

*Reforming Justice* calls for justice to be repositioned more centrally in evolving notions of equitable development. Justice is fundamental to human well-being and essential to development. Over the past fifty years, however, official development assistance – foreign aid – has grappled with the challenge of improving ‘the rule of law’ around the world with often underwhelming and sometimes dismal results. Development agencies have supported legal and judicial reforms in order to improve economic growth and good governance, but are yet to address mounting concerns about equity and distribution. Building on new evidence from Asia, Livingston Armytage argues that there is now an imperative to realign the approach to promote justice as fairness and equity.

LIVINGSTON ARMYTAGE is a specialist in judicial and legal reform, advising governments, courts and international development agencies on improving justice systems around the world. He has worked in numerous senior roles on substantial reform programmes for major development agencies in many countries from Afghanistan and Azerbaijan to Haiti, Palestine, Pakistan and Papua New Guinea. He is also Adjunct Professor of Law at the University of Sydney. His other books include *Educating Judges* (Kluwer/Brill 1996) and *Searching for Success in Judicial Reform* (OUP, 2009).

Cover illustration: Srey Lak, then aged 8 years, living and working on the Stung Mean Chey rubbish dump in Phnom Penh, Cambodia. Photograph by L. Armytage, 2006. The royalties of this book are now being applied to enable Srey Lak to attend school.

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**‘Exhaustively researched, carefully written, contributes in important ways to knowledge in this field, and provides a coherent and informed analysis of an important topic.’**

Philip Alston, Professor of Law, New York University, and UN Special Rapporteur on extra-judicial, summary or arbitrary executions

**‘The author has clearly spent many years on the frontlines of this difficult endeavour, and is surely better placed than most to understand it and to respond constructively to the challenges it presents in the years ahead.’**

Michael Woolcock, Lead Social Development Specialist, Development Research Group, The World Bank, and John F. Kennedy School of Government, Harvard

**‘Reforming Justice is an important contribution to the increasingly critical process of re-examining the assumptions and logic that underlies conventional assistance in this difficult area of international assistance.’**

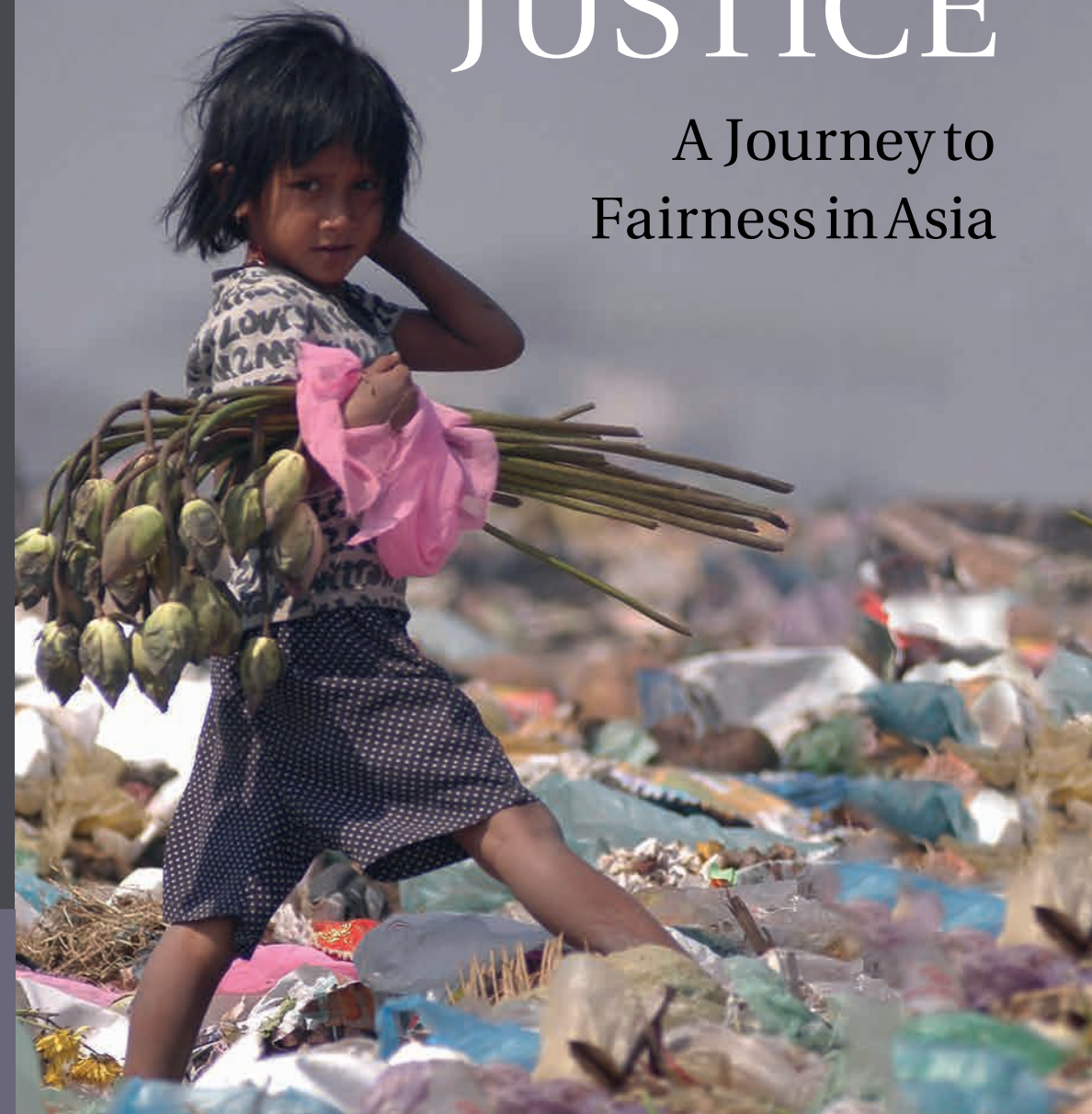
William Stadden Cole, Senior Director, Governance, Law, and Civil Society, at The Asia Foundation

Armytage  
REFORMING JUSTICE

Livingston Armytage

# REFORMING JUSTICE

A Journey to  
Fairness in Asia



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# REFORMING JUSTICE

## A Journey to Fairness in Asia

This book critiques the performance of judicial reform in international development assistance over the past fifty years for the purpose of making it more effective. It argues that this endeavour has yet to find its path and has failed to demonstrate success. This is due to two principal shortcomings: judicial reform is yet to formulate a coherent theory with which to justify its purpose, and there is a lack of any established consensus on how to evaluate success. To address these shortcomings, the book draws on new evidence from the emerging experience in Asia which is showcased in three case studies. These studies comprise the Asia Development Bank's law and policy reform program between 1990 and 2007, AusAID's Papua New Guinea law and justice sector program between 2003 and 2007, and the experience of practitioners across the Asia Pacific region over the past decade. Building on this evidence, it argues that the theory of judicial reform should be realigned to centre on the purpose of improving justice as fairness and equity, rather than on promoting economic growth or good governance. While acknowledging that there is ongoing work to complete, it argues that the evidence of success of this endeavour should then be measured in terms of attaining rights using frameworks of international, domestic or customary law.

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<sup>1</sup> Armytage, L, *Reforming Justice: A Journey to Fairness in Asia*, Cambridge University Press, 2012: <[http://www.cambridge.org/us/knowledge/isbn/item6658411/?site\\_locale=en\\_US](http://www.cambridge.org/us/knowledge/isbn/item6658411/?site_locale=en_US)> .

Chapter 1: Overview

*Night after night, in the long hours of the pre-dawn, I awake in Port Moresby, jolted by panic at the enormity of the justice problems, and what at those hours seems the almost laughable insufficiency of \$100 million to address them. Why is this? What is wrong? What can I do to help fix them?<sup>2</sup>*

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

There are infinite examples of injustices that blight people's lives. Too often, reform has been blind to these injustices in developing countries. Judicial reform is commonly charged to alleviate poverty through the promotion of economic growth, good governance and public safety. These are certainly worthy goals. But the evidence of practice shows that success has been elusive. This is not to suggest that these reforms have failed altogether; rather that judicial reform has not worked as well as expected, as is indicated by the mounting chorus of disappointment in the literature. The judicial reform enterprise has been misdirected. The core critique of this book is that these endeavours suffer from foundational conceptual, empirical and political deficiencies. It is now amply clear that existing approaches are based on inadequate theory, selective evidence and insufficient evaluation.

In particular, I will show that these reform endeavours suffer from two principal shortcomings. First, there is no cogent theory with which to justify their purpose, to date. Second, there is a lack of any established consensus on how to evaluate success, stemming in part from this confusion over purpose. To address these shortcomings, I will offer two solutions: first, the purpose of judicial reform should be to promote justice as fairness and equity. Second, the evidence of success should be measured using extant frameworks of law.

By realigning reform endeavour to focus on promoting justice, there is a much greater prospect of measurable improvement across all aspects of civic wellbeing. I will explain why development agencies should invest in judicial reform for the purpose of promoting justice - that is to promote outcomes that are more fair and just, rather than economic growth. By promoting justice, opportunities for economic growth and other benefits will improve. In a just society, there is equitable access to rights including the opportunity for economic wellbeing. The promotion of justice is as much the objective of development, where economic wellbeing may be seen as the consequence of equitable development, as it is a means of promoting it. This may not seem radical to the lay reader; but it will require a paradigm shift for those development agencies which have rendered justice as being instrumental to aggregate economic growth and indifferent to concerns about distribution.

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<sup>2</sup> Note from my diary, 23 March 2004, Port Moresby, PNG; below, Chapter 9. In this study, money is denoted in US dollars (\$=USD) unless otherwise specified.

I will explain that the goal of development is to promote civic wellbeing. In order to achieve this goal, judicial reform must promote justice because justice is foundational to social wellbeing. Justice in development embodies fairness and equity. It involves the exercise of rights, which are the political allocation of interests in law. In this sense, reforming justice is primarily concerned with enabling the exercise of rights, otherwise known as entitlements. These rights are embodied in law whether at the international, domestic or customary levels. Measurement of the success of these reforms is then demonstrable through visible improvements in the access to and exercise of these normative rights.

This book focuses primarily on reforming justice in terms of rights that have been allocated in law that is in the juridical sense, rather than in the executive sense of allocating political interests. It focuses on reform as a distinct endeavour in assisting the judicial arm of the state - being the courts, judges and related personnel – to adjudicate the law and administer justice. It will shortly be seen that ‘judicial reform’ is often associated – sometimes inseparably - with the more generic endeavour of ‘legal reform,’ and is variously described as ‘law and development,’ ‘rule of law’ or ‘law and justice sector-wide reform’. It will also be seen that this concept is evolving, in terms of encompassing customary as much as formal dimensions, and is increasingly seen through a broader political economy lens. This term is, therefore, to some extent imprecise and its boundaries may be contested. Development is an inter-disciplinary enterprise, and there is an overarching need to integrate and reposition notions of justice and law more centrally within it. I will explain why justice must be elevated from its existing instrumental role of supporting economic growth or good governance to a constitutive role in development. Suffice for this introduction to highlight that my focus is on those reforms which promote justice primarily by supporting the courts and the administration of justice for citizens by the state and, secondarily, more broadly on development as a whole.

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

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

This research was impelled by my concern about the limited impact of my work as a reform practitioner. I am convinced of the importance of justice; reforming justice

systems is my vocation. But, over the years, I found myself confronting growing doubts about the efficacy of most reform activities which seem to miss the injustices that have surrounded me in daily practice. I have observed that people in many developing countries in Asia routinely go without justice. In Port Moresby, Papua New Guinea, I worked with colleagues whose physical safety was threatened on a daily basis by extremely violent crime which regularly fell beyond the control of the justice system. In Multan, Pakistan, I met litigants whose grandparents' dispute remained entangled in the courts for 60 years. In Ramallah, on the West Bank, I worked with court staff so poorly paid that they openly procured commissions. In Panjshir, Afghanistan, I worked with judges untrained in even the basics of secular law. In Phnom Penh, Cambodia, I worked with judges who knew that confronting the government for stealing land from customary owners had career-terminating consequences. In Ulaanbaatar, Mongolia, I worked with courts unfamiliar with the notions of enforcement of contract. In Dhaka, Bangladesh, I worked in court-houses without electricity or any wherewithal to keep records.

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

So I started to reflect on how to improve my understanding of justice reform. I wished to make sense of the central riddle of why the best efforts in these reforms so often produced anaemic results – sometimes leaving no trace just months later. There must be a better way! What followed was my search for solutions to real problems; so this book is far from a dusty academic study. The quest for improvement drove me back to the foundations of philosophical thinking and out to the edges of empirical research to deepen my understanding of this endeavour. In doing so, I was humbled by the limits of my own knowledge but enthralled by the extent of existing inquiry. The multi-disciplinary dimensions of development – whether of economics, political science or law and justice – is immensely enriching. I was exhilarated by discovering the elegance and persuasion of the thinking of North, Sen, Weingast, Harvey, and Leftwich among so many others. This quest for knowledge provided me with a space for critical reflection and sheltered me from the insistent demands of daily practice. I had expected to discover clarity. But instead I found myself surrounded by a conundrum of uncertainty, divergent disciplinary inquiries, and debates over truth. I challenged these utopian ideas with my experience of 'the real world' of practice in places like Afghanistan, Haiti and Palestine, to ask: *but, does it work?* This was at once disconcerting and fascinating. Grappling with and trying to make sense of these mysteries characterised this heuristic journey. It is profoundly daunting to acknowledging the complexity, nuance, ambiguity, and contradiction of this enterprise.

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

While philosophers and political scientists may continue to debate the nature of justice and the role of judicial reform, even a four-year-old child will immediately recognise unfair treatment from its parents and know when justice is denied.<sup>3</sup> Realigning my reform practice to this innate sense of knowing has impelled this research which embodies the ongoing journey to improve justice reform.

## 1 Roadmap

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

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

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

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

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

## 2 Reform purpose

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

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

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

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<sup>3</sup> Our innate sense(s) of justice may vary, which gives rise to the need to articulate a theory of justice precisely to bring reason into play in the diagnosis of justice and injustice; Sen, A. 2009, *The Idea of Justice*, London: Penguin, 6 and 25.

reveal that these reforms have acquired an orthodoxy which has predominantly focused on promoting 'thin' or procedural notions of reform – as distinct from the substantive or 'thick' aspects. These reforms generally aim to improve the efficiency of the judicial function and the administration of justice within the formal sector of the state. From the outset, their foundational rationale has been grounded in judicial reform providing a means to support economic growth. This economic rationale has cast judicial reform in an instrumental role to protect the institutions of property and contract as a means of promoting a neo-liberal economic model of growth. This model is associated with the now largely discredited Washington Consensus. The instrumental rationale persists and has been variously conceptualised. More recently, the notion of promoting good governance through accountability has emerged in the political science discourse. The most recent rationales for reform aim to promote peace, security and civil empowerment. This analysis will show that there has been a range of justifications for judicial reform with economic, political, social and humanistic renderings over this period. Sometimes these justifications are conflated and occasionally they compete. I will demonstrate that judicial reform is still evolving in a formative state, and is yet to formulate any coherent justification or theory.

In Chapter 3, I will extend the survey of reform experience through an analysis of the nature of reform activities. I will show that up to this point there has been a 'standard package' of activities that tends to support efficiency-based improvements to the formal administration of justice, and reflects a broad homogeneity in approach. I will then move on to provide a synthesis of the academic commentary. Building in particular on the works of Trubek, Carothers, Jensen and Hammergren, I will reveal a mounting perception of disappointment in the performance of these reforms, which I will call the 'performance gap'. I use this commentary of disappointment as the hypothesis for this book – in effect that judicial reform has failed to this point. I will endorse much, but by no means all, of this commentary in my analysis in Parts 2 and 3, offering a number of explanations for this disappointment. I do not attempt to assess this disappointment many of whose causes are managerial and operational. Rather, I focus on and critique those aspects of the commentary which relate to the sufficiency of the theory or justification for these reforms. In this respect, the commentary finds that a lack of cogent theory has confounded judicial reform practice and it calls for a more knowledge-based approach. I identify the significance of this mounting disappointment as a driving force in refocusing reform efforts. There is some growing recognition of the importance of improving justice reform that is evident in the latest *World Development Report 2011*, which repositions justice more centrally in development. Indeed, there is emerging evidence that judicial reform may now be undergoing a process of reinvention which offers a potential to transform approach. Collectively, this new wave of reinvention emphasises four themes: empowering the poor; convergence with the human rights literature; legal pluralism and engagement in informal/customary justice; and a political economy approach which integrates justice as a moderating mechanism for competing interests.

Political economy analysis explains the significance of many precepts of justice reform, notably the sovereignty of law and the notion of rights. It also provides a cogent explanation for the role of justice reform within the broader institutional process of supporting development. There is now a more open acknowledgement of the critical role of political power in development. It is in this recognition that constitutionalism addresses the endemic challenge of controlling executive power by providing the mechanism to moderate competing interests of the state. The doctrine of separation of powers severs the agglomeration of political power through the independent function of courts enforcing constraints and accountabilities. For this reason, justice is indispensable in any political economy discourse to formulate an

integrated developmental approach.<sup>4</sup> Repositioning justice reform within the development discourse does not however answer the key question; what is the role of judicial reform in development? For this reason, I will then address the core issue of defining the purpose of justice.

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

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

Any notion of international development without justice is incomplete. Justice is fundamental to human wellbeing and is indivisible from development. Since Aristotle, justice has been recognised as core to any civilised notion of the good life, government and society: government without justice is tyranny; and society without justice is anathema to its citizens. Civic wellbeing is unattainable without justice. Nonetheless, justice is routinely subverted in many countries. Citizens, usually the powerless poor, are denied justice through the abuse of power, impunity, corruption and inefficiency. These are the usual challenges of reforming justice.

### **3 What is justice - and why is it important?**

To address these challenges, development must define justice. Justice is the notion of rightness built on law, ethics and values of fairness and equity which are foundational to civic wellbeing. The purpose of justice is to protect human wellbeing. Justice protects humanity from Hobbesian notions of anarchy, societal breakdown and the brutishness of life in nature. It embodies an ordered community governed by the rule of law. While there are many renditions of justice, most of the principles of justice are universal. These are reflected in the Universal Declaration of Human Rights and are constituted the core covenants of the United Nations.

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<sup>4</sup> Political economy is defined here to generally describe the interdisciplinary study of economics, law, and political science in explaining how political institutions, the political environment, and the economic system influence each other; Jensen, E. and Heller, T. (eds.) 2003, *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, Stanford, CA: Stanford University Press, California, 345.



All societies comprise some basic structure of institutions that embody renditions of justice, whether formal or informal. These renditions may be *political* (governance, social affairs and the allocation of interests), *economic* (opportunities for livelihood), *social* (civic order and safety) or *humanistic* (fundamental individual rights). There are numerous expressions of justice. Justice may be primarily utilitarian – concerned with maximising social outcomes; egalitarian - concerned with equality of opportunity, individual rights and freedoms; distributive - concerned with allocating interests in wealth, power or privilege; retributive - concerned with punishing wrongdoing; or restorative - concerned with restoring social harmony. Justice may be variously seen in terms of equality, need, reciprocity or deserts. Expressions of justice are sometimes distinguished from social justice. Potentially tautological, social justice is invoked in secular contexts to emphasise primacy of principles of equality and human rights to advocate more egalitarian opportunities and outcomes which are similar to the distributive expression above.

Justice embodies values which societies institutionalise through their laws and courts that administer those laws. Beyond the truism that law may not be just, promoting justice is concerned with enabling rights which are the political dispensation of interests in law. These rights are vested across the spectrum of human welfare, that is: political, civil, economic, social and cultural. For the purpose of this book, justice is considered in two qualitative dimensions: judicial and developmental. In the judicial context, this book focuses on the promotion of justice through the administration of law by the courts, being the rights-based or humanistic rendition above. In the developmental context, this book focuses more broadly on the promotion of justice in its other political, economic and social renditions.

This book explains why justice is central to the quality of development as well as to the work of the courts. Justice in development is concerned with bringing to life the rights which are enshrined in customary, domestic or international law. Development without a rights-based 'thick' concept of justice as fairness is not just insufficient, but perverse; focusing on improving the 'thin' efficiency of a captive court system does nothing more than accelerate the impunity of elite land-grabbing, as starkly evidenced in Cambodia. As already seen, notions of justice are pluralistic and can be understood to have different meanings and purposes. Pluralism does not however eclipse the imperative to specify what is meant by justice, though lawyers have been surprisingly muted in addressing this imperative at development's high table of political economy. This will change as justice is increasingly recognised as being indivisible from development. The principal defect of development to this point is not that it has failed, because economic growth has been unprecedented; but rather that it has been uneven. The rich have got richer while the opportunity gap for the poor has widened. This defect is core to development, and addressing it requires a paradigm shift. The imperative for justice - that is, centralising the concept of fairness - is thematic to development at large. Reforming justice is as essential to development as it is to courts. As justice should be the focus of judicial reform, so equally this focus should not be confined to courts. Justice must apply across development, though this has been rarely asserted to date.

Even the allegorical four-year child knows that justice is important. But why is this so? Justice is essential to maintain civic harmony and resolve conflict, sustain peace and safety, secure growth and good governance, and enable rights. The importance of justice becomes apparent as soon as it is denied. Society without justice is the antithesis of any notion of equitable opportunity. Recognition of the importance of justice is only now entering the discourse in other than economic terms, as evidenced in the *World Development Report 2011*. This recognition creates a space

to admit justice to the development pantheon of political economy, and opens the dialogue on the role of justice and its crucial relationship to development.

This is explained through close analysis of the history of judicial reform which exposes an unresolved contest for an overarching theory for judicial reform. This contest exists between an economic or political instrumentalist justification and a more recent human-centred justification. The prevailing economic or political justification is based largely on the thinking of North and Weber, notable among others, which constitutes the 'new institutional economics' model. North's notion of the 'rules of the game' constitutes the foundation for the school of institutionalism which has been pervasively influential of development, particularly in governance, over the past 20 years. This is an elegantly powerful and influential theory which has spawned a generation of empirical inquiry to determine the economic determinants of growth. This theory has been used to cast the state in the role of supporting the market through key institutions such as courts to secure property and contract which are necessary for investment-based economic growth, and to promote good governance. But, *does it work?* At best, the available evidence is ambiguous. There is little consensus that this institutionalist approach to the rule of law leads to growth. To the contrary, Polanyi and Chang show that history reveals that growth leads to the rule of law, rather than vice versa. While there is clearly some empirical evidence of correlation to show that institutions do indeed matter, correlation is not causation. Rodrik cautions that we have as yet little understanding of *how* they matter for the purpose of formulating development policy. This goes some way to explaining the underwhelming performance of judicial reform to this point.

The institutionalist approach to development is under challenge for failing to sufficiently meet the needs of the poor. Building on the thinking of Rawls, Dworkin and Sen, a more recent human-centred theory now offers a rights-based alternative that focuses on the constitutive importance of promoting justice. This theory casts development in the role of providing capacity to the poor – people who have rights to freedom and opportunity.

Central to my argument is the imperative for a paradigm shift in judicial reform. The goal of development is the alleviation of poverty. Over the past half century, development has brought unprecedented aggregate economic growth, but this growth has been uneven. There has been a demonstrable increase in what I term the 'equity gap'. I will show that the institutionalist theory of judicial reform which serves economic or political purposes is insufficient - even dysfunctional - because it has been unable to create equitable growth. To date, development ideology has privileged doctrines of growth-based economics which have given insufficient attention to distribution in poverty alleviation. This ideology has been deficient because of the absence of any dimension of fairness and equity. Poverty is measurable using an equitable or distributional dimension, in addition to being measured using financial metrics such as US\$1 per day. To support this understanding of poverty alleviation, I offer an alternative approach to justice being fairness and equity. Justice is concerned with outcomes that are fair and equitable; judicial reform should correspondingly promote justice. This more humanistic vision of justice-focused reform and the prevailing economic or political justifications, such as they are, are not mutually exclusive. They can, indeed, must coexist. The right to justice is universal. Sen argues persuasively that justice is constitutive to development. Economics cannot trump justice - though it is remarkable that this has been accepted in the discourse to this point - just as much as justice cannot trump economics. The tension between utility and aggregate wellbeing on the one hand, and equity and individual wellbeing on the other, lies at the fulcrum of reform policy. To the extent that emerging notions of equitable development may be superseding

aggregate growth as the current mantra of development, it is clear that judicial reform is now lagging the discourse.

In Chapter 5, I will demonstrate the insufficiency of the prevailing economic and political theories for reform by revealing the fragility of their empirical justification. First, I analyse the relationship between development theory and practice to understand what is known about the determinants of growth and the role of justice and judicial reform. I then critique the available evidence to show that it supports only some elements of the instrumentalist justifications for growth. More significantly, it is incomplete, qualified and on occasion contested by its own adherents. This lack of evidence creates the space – and the imperative – to refine judicial reform theory to centre on reforming justice by promoting fairness and equity.

To date, there is no consistent evidence available that judicial reform has attained its stated goal of alleviating poverty. Clearly, the global economy has grown. As many scholars including Stiglitz, Sachs and Collier emphasise, there has been unprecedented economic growth in many countries in the developing world. But equally there is irrefutable evidence of a growing inequality gap which is highlighted in the *World Development Report* of 2006. The rich have got richer, but the poor have either not got richer or they have got richer at a slower rate. Once the measurement of growth has been disaggregated, it becomes clear that the promotion of economic growth has failed to alleviate poverty. Moreover, it has had the perverse effect of exacerbating inequality. I therefore challenge the sufficiency of development economics and the judicial reform approach which has supported it.

I pursue this challenge by showing that the economic justifications for development policy do not rest on firm empirical foundations. Development economics is invariably incomplete and increasingly internally contested. This will be established through a scrutiny of the researches of Dollar and Kraay, Knack and Keefer, Djankov, Feld and Voigt, La Porta, North and Rajan whose collective work has been particularly influential in the formulation of the development policy of the World Bank and other major donors. Over recent years, there has been extensive investigation of the key relationships between aid, government, the institutions of justice and growth. This inquiry validates the existence of some significant relationships between justice, good governance and economic growth. But, equally, it reveals that many important issues remain contested; much of the evidence is ambiguous; and there are numerous gaps in knowledge. As Rodrik stresses, fundamental questions over the chain of causation remain unanswered and centrally problematic. While Kaufmann, for example, insists that good governance, as an institution, is a predeterminant of growth, others including Arndt and Oman directly challenge the integrity of this claim. Chang persuasively presents the reverse argument that development causes good institutions, reminiscent of Polanyi's earlier thesis which Stiglitz revisits. Evidently, much more empirical research is required before we can understand the key determinants of the good life, and the role of judicial reform in promoting it.

Additionally, there is a stark lack of any corresponding research into the equitable and distributive dimensions of justice as a determinant of wellbeing, which is a missing dimension in the empirical inquiry of poverty alleviation. The state of our inquiry to this point may thus be described as torch-beams in the night; most of our view remains in the dark. There is a dearth of research-based evidence to validate the prevailing – or any other – theoretical justification for judicial reform.

There is scant empirical evidence that judicial reform has attained an economic purpose. This does not indicate that past endeavours have been altogether dismal so much as to highlight the pressing need for an improved approach. The evidence of

the widening equity gap indicates the insufficiency of the prevailing instrumental justification for reform. This provides some explanation for the mounting chorus of disappointment on the performance of judicial reform - in essence, it has been tasked to do something for which there has never been compelling justification.

Collectively, the demonstrable insufficiencies of theory, lack of compelling empirical justification and record of underwhelming results create the imperative to realign our approach to judicial reform.

#### 4 Evaluating endeavour

In the second part, I will show that there are significant limitations in both the theory and practice of development evaluation which undermine judgments on the efficacy of judicial reform. These deficiencies in evaluation practice confound the initial perception of disappointment that is identified in the first part, which posed the hypothesis that judicial reform has failed. This finding is significant because it establishes that improving the means of evaluating judicial reform is a precondition to assessing its effectiveness. In effect, evaluating the effectiveness of judicial reform is dependent on first clarifying its goals and then devising a systematic means of appraising their attainment.

In Chapter 6, I examine the theory and practice of development evaluation to address the crucial question: '*Does aid work – and how is this substantiated?*' Finding an answer to this overarching question is necessary before refocusing analysis to appraise the performance of judicial reform. Without an answer to this question, it is impossible to establish whether the disappointment at the lack of results is caused by a deficiency in performance due to shortcomings in development practice, or a deficiency in providing evidence of performance due to inadequacies in evaluative practice.

In this chapter, I examine the mounting global concerns over how development effectiveness can be improved. In the past decade, these concerns have crystallised in the international consensus to reduce global poverty and demonstrate increased aid effectiveness, notably by attaining the *Millennium Development Goals*.<sup>5</sup> International assistance has entered a new era of managing-for-development–results (MfDR) which is reflected in the *Paris Principles of Aid Effectiveness* of 2005.<sup>6</sup> To demonstrate aid effectiveness, the tools for monitoring and evaluation have been repositioned to the centre of the development stage. As a consequence, there has been substantial growth and refinement in approaches involving a shift in focus from monitoring the efficient delivery of assistance to evaluating impact and results. In step, development evaluation is becoming professionalised by the OECD-DAC and is approaching a domain of standardised practice.<sup>7</sup> But, this practice is still in a transitional state and there is no established orthodoxy on how to evaluate development effectiveness.

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<sup>5</sup> *United Nations Millennium Declaration*, UN (treaty) 2000, United Nations Millennium Declaration, GA Res 55/2, UN GAOR, 55th Sess, Supp no 49, UN Doc. A/55/49, [www.un.org/millennium/declaration/ares552e.htm](http://www.un.org/millennium/declaration/ares552e.htm)

<sup>6</sup> *Paris Declaration on Aid Effectiveness*, OECD (treaty) 2005, Paris Declaration on Aid Effectiveness: Ownership, Harmonisation, Alignment, Results and Mutual Accountability, [www.oecd.org/dataoecd/11/41/34428351.pdf](http://www.oecd.org/dataoecd/11/41/34428351.pdf).

<sup>7</sup> Development Assistance Committee, Working Party on Aid Evaluation of the Organisation of Economic Cooperation and Development (OECD-DAC); OECD 2002, *Glossary of Key Terms in Evaluation and Results-Based Management*, Paris.

This transition has profound implications for both the theory and practice of development evaluation, which is now highly fragmented in its approach, largely due to competing rationales of accountability and effectiveness. This rift in evaluation theory is likely to be ultimately irreconcilable. It is apparent in debates over the purpose and methodology of evaluation, termed a 'paradigm war' in the literature. This war is being waged between positivists who advocate a scientific approach and constructivists who advocate a pro-poor approach over how to answer the question: '*Does aid work?*'<sup>8</sup> Obscuring ready answers to this question are a range of philosophical, conceptual and technical disjunctions. Notable among these is the formal recognition of the need to demonstrate impact; impact evaluation is however rarely undertaken in practice because it is technically difficult, slow and often disproportionately expensive. There are also mounting misgivings that the new school of managerialism, or the MfDR approach, which asserts that if 'Activity A' is done then 'Output B' will result, is reductionist and cannot guarantee improved effectiveness in evaluation. Fundamental questions in establishing causality and attribution remain endemic. Finally, there is a marked discrepancy between the rhetorical postures of the *Paris Declaration* and the state of evaluation practice, which I term an 'evaluation gap'. This evaluation gap is causing confusion over the fundamental aspects of the purpose, approach and methodology of evaluation. Unsurprisingly, this sometimes torrid state inhibits the evaluation of development effectiveness in general, and overshadows the formulation of any specific consensus over how to evaluate the performance of judicial reform in particular.

I then sharpen the focus of analysis to examine the evaluation of judicial reform. In Chapter 7, I address a key question of this study, '*Does judicial reform work?*' by deconstructing it in two parts: '*What should we measure?*' and '*How should we measure it?*' By analysing current practice in judicial reform, I will show that there are deficiencies in answering both of these questions. To redress them, I build on the earlier analysis which addressed the '*what*' question by proposing that judicial reform should aim to improve justice and, at its essence, be concerned with promoting fairness and equity. I now elaborate that this purpose requires a 'thick' normative foundation, which requires us to come to grips with what we mean by justice, as discussed above. Answering this central question of the purpose of reform has been evaded so long as endeavour is confined to 'thin' renditions of improved efficiency, usually investing in infrastructure or IT, without specifying the goals values or norms for which that efficiency is tasked. This 'thick' foundation, which is embodied at the international level in the core covenants of the United Nations – spanning political, civil, economic, social and cultural rights – provides the best available answer to the question of '*what*' to measure. This foundation then provides the means with which to design, implement, monitor and evaluate ongoing endeavour, using a combination of both 'thin' and 'thick' indicators to answer the question of '*how*' to measure effectiveness systematically.

To reach this conclusion, I critique the evaluation of judicial reform to show that both judicial reform practice and evaluation are demonstrably deficient. I will establish these deficiencies through an analysis of development evaluations which have found that judicial reform has consistently generated disappointing results. I describe this

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<sup>8</sup> The paradigm war describes a debate over how evaluation finds truth and contributes to knowledge. On the one hand, *positivists* advocate a highly formalised scientific approach, and are primarily concerned with methodological rigour, establishing the validity and reliability of data, adopt experimental methods and counterfactual measurements. On the other hand, *constructivists* are primarily concerned to hear the voice of stakeholders – notably the alienated poor – and use participatory methods. The former see the latter as imprecise and lazy; the latter see the former as costly, impractical and largely irrelevant. Cracknell, B. 2000, *Evaluating Development Aid: Issues, Problems and Solutions*, London: Sage, 47.

deficiency as a 'performance gap' between what was intended and what was delivered. Next, I will establish that evaluations are often conspicuous by their absence through a review of judicial reform practice. I describe this as an 'evaluation gap'. Finally, I will establish through an analysis - or meta-evaluation - of those evaluations which were conducted, that there are marked inadequacies in their evaluative method. I describe this as a 'meta-evaluation gap'. I deduce from these findings that the perception of the disappointing performance of judicial reform found in the literature is in fact muddled by the scarcity and limited quality of those evaluations. Hence, the deficiency in the evaluative effort has in no small measure affected the perceived disappointment in performance, which qualifies the initial hypothesis of reform failure.

In order to make these findings, I will conduct a survey of practice to show that there is still a lack of inter-disciplinary consensus over what to evaluate and how to evaluate it. This lack of consensus in evaluative approach is showcased through a survey of the proliferation of performance monitoring. Over the past decade, considerable resources have been devoted by the international community of donors to compile the data necessary to monitor and evaluate the performance of judicial reform. Most frameworks monitor narrow aspects of judicial performance or organisational characteristics of good governance. Closer analysis reveals considerable diversity in the purpose, focus, approach and methodology of these frameworks, which are characterised by: different conceptions of justice and judicial reform; considerable heterogeneity over what is being measured; an ever-expanding array of performance indicators; contention over data and collection methodologies; and an overall lack of harmonisation. The fact that each framework performs a distinctive function reflects the existing dispersion of theoretical justifications for judicial reform efforts already identified.

In seeking to answer the '*what*' question, these frameworks usually select indicators which measure formalistic notions of judicial reform and efficiency – viz rates of court access, disposal and delay. These measures are inferential of the qualitative dimensions of justice. They usually omit any 'thick' measures of the substantive dimensions of justice, such as fairness and equity, owing to conceptual, technical and practical difficulties. Of those surveyed, the Central European and Eurasian Law Initiative of the American Bar Association (ABA-CEELI) is among the oldest and most thorough, enabling tentative trend analyses of selective aspects of judicial performance. However, profound challenges remain unresolved. These arise from questions about the adequacy, legitimacy and utility of highly reductive rating scales to infer meaningful judgments about improving judicial quality. Causal linkage between reform and performance is inferential at best. Moreover practice relies on subjective appraisals of court performance where triangulation with objective data is rarely undertaken.

Consequently, we are as yet unable to reliably evaluate judicial reform. Judgments of merit and worth will remain qualified until some consensus is reached on the means of monitoring and evaluating this endeavour. The diversity of measuring methodologies which characterises the proliferation of monitoring may however be irreducible, owing to the multi-disciplinary heritage of development. To date, the explosion in frameworks has done little beyond substituting an earlier insufficiency of data with the new challenge of making sense from an excess of confusing, conflicting and often irrelevant data. Despite massive investment in the current proliferation, lots of monitoring just means lots of monitoring. In itself, it offers no assurance of improvement in performance. This does not suggest that these frameworks are useless, but rather they are just one step in the ongoing quest for evidence of success.

In reaching this conclusion, I will establish that the evaluation of judicial reform performance is itself deficient. The deficient nature of evaluative effort unavoidably compromises the assessment of development performance. This is not to claim that judicial reform has performed disappointingly; instead, it clarifies that the perception of disappointment rests on a foundation of inadequate evaluation. Judicial reform is rarely evaluated; when it is, this evaluation usually lacks rigour. There remains considerable technical contention over the adequacy and appropriateness of existing evaluative practices in judicial reform. Donors continue to limit their evaluations mainly to monitoring the delivery of outputs. To date, there has been no documented evidence of any systemic impact evaluation of judicial reform. More foundationally, there is a lack of consensus over the theory and practice of the meta-evaluation of judicial reform evaluation. This practice, which may be described as patchy, underscores the unresolved state of the entire literature on reforming development evaluation. Collectively, this state of affairs constitutes what I call the 'evaluation gap' in judicial reform.

This is another significant finding because it means that judicial reform and development evaluation must be attended to simultaneously in order to remedy the perceived poor performance of practice. I will provide the means to redress these shortcomings. But first, the deficiencies in reform and evaluative performance must be untangled. In doing so, improvements in evaluative approach are required to address the 'how' question in step with the clarification of 'what' judicial reform is required to do. Hence, I close this part by resuming the earlier argument addressing the 'what' question, viz. that judicial reform should promote justice as fairness and equity. This requires a 'thick' foundation of rights such as those constituted in international human rights law to provide the normative framework for purposes of evaluation. Any concept of equitable development embodies some notion of justice as fairness which warrants further debate. To initiate this debate, I propose that justice be measured through the application of rights. These rights reflect the political allocation of interests which have been variously dispensed in international domestic and customary law. While a definitive measurement approach to address the 'how' question remains a work in progress, this normative framework will provide the foundations on which to design, implement, monitor and evaluate ongoing reforms.

In sum, this part establishes the existence of substantial deficiencies in the practice of development evaluation notably as applied to judicial reform. These deficiencies are constituted both an 'evaluation gap' and a 'meta-evaluation gap' in reform practice – that is, evaluation is rarely conducted; when it is, it is done inadequately. The significance of these findings is that they qualify the initial hypothesis of reform failure being the 'performance gap' postulated in the literature.

## **5 Case studies of practice**

In the third part, I address the question '*What does the evidence of practice tell us about the nature and effectiveness of judicial reform?*' I will present three case studies of empirical evidence from across Asia during the past decade and a half. These case studies span the multilateral experience of the Asian Development Bank, the bilateral experience of Australia's aid agency in Papua New Guinea, and the varied experiences of a selection of reform practitioners from across the Asia Pacific region. Collectively, they present a substantial body of new evidence with which to appraise the existing academic commentary.

These case studies are drawn from my experience as a practitioner of judicial reform projects over the years. Methodologically, I adopt a qualitative, documents-based,

inductive approach to present experience from 'the real world' which has gone largely unstudied in the academic literature to date. This approach marshals evidence from the Asia Pacific region to contribute my professional narrative in addressing the core questions of this book. My participation as a practitioner weaves through the analysis of these experiences. To do so, I present a reflexive, ethnomethodological analysis - making sense of 'ordinary, routine details of everyday life' as defined by Patton - to deal with this participatory dimension.<sup>9</sup> The validity of this methodology is established using six criteria: the data is *authentic* (genuine), *credible* (accurate) and *representative* (generalisable); it has *meaning* (significant); it is *original* (contributes to the literature); and it '*tells a story*', embodying my perceptions of reality as a practitioner and researcher.

In Chapter 8, I analyse ADB's support of judicial reform during the period 1990-2007 which was innovative, exploratory and largely an unmapped enterprise. I will establish that ADB's championship of judicial reform has as a matter of dialectic been informal, driven by the conviction of the importance of reforming justice systems and, in this sense, a priori or ideological. This is evidenced in the ever-shifting articulation of the justification for judicial reform which has affected how the Bank formulated its approach to reform. I will also show that it has been difficult for ADB to demonstrate success; evaluation having been hampered by a continual changing in its goals for judicial reform, compounded by an endemic under-investment in evaluation. This analysis will reveal a mixed picture of the Bank's approach to development effectiveness: while generally appreciated by member states, it is documented that many projects were not well designed: their objectives were unclear; development logic was confused; and monitoring frameworks were consistently inadequate. Additionally, there has been no effort to assess impact. Consequently, ADB has been unable to demonstrate any measurable contribution to attainment of its objectives in poverty alleviation, good governance or civil empowerment. These weaknesses have rendered judicial reform to be fragile, being demonstrably under-competitive in the ensuing internal quest for funds. Evidently, ADB made something of a leap of faith in terms of investing in judicial and related reforms over an extended period in Asia.

In Chapter 9, I present the experience of Papua New Guinea's law and justice sector program between 2003 and 2007. This experience indicates that AusAID has made continuing refinements to its reform approach in response to mounting concerns over effectiveness. This is significant in two respects: first, it shows a shift in the focus of reforms from promoting 'law and order' in what Sage and Woolcock have termed a 'top-down' approach,<sup>10</sup> to adopting a more integrated approach to 'law and justice'. This repositioned notions of restorative justice closer to the heart of what may be called a more 'bottom-up' approach. Second, it showcases the major steps in a transition from accountability-based monitoring of the efficient delivery of activities to effectiveness-based evaluation of development impact and results. These steps involved dedicating a monitoring and evaluation capacity to support building a sector performance monitoring framework, and collecting baseline measures which in due course provided the first evidence of improving crime trends and rising public confidence. This required an investment of almost four times the global norm of 1.6% of ODA, which may be indicative of a continuing global under-investment in development evaluation. After almost four years, however, AusAID remained unable to identify any evidence of measurable impact in terms of attaining its stated goals of

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<sup>9</sup> Patton, M. 2002, *Qualitative Research and Evaluation Methods*, 3<sup>rd</sup> edn, Sage, Thousand Oaks California, 110.

<sup>10</sup> Sage, C. and Woolcock, M. 2005, *Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries*, World Bank, 11.



poverty alleviation and economic growth. While evidence of attribution or contribution remained elusive, these initiatives nonetheless represent potentially transformative steps towards demonstrating reform effectiveness.

In Chapter 10, I then analyse the experience of practitioners across Asia and the Pacific over the past decade to ascertain how selected countries have addressed the needs for judicial reform to improve the quality of justice.<sup>11</sup> This experience provides empirical evidence of mixed successes, mainly limited to efficiency-based procedural reforms such as in information technology innovation and delay reduction. It also identifies the existence of a number of challenges generic to judicial reform: refining goals; promoting more proactive leadership; involving the community; balancing independence with engagement; developing more sophisticated approaches to integrating training in change management approaches; and strengthening evaluation capacity in step with demonstrating improved results. As the contributions demonstrate, confusion over goals, under-investment in data, operational fragmentation, and a focus on outputs rather than results remain characteristic challenges across the region. Significantly, there is evidence that judicial reform in South Asia has on occasion applied a 'thick' conception of justice to address the distributive dimension of the equality gap. Examples include courts issuing judgments against governmental actions which enforced citizens' rights to fresh water and air, a clean environment, education, shelter, health, free legal aid, and speedy trial, thereby measurably improving civic wellbeing.

## **6 Generalised findings and key empirical propositions**

The evidence of these case studies establishes a number of significant findings. First, the judicial reform enterprise in the Asia Pacific region is exploratory and continuing to evolve. This body of experience identified eight characteristic challenges relating to goals, leadership, community, donors, independence, training and capacity-building, data and results which are showcased in the third case study.

Second, with the notable exception of the South-Asia experience, there is little evidence of any coherent pro-poor focus, despite increasing rhetoric on the goal of civic empowerment of the poor. Overall, the economic growth-based rationale for reform subsumed other goals, with judicial reform framed in the role of promoting efficiency and 'thin' procedural improvements to justice. There was often a pronounced conflation of reform objectives, as epitomised in the ADB experience. On occasion, there were conflicting goals, as evidenced in the PNG experience, which illuminated the difficulties of highly bureaucratised development systems engaging with the informal sector to promote customary justice. The case studies demonstrated an ongoing search for conceptual clarity in the purpose of judicial reform, propelled by the conviction of its importance, as seen at ADB. Until the equivocation over justification is resolved, however, it will remain impossible to articulate clear goals, elaborate developmental cogency or specify meaningful performance targets with which to demonstrate results. This in turn is likely to entrench the deficiencies which have characterised endeavour to date.

Third, there is consistent evidence of some 'results' which are the outcomes of the activities in each case study. These include a range of policy development, judicial training and organisational improvements in courts, notably in delay reduction,

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<sup>11</sup> This case study builds on the author's work in Armytage, L. 2009, 'Introduction: Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience', in Armytage, L. and Metzner, L. 2009, *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience*, Oxford University Press, 3–42.

technical publications and institutional reorganisation and new laws. This may give rise to some claims of 'success'. But this success is rare, difficult to substantiate, and tenuous in terms of attaining any of the stated goals of poverty alleviation, good governance or civil empowerment.

Fourth, the capacity to undertake systematic measurement of the performance of reform remains embryonic, as illuminated in the PNG experience. When monitoring is extensively undertaken, the usual experience of practice confirms that it is invariably limited to auditing the efficiency of implementation rather than promoting effectiveness and improving results. Continuing under-investment in evaluation is endemic. With the exception of this PNG experience, evaluating impact remains a matter of rhetoric rather than action and, for this reason, it is unlikely that we will see compelling evidence of success in the foreseeable future. The significance of this finding is to highlight the time required to implement the commitments of the *Paris Principles* to improve aid effectiveness including not just evaluation but also improvements in aid coordination. This picture of both development performance and evaluation conforms generally to the global literature.

Fifth, I will show through an ethnomethodological analysis of my participation in this practice that the assessment of value is affected by the context and purpose of evaluation. I identify discrepancies between my evaluations as a practitioner and as an independent researcher, using earlier works as counterfactuals. These discrepancies illuminate a critical though rarely seen space between the evaluand and evaluator. Discretionary judgments in this space may mean the difference between seeing the reform reality as being a 'glass half-full' or a 'glass half-empty'. Both perceptions may be legitimate; the difference being determined by context and purpose. The value of this analysis is to emphasise that value judgments are axiomatic to evaluation and irreducible in the complex challenge of assessing judicial reform. In effect, I find myself, like many commentators in the literature, conflicted in my own a priori belief in the importance of justice reform, knowing that judicial reform should contribute much more to promote human wellbeing than it has to date.

Drawing these evidentiary threads together, I will argue that the continuing explorations of practice are linked to - and driven by - its patchy performance. The experimental nature of this enterprise is unavoidable and, indeed, may inspire a virtuous cycle of continual improvement. But, so long as donors continue to disregard this evidence, these findings indicate a vicious cycle of dysfunctional practice where disappointing performance is overlooked, becoming embedded and even systematised. The dysfunctional nature of this performance is caused by three deficiencies in judicial reform, viz. deficiencies in development performance, development evaluation, and development justification. The first two deficits can be resolved at the managerial and technical levels. But the heart of the problem, which lies in the fundamental confusion over the theory or justification for judicial reform, is yet to be resolved.

This empirical evidence indicates that it is premature to conclude that the judicial reform enterprise has failed. It establishes that deficiencies in both the performance of reform endeavour and the evaluation of that endeavour are unlikely to be fully redressed for some years to come. But, much more important, these case studies also provide the evidence with which to redress these deficiencies.

## 7 Conclusions: a theory of justice reform

It is now clear that there are a range of unresolved philosophical, conceptual and technical challenges in judicial reform. I establish, from a survey of the literature and an analysis of practice, that there is evidence that both the performance of judicial reform and development evaluation are insufficient. Despite massive ongoing investment in both judicial reform and evaluative endeavours, we remain unable to demonstrate success. Hence the need to address the two key questions, '*what*' should be the purpose of judicial reform, and '*how*' should success be measured, which lie at the heart of this study.

Finally, in Chapter 11, I will redress these deficiencies in the judicial reform enterprise. In answering the '*what*' question, I define the purpose of judicial reform as being to promote justice as fairness and equity. This requires the inclusion of a human-centred, rights-based approach to improving justice constitutively. This supplements the deficiency in the prevailing instrumental approach to judicial reform with a more 'thick' conception, and provides the powerless and poor with the means to exercise their substantive rights. This theory of judicial reform builds on the nascent but significant experience from South Asia where there is emerging evidence of a potential paradigm shift to a rights-based approach of promoting justice. In answering the '*how*' question, I propose that the evaluation of these reforms can only be undertaken cogently by enabling the civil, political, economic, social and cultural rights variously constituted in international domestic and customary law. While the design of a systematic means to evaluate these reforms remains a work in progress, this normative framework will provide the coherence to transform the insufficiency of existing evaluative practice to demonstrate success.

In closing, I will show that this theory is actionable in practice by using a taxonomy of just development. This taxonomy provides examples of injustices affecting the rights of people – from Afghanistani girls, to Bangladeshi politicians, Nepali dalit women, Vietnamese businessmen, Palestinian labourers and Pakistani taxi drivers - together with indicative measures of reform success.

In sum, this book explains that judicial reform should promote justice and that justice must be centrally concerned with fairness and equity. The core purpose of judicial reform is to enable those rights that are constituted in international, domestic and/or customary law. These rights span the spectrum of civic wellbeing, comprising the economic, political, social and humanistic dimensions of any society. Reaching a consensus on which rights to promote may be difficult where the interests of power-holders are jeopardised, which has often required donors to make pragmatic compromises in practice. It is for this reason that justice reforms should focus on enabling those rights which have already been dispensed politically into law.

This theory of rights-based development reframes the approach of judicial reform and casts the human being – rather than the state, the market or the development agency – as the key actor in the development process. To realise this vision of placing justice at the centre of development, promoting social wellbeing, requires a shift in paradigm. The prevailing focus on primarily promoting aggregate economic growth has put the cart before the horse. By emphasising utilitarian notions of efficiency, it has shown a distributive indifference to notions of equality and a neglect of rights. Economic development cannot sensibly be treated as an end in itself; markets are instrumental in providing social opportunity for transactions. But the pursuit of growth or wealth cannot be the goal of development. Development must provide the means to enhance the lives of people and improve civic wellbeing. To do this justice must lie at the heart of reform endeavour.

These propositions realign judicial reform to the immanence of justice and the quest to promote fairness which has been recognised as elemental to human society since Aristotle:

Man, when perfected, is the best of animals; but if he is isolated from law and justice he is the worst of all .... Justice which is his salvation belongs to the polis; for justice, which is the determination of what is just, is an ordering of the political association.<sup>12</sup>

Justice and equity are neither absolutely identical nor generically different. .... This is the essential nature of equity; it is a rectification of law in so far as law is defective on account of its generality.... It is now clear what equity is, and that it is just, and superior to one kind of justice.<sup>13</sup>

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<sup>12</sup> Aristotle, *Politics*, Barker, E. (ed), 1958, Oxford University Press, London, (1253 a 15), 7.

<sup>13</sup> Aristotle, *Nicomachean Ethics*, Thomson, J (transl), 1955 (Revised 2004), Penguin, London, (1137a - 35) and (1137 b 25-35), 141.