Legal and Judicial Reform through Development Assistance: Some Lessons

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Legal and judicial reform plays an important role within the broader framework of international development assistance: stable and just legal systems support the promotion of security, equity, and prosperity. The author's goal is to assist those who are interested in designing or working on justice initiatives by contributing to the academic reflection on the strengths and weaknesses of legal and judicial reform initiatives.

There is a need for comprehensive and early analyses of the condition, status, and requirements of the governance system where intervention is being considered. Of critical importance in any such analyses is the need for precision, first, in describing the elements that constitute legal systems, and, second, in positing useful markers for specific goals. The author proposes indicators of systemic health, while stressing that each indicator will vary in relevance in each country's situation.

The author goes on to set out the principles for sound legal and judicial reform programming. First, sound reform initiatives should plan for long-term engagement because of the need for local commitment to the processes and goals of reform endeavors. Second, program designers cannot afford to ignore the question of indigenous social, economic, and cultural values because a lack of sensitivity to these values can lead to resistance, unsustainability, and ultimately failure. Finally, major projects should only be considered and undertaken once experience has been gained on more modest initiatives.

Based on these principles, the author presents diverse programming options, focussing on issues relating to sequencing, the recognition and seizure of opportunities with respect to the development of reform constituencies, as well as issues relating to regional initiatives and donor coordination. Some of the potential risks inherent in various forms of justice programming are also highlighted in the hope of assisting project designers and implementers to ask the right questions at the outset of legal and judicial reform initiatives.

The author concludes by discussing issues relating to the evaluation of the results of judicial reform programs, emphasizing that the means and ends of such programs are in constant interaction. Performance assessment schemes must include a complex combination of quantitative and qualitative results indicators and must also include risk assessment and reassessment mechanisms because risks can change, multiply, and abate during project implementation.

An example of how the author's analytical framework was employed in assessing Vietnam's legal system and in recommending programming options is provided in the appendix.

La réforme juridique et judiciaire joue un rôle important au sein du cadre plus large de l'assistance au développement international : les systèmes juridiques stables et justes soutiennent la promotion de la sécurité, de l'équité et de la prospérité. Le but de l'auteur est d'assister ceux qui sont intéressés à conceptualiser ou à travailler à atteindre des initiatives de justice en contribuant à la réflexion académique concernant les initiatives de réformes juridiques et judiciaires.

Il existe un besoin de faire des analyses compréhensives aussi tôt que possible de la condition, du status et des besoins du système de gouvernance où une intervention est considérée. D'importance capitale est un besoin de précision quant à la description des élémens qui constituent les systèmes légaux en premier, et puis afin de positionner des repères utiles pour arriver aux buts spécifiques. On propose des indices pour évaluer l'état systématique de salubrité du système, en soulignant que chaque indice sera plus ou moins pertinent étant donné la situation du pays concerné

L'auteur continue en étalant les principes nécessaires pour un programme de réforme légal et judiciaire sain. Premièrement, ces initiatives devraient prévoir un engagement à long terme parce qu'il est nécessaire d'avoir un engagement local des processus et des huts des efforts de réforme. Deuxièmement, ceux qui conceptualisent le programme ne sont pas en mesure d'ignorer la question des valeurs indigènes sociales, économiques et culturelles parce qu'un manque de sensibilité envers ces valeurs peut mener à la résistance, le non-soutenabilité, et ultimement l'échec. Finalement, des projets majeurs devraient seulement être considérés et entrepris une fois que l'expérience nécessaire a été acquise d'initiatives plus modestes.

À la lumière de ces principes, l'auteur présente divers options de programmation en concentrant sur la séquence, la reconnaissance et la saisie d'opportunités en relation au développement des circonscriptions de réforme, ainsi que les initiatives régionales et à la coordination de donateurs. Quelques risques potentiels inhérents des formes variées de programmation de justice sont mis en évidence dans l'espoir d'assister ceux qui conceptualisent les projets ainsi que ceux qui les implémentent et de poser les bonnes questions.

En conclusion, on discute l'évolution des résultats des programmes de réforme judiciaire, tout en soulignant que les moyens et les fins des programmes de réforme judiciaire sont en interaction constantes. Les projets d'évaluation de performance doivent inclure une combinaison complexe d'indices de résultats qui doivent être quantitatifs et qualitatifs ainsi que des mécanismes d'évaluation des risques et de ré-évaluation parce que les risques peuvent changer, se multiplier et diminuer pendant l'exécution d'un projet.

Dans l'appendice, le cadre analytique de l'auteur est utilisé afin d'évaluer le système juridique du Vietnam et afin de recommander des options de programmation.

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Introduction

In the spring of 1996, the Policy Branch of the Canadian International Development Agency ("CIDA") convened a national round table on legal and judicial reform.[1] The round table reflected the growing engagement of CIDA, along with many other bilateral and multilateral donors, in justice programming in many parts of the globe. Flowing from the round table, at CIDA's request, I prepared an "instrument" or "framework" that encapsulated the lessons learned by Canadians and foreign partners through their justice initiatives, and was designed to help decision makers within CIDA assess the utility and viability of legal and judicial reform programs.[2] Using that framework, CIDA commissioned an analysis of its projects and programs in the justice area, produced in 1999.[3]

Meanwhile, in 1998, the Federal Department of Justice, along with the Canadian Bar Association and the Canadian Council of Law Deans, organized a delegation to visit the World Bank and the Inter-American Development Bank to discuss legal and judicial reform initiatives. They then jointly convened a second national workshop on international justice reform in 1999,[4] again drawing a wide-ranging group of participants active in the design and delivery of international legal and judicial reform projects. Since 1999, the collective experience of Canadians in general, and of CIDA in particular, has grown significantly. CIDA has launched a series of legal and judicial reform projects and programs in all of its geographic branches, the Department of Justice and other federal

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[1] The terminology for such programming has undergone several permutations in the development community. Various agencies have referred to "rule of law", "administration of justice", "legal technical assistance", and "legal reform" programs. I prefer the term "legal and judicial reform programs", because it separates out the court elements that often come to overwhelm thinking about the justice sector as a whole. It also downplays the "technical" aspect of work in the justice area. In most developing countries and countries in transition, the fundamental legal problems relate to the very understanding of law and its role in a well-ordered society. This implies the need for significant social and attitudinal shifts, not merely technical change. For the sake of brevity and variety, I also use the compendium term "justice programming". The central point is that reform in legal systems should be broadly conceived to include work with the governmental legal bureaucracy, the police and prison systems, public prosecutors, the courts and other adjudicative agencies, legal professional associations, law faculties and training institutes, and non-governmental organizations promoting legal education and reform.

[2] Canada, CIDA, Policy Branch, *Programming in Legal and Judicial Reform: An Analytical Framework for CIDA Engagement* by Stephen J. Toope (September 1997), online: CIDA <http://www.acdi-cida.gc.ca/humanrights> [CIDA, *Analytical Framework*].

[3] Canada, CIDA, Policy Branch, *CIDA's Programming in Legal and Judicial Reform: Indicative List of CIDA Projects Related to Legal and Judicial Reform in Developing Countries and Central and Eastern Europe, 1990-1997* by Véronique Lamontagne (March 1999), online: CIDA <http://www.acdi-cida.gc.ca/humanrights> [CIDA, *Indicative List*].

[4] Canada, Department of Justice, *Report of the Workshop on International Legal Assistance Held in Edmonton 22 August 1999* [unpublished].

and provincial ministries and agencies have served as project designers and implementers, and many Canadian private sector and civil society actors have been engaged in justice reform work around the globe. Canadians have continued to share their experiences in workshops held at a succession of Canadian Bar Association summer meetings. Moreover, the experience of other bilateral and multilateral aid agencies with legal and judicial reform has grown exponentially in only a few years, and a wide range of studies and discussions has been published. The time is ripe for a detailed reflection on the experience with legal and judicial reform initiatives around the world. My principal goal is to assist those who are interested in designing or working on justice initiatives to do so with their eyes open and their minds attuned to opportunities and risks. A subsidiary goal is to contribute to academic reflection on the strengths and limitations of legal and judicial reform efforts. In this article, I propose a framework for assessing the health of a domestic legal system (Part I), set out principles for sound legal and judicial reform programming (Part II), assess the lessons learned from current projects concerning the management of risks (Part III), and offer reflections on the measurement of project and program results (Part IV).

A preliminary, but important, conceptual issue must be addressed before launching into an assessment of experience in legal and judicial reform to date: How do such efforts fit within the broader framework of international development assistance? In other words, why might legal and judicial reform be necessary in pursuing a development agenda? It must be acknowledged that empirical studies on the effects of justice programming are few. Studies that are available are largely impressionistic and tend to focus upon performance measures internal to legal systems without much attention being paid to extra-system effects. Although this is not surprising, given the inherent problems in assessing causality that will be discussed immediately below, we are left with remarkably little concrete evidence on the question how legal and judicial reform contributes to the broader development agenda. The methodology of this article reflects the paucity of empirical studies, relying instead on a survey of donor experience and reflections gleaned from over a decade of personal involvement in justice programming. With the evidentiary problem acknowledged, one can still proffer a brief, and inevitably superficial, answer to the question why legal and judicial reform matters: stable and just legal systems support the promotion of security, equity, and prosperity, if "security" is broadly defined to include the protection and enhancement of the quality of life of citizens, "equity" is viewed as the substantively equal and predictable treatment of all citizens, and "prosperity" is seen to be rooted in part in institutions and processes that favour investment, initiative, and economic growth. More specifically, reform of legal institutions and processes is integral to the promotion of human rights, democratic development, and good governance. Furthermore, it facilitates private economic activity by establishing a secure basis for contractual relations.[5] Justice reform can also assist in

[5] See Bernard Rudden, "Civil Law, Civil Society, and the Russian Constitution" (1994) 110 Law Q. Rev. 56 (on the importance of private law, infused with public values, in the process of legal change).

promoting the participation of women in sustainable development, though it is fair to say that this is an area that remains weakly explored in concrete programming. Legal reform is also necessary to establish a framework for environmental protection. In other words, legal and judicial reform is both a worthy end in itself and is most probably a means to facilitate other developmental objectives.

The main challenge in articulating the value of legal reform for social and economic development lies in the core commitment of most development agencies, including CIDA, to the provision of basic needs and poverty alleviation. Can one really posit a causal link between reform of legal systems and improvement in the plight of the poorest of the poor?[6] This question raises three separate problems. The first problem is the very notion of causal connection, a central concern of mainstream social science methodology. Briefly stated, the conundrum is whether or not it is possible, with integrity, to assert a causal link between programs designed to improve governance, which are almost always focussed upon elites and are invariably hierarchical, and the amelioration of the conditions of the poorest in society.[7] One can certainly imagine such a linkage, but it is inevitably so attenuated that causal connection tests are hard to sustain. Yet instinct and experience with the results of a failure to attend to legal (and other governance) frameworks suggest that law matters even for the poor. Some would argue that law matters more for the poor than for the rich, who often find alternative means to protect and pursue their interests.[8] Because causal effects are so hard to prove in "soft" areas of governance programming such as justice reform, it is easier to focus upon effects of reform within the legal system, leaving downstream effects largely to hope and speculation. More research is required to specify extra-systemic effects of justice reform initiatives.

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[6] CIDA's policy focus upon the achievement of results assumes that all activities should contribute to the "Agency's overall goals of poverty reduction and sustainable development ... " (Canada, CIDA, Performance Review Branch, *Framework of Results and Key Success Factors* (July 1999) at 1).

[7] The American pragmatist philosopher Richard Rorty has suggested that social change requires the "sentimental education" of elites, conditioning respect for others and the social value of human rights for all. But he recognizes that this is an unpalatable prescription for many people who would rather see social change as resulting from popular movements invoking natural rights or materialistic class-based claims: "[I]t is revolting to think that our only hope for a decent society consists in softening the self-satisfied hearts [through sentimental education] of a leisure class" (Richard Rorty, "Human Rights, Rationality, and Sentimentality" in Stephen Shute & Susan Hurley, eds., *On Human Rights: The Oxford Amnesty Lectures, 1993* (New York: Basic Books, Harper Collins, 1993) 111 at 130). Some development professionals, rightly committed to popular participation and participatory approaches to community development, are constitutionally uncomfortable with legal reform because of its elitist connotations.

[8] This claim underlies much critical and feminist legal scholarship that treats doubts about the social value of rights-based discourse as the privilege of white, middle class intellectuals who have not had to use rights claims to fight for respect and economic advancement. See *e.g.* Patricia Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991) c. 6 & 9.

A second fundamental problem is also closely related to difficulties with social science causality. It is the continually unresolved question of law's influence as an instrument of social change. Again briefly put, the question is whether law follows or leads. Can legal norms and institutions evolve only within contexts of shared understanding that are socially generated, or can law be used instrumentally to foment change in the absence of underlying social consensus? Empirical evidence supports both conclusions in different situations. This points to the beginnings of an answer to the question of law's influence: legal change is deeply contextual, often culturally specific, and inherently political.[9] So while in most circumstances legal initiatives will be largely responsive, they may at times be employed strategically, and with great effect, to further other agendas. But generations of scholars and theorists have not managed to produce a comprehensive theory of normative change that can tell us in advance exactly how effective law arises and how it shapes the identity and behaviour of actors and the evolution of structures in society.[10]

The third issue is of a different order. It is the longstanding argument typically pitting liberal economists against liberal lawyers. The issue is whether the notion of rights (which unfortunately often subsumes the entire concept of law)[11] is prior to, dependent upon, or coequal with the notion of "basic needs". One can immediately see why this issue is complicated in today's development context. For a generation at least, most development workers, historically shaped much more by economic than legal thinking, have relied upon the concept of providing for basic needs as a central justification for everything they do. Then along came the lawyers, claiming that it is not enough to think about human "needs", because such an approach is too materialistic and fails to account for the aspirations of the human spirit, which can only be guaranteed through the recognition of a diversity of human rights.[12] With the growing acceptance of a role for law in sustainable development, we have simply squared the circle without resolving the analytical tension. In CIDA's mandate, for example, both basic needs and rights are said to be priorities. No effort is made to relate the two. Yet many development old-timers are reluctant to grant law a priority close to that of basic needs. And the problem is that it is not possible to prove them right or wrong—once again, the issue of causality rears its head.

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[9] Cheryl W. Gray, "Reforming Legal Systems in Developing and Transition Countries" *Finance and Development* 34:3 (September 1997) 14 at 14.

[10] For my own recent attempt, see Jutta Brunnée & Stephen J. Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum. J. Transnat'l L. 19.

[11] See *e.g.* Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977).

[12] For a fascinating discussion of the unresolved professional conflict between economists and lawyers on the question of basic needs and rights, see R.J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 1986) at 83-88.

But it is not particularly helpful to development workers, or to people calling for legal and judicial reform in the developing world, to respond that social scientists continue to argue over causality, that there is no universally accepted theoretical explanation of the role of law in society, and that we cannot definitively explain the social relationship between rights and needs. In a helpful paper presented at a World Bank conference in 2000, Amartya Sen argued that the various aspects of development—economic, social, political, and legal—must be pursued in an integrated fashion; that single-track initiatives are likely to result in failure. Rather than worrying about whether or not one type of development serves as a precondition for another, Sen suggests that development is shorthand for a complex set of ideas and processes, and that we should be striving to achieve "conceptual integrity" and to recognize causal *inter*dependence.[13] He eschews the search for linear causal connections. In Sen's view, conceptual integrity in development programming reflects the idea that "development is a functional relation that amalgamates distinct developmental concerns ... [I]t involves a constitutive connection in the concept of development as a whole."[14] Legal and judicial reform has a supporting role to play in a comprehensive development framework.

It is therefore useful to extrapolate from practical experience in development, and to ask the pragmatic question: Can sustainable social and economic development take place at the macro level in the absence of functioning legal systems? Increasingly, the answer, backed up with some tentative empirical work, is "no".[15] In Sen's terms, legal reform is both causally interdependent with other development initiatives and conceptually necessary in any comprehensive approach to development. Over the last few years a number of major players in international development have undertaken studies on the role of legal and judicial reform in supporting social and economic development. These studies lay the groundwork for my analysis, and their varied understandings of the potential gains from investment in legal and judicial reform are worth highlighting.

For the World Bank, legal and judicial reform has been viewed in largely instrumental terms: "The Bank recognizes the significant role that law can play in fostering economic development ... "[16] The focus has been upon the establishment of

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[13] Amartya Sen, *What is the Role of Legal and Judicial Reform in the Development Process?* (Lecture presented to the World Bank Legal Conference, Washington, D.C., 5 June 2000) at 1, 5-7 [unpublished, archived online: The World Bank <http://www1.worldbank.org/publicsector/legal/legalandjudicail.pdf> [sic]].

[14] *Ibid.* at 8.

[15] Daniel Kaufmann, Aart Kraay & Pablo Zoido-Lobatón, *Governance Matters* Policy Research Working Paper No. 2196 (Washington: World Bank, 1999) at 3, 15; Richard A. Posner, "Creating a Legal Framework for Economic Development" (1998) 13:1 World Bank Research Observer 1 at 3.

[16] World Bank, Legal Department, *The World Bank and Legal Technical Assistance: Initial Lessons*, Policy Research Working Paper No. 1414, Doc. No. WPS1414 (Washington: World Bank, 1995) at 1 [World Bank, *Legal Technical Assistance*]. The same assumptions guide the work of the Asian Development Bank although, once again, precise causality is difficult to establish. Asian

effective "legal frameworks" to facilitate investment and a stable economic environment.[17] These "frameworks" include corporate law reform, the creation of stock exchanges, the drafting of market-friendly property and contract law, and of effective mechanisms for the registration of property rights. More recent World Bank studies have gone one step further, to suggest that as economic development begins to take off, this creates even "greater demand for a consistent legal framework and reliable legal tools."[18]

These legal-economic initiatives are obviously important, but they do not exhaust the justifications for justice reform. The World Bank has been constrained in its declared understanding of the role of legal and judicial reform by the limitations of its mandate that does not allow the Bank to be engaged with "political" issues. So justice programming must be cast in purely economic terms. In practice, however, the World Bank's work in legal and judicial reform has become more and more attuned to the broader social and political aspects of legal reform, extending even to programs in support of legal aid in South American barrios.

The Organisation for Economic Cooperation and Development ("OECD") has adopted a more expansive view of legal and judicial reform, suggesting that "there is a vital connection between open, democratic and accountable systems of governance ... and the ability to achieve sustained economic and social development."[19] In an even more explicit statement, the Development Assistance Committee ("DAC") of the OECD has argued:

> The rule of law is essential to the effective functioning of society and the economy. As stated in the DAC Orientations, a predictable legal environment, with an objective, reliable and independent judiciary, is an essential factor for democratisation, good governance and human rights.[20]

Development Bank, Office of the General Counsel, *Law and Development at the Asian Development Bank 1999* (Manila: Asian Development Bank, 1999), online: Asian Development Bank <http://www.adb.org/Documents/Others/Law_ADB/l&d-1999.pdf> ("law played an important role in facilitating economic development, particularly when governments pursued economic policies which fostered free markets and reduced the role of government as a primary decision-maker in the economy" at 2).

[17] World Bank, *Legal Technical Assistance*, *ibid.* at 7-8.

[18] World Bank, Legal Department, Legal and Judicial Reform Unit, *Initiatives in Legal and Judicial Reform* by Maria Dakolias [unpublished] at 9 [World Bank, *Initiatives*].

[19] OECD, *DAC Orientations on Participatory Development and Good Governance 2:2* (Paris: OECD, 1993) at 7 [OECD, *DAC Orientations*].

[20] OECD, Development Assistance Committee, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance: Part 1* (Paris: OECD, 1997) at 10, online: OECD <http://www.oecd.org> [OECD, *Final Report*]. See also David Hoffman, "A State of Lawlessness" *Washington Post Foreign Service* (9 September 1999) A01 (discussing post-Soviet legal reform needs in Russia, and relating a healthy legal system to the attainment of both economic and democratic development).

The linkage between democracy, human rights, legal reform, and development was also advanced in the *Plan du Caire* of the Agence de coopération culturelle et technique, now known as the Agence intergouvernementale de la Francophonie.[21] Similarly, the German Foundation for International Development has stated that reform in the justice sector is required "to strengthen the democratic and political culture and extend civil rights."[22]

In my view, the most comprehensive and helpful justification for legal and judicial reform has been offered by the Overseas Development Administration ("ODA") of the U.K., now known as the Department for International Development, echoing the approach advocated by Amartya Sen:

> Law is a crucial element of both good government and the wider development agenda. A sound and well-enforced legal framework provides benefits which are often desirable ends in themselves but also help provide a framework within which economic and social development may be achieved.
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> ...
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> Law is more than lawyers—to be of value in society it must provide guiding principles that allow for regularity and rationality in the way in which disputes are settled and the way in which relationships are governed.[23]

This approach recognizes both the intrinsic and instrumental value of a well-functioning legal system, and emphasizes its support for (and dependence upon) economic, social, and political development. Law is seen not only in its guise as a facilitator of dispute resolution, but also as a set of structuring principles and institutions helping to shape diverse social relationships. In more concrete terms, law is a set of actors, a set of institutions, and a set of norms. Relevant actors include the public, lawyers and legal aid workers, professional association officials, mediators and arbitrators, members of administrative tribunals, judges, police, prison officials, prosecutors, ministry of justice officials, parliamentarians, and law professors and students. Legal institutions include professional associations, legal non-governmental organizations, legal aid clinics, federal and provincial legal bureaucracies, administrative tribunals, courts, constitutional conventions, parliaments and their committees, the

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[21] Agence de coopération culturelle et technique, *Le Déclaration du Caire et plan d'action francophone en faveur de la justice, de l'État de droit, des droits de l'Homme et du développement, 1996-2000. Conférence des Ministres de la Justice des pays ayant le français en partage Held in Paris 30 October – 1 November 1995* (Paris: Agence de coopération culturelle et technique, 1995) [*Plan du Caire*].

[22] German Foundation for International Development, *Rule of Law, Legal Certainty and Judicial Reforms in Latin America. Report of Findings and Recommendations from the International Round Table Held in Berlin 28 November – 1 December 1995* (Bonn: German Federal Ministry for Economic Cooperation and Development (BMZ), 1995) at 16.

[23] U.K., ODA, Government and Institutions Department, *Law, Good Government and Development* (Guidance Paper) (January 1996) at 1, 12.

security services including the prisons, and law faculties. Legal norms are international (shaping and constraining state law in important ways), constitutional (guiding the functioning of the political state, and sub-state actors), procedural (setting the parameters and modes of operation of legal and to some extent political institutions), and substantive (attempting to guide and constrain the behaviour of subjects of the law). Every legal system is constituted by a variety of actors, institutions, and norms that is markedly or subtly different from other systems. Moreover, law reform interacts with other forms of economic, social, and political reform, producing mixed effects and feedback that requires constant readjustment.

Because of justice reform's potential but mainly unspecified downstream effects, one cannot treat legal and judicial reform initiatives as politically or socially neutral. Unless pursued with great sensitivity, justice reform can easily amount to cultural imperialism, where the great benefits of Western liberalism are to be transferred to the ignorant. Anyone seeking to work in the field would be well advised to consider the rise and fall of the law and development movement of the 1960s.[24] In that era, seemingly noble intentions were betrayed by cultural arrogance and hubris. Witness the plethora of American-style constitutions implanted in Africa that completely failed to engender any sense of democratic accountability. The only effective transfer seemed to be the ethos of "Hail to the Chief".

As will be discussed below,[25] useful justice reform initiatives are most likely where there is true indigenous demand. This reality does not, however, preclude efforts to foster demand through support for education and the nurturing of reform constituencies. Moreover, because much legal and judicial reform ultimately depends upon engagement with and change in formal institutions, justice programming will often require difficult negotiations with host states.

I. Assessing the Health of Legal Systems: An Analytical Framework

If there is any lesson that every aid agency and independent commentator seem to agree upon in considering prospective justice reform or other governance programs, it is the need for comprehensive and early analysis of the condition, status, and requirements of the governance systems where intervention is being considered.[26] This conclusion

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[24] For a set of thoughtful reflections on the legacy of the law and development movement, see Anthony Carty, ed., *Law and Development* (New York: New York University Press, 1992). See also Francis N. Botchway, "Good Governance: The Old, the New, the Principle, the Elements" (2001) 13 Fla. J. Int'l L. 159.

[25] See Part II.A.2, below.

[26] See *e.g.* World Bank, *Legal Technical Assistance*, *supra* note 16 at 4; Canada, CIDA, SEAFILD, *What Works?: A Case Study of Successful Canadian Governance Programming in Thailand and Cambodia* by Greg Armstrong (Ottawa: CIDA, Southewast Asia Fund for Institutional and Legal Development, 1998) at 44 [CIDA, *What Works?*]; Canada, CIDA, Africa and Middle East Branch, The Horn of Africa Program and the Policies, Planning and Management Directorate, *Ethiopia*

implies recognition of the need to accept relatively heavy project development costs before any concrete programming is undertaken. A second and related lesson is that the justice sector analysis must include an assessment of the broader social, economic, and political context in which justice reform initiatives might be undertaken.[27] In particular, an assessment must consider the wider issues of governance that will shape any possible legal and judicial initiatives. Given its political and public aspects, effective justice reform depends upon an interplay of factors, many of which lie outside the legal system itself. Some of these factors will be canvassed in Part II. For present purposes, the more immediate questions are: How does one go about "assessing" a legal system? What are the indicators of a well-functioning system of justice? These seemingly simple questions mask a morass of conflicting legal and political theories.

A. The Rule of Law

Very often the concept of a sound or healthy legal system, aligned with a democratic political system, is described through the shorthand of the "rule of law" (or "*l'État de droit*"). I have previously argued that this shorthand is not analytically useful, that it tends to mask more than it reveals, and that "[t]here is no simple, all-inclusive, definition of the rule of law any more than there is an inclusively supported definition of 'law'."[28] I admit that I have lost the battle. Every aid agency whose documents I reviewed continues to employ the term "rule of law" either as the category into which all legal and judicial reform programming must fit, or as the central underlying goal that such programming is meant to support. A literature on the rule of law in development is also emerging.[29]

Because of its constant invocation, it is worth pausing for a moment to consider what might be meant by the "rule of law". For the nineteenth-century English legal historian, Dicey, whose name is most closely associated with the concept, the supremacy of parliament was the defining feature of a legal system, for it epitomized

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Governance Study: Final Report by Philip Rawkins (April 1999) at 20, 37, online: CIDA <http://www.acdi-cida.gc.ca/INET/IMAGES.NSF/vLUImages/HRDG2/$file/HR_lesson_Ethiopia-e.pdf> [CIDA, *Ethiopia Governance Study*].

[27] See *e.g.* U.K., Department for International Development (formerly the ODA), *Good Government Assessment Framework* (January 1997) at 2.

[28] CIDA, *Analytical Framework*, *supra* note 2 at 7-9. See also World Bank, "The Rule of Law as a Goal of Development Policy" by Matthew Stephenson, online: World Bank <http://www1.worldbank.org/publicsector/legal/ruleoflaw2.htm> [World Bank, "Goal of Development Policy"] (stating that the rule of law has no fixed meaning); Gianmaria Ajani, "By Chance and Prestige: Legal Transplants in Russia and Eastern Europe" (1995) 43 Am. J. Comp. L. 93 (arguing that the supposed distinction between "the rule or supremacy of law and systems based on the *droit administratif*" is outmoded and unhelpful at 117).

[29] See Thomas Carothers, "The Rule of Law Revival" *Foreign Affairs* 77:2 (March 1998) 95.

the ordered hierarchy of authority which, for him, characterized law.[30] Thus, the rule of law could be defined simply as the need to follow the law as set down by constituted authority. The only important issues, then, would be procedural and largely value-neutral: Was the law validly enacted, internally consistent, and equally applicable to all?[31]

This supposed neutrality caused many twentieth-century commentators to challenge Dicey's version of the rule of law, and to argue that the rule of law is only relevant if it possesses a substantive content—that is, if it expresses certain values that a legal system should uphold. These values could include, depending upon the commentator, equality (especially substantive equality), fairness, transparency, accountability, consistency, and predictability.[32] It is commonly argued that, absent its capacity to promote substantive values, the rule of law becomes nothing more than a legitimation of de facto political power. Yet there is no universally accepted manner in which the substantive content of the rule of law can be defined; the content will inevitably depend upon cultural constructs and value preferences. For example, in a recent U.S. Agency for International Development ("USAID") publication, the rule of law was said to include a commitment to the promotion of market-based activity through the guarantee of the sanctity of contracts.[33] Equating the rule of law with neo-liberalism is clearly ideologically driven, and would by no means receive universal approbation even from liberal-minded Western lawyers.[34]

Because of the inherent uncertainty of the concept, the rule of law continues to be defined in diverse, sometimes conflicting ways within the development community. For some agencies, the rule of law is best defined by reference to the existence of binding adjudicatory mechanisms, primarily national courts. For the World Bank, "[a]n essential element of the rule of law concept is the existence of an independent dispute resolution body that resolves conflicts in the application of the rules or

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[30] A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed. (New York: St. Martin's Press, 1960).

[31] British Institute for International and Comparative Law, *Good Governance Project: The Rule of Law* (Draft of Discussion Summary, 27 February 1996) [unpublished] at 7.

[32] See *e.g.* Lon L. Fuller, *The Morality of Law*, rev. ed. (New Haven: Yale University Press, 1969); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, Indiana: University of Notre Dame Press, 1988); Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860; Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990).

[33] U.S., USAID, Center for Democracy and Governance, *Handbook of Democracy and Governance Performance Indicators* (Technical Publications Series) (August 1998) at 19-20, online: USAID <http://www.usaid.gov/our_work/democracy_and_governance/publications>.

[34] See *e.g.* Brigitte Stern, "How to Regulate Globalization?" in Michael Byers, ed., *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford Univerity Press, 2000) 247.

addresses instances of non-compliance with the rules."[35] A similar approach is adopted by the USAID,[36] and by the Council of Europe.[37]

The OECD also emphasizes the importance of an independent judiciary to the rule of law, but employs an even more specific analysis. On this view, the rule of law is fulfilled when human rights are protected by a legal system that controls the exercise of power by government through court supervision of executive and administrative powers. What is odd about this supposed requirement is that substantive judicial review of administrative action is not even firmly entrenched in some stable Western democracies, such as France (where the review power of courts is a current political preoccupation) and the U.K. (with its largely unwritten constitution that makes it complicated for courts to review state action against constitutional standards). In the OECD definition, the rule of law also requires an absence of arbitrary conduct on the part of state authorities, equality of access to redress grievances, and equality of treatment, whatever one's social status.[38]

The development agency of the U.K. adopted a guidance paper on law, good governance, and development in which the rule of law is defined succinctly:

> The Rule of Law emphasises the fact that government should be conducted in accordance with known and objective legal principles, should be able to point to lawful authority when exercising power and, furthermore, that law exists to protect and guide all elements of society.[39]

Implicit in this definition is an unspecified substantive content for the rule of law. Not only is "lawful authority" relevant, so too is the protection and guidance of "all elements of society." One might read in a notion of equality, and either human rights or paternalistic protection.[40]

Finally, the rule of law, and the values it contains, can be viewed from a different instrumental perspective. The *Good Governance Project* of the British Institute for International and Comparative Law has stressed the importance of the rule of law in strengthening "social peace and stability." On this view, "[r]ule of law mechanisms

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[35] World Bank, *Legal Technical Assistance*, *supra* note 16 at 15.

[36] U.S., USAID, Bureau for Policy and Program Coordination, Center for Development Information and Evaluation, *Weighing In on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs* (USAID Program and Operations Assessment Report No. 7) by Harry Blair & Gary Hansen (Febraury 1994) at 6, online: USAID <http://www.usaid.gov/our_work/democracy_and_governance/publications> [USAID, *Weighing In*].

[37] Council of Europe, Committee of Ministers, *Independence, Efficiency and Role of Judges, Recommendation R(94) 12* (Strasbourg: Council of Europe Publishing, 1995) at 7 (adopted 13 October 1994).

[38] OECD, *DAC Orientations*, *supra* note 19 at 14; OECD, *Final Report*, *supra* note 20.

[39] ODA, *supra* note 23 at 3.

[40] For a detailed list of the possible substantive commitments of "the rule of law," see Carothers, *supra* note 29.

provide a stable and non-violent means of structuring individual and group relationships within society in which disputes are settled on the merits of the positions rather than by force."[41] Although controlling resort to force is an important goal, the British Institute itself notes that an emphasis upon "stability" and "social peace" will not necessarily lead to the promotion of other equally important goals such as public participation and democratization.

This brief excursion into the development literature on the rule of law underscores the conclusion that there is no single definition of the term acceptable to all. Of more immediate concern is the tendency to employ the phrase in policy statements, and even in project planning documents, as if it contained a stable meaning that answered the "why" question of justice reform fully and comprehensibly. If development workers are going to continue to use the short hand of "rule of law", they should specify what they mean. More pointedly, the phrase should not be invoked to mask an absence of underlying analysis.[42] If one wants to employ the concept of the rule of law to help define a project goal, it is probably best to think of the concept in broad terms, as signalling the desire to manage by rule rather than fiat, and as reflecting the priority of publicly known laws over individual or sectoral interests. Any understanding of the rule of law would also include equality of treatment for all subjects of the law, without favours to political, economic, or social elites. But this is only a beginning, and for each project the general concept of the rule of law must be broken down into much more specific project purposes. If legal and judicial reform initiatives are to have any hope of influence, precision is required first in describing the elements that constitute legal systems, and second in positing useful markers toward the specific goals that are sought to be achieved. I undertake these two steps in the next sections of the paper.

B. The Interrelated Elements of a Legal System

As suggested by the lucid work of the ODA, there are four distinct but interrelated elements that make up a formal legal system, each of which encompasses a range of institutions and processes:

1. the articulation, formulation, and drafting of rules (including the creation of formal institutions);
2. the application and interpretation of rules;
3. the provision of legal representation and advice; and
4. the promotion of public access and understanding.[43]

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[41] British Institute for International and Comparative Law, *supra* note 31 at 12.

[42] See World Bank, "Goal of Development Policy", *supra* note 28.

[43] ODA, *supra* note 23 at 7.

Underlying each of these elements is a further component crucial to the health of any legal system: basic legal education and professional training. If one is to assess the relative soundness of a legal system, one must engage with each of these elements separately and try to penetrate their interrelationships as well. These elements are conceived broadly, as will soon be apparent, and are meant to include not only structural aspects, but processes and actor attitudes as well.

No legal system, or for that matter no social system, can function on the basis of its formal structures alone. To understand a system, one must come to grips with the way in which structures and agents (participants in the system) interact. Both the structures and the agents are shaped and modified by that interaction.[44] A relatively straightforward case is the perennial issue of the proper relationship between the judiciary and executive authorities. In Jamaica, the court system receives its budget allocations in specific budgetary envelopes directly from the Ministry of Justice, and chief justices and court administrators must often apply directly to the Ministry for funding for even minor initiatives. Although this financial relationship would send up a red flag in any standard analysis of judicial independence, the Jamaican judiciary is in fact strongly independent. This independence flows in part from other structural elements, such as the difficulty of removing judges from office, but also from inherited traditions of independence that are cherished and sustained by strong-willed individuals, acting out a well-established social role. To understand the issue of independence of judges in Jamaica, one needs to look carefully at both structures and actors. If the social role were to be undermined, hypothetically, by a series of highly unpopular judgments matched with out-and-out attacks from the executive upon the judiciary, the structures might not prove strong enough to guarantee continuing independence.

In addition, formal legal systems, at least in their Western varieties, are predicated upon certain animating concepts that must inform concrete programming decisions. These include a commitment to non-violence, support for the ethic of promising, upholding rights of possession, and a grounding in what might be called a "liberal education" in law.[45]

So in conducting an assessment of a legal system where intervention is being considered, the assessor should look at the four elements of the system, describe how they relate to each other, and attempt to understand how and why actors in the system behave as they do. Part of the answer to the behavioural questions is found in the education and training of legal professionals, and this should be the subject of specific

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[44] My understanding of social action and change is informed by the sociological theory of structuration. See Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Cambrdige, U.K.: Polity Press, 1984) especially at 2-3, 16-19, 22-28, 36, 83-87, 132-39, 162-65, and 179-80. Giddens provides a helpful review of "basic concepts" at 281-84.

[45] I thank Rod Macdonald for a helpful conversation that clarified these predicates.

analysis. In addition, the inherited traditions and "mystique" of professionals within the system should be explored, as should the commitment to the animating concepts of Western law noted immediately above.[46]

Within each of the four legal system elements, the following institutions and processes should be considered:

Articulation, Formulation, and Drafting of Rules: This element of a formal legal system encompasses such processes as public and professional demands for legal reform and the modification of institutional structures, as well as the work of legal advocacy groups and professional associations, constitutional assemblies, parliamentary committees, ministerial working groups, drafting committees, legislative drafting groups, and parliaments. Options for engagement include working with: (*a*) legal advocacy groups to promote sectoral interests within the legal system (urban poor, landless peasants, women, children, labour, etc.); (*b*) professional associations (of lawyers, notaries, judges) and advocacy groups to promote substantive law reform and drafting, and reform of institutions charged with the formulation and drafting of rules; (*c*) drafting committees and public consultation processes of constitutional assemblies or similar bodies, if constitutional reform is being considered; (*d*) law reform commissions and policy units in the civil service, including inter-ministerial committees or legislative drafting units in ministries charged with the preparation of study papers or draft legislation; (*e*) parliamentary or congressional committees charged with the drafting or review of legislation; (*f*) civil servants in ministries or executive and administrative agencies responsible for the drafting and promulgation of subsidiary regulations (e.g., in labour law, human rights, taxation, etc.); and (*g*) parliaments or congresses as they re-tool legislative processes or consider specific legislative initiatives.

Application and Interpretation of Rules: This element is accomplished through public response to rules (i.e., ignoring or abiding by the rules in most circumstances), decision making in governmental bureaucracies, the work of law enforcement officials, writings of legal commentators, pronouncements of administrative agencies and tribunals, and decisions of courts. Options for engagement include working with: (*a*) organizations interested in explaining and promoting justice reform initiatives to the relevant publics (these may include government agencies, professional associations, legal advocacy groups, news media, law faculties); (*b*) entities charged with training governmental officers and workers, and other professional actors within the legal system, in the new legal processes and new substantive rules (these entities may include government agencies, professional associations, non-governmental training organizations, legal advocacy groups, law faculties); (*c*) police and other

[46] On the importance of professional "mystique" see U.S., USAID, Bureau for Policy and Program Coordination, Center for Democracy and Governance, *Institutional Strengthening and Justice Reform* by Linn Hammergren (August 1998) at 32 [USAID, *Institutional Strengthening*].

security forces, including customs and excise officers, both in terms of their work in effectively enforcing the law, and in addressing internal organizational problems and issues of corruption; (*d*) prison authorities seeking to reform prison conditions and to address issues of corruption; (*e*) law faculties in reforming their teaching methods and curriculum and in addressing corruption (buying places and good grades, for example); (*f*) ombudsman offices, administrative agencies and tribunals (dealing with labour issues, housing, human rights, land reform, etc.), seeking to improve their processes and substantive decisions; (*g*) court administrative authorities trying to improve processes that support timely decision making (including caseload management, registry processes, the use of court-annexed methods of alternative dispute resolution); (*h*) courts, judicial training institutes, and professional organizations seeking to bolster judicial independence, or the broader independence of the justice system from executive or legislative interference; (*i*) courts, judicial training institutes, and professional organizations addressing corruption; and (*j*) judges who need to learn new substantive and procedural skills (through court continuing education programs and judicial training institutes).

Legal Representation and Advice: This aspect of a formal legal system may be offered by individual lawyers, law practices, trade unions, women's organizations, community groups, legal aid clinics, law faculties, bureaucrats in administrative agencies and ministries, and professional organizations. Options for engagement include working with: (*a*) professional organizations, such as bar societies and notarial associations, seeking to foster an ethic of professionalism, independence, and public service; (*b*) professional organizations establishing free or low-cost legal aid schemes; (*c*) non-governmental organizations, or membership associations such as trade unions, providing legal advice to specific sectors (women, the urban poor, landless peasants, students, workers, etc.); (*d*) law faculties establishing legal advice or information centres; (*e*) public service units of administrative agencies or ministries charged with advising the public on how to access governmental services or decision-making processes; and (*f*) human rights commissions.

Public Access and Understanding: This element may be promoted by many of the actors referred to above, including various organs of civil society, professional associations, courts, governmental agencies, and the media. Options for engagement include working with: (*a*) non-governmental organizations, schools, community organizations, and legal advocacy groups; (*b*) legal aid organizations, both private and public; (*c*) professional organizations interested in public outreach; (*d*) public affairs bureaus of ministries and administrative agencies (particularly ministries of justice and human rights commissions); and (*e*) the media, both private and state-controlled.

It must be emphasized that the elements of a legal system that I have described are often overlapping, and various groups and institutions may be involved in a variety of processes. For example, simply penetrating a legislative process may be extraordinarily difficult, as anyone who has tried to comprehend the progress of draft Vietnamese laws can attest. For any piece of proposed legislation in Vietnam, one

may have to consider the potential impact of various Communist Party of Vietnam ("Party") structures, the Office of the Prime Minister, the Ministry of Justice, a number of line ministries, drafting groups outside the government (such as those sponsored by the Vietnam Lawyers' Association), the National Assembly Legal Committee, other National Assembly committees, and the National Assembly itself. The list is not exhaustive.

So far, all that has been identified are the places and processes that should be subject to analysis. Precisely what is to be assessed has yet to be determined in detail: What factors collectively constitute the "rule of law", or in my preferred vocabulary, reflect a sound and effective legal system?

C. *Indicators of Legal System Health*

For three years, an ad hoc working group of the DAC struggled to agree upon "a common framework for assessing performance" in participatory development and good governance. They failed.[47] The problem was to agree on a limited set of indicators that could be used to assess improvement in governance. So many indicators were considered that no reasonable list could be arrived at by consensus. As one participant in a later expert group suggested, it was doubtful that a small number of indicators "could capture all the dimensions and complexity of democratic governance."[48] Instead, it was suggested that "[a] relatively large number of overlapping indicators linked to strategic national goals is therefore necessary to obtain a more accurate picture of a country situation."[49]

Although assessing the soundness of a legal system is less complex than assessing the entirety of governance structures and systems in a given country, similar problems arise. Legal systems are made up of a myriad of formal and informal institutions. There are scores of interrelated processes, and as many or more actors. Many distinct, and sometimes conflicting, values are promoted through law. To identify only a few indicators that provide a relatively accurate portrayal of systemic health is at least difficult, and is perhaps impossible. In addition, because of law's strong cultural and political aspects, positing only a few indicators that are likely to be equally relevant in all contexts is spurious. It is preferable to identify a series of overlapping indicators of

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[47] See OECD, Development Assistance Committee, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance: Part 2: Lessons from Experience in Selected Areas of Support for Participatory Development and Good Governance* (Paris: OECD, 1997), online: OECD <http://www.oecd.org>; OECD, Development Assistance Committee, DAC Expert Group on Aid Evaluation, *Evaluation of Programs Promoting Participatory Development and Good Governance: Synthesis Report* (Paris: OECD, 1997), online: OECD <http://www.oecd.org> at 4 [OECD, *Evaluation of Programs*].

[48] OECD, *Evaluation of Programs*, *ibid.* at 10.

[49] *Ibid.*

systemic soundness, and to admit that each will be of greater or lesser relevance in given country situations. Once indicators are chosen for the purposes of initial assessment, however, it is essential to continue to track them for the purposes of project management, an issue to which we will return in Part IV.

The following indicators are intended to help construct a "motion picture" of the legal system, using the analytical equivalent of a hand-held video camera, admitting that the picture will change, sometimes in surprising and disturbing ways, with political, economic, and social changes, and as a result of interventions of legal and judicial reformers. It is not helpful to imagine a thorough and nuanced assessment as a "snapshot", for that metaphor is misleading, suggesting stasis and an ability to focus and to define the edges of the photograph.

Accountability; Subjection to External Evaluation and Criticism: This category includes, most importantly, freedom of the media. Contempt of court or libel procedures that can be abused by governments and captive judiciaries should also be included. Open activity of legal advocacy groups must be permitted. Excessive use of force by law enforcement and corrections officials should be subject to public scrutiny and sanction.

Anti-corruption: The legal system itself should be free from corruption and should be seen as an instrument to inhibit or control corruption in other institutions of government and the private sector. In particular, law enforcement agencies must be free to investigate and prosecute all elements of society. They should be motivated by the public good, not by personal, family, or clan advantage.

Efficacy:[50] Governments are responsible for the wise use of resources. This should include an ability to shape and remake legal processes when necessary. One must assess the competence of key actors, such as governmental justice officials, lawyers, and members of the judiciary.

Equality before and under the Law: The legal system must treat various actors in a fair and equal manner, applying standards of justification that are relevant to the context of diverse elements of society, especially the poor, women, and civil society. Differential positioning in society should be considered relevant to equality analysis. One asks not only whether "equality of opportunity" is present, but whether a level playing field has been created. This attribute of law is often referred to, especially in Canada, as substantive equality.

Equality of Access: This consideration relates to comprehension of the legal system by citizens and access to basic advice. Specific concerns of "disenfranchised" groups such as women, the poor, rural communities, and indigenous peoples should

[50] The term "efficacy" is chosen in preference to "efficiency", which is often used as shorthand for a clumsy cost-benefit analysis that pays no attention to the substantive quality of decision making and that focusses only on numeric outputs, such as the number of cases decided.

be addressed. Access must be viewed not only as a question of process, but of substantive legal reform; the content of law and how it is interpreted are often more important barriers to justice than are cumbersome and expensive procedures.

Independent Actors (Judiciary, Quasi-judiciary, the Legal Profession, and Law Enforcement Officials): One must question whether or not judges have the capacity to exercise truly independent judgment; so too, members of administrative tribunals. Are they protected from governmental or other pressures to conform? Members of the legal profession exercise "professional" judgment in giving advice; they are not merely instruments of a dominant elite. Law enforcement officials should make decisions on investigation and prosecution free from the political interference of government.

Internal Values within the Legal System such as Transparency and Openness, Fairness, Consistency, and Predictability: Within the legal system, and its decision-making processes, certain central "legal" values must be upheld. These values shape rule making, rule interpreting and rule enforcing, and help to buttress the perceived legitimacy of the system.

Legitimacy and Indigenous Support: This criterion relates to respect for the legal system, in part as a function of the values it upholds, and to the perceived objectivity of key actors, as well as to an acceptance that the rules of the system are broadly fair, equally enforced and possible of individual compliance. The existence of legal pluralism, where indigenous solutions are encouraged, not the mere importation of unmediated foreign models, should be valued.

No Retroactive Rules: It should be possible for the citizen to know in advance what legal constraints affect his or her choices and preferences (especially in criminal law). Rules would be applied retroactively only in rare circumstances and with clear public justification.

Stability yet Flexibility: The system as a whole is stable, but with the possibility to accommodate changing situations and perceptions.

Timeliness: Delays of process must be reasonable. Achieving concrete legal remedies must be possible.

Understandable and Reasonable Parameters for the Legal System: The citizenry must sense that the application of law is constrained, that not every policy preference becomes "law". The legal system must allow space for political debate and disagreement, and for the evolution of local solutions to political and legal challenges.

No doubt some readers will have noted that I have not included "justice" as an indicator of systemic health. This may seem strange, for one would hope that the pursuit of justice is the primary goal of legal systems. The problem is that "justice" is

highly charged political concept, and is closely related to the substantive policy ends pursued by governments and actors in civil society. Again and again, in studies of legal and judicial reform programming around the world, the observation is made that justice reform is closely related to the essentials of state independence.[51] I prefer to conceptualize the tension somewhat differently. Once development agencies are in the business of promoting fundamental reforms in legal systems, they are involved in the "internal affairs" of host states. The issue is not whether or not to "intervene", for that choice has already been made. The question is how to do so respectfully and sensitively. One way of ensuring due deference is to focus upon processes and systemic values in justice work[52] and to avoid, as far as possible, substantive judgements on the policy goals of governments, or of critics of government in civil society. Internal political processes must be allowed to play out. It is not the job of any external actor to dictate the "quality of justice" in other states, unless, and it is an important caveat, the external intervenor could be contributing to actions or decisions that offend important values discussed below in Part II.A.3.

Again, a Jamaican example may help to clarify the point. In recent years, a major political storm has erupted throughout the Commonwealth Caribbean over the imposition of the death penalty. In 1993, the U.K. Privy Council issued a landmark ruling in *Pratt v. Jamaica (A.G.)*,[53] where it decided that holding two prisoners on death row for some fourteen years constituted a violation of the guarantee against inhuman and degrading punishment in section 17(1) of the Jamaican constitution.[54] This decision prompted renewed cries for the severing of the judicial link to the Privy Council and for the creation of a Caribbean Court of Appeal.[55] It seems also to have been the reason underlying Jamaica's decision in 1997 to withdraw its ratification of the *Optional Protocol to the International Covenant on Civil and Political Rights*.[56] Under the *Optional Protocol*, individuals from a ratifying state can lodge a petition

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[51] See *e.g.* United Nations Development Programme, Management Development and Governance Division, *UNDP and Governance: Experiences and Lessons Learned*, Lessons-Learned Series No. 1 (New York: United Nations Development Programme, 1998) at s. 4.6, online: United Nations Development Programme <http://magnet.undp.org/docs/gov/Lessons1.htm>.

[52] These values are what Lon Fuller described so evocatively as the "inner morality of law" (*supra* note 32 at 42).

[53] (1993), [1994] 2 A.C. 1, [1993] 4 All E.R. 769 (P.C.).

[54] *Jamaica (Constitution) Order in Council 1962* (U.K.), S.I. 1962-1550, sch. 2, s. 17(1) reprinted in Albert P. Blaustein & Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 9 (Dobbs Ferry, N.Y.: Oceana Publications, 1983).

[55] Roget V. Bryan, "Toward the Development of a Caribbean Jurisprudence: The Case for Establishing a Caribbean Court of Appeal" (1998) 7:2 J. Transnat'l L. & Pol'y 181 at 187ff.

[56] 19 December 1966, 999 U.N.T.S. 302, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*Optional Protocol*].

with the Human Rights Committee in Geneva alleging that their own state has violated their rights under the *International Covenant on Civil and Political Rights*.[57]

One of the justifications for efforts to increase the speed with which Jamaican courts deal with cases is to prevent any claim from future death penalty prisoners that their rights have been denied under Jamaican constitutional provisions. Such a claim might be heard by a Caribbean Court of Appeal, if not by the Privy Council. Given the commitment of many Canadians to the abolition of the death penalty, and a high degree of support for the *Optional Protocol* to the *ICCPR*, one should be careful not to assist in enhancing the efficiency of the Jamaican disposition of court cases for reasons which might prove inimical to other values, and hence prove embarrassing in a broader political context.

I recognize that I have not provided legal and judicial project designers with a short and handy checklist of what to look for in assessing the soundness of a legal system. Instead, I have suggested that there are four interrelated elements in a legal system, each containing numerous institutions and diverse processes, and that affecting each of these elements is the quality of legal education. I have gone on to identify no less than twelve indicators of systemic health that could be mapped against each of the four elements of a legal system in more or less useful ways, depending upon the social, political, and economic context. I have also cautioned that any assessment should consider not only structural (or institutional) elements of the legal system, but relationships and social roles. One could fairly object that this approach, while comprehensive and perhaps even thoughtful, is simply too cumbersome to be of concrete assistance to decision makers and project planners. I do not think so. Indeed, I argue that understanding the complexity of the legal system is crucial to any potentially successful intervention. Moreover, the process of assessment is not as difficult as it may at first appear. Rather than searching for an illusionary and misleading set of "core" indicators, a disparate yet structured set of assessment tools, employed with flexibility in given contexts, can shape our investigations and sharpen our analysis.

To demonstrate this approach more concretely, I outline in the appendix how the analytical framework that I have proposed was employed in assessing the legal system of Vietnam and in recommending programming options. I have chosen to profile Vietnam for a number of reasons. First, its legal system needs are complex and therefore fascinating. Second, important questions of value are presented in a pointed fashion. Third, my assessment of the Vietnamese justice system is relatively recent, and I had the opportunity to apply various lessons that I had learned in other countries. I cannot rehearse the full analysis of the Vietnamese legal system within the confines of this article. Instead, the appendix outlines what I believe are the requisite

[57] 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 (entered into force 23 March 1976, accession by Canada 19 May 1976) [*ICCPR*].

analytical steps, given the framework outlined above, and investigates two potential points of engagement to show how the framework leads to concrete programming recommendations.[58]

II. Principles for Sound Legal and Judicial Reform Programming

When one starts to consider specific program components in legal and judicial reform, it is soon apparent that justice reform programming typically lies at the intersection of technical assistance, capacity development, and institutional development. Each of these aspects of development work has generated its own literature, even though in practice they often overlap. The common denominator in all of the studies is the conclusion that "this kind of project is hard." Technical assistance is often difficult because it is commonly seen to be "donor driven", it usually relies upon expatriate expertise so is not always well rooted in national priorities, and it generally proves to be hard to sustain impact.[59] Moreover, "technical" advice may simply be inappropriate where highly charged political questions are at stake, such as the relationship between a judiciary and executive authorities.[60] Finally, technical assistance initiatives are often most needed by the states that are the least equipped to accept and make good use of them. For all these reasons, "overall the efficacy and cost-effectiveness of [technical assistance] has been disappointing ... "[61]

Capacity development work is similarly challenging. A thoughtful commentator on capacity development projects has noted that "[w]e are slowly realizing the need to come to grips with the challenges and dilemmas of intervening in complex human—and open—systems."[62] Capacity development is about "the self-organization of a society" and it must consider not only technical and organizational abilities and structures, but also "the more human, personal characteristics that allow people to

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[58] For the detailed presentation of the case, see Canada, CIDA, Asia Branch, Indo-China/ Thailand/Malaysia Programme, *Programming in Legal and Judicial Reform: Potential CIDA Engagement in Vietnam* (Diagnostic study) by Stephen J. Toope (August 1999). My work in Vietnam was undertaken with Dr. Phillip Rawkins, a governance expert, and his contribution to the study was invaluable. However, the work was structured so that I presented my "legal analysis" to Dr. Rawkins who then incorporated that report into a broader governance framework, which is why the legal component is authored by me alone. I want to be clear that my involvement with a potential CIDA project on legal and judicial reform in Vietnam ended with the production of a "diagnostic" study, and none of my comments necessarily reflect the final approach adopted by the CIDA Vietnam Program.

[59] See *e.g.* United Nations Development Programme, *supra* note 51 at s. 1.2.

[60] USAID, *Institutional Strengthening*, *supra* note 46 at 67.

[61] World Bank, Operations Evaluation Department, *Technical Assistance*, Lessons & Practices Series, No. 7 (Washington: World Bank 1996) at 4 [World Bank, *Technical Assistance*].

[62] Canada, CIDA, Policy Branch, "An Update On The Performance Monitoring of Capacity Development Programs: What Are We Learning?" (Paper presented to the DAC Informal Network on Institutional and Capacity Development) by Peter Morgan (May 1999) at 18, online: CIDA <http://www.acdi-cida.gc.ca/cd> [CIDA, "Update"].

make progress."[63] For these reasons, capacity development is often as much about processes such as planning, learning, and institutionalizing, as it is about concrete outputs.[64]

Institutional development is perhaps even more complex, involving both technical assistance and capacity development components in most cases. Moreover, institutions have their own ways of operating that are often impenetrable to outsiders. Legal institutions have proven to be particularly resistant to change,[65] no doubt in part because they are subject to social, political, and cultural factors beyond the control of project implementers.[66]

A. Objectives and Commitment over Time

It is no surprise that justice reform, often seeking to combine many individually difficult program elements, is itself supremely challenging. Adding to the complexity is the innately political aspect of justice systems, alluded to throughout this article. By this I mean that legal reform often touches upon deep-seated interests of a range of groups, and can call upon governing elites to reconsider their methods of governing. It can even threaten to displace elites.[67] A simple example is the manner in which the decision to learn about foreign legal "models" can be directly affected by strategic political considerations.[68] Cuba might not wish to be seen to be interested in learning from U.S. experience, even if that experience is rich and directly applicable. How much more sensitive is any reform initiative touching upon the reallocation of governmental power, or the dismantling or major restructuring of national and regional institutions?

Another reason that justice reform is so difficult is that consistent donor experience tells us that, ultimately, only comprehensive reform efforts will produce sustainable results.[69] A recent World Bank study has emphasized that a piecemeal approach to justice reform leads only to incoherence. Real reform requires attention to substantive law, to legal institutions, and to the processes that shape relationships

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[63] *Ibid.* at 6, 14.

[64] *Ibid.* at 13. See also United Nations Development Programme, *supra* note 51 at s. 3.7.

[65] Asian Development Bank, *supra* note 16 at 2.

[66] World Bank, *Technical Assistance*, *supra* note 61 at 2.

[67] OECD, *Evaluation of Programs*, *supra* note 47 at 29; U.S., USAID, Bureau for Policy and Program Coordination, Center for Democracy and Governance, *Political Will, Constituency Building, and Public Support in Rule of Law Programs* by Linn Hammergren (August 1998) at 46 [USAID, *Political Will*].

[68] Ajani, *supra* note 28 at 97.

[69] See Department of Justice, *supra* note 4 at 5 (comments of Omar Sherif Hassan, Acting General Counsel, Operations, World Bank). See also USAID, *Institutional Strengthening*, *supra* note 46 (arguing that reform is always multi-institutional, and that one must adopt a broad perspective "with an eye to the longer term issues of balance and countervailing powers" at 11).

among various actors within the legal system, and those actors with the citizenry.[70] The Asian Development Bank has also emphasized the need for a "systemic" approach to legal and judicial reform, stressing the role not only of state legal institutions, but of law faculties and professional associations as well.[71] A recent United Nations Development Programme ("UNDP") evaluation of legal reform initiatives supported by that agency makes the point forcefully:

> The legal system of any country is a vast web of interdependent entities comprising institutions (courts, police, prisons), norms and procedures, and the societal linkages to the goals and responsibilities of the civil society. If any one of these parts fails, the whole legal system is rendered dysfunctional. Therefore, it is necessary to approach judicial reform in a *comprehensive* manner, recognising the interdependent linkages of its components.[72]

With its high degree of politicization and programmatic complexity, one can only expect significant results in justice reform over the long term. The issue of results will be discussed further in Part IV, but it is important to note here that for anyone contemplating major programming in the justice sector, it is wise to plan for engagement over a period of at least five to ten years.[73] Fundamental change may take a generation or more to accomplish. As the UNDP has discovered, any type of public sector reform is likely to require long-term commitment, often because it requires not only a financial expenditure, but the dissipation of "political capital" as well.[74] Moreover, independent studies confirm that whenever a project has significant institutional development components, as is often the case with justice reform, success is dependent upon the integration of the components into a long-term strategy.[75]

1. A Step-by-Step Approach

Because successful engagement in legal and judicial reform requires time, one should only consider major projects after experience is gained working on modest initiatives in the sector.[76] A recent CIDA study of governance programming in Ethiopia confirms the validity of this approach. Governance programming as a whole,

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[70] World Bank, *Initiatives*, *supra* note 18 at 12.

[71] Asian Development Bank, *supra* note 16 at 3.

[72] United Nations Development Programme, *supra* note 51 at s. 4.6.

[73] See *e.g.* World Bank, *Initiatives*, *supra* note 18 at 8; USAID, *Institutional Strengthening*, *supra* note 46 at 12.

[74] United Nations Development Programme, *supra* note 51 at s. 3.7.

[75] European Centre for Development Policy Management, *International Experience with Institutional Development and Administrative Reform: Some Pointers for Success* by Joan Corkery, ECDPM Working Paper No. 15 (Maastricht: European Centre for Development Policy Management, 1997) at para. 15, online: European Centre for Development Policy Management (Archive) <http://www.ecdpm.org>.

[76] USAID, *Institutional Strengthening*, *supra* note 46 at 31.

and justice programming in particular, is strongly context-specific. Donors have high information needs, which are often hard to fulfill simply through standard staffing at the post mixed with a short-term "design mission".[77] In my experience, perhaps because justice reform is a relatively new area of work, in-country diplomatic and development aid staff are not well connected in the legal community. It is extremely difficult to learn all that one needs to learn by relying on existing contacts. Obviously, the same is even more true for a design team in place for a matter of weeks. For that reason, a step-by-step approach to justice programming is essential. I concur entirely with Phillip Rawkins' recommendation flowing from his Ethiopian review:

> [B]est results are obtained through a careful, iterative approach. This is likely to involve constructing a base of information and analysis through a joint needs analysis, conducted with the host-country partner organization, followed by a sequence of small, highly focused projects, building trust and mutual understanding and working towards major project intervention.[78]

The only caveat I would add is that it is often difficult to restrain the expectations of host country partners, especially those in the legal sector. Justice programming is a recent phenomenon, and there is a great deal of pent up demand for assistance. Moreover, most justice ministries, courts, law faculties, and other legal institutions are not very experienced in dealing with donors. They are often surprised and disappointed at the time it takes to build programs that are likely to succeed. Reining in desires requires great tact. It is often necessary to try to build in relatively quick and inexpensive initiatives, sometimes paid for out of existing regional or thematic funds, so as to retain the attention and interest of overworked partners. For example, much of CIDA's initial legal work in Vietnam was funded by the Southeast Asia Fund for Institutional and Legal Development ("SEAFILD"), which had a project budget limit of 100,000 Canadian dollars. Similarly, early Canadian contacts with the Ethiopian

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[77] ODA, *supra* note 23 at 2-3; CIDA, *Ethiopia Governance Study*, *supra* note 26 at iv, 18-20; USAID, *Political Will*, *supra* note 67 at 45. Rawkins and Qualman point out that gaining accurate information for governance programming is particularly difficult because the environment changes quickly, governmental priorities may be different depending upon to whom one speaks and at what level of the political or bureaucratic hierarchy he or she is found, the very common reluctance to speak frankly about governance problems, and the unwillingness of many people to forego sectoral interests in information sharing. Canada, CIDA, Africa and Middle East Branch, Policies, Strategic Planning and Management Division *Democracy and Governance Programming Lessons for CIDA: Ethiopia Case Study* by Phillip Rawkins & Ann Qualman (March 2000) at 2 [CIDA, *Ethiopia Case Study*]. Schacter adds that development agencies often fail to penetrate much beyond the sources of the capital cities in designing governance programming. World Bank, Operations Evaluation Department, *Monitoring and Evaluation Capacity Development in Sub-Saharan Africa: Lessons from Governance Programming* by Mark Schacter, Evaluation Capacity Development Working Paper Series, No. 7 (Washington: World Bank, 2000) at 9 [World Bank, *Monitoring and Evaluation Capacity Development*].

[78] CIDA, *Ethiopia Governance Study*, *ibid.* at 38-39.

legal community were facilitated by small "Canada Fund" projects, falling within the control of the embassy.

The ideal situation may be the creation of an in-country position of "senior governance advisor". Such a person can work to develop the needed local contacts, and build up a store of information useful to all governance project planning, including in the justice sector. I saw this work very effectively for a number of years in CIDA's Sri Lanka Programme (where the focus was solely upon human rights); the *Ethiopia Governance Study* also highlights the utility of such a position.[79] Another useful approach in dealing with the need for local information is the creation of teams whenever technical assistance is a significant component of a justice reform project. World Bank experience suggests that the team should fuse foreign specialist expertise with both local legal and broader governance expertise.[80] Having worked with locally engaged governance experts while assessing the needs of the Jamaican and Philippines justice systems, I strongly endorse this approach.

2. Political Will and Reform Constituencies

Donor experience reveals a further, and very important, consideration in setting objectives for legal and judicial reform projects: the degree of local commitment to both the processes and goals of reform endeavours. Reform that is entirely or even largely externally driven is unlikely to be sustainable. This is because such reform efforts will commonly be viewed as illegitimate. Healthy and effective social structures are built up through interactional processes that allow for public participation.[81] Even if initial stages of legal and judicial reform are led by elites, indigenous elites must be involved. In the long term, broader participation, or at least the tacit support of the population, is required. In some settings, and here the example of Quebec is obvious, the legal system is also seen as a constellation of significant cultural artefacts, helping to define a "people". Fundamental change can only occur when it is desired, at some level, by the supposed beneficiaries.[82] This statement, however, only prompts a further set of complex questions: Within a given state, who must "want" reform? The government? The legal-professional community? The people? And what is it that the "beneficiary" must want? Is a desire for fundamental change needed before reform projects are undertaken, or is it

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[79] *Ibid.* at 17.

[80] World Bank, *Initiatives*, *supra* note 18 at 11.

[81] For a detailed account of structuration theory, from which this understanding of social structure is derived, see Giddens, *supra* note 44. See also Roy Bhaskar, *The Possibility of Naturalism: A Philosophical Critique of the Contemporary Human Sciences* (Atlantic Highlands, N.J.: Humanities Press, 1979); Alexander Wendt, "The Agent-Structure Problem in International Relations Theory" (1987) 41 Int'l Org. 335.

[82] See Department of Justice, *supra* note 4 at 5 (comments of Omar Sherif Hassan, Acting General Counsel, Operations, World Bank); World Bank, *Initiatives*, *supra* note 18 at 8; World Bank, *Monitoring and Evaluation Capacity Development*, *supra* note 77 at 10.

enough for mere tinkering to be contemplated, which might lead to deeper and more sustained reform efforts?

The answer to the question who must want reform depends upon specific contexts. It is not enough to glibly invoke the need for "political will". In a provocative paper for USAID, Linn Hammergren argues that political will is a much abused and generally unhelpful concept, for at least two reasons. First, it tends to reflect a static understanding of political processes—either a country has a will to reform or it does not. In reality, achieving commitment to reform processes requires constant renegotiation with the key actors: "The political calculus changes over the course of a reform; what is needed to get approval[,] get ownership, get passage, and work implementation are all different."[83] Secondly, political will is not something that either exists or does not. The key point is that it can be built, employing processes that engage extra-governmental forces as pressure points, and intra-governmental forces who are already inclined to favour reform (so-called champions) or who are convinced after the initial steps that reform is beneficial. This second point is critical, for it emphasizes the need to consider program elements that promote the building of "reform constituencies" and "alliances".[84] Indeed, the USAID experience, which seemed to gain a wide consensus as to its general applicability during discussions in the DAC, supports the conclusion that one should not start any justice reform program without an explicit constituency and coalition-building strategy.[85]

The membership in reform constituencies is varied. In the first generation of legal and judicial reform projects, donors displayed a strong tendency to favour work with civil society organizations such as community legal aid clinics or women's legal advocacy non-governmental organizations. These groups were assumed to "embody the counter-hegemonic principles needed to accomplish real reform."[86] Reform would be pushed from the bottom up. It remains the case that engagement with civil society organizations can be a useful way of pressuring for change from outside state power structures. At the 1996 Canadian Round Table on Legal and Judicial Reform, the vast majority of the participants expressed a preference for supporting justice work undertaken by civil society actors. Such a strategy made a great deal of sense in apartheid South Africa, to cite but one example.

Successful justice reform will typically begin by engaging and supporting reform constituencies and key actors. Recent experience suggests, however, that because of the need for comprehensive programming strategies that involve institutional change

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[83] USAID, *Political Will*, *supra* note 67 at 46. Hammergren's analysis runs counter to an earlier USAID study that emphasized an unspecified "political will" as a key to success in justice reform projects. See USAID, *Weighing In*, *supra* note 36 at 28.

[84] USAID, *Political Will*, *ibid.* at 14.

[85] OECD, *Evaluation of Programs*, *supra* note 47 at 37; OECD, *DAC Orientations*, *supra* note 19 at 10. See also USAID, *Political Will*, *ibid.* at 13-14.

[86] USAID, *Political Will*, *ibid.* at 31.

and capacity development, sustainable justice reform can only take place if government structures are ultimately targeted.[87] Hammergren argues:

> Planners must remember that justice reform is not a revolution. Public discontent is a good incentive, but realistically, support must be sought among those who already have power, and thus represent some version of their interests. Those interests can be educated, but absent a broader political revolution, a reform which pits mass interests against those of elites will not succeed.[88]

This argument returns us to the point made at the outset about legal reform often being an elitist activity. It is important to remember, however, that political and legal elites are not monolithic. Nor are they necessarily coextensive.[89] While there are certainly cases where powerful figures within the legal community are dead set against change, there are other circumstances where it is those who work within the system who see the need for change most clearly. In Jamaica, the impetus toward reform is found primarily within the leadership of the legal community itself.[90] In a fortuitous constellation of promising circumstances, when CIDA launched its comprehensive justice program in Jamaica, people who occupied key positions, from the minister of justice to the chief justice, from the head of the private bar to the chief of correctional services, all seemed to be convinced of the need for change. The drive for reform existed even though the general public would not likely have ranked change in the justice system as a top national priority. It remains unclear whether the political or business elites will take up the cause of justice reform.[91] In Cuba, on the other hand, key leaders in the justice sector seem entirely comfortable with the status quo. In Vietnam, the situation is more complicated. There are reformist elements within the legal elite, but it is unclear whether they are also powerful politically. Given the almost complete absence of civil society organizations, one is forced to do nothing or to risk modest support for those elements within the state system that seem most open to change, and to seek out the few alternative, non-state locations of influence that are emerging, such as small university-based legal aid centres.

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[87] ODA, *supra* note 23 (noting the inevitable tension in all governance programmes between a society-centred and a state-centred approach, and suggesting correctly that neither should be ignored at 3). On the need to work within state structures, see Yves Dandurand & Rodrigo París-Steffens, *Beyond Wishful Thinking: Canadian/Latin American Cooperation in Criminal Law Reform and Criminal Justice*, The FOCAL Papers (Ottawa: Canadian Foundation for the Americas, 1997) at 9.

[88] USAID, *Political Will*, *supra* note 67 at 48-49.

[89] *Ibid.* (distinguishing between political elites and institutional leaders at 30).

[90] Hammergren emphasizes that reform constituencies within the public service may be the most important allies one can hope for. In any event, their engagement will ultimately be necessary for any structural or institutional reform to take place. *Ibid.* at 14.

[91] Although early efforts at justice reform in many countries were justified on the need for the legal system to support economic reform, business elites almost never serve as core elements of a justice reform constituency. See OECD, *Evaluation of Programs*, *supra* note 47 at 32. My experience in Jamaica and Indonesia fully supports this conclusion of the OECD expert group.

One can conclude that a reform coalition or constituency can emerge in a number of ways. It may sometimes coalesce around a small group of convinced insiders. In USAID's Latin American justice programs, "[t]he most important constituencies were not formal organizations, but rather individual lawyers, judges and concerned jurists, in both the private and public sector."[92] I have encountered a similar process prompting and guiding judicial reform in the Philippines. But in other cases, civil society organizations may be the principal element promoting reform, as is the case in Malaysia, where the Bar Council and various non-governmental organizations have been at the forefront of demands to address judicial corruption. In yet other settings, the drive for change may come from the top, led by a reformist justice minister, as was for a time true in Russia and Ukraine. What matters is knowing where the alliance for reform is centred in any given country, and strategizing about how it can be expanded when more support is needed to implement projects effectively. Reform coalitions need not only be built; they must be held together and expanded as the effects of reform efforts come to be felt. Even committed reformers can lose faith or confidence as implications of reform that they perceive to be negative manifest themselves.[93]

If the step-by-step approach recommended here is adopted, widespread public engagement with legal and judicial reform may not be needed for quite some time. Indeed, starting small and building carefully helps reform alliances to grow in manageable ways.[94] This may make a great deal of sense as most projects have been small scale, and have only begun to engage the various reform constituencies ultimately needed to implement fundamental change. But as longer-term projects are developed, with more ambitious and far-reaching goals, one might expect more attention to be paid to the engagement of the public with legal reform efforts. If public institutions are ultimately an object for major legal and judicial reform efforts, as they typically must be, the citizenry should have some knowledge about what is planned, and an opportunity to influence decision makers within their own country. Donors should not willingly undermine such legitimate expectations. In any event, it seems doubtful that significant reform of public institutions of any kind can be sustainable if not at least tacitly supported by the citizenry.

Both USAID and the DAC have argued that in seeking to nurture a broader reform constituency, especially in attempts to promote greater access to justice, support for legal advocacy groups in civil society represents the most "promising"

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[92] USAID, *Political Will*, *supra* note 67 at 32.

[93] *Ibid.* at 16.

[94] Hammergren cautions that there are "many publics" with differing ends and strategic calculations. Getting "everyone involved" immediately may simply produce paralysis. *Ibid.* at 15. Yet, for fundamental change to take place, at some point the reform coalitions will likely have to be broadened.

strategy.[95] Legal advocacy groups typically employ legal tools to assist disadvantaged groups, but they also engage in advocacy and lobbying that helps to build a broader constituency for reform. Of course, there are some states, such as Vietnam and China, in which such groups do not exist, or are at most nascent. In such cases, reform constituencies are more likely to be found within government structures, if at all.

3. Legal Values and Cultural Difference

One of the hardest puzzles in legal and judicial reform programming is finding a balance between the promotion of legal values and the recognition of cultural difference. In any development programming, a lack of sensitivity to indigenous social, economic, and cultural values can lead to resistance, unsustainability, and failure.[96] Nonetheless, the engagement of Western development agencies in legal and judicial reform programming is usually rooted in values that their home countries strive to incorporate into their foreign policy generally, and their aid policy specifically. In this regard, it is worth recalling that the mission statement of the Canadian Department of Foreign Affairs and International Trade calls upon the Department to promote not only Canadian interests, but Canadian values as well. In highly political initiatives such as justice reform, it is neither possible nor wise to ignore the value base that Canadians profess to bring to their international engagements. In the case of CIDA, many of those values are stated explicitly in the 1995 programming priorities.[97] Fortuitously, they also derive from inclusively supported values of Canadians active in justice reform, as my 1997 survey of attitudes and priorities revealed.[98]

For present purposes, the relevant Canadian legal values can be stated simply, and summarized in five categories. First is a commitment to the promotion and protection of equal human rights for all, including the rights of individuals and communities. It must be emphasized that Canadian legal values concerning human rights are rooted directly in international standards, articulated both in formal treaties and in various

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[95] USAID, *Weighing In*, *supra* note 36 at 35; OECD, *Evaluation of Programs*, *supra* note 47 at 35. Legal advocacy groups are distinguished from legal aid providers and paralegal activists that tend to focus upon individual cases or issues, without a broader strategy for reform.

[96] See Part II.A.2, above.

[97] It is incontrovertible that priorities such as promotion of the full participation of women in development, increased respect for human rights, a strengthened civil society, and private sector development are grounded in specific values. These are not universally recognized priorities. So the decision has already been taken that Canadian aid promotes Canadian values. The question is how to effectively pursue that approach in the light of cultural and social diversity, acknowledging that mere imposition of values is not likely to be successful in any development programming.

[98] See the cousultation report included in CIDA, *Analytical Framework*, *supra* note 2 at 6, App. II.

plans of action adopted to promote the implementation of treaty rights.[99] But in addition, Canadians have taken a leadership role in the articulation of principles of substantive equality within the legal system.[100] Second is an attachment to democratic processes of government based upon such principles as transparency, accountability, and public participation; these principles are viewed as central to the legitimacy of any governing regime. They include a strong reluctance to support governmental structures that are perceived to be corrupt or oppressive. Third is a belief in the essential role of organs of civil society in the furtherance of human rights and democracy. Fourth is a faith that legal institutions and processes can and should be employed in an equitable fashion to provide remedies for breaches of rights and to help organize effective governance structures. Fifth is an acknowledgement of the mutually supportive roles that can be played by public and private sector institutions in the promotion of the other values identified above; Canadians are loathe to demonize the state or private interests.[101]

In my experience, these values are highly salient in concrete programming decisions. Two examples will suffice. In attempting to identify potential elements for a CIDA-funded justice reform initiative in Cuba, it became apparent that the regime had no particular interest in furthering human rights (at least in their civil and political incarnation) or democratic accountability. The Cuban government insisted upon what can only be described as purely technical assistance, focussing upon the provision of computers and access to legal information databanks for the Ministry of Justice. But this assistance was highly unlikely to lead to any greater openness in the justice system, which is routinely used as a mechanism to suppress dissent. The question arose whether or not Canada should assist a ministry that might be viewed as a part of the problem in Cuba, and where no indications of reform-mindedness had been offered. Despite Canada's strong desire at the time to carve out an independent foreign policy vis-à-vis Cuba, and a wish to act forcefully to repudiate American

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[99] See *e.g. ICCPR, supra* note 57; *International Covenant on Economic, Social and Cultural Rights*, 993 U.N.T.S. 3, Can. T.S. 1976 No. 46 (entered into force 3 January 1976, acccssion by Canada 19 May 1976); *Convention on the Rights of the Child*, 20 November 1989, 1577 U.N.T.S. 3, Can. T.S. 1992 No. 3 (entered into force 2 September 1990, ratification by Canada 13 December 1991) and the resulting *Action Plan on Child Protection: Promoting the Rights of Children Who Need Special Protection Measures* (CIDA (June 2001), online: CIDA <http://www.acdi-cida.ca/childprotection>).

[100] The Supreme Court of Canada has decided that the equality guarantee contained in section 15 of the *Canadian Charter of Rights and Freedoms* (Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11) relates not only to "formal" or "procedural" equality, but also to "substantive" equality. This implies that an evaluation whether a given individual or group is being treated unequally requires a close analysis of context. Substantive equality demands the accommodation of differences within the legal system, not a static test of "equal treatment" or "equal opportunity". *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, 56 D.L.R. (4th) 1 ("for the accommodation of differences, which is the essence of true equality, it will frequently be necessary to make distinctions" at 169).

[101] See consultation report cited at note 98.

attempts at extra-territorial legislation, it was difficult to use justice programming to accomplish these ends because it could run counter to important legal values upheld by most informed Canadians.

Similar issues arose with potential legal and judicial reform programming in Indonesia in the early days of the post-Suharto era, when President Habibi and his cronies remained in power. Despite the presence of an acknowledged reformer as minister of justice, it was very difficult to identify any justice programming with Indonesian executive agencies that would not be subject to valid criticisms on the grounds of support for corrupt (or at the very least, grossly inefficient) institutions. The Supreme Court of Indonesia was even more problematic, for it was a bastion of old-style thinking and extreme corruption. If legal values were not to be ignored in Indonesia, it emerged that the best form of engagement would be with the National Human Rights Commission, that had already displayed strong evidence of independence, and a modest and targeted initiative with the relatively reformist minister of justice.

In deciding whether or not to engage in legal and judicial reform work, Western aid workers and legal experts would be well-advised to consider not only the express policy framework for such work, but the values that underlie that framework. In practice, these assessments are difficult for a number of reasons. First, legal values are neither uniform nor entirely congruent. Encouraging a legal framework that supports private sector initiatives promotes one set of values, but this may conflict with values promoting democratization, for example. This is certainly the case in Vietnam, where greater economic openness is not yet matched by significant political reform. The question then becomes one of seizing opportunities to promote new ways of thinking where they emerge in the system, but being careful not to sacrifice important values in the process. Second, programming in the legal and judicial area may be shaped by foreign policy decisions that are not entirely attuned to developmental problems and issues. Extensive Canadian involvement with justice programming in Haiti is a prime example of heavily politically driven programming decisions.[102] Third, legal values cannot be expressed abstractly. They are relevant in relation to specific cultural, social, and political contexts where an aid agency seeks to undertake work. In arguing for the salience of values in justice programming decisions, it remains true that overseas development assistance initiatives are typically negotiated with host governments. Cultural arrogance will never succeed in promoting change, especially in politically sensitive areas such as law. Canadians, and other donors, bring their values to the

[102] It is fascinating to contemplate that between 1990 and 1997, of the total CIDA disbursements on legal and judicial reform programming, between a quarter and a third "was spent exclusively in providing support to the National Haitian Police" (21.4 million dollars out of a total disbursement of 71 million dollars) (CIDA, *Indicative List*, *supra* note 3 at 9). I take no position as to whether or not this investment was appropriate, but it was certainly skewed in relation to the extensive needs evident in many countries where CIDA is engaged in justice reform programs.

table, but they are not trump cards.[103] It may be best to cast the issue in terms of expressing values that are based on our own experience, an experience that we are sharing, not seeking to impose. Yet, if there is simply no congruence between the legal and judicial reform expectations of a host government and the values that a development agency brings to such work, I suggest that engagement is, at most, inappropriate, and at least, risky.

Program designers cannot afford to ignore the values question, for it will ultimately rear its head. Naive assumptions of congruence are often overthrown in project implementation, causing immense frustration. Moreover, assistance to justice systems that turn out not to be amenable to reform because of deep-seated incommensurable values can sometimes lead to embarrassing questions about support for corrupt and repressive regimes. The saga of public hearings concerning Canadian government deference to the dying Suharto administration in Indonesia provides a telling cautionary note.

B. Justice Programming Options

To promote the policies discussed in the first part of this article in a way that is respectful of the values just discussed, diverse programming options may be pursued. These options may range from modest financing to support the stable provision of day-to-day legal services (such as legal aid), to a comprehensive program designed to encourage and facilitate large-scale social, political, and economic reform. Between these two extremes lie other points of possible engagement, including targeted programming aimed at building the sustainability of existing levels of legal services (such as police training or court administration improvements), or support for legal reform initiatives, such as the creation of administrative tribunals, the design of independent or court-annexed alternative dispute resolution systems, prison reorganization, or programs designed to facilitate equal access to justice (usually public legal education, legal aid, or advocacy initiatives).[104] In most cases, as noted above, any significant engagement with the legal system will ultimately lead to efforts at capacity development and institutional reform within a diverse set of public and quasi-public bureaucracics, including ministries of justice, courts, administrative tribunals, ombudsman's offices, law reform commissions, human rights commissions, prosecutorial services, the police, prisons, professional organizations, law faculties, judicial training centres, and community dispute resolution centres.

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[103] For a helpful way of conceiving how one can relate deeply held values to work in culturally diverse legal and political systems, see Jeremy Webber, "Multiculturalism and the Limits to Toleration" in André Lapierre, Patricia Smart & Pierre Savard, eds., *Language, Culture and Values in Canada at the Dawn of the 21st Century* (Ottawa: Carleton University Press, 1996) 269.

[104] In this listing of levels of engagement, I am tracking work already undertaken by the ODA. See ODA, *supra* note 23 at 5-6.

In the light of the step-by-step approach to justice reform programming recommended here, another way of framing possible programming options, focussing upon specific elements of the legal system, is as follows:

1. support for the improvement of legal infrastructure, such as court administrative systems, quasi-judicial tribunals, the public service administering justice, the police, or policy units within ministries of justice or other governmental departments;
2. capacity building within existing legal structures such as the courts, legislative drafting units, or the professional bar to perform established functions more effectively;
3. capacity building, primarily through training initiatives designed to promote attitudinal and behavioural change for justice personnel, including judges, members of the bar, and public servants;
4. normative reform, including the drafting of new laws and regulations, and efforts at improved implementation;
5. regulatory reform through the establishment of independent quasi-judicial tribunals and regulatory agencies (especially in cases of widespread privatization of previously governmental activity);
6. change to fundamental structures of the public realm, usually through assistance to constitutional reform processes;
7. democratic development initiatives related to legal reform of electoral systems;
8. support for the promotion of substantive equality in the law and legal aid or counselling, focussing on rights claims of dispossessed populations (including the poor, women, and indigenous peoples); and
9. assistance to non-governmental organizations (primarily legal advocacy groups) seeking to deliver programs to encourage substantive legal reform and rights claims by dispossessed populations, or by the general public.

All of these potential reform initiatives fall within the framework set out in Part I.B, as they relate to the articulation, formulation, and drafting of rules; the application and interpretation of rules; the provision of legal representation and advice; and the promotion of public access and education. However, it is obvious that specific initiatives often involve the interplay of more than one function. Moreover, they reveal that one should think of a legal system in dynamic terms, for many initiatives are about process and learning, not about pumping out specific legal products.

The listing of program options moves from essentially formal, institutionally oriented reform processes, to processes that are more open and largely based upon attitudinal and behavioural change both within the legal system and within society at

large. Each element may overlap, and none are mutually exclusive. Given the almost infinite range of precise program elements, and their strong context dependency, I will not seek to provide a checklist of specific points of engagement. Rather, I will highlight the pros and cons of some widely employed program options in the context of risk assessment in Part IV. Before turning to a discussion of risk, however, I want to say a few words about more general issues relating to the design of a justice reform program.

1. Sequencing

There is no ideal sequence for the implementation of elements of a justice reform program. Everything is dependent upon the specific context in which reform is sought or promoted. Cheryl Gray posits a three-step approach to her ultimate goal of market friendly legal reform, starting with a set of written laws, continuing with the reform of "supporting institutions," and concluding with the creation of incentives for "individual market participants" to take advantage of their legal rights.[105] I believe that this approach is overly schematic and rigid. I also doubt that beginning with a new normative framework of laws and regulations makes sense in most cases without an assurance of some genuine desire for change, as discussed above. Too much of the first generation of justice reform programming was devoted to rather abstract efforts in support of legislative drafting of bills that would never see the light of day, or for which no thought had been given to the challenges of implementation. Most commentators emphasize the importance of proper sequencing, but eschew any standard formula,[106] arguing instead that flexibility in all governance project design is crucial.[107]

Although fundamental structural reform and institutional strengthening are usually both required to promote the factors associated with a sound legal system enumerated in Part I, it may not be possible to start with such reforms in the absence of some evidence of governmental commitment (though, as we have seen, a key aspect of early justice reform efforts is fostering that commitment). One important implication of the need for governmental engagement is that "institutional strengthening" will not be an appropriate *reform* strategy unless the institutions to be strengthened are tested against relevant criteria for sound legal systems apart from efficacy (or efficiency) alone. For example, improving the administrative functioning of a court system working comfortably within the constraints of a repressive regime is not likely to prompt legal reform, as the Cuban example demonstrates so clearly.

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[105] *Supra* note 9 at 15-16.

[106] See *e.g.* OECD, *Evaluation of Programs*, *supra* note 47 at 29.

[107] See *e.g.* World Bank, Operations Evaluation Department, *Designing Technical Assistance Projects: Lessons from Ghana and Uganda*, Precis & Briefs, No. 95 (Washington: World Bank, 1995).

Similarly, enhancing the administrative capacity of a justice ministry riddled with corruption may only lead to the more efficient exploitation of corrupt practices. On the other hand, attempting to promote reform through the elaboration of new normative frameworks, in the absence of a strategy for institutional change, may simply prompt "frustration and cynicism" as new laws are seen to have no effect.[108] There is simply no template for programming in this complex area of governance. Rather than seeing sequencing as a chain of cause and effect, it is better to imagine a web of interconnections, drawing once again from Amartya Sen's arguments concerning the need for both conceptual integrity and causal interdependence in comprehensive development programs.[109] The one "precondition" that seems to exist in almost all cases is indigenous demand for legal and judicial reform, be it driven by an elite (the common pattern) or by broad popular sentiment. Yet even this assertion requires nuance, for part of the goal of justice programming may be to help relevant actors to see what is possible. The nurturing of legitimate aspirations for reform is a central element in the building-up of reform constituencies.

Once an indigenous constituency for legal and judicial reform has been identified, that constituency can, however, be nurtured through support to civil society activities and governmental initiatives as appropriate. A strong will to reform is not something that must predate all justice activities; the will can be built up. Ultimately, institutional strengthening may become appropriate, but this will depend upon the evolving desire to change, the possibility of influence from external critics such as legal advocacy groups and the media, and a basic structural capacity to engage in reform. The latter point relates principally to the human resources present within the system capable of guiding the institutional strengthening. Being "committed" to change is not enough, even for the political and legal leadership: capacity to change is required and will almost certainly have to be strengthened.[110] It may be appropriate to engage in a parallel strategy to build capacity for reform within governmental justice systems while encouraging and supporting demands for change in civil society. The central point is to avoid premature engagement with the existing formal justice structures for, at best, such engagement is likely to be ineffective, and at worst it could actually strengthen systems resistant to significant reform.

2. Seizing Opportunities

At the same time, one must be careful to avoid monochrome assessments of institutions and groups. If one wants to begin helping to plant reform coalitions in seemingly infertile ground, it will be necessary to seize opportunities when they

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[108] USAID, *Institutional Strengthening*, *supra* note 46 at 9.

[109] See Sen, *supra* note 13.

[110] See *e.g.* European Centre for Development Policy Management, *supra* note 75 at para. 34; CIDA, *Ethiopia Governance Study*, *supra* note 26 at 7-8.

present themselves. One should not overestimate the rationalism of human governance systems, nor tie oneself into a straightjacket of pre-established sequencing. Within the various groups and institutions of the justice system, one may find that engagement will have to start at different places and move at different speeds. Nor will the trajectory of reform be linear. Processes of change are likely to circle back and effect other, related processes, some of which are internal to the legal system, but many of which will be external and therefore hard to influence within the framework of the justice program. In some circumstances it will be possible to work with segments of governing structures, or with reform-minded individuals, in the hope of encouraging ferment within an otherwise stagnant and repressive system. In the final hours of the Habibi administration in Indonesia, it seemed possible to work with the relatively reformist minister of justice, even though the broader context for justice reform looked decidedly bleak. Similarly, in Sri Lanka, after the eleetion of a new government publicly committed to constitutional devolution of authority, a window opened for work with another reformist, the minister of justice and constitutional affairs. But caution is needed in launching such opportunistic programming. Individuals are not necessarily capable of carrying the day; they may not be politically powerful or astute enough to promote their reform agenda successfully. They may also lose their jobs. "Champions" are important, but one must also assess their capacity and their political clout. More broadly, the central point is that one should seek to engage where the engagement is most likely to be effective. If an idealized, comprehensive approach is not yet possible, one may still want to act, but in full knowledge that the actions may not produce the desired results. Risks are often worth taking, but they should be acknowledged as risks.

Modest attempts at structural or institutional change may be possible even if the will to change is highly localized. One must then caution realism: modest and localized attempts at structural change are likely to yield modest and localized results, at least over the short and medium terms. The experience of legal and judicial reform efforts in China supports this conclusion. Given resource limitations and the size of the country, one cannot posit widespread impact from local reform efforts in China. Worldwide experience with pilot projects suggests caution in assuming the replicability of results. Although a step-by-step approach suggests the need for pilots, one must remember that pilot sites are typically chosen because of their particular receptivity. Moreover, being singled out as "special" can prompt local commitment at a level that cannot be expected in a more geographically widespread program.[111]

3. Regional Initiatives

Programming in justice reform need not take place at the bilateral level. Indeed, there are strong arguments to support a regional approach, at least in early efforts to

[111] See USAID, *Institutional Strengthening*, *supra* note 46 at 12.

encourage legal and judicial reform. First, given the posited connection between legal reform and the promotion of human rights and good governance, regional programming may be viewed with less suspicion by target governments, allowing for more forceful initiatives, particularly those directed to attitudinal change. Second, regional programming can take advantage of regional resources. In Southeast Asia, for example, the experience of non-governmental organizations in the Philippines could prove most helpful in suggesting strategies for the development of civil society within neighbouring countries. Regional meetings are one useful way to allow activists and professionals to share experiences and to make contacts.[112] Third, regional justice programming can allow for the more efficient sharing of foreign resources. Some of the problems faced within the legal systems of, for example, Uganda, Tanzania, and Kenya are common.[113] Common challenges are also presented in many states of Central and Eastern Europe.[114] Foreign expertise can be relevant regionally, and a common strategy for engagement might usefully evolve. Fourth, regional funds to support small governance projects, including justice work, can allow innovation and some risk taking in the exploratory stages of program development. They can help build up the knowledge base required for more extensive engagement.[115] This implies that regional funds should be encouraged to undertake bilateral (single country) projects when there is a prospect of building contacts and learning more about the local situation in the justice sector.

4. Donor Coordination

Legal and judicial reform programming should eschew single-minded bilateralism for another reason as well. A constant criticism of legal and judicial reform initiatives is their tendency to isolation, marked by a lack of coordination amongst members of the donor community. The Legal Department of the World Bank has argued:

> Legal reforms in developing countries are often supported in a piecemeal approach consisting of isolated interventions in a particular area of law. The

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[112] Canada, CIDA, Asia Branch, *Country-Specific Projects in a Regional Programme: A Results-Based Management Assessment of Three SEAFILD Regional Governance Projects in Southeast Asia* (Consulting Report) by Greg Armstrong (January 2000) at 14-15 [CIDA, *Country-Specific Projects*].

[113] Consider the potential role of multi-partyism in promoting legal pluralism (customary law within national systems), or the independence of the judiciary.

[114] See *e.g.* European Commission, Office of International Policy Services *et al.*, *An Evaluation of PHARE Public Administration Reform Programmes: Final Report* (Brussels: European Commission, 1999) (discussing similar legal reform needs in Eastern Europe in European Union).

[115] CIDA, *Ethiopia Governance Study*, *supra* note 26 (but he cautions that "learning is a planned result of [fund] activities" at 19); CIDA, *Country-Specific Projects*, *supra* note 112 at 25.

> result is a lack of focus by donors and a lack of strategic thinking in financing and providing legal technical assistance.[116]

The first round of justice reform funding focussed primarily on either support for modest civil society initiatives, such as community legal aid or targeted public education, or on assistance to legislative drafting. In both cases, there was no comprehensive reform strategy. Subsequent efforts have tended to promote isolated reforms in specific institutions, notably courts. Various donors have established exclusive partnerships in highly circumscribed areas, or have carved out "microprograms" that are typically completely uncoordinated with other donors' "microefforts". A good example is the bevy of donors tripping over themselves to provide advice to the drafting of new economic law and regulation in Vietnam. In recent years, American, Australian, Canadian, French, and German advisors have provided incommensurable, sometimes conflicting, advice on questions of land ownership, registration of interests in real and moveable property, bankruptcy, contracts, and commercial transactions. To their credit, key Vietnamese legal actors came to realize that they had better improve their capacity in comparative legal analysis if they were not to end up with an utterly incoherent "reformed" legal system.

I have seen little evidence of improvement in coordination in the decade since my own involvement in justice reform programs began. A detailed exploration of the psychology, politics, and economics of donor coordination is beyond the scope of this article, but I continue to find it surprising that progress is so difficult. In some countries, "governance groups" have been set up among like-minded donors, but I have never worked in any setting where these groups led to an explicit division of labour, much less to co-operative programming. When I made an informal suggestion for cost sharing on a strong program for which the UNDP was looking for a partner, I was told by an officer from a bilateral donor that the donor was looking for profile and cost sharing would not achieve that objective. Whether or not that officer's assessment was accurate in the particular circumstances, it reflects a more general problem: donors still hoard information and seek an ill-defined influence at the expense of rational collaboration. This occurs despite the fact that no donor, and certainly not Canada, has the in-country staff to guarantee adequate contacts or local knowledge to support complicated governance programming.[117]

For a donor of modest means, such as the Nordic countries or Canada, collaboration and joint planning with other donors would seem an attractive option, and one likely to boost the impact of legal and judicial reform programming. At the moment, one sees many examples of duplicated effort, especially in legislative drafting and court reform projects. Succeeding generations of incompatible, underutilized or broken down computer systems dot court offices in the Caribbean

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[116] World Bank, *Legal Technical Assistance*, *supra* note 16 at 21.

[117] CIDA, *Ethiopia Governance Study*, *supra* note 26 at 11, 43.

and Southeast Asia. One also confronts the spectre of donors overloading well connected recipients (often because key actors in an organization speak English well) with funds that cannot be assimilated. Diverse and complicated reporting requirements then come to overwhelm the administrative capacity of the organization. This is a particular problem with legal reform groups in civil society headed by a charismatic leader (often a displaced government minister). Moreover, if donors were to coordinate their efforts and achieve an explicit division of labour, sustained commitment should prove easier to plan for and justify. An interesting example of just such an effort can be found in an ambitious court reform plan put forward by the Supreme Court of the Philippines, where the World Bank is trying to lead a coordinated response from donors.

III. Lessons Learned in Managing Risks

As should already be apparent, legal and judicial reform programs are often high risk, in large measure because they are so dependent upon political forces outside the control of project officers and implementers. In my view, a large part of managing for risks is realism in project goals and purposes, an issue to be discussed in Part IV. I would simply emphasize here that the more far-reaching the claims of project impact, the more likely that uncontrollable intervening variables will undermine the claims.

Legal and judicial reform projects will also require continuing political negotiations and constant attention to the nurturing of reform constituencies, as discussed above. So a second key aspect in managing political risk is devoting time and attention to these efforts at negotiation and constituency building. This aspect of justice work can be particularly frustrating, because one is often working on the details of reform with "experts" who may be inclined to pursue initiatives that are essentially self-serving, or at least focussed on the needs of the profession (lawyer, judge, ministry official), rather than the wider society. Third, as already noted, managing political risk requires good information on the general governance environment. If information sources are unreliable or inadequate, project officers and implementers will be thrust into distinctly uncomfortable situations. All of these elements can be summarized in a fourth overarching aspect of risk management: justice project design should seek to allow step-by-step engagement and minimize the disbursement pressure that forces premature implementation.[118] As has been emphasized throughout this article, justice reform is as much about people and process as it is about the production of concrete legal artefacts. Patience is required, and this can run up against the desire to demonstrate results, an issue to which we will return in Part IV. It is generally acknowledged that much legal and judicial reform programming will be undertaken where optimal conditions for success are only "marginally present."[119] Some project

[118] See *e.g. ibid.* at 29, 31, 39.

[119] OECD, *DAC Orientations*, *supra* note 19.

implementation will occur as one assesses the possibilities for deeper engagement; that is the essence of step-by-step programming.

A. Risks Specific to Particular Types of Programming

It is not possible to address all of the potential risks in specific justice reform initiatives. Instead, I will highlight some of the risks inherent in typical categories of programming in the justice sector. I will then draw out some broader themes concerning the effective management of risk in legal and judicial reform projects. This risk assessment framework is derived largely from personal experience and from a survey of qualitative evaluations undertaken at the request of various aid agencies. Although empirical research would be helpful to validate my admittedly conclusory claims, the purpose here is largely hortatory. It is hoped that by adverting to potential risks, the minds of project designers and implementers will at least be focussed upon the right questions.

Alternative Dispute Resolution: Alternative dispute resolution, or "ADR" as it is colloquially known, includes a broad range of possible initiatives, ranging from highly structured commercial arbitration, through relatively formal court-annexed mediation schemes, to community-based conflict management systems. One common risk is imprecision in what is being sought in invoking ADR, and the resulting frustration that the outcomes do not match the goals. If one wants to focus upon community engagement, for example, the type of mediation training required is completely different from that which one might design to foster the settlement of commercial disputes. ADR has become an industry in North America, but practitioners and trainers do not necessarily possess skills that cross over the divide between community-based activities and business needs. ADR can be less expensive and more expeditious than formal court adjudication, but will not necessarily be so, especially in complex commercial matters. In family law disputes and community conflicts, doubts have been raised about the ability of informal mediation processes to address power imbalances between parties.[120] Although these doubts do not undermine the advantages of community based ADR, they do caution against uncritical assumptions that the community will always be fair.

Anti-Corruption: The greatest risk for anti-corruption programs is in adopting a narrow focus that looks at corruption simply as "the abuse of public office for private gain."[121] Such an approach fails to place public sector corruption in its broader social

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[120] U.S., USAID, Center for Democracy and Governance, *Alternative Dispute Resolution Practitioners' Guide*, (Technical Publications Series) (March 1998), online: USAID <http://www.usaid.gov/our_work/democracy_and_governance/publications>.

[121] U.S., USAID, Center for Democracy and Governance, *A Handbook on Fighting Corruption*, Technical Publications Series (February, 1999) at 5, online: USAID <http://www.usaid.gov/our_work/democracy_and_governance/publications>.

context, thereby risking ineffectiveness. If private sector actors rely on corrupt practices to gain contracts or favours, it is difficult to address the issue with projects that look solely at bureaucrats and politicians. It is also hard to address corruption without wider initiatives in public sector reform, including addressing salary differentials between the public and private sectors, and public sector working conditions. But it is almost impossible for donors to treat these issues directly in programming. They must form part of a continuing policy dialogue with the host government. One must also be careful in supporting anti-corruption efforts that the goal of the project is really to weed out corruption and not to use corruption as an excuse to attack political opponents or the ideologically "impure".[122]

Constitutional and Structural Reform: The political risks in constitutional and structural reform are enormous. Passive and active resistance will be forthcoming from those interests who perceive that they are likely to lose power or advantage. Engaging in broad consultations and discussions will bring to light significant differences of ideology and opinion that may be hard to shape and manage productively. Ambitions can easily exceed capacities, both to deal with change psychologically, and to manage change from a technical perspective.[123]

Information Systems and Automation: Donors have displayed a tendency to focus on issues of acquisition of hardware and software (often tied to the systems of countries providing the resources, regardless of quality or appropriateness) without first carefully assessing the actual information needs of the target institutions. Closely related legal institutions may acquire different and incompatible computer systems. Many actors in the legal system are blinded by the promise of technology without really understanding its value, possibilities, and limitations. The prospective users are not usually highly computer literate. The real need is often improved information tracking and file management, which can be accomplished without massive investments in computer systems. Basic training of administrative staff in courts, ministries, et cetera, on office and personnel management, and on filing, can often accomplish more than computerized information systems that remain mysterious and unused. Even if new computers are used, they may simply be replicating bad administrative systems in automated form. A special risk is that investments in computer training will have no long-term impact because the trained staff will be picked off by the private sector offering better salaries and working conditions.[124]

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[122] Compare the approach of USAID (*ibid.*), which emphasizes only the pathologies of the public sector, with that of Transparency International, which pays regard to the interplay between public and private sector corruption. See Jeremy Pope, *Confronting Corruption: The Elements of a National Integrity System*, TI Source Book 2000 (Berlin: Transparency International (TI), 2000), online: <http://www.transparency.org/sourcebook/index.html> at 1-2, c. 1.

[123] OECD, *Evaluation of Programs*, *supra* note 47 at 33-34.

[124] See USAID, *Institutional Strengthening*, *supra* note 46 at 61-70; OECD, *Evaluation of Programs*, *ibid.* at 33; Inter-American Development Bank, Regional Operations Department, *Judicial Reform in*

Judicial Reform and Court Administration: Judicial reform and court administration efforts are often responsive to the perceived needs of institutional actors, particularly judges, but are not attentive to the needs of the citizenry. These initiatives become a "guild reform", promoting the interests of insiders. One needs to think of judicial reform in terms of institutional strengthening *and* reorientation. Anti-corruption measures are sometimes just as important as reforms to promote independence. The judiciary in most countries tends to be hierarchical and strongly rooted in tradition. Its perception of its own importance can make communication difficult. "Judicial independence", although crucial, can sometimes be invoked to escape accountability. But independence means that judges should not be viewed as bureaucrats, even when that is their own self-conception (as in Vietnam and Cuba). If there is no independence, and if judicial and court administrative appointments are not merit-based, improving systems will not usually improve the quality or fairness of judicial decisions. The nature of judging makes it difficult to define improved performance, as the central question is the substantive quality of decisions rather than administrative measures of efficiency. Court administrative structures are notoriously weak the world over, in part because of the tradition of collegial governance that makes it hard for difficult administrative decisions to be made.[125]

Judicial Training: Judicial training programs often tend to be "remedial", attempting to bring judges up to international standards in substantive areas of law. One needs to more carefully target the attitudinal and behavioural changes that will lead to sustainable systemic or structural improvements (though this can be difficult while paying appropriate attention to judicial independence). Short-term training is only useful if coordinated with broader reform initiatives, and linked to specific goals for behavioural change. Training in itself is not likely to lead to institutional change, and can actually serve to deflect pressures for more substantial reform. It will be utterly ineffective unless the trainers have juridical as well as educational skills and credibility. It is also important to assess what different groups of judges actually do. Some are engaged in rather technical assessments, while others are asked to deal with highly complex social issues. One must be careful not to imagine that all judges are required to perform Herculean intellectual tasks. When judges plan their own training programs, they are often self-interested and distant from challenges that would be posed by the wider public.[126]

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the Caribbean by William Charles, Carl Baar & Robert Hann (Washington: Inter-American Development Bank, 1999) at 5, 17-18.

[125] See USAID, *Institutional Strengthening*, *ibid.* at 9, 15-16, 56-58, 76-84.

[126] See *ibid.* at 58-59; U.S., USAID, Bureau for Policy and Program Coordination, Center for Democracy and Governance, *Judicial Training and Justice Reform* by Linn Hammergren (August 1998) at 17-18, 20, 26 [USAID, *Justice Training*] (with respect to France and the criticism that "judicial ownership has produced a closed caste of judges," the author cites Herbert Jacob *et al.* (*Courts, Law, and Politics in Comparative Perspective* (New Haven: Yale University Press, 1996)) at 18).

Legal Education: The provision of basic legal education is expensive because it involves engagement with a relatively large target group: professors and students. In some countries, especially those in the civil law tradition, huge numbers of undergraduate students are registered in law programs. Pilot projects seeking to reform curriculum may be useful, but are also hard to replicate, given the limited resources of most funding agencies. Legal education is rarely a national priority when compared to technical, scientific, and medical education, so the experience of pilots is rarely generalized through local action. In some countries, legal education is rigorously controlled by state agencies, and real reform is resisted. The education and training of the existing professorial corps must be assessed to determine whether or not professors are likely to be open to and capable of significant change in the legal curriculum.

Legal Literacy and Public Information: Legal literacy and public information programs are often too general and their impact is limited by the weak literacy skills of the target populations. Lawyers tend to focus on the written word, even when people cannot read, producing pamphlets and other documents that are largely irrelevant to the people who need information. These campaigns should relate to specific objectives that are responsive to acknowledged needs of the target populations (not simply "knowing your rights"). Some governments use such campaigns to "pass messages" that are related to control, rather than liberation, and care must be taken to assess the goals of public information campaigns.[127]

Legislative Drafting and Code Reform: The most serious risk with legislative drafting and code reform programs is a failure to pay adequate attention to questions of implementation, through the preparation of institutions and the relevant publics for upcoming changes. Drafters focus upon ideological and logical consistency, but pay less attention to the social settings into which legal texts are thrust. Failure to develop an implementation plan and a transition plan can lead to chaos or irrelevance. "Borrowing" external solutions without adequate attention to the social factors that allow specific types of legislation and regulation to work effectively in some settings, but not in others, is a second common problem. Drafting exercises often operate in isolation from wider reform questions and problems, and have little systemic impact. Failure to take into consideration the political priorities of key actors can result in excellent drafts that sit on shelves. Finally, drafting exercises can take place in settings where there is no real commitment to broader reform. The goal may be to create a framework for a "socialist market economy", for example, without any desire to alter legal structures or the relationship between the citizenry and the state.[128]

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[127] See OECD, *Evaluation of Progams*, *supra* note 47 at 35.

[128] See USAID, *Institutional Strengthening*, *supra* note 46 at 60; U.S., USAID, Bureau for Policy and Program Coordination, Center for Democracy and Governance, *Code Reform and Law Revision* by Linn Hammergren (August 1998) at 15-19; Ajani, *supra* note 28. But see Posner, *supra* note 15

Police, Prosecution, and Prison Reform: Political risks are particularly high in the areas of police, prosecution, and prison reform programming. Donors can be justly criticized for supporting the state apparatus of repression, unless great care is taken in the precise selection of initiatives. On the other hand, there is increasing recognition of the need for deep reform in these sectors if human rights values are to be upheld and the legitimate security concerns of the citizenry of many states are to be recognized and validated. A risk in this area is that inadequate attention will be paid to security issues in an otherwise comprehensive reform package, thereby undercutting the impact of the entire scheme.[129]

Public Legal Aid Initiatives: Because public legal aid schemes are relatively easy to structure, this prompts overly ambitious goals. The key risk is that levels of service are promised that are utterly unsustainable. The tale is repeated around the globe: China, Vietnam, Jamaica, Sri Lanka. Promises of widespread access are made, but no money (or too little money) is available, and no plan is in place to subsidize the service. In practice, the system collapses or comes to serve a more and more limited clientele, thereby failing to meet its stated objectives. Even when they do operate, legal aid schemes tend to focus on individual cases, without adequate attention to broader systemic questions. One needs an overall reform strategy to which targeted litigation can contribute.[130] Legal aid initiatives, based on Western models, may also neglect indigenous methods of dispute resolution, often found in traditional or customary law.

B. Establishing Appropriate Partnerships

Another difficult problem in justice reform is establishing appropriate partnerships. The difficulties can arise at both ends of the relationship (namely donor and host country or region). The first issue relates to programming goals, and the appropriateness of various types of partners. Judicial councils or professional associations in donor countries are unlikely to possess the expertise required to assist in the delivery of popular legal education campaigns or in the bolstering of indigenous legal advocacy non-governmental organizations. Supernumerary judges are not likely,

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(arguing that one should start reform efforts with relatively inexpensive drafting, rather than any institutional initiatives, because getting the "structure" right will allow market efficiencies to affect further reform at 3-5).

[129] See Dandurand & Paris-Steffens, *supra* note 87. I once recommended that a donor support reformist leadership in a prison system within a democratic country only to be told that "our home politicians don't like us to help prisons." The assessment may or may not be accurate, but it reveals a dangerous myopia. Within any justice system, prisons are on the front line of conflict management. They also serve as crucibles in testing commitment to human rights values. Donors cannot afford to ignore prisons, or police and prosecution for that matter, if they want to address legal and judicial reform in an appropriately comprehensive manner.

[130] See USAID, *Institutional Strengthening*, *supra* note 46 at 15-16; OECD, *Evaluation of Programs*, *supra* note 47 at 30, 35.

in most cases, to be vigorous proponents of attitudinal change within legal systems. Similarly, law professors may not be the most effective judicial trainers, for they may be viewed as out of touch with the preoccupations of an embattled judiciary. In host states, supreme courts operating without judicial independence may not be sensible targets for training in the administration and processing of caseloads. Loosely organized non-governmental organizations will not be able to deliver structural or institutional legal reform. Again, if comprehensive reform is the goal, one must ultimately engage with the state apparatus, even if at first a campaign of alliance building focusses upon non-state actors. In assessing partners, one must consider the values one seeks to promote through the proposed programming, the technical needs of the program, the capacity of the partners both in terms of analysis and implementation (including an assessment of influence), and the compatibility of "cultures" of Canadian and foreign partners.

Given the politicized nature of justice reform, there may emerge an institutional tendency to choose seemingly safe host country partners. It is interesting to note, for example, the large number of justice initiatives focussing upon judicial training. Improving the capacity of judges to undertake their important role is hard to criticize, but donors should try to seek out a range of partners, even when they are somewhat more risky politically. I have emphasized the need for a comprehensive approach to justice reform. Singling out only the relatively easy—and uncontroversial—institutions with which to work will not result in sustainable systemic reform. Once again, this observation points to the need for good on-the-ground knowledge. A final risk associated with local partners is that many donors will fix upon the same organization, which will then lack the capacity to accomplish all the programs it has undertaken.[131]

Another set of partnership issues concerns the strengths and weaknesses of different types of executing agencies. The cost of legal and judicial reform initiatives can vary enormously depending upon the chosen implementers. Many private sector law firms in Western states are interested in expanding their foreign client base. Engagement in publicly funded reform initiatives is one of the obvious strategies to develop contacts. Even if these firms are willing to charge out their services at a "development rate", which they are generally willing to do, they will typically be more expensive to support than public sector actors such as ministries of justice or organizations in civil society. On the other hand, for certain types of programming, particularly where substantive areas of law are to be reformed, private firms may be a source of great expertise. For example, some of the most qualified legal experts who deal with corporate structures, the creation of stock exchanges, natural resources law, property law, and registration systems are members of private law firms.

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[131] CIDA, *Ethiopia Governance Study*, *supra* note 26 (discussing "donor overload" at 26).

Given constraints upon resources, non-governmental organizations and some public sector actors such as universities and ministries of justice face difficulties in supporting core operations. Infrastructure support is often weak and the addition of development programming may not be sustainable unless arrangements are made to cover all flow-through costs and overhead. If this support is not available, program delivery may not be possible, and alternative domestic partners may have to be sought out. This issue underscores a particular problem for small donor countries. While many potential project implementers are endowed with strong analytical skills in the area of justice reform, matched with relevant experience, the organizational structures available to deliver programming are neither numerous nor, generally speaking, strong.

A pattern has already emerged whereby comprehensive legal reform projects are executed by management consulting firms that hire specialized staff for given projects. It remains to be seen whether these firms manifest a long-term commitment to the justice sector. As it is, they are largely dependent upon the availability of a small number of independent consultants and professors to deliver projects on an ad hoc basis. This type of structure is flexible, but it may actually inflate project costs, and it is not easy to develop broader capacity in the sector using this model of project delivery. Moreover, unless an executing agency has a real interest in the subject matter of a project, it may not follow through as effectively as one might hope in the face of the challenges and risks of justice reform programming. This is not an area where the financial rewards for consulting firms are likely to be significant enough to compensate for the psychic and material costs.[132] To overcome these problems, donors should consider facilitating the construction of consortia and alliances for the delivery of justice programs.[133] An interesting option might be having a project lead that would be an organization with substantive legal knowledge and skill, and a management firm serving as a technical resource.

C. Other General Risks in Legal and Judicial Reform Initiatives

A third central challenge for all types of legal and judicial reform programming is sustainability. This is not an area where quick fixes can work, nor is it likely that programming can be effective unless there is consistent engagement over a number of years, usually extending beyond standard development program cycles. Implications are numerous, including the need for longer-term financial planning to support continuity of programming, careful iteration of programs, the usefulness of joint planning with other donors, and the need to evaluate the long-term interest and commitment of Canadian and foreign partners. Sustainability also relates to the

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[132] See CIDA, *What Works?*, *supra* note 26 at 45.

[133] See also CIDA, *Ethiopia Governance Study*, *supra* note 26 (making the same argument vis-à-vis all governance programs at 35).

problem of unrealistic expectations. Sustainable programming is likely to demonstrate some modesty in the identification of program goals.

A fourth challenge that has already been adverted to in the discussion of priorities, sequencing, and donor coordination, is complementarity amongst specific projects. This issue is highly salient to the overall effectiveness of programming.[134] Legal and judicial reform initiatives should be undertaken within a strategic framework linked to the pursuit of program goals. Too often they are conceived rather as ad hoc responses to particular problems within specific institutions. The U.K.'s ODA has emphasized that any needs assessment for justice reform must look at the legal system as a whole, and not only at component parts, be they ministries of justice, courts, legal aid administrations, and so forth. It is likely to be the case that several institutions or groups contribute to a particular legal process or service, and that assistance may have to be directed to a number of these institutions or groups.[135]

A fifth and final general risk associated with justice reform projects relates to the broad problems associated with institutional development and capacity building initiatives discussed above.[136] Justice reform typically requires substantial attitudinal and behavioural change on the part of actors within the system. That is why so many projects focus upon training initiatives. But all the capacity building in the world, all the attempts at institutional strengthening, will falter if the surrounding political and institutional culture does not support the behavioural changes that are sought. To take a simple example, training a group of judges on the importance of judicial independence will have little or no impact in a system that is still contaminated by executive abuse of the judicial appointment process, and a cultural expectation that judges will do the bidding of the executive authorities (sometimes called "telephone justice"). Similarly, training court clerks in better file management will not improve performance within a system that privileges the hierarchical power of judges to physically control files, or that allows litigants' lawyers unrestrained access to court registries. Attitudinal and behavioural change must be promoted in conjunction with the institutional changes that will buttress the behavioural goals. In addition, if newly trained people are to be retained in the public sector, incentive structures often need to

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[134] This linkage was also posited in the case of programming in human rights and democratic development. Canada, CIDA, Policy Branch, Good Governance and Human Rights Policies Division, *Lessons Learned in Human Rights and Democratic Development: A Study of CIDA's Bilateral Programming Experience* by Phillip Rawkins & Monique Bergeron (December 1994) at 26 (recommendation A.4.1.a).

[135] ODA, *supra* note 23 at 8-9.

[136] See Part II.A.2, above.

be reformed and innovative methods found to reward good performance, accepting that public sector salaries are likely to lag behind those in the private sector.[137]

IV. Assessing Results in the Justice Sector

For the last decade or so, Western governments have sought to improve strategic management, prove the worth of their programs, and justify the expenditure of scarce public resources by implementing performance measurement systems and program evaluation mechanisms.[138] Development agencies have embraced the trend, and although their terminology may be diverse, the impulse toward "managing for results" is firmly established.[139]

Managing for results cannot be a linear process. As one CIDA document puts it, "Based on constant feedback of performance information, inputs and activities can be modified and other implementation adjustments made."[140] But it is not just the process of implementation that is iterative and sometimes circular. If Amartya Sen is right in seeing comprehensive development as a set of interacting economic, legal, political, and social processes,[141] it is the very concept of "result" itself that is iterative. There can never be one, final "instrument choice" that will inevitably produce the desired results. Instead, the means and ends of legal and judicial reform will be in constant interaction. As various interventions are undertaken, they will affect each other's results, and require changes in the very results that are sought.

The selection of results indicators is difficult for justice projects. Within CIDA's current framework, for example, an indicator should ideally be valid, reliable (constant over time), sensitive to change, simple, useful, and affordable.[142] Donors do

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[137] See *e.g.* World Bank, *Monitoring and Evaluation Capacity Development*, *supra* note 77 at 5-6; United Nations Development Programme, *supra* note 51 at s. 1.2; USAID, *Justice Training*, *supra* note 126 at 26.

[138] See *e.g.* Gerald E. Caiden & Naomi J. Caiden, "Approaches and Guidelines for Monitoring, Measuring and Evaluating Performance in Public Sector Programmes" (1998) 4 International Journal of Technical Cooperation 293. Note that the three goals may not always point in the same direction.

[139] For a detailed description of the efforts of Western aid agencies to implement programs of monitoring for results, see OECD, *Evaluation of Programs*, *supra* note 47. For the US "results" model, which is closely related to the approach adopted by CIDA, see USAID, *Weighing In*, *supra* note 36.

[140] Canada, CIDA, Performance Review Branch, *Results-Based Management in CIDA: An Introductory Guide to the Concepts and Principles* (Results-Based Management Guide) (January 1999) at 21, online: CIDA <http://www.acdi-cida.gc.ca/perfor-e.htm> [CIDA, *Results*].

[141] Sen, *supra* note 13.

[142] CIDA, *Results*, *supra* note 140 at 16. USAID suggests an even longer list of requirements for good indicators, adding to the CIDA list appropriateness, direct relationship to result, ease with which the indicator can be made operational, objectivity, sensitivity to magnitude of problem, and ease of statistical disaggregation by gender or other relevant population group. USAID, *Weighing In*, *supra* note 36 at 7.

not typically insist upon the production of quantitative indicators. Indeed, in the area of justice programming, such indicators are often difficult to track down, as justice systems are notoriously weak in data collection.[143] In any event, quantitative indicators can be highly misleading unless tested against qualitative assessments. For example, although the old maxim "justice delayed is justice denied" has validity, one would not want to uphold a judicial system that managed to race through cases at the expense of the fairness and legal soundness of judgments. Recent reforms to the judiciary in Singapore have been criticized on exactly this ground. Similarly, a community mediation scheme that managed to settle family law disputes quickly should still be assessed on a qualitative basis, for example by investigating any systemic bias that might appear in settlements, such as gender-based inequalities in property division. A more far-reaching point must also be made: "Not all activities may be meaningfully quantified."[144] Examples of essentially qualitative activities include the negotiation, drafting, and implementation of new constitutions, the design of legal institutions, policy advice, and legal research.

The sheer complexity of indicator choice suggests that the process of selection should itself be staged, with an initial list of proposed indicators being explored in relation to existing sources of data and then refined as needed.[145] Project implementers should be aware that the choice of indicators can skew project performance, for the selection of a particular indicator is an incentive to make sure that the indicator is covered off in programming decisions.[146] Care should be taken to seek out quantitative indicators where possible, but the harder task will be to establish qualitative indicators that are not purely impressionistic.[147] This is possible, especially if one selects qualitative indicators that rely upon what is often called in the social science literature "intersubjective meaning". This rather cumbersome term simply suggests that by working together, groups can build up a store of shared meanings as a result of their

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[143] See *e.g.* the lament of Charles, Baar and Hann, who found it impossible to find reliable Caribbean data on court performance in terms of case handling and delay. Inter-American Development Bank, *supra* note 124 at 5.

[144] Caiden & Caiden, *supra* note 138 at 304. See also Canada, CIDA, Policy Branch, *Indicators for Programming in Human Rights and Democratic Development: A Preliminary Study* (Policy Document) by Ilan Kapoor (July 1996), online: CIDA <http://www.acdi-cida.gc.ca/humanrights> ("the principally qualitative nature of political change has tended to make analysts shy away from attempts to measure or quantify it" at 1).

[145] USAID, *Weighing In*, *supra* note 36 at 6.

[146] See CIDA, "Update", *supra* note 62 at 22.

[147] Current CIDA policy goes no further than recommending a "pragmatic balance between the use of qualitative and quantitative indicators" (Canada, CIDA, Performance Review Branch, Results-Based Management Division, *Results-Based Management* in *CIDA* (Policy Statement) (March 1996), online: CIDA <http://www.acdi-cida.gc.ca/perfor-e.htm>; Canada, CIDA, Corporate Management Branch, *Results-Based Management* in *CIDA*, Policy Statement (March 1996), online: CIDA <http://www.acdi-cida.gc.ca>).

interaction.[148] In results measurement, this would imply the crafting of qualitative measures that are convincing or persuasive to the various stakeholders who care about the success of the project. In other words, the central question is: Would the indicators chosen help to convince a knowledgeable person that the project was actually achieving its aims? Some preliminary work on indicators has already been undertaken by both the World Bank and USAID, but more research on qualitative indicators for performance measurement in governance programming is needed. The work so far suggests that qualitative assessments can move beyond simple narrative reporting through the use of structured surveys of community leaders and outside experts, especially when framed as quality scales and multi-component indices. Participant surveys may be helpful in assessing attitudinal and behavioural change. In addition, well-targeted and carefully written public surveys can provide useful qualitative information.

In any performance assessment scheme, one of the essential goals is assessment of risk. For many donors, the focus is upon risk assessment during program design, but I suggest that risk assessment should also be conceived of as a continuous exercise during the creation and life of any justice sector initiative. Because of the staging required of most projects, risks can change, multiply, and abate during project implementation. In my experience, assessment of risk is one of the weakest elements of most project design and monitoring. Risks are either posited at too high a level of abstraction ("political will to support the project may cease"), or are minimized, presumably to facilitate project approval or the disbursement of funds.

An assessment of impact, as opposed to the measurement of specific outcomes, can logically take place only at the level of an entire justice sector program, not at the level of individual projects. This limitation exists largely because real impact for a justice reform program generally requires more than one intervention, and a commitment over the long term. At the project level, asking questions about results is still useful because it requires implementers and officers to continuously assess what they hope to achieve. Trying to assess results, not merely listing activities, forces attention upon intermediate outcomes, and requires that implementers ask whether or not project activities are contributing to posited outcomes and whether or not those outcomes must be reconceived.[149] In that sense, "managing for results" is actually a constant reassessment of means.

The problem is that in practice, claims are made as to project goals that are overly broad, and effort is wasted in attempting to find indicators for an impact that is impossible to measure during the life of a project. For example, in a modest court administration project in Africa, the project goal was stated as follows: "[T]o

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[148] See *e.g.* Thomas Risse, "'Let's Argue!': Communicative Action in World Politics" (2000) 54 International Organization 1; Brunnée & Toope, *supra* note 10.

[149] Brunnée & Toope, *ibid.* at 10-11.

contribute to the stability and security of [State A] by promoting practices that will help achieve and sustain the rule of law."[150] Yet by the time the project was boiled down to its more specific purpose, the objective was more modest: "[T]o build and strengthen the administrative capacity of the Supreme Court."[151] A similar gap between the over-statement of project goals and relatively limited concrete initiatives is found in another African project in support of a non-governmental organization constitutional litigation unit. The goal was stated as follows:

> This project plans to constructively help dismantle the legacy of ... inequality. It is designed to help transform one of the world's most oppressive societies into a sustainable, functioning democracy where consciousness of basic rights is integrated into daily lives and directly improves the social and economic quality of life for millions of [citizens].[152]

Yet the specific project purpose was to assist in building up the capacity of an important civil society organization by supporting its strategy to litigate questions of fundamental rights.[153]

My point is not to criticize these two projects. In fact, both were seen as successful by the beneficiaries, by the project delivery team, and by the donor. Moreover, the tendency to claim enormous impact for legal and judicial reform projects is widespread.[154] My concern is that by claiming too much, the benefits of the project become extremely hard to assess.[155] An exercise in results assessment either produces inevitable failure ("we did not meet our goal"), or more commonly, the process is derailed as implementers realize that they cannot possibly meet expectations, and they finesse reports by avoiding any detailed analysis of indicators, relying instead on sweeping statements of impact that match the sweeping claims of the project designers.

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[150] Canada, CIDA, Africa and Middle East Branch, Internal Project Approval Document [confidential: on file with the author].

[151] *Ibid.*

[152] Canada, CIDA, Africa and Middle East Branch, Internal Project Approval Document [confidential: on file with the author].

[153] *Ibid.*

[154] See also Canada, CIDA, Asia Branch, Internal Project Approval Document [confidential: on file with the author]. The CIDA Results-Based Management policy calls upon officers to be attentive to the realistic "reach" and "depth" of a project, but this warning is not invariably heeded. CIDA, *Results*, *supra* note 140, at 8-9.

[155] See *e.g.* USAID, *Weighing In*, *supra* note 36 (on the problems of implementing any performance measurement scheme in the face of overly "high or bundled objectives" at 5); European Commission, *supra* note 114 (on the difficulty of assessing project progress in the face of objectives that were too ambitious at 4).

My primary plea, then, is for modesty in crafting goal and impact statements.[156] They should be aligned with overall program objectives, but need not foresee the direct or immediate achievement of those objectives. Instead, project designers and implementers should expend their efforts in pursuing outcomes that have some possibility of achievement during the life of a project. Rather than seeing all intermediate achievements as "results", or end products, it might be more useful to consider them as "benchmarks" toward the attainment of project purposes.[157] The clearer one can be in identifying the signals of progress and the warning signs of failure during the life of a project, the more likely it is that reinforcing or corrective measures can be adopted to make the project as strong as possible. The tension remains that project implementers cannot simply ignore program level objectives. Indeed, if it is true, as I firmly believe, that legal and judicial reform is most likely to be effective in a context where the impact of economic, social, and political factors is being assessed and factored into project design and implementation, big picture objectives must be kept in view. A set of bifocals is required. Looking up over the horizon is crucial to focussing vision, but reading the close texture of specific project settings is also required. There is a conceptual link between the two optics, but it is generally mistaken to posit detailed project level results that directly reshape the vision. That reshaping can only emerge as a cumulative effect of a number of projects.

Conclusion

I end on a cautionary note, emphasizing once again the elitism and tendency to centralization inherent in government-to-government legal and judicial reform initiatives. In the words of one of the world's foremost comparative lawyers:

> Not merely the state, but the legal order itself can sometimes be inimical to civil society. Private relations can be tainted and our sense of obligation weakened by being juridified. The law must know where to stop, where to keep things from the court and leave them to the heart.[158]

However much the world may need law to facilitate sustainable economic, social, and political development, law will remain only a part of the equation.[159] In "discovering" law, the development community must resist the temptation to legal triumphalism so apparent in much Western, and particularly American, social and

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[156] Examples of well-crafted, appropriately modest, project goal statements can be found in all branches of CIDA. I reviewed project documents from approximately thirty projects in preparing to write this article.

[157] See USAID, *Institutional Strengthening*, *supra* note 46 at 12; Caiden & Caiden, *supra* note 138 at 305.

[158] Rudden, *supra* note 5 at 82.

[159] See Sen, *supra* note 13. In her reflections on World Bank experience with legal and judicial reform, Gray notes, "The best legal systems operate only at the margin, leaving most standards in a society to be internalized and 'self-enforced' by society itself" (*supra* note 9 at 15).

political theory.[160] Legal and judicial reform threatens to become yet another development fad. That fate can be resisted if justice reform is placed firmly in context, as but one of the elements that helps to address the poverty and social division in our world.

[160] Examples of the "juridification" Rudden bemoans can be found in the work of contemporary theorists of great stature. See *e.g.* Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986); John Rawls, *A Theory of Justice* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971); John Rawls, *The Law of Peoples* (Cambridge, Mass.: Harvard University Press, 1999).

Appendix: A Vietnamese Case Study

I. Contextual Factors

To offer any assessment of possibilities for legal and judicial reform, one must first consider contextual factors affecting the justice system.[1] In the case of Vietnam, these economic, social, and cultural factors, as of 1999, included:

1. Vietnam's extreme poverty, particularly acute in rural areas;
2. the priority the government has placed upon rural poverty reduction, which strongly affects resources devoted to other program areas;
3. the high level of corruption among local officials, and the use by the Party of corruption as a justification for various purification drives;
4. the practically impenetrable complexity of the Vietnamese political system and the closed nature of the society;
5. the indigenous cultural drive towards consensus, exploited to great effect by the Party, which "guides" consensus;
6. the fear of the Party elite prompted by the shocking economic and political collapse of the Soviet Union;
7. the internal divisions in the Party between those who promote modest attempts at greater political openness and those who argue for even stricter ideological purity in a time of economic change;
8. the placement of the minister of justice in the "reformist" camp, but his seeming lack of political clout;

[1] Some of this contextual information is derived from background reading, but a great deal can only be gleaned from conversations with informed observers and participants in governance structures, especially the legal system in the host country. The process of information gathering is therefore not linear: although the context informs the eventual analysis, the appreciation of context often arises contemporaneously with the more specific programmatic information gained in the field. In my experience, it is very useful to meet with high governmental officials who can sometimes provide a good political and policy overview, before meeting with people directly involved in the justice system. I have also found it invaluable to speak with a wide range of diplomatic representatives, officials of various donors, and civil society actors (if they exist) before settling on specific structured interview questions for participants in the legal system. Although all diplomats and donor representatives have biases, they are often well informed and critical (even if entirely sympathetic). If one speaks to a range of foreign and domestic observers, there is less chance of becoming too reliant on any single "take" on the subject in question.

9. the decline in foreign investment exacerbated by the so-called Asian economic crisis, which caused the political leadership to waver on questions of economic liberalization;

10. the lack of governmental responsiveness to external political pressures, and the desire always to find "a Vietnamese way forward";

11. the lack of interest on the part of the Vietnamese political elite in any policy dialogue on questions of human rights or democratization;

12. the total Party and government control of the media; and

13. the almost complete domination by the Party and government of all social organizations.

In addition, one must consider more specific aspects of the legal system itself that could affect possibilities for justice reform. In Vietnam, the legal system is grounded in two fundamental ideological predispositions: state positivism and legal formalism. The former treats law as rooted solely in the authority of the state. It rejects any notion of natural law, the rights of man, or legal pluralism, and sees law as serving the interests of the socialist state (which is assumed in Marxist thought to serve the interests of the working classes). Of course, this statism is made much more complex by the parallel operation of Party structures, but the fundamental point remains: law is largely about command and control. Vietnamese legal formalism is a by-product of state positivism. Law is seen as a formal hierarchy of sources of authority, with the state seeking to control all the actors in the system. The principal focus of attention is the legal text, normative instruments, which are treated as if self-executing. Little attention is devoted to questions of interpretation or implementation. The primary goal of the system is to ensure that the sovereign authority is obeyed, through coercive enforcement if necessary. The role of the judiciary is largely to "explain" the correct meaning of legal texts to the population.

Vietnamese authorities like to stress that they are formally committed under the 1992 constitution to the creation of a "state ruled by law."[2] But given the controlling force of state positivism and legal formalism, it is crucial to understand that the role of law in Vietnam is essentially constraining, not liberating or facilitative. The "state ruled by law" is emphatically not the "rule of law" as envisioned, admittedly in various permutations, in Western democracies. In Vietnam, an improved legal system is sought to promote greater economic efficiency and more effective social control; in

[2] *Constitution of the Socialist Republic of Vietnam*, 15 April 1992, 11th Sess., 8th National Assembly, reprinted in Albert P. Blaustein & Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, vol. 20 (Dobbs Ferry, N.Y.: Oceana Publications, 1992).

the words of a senior academic, "to perfect the legal system to encourage the fulfilment of duty."[3]

A further defining aspect of the Vietnamese legal system is the significant gaps in substantive knowledge of even the most influential actors. It is important to note that faculties of law were closed for long periods during the most recent "war of liberation," and law was generally devalued. The Ministry of Justice was only refounded in the early 1990s. Fundamental conceptions of Western law, even those that inspire the reformed "economic law" of Vietnam, are simply not understood. The positive side to these fundamental knowledge gaps is an extraordinary openness to learning about how law works in other countries. This openness extends from high officials and judges to students in the law faculties, whose curriculum is still modelled on the Soviet-era "state and law" principles. Indeed, Vietnam has engaged in a process of learning about law with modest support from many Western donor agencies over the last few years. Within specific subject areas, notably economic law, various models have been explored, borrowed, and partially reconstituted in a search for indigenous solutions. But this has left the legal system somewhat in a state of incoherence, with civil law and common law approaches uncomfortably mixed. For example, Vietnam has promulgated an entirely revised Civil Code, modelled in part on the relatively new codes of Quebec and the Netherlands, but operating in conjunction with a great deal of common law inspired commercial legislation, picked up from American and Australian advisors in particular.

Another set of frames in this "motion picture" of the Vietnamese justice system must be devoted to the attempt by the executive authorities, through the Ministry of Justice, to exercise greater centralized control over all elements of the system. Again and again, Ministry officials emphasized the "supervisory role" of the Ministry over the courts, legal aid, public legal information, and legislative drafting. In practice, this supervision is often ineffective, but the instinct to control is powerful, and is strongly supported by the official ideology of the state.

II. Assessing the Four Elements of the Legal System

With these broad and system-specific contextual factors firmly in mind, one can explore the current state and prospects for change of the four interrelated elements of the legal system. In a series of structured interviews with leaders of various institutional components of the legal system, and with actors in civil society (if they exist), the indicators of a healthy legal system can be invoked and discussed. For the sake of brevity, I will simply note the types of people with whom I met in Vietnam, within each element of the legal system, and indicate the categories of indicators

[3] Private conversation with a leading Vietnamese academic. Notes on file with the author.

explored. I will then discuss two sets of program options in more detail and explain how recommendations were elaborated.

Articulation, Formulation, and Drafting of Rules: I held meetings with in-country representatives of donors involved in support of substantive legal reform and drafting, young members of the "private" bar who specialize in working for foreign clients and for Vietnamese enterprises, the senior leadership of the Vietnamese Lawyers' Association (a Party-based "professional" organization), academic members of specific legislative drafting committees, the National Assembly Law Committee, the minister of justice, and various departments and working groups within the Ministry of Justice. The indicators that were explored related primarily to accountability, efficacy, equality before and under the law, internal values (such as transparency, fairness, and predictability), the retroactivity of rules, and understandable and reasonable parameters of the legal system.

Application and Interpretation of Rules: I held meetings with legal and other governance project implementers (on issues of public perceptions about law, and the role of law in shaping behaviour), representatives of the Supreme People's Procuracy (having prosecutorial functions and general "supervisory" functions vis-à-vis the public administration, including courts), the minister of justice, Ministry of Justice officials, legal academics, and judges from various courts. Indicators that were explored related primarily to accountability, anti-corruption, efficacy, equality before and under the law, equality of access, independence of all actors, internal values (such as transparency, fairness, and consistency), legitimacy, stability yet flexibility, and timeliness.

Legal Representation and Advice: I held meetings with the Vietnam Lawyers' Association, members of the "private" bar, the staff of a public interest law and legal aid centre affiliated with a law faculty, project implementers on women's rights issues, the minister of justice, the Legal Aid Department of the Ministry of Justice, and legal academics. The indicators that were explored related primarily to accountability, anti-corruption, efficacy, equality before and under the law, equality of access, independence of all actors, legitimacy, and timeliness.

Public Access and Understanding: I held meetings with various radio and television journalists specializing in legal affairs programs, the Vietnam Lawyers' Association, the minister of justice, the Legal Dissemination Department of the Ministry of Justice, staff of a public interest law and legal aid centre, project implementers on women's rights issues, and project implementers on legal dissemination. The indicators that were explored related primarily to efficacy, equality of access, independence of all actors, legitimacy, and understandable and reasonable parameters of the system.

III. Recommendations

Having considered each of these elements, and the complex interrelationships among various actors, processes, institutions, and the elements as a whole, it was

possible both to recommend a range of possible points for CIDA engagement in legal and judicial reform programming in Vietnam, and to suggest where such engagement would not be wise. I will take one example from each category to explore in more detail.

A. Where to Work

A remarkable consensus emerged in meetings with both foreign and Vietnamese commentators that one of the top priorities for the Vietnamese legal system is to build capacity in sophisticated comparative law analysis. Given the yearning to learn from other legal systems, and the existing incoherence of partially borrowed and partially indigenous solutions to legal problems, a comparative approach had become essential. Current comparative law capacity was weak, and the comparisons undertaken were typically superficial. This relates in part to the legal formalism discussed above. Foreign legislation was studied without regard to the social and political contexts that support the legislative solutions adopted in other countries. The focus was the text, and its logical coherence, rather than questions of implementation and social legitimacy.[4] What was needed was a deeper understanding of comparative law methodologies, which extend far beyond the comparison of specific legislative texts, and assistance in the application of comparative law methods to concrete legal problems.

In the long term, the greatest need for the Vietnamese justice system is change in basic legal education. While no foreign donor has the right (or the financial ability for that matter) to completely reimagine and reorganize the law faculties of Vietnam, engagement with specific academic initiatives in comparative law could serve as a catalyst for changing understandings of the role of law, and even of the relationship between the state and the citizen. Working with young university lecturers, and thereby influencing the education of generations of law students, had the potential to promote significant change within the Vietnamese legal system. Such involvement could positively influence such indicators of legal system health as accountability, efficacy, independence of actors (in this case, especially the legal academy and the bar), internal values such as transparency and consistency, and legitimacy.

It was suggested that support for initiatives in comparative law education be provided to one influential law faculty that had previously only limited access to foreign ideas and contacts. This faculty was currently working on the development of a comparative law curriculum, so had made its own decision concerning the importance of this work. Furthermore, the faculty had hired a cohort of seemingly

[4] It is important to note, however, that foreign legislation seems to be tested against political objectives of the Party, so in that sense is subjected to examination against an indigenous context. This is especially true of issues concerning property rights and forms of commercial and corporate organisation.

creative young lecturers who had already demonstrated commitment to change through the creation of a legal aid and information centre. A CIDA regional fund for human rights and legal reform promotion had worked with the centre, and the experience had been strongly positive. Finally, this faculty was relatively independent of the Ministry of Justice, and might serve as an alternative locus for the emergence of new ideas.[5] CIDA was encouraged to consider short term in-country training in comparative law for lecturers, longer term Canadian graduate program scholarship assistance for young lecturers, matched with language training, and the creation of a continuing mechanism of support for those who had studied comparative law under Canadian auspices. This support might include the creation of a network for Canadian law alumni(ae), a seminar series where comparative law research could be presented, and follow-up training sessions, as more experience was gained.

B. Where Not to Work

Every foreign observer and Vietnamese lawyer with whom I spoke agreed that, ultimately, for the legal system in Vietnam to change fundamentally, judges would have to be both better trained and more independent. Yet the time was simply not ripe for Canadian engagement with the Vietnamese court system. It is crucial to remember that there is no separation of governmental powers in Vietnam. The courts are utterly reliant on the "guidance" of the Party, just as is every other governmental institution. This results in a grossly impoverished view of the judicial role. Indeed, the judges with whom I met clearly saw themselves as "government officials", with no capacity for independence. For example, in the area of criminal law, one senior justice official told me that the role of the courts is "to explain to the people that if they violate the law they will be punished." To work with the courts at this stage in their development would be simply to support a principal mechanism for the repression of dissent and the imposition of authoritarian control. I did not meet any judge who sought a more independent role, so no "window of opportunity" presented itself. Given the values that inform CIDA's engagement with legal and judicial reform, the prudent course was to wait for signs of change and to seize the opportunity to assist internal forces when they emerge. Attempts to facilitate a desire for change are more likely to be effective in other, more open, institutions of the legal system, such as the law faculties. Even the Ministry of Justice seemed to contain more reformist elements than the courts.

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[5] Given the strong centralizing force of the Vietnamese authorities, helping to create room for intellectual and experiential diversity is an important goal. Yet at the same time, no significant legal and judicial reform can take place without the engagement of the state, so direct work though the Ministry of Justice (in highly targeted areas) was also recommended.