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Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience

(Editor and Author: Mr. Livingston Armytage)

1.0 Introduction

The purpose of this book is to promote development of know-how and refinement of understanding of judicial reform through a critical reflection of actual experience across the Asia Pacific region.

Searching for Success gathers the emerging experience of judges, court administrators, lawyers and researchers engaged in judicial reform in a collection of case-studies that address many of the modern challenges of justice: exclusion, delay, corruption and incompetence. The collection focuses on the experience of practice, rather than theory, to develop insights which build from authors' learning from their work as judicial reformers. In each chapter, authors examine aspects of judicial reform and offer analysis of its strengths and weaknesses for the purpose of developing know-how for readers. Learning by doing; success is sometimes is qualified. This book provides a wealth of experience and insight to adapt and use across the region.

Analysis of this experience indicates the existence of ten themes, or overarching challenges, which have confronted the passage of judicial reform over recent years. These challenges are often interrelated and in any particular context may warrant consideration in a variety of configurations. For the purpose of this introduction they may be described as relating to goals, leadership, independence, capacity for change, training, integration, community, donors, data and results. In essence, this experience suggests that from the outset there is a need for a clearer refinement of purpose to untangle the existing conflation of goals, some of which are over-ambitious and may conflict with each other. This will then enable tighter linkage with and a sharper focus on development results. This, however, rests on a more serious investment in data, research, performance monitoring and evaluation by donors to guide ongoing endeavours.

The experience contained in this book provides a number of useful lessons. Ultimately this experience suggests that it is the nature and quality of leadership which is critical to the success in judicial reform. Invariably, authors find the proactive leadership of the judiciary to be central to success in their reform endeavours. Moreover, home-grown leadership - epitomised in the Indian experience - builds ownership and co-opts the participation required for sustaining change. The quality of this leadership is however critical, and requires the judiciary to build relationships with other reform stakeholders in the executive, community and with donors, each of which requires nuanced management. Integrating judicial reform initiatives with higher-level national planning may now be recognised as essential for effectiveness, yet this calls for collaboration, proximity and engagement with the executive that, at first glance, may sit uneasily with more traditional notions of independence. Calibrating appropriate

proximity with the executive requires considerable sensitivity. Similarly, it is not always easy to engage closely enough to the community to hear its needs, while differentiating the needs for even-handedness and insulation from the lobbying of interest groups. Perhaps most challenging, is balancing the relationship with donors who, on the one hand, have a legitimate interest to facilitate reform yet, on the other, risk subsuming local ownership of its agenda.

2.0 Reform context

Judicial reform is important because it is concerned with improving the quality of justice. Justice, embodying fundamental notions of fairness and equality, is elemental to social wellbeing and lies at the foundations of human civilisation.[1]

Over the past fifty years, in particular, recognition of the significance of this reform has grown. The field of judicial reform in international development assistance has developed substantially and rapidly in various iterations. Commencing with the reconstruction of post-war Europe, judicial reform contributed to the 'law and development movement' of international assistance in Latin America in the 1960s and 1970s. It then played a significant role during the Washington Consensus-era of support to market economies in post-soviet bloc during the 1980s and 1990s. Judicial reform has more recently spread in what has been termed 'the rule of law revival' across the developing world to Asia and the Pacific as a means to promote human rights, good governance and poverty reduction.

The development rationale for judicial and legal reform has been variously conceptualised across this period to include promoting economic growth by strengthening legal frameworks to secure market dealings; building governance and democracy through the rule of law and judicial independence; consolidating the capacity of state institutions to provide public goods, notably public order, safety and security; and reducing poverty by increasing empowerment, human rights and access to justice. For these reasons - economic, political and social - policy-makers and development agencies have seized on the rule of law as what one commentator has describes as "*…an elixir for countries in transition…*" because it promises to remove the chief obstacles on the path to democracy and market economics.[2] Judicial reform, a core element of the rule of law, has become a big business, supported by numerous multilateral and bilateral donors in hundreds of programmes and projects of steadily increasing size which are now valued in billions of dollars.[3]

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[1] See, for example: Aristotle, 'Politics' (1958) Barker E, Editor, *Oxford University Press, Oxford*. Also, 'Nicomachean Ethics' (1955) Trs Thomson J, *Penguin, London*; among others.

[2] Carothers, T, 'Promoting the Rule of Law Abroad: In Search of Knowledge' (2006) Carnegie, Washington DC, 7. It would be an oversimplification to categorise major players, notably the World Bank, as traditionally promoting economic growth, USAID as promoting criminal justice and democracy, and UN agencies as promoting human rights, as these objectives are invariably conflated and, it may be argued, confused.

[3] *The World Bank* has increasingly come to recognise that the judicial system plays an important role in the development of market economies, and justice sector reform has emerged as both a priority development goal in recent international declarations and as one of the four pillars of development in The World Bank's Comprehensive Development Framework. The World Bank has financed more than 1,300 legal and judicial reform projects. From 2001 to 2006, worldwide lending for law & justice

Despite the evident importance of, and substantial growth in, judicial and legal reform over recent decades, a review of the literature shows that there are strongly mixed views on the results and effectiveness of these endeavours. There is evidence that suggests that levels of procedural or what is sometimes called 'thin' reform can clearly be demonstrated in practice - as, notably, demonstrated in chapter 2 in improving the efficiency of court procedures in Manila and Jakarta, respectively.[4] Whether less court delay causes substantive improvements in justice or good governance is however another matter. Some argue that attainment of these higher level substantive or 'thick' goals remain disturbingly elusive.[5]

With the growth of reform endeavours have come a mounting disquiet about aid effectiveness and what one commentator describes as the spotty performance of reform efforts and its elusive and disappointing results.[6] Jensen describes the story of judicial and legal reform as one of modest successes and frequent failures. He goes on to highlight significant gaps between theoretical understanding of legal systems and of project design and implementation that calls for greater appreciation of the complexity of political economy in reform endeavours.[7] Effectiveness has been patchy and limited at best, with little compelling evidence of any discernible contribution to reducing poverty or other development goals. Over the past decade, this has lead to a mounting re-examination of the purpose, approach, methodology and results of the prevailing approach to judicial reform, as is documented in the first chapter. Other authors address a variety of these concerns throughout the collection.

This lack of visible results is attributable to the existence and combination of two deficiencies. The first deficiency may exist in *development practice* which relates to the need to refine objectives, development logic and implementation strategies to improve the linkage between purpose and results. The second deficiency may exist in *evaluation practice* which requires increased investment in improving performance data, monitoring and evaluation. Many observers comment on near

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and public administration increased from $3.9 billion to $5.9 billion. In the same period, worldwide thematic lending for 'rule of law' projects also rose, from $410 million to $757 million. In this writer's personal experience, six current projects alone are worth $600m. Asian Development Bank's *Access to Justice Loan* is valued at $350m. AusAID is presently conducting a law and justice reform programme in Papua New Guinea valued at around $150m. USAID has two law and justice initiatives in Cambodia valued at around $40m, and similar amounts in Afghanistan.

4 See, for example: Bhansali, L, and Biebesheimer, C, 'Measuring the Impact of Criminal Justice Reform in Latin America' in Carothers T, 'Promoting the Rule of Law Abroad: in search of knowledge' (2006) *Carnegie, Washington DC*, 301-323, 306. Also, Hammergren, L, 'Latin American Experience with Rule of Law Reforms and its Applicability to National building Efforts' (2006) *38 Case Western Reserve Journal of International Law* 63.

5 Carothers, T, 'Promoting the Rule of Law Abroad: In Search of Knowledge' (2006) *Carnegie, Washington DC*; see also: Carothers T, 'The Rule of Law Revival' *Foreign Affairs*, 1998, 95-106; Messick R, 'Judicial Reform and Economic Development: a survey of the issues' *The World Bank Research Observer*, 14,1, February 1999, 117-136; and Trubek, D, and Santos, A, 'The New Law and Economic Development: a critical appraisal' (2006) *Cambridge UP, New York*.

6 Jensen, E, 'The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses' in Jensen, E, and Heller, T, 'Beyond Common Knowledge: Empirical Approaches to the Rule of Law' (2003) *Stanford University Press*, 345+.

7 Ibid, 364/5.

absence of rigorous systematic evaluations, which one describes as disturbing.[8] It is not yet altogether clear whether this spotty performance relates to a lack of results or to a lack of reliable evidence of results.

Within this context, the experience outlined in this book will illuminate and provide insights on this concern for effectiveness. Authors analyse their experience in terms of its purpose, nature, method and effectiveness. This analysis in turn stimulates and provokes reflection on the justification of reform approach and a timely reassessment of the robustness of its theory.

3.0 Searching for a theory

A brief review of the literature indicates that there are in essence two competing schools of development thinking, or theories, of judicial reform. The first and prevalent school comes from the economic domain, defined by legal and economic philosophers who see the role of the state as being to support the market by providing key institutions such as courts to secure investments and property rights and to adjudicate commercial disputes.

Seminal to the formulation of this approach has been the work of Max Weber, which established the key developmental propositions that modern legal doctrines of property and contract enforced by a politically independent and technically competent judiciary are the best means of managing the risks of transactions with strangers. These propositions have become foundational to the economic justification in promoting courts as key institutions of the state to protect the market. Weber saw the state as being the polity which possesses a monopoly on the legitimate use of physical force, and defined law as a precondition for modern political development. In his view, law and justice are assigned central roles in development because they provide the necessary certainty and predictability essential for entrepreneurs to pursue what he described as the 'profit-making enterprise.'[9]

More recently, Douglass North build on this work to propose that economic performance hinges on institutions, such as functioning courts of law, that protect property and contractual rights. He defines institutions as 'the rules of the game' in a society that structure the human environment in order to reduce uncertainties in interaction. This thinking provides the theoretical justification for framing the instrumentalist approach to judicial reform as a neo-liberal strategy for poverty reduction through market liberalisation, enterprise privatisation and state deregulation which has characterised the approach of the World Bank, IMF and related agencies over recent years.[10]

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[8] Hammergren, L, 'Use of Empirical Research in Refocusing Judicial Reforms: Lessons from 5 Countries' <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/usesOfER.pdf> (30 July 2008); and Hammergren, L, 'Reforming Courts: The Role of Empirical Research' *PREM Notes*, March 2002 <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/premnote65.pdf> (30 July 2008) Hammergren argues that a core challenge for legal and judicial reform is to improve knowledge management, specifically the empirical rigors of diagnostics, monitoring and evaluation and research.

[9] Weber, M, '*On Law in Economy and Society'* (1954) Harvard UP, Cambridge Mass.

[10] North, D, '*Institutions, Institutional Change and Economic Performance'* (1990) Cambridge University Press; among others.

A number of respected practitioners argue that this approach has brought about significant improvements to the courts through the provision of technical assistance, infrastructure and information technology. Christina Biebesheimer, for example, argues that on the weight of this evidence, it is possible to measure some positive changes made by criminal justice reforms to a variety of due process indicators - for example, preventative detention, speed of trials, and structural reform through lawmaking and organisational change.[11] Linn Hammergren agrees on the contribution of technical assistance, which she classifies as including changes to laws and procedural frameworks; measures to improve access to the poor; creation of new organisations, such as public defence, human rights ombudsman and anti-corruption offices; case-flow management, and so on.[12] Judicial reform often coexists with legal reform, and makes up a package of three core components involving: changing substantive laws; focussing on law-related institutions; and addressing the deeper goals of governance compliance with the law, particularly in the area of judicial independence.[13] Many donors have focussed on making formal judicial institutions more competent, efficient and accountable, as we see from the experiences in chapter 5, training judges in Kathmandu and Phnom Penh, and the building of accountability mechanisms and practices recounted in chapter 4, respectively.

The integrity of this theoretical approach has however come under challenge from scholars, such as Ha-Joon Chang who interrogates the role of institutions including the judiciary, law and property rights in promoting economic development and good governance. He argues that the correlation between economic development and institutional variables is unclear let alone causal, and concludes that it is historically more accurate to see these institutions as the *consequence* rather than the *cause* of economic development.[14]

Mounting concerns over the prevailing approach to judicial reform are building around the lack of compelling evidence that it achieves its goals, usually to promote justice or help the poor. Thomas Carothers, for example, critiques the practice of what he describes as 'the rule of law revival' as lacking a well-grounded rationale, any clear understanding of the essential problem and a

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[11] Biebesheimer, C, (now senior counsel at the World Bank but then of the IADB) and Bhansali, L. 'Criminal Justice Reform in Latin America' in Carothers, T, '*Promoting the Rule of Law*' (2006), Carnegie, DC, 301+, at 312.

[12] Hammergren, L, 'Latin American Experience with Rule of Law Reforms and its Applicability to National building Efforts' (2006) 38 *Case Western Reserve Journal of International Law,* 63.

[13] Jensen, E, above n. 6, 348.

[14] Chang, H, 'Kicking Away the Ladder: Development Strategy in Historical Perspective' (2002) *Anthem, London*; see also: Polanyi, K, 'The Great Transformation: The Political and Economic Origins of Our Time' (1944) *Farrar & Rinehart, New York,* 43; and Boston: Beacon 2001. Polanyi analysed the economic history of nineteen and twentieth century Europe to discern a pendulum movement from tightly-regulated to deregulated market economies reflecting policy movements driven by shifts in sentiment over the relationship between the state and the market. The Great Transformation was an inevitable consequence of adopting a pure market economy because of its harsh and unacceptable consequences. While this vision may not be shared by all economists, it illuminates the perpetual tension between state and market, and the historical trend to self-correction, which provides an explanation for economic development that transposes more transient theory-making, most recently expounded in the Washington Consensus neo-liberal mantra for deregulation, free trade and privatisation.

proven analytic method. In essence, the rule of law makes possible individual rights which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy, such as property rights and contracts are founded on the law and require competent third party enforcement. And herein lie the seeds for the conflation, confusion and collision of economic and political rationale for reform practice.[15] Erik Jensen and Thomas Heller, and others, support these concerns and call for a renewed approach based on increased empiricism to understand what courts and their alternatives actually do.[16] Some of these concerns are raised in the review of global experience in the first chapter.

Most recently, an alternative theory is emerging to providing a more defensible justification and approach for judicial and legal reform. This approach is grounded in the thinking of Amartya Sen, who sees the role of development as providing capacity to the poor, people who have rights to opportunity. Sen argues that development should be seen as a process of expanding the real freedoms and rights that people enjoy. In his critique of what he describes as the more traditional rationale for development economics, Sen argues that development requires the removal of major sources of 'un-freedom': poverty as well as tyranny; poor economic opportunities as well as systematic social deprivation; neglect of public facilities; as well as intolerance or over-activity of repressive states. Focussing on real freedoms contrasts with the prevailing narrower views of development which measure development with the growth of gross national product, the rise of personal incomes or social modernisation. Sen sees justice as fundamental to the creation of social opportunities and the expansion of human capabilities because it contributes directly to the quality of life; and it links closely with his view of the state's role to supply public goods such as health, education and effective institutions for the maintenance of local peace and order.[17] This alternative theory for judicial reform is already becoming influential and, for example, impels the reform endeavour to improve access outlined in chapter 3.

As we can see, this view of development builds from the foundational notion of justice articulated by Aristotle and, more recently, the work of John Rawls who is most significant for current purposes for his theory of justice that expounds the concept of justice as fairness.[18] Rawls builds his work on the tenets of social contract theory, formulated on the work of Locke and Rousseau among others**,** to describe the implied agreements by which citizens conform to establish the social order which provides the foundation for state authority and establishes the theoretical groundwork for democracy. He argues that the principles of justice

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[15] Carothers, T, 'Promoting the Rule of Law Abroad: In Search of Knowledge' (2006) *Carnegie, Washington DC*; among others.

[16] Jensen, E, and Heller, T, 'Beyond Common Knowledge: Empirical Approaches to the Rule of Law' (2003) Stanford University Press.

[17] Sen, A, 'Development as Freedom' (1999) *Random House, NY*; among *many* others.

[18] Rawls, J, 'A Theory of Justice' (1971) Revised Edition (1999) Oxford University Press; Rawls, J, 'A Theory of Justice' in Arthur, J, and Shaw, W, (eds) 'Justice and Economic Distribution' (1978) *Prentice-Hall, Englewood Cliffs NJ*, 18-52; Rawls J, 'Justice as Fairness: A Restatement' (2001) *Cambridge, Massachusetts: Belknap Press*.

form the basis of society and are the object of the original social contract. [19] The central notion of justice as fairness is based on people in what he terms the 'original position,' shrouded in a 'veil of ignorance,' who are motivated by rational self-interest to collectively maximise greatest opportunity to accomplish the good life by reference to principles of equal basic liberties. Justice as fairness rests on two principles, the first requiring equality in the assignment of basic rights and duties, while the second holds that social and economic inequalities, for example, inequalities of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society.[20]

Rawls' normative approach to 'rights' is foundationally important in providing a contemporary notion of justice that links to the previously separate discourse on human rights which is formulated in the work of Sen.

There is now inquiry beyond the 'rule of law revival' to develop this alternative thinking. Stephen Golub argues that rule of law reform is unlikely to produce changes that will contribute to a better life for significant numbers of people in developing societies. He characterises this traditional approach, which is commonly adopted by multilateral development banks, as being 'top-down' and institution-centric. He sees this approach as flawed and incomplete, and proposes an alternative that concentrates on legal empowerment of disadvantaged persons, which builds on Sen's capabilities approach to focus on civil society as the best route to strengthening the legal capacities and power of the poor.[21] Other examples of initiatives to operationalise Sen's freedom-centred alternative approach to judicial and legal reform are being variously developed in the emerging '*access to justice'* approach of the United Nations, and the '*justice for the poor'* approach of the World Bank. A new wave of judicial and legal reform endeavours are now extending to more pluralistic approaches to justice, informal systems and customary pathways for community-based dispute resolution. Most recently, David Trubek and Alvaro Santos crystallise this emerging body of new inquiry as a 'Third Moment,' which is still in a formative phase. This inquiry contains a mix of different ideas for development policy and considerable experimentation in approaches to explore reform in the informal sector, non-legal normativity, the role of the enabling state and non-state actors in development, and rights-based empowerment approaches.[22] Of potentially

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See, in particular, Locke and Rousseau: Locke understood the social contract as preserving the natural rights to life, liberty and property and the enjoyment of private rights; the right to own property is seen as a basis of modern capitalism. He advocated limited government to maximise individual liberty. Locke, J, 'Two Treatises on Government' (1690) <http://oregonstate.edu/instruct/phl302/texts/locke/locke2/locke2nd-a.html> (1 May, 2008); see also: Rousseau, JJ, 'The Social Contract - or Principles of Political Rights' (1764.) <http://ebooks.adelaide.edu.au/r/rousseau/jean_jacques/r864s/book1.html> (1 May, 2008)

[20] This is the so-called 'difference principle' with the first principle having priority over the second, and the first half of the second having priority over the latter half. Rawls, J, 'A Theory of Justice,' in Arthur, J, 'Justice and Economic Distribution' (1978) *Prentice Hall, Englewood Cliffs NJ*; and Rawls, J, 'Justice as Fairness' (1985) *Philosophy and Public Affairs*, 14, 3, 223-251, 227.

[21] Golub, S, 'Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative' (2003) *Carnegie Working Papers*, *Carnegie Endowment, Washington DC,* 43.

[22] Trubek, D, above n. 5; Sage, C, and Woolcock, M, 'Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries' (2005) *World Bank*, 28; and Adler, D, Porter, D, and Woolcock, M, 'Legal Pluralism and the Role of Interim Institutions: Challenges and Opportunities for Equity in Cambodia' (unpublished draft, 25 April 2007.)

great significance, this 'third moment' presages a new scrutiny of the distributive dimensions of judicial reform, which have largely been overlooked in the earlier instrumentalist approach to supporting economic development.[23]

This is an exciting time for reappraisal of approach. This is becoming apparent in the literature, where commentators are refreshing our understanding of the theory for judicial and legal reform. This is a dynamic and healthy process which continues to evolve. For practitioners in the field, however, the key issue is not so much the existence of this theoretical discourse, sometimes truncated to 'top-down' versus 'bottom-up' approaches, but ascertaining how it will be resolved. The actual experience of practitioners from across the region provides a most timely contribution to refreshing our understanding of judicial reform by creating a bridge between theory and practice, enabling theory to inform practice and practice to refine theory.

4.0 Experience of practice - the contributions

The authors who have contributed to this work offer a sizeable body of case-studied experience and a substantial body of reasoned analysis with which to test, apply and continue to build our understanding of reform endeavours to promote justice across the region.

4.1 Development and implementation of reform initiatives to ensure effective judiciaries

In a ground-setting conceptual overview to open this collection, Dr Mohan **Gopal,** Director of the National Judicial Academy of India and formerly of the World Bank, surveys the global experience of judicial reform over recent decades to observe that little consensus exists on the purpose or success of these endeavours, and to note increasing calls for a fresh approach. To address these calls, he marshals a number of lessons from the international judicial reform experience. He illustrates these lessons with a case study on India's experience, which has had a marked impact on improving the administration of justice that compare favourably to the international experience, with a view to improving this reform initiatives throughout the region.

The paper highlights that judicial reform programmes be home-grown and internally-driven, with a significantly minor role for external donors. Reforms have been developed to enhance justice, adopting what he terms a justice-orientated approach. In this approach, justice is seen not in a traditional manner as, for example, the description of a just decision made by a court. Rather, justice is understood as a standard of human existence in which human conduct conforms to acceptable normative standards which comprise freedom, equality, dignity, equity and fairness. Dr Gopal offers, as an example, gender justice that exists not merely when a court renders a decision upholding equality for women, but

[23] Kennedy D, 'The Rule of Law, Political Choices, and Development Common Sense' (2006) in Trubek, D, above n. 5, 95-173. Kennedy argues that development strategy requires a detailed examination of the distributional choices effected by various legal rules and regimes to determine, as best one can, their likely impact on growth and development, 172.

rather, when women actually experience and enjoy equality because human conduct towards them conforms to standards of equality prescribed by law.

Thus the goal of the judiciary and, thereby, of judicial reform initiatives, should be to secure human conduct consistent with acceptable normative standards. These, he proposes, are the standards of conduct required in international treaties and in generally accepted principles of international law. To achieve this goal, the content ('what') and methodology ('how') of judicial reform programmes need a new approach that addresses six critical variables, which he describes as the '*judicial reform hexagon*.' These variables include the role and responsibility of courts, organisational efficacy, knowledge of law, judicial method, management systems of courts, and access to justice. A most important consequence of this approach in India has been the emergence of public interest litigation that has had a profound influence not only on the judicial system but also on the course of national development, at large.

India offers an example of a distinctive approach to judicial reform - one that has sought to transform its colonial adjudicatory system to a system that serves a democratic polity and a market-oriented economy. Dr Gopal argues persuasively that the core function of the judicial system is to secure justice rather than, for example, merely settling disputes fairly, efficiently and promptly as an end in itself. It follows that the effectiveness of judiciaries should be defined and measured on the basis of their effectiveness in fulfilling the core goal of securing justice.

Dr Gopal showcases this experience to show that justice-oriented judicial reform which secures 'just' human conduct also enhances public confidence in the judiciary.

4.2 Case management and delay reduction

In chapter 2, Ms. Zenaida N. **Elepano**, Court Administrator and Head, Department of Court Management, PHILJA, Supreme Court of the Philippines, reviews the experience of the ***Philippines*** in administering judicial caseload and addressing the problems of delay, which have beset courts around the world. In what may be termed a paradigm shift in judicial leadership, she describes the transformation to a more interventionist style of judicial management since 2003. The paper evaluates the experience implementing a variety of differential case management techniques, calls for greater investment in, and a more integrated approach to information gathering and management processes, and advocates for the introduction of technology to be considered from as early as day one of a reform programme.

This paper demonstrates that caseflow management can work and is effective in reducing delay in the disposition of cases, but "*…only if the court is genuinely committed to see that all the events or stages of the case happen within the designated time frames so that undue delay is averted*." What makes up this genuine commitment? The author portrays the court as a learning institution, steadily lead from the top, committed to critically monitoring its progress and

constantly refining its approach as it goes. In particular, sustained leadership is required to manage the human dimensions of the change process without which the desired change will be resisted. She recounts that resistance to change was encountered from older judges, court personnel and litigants who found adjusting to the new timeframes difficult, causing complaints of burn-out and stress. Many of these concerns ultimately transpired to be based on misunderstandings that were redressed through more participatory planning and communication. So, coupled with leadership are other useful lessons: on the needs for clear communication of purpose, providing incentives and sustaining the motivation of key actors, monitoring progress closely and regularly providing information on results, and adjusting approach as required. It goes almost without saying that such reform endeavours demand vision, focus, time and attention to be successful.

Resuming judicial control of the pace of adversarial litigation from the lawyers has restored predictability of case events occurring as scheduled and disposal within reasonable timeframes, though it was clearly not an easy transition. Ms Elephano observes that this resumption of judicial control has enhanced trust and confidence in court processes which are now seen to discharge their adjudicative functions in a fair and timely fashion. While elimination of delay does not necessarily result in speedy justice, she argues that it does publicly signal that the courts are no-nonsense tribunals that mean business, and does encourage court users to seek relief free from the anxiety and fear of protracted, unpredictable and expensive litigation.

Central to the Filipino experience, the case management approach has focussed on delivering timely justice by using a rights-based approach, where procedural law is used as a case management tool for the attainment of substantive justice. Ultimately, she argues, the goal of case management in any conflict resolution endeavour is to see that justice is done and attained within a reasonable time and in a fair manner. If procedural law hinders or prevents justice, then it should be disregarded or altogether discarded. In this sense, the Philippine experience is testament to a purpose-driven, (that justice is attained) rather than a rule-driven approach.

The next paper is written by Deputy-Chief Justice Dr Paulus **Lotulung** of the Supreme Court, Mr. Aria **Suyudi** of the Centre for Law & Policy Studies and the Judicial Reform Team, who analyse the ***Indonesian*** experience of case to redress the problems of chronic delay, and offer a number of practical lessons for readers across the region. During this period, the Supreme Court has succeeded in reducing its backlog of aged cases (defined by the court as all cases of more than two years from registration) by almost 35%. Prominent from this experience are three keys messages. First, for case management to be successful, a dual strategy for backlog reduction and new case management procedures is required. These must address the problems of accumulated backlog and the causes of ongoing delay simultaneously; only in this way will backlog not reoccur as soon as the last intervention has finished. Adding resources is not sustainable; what is required is implementation of procedures that manage the passage of cases effectively from the outset.

Second, case management can - and should - be simple and cost effective. While it may be inevitable for courts which have many cases to need computer-aided systems and information technology (IT) to effectively manage high volumes of case data, the Supreme Court of Indonesia demonstrates that IT-based solutions do not need to be sophisticated. The court successfully used a generic spreadsheet application, such as Microsoft Excel, to improve its capacity to manage case information. The court intentionally selected this approach to manage a significant internal transition process in an environment of limited resources because it was sustainable and avoided becoming chronically dependent on external consultants requiring funding through donor-assistance.

Third, information management is the foundation for case management. The Indonesian experience demonstrates that accurate information is an essential prerequisite to establishing any effective case management approach for any court. Introducing an information management system provides reliable data on which judges can understand the actual logistics of service delivery - possibly for the first time. It identifies delay which then becomes a visible symptom of institutional inefficiency that can be redressed. It also enables timely monitoring of the court's performance in attaining its time standards and addressing delay reduction goals, on which refinements can be made. In any effort to reduce backlogs, improvements in case management must be a high priority. It is interesting to note that the authors attribute much of the success to date to the culture change in judicial attitudes which has resulted from the regular communication of detailed information on court performance. This has provided judges with an incentive to perform well in comparison with their colleagues. They now expect detailed information on the exact distribution and age of cases, and have more recently starting to use this information as a monitoring tool in the management of their lists. Showing the tangible benefits of reform initiatives, they conclude, encourages further organisational change.

Fourth, the Indonesian experience also affirms the critical existence of judicial leadership and the contribution of stakeholder participation in the reform process.

4.3 Promoting access to justice through judicial reforms

In chapter 3, Ms. Anita **Jowitt,** a lecturer-in-law at the University of the South Pacific and a reform practitioner, presents two case-studies of the experience of courts in ***Vanuatu*** to improve the access of marginalised groups to exercise their legal and customary rights. The first examines the courts' response to improving access for women suffering from violence in the home; the second examines the courts' response to improving access for those living in rural areas by renovating the island court system and introducing a customary lands tribunal. These reforms have met with varying success, from which a number of useful messages may be drawn.

Most important, this experience demonstrates that judges can seize the initiative as reform leaders by proactively improving the operation of the courts. This need not be confined to a reactive role. Moreover, judges can adopt a broader standard-setting role that extends beyond the courtroom to society when so

warranted. As Ms Jowitt observes, creating the climate for judges to see that leading this change was a legitimate judicial role was critical, as was promoting ownership of the process at large. Changing the operation of the courts to make them easier to use by marginalised groups can then influence, support and flow-on to leading changes in other areas of society. The study on domestic violence protection orders, in particular, offers a powerful example of how the judiciary can initiate feasible change that promotes the exercise of legal rights, even in the face of a parliament that may be reluctant to implement laws that protect women.

Essential in any strategy to improve access to justice is the involvement of the community, starting by listening to the voices of those directly affected. Not only is the community central to identifying the problems and developing solutions, it is also critical to sustaining implementation and monitoring results. The Vanuatu experience indicates that active participation in the change management process is critical for success. Judicial ownership of the new approach to domestic violence ensured the successful introduction of new court rules, but the non-participation of police caused misgivings and created obstacles in the enforcement of their orders.

Similarly, suspicion greeted separate efforts to develop the customary land tribunal. Many resisted its implementation as it was seen as being externally-imposed and, consequently, widely distrusted as a mechanism to weaken community control of the culturally sensitive issue of resolving customary land disputes. The lesson of these experiences suggests that stakeholders must be centrally involved as reform partners and have a real sense of ownership in developing access to justice solutions.

The nature and extent of home-grown initiatives and local-ownership in both harmonising and integrating customary and formal justice systems have been critical factors in the success of judicial reform endeavours in Vanuatu, where there is a latent risk of collision between those systems. In this sense, successful change has been demand-driven jointly by the judiciary and the community. The experience rehabilitating the island courts by appointing influential local leaders as judges is instructive of how the state court system can work more closely with non-formal dispute resolution mechanisms; not only did this avoid the erosion of traditional authority, but it positioned the formal and informal justice systems to complement each other with the effect of enabling more people in remote communities to access the courts to uphold their rights. Other factors key to success included the extent of public consultation and training, and the selection of court clerks who exercise a key 'gatekeeper' role and have proved essential in promoting public accessibility in day-to-day operations.

Ms. Ayesha **Dias**, a legal reform consultant and academic, then argues that promoting access to justice in the national/regional context is a key task of judicial reform, mandated by the *Manila Declaration for a 21st Century Independent Judiciary*. She considers the experience of two case studies of rights realisation in ***India*** and access to justice in ***Sri Lanka*** to demonstrate that judges are uniquely placed to proactively enable human rights at the national level by applying the standards contained in international human rights treaties.

The Indian and Sri Lankan experiences underscore that providing 'access to courts' may not be a sufficient measure by itself to secure access to justice for all. Drawing in particular from the experience of social action litigation (SAL) in India, the author highlights the need to ensure that reform measures aim at both improving *access to* the courts as much as measures improving access to justice *through* the courts. The experience with SAL goes a step *beyond* public interest litigation as discussed in Mohan Gopal's paper. It is more orientated towards enhancing justice, and goes further to envisage social action by victim groups together with civil society and the courts to bring about reform through implementing the orders and directives issued by the courts, applying human rights standards in litigated cases. It requires the justice *system as a whole* to be reformed to enhance the ability of courts to secure accountability of power-wielders.

Such reforms may take the shape of a formal process, carried out in a phased manner or else, as the Indian experience shows, it may be initiated through judicial activism and support from civil society. Driven by apex courts issuing a number of judgments against governmental actions, she points out that SAL has filled gaps in the legal framework and expanded the concept of right to life under the Constitution to include the right to fresh water and air, the right to a clean environment, the right to education, the right to shelter, the right to health, the right to free legal aid, and the right to speedy trial and justice. This Indian experience, in combination with an outlook of judicial activism within the existing constitutional structure, has made significant contributions to enhancing access to justice. This has lead to an enhanced perception and effect of the rule of law, which may serve as a persuasive approach for judges elsewhere in the region.

Many authors in this collection observe the importance of judicial leadership in championing the reform process. Ms Dias adds an additional dimension to these observations to stress the role of other participants external to the courts and their contribution to strengthening the sustainability of the reform process through the pressure of their advocacy. She highlights the value of civil society groups forming coalitions with the courts to improve access to justice. In this sense, 'top down' national or regional level reform measures can be complemented from the 'bottom-up' to address specific local needs.

4.4 Ethics, integrity and judicial accountability

In chapter 4, Mr. Hari **Phuyal,** an advocate to the Supreme Court of Nepal and lawyer to the International Commission of Jurists, Kathmandu, discusses ***Nepal's*** recent experience in strengthening judicial integrity and accountability, in particular, through the establishment of a judicial council. This is a positive and important step towards ensuring the independence and accountability of the judiciary, which he commends as a substantial achievement. It provides the judiciary with a mechanism to address unethical conduct as much as protection from arbitrary interference from the executive during a transitional period of massive constitutional and political change.

While it remains premature to fully evaluate this experience, the author offers a number of observations. Perhaps most important, the introduction of institutions like the Judicial Council will not be effective in themselves without sustained support for implementation measures. Creating new institutions, however mandated, is inadequate so long as credible reports of corruption in the judiciary persist. In this sense, Mr Phuyal argues, Nepal is still struggling to fully realise the potential of the new judicial council. He identifies a number of steps to be taken to complete the reform agenda and operationalise this judicial accountability mechanism. Significant among these are the streamlining of complaints procedure, and extending the training to judges, court staff and the public. But further training alone is insufficient. Additional steps include sustaining visionary leadership, establishing a full-time secretariat and staff and building its professional capacity, adoption and implementation of codes of conduct, expansion of supervisory jurisdiction to include court staff, broader law reform and practical corruption control measures, developing standard operating procedures and practices including formalising the decision-making process, improving coordination across the justice sector, and fully embracing transparency as the basis for accountability.

In effect, the Nepali reform experience demonstrates the need for a more integrated and comprehensive reform agenda, one that is iterative and amenable to ongoing refinement. This, in turn, calls for recognition that effective change requires both planning and time for all steps to be completed, and raises the need to constantly monitor and refine the implementation approach to ensure attainment of its objectives. In Nepal, he observes, it takes time to develop lessons learn and set-up workable concepts and mechanisms - as elsewhere, we might add. These observations need the ear of international donors who fund the establishment of worthy institutions such as the judicial council but then, all too often, move on to other matters and abandon them to struggle unsupported through the critical challenges of implementation. Why this happens is understandable, even unavoidable, within the project-based framework of development assistance; but, why it must continue to be repeated is difficult to justify as an effective approach to development investment.

Professor Myrna **Feliciano**, Executive Director of Mandatory Continuing Legal Education, then moves on to consider the experience of the judicial reform programme of the Supreme Court of the ***Philippines*** to improve accountability, transparency and complaints procedures, to offer readers a number of practical observations.

Explaining that the judiciary in the Philippines has not been spared the widespread public perception of corruption in government, Professor Feliciano first advocates for the introduction of defined codes of ethical standards to guide judges against which they may be held accountable. The Philippines' experience indicates that compliance with an enforceable and defined code of ethics will not only entail greater accountability, it will also enhance the individual integrity of judges and engender respect and confidence in the judiciary.

Second, she calls for transparency in judicial appointments by opening the exercise of the political power of appointment to public scrutiny. Transparency in

judicial appointments protects the integrity of the judiciary by opening to public scrutiny the exercise of the political power of appointment. The author cites two specific examples: the case of *Kilosbayan* as a landmark example of judicial activism to demonstrate the judiciary asserting its independence and offering a concrete example of transparently challenging the arbitrary exercise of presidential nominations to the bench. She also addresses the culturally sensitive issue of how courts should deal with political influence in judicial appointment which in the Philippines' context, is the tradition of '*utang na loob'* or debt of gratitude. This tradition pertains to the belief that an appointed public official is perpetually indebted to the appointing power and whoever endorsed the appointment. Since courts ultimately resolve political contests, some politicians exert means to influence the appointment of judges and justices, with a view to collecting such 'debt of gratitude' at a later, more opportune time. The solution, she offers, is to insulate the appointment process from executive discretion and expose it to the light of day.

Third, she recommends the need to streamline judicial conduct complaint procedures to ensure that administrative cases are heard and decided fairly and expeditiously. In recent experience, she argues, this has become imbalanced in favour of complainants, encouraging often frivolous or vexatious complaints, with 95% of complaints being dismissed without even reaching the investigation phase that divert resources and cause the courts to become clogged.

4.5 Judicial education and skills development for judges and court staff

The final chapter opens with a review of ***Cambodia's*** experience grappling with the harrowing challenges of rebuilding the judiciary, where it has been estimated that just six law professionals survived the legacy of war and the genocide of the Khmer Rouge. Justice Sathavy **Kim** of the Supreme Court of Cambodia and Mr. Ly **Tayseng**, Secretary-General of the Cambodian Bar Association, reflect on the steps being taken to rebuild not only the competence of the judiciary but, at the same time, to establish the capacity of the new training institution to perform this role.

With the benefit of hindsight, the resources required to support rebuilding the Cambodian judiciary have been underestimated by the internal community. It is now clear that the depletion of professional capacity across the entire justice sector persists after more than two decades in the post-conflict context, and the international community of donors is yet to fully diagnose and provide sufficient support to complete the required institutional capacity building, notably in establishing the faculty of trainers and creation of core training materials.

This paper describes the profound difficulties in restoring judicial competence after the obliteration of judicial and legal expertise. There were almost no sources of judicial professionalism for the purpose of training novice judges. On the one hand, there was an acute shortage of competent judges in the ranks of the depleted judiciary or indeed any other suitable experts experienced in judicial training; and, on the other, international experts were generally unfamiliar with Cambodian law, culture and needs. Moreover, judicial culture and standards

subsequently degraded in the post-conflict situation, when judges were appointed without the opportunity for formal legal training, supported at best by young western law graduates volunteering as mentors and occasional donor-sponsored seminars. Most recently, in 2005, the first generation of law-trained but inexperienced judicial novices graduated and is undergoing assimilation with the remaining experienced but untrained judges. The transition to restore judicial professionalism and integrity is ongoing, and opportunities for appropriate role-modelling and mentoring remain constrained.

To address these needs, the new Royal School for Judges & Prosecutors (RSJP) has focussed on developing a 24-month curriculum for initial judicial orientation which is structured over 5 phases to develop judicial know-how including skills, knowledge in substantive laws and procedures, and judicial attitudes and behaviour. While this curriculum is still being developed and is yet to be formally evaluated, it is already recognised that there is a need to build a more skills-based training which extends beyond substantive law such as legal analysis, reasoning, judgment-writing, and protection of human rights. As the result of conducting a training needs assessment in 2005, the school has now also launched a programme of continuing legal education.

The shortage of judicial trainers has created the imperative for the school to build its own capacity by conducting Training-of-Trainers (ToT) programmes. The authors describe this capacity building as having been useful but meeting with varying success owing to its ad hoc nature, the insufficiency of funds to pay trainers adequately, and the lack of ongoing support from donors. While it is clear that donors have certainly supported ToT, they have seemed reluctant to provide sufficient resources and incentives for local trainers to participate and also to develop much-needed course materials.

Additionally, it has clearly been very difficult for RJSP to coordinate donor support. Whilst the authors stress that all support has been of benefit, it is clear that this support has not always responded directly to the needs of the school but rather, as they put it, to respond to project designs of the development partners. Donors have often changed their experts and staff, making it all the more difficult for the school repeatedly dealing with new-comers who have little knowledge. The authors observe that the training approaches of one donor takes the training in different directions to that of another. There have been some instances where the content in different programmes overlaps. Trainers from common law and civil law jurisdictions sometimes adopt different training methodologies. Evidently, the coordination of donor support has significant 'hidden costs' which has required the allocation of precious resources to manage, that would otherwise have been available for the core business delivering training to judges. While this is doubtless a sensitive issue, it is also an important - even courageous - message to convey to international benefactors.

Finally, Justice Dr Ananda **Bhattarai**, a judge of the Court of Appeal, Kingdom of ***Nepal***, completes the collection with a review of experience in establishing the National Judicial Academy (NJA) in Kathmandu. The NJA has launched a professional development programme for judges designed to enhance judicial competence and improve the quality of justice during a transitional period of

massive constitutional and political change. The conclusion of the debilitating civil conflict has left the courts depleted of resources and damaged in credibility. He describes the daunting but ground-breaking challenges of undertaking the first judicial training needs assessment and establishing the inaugural faculty of judges to serve as trainers, acquiring and adapting the methodologies of adult learning as they proceed forward.

The paper explores the challenges and constraints that were confronted in establishing a new training institution: assessing the needs for training, developing a training faculty from scratch, conducting ToT, developing its curricula, and producing training materials. It discusses the slow but essential process of creating local ownership where initiatives may be donor-driven, developing institutional capacity and momentum for change, the sensitive issue of lobbying for additional resources, and shifting judges' resistant attitudes. While judicial education is still in its early days in Nepal, the author calls for increased attention to monitoring and evaluating the impacts of training.

The Nepali experience casts judicial education into a particularly dynamic and instrumental role in helping a transitional society to restore a just, humane and peaceful order, and to start rebuilding public confidence in the judiciary as a trustworthy and capable social institution. The author describes the perennially difficult decisions of managing limited resources, and having to focus on selected priorities in order to avoid stretching scarce resources too thinly across potentially overwhelming needs. Crucial to experience has been recognition of the need to find the right balance between rationalising training resources for the benefit of all law professionals while avoiding erosion of judicial independence and the risk of being spread too thinly. This has resulted, most recently, in the NJA seeking a refinement of its mandate to concentrate its training on judges alone.

The paper recounts the active steps that were required to develop genuine local ownership of the training programme, where support was initiated largely through the vigour of donor assistance, and the challenge of avoiding dependence and resistance to something seen as being imposed from outside. In Nepal's case, leadership has been provided by the Supreme Court in steering the training programme and in seconding high-calibre personnel to ensure its success. Justice Bhattarai notes that as this programme grows, so steadily does its credibility for the judiciary as understanding and confidence in its practical usefulness grows from the experience of training helping judges to perform their duties on a day-to-day basis.

Finally, the author calls for programmes to learn more from the regional and global experience. As recognition of the need for judicial education gains prominence in many jurisdictions, local efforts can be supplemented through the cross fertilisation of ideas. Every country, he advocates, can learn from comparative, regional and global initiatives relating to internationalisation of human rights values, and emergent international norms of trade, commerce and services.

5.0 Overarching themes - ten challenges

A number of themes emerge from this body of experience in judicial reform that are recurrent throughout the contributions and may be seen as key challenges that warrant ongoing consideration. These challenges are separately listed below, in transactional sequence though not necessarily order of importance, for ease of identification. They are found in the papers configured in various combinations indicating the multi-dimensional nature of their existence, and the need to consider their significance in an integrated reform approach.

5.1 Goals

Many contributions seek to clarify the goals for reform and strengthen the relationship between purpose and results. In this sense, authors seek to illuminate the value of developing a clearer consensus on what we are trying to do, how we should set about doing it, and how to become more systematic in contributing measurable improvements to justice across the region. This collection re-opens consideration of the 'big' question: 'what are we trying to achieve in judicial reform?' which may become obscured as we go about activities on a day-to-day basis. As we gain experience, so our answers become better informed.

At the conceptual level, Mohan Gopal argues from the Indian experience for a judicial orientation approach to securing justice, which is normatively focussed to improving human conduct as measured in freedom, equality, dignity, equity and fairness. This reflects the current realignment in the theory for judicial reform which is being guided, as we have seen in the earlier discussion, by the thinking of Nobel laureate Amartya Sen. The ground-shifting significance of this realignment rests in its potential to evolve from the prevailing market-based rationale to an altogether more potent theory which is normatively rights-centred, and places the human being - rather than the state, the market or the development agency - as the key actor in the reform process. In due course, this will enable a consideration of the distributional dimensions of judicial reform, which have been largely overlooked to date. The implications of this evolution are potentially profound both in terms of addressing the challenge to contribute substantive improvements to justice which go further than the existing headway in promoting procedural reforms through delay reduction, and in the providing means to monitor their success.

At a more specific level, Zenaida Elephano advocates from the Philippines' experience a rights-based approach in case management which is compatible with this theory, and provides the rationale to ensuring that substantive justice is done by ensuring procedural delay is reduced to a reasonable time and in a fair manner. Similarly, Ananda Bhattari sees training as contributing to improving the quality of justice, as made up through deliberations built on designated standards of legal knowledge, judicial skills and professional attitudes.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book demonstrates that clarification of goals

configures with the nomination of intended results, identification of relevant performance data, and selection of indicators with which to evaluate the effectiveness of the reform endeavour.

5.2 Leadership

The significance of leadership is consistently identified by authors as one of the most significant factors for success in the reform process. Analysis of this experience invariably attributes the presence of success to the extent to which the judiciary actually owns and leads the reform process. At least two authors separately describe this leadership as needing to be 'home-grown. Anita Jowitt goes further to comment on the need for a culture-shift in judicial thinking in Vanuatu to recognise the legitimacy of assuming a more proactive role.

Similarly, dispositions of judicial activism have variously emerged in India and the Philippines over recent years where judicial intervention in resuming control of the docket from lawyers has been transformational. Embedded in this paradigm shift is an evolving recognition of the environment to be changed. Central to the Indian and Vanuatuan experiences in access to justice, for example, has been the shift of focus from access *to* the court to access *through* the courts described by Ayesha Dias. This frames the focus of judicial reform beyond the courtroom and onto the larger stage of securing justice in societal terms. While the extent to which judicial activism may be accepted by any judiciary is a matter to be determined by own members, this experience does indicate that it has contributed to the success of reform endeavours throughout the region.

Managing the human factor is a more important element of this leadership. The Indonesian experience of focussing on stakeholder relations and simple solutions is a valuable lesson for the region. Simple excel spreadsheets offer greater feasibility than arcane hi-tech solutions. Leadership that focuses on keeping reform efforts simple sustaining motivation and rewarding efforts have proved successful.

Other authors, notably Sathavy Kim and Ly Tayseng, remark on the need to ensure that the agenda is not taken-over by donors, however keen they may be in their efforts to support reform, as this changes the ownership of the reform agenda and may lead to resistance to initiatives out of suspicion of donors' intentions. This is a difficult but important issue to balance in practice: on the one hand stimulating and enabling reform, but on the other respecting the integrity of local ownership.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates that leadership and ownership of the reform agenda configures with issues of independence, the formation of key relationships with other reform stakeholders, and the sustainability of change.

5.3 Independence

Reform experience across the region suggests the need to find a balance between active engagement and the more traditional notions of judicial independence synonymous to isolation. In this collection, the theme of independence emerges in a multi-dimensional frame: on the one hand, there is a need for engagement with external partners, as outlined above while, on the other, there is the need to consolidate judicial independence.

While few publicly dissent on the importance of independence of the courts, this precept is often honoured by its breach in practice. More vexing in the reform context, is that the funding-stream of development assistance intended to consolidate judicial independence has often the unintended effect of rendering the courts more beholden to external influence - be it from the executive or donors. How to address this conundrum? Experience from the region indicates that developing and integrating judicial reform plans with broader national change agendas is both desirable and necessary. These calls bring with them the unavoidable challenge for all interests, specifically including the judiciary, to depart from its traditional disposition to more actively engage in mature and collaborative partnerships for reform.

The practical experience contained in this book is useful in demonstrating how courts can preserve their independence through reform endeavours. Authors variously address the complex and sensitive issue how should judiciaries engage with the executive, donors and the community to manage their reform agenda. In the past, judges have often held back from contact with any in the executive, the community or donors as the preferred means to avoid compromising their independence. Yet, experience demonstrates the need for judiciaries to engage more closely with their reform partners in the executive, the community and donors to manage considerably more nuanced relationships. This is evidenced in the positive progress attained in the working relationships between the courts and the executive in India and Cambodia, with the community in Vanuatu, and with stakeholders in Indonesia.

This also requires careful and rigorous balancing of the need to strengthen transparency and accountability, as evidenced in the judicial disciplinary procedures in the Philippines or the judicial council in Nepal, as an essential means to consolidate credibility and reduce corruption.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this collection indicates that judicial independence configures with issues of leadership, accountability, integration and the formation of key relationships with other reform stakeholders.

5.4 Capacity building for transitional change

A number of authors usefully examine their experience of capacity building causing the reader to reflect on the important question: *what is capacity building, and how is it supported?* While this is a question on which there has as yet been

surprisingly little research by the international community of donors, it is clearly an important issue.

The experience contained in this book provides donors with a valuable opportunity to hear the voices of reform practitioners from across the region calling for a less truncated approach to capacity building in future. From Nepal, the example offered by Hari Phuyal of establishing the Judicial Council clearly shows only partial reform pending the building of numerous aspects of institutional capacities which remain outstanding. This experience is mirrored through the narration of Ananda Bhattari in the establishment of the National Judicial Academy. Moreover, the under-assessment of capacity building needs, already discussed by Sathavy Kim and Ly Tayseng, was certainly also the case in Cambodia. A pattern is forming around a disturbing discrepancy between, on the one hand, the need for effective capacity building requiring adequate planning and sufficient time for implementation to be sustainable and, on the other, a consistently shorter-term perspective to capacity building assistance being part of standard reform initiatives. This discrepancy in the post-conflict situations of Cambodia and Nepal gives rise to other questions like, why has it taken so long for the international community to diagnose and support the rebuilding of capacity, which requires support for transitions little short of generational change?

Here we pose the questions prompted by the authors' experience, rather than pre-empting the answer of the international community of donors. One may however speculate that the explanation will be found in donors seeing their role as being facilitative and essentially transient to avoid creating dependency. But, even so, how does one measure how long to assist counterparts? Any survey of the duration of donor assistance confronts the sometimes baffling reality that reform takes considerably more time than is usually provided in project-based frameworks.

Ultimately, it is argued that the experience of the authors suggests that alternative models of extended donor engagement are likely to yield more sustainable results. It may, for example, be significantly more effective for donors to consider their role in building capacity as being based on a longer-term *partnership* of reform engagement with counterpart institutions which is ongoing at least in the sense of not being arbitrarily discontinued at the end of an initial eighteen or thirty-six month establishment project. It is to be hoped that these observations may find the ear of international donors who are interested to fund the establishment of worthy institutions such as the National Judicial Academy of Nepal or Cambodia's Royal School for Judges and Prosecutors which, all too often, seem to be prematurely cut-loose to struggle unsupported through the critical challenges of implementation.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates that capacity building configures with reassessment of goals, integration of training among other approaches, and the formation of longer term relationships with reform stakeholders.

5.5 Training

The lesson from this body of regional experience is to devise reform strategies that do not over-ask of training, and that seek to integrate a range of strategies with training and related capacity building endeavours to attain the proposed objectives.

Development projects almost invariably contain training components which are treated as the synonym for 'capacity building,' and the anodyne for all reform needs. Evidently, training may be a cross-cutting tool in many change management strategies. Equally, however, it is hardly an elixir that can transform any form of underperformance; and this is clearly evidenced throughout these papers. Many authors comment simultaneously on the need for training and the insufficiency of training alone to support to required changes. Frequently, good training goes to waste because of the lack of integrated strategies: structural reform; incentives; and related measures to support and accompany the proposed behaviour changes. When courts don't improve performance, this may not be because the training didn't work, but rather that other reforms should have accompanied it.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates that in addition to training configuring with capacity building, and consistently more integrated change management approach is required involving structural reform, and the provision of incentives among other strategies.

5.6 Integration

Experience throughout this collection testifies to the reality that as reforms become bigger and more complex, so they become more difficult to manage effectively. Keeping the complex simple lies very near to the heart of the successes identified in regional experience. It follows that big is not necessarily better. As persuasively articulated by the Judicial Reform Team, experience in Indonesia demonstrates that the key to the success is *feasibility* rather than *more resources*.

This leads the reader to contemplate the prospects for a more integrated approach to judicial reform. Certainly, this recognition may explain the emerging trend towards the new sector-wide programme approach which intends to address the fragmentation of the earlier institutionally-focussed project approach. In terms of developing a reform approach to address this challenge, the experience outlined in this book collectively calls more a more integrated approach to judicial reform which configures goals with results, research and data with evaluation, training with capacity building, independence with accountability, leadership with relationship-building. Taken together, the papers overlap to explore the mesh of critical interdependencies between access to justice and procedural reform, case management and information management, training and incentives, integrity and discipline, and so on.

5.7 Community

Authors attest that community participation is essential to success in judicial reform. Not only is the community central to identifying the problems and developing solutions, it is also critical to sustaining implementation and monitoring results.

The role of the community in judicial reform is variously described by authors, who explore their experience to offer insights on the often complex nature of the role and relationship of courts with non-state actors in the community and civil society. Just as they have identified the importance of judicial leadership in championing the reform process, they recognise the benefits of forming partnerships with the community to better understand its needs and use its advocacy to sustain the momentum of the reform process. While this may seem an improbable outcome for those judges who believe that circumspection is required to preserve their independence, this has been the case in Sri Lanka and Vanuatu, where civil society groups have formed coalitions with the courts to improve access to justice from the bottom-up, as much as in Indonesia where successful change has been attributed to having been demand-driven jointly by the judiciary and the community.

The lesson of these experiences suggests that stakeholders should be centrally involved as reform partners and have a real sense of ownership in developing access to justice solutions. Many of the experiences described in this collection indicate that change management is often critically concerned with managing the human dimensions of reform. Authors comment at length on the need for both leadership and participation. Active participation in the change management process is critical for ownership, and the Philippines' case management reform experience highlights that non-participation creates misunderstanding, suspicion and resistance to change.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in the following chapters indicates that inclusion and participation should be seen as the corollary of judicial leadership, and requires the formation of longer term relationships with community stakeholders.

5.8 Donors

Other important messages have emerge from the authors' experiences relating to the role of donors in addition to those discussed above. First, the positive message of writers is first that 'home-grown' reform is best because it addresses the needs which stakeholders really want to change, is genuinely owned and, as a result, likely to be feasible and sustainable.

Domestic budget constraints, however, make donor assistance often indispensable for judicial reform initiatives. While the authors stress that donor support has been of benefit, this is only half the story. It is clear that this support has not always been coordinated to respond directly to the needs of stakeholders but rather, as one author puts it, to respond to the project designs of the

development partners. As has been the case in Cambodia, donors may bring other agendas however benevolent, their advisors may lack knowledge and understanding of the needs to be addressed, and there programmes may compete, overlap and pull their counterparts in different directions. Likewise in Vanuatu, changes that are seen as being imposed from above or outside are often misunderstood and resisted. As in the case of Nepal, assistance may be discontinued before foundling intuitions have established their capacity of operate effectively. It may be from these reasons that India has funded its own reform programme without donor assistance, and Indonesia has focussed on simple technical solutions that minimise the risks of dependence on external advisors.

Second, it is clear from these experiences that donor support, while perhaps indispensable, needs to be managed better. This is no trite diagnosis: getting the balance right is clearly difficult, and defies template prescriptions. This is a nuanced message that simultaneously recognises the limits of capacity of developing judiciaries which in turn invokes a need to refine the role and relationship of donors. At the heart of this challenge lie many of the concerns to be addressed in the *Paris Declaration on Aid Effectiveness* in 2005, which writers indicate continue to plague practice.[24] Recent moves by the international community of donors to support the new sector-wide approach to planning - sometimes abbreviated to SWAp - may be seen as a promising step in this direction. While focussing on promoting the primacy of local planning and improving aid coordination, experience in this region continues to demonstrate that better planned collaborative partnerships between domestic stakeholders and international donors are required to consolidate local ownership and leadership of the reform agenda, and to harness commitments to longer-term engagement and heightened responsiveness in reform approach.

Scarcity of domestic resources to address the needs for judicial reform impels reliance on foreign assistance, but reform projects to address these needs unavoidably require further resources. The experience of Cambodia, in particular, demonstrates how managing development assistance burdens already under-resourced courts and ministries of justice before it helps them. How to solve this problem? Consider the needs these overburdened actors is the first answer, coming from the Cambodian experience. Concentrate on simple feasible solutions to help cope with often overwhelming challenges is another, coming from the Indonesian experience.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates the need for the judiciary to actively engage with donors. Any such interaction must balance the legitimate role of donors to facilitate reform, with the imperative of the judiciary to lead the reform agenda.

[24] The *Paris Principles*, so called, reflect a consensus of mounting concerns across the development spectrum by both donors and developing nations to improve endeavour through a series of key measures comprising the promotion of: ownership; harmonisation; alignment; managing for development results; and mutual accountability. Measures to be taken by 2010 include: development strategy frameworks in developing member countries, aid flows aligned to national priorities, strengthen capacity by coordinating support/programmes, use country systems, share analysis, results-orientated frameworks to assess progress re national development strategies and sector programmes.

5.9 Data

Another recurrent theme to emerge from the contributions is the importance of data. The authors call for courts and donors alike to invest in information technology. This is a message which is shared most directly from experience in Jakarta and Manila to address the causes of delay through effective case management strategies. The Supreme Court of Indonesia has found that building a systematic information management strategy has been foundational to reducing backlog which has been informed by an analysis of actual data from their case audit. This experience demonstrates that accurate information is an essential prerequisite to establishing an effective case management approach for any court, and that introducing an information management system provides reliable data on which judges can understand the actual logistics of service delivery - possibly for the first time.

More broadly, the experience across the region calls for a greater investment in research to focus reform endeavours through a more methodical assessment of data on the actual performance of courts, better informed analysis of the community's needs for reform, and as a tool to evaluate data on the effectiveness of efforts. These calls correspond with the mounting recognition of the imperative for sound data, methodical research and rigorous analysis to be found in the literature. In effect, both authors and commentators agree on the need for a more empirical approach to judicial reform, firmly grounded in an appreciation of actual needs and performance, which lies at the heart of the rationale for this book.

5.10 Results

Finally, building on the need to invest more seriously in information, the authors confirm the near universal lack of evaluation, which has been identified in the literature. Focussing on results continues to remain elusive. Time and again, the authors remark on the insufficiency of monitoring and evaluation. Governments and donors continue to under-invest in performance monitoring and evaluation. Why is this? Are they really unconcerned with demonstrating success, or afraid of exposing failure, or is it seen as an unimportant, expensive and tokenistic afterthought?

The continuing nature of this deficiency remains something of a mystery and a substantial under-addressed challenge for organisations committed to development. We have seen that there is clearly a conceptual need to clarify the purpose of judicial reform, and also to ensure the availability of reliable performance data, which is often no small challenge in developing countries. Additionally, time is required to discern change, and causal attribution is required. That said, it should be emphasised that monitoring and evaluating judicial reform is technically feasible. Once the goals are clearly specified, the design logic of the reform approach tested, and the information systems aligned, the exercise is essentially mechanistic, requiring roughly equal measures of rigour, resources, elapsed time and commitment. Experience elsewhere in the region has indicated

that getting serious about evaluation is not necessarily cheap, nor is it prohibitive or disproportionate.[25] These costs are as legitimate and useful as other costs to secure the integrity of the reform process, such as accountability mechanisms for impress accounts or personnel record-keeping. Addressing deficiencies in monitoring and evaluation, which as the literature shows has long been a weak link in legal and judicial reform, is key to addressing the core concern of development effectiveness.

In terms of developing an integrated reform approach to address this challenge, the experience outlined in this book indicates a need for government and the international community of donors to develop a more empirical approach in judicial reform through a consistently more serious investment in data, research, analysis and evaluation.

6.0 Conclusion

Over the years, understanding of judicial reform has evolved in line with international development assistance and the growing recognition that the policy, governance and institutional dimensions play crucial roles in shaping development. Economic thinking has traditionally prevailed to cast the state, and the judiciary as a key institution, in an instrumentalist role to support development of markets. More recently, this approach is yielding to growing recognition of the imperative to evolve a more human-centred pro-poor vision for judicial reform. At the same time, understanding and appreciation of the complexity of the political economy environment has also deepened with this experience. Donors' continuing support for judicial reform reflects the growing recognition of the importance of justice to societal wellbeing, and is on what may be fairly be described as a continuing journey of development understanding. Over the past decade in particular, many countries in the region have laid important but as yet uneven foundations in judicial reform which are characterised by both their development merit and their greater potential. These foundations, and their fragility, are to be appreciated by citizens, governments, donors and reform practitioners alike.

Any serious contemplation of judicial reform should acknowledge the challenges of practice evidenced in the experience of authors in this collection. The effectiveness of judicial reform is often qualified, as is documented in the broader literature. That said, the evidence of practice demonstrates that judicial reform endeavours do yield results: whether in opening up the courts to provide justice to the poor, reducing backlog, disciplining corruption, reaffirming independence and accountability, or rebuilding competence from scratch in post-conflict countries. The experience of authors - judges, court administrators, lawyers and researchers across the region - shows that reform is doable: it will evidently take time, often it seems, more time than expected by donors; and the path may be littered by mistakes.

[25] These costs have been estimated at 6% of reform investment in AusAID's PNG's law and justice reform programme valued at A$150 million. Armytage, L, and Miller, S, 'Legal and judicial reform performance monitoring: the PNG approach' *The European Journal of Development Research, Vol. 20, No. 1, March 2008*, 141-157.

Acknowledging the experimental nature of these endeavours is both important and encouraging as it casts the courts as learning institutions committed to the dynamic process of ongoing improvement. Learning by doing requires innovation, experimentation and evaluation. Does qualified performance, identified in these pages and the broader literature, indicate that the approach is flawed, as questioned by some commentators? Hardly! But the approach will surely benefit from refinement. As the contributions indicate, confusion over goals, under-investment in data, fragmentation at many levels, and the focus on outputs rather than results are particular weaknesses in approach that warrant further consideration.

There is some risk of oversimplifying the challenges identified by authors which are to be addressed in judicial reform. Similarly, prescription of solutions to address these challenges risks being trite. *Does one size fit all?* Evidently not. The diversity of needs, approaches, priorities and responses described in spanning post-conflict, transitional and development contexts defies over-generalisation. Moreover, this collection does not claim to be comprehensive. The experience contained in these pages is indicative of actual experience in all of its diversity. The authenticity of these experiences is characterised by the diversity of its voices.

Some tantalising questions remain to be addressed. Most particular, is the experience contained in these pages illustrative of a distinctive regional approach to judicial reform? Is there a definable Asia Pacific approach which can be differentiated from the earlier Latin American or post-soviet approach and, if so, how? Finding the answers to these questions hinges on the more fundamental issue of whether the global practice of judicial reform reflects a coherent discipline against which this experience may be compared. Although this assessment goes beyond the empirical parameters of this collection, it warrants further inquiry and would usefully build on the foundations of existing regional scholarship, which has: validated the relationship of law to economic development in Asia;[26] explored the local challenges of promoting judicial independence in South-Asia;[27] formulated development strategies to rebuild the Afghanistan judiciary degraded by war;[28] developed a leadership model for judicial education and training in Asia;[29] explored practical aspects of integrating judicial reform in major sector-based reform programs in Pakistan;[30] and developed a performance monitoring approach for legal and judicial reform

[26] In a major regional law and economics study, Pistor and Wellons offer some validation for the premise that law is relevant and important to market and private sector development in Asia and, in particular, to the development of financial and capital markets; Pistor, K, and Wellons, P, 'Role of Law and Legal Institutions in Asian Economic Development, 1960-1995' (1999) *Oxford University Press, Oxford*.

[27] In relation to practical challenges in promoting judicial independence in the region, see, for example: Asian Development Bank 'Law and Policy Reform Annual Reports 2003: Judicial Independence.'

[28] Armytage, L, 'Justice in Afghanistan - Rebuilding Judicial Competence after the Generation of War' *(2007) Heidelberg Journal of International Law,* HJIL/ZaöRV 67, 185-210.

[29] Armytage, L, 'Training of Judges: Reflections on Principle and International Practice,' *European Journal of Legal Education,* 2005 2(1) EJLE 21-38.

[30] Armytage, L, 'Pakistan's Law & Justice Sector Reform Experience - Some Lessons,' *Law, Social Justice and Global Development Journal,* University of Warwick (LGD) 2003 (2); and 'Pakistan's Judicial Reform Program,' *Australian Law Journal* (May 2001).

programmes in Papua New Guinea;[31] which collectively add to this emerging body of experience.

Taking into account this experience, it is clear from initiatives already in hand that judiciaries across the region are responding to the need for judicial reform to improve the quality of justice. It is already broadly recognised that courts are essential institutions for economic development and good governance through their instrumental role to enforce contract and title, as much as to protect safety and security. Of considerable significance, it is now becoming generally recognised that their importance in development extends to a constitutive role as the guardians of equality and fairness.

It is hoped that the experience and insights contained in *Searching for Success* will provide an inspiration for judiciaries to seize the leadership of reform, to refine understanding of the purpose and means to improve substantive as much as procedural justice, to engage more closely with other reform actors in the executive community and donors, and to focus on effectiveness and the results of these endeavours to improve justice across the region and beyond.

[31] Armytage, L, above n. 25, 141-157. See also: 'Monitoring Performance of Legal and Judicial Reform in International Development Assistance - Early Lessons from Port Moresby & Phnom Penh' *International Bar Association Chicago Showcase, Judicial Reform: Economic Development and the Rule of Law,* 18 September 2006, Governance and Social Development Resource Centre;