEGAL CHANGE

Statistical techniques may give an inaccurate picture in cross-national comparisons of complex phenomena such as legal reform. Such analyses frequently overlook "theoretical ideas about reciprocal causation, path dependence, and alternative causal paths to similar outcomes." Moreover, comparative historical scholarship does not assume the equivalence of different societies or phenonmena as so frequently happens with cross-national statistical analyses but instead takes seriously the particularities of the cases and societies studied. In the rule of law context, arrival at some end point—an efficient and formally consistent legal system—may tell only part of the story. Indeed, the part of the story missing is what may be most important. Failure to take account of the complexities of social, economic, and political structures may increase the likelihood of applying one size fits all solutions. The call to improve historical thinking in relation to legal and governance reform can help move beyond essentialism in thinking about the topic. Taking such an approach has the benefit of lengthening the time horizon beyond what is typical in international development projects. Through this approach, specific projects can be seen within a broader development horizon, thus leading to more realistic expectations

for such work. We may see that specific projects, while not resulting in immediate quantifiable benefits, have consequences beyond what we might have expected. We can also better understand the sequence in which such reforms should be attempted and distinguish between the "essential and the merely desirable." It is in this sense that the observation made at the outset of this book again comes into play. Understanding that legal reform has happened and continues to happen in many different contexts suggests that, while we may not achieve ambitions for short term measurable results that demonstrate the positive causal contribution of specific legal reform projects to important goals justifying this work, the contribution of legal reform programs to long term objectives may be substantial. As we refine our understanding of historical institutional and legal change, the ability of the international community to play a useful and supportive role in this area will be enhanced.

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he call to improve knowledge about law, governance, and institutional reform in this chapter responds to the appeals by a number of scholars and students of governance and legal reform to develop a more empirical and historical understanding of this field.²² In charting the way forward, one thing appears clear: the world has much less need for ever more precise definitions of "rule of law" and much more need for solid analytical work that explains how many of the good things encompassed by that notion come about. The pieces in this volume are contributions to this ongoing research project. Some of this work should be done within the field of international development and related international policy studies, while it is likely that comparative historical institutional scholarship that addresses rule of law issues specifically can provide broader macrohistorical perspectives. In an interest in improving its work in this field, IDLO will seek to expand and build on its partnerships with other scholars and practitioners to continue this research project in future years. As an ultimate outcome of this work, it is intended that standards of legality and legal institutions will improve. In the shorter term, it is hoped that by developing more useful knowledge donor programming can be improved and public interest organizations motivated to persevere in struggles for justice.

- ¹ Many of these issues are explored in depth in a recent edited volume. See generally James Mahoney and Dietrich Rueschemeyer eds., Comparative Historical Analysis in the Social Sciences (2003).
- ² Paul Pierson, The Limits of Design: Explaining Institutional Origins and Change, 13 Governance 475, 477 (2000).
- ³ Miles Kahler and David A. Lake, GLOBALIZATION AND GOVERNANCE in eds. Kahler and Lake, Governance in a Global Economy: Political Authority in Transition (2003). See also, Peter A. Hall and David Soskice, Varieties of Capitalism: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (2000).
- ⁴ Merilee S. Grindle, Good Enough Governance: Poverty Reduction and Reform in Developing Countries, 17 GOVERNANCE 525 (2004).
- ⁵ *Id*.
- ⁶ See generally Ronald Dworkin, Law's Empire (1986).
- ⁷ See, e.g., Kathleen Thelen, How Institutions Evolve: Insights from Comparative Historical Analysis in supra note 1 at 217-222.
- ⁸ Oona A. Hathaway, Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System, 86 Iowa L. Rev. 101, 105 (2001).
- ⁹ Theda Skopcol, Doubly Engaged Social Science: The Promise of Comparative Historical Analysis, in supra note 1 at 415.
- 10 Id. at 417.
- ¹¹ South Africa v. Grootboom, 2000 (11) B.C.L.R. 1169 (CC).
- ¹² Amy Chau, The Paradox of Free Market Democracy: Rethinking Development Policy, 41 Harv. Int'l L.J. 287, 301–307 (2000).
- ¹³ James Mahoney, Strategies of Causal Assessment in Comparative Historical Analysis, in supra note 1 at 369.
- ¹⁴ Skopcol, *supra* note 1 at 423.
- 15 Id.
- ¹⁶ Stephen Holmes, *Lineages of the Rule of Law*, in eds., José Maria Maravall and Adam Przeworski, Democracy AND THE RULE OF LAW (2003).
- ¹⁷ See Barry Weingast, A Postscript to "Political Foundations of Democracy and the Rule of Law", in supra note 16 at 109.
- ¹⁸ Skopcol, *supra* note 1 at 416.
- 19 Id. at 415-416.
- ²⁰ Grindle supra note 4.
- ²¹ Id.
- ²² Thomas Carothers, ed., Promoting the Rule of Law Abroad: In Search of Knowledge (2006); Eric G. Jensen and Thomas C. Heller, BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO RULE OF LAW (2003); Balakrishnan Rajagopal, The Role of Law in Counter-Hegemonic Globalization and Global Legal Pluralism: Lessons from the Narmada Valley Struggle in India, 18 Leiden Journal of International Law 345–387, 348 (2005); Grindle, supra note.



EPILOGUE: AN OVERVIEW OF LAW REFORM IN THE ECONOMIC DEVELOPMENT CONTEXT

Yohannes Kassahun

conomic and social change requires adjustments to the rules that steer individual and institutional behavior. Policy makers responding to such changes initiate modifications of existing law and regulation and employ various enforcement devices to ensure that the enactments have normative force. Whether in advanced market economies, developing countries or post-Soviet East and Central European transition countries, the process through which such rules are developed may differ depending on historical precedent, political economy or existing social structures.

With the ascendancy of market economies during recent decades, virtually all countries have undertaken pro-market legal reforms to some degree. In advanced market economies existing laws were aligned to new market demands, while in developing countries, policy makers prioritized privatization of state run enterprises, which in turn led to complementary reform of existing laws (whether received during colonial periods or voluntarily adapted from more advanced economies). Despite numerous critiques in the early 1970s of legal transplantation as a failure, such approach was nevertheless employed on a widespread basis in the transition countries of East and Central Europe. Similar outcomes are broadly evident in transition and developing countries, and what follows will compare different approaches to local readjustment.

In advanced market economies the law reform process, in relation to the private provision of public services for instance, involved modifying provisions that governed key issues such as ownership and regulatory oversight of economic activity. The new rules reallocated property from public to private hands, revised government's role, and also introduced regulatory regimes that employed market mechanisms. Conflicts among actors and new institutions were addressed and managed through administrative and judicial institutions.² Such institutions ensured the implementation of legal reform.

In developing and transition economy countries, on the other hand, laws that were designed to establish and govern privatized entities were generally not supported by effective institutions, procedures for readjusting legal norms as needed, or systems for managing conflicts among interested actors. As a result, legal reforms typically yielded less favorable outcomes.³

To supplement the various chapters of this book that provide conceptual and empirical analyses of these reforms, I wish to contribute some insights IDLO has obtained on institutional strengthening and professional capacity development. Such understanding can contribute to the discourse on how to improve the effectiveness of reforms and propose areas for future research needed to understand how to avoid problems that have affected legal reformers in a variety of contexts.

INSTITUTIONAL FOUNDATIONS TO SUPPORT LEGAL REFORM

ne driver of legal reform in the economic development context is a desire among communities of development agencies, governments, and concerned citizens in the countries concerned to prevent prevailing social norms from undermining development prospects. The process of development may require societies to change or dispense with social norms that prevent needed economic, political or legal reform.⁴ It is this issue that will be my theme in this note. The existing norms rest on institutions that regulate and balance the interactions and behaviors of the individuals in society. Laws are an outgrowth a given social system and, as observed in the context of developed countries, legal reform in one sector tends to reflect reforms of interrelated institutions.

DEVELOPING MARKET ECONOMIES

In developing countries, legal reform has tended to involve application of legal models derived from advanced market economies. Such reforms are frequently laid upon existing traditional institutions that guide individual and institutional behavior. The underlying institutions, however, fail to guide the conduct proscribed by the new laws because they are frequently not aligned with prevailing societal concepts, beliefs, and customs. In Heller's description, such imported laws fail to reinforce existing legal institutions, strengthen traditional claims of court autonomy, or access to courts, which are necessary to enhance the ability of law

to penetrate social norms and institutions.⁵ Therefore, the laws remain alien to the underlying institutions and at best create an institutional superstructure that is governed by the new law, allowing the substructure of preexisting institutions and behaviors persist. For instance, many colonial laws that were intended to displace traditional norms of colonized peoples—including tribal, ethnic, or state organizations—were, in the course of struggles for independence, voluntarily adopted by post-colonial states. Yet such ratification of laws handed down by colonial administrations still had minimal effect on institutional and individual behavior. In Kenya, a recent study found that many laws applicable to commercial activities were in place in the 1960s after the newly independent government had readjusted colonial laws, but the impact of courts and the public administration on the direction of economic development was very limited.⁶

Some scholars have argued that post-colonial elites in leadership used the ratified laws to establish state enterprises that consolidated their power against the interests of the majority of the citizenry, rather than encouraging the development of competitive business organizations. Such laws formed 'exotic institutional transplants' without deep roots in indigenous soil. Others scholars have observed, instead, that the laws were ineffective because the market system was non-existent. Political institutions inherited from the colonial past led to continued 'immobilism' in contrast to the Weberian notion of bureaucracy as facilitating the development and maintenance of capitalist economies. For similar reasons, the movement towards liberal market economies that reduced the role of state institutions, through economic law reform, failed to generate impressive results. 10

The behaviors of patriarchal leaders in such countries can still be explained in part as the legacy of traditional norms in pre-colonial and pre-industrial societies. Although evidence of such phenomena is difficult to deny, it does not explain the ability of some societies to overcome such legacies as shown in certain 'islands of excellence', wherein market development occurs in discrete sectors despite the persistence of pre-capitalist social norms. Evans' studies on market development in India and Brazil finds some such 'islands of excellence' amid oceans of inconsistent and poorly executed decisions. In India, for instance, the result of such changes is the creation of a thriving market in the information technology field. 11 Similarly, law reform may also exhibit such 'island of excellence' at the lower end of the society. In a recent post-Tsunami legal assistance project undertaken by IDLO in Aceh, Indonesia, for instance, we found that the applicable law included a mixture of customary, Islamic and civil law that applied to different types of persons in different ways. Efforts to address problems of resettling displaced persons and develop rules on guardian, land and inheritance, involved government agencies, community representatives, and extensive awareness campaigns. 12 The guardian, land and inheritance rules were developed through consensus building among community leaders, relevant government agencies, and the public through a public awareness program. The process ensured that the rules were acceptable to the community as they were based on concepts not repugnant to their customary rules. Finally, institutions were designed to enforce the rules through building professional capacity to facilitate conflict resolution, involving NGOs and

ADR experts. These reforms are the basis for a system where individuals' property rights are secured through registration, access to justice is ensured through redesign of local concepts and institutions, and access to micro-financing provided through these changes. If successful, such reforms will facilitate a variety of economic interactions within the community, thus laying the initial foundation for market interactions. These lessons have two significant implications. First, such 'islands of excellence' should be carefully studied to inform future legal reform work. Secondly, notwithstanding their successes, islands such as these must be integrated into a national economic framework linked through legal instruments that establish threads between layers of economic activities and institutions. Experiments like South Africa's integrated community development and Malaysia's attempt to build a national economic framework by integrating disadvantaged groups into the national economy through successive law reform programs are potential models. As discussed below, a prerequisite for such reforms to move forward is professional capacity within the legal and juridical fields.

POST-SOVIET TRANSITION ECONOMIES

he systemic changes in Eastern Europe and former Soviet Union were characterized by massive importation of laws to create institutions and professional capacity capable of leading macro-economic reform strategies. The transplant of laws was undertaken to promote the rule of law and legal and institutional requisites of sustainable democracy and market economies. As with post-colonial reforms discussed earlier, however, many of the newly generated laws remained ineffective until a second set of adaptive reforms took place.

The Soviet era laws forced individuals and institutions to conform to a socialist economic and political model. Those laws however were imposed on legal systems that were generally influenced by Roman-Germanic law, including scholarly works and statutes deriving from French, German and Austrian legal systems. 18 Soviet legal reforms replaced these systems with socialist civil and constitutional law thereby subsuming the peculiarities of national legal cultures to the uniformity of the socialist system. After the fall of the Berlin Wall, that preexisting legal culture was believed to be the relevant legal tradition to guide the development of market economies. This view turned out to have been mistaken because it underestimated the degree to which individual and institutional behavior had become conditioned by socialist legal understandings. Traces of the pre-existing legal culture were all but extinguished in contrast to the very real presence of traditional norms in colonial and post-colonial societies. The coercive apparatus of the Soviet system was thus able to nullify pre-existing social and legal norms. Thus, while many states enacted new codes and laws in commercial areas, similar to those in advanced economy countries, their effectiveness required changes in institutional and individual behavior.¹⁹ It became clear that adopted economic laws require an institutional network and procedures to achieve satisfactory compliance.²⁰

The imported laws created a superstructure, while the underlying societal norms—conditioned by socialist ideology—continued to guide behavior. This discrepancy forced the re-adaptation of laws within the societal context of the respective countries.²¹ The laws were to be integrated into the societal norms to address major pathologies in new market-oriented societies. The reformed laws were meant to overcome the discrepancies between the policy orientation and the underlying conditions that reflected preexisting institutional and individual behavior. In Eastern Europe, the re-adaptation process was facilitated through the EU accession process. Such incentives may help these countries escape the consequences of the non-assimilation of the legal transplants seen in African and Middle Eastern societies.

PROFESSIONAL CAPACITY AND ORIENTATION

apacity and support for reform among legal, regulatory, and judicial professionals determine the extent to which imported laws become enforceable norms.²² While professional capacity building has been an important element of international rule of law promotion work, IDLO's experience suggests that in addition to the need to create a critical mass of skilled professionals, understanding of social norms that affect the orientation and allegiance of such professionals to the market system is imperative. Where social norms emphasize communal protection of the individual, professionals frequently must show allegiance to both professional and communal norms. Bates' description of the behavior of governing elites exploiting farmers through inefficient bureaucracies may be explained in part as a consequence of self-interest among the professional class, which may disadvantage the wider public still loyal to traditional norms.

Nevertheless, professionals and leaders, who are entrusted with developing market economies while working 'by the book', may continue to act in accordance with pre-existing socio-economic norms that emphasize communal ties. Ellis observes for example that market supporting institutions are 'imperfectly understood', and thus result in slow growth. The leaders' 'imperfect understanding' has roots in the cognitive dissonance experienced by professionals whose tend to behave in accordance with preexisting societal norms despite training they have received on imported laws that relate to institutions that promote market economies. These divergent social influences account for the frequent failure of institutions and civil servants in such contexts to meet the standard of Weberian bureaucrats characterized by meritocy and detached professionalism. Therefore the need for research in reforming laws should extend to the orientation of professionals towards the market so that the expected results can be achieved in integrating the pre-capitalist segment of the economies into the 'islands of excellence'.

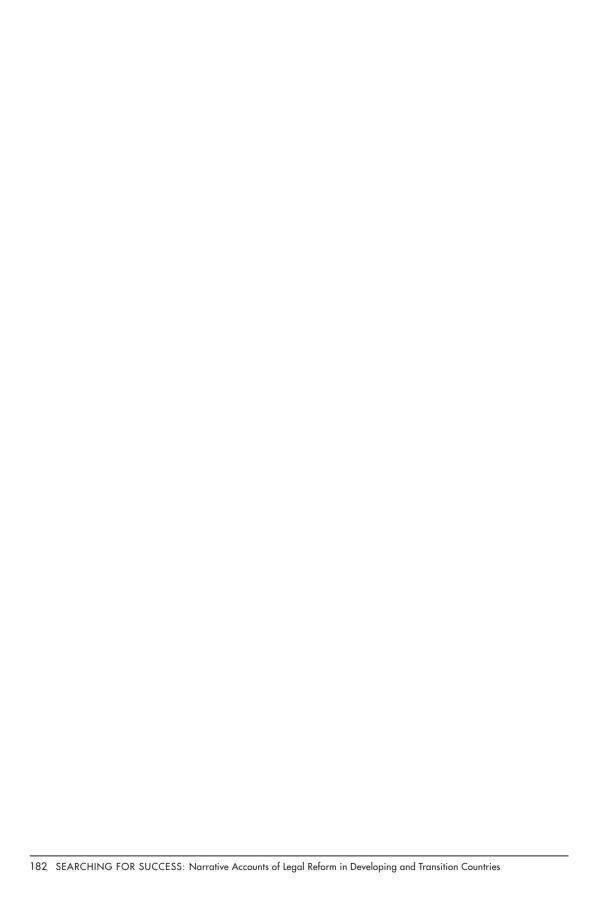
Where legal reforms to advance market institutions have met with limited success, the development of professional capacity that links the reformed laws to preexisting social norms can help to address problems of the application of the law. Further research is needed on particular stories

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such as the way Japanese communal behavior originating in rice patty settlements that promoted individual allegiance, work discipline and conflict management, while providing a social basis for Japanese corporate norms of informal conflict management, worker allegiance and discipline.²³ Capacity development that seeks to establish continuities with traditional social norms can ensure that laws, transplanted or local are effective. In this regard efforts to create 'integrated community development' within the national macro-economic development policies of South Africa may yield similar lessons. Finally, legal reform and technical assistance focusing on anti-corruption should reflect more on the duties of professional civil servants, in addition to creating formal instruments to sanction corrupt behavior. Such approach may help to address those contributors to corruption that arise from the continued prominence of personalistic ties and kin interests.²⁴ Likewise, the role of religion in contributing to the emergence of a work ethic and discipline in Weber's analysis of capitalist development should be further examined to identify the relevant ethical standards in the pre-existing norms that may contribute to the effort.

In sum, legal reform prompted by historical or global conditions requires several stages of re-adaptation, to minimize and overcome conflict with pre-existing legal or customary rules that govern individual and institutional behavior. Such conflict may retard economic development to the extent that many citizens remain outside the purview of the laws, become apathetic, or express resistance by turning back to extol the pre-existing norms that unsatisfactorily address current commercial and participatory governance demands. Therefore priorities in law reform should be building professional capacity and orientation within institutions that remodel imported laws and create new ones to address the economic development demands of a country.

- ¹ See John Nellis, Privatization in Africa: What has Happened? What is to be done?, Working Paper No. 25, Center for Global Development (2003) available at http://rru.worldbank.org/PapersLinks/Impact-Privatization-Competitive-Industries/.
- ² See generally Rothwell and Gomez, eds, Electricity Economics: Regulation and Deregulation (2003).
- ³ Berkowitz et.al., The Transplant Effect, 51 Am. J. Comp. L. 163 (2003); for an analysis of issues and problems in Africa, see supra note 1.
- ⁴ Roberto M. Unger, Law in Modern Society, 1976,145.
- ⁵ Thomas Heller, An immodest postscript, in Eric G. Jensen and Thomas C. Heller, BEYOND COMMON KNOWLEDGE: EM-PIRICAL APPROACHES TO RULE OF LAW (2003).
- ⁶ In insolvency law for instance, the weak capacity in conducting due diligence and slow court actions delimited the use of the law as a vehicle to restructure or remove ailing companies out of the competitive market and therefore affected the development of a vibrant commercial sector.
- ⁷ Robert Bates, Markets and States in Tropical Africa: The Political Basis of Agricultural Policies (1984).
- ⁸ Bratton, Peasant-State Relations in post colonial Africa: Contradiction of Power, in Joel Migdal et al. (eds), STATE POWER AND SOCIAL FORCES: DOMINATION AND TRANSFORMATION (1994).
- ⁹ Boone, States and Ruing Classes in Post-colonial Africa: the enduring contradiction of power, in Migdal, see supra note 8.
- ¹⁰ Joseph Stiglitz, GLOBALIZATION AND ITS DISCONTENTS (2002).
- ¹¹ Peter Evans, Embedded Autonomy: States and Industrial Transformation (1995).
- 12 IDLO, GUARDIANSHIP, INHERITANCE AND LAND LAW IN POST-TSUNAMI ACEH (2006) available at http://www.idlo.int/ documents/Guidebook%20PDF.pdf
- 13 Hernando De Soto, Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else (2001).
- ¹⁴ Department of Finance of South Africa, A Strategy for Delivering Public Services through Public Private Part-NERSHIPS (2000).
- 15 Asian Development Bank, Katerina Pistor and Phillip Wellons, The Role of Law: The Legal Institutions in Asian ECONOMIC DEVELOPMENT 1960-1995 at 18 (1998).
- ¹⁶ See Mistelis, A.L., Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform-Some Fundamental Observations, 34 International Lawyer 1063 (2000).
- ¹⁷ See a critical analysis, Waelde and Gunderson, Legislative Reform In Transition Economies: Western Transplants-A Short-cut to Social Market Economy status? 43 INT'L & COMP. L.Q 347 (1994).
- ¹⁸ Ajani, By Chance and Prestige: Legal Transplants in Russia and Eastern Europe, 43 Am. J. Comp L. 94 (1995).
- 19 Ibid. 108.
- ²⁰ Waelde and Gunderson, supra note13 at 360 ("It is delusional to believe that the formulation and enactment of foreign statutes will bring about the transition towards market economies desired. The fallacy is in thinking that legislation per se without an economic policy backed by social and institutional change, can be the lever for change. Laws become effective by social forces and pressures interested in and working for implementation").
- ²¹ Id. These are true in earlier transfers, for instance, Japan's received competition laws by the American post world war II, transition and German adoption of competition law forced by the American legal system, had local remaking and adjustment to the social and political outlook of the countries. supra note 13, at 361.
- ²² Law and legal institutions in Asia changed in response to economic policies. Rules adopted from the developed economy countries like securities and exchange commission rules, differed markedly from the original models. For details of re-adaptation, see Pistor and Wellons, supra note 15.
- ²³ F.K. Upham, Law and Social Change in PostWar Japan (1987).
- ²⁴ Roberto Unger, supra note 4 (1976).



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- Contributes to the establishment, progressive development and application of good governance and the rule of law in developing countries, countries in economic transition and countries emerging from armed conflict;
- Assists these countries to improve their negotiating capabilities in the fields of development cooperation, foreign investment, international trade and other international business transactions; and
- Promotes sustainable development through the maintenance and improvement of the legal and judicial systems of beneficiary countries.

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