Beyond Common Knowledge

Empirical Approaches to the Rule of Law

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CHAPTER 10

The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses

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AN INTENSIVE SEARCH is on for the rule of law, the holy grail of good governance and sustainable development around the world. Centripetal forces pull that search, and the vast majority of resources in rule-of-law programs, to the courts, expecting them to strengthen their operations and, presumably, the rule of law itself. Is it wrong to privilege the courts? Not necessarily. It depends on our expectations. Challenges of court-centric strategies to strengthen the rule of law in country after country begin with a basket of constraints familiar to scholars of comparative law—namely, that judiciaries are the product of localized evolution and persistent differentiation, notwithstanding globalizing forces for convergence (see, for example, Merryman 2000b). A special focus on the courts may be suitable in some places, but we should not assume that it is suitable in every place.

Moreover, efforts to propagate the rule of law through court-centric programs founder for several reasons:

- Judicial leadership, if it exists at all, often transfers to other posts, retires, or is voted out of office.
- Implementation capacities, especially among subordinate court staff, are extremely limited.
- Broader political and economic goals—for example, judicial independence and macroeconomic growth—remain largely out of reach of a court-centered approach.
- Reform strategies are developed with minimal if any empirical research.
- And above all, donors face incentives to spend money with insufficient regard for the economic and political changes that spending may engender.

Keeping these constraints in mind, two related arguments are central to this chapter. One is that even if the rule of law is an important goal, how the rule of law is conceived—with particular attention to the institutional configurations that further this goal—may differ considerably across countries. Accordingly, this chapter urges reformers to begin with a detailed empirical approach, paying special attention to restrictive as well as expansive definitions of the rule of law. They should focus in particular on what courts actually do, noting that in many cases noncourt institutions perform specific functions as well as or better than the courts themselves. The second argument flows from the first: efforts to promote the rule of law on the part of international agencies tend to be impeded by a rigid conceptualization of the relevant policymaking domain and, ultimately, by the highly formalized incentive structures of the international development agencies themselves.

Like all of the papers in this volume, this chapter tells a story about the evolution of legal and judicial reform both in theory and in practice.[1] Ultimately, the hope is that a more nuanced understanding of international donor assistance will contribute to an understanding of why, when, where, and how reform interventions can make a difference.

The first section examines the recent history of legal and judicial reform, and poses the following questions: What is the rule of law? Why has momentum for rule-of-law programs gathered such strength in recent years? What are the challenges we face when it comes to strengthening reform programs? How does the rapid growth of the rule-of-law sector translate into increased demands on the courts?

The second section describes the *standard package*, the components that generally go into legal and judicial reform programs. The section begins with a history of the rule-of-law movement, which puts the standard package in context. Then it examines different levels of intervention. Finally, it takes a disheartening look at the impact of loan structures on the assistance process.

The standard package is the product of a consensus. The third section looks at the constituencies that are a part of that consensus and those that are not. And it asks why broader, well-organized, dissenting constituencies are absent. This section begins to address the underlying political economy of institutional reform, focusing on the problems associated with reform constituencies and the perverse incentives they face.

The next section examines the record of successes and failures in legal and judicial reform as a whole, paying special attention to resource-intensive investments like courthouses, computer systems, court management, and training.

Finally, the last section suggests an agenda for improving judicial reform that relies on empirical analysis. After setting out the case for such analysis,

it focuses on the critical components of the empirical-research agenda—of dispute resolution forums, and monitoring and evaluation that could positively influence the evolution of the standard package in the future. The research suggested will help set baselines, target incentives and interventions for measuring progress and success against baselines, and reduce the risk of allegations of lack of due diligence.

Defining the Rule of Law

Every donor organization has an internal structure by which it sorts and classifies its development assistance programs. The assignment of judicial reform within that structure can vary. Some donors link judicial reform to the promotion of democracy and human rights. Others place it within governance or public-sector management programs. Many situate it within economic reform programs and, increasingly, attempt to link it to larger poverty-reduction programs as well. In every case, however, assistance for judicial reform remains the chief operating vehicle for strengthening the rule of law around the world. If we want to understand the gathering momentum in this "sector," especially among prominent donor agencies, we must begin with an effort to define *rule of law* and *legal system*. What are the specific challenges associated with this objective? How does increased demand for the rule of law translate into increased demands on the courts?

WHAT IS THE RULE OF LAW? DEFINITIONS THICK AND THIN

While legal and judicial reform efforts proliferate, important questions remain concerning the definition of *rule of law*, the nature of judicial independence, and the boundary between the judiciary and the bureaucracy in the local context.

The definition debate is heated (see Radin 1989). Some define *rule of law* as a stage at which laws have become widely known and understood,[2] and where they are applied equally to everyone (Carothers 1998). In practice, it is hard to imagine even a single jurisdiction where this standard actually is met. Others attach special importance to constitutional limitations on the scope of legitimate state action, or on a clear demarcation of powers between central and peripheral governments. In Western liberal democratic discourse, *rule of law* connotes a commitment to democracy, an emphasis on law and order, limitations on the power of state actors (particularly police and prosecutors), respect for legal authority, individual rights, and an effort to hold state actors up to the same rules and standards as everyone else.[3]

Casper (2002) observed that "calls for the rule of law . . . are quite undifferentiated and rarely specify what conditions have to be met in order to justify the conclusion that, in a given context, the rule of law is actually being

furthered." Indeed, the goals and expectations articulated in rule-of-law projects often diverge dramatically from their activities and accomplishments. Expectations tend to be bloated. One of the most important reasons for this disjunction between goals and accomplishments is that project designs embrace "thick," expansive definitions of *rule of law*. In other words, they aim at broad substantive goals like strengthening individual rights and political institutions, and stabilizing the economy. To the extent that these reform programs succeed, however, that success is often at the "thin" level of the rule of law: improvements in the procedures and the efficiency of legal processes.[4]

In his very useful effort to organize the debate about competing definitions of *rule of law*, Peerenboom (2002) suggests that there is significant agreement on the essential elements of a thin (procedural) definition but no agreement at all when it comes to a thick (substantive) definition. This is particularly true when we begin to ask about the extent to which our definition should incorporate particular notions of morality related to economic governance (market economies versus command economies), regime type (democratic regimes versus single-party socialist regimes versus neoauthoritarian regimes), and human rights (individual rights versus communitarian rights versus collectivist rights).[5]

In economic relations, thick descriptions tend to emphasize the importance of law (versus the trust developed through repeat transactions) to the relationship between individuals and businesses. Many want the playing field leveled through competitive market structures (competition law) and appropriate incentives for private actors (free-trade regimes). Others point to the need for intervention in macroeconomic policy to ensure monetary stability. A few even go so far as to stress the need for internalizing social costs and benefits not reflected in market prices and, ultimately, for redistributing wealth.

Those who argue for a thick, substantive definition of the rule of law in economic governance further argue that the application of a purely procedural approach leads to perverse results. For instance, a country might adopt a rule that every decision corporate managers make can be challenged by shareholders in court and that judges are empowered to make *de novo* decisions about the wisdom of each corporate judgment (this is the opposite of the business judgment rule). Procedurally, this rule may be flawless—after all, judges are being petitioned to review business decisions, and they are reviewing them honestly. But as the critics of a purely procedural approach are quick to point out, the law itself may weaken certain goals pertaining to the rule of law, especially if economic growth and development are frustrated by the substantive terms of the law itself.[6]

Actual reform experience demonstrates the urgent need to strike a more

effective balance between universal ideas about the rule of law in a purely procedural sense and exceptional ideas about specific substantive concerns embedded in local contexts. In striking this balance, however, the most urgent need is for more thick descriptions of local context regarding the role, functions, and substance of formal and informal legal institutions.[7] Within the formal legal system, for example, differentiated analyses are needed to parse out prescriptions for high courts and low courts. At the same time, we need a differentiated approach to the bureaucracy and the judiciary, the urban judiciary and the rural judiciary, and the judiciary and various local tribunals, one that allows us to determine which forum is the most appropriate for which judicial functions.

Defining the Legal System. Defining the scope and boundaries of the legal system is an equal challenge. Local preferences and competing notions of success in the realm of dispute resolution are exceedingly difficult to define and measure. In the early 1970s, Stanford University initiated an ambitious empirical project known as Studies in Law and Development (SLADE) to investigate and compare the performance of legal institutions in a wide range of countries. Notwithstanding a staff of first-rate scholars, the exercise proved very difficult. Among other things, the researchers encountered a host of comparability problems when it came to classifying disputes and dispute resolution processes across different countries.[8]

The difficulties encountered by SLADE are instructive. After all, defining the domain and functions of legal actors and institutions is central to any empirical analysis of legal systems. Over three decades ago, Lawrence Friedman (1969) attempted to resolve this conundrum by applying a functional approach to the analysis of legal systems. In particular, he argued that legal-systems research should identify legal functions whatever their formal classification ("legal" or "nonlegal"). "What *is* the legal system? What are its boundaries? Where does it begin and where does it end?" Friedman asked.

> Most of the definitions come from the lawyers themselves; but these may be deceptive. The lawyer's definitions are bounded by his own experience. . . . Logically, however, the phrase "legal system" could just as well apply to all of government, to all of social control, to every institution that makes rules or applies them, to any way in which private persons address themselves to higher authority, to every official response to private behavior, and to all actions of persons and groups that consciously relate to the law, including deviation or evasion. (56–57)

As Friedman points out, the boundaries of the legal system often are unclear.[9] Donor-supported rule-of-law projects tend to be quite strong when it comes to defining the boundaries of the judiciary, for example—especially when it comes to drawing a sharp distinction between the judiciary and the bureaucracy—but they are extremely weak when it comes to determining the functions that are best allocated to each institution.

In many cases, the bureaucracy appears to be an attractive substitute for the judiciary. Yet often law projects simply assume the virtue of the large-scale migration of power from the bureaucracy to the judiciary, never pausing to consider that certain functions are carried out comparatively well by the bureaucracy itself. The civil courts in China, for example, function like bureaucratic institutions, and they handle family disputes quite well:

> Key to understanding Chinese courts . . . is understanding that they are essentially a bureaucracy, like other bureaucracies in the Chinese government. . . . They do not occupy (except formally) a position apart from and superior to the rest of the government. Consequently, we should attempt to measure their performance using the measures we would apply to other Chinese government bureaucracies; attempts to apply measures we would apply to courts in the United States are likely to fail. (Clarke, Chapter 5)

Legal and judicial reform projects cannot succeed without a stronger understanding of the actual function and scope of the legal system, and related institutions, in a particular local context.

Judicial Independence. Woven through this chapter are references to judicial independence. Like the meaning of *rule of law* or *legal system*, the definition of *judicial independence* is contested; its evolution is contingent on the interaction of a complex set of variables and institutional patterns; its measurement is challenging; and its manifestations, we think, are not always clear.

The case-specific approach to judicial independence that Hualing Fu develops and applies in Chapter 6 is compatible with the stratification of the rule of law—thick (substantive) and thin (procedural) definitions. Fu argues that the independence, fairness, and competence of the courts in China vary by type of case. Judicial independence is severely constrained in criminal cases with serious political overtones and, to some extent, in economic cases that affect powerful local enterprises and administrative cases in which a strong government department is the defendant. Yet, he argues that in a large number of ordinary cases—family cases, most small debt and property cases, and disputes between private companies—judicial independence is not impeded. In the vast majority of cases before the civil courts, then, a thin rule of law works.

In a superb paper, Matt Stephenson (2003) models judicial independence and finds that even in stable political systems, independence is highly contingent on the complex convergence of three variables: (1) a political system that is sufficiently competitive, (2) judicial doctrine that is sufficiently moderate, and (3) political competitors who are sufficiently risk-averse and concerned about future payoffs.

Finally, it can be difficult at times to know whether a court is acting independently or not. Every ruling against the government is not necessarily a sign of judicial independence. For example, in August 2002, the Venezuela Supreme Court, invoking a technicality, refused to hear the attorney general's petition to bring a case against military officers involved in an attempted coup some months before. On the surface this looked like—and many have heralded it as—a triumph of judicial independence: the judiciary standing up to the executive. But on closer analysis, it probably was something very different. For instance, the justices may have been weighing (and been influenced by) the likelihood of regime change. The Court has an interest in being on the right side of history, and in disassociating itself from an autocratic leader, especially one on the way out. Second, the Court may be independent of the executive and the legislature but not of the military. Each side of this dispute was a powerful force. Third, the Court may have been insecure about its own institutional integrity and survival in a transition period. This would fit a pattern found in Argentina, where their lack of judicial independence has motivated judges to "strategically defect" from a government once it begins to lose power (Helmke 2002). In other words, what appears at first as an act of judicial independence actually may be a pragmatic decision in light of local power realities.

WHY IS MOMENTUM FOR THE RULE OF LAW GROWING? GOALS AND CHALLENGES

Efforts to strengthen the rule of law are rooted largely in efforts to institutionalize values.[10] This pressure may grow out of genuine humanitarian concerns—to alleviate poverty or protect human rights, for example. But it also may grow out of more-expansive notions of national self-interest—that peace prevails in democracies or that respect for contractual rights prevails in countries with strong rule-of-law regimes. Of course it may grow out of a combination of both.[11] At least among those who choose to promote the rule of law, however, the challenge seems to lie in institutionalizing an abiding respect for human rights, economic growth, and democracy amid the world's shifting political, organizational, and technological forces.

Human Rights. The human rights agenda after World War II was focused on the prevention of torture and genocide. By the 1970s, that agenda had grown to include the protection of civil and political rights, and there was vigorous debate about adding to those rights the right to development itself. Today the human rights agenda has been expanded still more, to include an explicit focus on economic and social rights, such as the right to work, the right to education, and the right to social security.

Economic Growth. The value of economic opportunity and growth is reflected in an appreciation for predictability in planning and efforts to prevent grants of monopoly privilege and arbitrary exactions. Max Weber and Douglass North provided broad theoretical support for this thinking, and recent hypotheses on the value of secure property rights in corporate governance and intellectual property supplement this view.

But the empirical evidence is inconclusive on the importance of the formal legal system in the economic-growth agenda. Many countries with an extremely thin rule-of-law regime question the importance of the formal judiciary when it comes to foreign investment, economic growth, and development. China, for example, has enjoyed high levels of foreign direct investment (FDI) and growth; and Brazil has a growing credit market based on the dense information available through new technologies and databases, both of which tend to substitute for strong legal institutions. At the same time, actors in India are pursuing international capitalization by adhering to more-rigorous international standards of corporate governance—even more rigorous than their domestic laws would require.[12]

Democracy. The value of democracy underlies demands for legitimate authority and accessible due process. These demands, in turn, oppose noncompetitive concentrations of political and economic power. Calls for transparency, accountability, and participation have grown in recent years, and, for the most part, they appear to be genuine. Slowly but surely then, we are seeing the growth of civil society organizations and independent regulatory bodies despite the fact that important questions remain about the extent to which formal legal institutions can address the frustration of a series of repeat elections that do not improve well-being (the democratic-fatigue dilemma).

HOW DO RECENT DEMANDS FOR THE RULE OF LAW TRANSLATE INTO INCREASED DEMANDS ON THE COURTS?

Typically, demands for "more and better" rule of law imply increased demands on the courts in all three domains: human rights, economic growth, and democracy. In fact, some human rights advocates have even begun to press the courts for judgments regarding social justice (Politics of human rights 2001, 9). The courts, they argue, are in a unique position to push public policy in the right direction, noting that social and economic rights should be justiciable, notwithstanding the risk of a hostile government backlash and the inability of the courts to enforce judgments even in much less complex cases.[13]

In a related trend, constitutions and constitutional courts have prolifer-

ated in recent years, especially in developing countries. The extent to which the rights enshrined in these constitutions are more likely to be recognized once they are written down, however, remains unclear.[14] Those with an interest in constraining the state have supported this new wave of constitutionalism, but the general impact of their efforts is also unclear.[15]

Economic growth and democratic participation produce pressure both to deconcentrate domestic power and to reregulate it at an international level. Deconcentration places more and different demands on the legal system by increasing the likelihood of mobility between jurisdictions and by imposing constraints on various administrative monopolies. Generally we assume that demands on the courts will grow as the powers of a unitary government are redistributed to lawmakers, the courts, and other institutions. Judicial review is one example of a power that creates work for the courts. But whether external controls on administrative processes—for example, in the form of domestic and international oversight agencies—will translate into greater pressure on the courts or lead to alternative forms of dispute resolution is unclear.[16]

Perhaps the greatest challenge to the rule of law in developing countries lies in managing the gap between the expectations that drive rule-of-law programs and the reality of what these programs can deliver. Rule-of-law programs in developing countries are burdened with expectations that far exceed those placed on development programs in richer nations in a previous era. Indeed, courts and lawyers in developing countries increasingly are expected to play a central role, not only in resolving common disputes, but also in coordinating markets, managing decentralized bureaucracies, leading social and cultural reform, and monitoring the behavior of local politicians.[17] This burden may simply be too much.

In his classic book, *The Hollow Hope: Can Courts Bring About Social Change?* (1991), Gerry Rosenberg uses rigorous empirical analysis to challenge the myth of court-led social reform in the United States. He suggests that contrary to conventional wisdom, the U.S. Supreme Court generally lags behind broader social movements. Indeed, Rosenberg's extensive empirical study shows just how far off those who point to an activist Court may be from the reality of American history.[18] Yet the image of an activist Court endures. And in many developing countries, a belief in the transformative capacity of litigation has grown palpably.

If the U.S. experience is any guide, legal reform–based efforts to fight poverty, for example, are likely to fail.[19] Indeed, Rosenberg concludes that courts do not lead social reform and that they cannot transcend the political conflicts in which social problems are so deeply embedded. He writes: "Problems that are unsolvable in the political context can rarely be solved by the courts. . . . Turning to courts to produce significant social reform substitutes the myth of America for its reality. It credits courts and judicial decisions with a power that they do not have" (338).[20]

The Standard Package of Judicial Reforms

Increasingly, demands for rule-of-law reforms have been marked by a strong preference for judicial centrality. Indeed, within international development circles, the rule of law has become virtually synonymous with the reform of judicial structures—notwithstanding the lack of empirical research to support that thinking. This uncritical gravitation toward judicial centrality has produced an unmistakable tendency to treat the courts as a black box, an entity set apart from any larger institutional context.[21] In fact, there has been little if any attention paid to the larger ecology of legal institutions. This has left the standard package of judicial reforms cut off from its institutional context and ill equipped to consider alternative dispute resolution (ADR) and risk management, even when those options may be more effective than the courts themselves.

HOW THE STANDARD PACKAGE WAS DERIVED: FIVE WAVES IN THE LAW AND DEVELOPMENT MOVEMENT

Recent efforts on the part of international donors to strengthen formal legal institutions reflect several factors. Chief among them is the assumption that a close connection exists between the effectiveness of the formal legal system and economic development. In particular, the multilateral development banks (MDBs) emphasize the importance of international investment and competitiveness in generating sustainable growth, insisting that domestic legal systems must be brought into conformity with international standards to raise investor confidence. The ideal scenario: a formal legal system is one in which contractual obligations between strangers are honored, property rights are secure and transferable, resources are allocated fairly, and public decision-making authority is exercised transparently and predictably, thereby inspiring citizen and investor confidence. Although USAID describes its judicial reforms in terms of protecting democracy and human rights, it also subscribes to the banks' economic justification for those reforms.[22]

Rule-of-Law Reform: The First Wave. The past fifty years have seen at least four waves of judicial reform, with a fifth wave growing from a ripple into at least a rhetorical splash during the last several years. The first wave began immediately after World War II and lasted until the middle of the 1960s. During this phase, foreign aid was expected to make public institutions work more effectively. This wave was motivated by modernization

theory: development is inevitable; and the evolutionary process of increasing societal differentiation results in economic, political, and social institutions akin to those in the West—namely free markets, liberal political institutions, and the rule of law (see Tamanaha 1995). Programmatically, the central focus of reform programs was building the capacity of centralized bureaucracies.[23] Very little support was given to judiciaries; but to the extent it was, the judiciary was viewed as just another public institution in need of technocratic enhancement, with rudimentary institutional reform and a bit of substantive legal reform and constitutional drafting thrown in for good measure (see Klug 2000).[24] In its effect, the first wave reflected many elements of legal transplants of earlier periods, for example, when the study of Roman law was revived in European universities, or when common law was introduced in colonial jurisdictions.

Rule-of-Law Reform: The Second Wave. The convulsive second wave lasted from the middle of the 1960s through the 1970s. The much-maligned law and development movement reached its peak in the late 1960s, when Latin American legal academics and lawyers were sent to American law schools, and American lawyers were sent to develop legal education curriculums in Latin America.[25] Two doctrinal forces were at work during this period: one grounded in prevailing ideas about economic development; the other, in prevailing ideas about democratic development. Although the programs from this period have been criticized for exporting American legal institutions, many of the lawyers and academics who participated in the exchange in fact were charged with supporting a much larger economic development paradigm. So many were placed in ministries of finance, commerce, and planning. Their brief was to make public institutions work for economic development. Participants in the democratic side of this movement were motivated by the civil rights movement in the United States. They believed that lawyers could, and should, be activist agents of change.

Even as the law and development movement set out to encourage broader social change, however, modernization theorists were becoming increasingly pessimistic. Throughout the 1960s and 1970s, countries failed to progress economically, political institutions deteriorated, and authoritarian regimes proliferated. Before long, modernization theory was cast aside—at least by some influential theorists—and dependency theory rushed in to fill the theoretical void. Increasingly, blame for the failure of development efforts shifted from endogenous factors, factors within each country, to exogenous factors like the structure of global capitalism and postcolonial exploitation as a whole.

Rule-of-Law Reform: The Third Wave. During the 1980s, a third wave emerged. The programs in this period—like USAID's Administration of Justice programs—were funded by U.S. agencies and foundations to promote democracy through legal development. The programs started in Latin America; but by the end of the decade they had reached Asia as well. As the decade closed and the cold war ended, more attention was paid to the questions of judicial independence, constitutionalism, respect for civil and political liberties, and criminal law. Thus began a limited systemic approach to the development of legal systems. The approach was *limited* in the sense that formal legal systems shaped the boundaries of its focus.

Rule-of-Law Reform: The Fourth Wave. The fourth wave began with the post–cold war rule-of-law renaissance in the early 1990s. The rule of law became the big tent for social, economic, and political change generally—the perceived answer to competing pressures for democratization, globalization, privatization, urbanization, and decentralization. Rule of law also became the big tent for donor activity to "rebalance the state." During this period, those who provided support during the earlier waves suddenly were joined by a legion of bilateral, multilateral, and foundational actors. In particular, European influence emerged in the form of support for ombudsmen, judicial councils, and constitutional courts.[26] United Nations agencies, especially the United Nations Development Program (UNDP), entered the fray as well.

The most notable development, however, was the entrance of multilateral development banks (MDBs) and the remarkable infusion of capital they brought with them. Three MDBs stand out: the World Bank, the Inter-American Development Bank (IDB), and the Asian Development Bank (ADB), though the ADB is a relative newcomer to this window of assistance. Constrained by their respective charters to avoid the political dimensions of development, they rationalized their entrance in terms of the need to strengthen legal institutions for foreign investment by enforcing contracts and property rights.[27] More specifically, they insisted that a well-functioning judiciary is necessary for economic development.

MDB involvement in rule-of-law programming was bolstered by the "Washington Consensus" and its push for private-sector development.[28] Thus, MDB support emphasized company law, secured transactions, and bankruptcy law. USAID, on the other hand, interpreted its mandate more broadly. It focused on criminal justice and criminal procedure to address problems of lawlessness and human rights, especially in Latin America. The theoretical dimensions of this fourth period were enriched by advances in institutional economics and organizational theory, including game theory (see, for example, North 1990; and Powell and DiMaggio 1991), as well as advances in the literature of law and economics, and law and society.[29]

Judicial Reform: The Fifth Wave. Under a purported comprehensive approach to legal and judicial reform, we now seem to be entering a fifth wave:

> Large donors have tended to move into comprehensive, integrated, or "holistic" programs, but this often means little more than the pursuit of multiple objectives by combining an equal or greater number of project components. The strategic linkages among goals, components, and activities remain weak. (Hammergren, Chapter 9)

This time, poverty reduction is the centerpiece (see, for example, ADB 1999; Narayan and Petesch 2002; and World Bank 2001b). Poverty-focused judicial reform programs have as a goal expansion of the human rights agenda to include social and economic rights—for example, poverty alleviation and health care. Some human rights advocates extend this agenda and use it as a basis for arguments about the redistribution of wealth. It is unclear how the MDBs will revise their standard package of investments to match the rhetoric, goals, and objectives of this fifth wave. For example, previously the World Bank might have launched a case management program to improve the climate for foreign investment and economic growth. Today, the Bank may embark on precisely the same program to reduce the number of cases so that impoverished litigants can gain greater access.

THE STANDARD PACKAGE: A CLOSER LOOK

As noted at the start of this section, some donors promote human rights; others promote economic development or democracy. Yet despite these differences in the stated rationales for legal and judicial reform, the actual allocation of resources across projects differs very little. "Everyone funds training, trips, law drafting, short-term consultants, and conferences; those that can afford them provide long-term advisers, infrastructure, and equipment" (Hammergren, Chapter 9).[30]

This convergence in practice is explained at one level by a dominant interpretation of the theoretical literature. On a purely technical level, convergence results because "the [design] process draws heavily on conventional wisdom . . . about the nature of judicial problems and their solutions." (Hammergren, Chapter 9). On another level, however, convergence is explained by the political economy behind the loans MDBs make and the grants bilateral donors make: foreign assistance is an instrument of public international diplomacy.

Tom Carothers (1998) has delineated three levels of engagement in the standard donor template:

- *Type One Reform* involves changing substantive laws: constitutional law, criminal law, commercial law, administrative law, and the like.[31]

- *Type Two Reform* focuses on law-related institutions, making them more competent, efficient, and accountable. This level of engagement often moves beyond the judiciary to include the police, prosecutors, public defenders, prisons, law schools, ADR, and local government.[32]
- *Type Three Reform* focuses on the deeper goal of government compliance with the law, particularly in the area of judicial independence.[33] Needless to say, this type of reform depends less on technical issues and more on enlightened leadership and pressure from above.[34]

Follow the Money. In the standard package, most donor resources are concentrated on Type Two Reform, making formal judicial institutions and related institutions more competent, efficient, and accountable (World Bank 2001a).[35] Unfortunately, donors often find that the judiciary has very little absorptive capacity for massive infusions of capital.[36] In light of this fact, it often is more important to follow the money as opposed to the rhetoric when it comes to an analysis of donor-funded rule-of-law programs. Where does the money actually go? What does it accomplish?[37] What is the relationship between investment strategies and the larger incentives for sustainable and effective reform?

Resource-Intensive Interventions. By and large, capital-intensive reform targets in the judicial sector include salaries and benefits (plus nonsalary benefits, like cars), as well as courthouses, computers, and training. Higher salaries and increased budgets often are the stated goals of multilateral and bilateral assistance, but, as a matter of policy, donors rarely finance them. The primary rationale is that donor increments for salaries and budgets are not sustainable. Building courthouses, however, seems popular—some projects have the construction of a courthouse as their only objective—this despite the fact that long-term efforts to maintain courthouses have been conspicuous by their absence.

The computerization of functions related to judicial administration, case management, and other services remains one of the most popular forms of capital-intensive intervention, but training in this area has fallen far behind. Similarly, substantial resources have been committed for the creation of specialized courts in commercial law, bankruptcy law, and corruption law, but their efforts have not been informed by empirical research, which has left these courts underused or inefficient, ineffective, and corrupted like their general court counterparts.

Modest-Resource Interventions. Donors spend more-moderate amounts on projects that relate to the internal governance of the judiciary. One response to the manipulation of judges through promotion and remuneration, for example, has been the creation of independent judicial service commis-

sions, or judicial councils. On the whole, these councils have had mixed success, depending on their composition and goals (see Hammergren 2002). Other moderate-resource interventions are delay reduction programs, the production of annual reports on judicial performance, the development of judicial performance standards, and the preparation and management of judicial budgets. Bar associations have received a moderate amount of funding as well.

Lip-Service Interventions. Lip-service interventions always find their way into donor reports, but they receive very little if any MDB funding. Among these interventions are legal education and access-to-justice activities (for example, support for civil society organizations engaged in advocacy and public-interest law). Legal education has received a certain amount of support from bilaterals and foundations, but very little support from the MDBs. Civil society organizations have received funding from USAID, the Ford Foundation, and The Asia Foundation, but, again, very little from the MDBs (see, for example, McClymont and Golub 2000). Activities related to access to justice for disadvantaged sectors—women, the poor, lower castes—are always a part of the standard package, but, more often than not, the very last part.[38]

THE POLITICAL ECONOMY OF DONOR ASSISTANCE

Unfortunately, the political economy of donor assistance poses serious impediments to effective assistance within the judicial sector and, indeed, within the governance sector as a whole. Many of the forces that limit the effectiveness of donor-assisted programs are well within the donors' control, such as design practice and implementation structures. Others are beyond the control of any single donor, such as the politics of donor assistance. All can impede good development work. But the factor that impinges most on the effectiveness of programs is the loan structure itself. Experience suggests that the core incentive for MDB staffers lies in making big loans, even when those loans are going to incompetent or corrupt debtor countries whose priorities—financial liquidity over institutional reform—vary considerably from those of the project. Institutional incentives within MDBs encourage big loans without sufficient regard for the absorptive capacity of the recipient governments. That means the MDBs seek out investments that can absorb huge amounts of capital with modest, if any, concern for the extent to which those investments support the larger judicial reform effort. And that is why project activities usually include the construction of courthouses and the purchase and installation of computers. Put simply: they cost more money.

The problem caused by the perverse incentives of the MDBs is exacerbated by the political incentives of debtor governments. Government representatives, who may be incompetent and/or corrupt, are well aware that they are in a stronger position vis-à-vis a bank's staff than they would be in the negotiation of a grant. Indeed, incompetent or corrupt government representatives may well be responsible for managing and implementing weak loan-funded projects.

There is an obvious question here: why do the MDBs continue to make loans knowingly, systematically, and extensively to incompetent or corrupt governments? In light of the long-standing good-governance mandate within the World Bank, for example, this is tantamount to what Steve Krasner (1999) would characterize as "organized hypocrisy"—the presence of long-standing norms that are frequently violated.[39] As long as the "big loan" incentive structure operates, it is likely that the gap between rhetoric and practice will widen, and the credibility of institutions that make big loans will decline.

Policy-based loans (PBLs) are generally a type of big loan.[40] The success rate of PBLs consistently has fallen well short of expectations (see Collier 2000; and Dollar and Svensson 1998). Two reasons for this failure seem obvious. First, loan instruments list too many conditions and too much detail, and they are inflexible. Second, experience shows that policy-based lending is only effective when the recipient governments are convinced that the reforms are urgently needed and a process for their adoption is in place.[41] Unfortunately, neither condition is met with any regularity.

Although some actors in the large MDBs do undertake critical analyses of program design, they are not in the mainstream. In fact, these individuals are acting nobly rather than in response to any meaningful performance-based incentives to encourage them. To a certain extent, weak independent evaluation is tied to the politics of donor assistance. After all, the goal of monitoring and evaluating these projects lies in obtaining a clean bill of health so that disbursements can go forward and new loans can be made. Even an agency like USAID, which undertakes comparatively thorough assessments, is challenged by a lack of institutional learning and memory.

The World Bank has a particularly poor record compared to that of USAID or the IDB. Writes Hammergren:

> "Although the World Bank's program is new, the near absence of rigorous, systematic evaluations is disturbing. To the extent it has evaluated these projects, the bank has relied on self-assessments by project staff and counterparts, desk exercises, and extremely short term field reviews. The periodic visits of the task manager, . . . sometimes accompanied by a few short-term consultants, . . . are not a substitute for comprehensive monitoring and evaluation. Also conspicuous by their absence

are cross-cutting reviews of all projects, common activities, and methodologies. (Chapter 9)

The bottom line, according to Hammergren, is that once loans are made, "disbursements are the primary indicator of project success."

In light of this pattern, we see that MDB structures themselves thwart successful long-term reform initiatives. Furthermore, because those initiatives target relatively narrow sectors, they discourage problem solving. Narrowness is a significant obstacle when it comes to operationalizing or implementing "integrated governance projects." As one development practitioner confessed: "We realize . . . that there are critical relationships between the judiciary, on the one hand, and the police, the public accounts auditor, [and] the prosecutors (among others), on the other. But have you ever tried to organize a project management group across sectors like that? Impossible."[42]

In the case of the World Bank, project implementation is managed from Washington, D.C. Implementation units are selected and approved by recipient countries, but the units have an extremely poor track record. USAID, The Asia Foundation, and the Ford Foundation place far more emphasis on in-country presence and engagement; still, because most agencies lack project expertise internally, they rely heavily on outside consultants. As more consulting firms and nonprofits enter the field, they, too, find themselves constrained by a lack of long-term presence and a lack of country-specific expertise.[43]

Although the problems created by the structure of assistance are substantial, many defend legal and judicial reform programs. Their reasoning: they are a "lesser evil." Although the investments the banks make in these reforms are large, the loans are small when compared with loans for, say, education and health. If money is "wasted," then, at least it's not a lot of money. It is well beyond the scope of this paper, however, to test the veracity of the lesser-evil hypothesis. Instead we turn to an examination of the effectiveness of legal and judicial reform programs on the ground.

Constituencies For (and Against) the Standard Package

Given the importance of the rule of law, one would expect to see broad and well-organized constituencies among various groups in government, civil society, and the market strongly supporting the standard package. One of the most important reasons for the failure of legal and judicial reform efforts, however, lies in the fact that constituencies for judicial reform—at least when we speak of judicial reform in terms of the standard package—tend to be extremely narrow. Citizens seem to have a stake in a well-functioning judicial system, especially on certain inheritance and family issues; but for most citizens in most developing countries, the formal legal system has little bearing on their daily lives. Similarly, we might expect businesspeople to be powerful advocates of the standard package. Instead, we find that many businesses make use of cost-effective substitutes for a well-functioning legal system and so remain almost entirely untouched by conventional approaches to legal and judicial reform.[44]

This section examines the interests of potential stakeholders in the larger reform process. It is organized around three questions: Which constituencies are present, and why do they "win"? Which constituencies are absent, and why do they "lose"? And, finally, why are broader, well-organized constituencies of support (or dissent) typically absent?

WHICH CONSTITUENCIES ARE PRESENT, AND WHY DO THEY "WIN"?

Judges and Lawyers. Judges and lawyers dominate the reform agenda. They also dominate the design and implementation of the standard package.[45] The insights of judges and lawyers are important, of course; but this group controls virtually every phase leading up to and including the implementation of the standard package. Where well-organized external pressures for accountability are absent, as they usually are in legal and judicial reform programs, reforms are limited by the capacity and the interests of internal legal cultures. Unfortunately, those responsible for the design of legal and judicial reform projects tend to be judges and lawyers with a material stake in the status quo, not social scientists or other external observers with an interest in change.[46]

Judges—especially appellate judges, who most often participate in the design of reform programs—tend to view lack of capital as the greatest constraint on judicial performance. The interests of judges in large capital investments for salaries, courthouses, computers, study tours, and training, then, fit perfectly with the interests of MDBs: the banks want to make large loans, and the judges want resource-intensive investments.

The senior lawyers who participate in the design of the standard package tend to be officers of their respective bar associations. Their positions in part explain why the standard package usually makes some provisions for bar associations. Beyond this, support for the bar typically boils down to "buying off the opposition." Indeed, as Adrian Zuckerman (1999) pointed out in a study of legal and judicial reform in three common law countries and ten civil law countries in Europe and Latin America, the most important opponent of legal reform is the practicing bar.

In Chapter 7, Carlos Peña González underscores the problems that arise

when internal actors participate in judicial reform projects: "Public actors . . . declare the need for reform and enthusiastically commit themselves to seeing the process through. Then, like players in a Greek tragedy, they do what is necessary to ensure that the process fails." One reason Peña gives to explain this phenomenon has to do with the problem of undifferentiated functions within the legal system. As Peña notes, it is completely rational for those involved in the reform process to seek ways to profit from it.

Consultants and Civil Society Organizations. During the fourth wave of the rule-of-law movement, the number of international and domestic consultants increased considerably. The number of civil society organizations set up to participate in judicial reform projects increased as well. The motivations of these specialized civil society organizations have not been the subject of critical comparative analysis but deserve closer scrutiny. Are they pressing for judicial accountability or taking advantage of funding opportunities and serving a public relations role? Whether the intentions of these groups are genuine or not, their ability to represent broader constituencies is questionable. Certainly their ability to mobilize broader constituencies for reform has been extremely limited.

Legal Academics. For the most part, full-time legal academics tend to be on the margins in developing the standard package. Chile, however, seems to be an important exception. As Peña describes it, professional legal academics and social scientists drawn from the Law School of Diego Portales and the Corporation of University Promotion were drawn into the Chilean criminal justice reform process to mediate the design of public policy and the production of social science research relevant to policy formulation. Such groups, he notes, are rare in Latin America, but they are critical to successful reform. "This kind of academic community, virtually nonexistent in the region outside Chile, no doubt contributed to the success of the reforms in Chile" (Peña, Chapter 7).

WHICH CONSTITUENCIES ARE ABSENT, AND WHY DO THEY "LOSE"?

Citizens. Increased access to justice for ordinary citizens—and especially for the poor—is the weak sister in every standard reform package, yet it is almost always included. The charitable explanation: an emerging global consensus that broader citizen participation is integral to stronger democratic practices. This view finds support in the literature among those who believe that recent calls for greater transparency and participation are genuine.[47] But most scholars have a more cynical explanation: it is one thing to pay lip service to access to justice; it is quite another to allocate enough money to the poor so that they threaten the larger reform initiative. The amount allocated to "pro-poor" activities will not be sufficient to surmount the costs associated with collective action capable of creating sufficient pressure for institutional reform that is responsive to the needs of the poor. Consequently assistance, such as legal aid, tends to be welfare-oriented and unthreatening to unreformed institutions.

Civil Society Organizations. Civil society organizations are absent from or marginalized in the reform process because they lack clout or capacity. When a capable network of civil society organizations is at the table, however, its contributions can be noteworthy. Evidence of this comes from Chile. The Paz Ciudadana Foundation has strong links with powerful business groups in the country, including a significant presence in the media–communications market. With funding from USAID, it played a key role in mediating between parties in Chile's recent criminal justice reform process. For reasons Peña is still exploring, the foundation was able to mobilize specific and global interests touching on the reform: "Without the participation of the foundation or a similar entity, it is probable that the consistent minority—conservative judges and lawyers—would have won out over the diffused and disorganized majority" (Chapter 7).

Still, Peña and others do not embrace civil society organizations uncritically. Many are concerned about the range of actors in judicial reform who represent themselves as members of civil society: "The rise of a whole rash of reformers in the region of Latin America—who represent themselves as members of civil society—should be examined with care and without getting prematurely excited" (Peña, Chapter 7).

WHY ARE BROADER, WELL-ORGANIZED CONSTITUENCIES ABSENT?

Experience suggests six constituencies may have some capacity for collective organization: human rights groups, students, environmental groups, consumer groups, organized labor, and organized business. For example, human rights groups and students in Indonesia, labor groups in Yugoslavia and Poland, and consumer groups in Malaysia have catalyzed democratic reform movements. In general, however, reform efforts require strong, well-organized economic actors who share a portion of the reform agenda—that is, economic actors who share broader public-interest goals in addition to their narrow industry-level objectives.[48] This, too, is illustrated by the Chilean case.

Well-organized constituencies in favor of legal and judicial reform, however, tend to be absent for three well-defined reasons: the traditional problems with collective action; the presence of substitutes for the formal legal system, especially among business interests and close-knit groups of citizens;

and the existence of specialized tribunals, including ADR forums and other special courts.

- *The problems with collective action.* Large groups of citizens—the poor, for example—tend to be fragmented and, so, are least able to engage in collective action, certainly by the criteria that Mancur Olson (1965) identified in his seminal work on the subject (also see Varshney 1995).[49] Along these lines, Santos Pastor (1993) examined citizens as beneficiaries of legal and judicial reforms. He concluded that "the whole body of citizens" incurs high transaction costs when it comes to organizing collectively, with modest and speculative individual gains; as a result, they face enormous collective-action problems in the context of diffuse institutional reform programs with few short-term gains.
- *Substitutes for formal legal institutions.* Substitutes for legal institutions can weaken both formal institutions and coalitions for legal reform. Among the substitutes for formal legal processes are relationships with extended families, tribes, or clans; good-faith dealings and the accumulation of trust over time; abundant information, a by-product of technological advances; guilds and other organizations that mediate or internalize risk; and voluntary associations with carefully constructed codes of conduct. There also are illegal substitutes for legal institutions—mafias, for example—that mete out judgments under their own code of justice.
- *ADR and special courts that reduce coalitions.* Specialized solutions typically amount to a subset of the legal and illegal substitutes mentioned above. These include special courts within the larger court structure—for example, courts with family, commercial, or bankruptcy jurisdiction—and certain special courts within the court system that are especially encouraged by the executive (see, for example, Cazalet 2001), among them the *lok adalats* in India (see Chapter 3). A third type of special forum lies within the executive branch of government. These forums tend to be highly political (if not politicized): they deal with terrorists, drug traffickers, and the like through summary procedures. A fourth type exists outside both the judiciary and the executive but within the democratic framework—for example, dispute resolution forums organized by local political parties. Finally, a fifth type of special court also operates outside the legal framework but with weak democratic credentials. The Maoists in Nepal, for instance, manage dispute resolution forums that compete for decision-making authority with the formal system (Jensen, Moog, and Kardar 2001).[50] Like all of the forums mentioned here, by meeting the needs of their constituencies, they dissuade those constituencies from pressing for judicial reform.

Many of us who have designed and tried to implement participatory processes around reform efforts acknowledge their importance.[51] Indeed, developing a credible process is more important than any technical reform, although, in general, designing a credible process is a much more difficult task.[52]

The World Bank's Comprehensive Development Framework is an example of the rhetoric that typically surrounds participatory exercises. The framework notes that "broadening the concept of ownership to mean the country, not only the government, requires consultations with all stakeholders."[53] Unfortunately, consultation with all stakeholders is not a realistic goal in a broad-based institutional reform initiative: those who reasonably should be considered stakeholders are simply too numerous.

We should never conflate limited consultative processes within a project framework with broader democratic processes. Stakeholder consultations cannot substitute for more comprehensive and deconcentrated deliberative processes.[54] Even if participatory processes and channels of implementation are designed in good faith, however, the practical problems of applying them adequately are significant. Among those problems is the deep-rooted cynicism that potential constituencies harbor toward the consultation process in any reform program.[55] In a series of consultations funded by the Asian Development Bank in Pakistan between 1997 and 1999, for instance, meaningful consultations were stymied by both skepticism about the reform process as a whole—including but not limited to legal and judicial reforms—and citizens' lack of participation in larger political processes.

Examining the Record: Successes and Failures

Although theoretical insight into the dynamics of institutional change has sharpened dramatically over the last decade, mainstream MDB practice still adopts a limited systemic approach. The boundaries have changed over the last ten years, but resource-allocation patterns suggest that most attention still is paid (as it always has been) to the formal legal system. Indeed, project strategies and activities remain overwhelmingly technocratic; for the most part, they do not address the larger political economy of reform.

Again and again, development professionals have focused on poorly managed courts, limiting their reform strategy to a technical understanding of why courts fail. Even here there are no surprises. The reasons courts fail are fairly consistent from place to place: poor management of personnel, finances, and cases; a lack of skills, training, and education among court staff members; perverse performance incentives; and an overall lack of transparency and accountability.[56] Not unexpectedly, effective judicial performance

standards have been extremely difficult to introduce, as has an effective approach to corruption.[57]

The following discussion critiques the prevailing patterns of resource allocation—courthouses, equipment, and training (as opposed to legal education). It should be considered with the critique of the participatory processes in the standard package discussed earlier.

COURTHOUSES

To our knowledge, there is only one study that claims to provide empirical evidence linking the construction of new courthouses to improved judicial performance (Buscaglia and Dakolias 1999). The study focuses on Singapore, which launched an ambitious judicial reform program in the early 1990s.[58] New courthouses were built and more resources were allocated to the judiciary, and somehow those investments translated into a 39 percent improvement in the rate of case disposal. The precise link between new courthouses and improved performance remains ambiguous. Common sense would suggest that well-designed, functional workplaces are appreciated by court staff, but as far as we are aware no study has been able to disaggregate the extent to which better courthouses improve court performance. This is a significant criticism given the amount of money allocated for building new courthouses.

Unfortunately the criticism does not end when the courthouses are built. Maintaining facilities requires significant resources as well. Yet, as noted earlier, the maintenance of capital assets is notoriously underbudgeted and unattended to in developing countries, and loan funds do not provide sufficient support to maintain these facilities over time.

CASE MANAGEMENT AND COMPUTERIZATION

Professional management is essential to the technical success of judicial reform, yet it is a relatively new focus of reform programs. Until the 1980s, most analyses failed to acknowledge any need for professional management. On a purely technical level, the comparative literature provides abundant support for those who point to the need for professional managers. The bench, the bar, and the public are well aware of the problems associated with delay, unpredictability, and the high cost of litigation, but their sense of specific solutions—among them case management—has been weak. Indeed, experience suggests that improved court administration and case management may be the single greatest contribution of the standard package (see, for example, Steelman 2000; and Tobin 1998).

The extent to which a significant capital investment in computer technology is necessary to improve court administration, however, remains a deeply contested issue. John Blackton (2001) suggests that countries may

have three motivations for converting to and installing computerized case management applications (CMAs): to appear modern, to reduce file tampering by court personnel, and to reduce delays through more accurate and timely reporting on case status. Blackton argues, with some force, that only the third motivation—reducing delays—is justified by the evidence. Although computers can help in case management, and the technical competence to design and install useful CMAs is clearly available on the international market, there may be other, more effective ways to reduce delays in the courts. Other nettlesome issues yet to be resolved: Is delay actually a serious problem?[59] Is computerization necessary? Would existing manual systems do just as well? And do poor nations have the economic and technical means to maintain computerized CMAs without long-term donor support?

TRAINING

Enhancing the human capital to move forward a reform process is not an inimical objective, yet experience suggests that training (including the ethics training designed to change the local legal culture) receives a disproportionate amount of attention. Donors like training programs because they are easy to mount, almost infinitely flexible in size and resource requirements, and highly visible. Local leaders like them because they demonstrate a commitment to reform and offer the opportunity for patronage and contact with lower-level court personnel. The ease of setting up training programs, however, far surpasses their success rates (Hammergren 1998, 1–2). The fundamental problem: judicial training programs rarely are tied to meaningful incentives, to incentives that relate to performance. Although salaries, appointments, promotions, and transfers are significant incentives, the lessons derived from targeted training will stick only if they are linked to relevant performance incentives. Unfortunately, very few judicial systems have these types of incentives in place. Where incentives are not effectively linked to credible performance standards, training programs amount to a colossal waste of time and money.

Although donors are fond of training programs, they are reluctant to allocate resources to legal education. There seem to be two primary reasons for that reluctance. The first is a simplistic understanding of the controversy over legal-education programs during the second wave of rule-of-law reform (see note 25); the second is concern that legal education demands the sustained support of both donor and government, support that can be difficult to marshal.[60] But in terms of effectiveness, the preference for investment in judicial training over legal education is a bad choice. Many of the judges who take part in training activities are midcareer and often have had a woefully inadequate formal legal education. The efficacy of many training programs, then, is constrained by the participants' lack of educa-

tion. A more strategic intervention would address legal education first. Legal education, quite simply, is the foundation of development in the formal justice system as well as in ancillary institutions.

Many of the contributors to this volume have long argued that more resources should be committed to legal education. One example of the potential payoff is the National Law School of India University, in Bangalore. This school was started in the 1980s with indigenous funding and support from the Ford Foundation. It has developed into a center of excellence in legal education; and today it is as transformative an investment in legal-systems reform as any in India. Marc Galanter evaluated the school's program during the 1990s and agreed with this assessment.[61] Carlos Peña's experience in Chile corroborates the importance of legal education: he stresses the centrality of credible institutions of legal education to the successes of the Chilean reform process as a whole.

LEGAL INFORMATION

The standard package usually allocates resources to the generation and dissemination of two types of information. Both improve transparency and could address corruption, although there is little evidence of an impact on corruption to date.[62] The first is the statistical information the courts use internally. Installation of case management systems—putting aside the issue of computerization for the moment—can be a strategic intervention: such systems generally improve the management of cases by providing timelines and a method of tracking the progress of each case. They also show how individual judges treat cases, information that could be useful in the hands of judicial leadership if that leadership chooses to care about corruption and develops the resolve to do something about it (a significant qualification).

The second type of information is disseminated in the public domain. Here intervention might take the form of a mandatory annual report—with data—on the judicial system's accomplishments; or it might involve publishing judicial decisions. The latter is often taken for granted, but frequently—in countries from Indonesia to Venezuela—the rationale for Supreme Court decisions has gone unreported. Arguably the greatest success of a recent World Bank project in Venezuela lay in helping the Supreme Court move from a system in which the rationale for its decisions was confidential, to a system in which the Court's decisions are published on the Internet.[63] This low-cost activity could be helpful in an anticorruption campaign (compare Johnston and Kpundeh 2001). In general, the decision to publish a high court's decisions is admirable; the decisions themselves sometimes are not. In fact the quality of the decisions can be so poor that one can only conclude that the justices are either incompetent or corrupt, or both.[64]

Improving Reform Efforts

Most rule-of-law programs do not seriously consider why the link between laws and legal institutions, on the one hand, and the normative behavior of judges and lawyers (and the public), on the other, is so weak. Part of the answer, we would argue, has to do with incentives. Because they focus on substantive law reform and various training efforts, rule-of-law projects generally pay very little attention to incentive structures and, hence, to the larger political economy of institutional reform. Difficult as the process is, however, institutional reforms are likely to take hold only if incentives are linked to credible and binding standards of performance that take into account the local context as well as the formal and informal constraints on performance (Nelson 2002). To make these connections requires empirical work, an all-too-familiar refrain.

MAKING THE CASE FOR AN EMPIRICAL APPROACH

This section builds the case both theoretically and practically for undertaking certain types of research to support the design of reform programs. In many respects, it is difficult to examine the record of successes and failures in legal and judicial reform projects because we have little baseline data against which to assess progress. Indeed, the lack of credible baseline data amounts to the first failure in most projects. Much of the foregoing analysis implies or assumes an understanding of what courts and other dispute resolution forums actually do in particular countries. Unfortunately, information of this type is generally missing.

The frustration surrounding judicial backlogs is a case in point. Judges across the developing world have been making the same plea for decades: "Our backlog of cases is *X* thousands or *X* millions. Give us more judges, more courtrooms, more resources, and our performance will improve."[65] But the size of the backlog isn't as important as determining how the backlog got there in the first place. What incentives allowed—even encouraged—a backlog to accumulate? How effective are the available substitutes that allow actors to circumvent backlogs and the delays that accompany them? Because the average clearance time in many countries is several years (as opposed to several months), we need to know what happens to cases that are simply not pursued. In effect, we need to know about the incentives that draw people away from the courts. If we want to make the courts more efficient, we need to know about the efficiency of the informal competition (Nelson 2002).

There are many good and practical reasons that donor agencies should support empirical research on the world's legal systems, but three are espe-

cially compelling. First, it is impossible to plan interventions—to target institutions, to design activities, and to calibrate incentives—without knowledge. Second, it is impossible to evaluate the progress of implementation or its success in the absence of research that establishes baseline data and a reliable framework for measuring progress against those data. Third, as projects are increasingly scrutinized, failure to support empirical research for these purposes may lead to allegations that donors have failed to exercise due diligence.

CHALLENGING ASSUMPTIONS ABOUT DISPUTE FORUMS: THE LIMITS OF COMMON SENSE

Deborah Hensler analyzed extensive data on litigation and ADR in the United States and the mistaken assumptions behind passage of the Civil Justice Reform Act of 1990. Based on that research, Professor Hensler (2001) cautions policymakers in developing countries against the wholesale and untested importation of a standardized judicial reform agenda:

> [You] ought to be particularly skeptical about claims with regard to the consequences of introducing these reforms into *your* legal system, whose legal regimes may produce very different incentives for judicial, lawyer and party behavior. It is only by understanding the realities of litigation within your own court systems—what is actually going on, and what drives behavior—that you will be able to design programs that improve your systems. Such understanding requires careful quantitative and qualitative analysts. Simply relying on "common sense" will not do, because common sense—however common—is often wrong. (8)[66]

The RAND study of civil litigation in the 1990s, led by Hensler, showed just how wrong common sense can be when held up to the scrutiny of empirical analysis (Kakalik et al. 1996). The study demonstrated that ADR is a wash for the parties in terms of both time and money. If ADR is done correctly, it should influence the parties' satisfaction on variables like participation and fairness. Yet the study found that parties prefer more formal (and so more time consuming) and expensive variants of ADR. Though very few cases in the United States go to trial, the Rand study showed that ADR does not reduce the already low percentage of litigated cases.[67] Like Galanter and Krishnan (see Chapter 3), then, Hensler and her colleagues drew attention to the importance of negotiating "in the shadow of the law."

A recent empirical study in Pakistan came to many of the same conclusions (Nelson and Jensen 2001). Funded by the ADB and developed in collaboration with The Asia Foundation, the study found little in the way of common sense regarding citizens' preferences for informal dispute resolution forums. It showed that especially in the less tribal areas of the country, citizens viewed the courts (including the lower courts) as the institution most capable of delivering "justice."[68] Traditional community-based ADR (*panchayats*) were regarded as speedy and inexpensive but largely unjust, mostly owing to the fact that they were easily captured by local elites. For our purposes, this would indicate that fixing the formal system is likely to be a strategic (and popular) intervention. Exactly how and why this is the case, however, remain questions for those with sound empirical data.

CAPTURING BASELINE DATA IN DIVERSE INSTITUTIONAL SETTINGS

To develop the baseline data against which progress or change can be measured, sophisticated research methods are required. These methods allow for the careful collection of quantitative and qualitative evidence on the role of the courts and other dispute resolution forums in a particular context. For example, an examination of case records is needed to map disputes,[69] understand clients' motivations,[70] evaluate the quality of judicial reasoning, and monitor existing clearance and disposal rates. Litigant and would-be-litigant surveys, interviews with judges and other court personnel, and detailed cost-benefit analyses across branches of government and within the judiciary are prerequisites for any effective and sustainable effort to promote legal and judicial reform.[71]

To capture a functional picture of dispute resolution, at least four layers of the dispute resolution landscape are relevant:

- The first layer concerns the *formal justice system*, including the courts and various special tribunals.
- The second layer includes *formal, quasi-formal, and informal ADR*—a full array of mediation, arbitration, and conciliation techniques in state-supported, community-based, traditional, and private settings.[72]
- The third layer includes *administrative dispute resolution forums* designed to handle disputes between private citizens and bureaucrats.
- The fourth layer includes a vast array of *legal and illegal dispute resolution substitutes* operating in relation to—although never fully constrained by or coordinated with—the dispute resolution sources mentioned above.

As a general rule, research designs need to focus greater attention on formal and informal substitutes for the formal legal system. It is beyond the scope of this paper to discuss these substitutes in detail, but we would like to mention two in passing. The first relates to information density; the second, to expanded relational networks.

Recent research suggests that technological advances in the dissemination of information can provide meaningful substitutes for the legal system and its enforcement mechanisms in commercial transactions. Detailed information about fellow traders or borrowing partners can be a far more potent and

targeted risk management tool than a written contract solemnizing an economic relationship. In Brazil, for example, detailed information about the creditworthiness of businesses, available on the Internet, in many cases was an effective substitute for a well-functioning judiciary.[73]

Likewise, many of the most successful ADR mechanisms, including expansive relational networks, lie beyond the pale of traditional ADR analysis. Distinct from information technology, or perhaps corollary to it, are the expansive relational networks in Asia and much of Latin America (see, for example, Dezalay and Garth 1997). These networks tend to confound the standard literature on the benefits of objective contracting. Where the shadow of the law is entirely wanting, however, businesses can thrive if dysfunctional courts are systematically avoided. Indeed, empirical evidence suggests that informal codes of conduct can support vast networks of subcontracting far beyond what the standard literature concerning collective-action constraints would suggest. Violations of these informal codes are not penalized by law; instead, they are penalized by a loss of reputation and business.

MONITORING AND EVALUATION

An approach that stresses the importance of empirical knowledge in the design of interventions by extension must emphasize an empirical basis for monitoring and evaluation (see, for example, Hammergren et al. 2002). The process of measuring outputs is not easy. Many factors are at work here, but five are particularly well known:

- First, ascertaining causality is extremely difficult. A significant decrease in the number of certain human rights abuses was documented in El Salvador and Guatemala, for example, just when judicial reform programs were introduced to address the problem. The decrease may have been tied to the end of a protracted civil war, external political pressure, or to other donor-funded programs with a focus on monitoring the abuses. The link between a program's goals and a program's success can be extremely difficult to nail down.
- Second, meaningful impact indicators are notoriously difficult to develop.[74] Most indicators are focused on efficiency—for example, by reducing delays and backlogs, by increasing clearance rates, and by cutting the cost per case disposed. Yet, as Don Clarke points out in Chapter 5, these indicators are largely irrelevant when it comes to the task of evaluation in China. Indicators for more significant problems, including corruption, incompetence, limited access, politicization, and bias, however, are still in the earliest stages of development.
- Third, impact is difficult to document. Targets such as higher closure rates for criminal cases, the satisfactory resolution of cases, and reductions in the percentage of unsentenced prisoners are often measured unreliably. Developing independent measures, however, can be extremely time consuming and expensive.
- Fourth, results tend to be indeterminate. In part this constraint relates to the nature of reform itself: institutional change takes time; and legal cultures are especially resistant to change. In addition, the human resource base to enact judicial reform often is weak; and the incentives and recruitment system often are poor. Carlos Peña argues that in light of these difficulties, the best we can do in our assessments is to achieve a "high degree of plausibility" (Chapter 7).
- Finally, the development community in general pays little attention to evaluation—although some agencies pay slightly more attention to it than do others.

In any event, the reasons for avoiding an empirically based political-economy approach to legal and judicial reform are many. Research is difficult, and results are slow to evolve. And it is surprisingly difficult to find common definitions across legal systems in what should be comparable groups of courts, lawyers, and functions—a problem that extends even to circumscribing the domain of "the *legal system*."[75]

The debate over (and the difficulties that attach to) the development of meaningful performance indicators is of long standing. But the growing risk that the failure to exercise due diligence will be exposed publicly may provide incentives for change. The report of the U.S. General Accounting Office (GAO) titled *Former Soviet Union: U.S. Rule of Law Assistance Has Had Limited Impact and Sustainability* (2001) is just one example of the growing concern about due diligence. For baselines, the agency was given micro-indicators that reflected outputs—for example, *X* judges trained, *X* manuals developed—rather than indicators that would or could serve as benchmarks for sustainable reform. The GAO then turned to aggregate, very generalized data in the Freedom House's Rule of Law Ratings for Newly Independent States and found that the score of only one of the twelve countries had improved in terms of rule of law, and that the ratings in the two countries where most resources were focused—Russia and Ukraine—actually had deteriorated between 1997 and 2000.[76] The GAO concluded that the various U.S. agencies involved in rule-of-law reform in the former Soviet Union largely had failed to monitor and evaluate their own programs. Pressure for due diligence will grow as resources disbursed to rule-of-law portfolios increase.

Conclusion

The story of legal and judicial reform is one of modest successes (some potentially important to citizens) and frequent failures, and of significant gaps between theoretical understanding of legal systems and project design and implementation. The gap between theory and practice stems from a number of pressures—among them the political economy of reform, donor structures, and limited staff and research. It points to the crucial need for investment in empirical approaches to legal systems development and to the invidiousness of the distinction that some in the development community make between action and research.

In this chapter, I have argued that with the benefit of conceptual and definitional clarity, we need to adjust our expectations and calibrate our goals in rule-of-law programs. Our objectives should be much more modest. We should view with at least some skepticism the notion that support for the judiciary translates into fewer human rights abuses, faster economic growth, and more robust democratic participation. The evidence for these thick interpretations of the rule of law is weak or mixed. That doesn't mean the programs must fail: we do have evidence that the standard package of judicial reform interventions, where the focus of those interventions is on thin interpretations of the rule of law, can increase the efficiency of the courts and the transparency of the judiciary.

We also have argued that the institutional loci of the functions the standard package hopes to promote—in the courts or elsewhere—must be identified. Attempts to understand the failure of legal and judicial reform projects, at least insofar as they reflect the standard package, must begin by assessing who is involved in the projects, who is excluded from them, who supports them, who resists them, and who simply doesn't care. Legal and judicial reform projects must take into account the incentives of those who are involved *and* those who are excluded—and must tie those incentives to real improvements in the performance of the courts.

Finally, we need to situate our understanding of what the courts actually do within a much larger and more sophisticated understanding of how local institutions and networks operate. Pretensions to universalism in accounts of the rule of law must give way to more differentiated analyses and prescriptions in particular times and places.

Notes

1. To bridge the gap between theory and practice, I compare two competing strains in the literature: claims regarding the role of independent formal judiciaries in the context of a new global constitutional order that is committed to political and economic liberalization, and the actual record of accomplishments of legal and judicial reform projects "on the ground." The merits of these two strains are defined in terms of the extent to which they compare with the empirical record.

2. Some of our colleagues and students take issue with this definition, arguing that a fiction surrounds the broad-public-knowledge criterion in relationship to the law. Except for a subset of laws that codify common sense with respect to traffic crime and family, they insist, many laws remain beyond public knowledge even in countries where the rule of law is purportedly strong. See, for example, Ellickson (1987, 87–88), who discusses among other cases therapists' lack of knowledge in California about significant case law and general rules regarding potential liability for their patients' actions.

3. See, for example, West's synthesis (forthcoming) of Western legal scholarship on the rule of law. In general, West says, laws are (1) broad in scope; (2) created by a legitimate authority in a way that makes them certain, clear, publicly accessible, mutually consistent, prospective, and able to be obeyed; (3) applied through a transparent process characterized by principled reasoning and the possibility of organized appeal; (4) interpreted and monitored by an independent judiciary free from political control; and (5) congruent with the behavior of the officials who administer them (that is, congruent with their actual administration). These five clusters of attributes are largely formal or procedural. Also see Fuller's seminal work, *The Morality of Law* (1977).

4. Kelsen's influential definition of the commonality of legal systems is even more sparse: "a *normative* system backed by a *credible* threat of using *physical force* against a violator of the norms" (quoted in Posner 2003, 171). Interestingly, as central as enforcement is to the embedding of the rule of law, it is rarely an issue of research across countries or a focus in rule of law–styled programs.

5. Peerenboom's work includes an excellent discussion of the thick–thin differences and an argument for employing a thin definition, with China the primary point of reference.

6. My thanks to John Donohue for this example.

7. This, of course, is entirely consistent with the groundbreaking field studies and thick-description methodology presented by anthropologist Clifford Geertz (1983) over a lifetime of work on interpretations of meaning based on local knowledge.

8. Even within the European Union (EU), these kinds of comparisons are difficult to develop with methodological rigor. See Erhard Blankenburg's contribution to this volume in Chapter 2; also see Merryman (2000a, 2000b).

9. On the other hand, Blankenburg (Chapter 2) would argue that at least in some cases, an institutional definition works very well. For example, the Council of Europe defines *prison* by its functions, and the term is understood widely. Key to understanding domains and definitions is identifying which procedures are internalized

in legal institutions and which are externalized. In The Netherlands, for example, administrative disputes are internalized in the justice system: the plaintiff files a claim, and the case comes before a judge for trial. No-contest divorces, however, are externalized: papers are filed and approved with no formal hearing.

10. The values implied by the rule of law often are associated with modernity. Of course, the meaning of *modernity* itself is contested. Indeed, state discourses about modernity reveal the sometimes-conflicting tensions between economic development on the one hand and perceived threats to national culture and sovereignty on the other. In this sense, alternative forms of modernity stand in opposition to the dominant Western formations. For example, Dirlik (1994) argues that non-European societies have critical claims on the history of capitalism, which contrast with standard Eurocentric views on the links between capitalism and the development of the modern state. And Barlow (1991) argues that Chinese intellectuals have developed a sophisticated sense that China is modern without necessarily being Western.

11. For an interesting historical account of security, economic, and democratic motivations, see Packenham (1973).

12. Tom Heller is developing a framework for a forthcoming case study on the pharmaceuticals industry. To explain inconsistent evidence regarding the centrality of formal legal institutions in the context of economic development, he suggests we must consider the possibility that economic actors pursue predictability through a portfolio of public and private institutions. This approach would place legal risk in the context of multiple risks. With respect to FDI, for example, we could imagine at least five general sets of risk: (1) commercial risk (for example, from fluctuating markets); (2) political risk (from expropriation); (3) legal risk (from unpredictable courts); (4) regulatory risk (from capricious rulemaking or decision making); and (5) social risk (resulting in citizens' taking action for or against certain types of investment).

13. An analogy can be seen in the debate in Europe over the policy initiative for an EU Charter of Fundamental Rights. One group wants to exclude social rights entirely or minimize their legal content by including them in a "programmatic" section or by making them purely declaratory. The other group wants to maximize the content of social rights, elevate them to the same level as civil and political rights, and make them justiciable and enforceable (Bercusson 2002, 26–29; also see Helfer 2002).

14. See Cross (1999) for an empirical study that, among other things, compared countries with and without the constitutional right to be free from unreasonable search and seizure. He found that whether the right was constitutionally guaranteed or not mattered very little in practice. But he did find subtle differences on a number of factors between countries with and countries without constitutional protections. For example, judicial independence was a statistically insignificant variable in nations with a constitutional protection against search and seizure, but it was an important variable in countries with no constitutional protection (there may have been a statutory protection).

15. "Even if we accept the empirical evidence that more and more nations have adopted written constitutions with bills of rights and have empowered their courts to uphold these new charters as the supreme law of the land, it is not self-evident that the outcome, or even the meaning of these new institutions, is the same in all societies. While we may recognize a globalizing constitutionalism, the challenge is to understand the specifics of its incorporation into particular national legal systems" (Klug 2000, 3).

16. If the transformation is partial or incomplete, it may simply reinforce the economic and political power structure of the prior regime under the guise of reform. On the negative reinforcing effects of partial reform in Eastern Europe and Russia, see Hellman (1998).

17. The second wave of the law and development movement seemed to end with a self-hate phenomenon among certain lawyers and legal academics; the current rule-of-law movement (waves four and five) is marked with a self-lovefest among lawyers and judges from both developing and developed countries. For a brief history of rule-of law reform, see the section titled "How the Standard Package Was Derived: Five Waves in the Law and Development Movement."

18. "The findings of this study also suggest that a great deal of writing about courts is fundamentally flawed. Treating courts and judges as either philosophers on high or as existing solely within a self-contained legal community ignores what they actually do. . . . To ignore social science literature and eschew empirical evidence, as much court writing does, makes it impossible to understand courts as they are" (Rosenberg 1991, 342).

Even the educational effect of Supreme Court decisions seems highly contingent (see Klarman 1998, 176–78; and compare Bickel 1962, 26).

19. One lesson from earlier periods is that the law has limits: it cannot solve what are essentially social and political problems. It is not possible to bootstrap these problems through the law. As Tamanaha (1995) puts it: one cannot "conjure a social agenda into reality by insisting that law requires it" (486).

20. Many would argue that Rosenberg's assessment goes too far. Other studies have found that on discrete issues, Supreme Court decisions do influence larger social processes. It simply depends. In an article about civil rights litigation in the United States, Michael Klarman (2002) argues that the Supreme Court's criminal procedure decisions had virtually no impact on the criminal justice system in the South in cases involving allegations of serious crimes (such as rape) between blacks and whites. On the other hand, Klarman finds that the Supreme Court rulings did have an indirect effect on other dimensions of the civil rights movement. For example, he finds that the process of civil rights litigation may have contributed to mobilizing social protest, a finding with which many would agree (see Klarman 2001). Moreover, new research suggests that negative jurisprudence can have the unintended effect of advancing social reform (Donohue, Heckman, and Todd 2002). Still, the point remains that opportunities for significant social gains—intended or unintended—through litigation are narrow although perhaps not as hopeless as Rosenberg has argued.

21. I speculate about the connection between current theoretical justifications and donors' gravitation toward formal legal institutions in this wave of law and development in the section titled "The Political Economy of Donor Assistance."

22. In practice, USAID is split into two units: democracy and governance, and economic growth. At times the interaction between the two is weak (see Jensen 2002).

23. This is consistent with Samuel Huntington's (1968) authoritarian prescription: deemphasize participation in favor of building political institutions, especially a dominant political party that can exercise control. Huntington's lead example of positive authoritarianism was the military regime of Ayub Khan and the Basic Democracies program in Pakistan in the 1960s. Huntington argued that aspects of modernization—including urbanization, increasing literacy, and industrialization—coincided with stagnant political development. The weakness of Huntington's authoritarian prescription, at least as it related to Pakistan, was laid bare not long after his famous book went to press: Ayub Khan was forced out of the government early in 1969.

24. For a thought-provoking analysis of the diffusion of laws across borders, see Boyle and Myers (2002). For a remarkable historical account of Justice Thurgood Marshall's role in the first wave of the rule of law, see Dudziak (2002).

25. The second wave of law and development in most of the literature is viewed as the first wave. The second wave of law and development was examined by Trubek and Galanter in their famous article, "Scholars in Self-Estrangement" (1974), a critique that has been uncritically mimicked during the nearly three decades since it was published. Indeed, Galanter and Trubek's critique has been mimicked prodigiously. Theirs is one of the one hundred most-cited law review articles of all times (Shapiro 1996). Were Trubek and Galanter right in their analysis of the second wave? Careful historical accounts suggest that Latin American legal academics were concerned about reforming the pedagogy and curriculum of legal education before the arrival of the so-called imperialists (see Perez-Perdomo 2003).

26. Whereas the second wave was 90 percent funded by organizations based in the United States, the fourth wave was funded by diverse international sources. U.S. bilaterals and foundations funded approximately 25 percent to 40 percent of the total assistance during this period. (These data were taken from a talk by Tom Carothers at Stanford University in November 1999.) By 1999, every established democracy in the world had a rule-of-law promotion program.

27. Interpretations of their respective charters are evolving, however. The ADB, for example, is entering the domain of criminal justice.

28. One definition of *Washington Consensus*, a term coined by John Williamson in 1990, as it came to be used is "Liberalize as much as you can, privatize as much as you can, and be tough in monetary and fiscal matters" (Gregorz Kolodko quoted in Williamson 2000, 255).

29. Scott (2001) broadly summarized some of these contributions: "Through the work of agency and game theorists at one end of the spectrum and law and society theorists at the other, we are reminded that laws do not spring from the head of Zeus nor norms from the collective soul of the people; rules must be interpreted and disputes resolved; incentives and sanctions must be designed and will have unintended effects; surveillance mechanisms are required but will prove to be fallible, not foolproof; and conformity is only one of many possible responses by those subject to regulative institutions" (54).

30. For an extensive description of the types of activities funded, see deLisle (1999).

31. Julio Faundez (2000) calls law reform a "fatal attraction" of Western lawyers. That attraction, he says, is a product of lawyers' excellent drafting skills and lack of time to take stock of the history, culture, and society of a country to understand which reforms might be more meaningful. On the other hand, although law reform invites critical scrutiny, it cannot be dismissed per se as unimportant. Laws and legal practices have been transplanted to developing legal systems throughout history.

32. This crowded reform agenda makes success elusive and reduces the time for consultation. It may unintentionally undermine the reform process.

33. But see Rosenberg (1992). Professor Rosenberg selected nine periods during which the U.S. Congress frequently "attacked" the courts by passing bills in response to unpopular decisions or limiting jurisdiction, for example, and then examined U.S. Supreme Court decisions during the same periods. He found that in six of those periods, the Court succumbed to congressional pressure. That finding led him to conclude that judicial independence is least likely to be found when it is most needed.

34. Carothers is absolutely right about the importance of leadership. But in practice, donors often are left with handfuls of tea leaves as they try to ascertain or generate the political will to initiate projects and to sustain them in recipient countries.

35. Until recently, MDBs provided almost no assistance in the sphere of criminal justice. (USAID has supported criminal justice reform for decades.) The ADB is beginning to focus more on criminal justice and the police; the World Bank is still reluctant.

36. But see Lawyers Committee for Human Rights (1996, 2000).

37. Compared with the MDBs, bilateral donors maintain greater control over the management of their funds and the implementation of their projects. In fact, USAID and other large bilaterals place long-term consultants in-country with a large staff of in-house or contracted professionals. The MDBs, on the other hand, work remotely: they manage their projects through a government entity and an implementation unit. Unfortunately, the World Bank's implementation units have been especially weak when it comes to pushing government entities into action.

38. See ADB (2001), a study prepared by The Asia Foundation for the ADB. Also see the World Bank sourcebooks (2002a, 2002b). In recent years, the World Bank has tried to refocus on poverty. In this context, the Bank has suggested three activities to increase access to justice: legal counseling and advocacy (especially for vulnerable groups), ADR mechanisms, and modern court facilities. Similarly, the ADB recently commissioned a study to explore ways in which the Bank and other donors can increase access to justice more effectively. But traditionally, increasing the access of vulnerable groups has been the area of greatest investment by the Ford Foundation and The Asia Foundation.

For an interesting comparison, see Willis (1981, cited in Ferguson 1994, 12–13).

Willis opened the black box and exploded the notion that simple institutional reforms could serve the broader goals of social, political, and economic reform (reducing corruption, for example, or alleviating poverty). His methodology involved a careful ethnography of what actually happens to working-class children when the schooling apparatus is brought to bear on the target population.

39. Krasner's *Sovereignty: Organized Hypocrisy* is an excellent historical and political account of the myth of the Westphalian sovereignty of nations. For an excellent study on the need to revise conceptions of sovereignty, see Deng et al. (1996).

40. Most PBLs are not linked to specific project activities but to the implementation of policy reform. (PBLs aspire to have an impact on an entire sector or economy.) These loans are disbursed relatively quickly, to cover the immediate adjustment costs arising from policy reforms. Project loans, on the other hand, are disbursed relatively slowly, as the project's expenses are incurred.

41. The oft-cited example of success with policy-based loans is Costa Rica. But the government showed substantial commitment to reform activity before the MDBs began to support projects there.

42. In an interview with the author in May 2001.

43. In the face of obviously incompatible incentives, surprisingly few individuals focus on donor accountability in the area of legal and judicial reform. Tom Carothers, vice president of the Carnegie Endowment for International Peace, is an exception.

44. In economies in transition—like Vietnam's, for example—courts are largely irrelevant to many business transactions; and some worry that legal reform could impede the productive and innovative business relationships that have developed under current business practice, in which "substituting behavior" predominates. This accords with, among others, the findings of economists John MacMillan and Christopher Woodruff (2000).

45. For an excellent political-economy analysis of the interests of internal actors in the lower courts in India, see Moog (1997).

46. This is slowly changing.

47. For example, a recent ADB (2000) bulletin outlines the Bank's law reform projects by country; many of them have an access-to-justice component. And the World Bank Law and Justice Conference in 2001 also featured much discussion on improving access to justice as a key objective of legal reform.

48. In some Latin American countries, though, human rights coalitions have endured and succeeded in developing broad-based support.

49. Simply stated, Olson's "collective action problem" is twofold. First, the interests of individuals in a group may contradict the interests of the group to which the individuals belong. Second, smaller groups are easier to organize than larger groups, and members of the larger group are more likely to free ride on the efforts of those members who act.

50. As the brutality of the Maoists has increased and the internal discipline of the insurgency has decreased over time, some suggest that constituencies for judicial reform in Nepal could be strengthened.

51. In a 1999 paper, Jensen and Alkire discuss five questions: (1) What participation is "meaningful," and how much is enough? (2) Does the participatory approach simply ratify preconceived prescriptions? (3) Are consultations expected to substitute for broader democratic deficiencies? (4) Does the judiciary have unique characteristics that affect the value of participatory processes? And (5) are there tensions between the priorities of citizens and the internal legal culture? If so, how can they be managed in participatory processes?

52. "Precisely because intensive discussion is needed more than diktats, there is no merit in offering a detailed blueprint for global reform: the process of discussion is part of the solution" (Sachs 1998, 23).

53. The quote comes from a description of the framework on the World Bank Web site (www.worldbank.org). The goal of all-inclusive participation reflects a larger problem within the Bank: responsible goal setting. The Bank tends to "proliferate its goals, intentions, programs, decisions, without being much constrained by what it can plausibly deliver, because as a political organization its statements of ideology, goals, programs . . . signal its *good intentions*" (Wade 2001, 6).

54. For brief periods, external incentives can serve as an effective substitute for political will; but this is a risky, often unsustainable strategy, highly contingent on the emergence of internal leadership. In 1993, a U.S. General Accounting Office report criticized the disbursement of USAID funds for projects where the "will" to embark on institutional reform was not present. In response, USAID contended that such projects actually could contribute to developing a consensus for reform (GAO 1993a, 1993b).

55. Because every development project involves a consultation component, and because often projects do not materialize or the input from consultations does not inform the design, potential local constituencies may not bother to participate in consultations.

56. Countries that have undergone reforms have realized a reduced case backlog, improved management systems for administration and finance, and somewhat improved professional competence. See, generally, Dakolias (1999).

57. Despite the higher salaries judges enjoy in countries that have undergone significant technical reforms, corruption continues to be a problem in recipient countries and elsewhere.

58. The judicial system in Singapore consistently ranks high in *The World Competitiveness Yearbook*, an annual publication of the Institute for Management and Development (IMD). For example, in the 1998 *Yearbook*, Singapore ranked fourth of forty-six countries in a study on confidence in the fair administration of justice. And the Washington-based Cato Institute and the Canadian Fraser Institute gave the Singapore judiciary a perfect 10 for its contributions to maintaining the rule of law and to maintaining competitiveness and economic freedom in the country (see Subordinate Courts of Singapore 2000). Although Singapore's judiciary ranks very high in efficiency and the economic dividends it reaps from that efficiency, many allege that it does not do as well in terms of judicial independence in human rights cases. Still, the cases where independence arguably is compromised constitute

a very small portion of the overall caseload. Public opinion polls on the courts and the police in Singapore are extraordinarily favorable. The Singapore example illustrates the need for a differentiated critique by case type of performance within a legal system.

59. In one district court in Nepal, for example, a total of only five cases came before it in one year. See Jensen, Moog, and Kardar (2001).

60. A third reason for the reluctance to invest in legal education may stem from the pre–rule of law era, in which studies in developing countries showed that the economic returns on primary education are higher than the returns on tertiary education.

61. In a telephone conversation with the author in April 2001. Also see Galanter, Goonesekere, and Twining (1996).

62. The role of the judiciary vis-à-vis corruption has two primary dimensions: one is corruption within the judiciary; the other is the judiciary's ability to address corruption in other branches of political administration. Bob Klitgaard (1991) developed a formula to show the impact of institutional characteristics that encourage corruption: M (monopoly) + D (discretion) − T (transparency) = C (corruption). Based on these criteria, judiciaries are well suited to corruption. For the most part, they are monopolies; they have a large amount of discretion in their decision-making authority; and they have low levels of transparency. Per force if judiciaries are corrupt or corruptible either systemically or pervasively, they are not suited to the task of rooting out corruption in other government institutions.

63. Actually, the Court began to publish its decisions on the Net after the project ended. This illustrates the problem of evaluating short-term projects from which unintended but important consequences may yet emerge. Project closeout and evaluation usually take place before longer-term impacts manifest. The Venezuela case also illustrates the inherent problem of understanding the causal linkages between project inputs and reforms (see Jensen with Unterman 2002).

That the Internet is a low-cost means of getting information out to the public is a fact that is not lost on donors. With USAID funding, The Asia Foundation is supporting an Indonesian NGO, Hukum On Line, that posts decisions of the Indonesia Supreme Court on the Net. And the ADB now explores this information outlet as a matter of course.

64. Some would even contest the value of publishing judicial decisions on the grounds that access in this instance simply is not meaningful. In systems with no judicial review or case law, it may be that other data about judicial performance would be more useful for the public to form an idea about the degree to which the judiciary is functioning effectively.

65. The common perceptions and supply-side solutions prominent among judiciaries fit very well with the philosophy that seems to underlie many donor programs, particularly those of the MDBs: make large loans, and that will fix the problem. In Pakistan, the data show that cost, not delay, is the most significant barrier to the access to justice for the poor (see Nelson and Jensen 2001).

66. Also see Hensler (2000a, 2000b).

67. For example, fewer than 10 percent of cases filed go to trial at the federal level; fewer than 3 percent of cases filed go to trial in California; and fewer than 2 percent of cases go to trial in Los Angeles.

68. Among many other things, the research demonstrated the importance of data and the limits of received wisdom.

69. After reviewing, among other things, the RAND study of civil litigation in the United States (Kakalik et al. 1996) and survey instruments from around the world, The Asia Foundation, with support for various endeavors from the Hewlett Foundation, the ADB, USAID, and the U.S. government, designed qualitative and quantitative dispute-mapping instruments to ascertain dispute resolution needs. Among the objectives of this dispute-mapping approach are the following: to identify the frequency, nature, and severity of disputes; to identify actions taken in response to various types of disputes and problems; to assess public demand for dispute resolution mechanisms so that the sequential path for a reform agenda dovetails closely with that demand; to ascertain citizens' confidence in, and satisfaction with, various dispute settlement procedures; to identify sources of information about key dispute resolution mechanisms; to identify and measure citizens' perceptions of justice and injustice with respect to both substantive issues and dispute resolution procedures; and to determine motivations for taking action or avoiding action in various dispute forums.

70. Galanter and Krishnan (Chapter 3) show that litigants' motivations in accessing the courts can be very mixed. For example, in India, lower courts often are not effective tools for those seeking justice; instead they are useful tools for delaying justice—to postpone the payment of taxes or debts, to forestall eviction, to harass the opposing party (countersuits or ancillary litigation), or, generally, to maintain the status quo. This situation can lead to perverse incentives, where those who have strong cases want to settle quickly and those with weaker cases tend to prolong the process (see also Nelson 2002).

71. Cost-benefit analyses of proposed programs are useful, in part, in answering this question: could resources spent on legal and judicial reform be better spent elsewhere on improving governance? The traditional rhetoric of lawyers and judges conceives of all legal activities as a public good "that once produced benefits a wide range of consumers whether or not they have paid for it" (Peña, Chapter 7). The market, then, would not be a suitable mechanism for providing legal and judicial services because people would lack incentives to pay for the service; that is, they would wait for others to pay for it. The mainstream model is that justice is a public good delivered by officials paid by the state, financed by taxpayers, and with no apparent pricing barriers to access those services. However, an examination of the empirical evidence in many civil and most commercial cases shows that justice does not constitute a public good. As Rick Messick (1999) points out, the analysis about the extent to which adjudication can be viewed as a private good is informed by Landes and Posner's seminal work, "Adjudication as a Private Good" (1979).

72. Mediation methods range from evaluative (the mediator suggests a resolution) to facilitative (the mediator helps the parties find a resolution but does not offer a resolution) to transformative (the resolution is less important than the parties' gaining new understanding and developing new skills to deal with the problem).

73. For an excellent empirical case study on this, see Pinheiro and Cabral (1998).

74. For an excellent general discussion of the problems related to evaluation and impact, see Carothers (1999, 281–302).

75. On the difficulty of comparing legal officers, actors, and institutions across different sociocultural and historical contexts, see Abel and Lewis (1995); and Barcelo and Cramton (1999).

76. Although beyond the scope of this paper, all currently available instruments that construct aggregate measures of the rule of law and effective governance—for example, those developed by the World Bank, Freedom House, Transparency International, the U.S. Office of Management and Budget, the UNDP, the EU, and others—have empirical limitations. And the utility of most of these instruments for establishing baselines is limited.

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