Rethinking Justice Reform in Fragile and Conflict-Affected States

The Capacity of Development Agencies and Lessons from Liberia and Afghanistan

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> *In order to truly address the problems afflicting post-conflict countries, donors must not settle for superficial, humbug solutions. Instead, they must presume that a problem they are encountering here is unique and idiosyncratic, presume it is incredibly complex and nuanced, and presume it is nowhere close to monolithic and that the symptoms in one part of the country or in one part of the world must stem from entirely different pathologies than those working to create the same symptoms in another part. At a minimum, such presumptions will force donors to do the foundational diligence that is truly necessary to accomplish sustainable change.*
>
> — Christiana Tah, minister of justice, Liberia[1]

Introduction: Justice and Conflict[2]

There is broad and growing recognition across a range of development actors that fragile and conflict-affected states (FCSs) pose particular development challenges; indeed, they are a key development challenge of the coming decade. Home to approximately 1.5 billion people, FCSs contain many of the world's poorest and most vulnerable. People in FCSs are more than twice as likely to be undernourished as those in other developing countries, more than three times as likely to be unable to send their children to school, twice as likely to see their children die before the age of five, and more than twice as likely to lack clean water. No low-income FCS has yet achieved a single Millennium Development Goal.[3]

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1 From a presentation delivered by Christiana Tah to the World Bank's Law, Justice, and Development Week 2010 in Washington, DC. *See* Abdul Salam Azimi and Christiana Tah, J*ustice Development Programming in Fragile and Conflict-Affected Areas: Perspectives of Two Leaders in Justice Administration,* 15 Justice and Development Working Paper Series 1, 12 (2011).

2 This chapter draws on Deval Desai & Caroline Sage, *Justice*, an Input Paper for the *World Development Report 2011* (Nov. 5, 2010), available at <http://wdr2011.worldbank.org/justice>, and presentations made by Minister of Justice Tah of Liberia, Chief Justice Azimi of Afghanistan, Michael Woolcock (World Bank), and Pablo de Greiff (International Center for Transitional Justice) at the World Bank's Law, Justice and Development Week, Washington, DC, November 2010.

3 World Bank, *World Development Report 2011: Conflict, Security and Development* 2–6 (World Bank 2011) ("WDR2011").

Multilateral development groups and organizations have highlighted FCSs in their recent strategies: the Organisation for Economic Co-operation and Development (OECD) Development Asisistance Committee (OECD-DAC) has convened the International Network on Conflict and Fragility (INCAF), which has developed a series of materials and guidance notes designed to improve involvement—or reduce the harm of "poorly-conceived involvement"—in these "most challenging [of] development situations." Such states "face severe development challenges such as lack of security, weak governance, limited administrative capacity, chronic humanitarian crises, persistent social tensions, violence or the legacy of civil war."[4] The United Nations Development Programme (UNDP),[5] the African Development Bank,[6] and the European Commission[7] have followed suit, seeking improved donor engagement in FCSs. Bilateral donors—including the British,[8] Dutch,[9] French,[10] and German governments[11]—have also taken clear positions on FCSs as a priority development challenge.

As development actors have directed their attention toward FCSs, there has been a concomitant burgeoning recognition of the importance of laws, norms, and justice institutions in meeting the particular challenges posed by such situations. The president of the World Bank, Robert Zoellick, has argued that "a fundamental prerequisite for sustainable development [in FCSs] is an effective rule of law," using this as a rallying cry for broader development engagement in justice reform in FCSs:

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4 OECD-INCAF, About the Fragile States Principles, available at <http://www.oecd.org/document/40/0,3746,en_21571361_42277499_42283112_1_1_1_1,00.html>. *See* also OECD-DAC, Principles for Good International Engagement in Fragile States and Situations (Apr. 2007), available at <http://www.oecd.org/dataoecd/61/45/38368714.pdf>.

5 Executive Board of the United Nations Development Programme and of the United Nations Population Fund, Role of UNDP in Crisis and Post-conflict Situations, UN Doc. DP/2001/4 (2000), available at <http://www.undp.org/execbrd/pdf/dp01-4.PDF>.

6 African Development Fund, Strategy for Enhanced Engagement in Fragile States (Jan. 2008), available at <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Policy-Documents/30736191-EN-STRATEGY-FOR-ENHANCED-ENGAGEMENT-IN-FRAGILES-STATES.PDF>.

7 European Commission, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Region, Towards an EU Response to Situations of Fragility: Engaging in Difficult Environments for Sustainable Development, Stability and Peace, SEC (2007) 1417, available at <http://ec.europa.eu/europeaid/what/education/documents/eu_communication_situations_of_fragility_en.pdf>.

8 Department for International Development, Building Peaceful States and Societies: A DFID Practice Paper (2010), available at <http://www.dfId.,gov.uk/Documents/publications1/governance/Building-peaceful-states-and-societies.pdf>.

9 Ministry of Foreign Affairs (Development Cooperation), Our Common Concern: Investing in Development in a Changing World (2007), available at <http://www.minbuza.nl/dsresource?objectid=buzabeheer:32207&type=pdf>.

10 France Coopération, Fragile States and Situations of Fragility: France's Policy Paper (2007), available at <http://www.diplomatie.gouv.fr/en/IMG/pdf/EtatsFragiles-2.pdf>.

11 Federal Ministry for Economic Cooperation and Development, Development-Oriented Transformation in Conditions of Fragile Statehood and Poor Government Performance (2007), available at <http://www.oecd.org/dataoecd/4/38/43480415.pdf>.

> A legal order is a safeguard against the serious risk of criminalisation of the state. Corruption adds to fragility and undermines legitimacy. Abuse of state power destroys confidence, and ultimately the state's core purpose. Building the rule of law is also vital to public safety—poorly trained and paid police usually add to fragility by arming and empowering predators. In much of Afghanistan, the greatest security fear for businesspeople is kidnapping, often by the police.[12]

Most recently, this entreaty was taken up by *World Development Report 2011: Conflict, Security and Development* (hereafter WDR "2011"),[13] which tackles the development challenges presented by FCSs. Building on the work of North, Wallis, and Weingast, and others,[14] the WDR 2011 highlights justice as one of three key areas (the others being security and jobs) on which donors should focus in order to build effective and sustainable transitions out of situations characterized by endemic conflict and fragility.[15]

However, while legal, regulatory, and justice institutions are now seen as an important part of the solution to problems of conflict, fragility, and development, this recognition is not matched by a correspondingly clear sense of what should be done, how it should be done, by whom, in what order, or how success may be determined. Nor is this a new problem. The effort to forge theories and operational models on the role of justice initiatives in laying a path out of fragility must build on the experiences of the constituent fields of conflict and development: the former, a field that has been the domain of those engaged in rule of law reform as a component of state building in countries emerging from conflict,[16] the latter the domain of actors concerned primarily with economic growth. Both fields have struggled with a similar conundrum: on the one hand, there is a broad North-South, left-right consensus that justice, or rule of law, is key to achieving their respective goals; and on the other hand, a recognition that surefire ways of achieving rule of law remain elusive.[17]

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12 Robert Zoellick, *Fragile States: Securing Development*, 50 Survival 67, 75–76 (2008).

13 *Supra* note 3.

14 *See* Douglass North, John Joseph Wallis, & Barry Weingast, *Violence and Social Orders* (Cambridge U. Press 2009). *See* also Douglass North, *Institutions, Institutional Change, and Economic Performance* 54 (Cambridge U. Press 1990) (claiming that the absence of a low-cost means of enforcing contracts is "the most important source of both historical stagnation and contemporary underdevelopment in the Third World"); Dani Rodrik, Arvind Subramanian, & Francesco Trebbi, *Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development*, 9 J. Econ. Growth 131 (2004).

15 *Supra* note 3.

16 *See* Kirsti Samuels, *Rule of Law Reform in Post-conflict Countries: Operational Initiatives and Lessons Learnt*, World Bank Social Development Papers: Conflict Prevention and Reconstruction No. 37, 4–6 (2006), available at <http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf> (arguing that, save multilateral assistance to post-Soviet transition countries, the majority of rule of law work in FCSs has been carried out by USAID and the United Nations Department of Peacekeeping Operations).

17 Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Carnegie Paper No. 34, 6–7 (2003). *See* also Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* 127–37 (Cambridge U. Press 2004); Rachel Kleinfeld, *Competing Definitions of the Rule of Law*,

This chapter contributes to the discourse of justice (or rule of law) reform in FCSs in the following way: while other critiques have focused on extremely important failings of planning, technique, and execution (such as inadequate donor coordination, a lack of readily available and appropriately skilled international personnel, and excessively curtailed time horizons),[18] this chapter seeks to *problematize the conceptual underpinnings of justice reform efforts*. This chapter begins by exploring the conceptual bases and corresponding operationalization of the two dominant paradigms of justice reform—that of rule of law linked to state building, and that of justice reform linked to economic growth. Using the examples of Liberia and Afghanistan, the chapter examines the shortcomings of these models. It explores a *lack of capacity*, not in the traditional sense of technical expertise on the part of actors in countries, but on the part of donors to understand those countries and contexts in which they are working and to support processes that lead to sustainable change. The chapter seeks not to lessen or discount the vital importance and legitimacy of national policymakers but to problematize donor action, arguing that failings in justice programs can often be traced to the predilection of development actors to treat challenges requiring fundamental changes in people's attitudes, perceptions, values, and behavior (as governance and legal reform invariably does) as variants on technical problems that focus on—in Minister Tah's words—"superficial, humbug solutions."[19]

The current convergence of the two fields—state building and development—may present an opportunity to rethink conceptual underpinnings of justice reform efforts at the nexus of conflict and development, leading to more successful operational approaches. The latter part of the chapter explores the dynamic that may ensue from a convergence of these two fields and offers ways to avoid mutual negative reinforcement of the two models that could result in "securitizing"[20] the approach of development actors, overemphasizing existential threats to development goals, and undermining broader considerations of the state-society compact on which the efficacy of any institutional reform effort ultimately turns.

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in *Promoting the Rule of Law Abroad: In Search of Knowledge* 31 (Thomas Carothers ed., Carnegie Endowment for International Peace 2006). *See,* generally, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Thomas Carothers ed., Carnegie Endowment for International Peace 2006); Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 World Bank Research Observer 117 (1999); Samuels, *supra* note 16; and Stephan Haggard, Andrew MacIntyre, & Lydia Tiede, *The Rule of Law and Economic Development*, 11 Annual Rev. Pol. Science 205 (2008).

18 Samuels, *supra* note 16; World Bank: Report on Headline Seminar, Rule of Law in Fragile and Conflict-Affected Situations (Jul. 21, 2009), available at <http://siteresources.worldbank.org/EXTLICUS/Resources/511777-1224016350914/5474500-1257528293370/Final_Report_H3-Rule_of_Law_July_21_09.pdf>.

19 Azimi & Teh, *supra* note 1. *See,* generally, Lant Pritchett & Michael Woolcock, *Solutions When the Solution Is the Problem: Arraying the Disarray in Development*, 32(2) World Development 191 (2004).

20 Ole Waever, *Securitization and Desecuritization*, in *On Security* 46 (Ronnie Lipschutz ed., Columbia U. Press 1995).

The (In)capacity of Concepts and Models

The elevation of the rule of law to the status of a sine qua non for peace and development has occurred on two tracks that, although parallel, have remained largely discrete. One track emerged in the 1990s as the United Nations experienced an unprecedented demand for peace interventions, from Haiti to the Balkans, El Salvador to East Timor. As mission mandates took on ever more ambitious tasks of civilian administration, the justice components of those mandates quickly grew from police reform to reform of all components of the criminal and civil justice system. The fundamental importance of the rule of law to the project of post-conflict state building was set out by the secretary-general of the United Nations in 2004, in a document that embodies the paradigm that this chapter calls the "state-building" model. The document sets out a definition of the rule of law that equates it with a political system with substantive content—a state that generates, promulgates, and is ruled by laws that fulfill certain technical *and normative* criteria:

> [The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[21]

The UNDP further defines the primary modality of the rule of law in its clear nexus with security and recurrence of conflict: "Conflicts may be caused by or result in the breakdown of law and order, or a collapse of state institutions. Preventive measures can be taken to help strengthen local capacity to prevent conflict occurring and to support the institutional structures that support dispute resolution and democratic governance. Strengthening the rule of law can be a critical tool for conflict prevention."[22] As a result, the UNDP takes a state-centric approach, placing national institutions at the center of its model: "the initial focus needs to be on building the capacity of national institutions and stakeholders to prevent and bring an end to violations, insecurity and impunity through their own capacity and resilience."[23] In this way, the rule of law, as a way of defining and constraining state power and of containing and managing disputes, is linked to the aims and ends of state building: the rule of law is intrinsically tied to the construction of a functioning state

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21 The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General, at 4, UN Doc. S/2004/616 (2004).

22 UNDP Bureau for Crisis Prevention and Recovery, The Rule of Law in Fragile and Post-conflict Situations 1 (2009), available at <http://www.undp.org/cpr/documents/jssr/rol_concept_note_july09.pdf>.

23 *Id.*, at 7.

and—through its ability to contain conflict—is part of the establishment of a monopoly over violence. Consequently, justice interventions in this paradigm focus primarily on strengthening the capacity of state law-and-order institutions while bringing substantive laws into compliance with international human rights standards.

The second dominant approach to rule of law reform began even earlier, with origins commonly attributed to the law and development movement of the 1960s and 1970s. This "economic development" paradigm seeks to enhance the quality of the legal underpinnings deemed necessary to support inclusive economic growth. Most commonly associated with the World Bank but broadly reflecting neoclassical economic orthodoxy, this approach stresses the importance to growth of legal concerns such as property rights, contract enforcement, and judicial predictability and efficiency. This paradigm is distinct from the state-building one in terms of nomenclature: it uses the term "justice" to encapsulate a range of issues that would likely fall under the rubric of "rule of law reform" when considered by state-building actors. Its approach is also substantively distinct. While the Bank has long shared the United Nations' "belief that reconstructing countries devastated by warfare [is] an international responsibility,"[24] it has consistently used a strictly economic—rather than political—lens to examine the role of law and justice. According to Eugene Meyer, the first head of the World Bank:

> Prosperity, like peace, must . . . be viewed as indivisible. And even from the narrowest considerations of self-interest, each of us must be concerned with the economic development of the world as a whole. For we shall prosper individually only as we prosper collectively.
>
> But there are even larger considerations than material welfare which dictate our recognition of the world's essential unity. Economic distress is a prime breeder of war; it makes for a desperation from which aggression seems the only avenue of escape. . . . We are engaged in the first large-scale, practical implementation of the United Nations spirit. . . . Our endeavor is a concrete test of the capacity of nations to work cooperatively toward the solution of a specific common problem.[25]

The economic development paradigm consequently focuses predominantly on the role and functioning of justice institutions, many of which enable market activity, and the locus of which is generally the nation-state

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24 World Bank, World Development Report 2011: Concept Note i (2010), available at <http://siteresources.worldbank.org/EXTWDR2011/Resources/6406082-1256239015781/WDR_2011_Concept_Note_0207.pdf>.

25 International Bank for Reconstruction and Development, First Annual Meeting of the Board of Governors: Proceedings and Related Documents 15–16 (World Bank 1946).

(given the mandate and history of the Bank and the fact that its members are states-parties).[26] Functioning legal frameworks and institutions may be seen as developmental goods in themselves, allowing people to uphold and exercise their rights.[27] More important, in this paradigm, they are also instrumental in realizing a range of other development goals: without justice, people cannot easily receive or access public goods and basic services, nor can they effectively access a range of markets.[28]

It is important to note that these two paradigms are, of course, stylized, and as such gloss over internal differences and pluralities among agencies and donors. There is both heuristic and narrative utility in boiling down the complex conceptual, political, and organizational underpinnings of these two broad approaches to justice reform as state building and economic development. Both the heuristic and narrative values can be seen in figure 1, which forms part of the Capstone Doctrine of the United Nations' Department for Peacekeeping Operations.[29] The Capstone Doctrine, which was devised by the UN Peacekeeping Best Practices Section, is an attempt to outline the fundamental principles and core objectives of peacekeeping in response to new challenges, as a revamp of the General Guidelines on UN Peacekeeping issued in 1995.[30] It thus forms both a useful analytical tool and a narrative around which to structure interventions, and clearly shows the division that actors have seen between state building and economic development.

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26 Alvaro Santos, *The World Bank's Uses of the "Rule of Law" Promise in Economic Development*, in *The New Law and Economic Development: A Critical Appraisal* 253 (David M. Trubek & Alvaro Santos ed., Cambridge U. Press 2006). *See,* generally, Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* 131–49 (Cambridge U. Press 2010). On the role of nonstate justice institutions, *see infra*; *see* also Varun Gauri, *How Do Local-Level Legal Institutions Promote Development?* World Bank Policy Research Working Paper 5108 (2009).

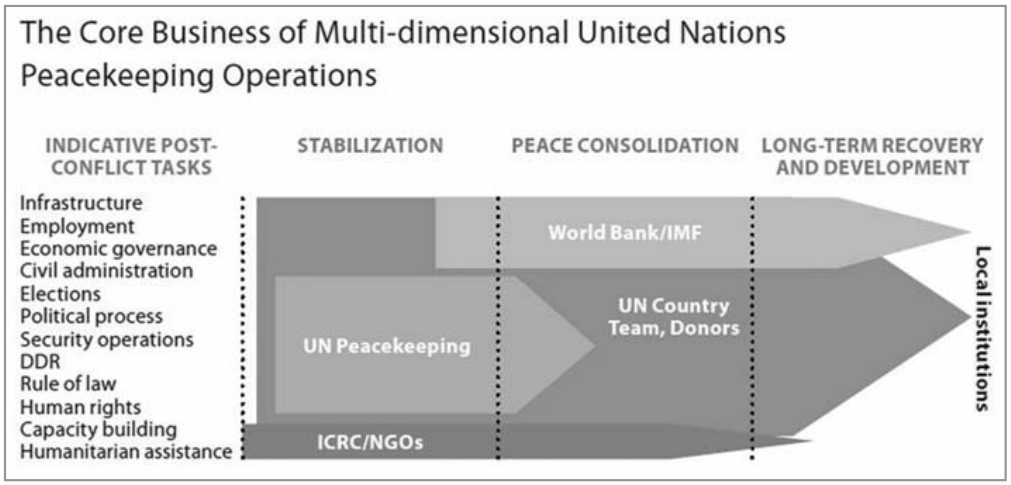
27 Amartya Sen, *What Is the Role of Legal and Judicial Reform in the Development Process?* 2 World Bank Legal Rev. 33 (2005).

28 *See,* generally, Amartya Sen, *Development as Freedom* (Oxford U. Press 2001); *see* also, on the importance of customary and formal law and norms to land market access, Klaus Deininger, *Land Policy Reforms*, in *Analyzing the Distributional Impact of Reforms: A Practitioners' Guide to Trade, Monetary and Exchange Rate Policy, Utility Provision, Agricultural Markets, Land, and Education* vol. 1, 213 (Aline Coudouel & Stefano Paternostro ed., World Bank 2005).

29 United Nations, Department for Peacekeeping Operations, *United Nations Peacekeeping Operations: Principles and Guidelines* (United Nations 2008) (hereafter "Capstone Doctrine").

30 Jean Marie-Guéhenno, Under-Secretary-General for Peacekeeping Operations, Remarks to the Fourth Committee of the General Assembly (Oct. 19, 2006), available at <http://www.un.org/en/peacekeeping/articles/article191006.html>.

Figure 1[31]



Models

While the paradigms highlighted here may differ in terms of stylized philosophical underpinnings, there are distinct similarities in the models[32] used to apply those underpinnings to real-world situations. This section examines four ways that these paradigms are translated into operational models that exhibit similar features and suffer from similar flaws: state-centrism, organizational isomorphism, short time frames, and linear trajectories of change. This analysis draws on two key arguments made by Pritchett and Woolcock[33] regarding conceptual failures of development practice. First, that the goal of much of development is "to ensure that the provision of key services . . . is assured by effective, rules based, meritocratic, and politically accountable public agencies—that is, something resembling Weberian bureaucracies."[34] Second, that the problems associated with realizing this objective are compounded by "skipping straight to Weber"; that is, an "attempt to remedy problems of 'inadequate services' by calling upon a centralized bureaucracy to supply a top-down and uniform public service," providing "a technical (supply) solution . . . implemented by an impersonal, rules driven, provider." In doing so, development actors give short shrift to a key link in the implementation chain, namely, those ongoing, face-to-face "interactions between citizens, the state, and providers" that

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31 *Supra* note 29, at 23.

32 We acknowledge those who would seek to limit the use of the word "model" and draw a keen distinction between it and "ideology." *See* Joel M. Ngugi, *The World Bank and the Ideology of Reform and Development in International Economic Development Discourse*, 14 Cardozo J. Intl. & Comp. L. 313, 319–23 (2007). We use the term in a much more general sense here, as an attempt to refer to organizing logics that might be ascribed to families of intervention.

33 Pritchett & Woolcock, *supra* note 19, at 191.

34 *Id.*, at 192.

necessarily entail deep contextual knowledge, adaptive strategies, and engagement beyond institutional forms.[35]

State-Centrism

As established above, state-building and economic development practitioners generally place state institutions at the center of their justice reform work in FCSs (although the expressions of this can differ, with the former placing a greater emphasis on the monopoly over violence[36] and the latter engaging with aspects of institutions that support economic development and service delivery).[37] In general, there is good reason to support the tradition of political philosophy and policy that holds that state-backed formal institutions are a desirable means to a range of development ends, including security, political participation, and economic growth.[38] However, an exclusive focus on state institutions as the appropriate form promoting capable legal and regulatory institutions may miss the mark. In many FCSs, these institutions are either decimated or captured by political, criminal, or other interests, and may be inaccessible owing to economic, political, geographic, or linguistic factors. State institutions in such contexts characteristically lack infrastructure or institutional capacity, and can be remote, unaffordable, delayed, and seen as unfair, incomprehensible, and/or a foreign imposition, thus effectively denying legal protection to ordinary people. In many countries, customary systems operating outside the state regime are often the dominant form of regulation and site of dispute resolution. For example, in Sierra Leone about 85 percent of the population is predominantly governed by customary law; with a population of approximately 5 million people, the country had an estimated 125 legally trained personnel in 2003, 95 percent of whom were based in the capital, Freetown.[39] According to the Liberian minister of justice, in the aftermath of the ravaging civil war,

> [l]egal institutions barely functioned as many of the well educated and well trained citizens in law enforcement and the law fled the country in the 1990s. The few who remained in the country tried to provide a semblance of law and order, but were often threatened into submission, leaving citizens very distrustful of the formal legal system. Corruption among judges and other public officials became more prevalent than in the past, due to the fact that civil servants regularly received meager salaries several months in arrears. Ultimately, the formal justice system virtually collapsed and, consequently, most citizens (educated and uneducated) resorted to the

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35 *Id.,* at 193.

36 UNDP, Evaluation of UNDP Assistance to Conflict-Affected Countries vii, 57 (2006), available at <http://www.undp.org/execbrd/pdf/f_EO_Conflict.pdf>.

37 *Supra* note 14.

38 *See,* generally, WDR 2011.

39 Paul James-Allen, *Accessing Justice in Rural Sierra Leone: A Civil Society Response*, Open Society Justice Initiatives: Legal Aid Reform and Access to Justice 57 (Feb. 2004).

> informal justice system as a viable alternative. In a few instances, vigilante justice or mob violence prevailed.[40]

The existence of plural legal orders is not just a question of access; they may also be hotly contested political arenas with deep implications for the allocation of power, mechanisms of social accountability, governance structures, and the ethnic and ideological identity of the state. In Afghanistan, for example, efforts by the Kabul government to expand its reach to areas traditionally governed by nonstate justice systems—*jirgas* and *shuras*—have historically been met with hostile resistance that threatened state legitimacy and control.[41] In Liberia, while "progressive" voices call for the elimination of customary justice systems as a means of remedying the historical legacy of discrimination, many citizen users of customary justice consider the idea of a single (formal) justice system for all Liberians to be a further unwanted imposition of a Monrovia-based elite.[42] In such situations, external interventions that focus exclusively on state institutions are seen as—and indeed are—political choices with considerable consequences.

In recent years, the state-building approach has moved discursively to embrace the importance of nonstate justice systems.[43] The nature of this rhetorical engagement is, in its weaker form, disconnected; that is, nonstate justice systems are a "thing" to be engaged with, with strategies of engagement remaining ad hoc. In its stronger form, engagement is still underpinned by state-centrism; nonstate institutions are to be harmonized or embedded organizationally (through laws and structural reforms) and normatively (through the transmission and enforcement of human rights norms) into the state system.[44] Justice actors therefore focus on "entry points" for the transformation of such systems along a state-centric model.[45]

This trend has been mirrored in the literature on economic development. Recognition of the importance of nonstate systems has been rhetorical (e.g., accounting for them discursively as "alternative dispute resolution" alongside

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40 Azimi & Tah, *supra* note 1, at 8–9.

41 Thomas Barfield, Neamat Nojumi, & J. Alexander Thier, *The Clash of Two Goods: State and Non-state Dispute Resolution in Afghanistan*, in *Customary Justice and the Rule of Law in War-Torn Societies* (Deborah H. Isser ed., USIP Press, forthcoming 2011).

42 Deborah H. Isser, Stephen C. Lubkemann, & Saah N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, USIP Peaceworks No. 63 (Nov. 2009).

43 *See* Strengthening and Coordinating United Nations Rule of Law Activities: Report of the Secretary-General, at 11, UN Doc. A/63/226 (2008). *See,* generally, Ewa Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (UNDP Oslo Governance Centre 2006).

44 Deborah H. Isser, *The Problem with Problematizing Legal Pluralism*, in *Legal Pluralism and the Future of Development: Dialogues for Success* (Caroline Sage, Brian Tamanaha, & Michael Woolcock ed., Cambridge U. Press, forthcoming 2012).

45 Wojkowska, *supra* note 43.

other nonstate systems such as commercial arbitration).[46] In its more muscular state-centric form, the literature has pressed for harmonization and formalization as a means of providing economic goods: Hernando de Soto's call for the formalization of customary land rights as a means to develop an asset base for the poor can be seen in this light.[47]

Unless the conceptual underpinnings of both justice paradigms shift away from state institutions as the answer, these trends will run into the same problems as their orthodox antecedents: an overemphasis on particular *forms* rather than on the actual *functions* they are meant to perform. Rather than starting with predetermined notions of the "right" institutional formulation, an alternative conception of an array of justice institutions starts with an analysis of the prevailing justice needs of citizens; the ways in which the various institutions mediate power, rights, and accountability; and the process through which such institutions can be made to deliver justice more fairly and effectively. As Minister Tah puts it, assume that every situation is "unique and idiosyncratic," "incredibly complex and nuanced."[48]

Organizational Isomorphism

The second key feature underpinning both paradigms is the presumption that inputs, incentives, and information deemed successful by experts in one context will work in the same way elsewhere; or, put differently, that a particular organization's functionality (what it does) is a product of its design (what it looks like), thereby justifying the transplanting of best practices (e.g., a given country's constitution or commercial code) from one context to another. This phenomenon follows closely from the first feature: the assumption of state-centrism is itself a form of isomorphism. Isomorphism further encompasses the limited engagement with social context on the part of donors and derives from stylized views of the relationship between individual and society. An alternative approach is rooted in the notion that institutions are instead *intersubjectively constructed*; that is, communities build shared understandings through social interaction of what an institution is, what it does, and how it should be assessed and (where necessary) improved.[49] For example, in the context of Liberia, legalized notions of human rights—such as the right to a fair trial—while important, may not "automatically assuage the concerns and

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46 *See,* for example, International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-state Law* 3–5 (ICHRP 2009).

47 Hernando de Soto, *The Mystery of Capital*: *Why Capitalism Triumphs in the West and Fails Everywhere Else* (Basic Books 2000). *See* also Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* vol. 1 (CLEP & UNDP 2008).

48 Azimi & Tah, *supra* note 1, at 12..

49 *See* Varun Gauri, Michael Woolcock, & Deval Desai, *Intersubjective Meaning and Collective Action in "Fragile" Societies: Theory, Evidence, and Policy Implications*, Policy Research Working Paper No. 5707, World Bank (2011).

distrust of a public that for so long has been alienated from the formal justice system" and that is looking for the meting out of justice.[50]

In FCSs, such isomorphism may render reform ineffectual; it may also lead to *increased* conflict. In Liberia, insistence on the best practice of prohibiting customary courts from handling serious crime has—in the absence of both sufficient capacity and a shared sense of what constitutes justice—led to impunity and mob justice, and has undermined the legitimacy of the fledgling democratic state.[51] To take land and justice as an example, there is a broad[52] (albeit nuanced and critiqued)[53] literature on the value of formalizing land rights that is rooted in concepts of legal certainty and access to justice. However, competing claims can be extremely difficult to regulate owing to the plurality of ways by which people conceive of land and land rights—for example, on a spectrum between communal and individual goods (indeed, for some disputants, it may be inconceivable that land be considered a good amenable to exchange). In a study regarding land privatization in Mongolia, a Mongolian pastoralist being interviewed regarding a murder in a fight over a campsite reflected: "This land ownership is the worst possible thing for livestock husbandry. Cropland can be privatized and protected, OK. Livestock husbandry must certainly not be settled. The climatic conditions are extremely difficult and changeable here. Therefore, pasture must be shared among herders and used in common . . . it must be left as it is and has been for hundreds of years."[54]

Short Time Frames

A related issue, stemming from the above point, is that reform is expected to take place within highly unrealistic time frames—three to five years being the limit of an electoral cycle and/or the (maximum) time a task manager may oversee a given project before moving on.[55] Imperatives to support projects meeting predetermined targets (such as the Millennium Development Goals) and to prioritize for support those projects that demonstrably work can mean

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50 Azimi & Tah, *supra* note 1, at 9.

51 Isser, Lubkemann, & N'Tow, *supra* note 42.

52 *See* de Soto, *supra* note 47; Sebastian Galiani & Ernesto Schargrodsky, *Property Rights for the Poor: Effects of Land Titling*, Ronald Coase Institute Working Paper No. 7 (2009); Timothy Besley, *Property Rights and Investment Incentives: Theory and Evidence from Ghana*, 103 J. Pol. Econ. 903 (1995).

53 Deininger, *supra* note 28; Antara Haldar & Joseph Stiglitz, *The Dialectics of Law and Development: Analyzing Formality and Informality*, paper prepared for the Initiative for Policy Dialogue's China Task Force (2008), available at <http://policydialogue.org/files/events/Haldar_Stiglitz_dialectics_law_dev_1.pdf>; Klaus Deininger & Hans Biswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14 World Bank Research Observer 247 (1999).

54 Maria Fernandez-Gimenez & Batjav Batbuyan, *Law and Disorder: Local Implementation of Mongolia's Land Law*, 35 Dev. and Change 141, 154–5 (2004).

55 Lant Pritchett, Michael Woolcock, & Matt Andrews, *Capability Traps? The Mechanisms of Persistent Implementation Failure*, Center for Global Development Working Paper No. 234 (2010).

rule of law projects face unwarranted expectations and, when they fail to meet them, suffer doubly when rival initiatives are lauded. As the WDR 2011 notes, attaining a one-standard deviation improvement in the rule of law (as measured by the World Bank's governance indicators) takes an average of 41 years in the 20 *fastest reforming* developing countries, let alone FCSs (where, in effect, the timescale for improvement is infinite, since their recent trajectory is inexorably downward). Such time frames are a daunting challenge not only to FCSs but also to donors and international agencies; embarking on crucial reforms whose realization, by their very nature, is likely to span multiple generations (let alone careers and budget cycles) suggests the need for an entirely different response framework.

Linear Trajectories of Change

A fourth problem, which characterizes the assessment of development projects more generally, is that change is presumed to take place along a linear trajectory, enabling relatively quick judgments to be made about project efficacy now and into the future.[56] In terms of political and legal reform, institutions change along trajectories that are likely to be anything but linear[57]—a more realistic view would characterize such change processes as "step-functions" (or "punctuated equilibriums": long periods of stasis followed by abrupt transformation) or "J-curves" (wherein things get worse before they get better). If this is so, it makes evaluating institutional reform efforts highly problematic: without knowing where a given project lies in its trajectory, it is highly likely that a false diagnosis (i.e., inaccurately declaring failure or success) will be rendered. In a world where time frames are short, patience is thin, uncertainty is high, and trajectories are unknown (or even unknowable), however, institutional reform projects that can *claim* to deliver clear and predictable results in a short time will be highly favored, privileging the familiar tropes of best practice. Care must be taken to shift the incentives for "superficial, humbug solutions" that reinforce cycles of bad projects in favor of engaging with complexity and basing projects on "foundational diligence."[58]

The cumulative upshot of these similarities is that both the state-building and the economic development approaches miss the interconnectedness of institutions and the social networks in which they are embedded. As a result, donor help is lopsided.[59] Fragile governments are called on to make complex and difficult trade-offs within unrealistic time frames, generating in the process outcomes that are less than satisfactory and that, through failing *in this*

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56 Michael Woolcock, *Toward a Plurality of Methods in Project Evaluation: A Contextualized Approach to Understanding Impact Trajectories and Efficacy*, 1 J. Dev. Eff. 1 (2009).

57 Michael Woolcock, Simon Szreter, &Vijayendra Rao, *How and Why Does History Matter for Development Policy?* 47 J. Dev. Studs. 70 (2011).

58 Azimi & Tah, *supra* note 1.

59 *Id.*, at 12.

way, delegitimize the very idea of reform, erode the likelihood that pro-reform coalitions will be sustained over time, and stifle long-run organizational innovation and indigenous learning, thereby undermining the very possibility of more effective reform in this domain.

Ideas for Experimentation

Thus far, this chapter has sketched out the dynamics of the gradual convergence of two distinct and powerful paradigms for development interventions—state building and economic development—that both reinforce and undermine the best and worst in each other. This convergence is new and unusual: in Kennedy's[60] and Kennedy's[61] genealogies of development, paradigms or consensuses have tended to collapse under critique in particular "moments" rather than to converge and assimilate or mutate. How such convergence might affect the supranational and national spaces for justice reform is anybody's guess; however, it is safe to assume that, as others have said in the context of the convergence of paradigms in education, it will result in "nontrivial changes in the structure, culture and organization"[62] of such reform in FCSs.

It might thus be possible to sketch out the following dynamic between evolving concepts in rule of law/justice reform in FCSs: there is a move by development actors to engage in space that has traditionally been the domain of those engaged in state building. This brings a development lens to the causes and consequences of conflict: for example, the need to resolve underlying disputes, such as those over land or labor, which might otherwise spill over into conflict.[63] This broadening has the potential to enrich justice reform in FCSs. However, development actors moving into this space are simultaneously engaging with those who take a state-building approach, which requires the ability to adopt a security lens, a lens that underscores the state monopoly over force. This can lead to initiatives that undermine local institutions that may be fundamental to containing the spread of violence and that focus on law, order, and the control of deviance, with less consideration of rights and entitlements—that is, "legitimate" grievances, and control and oversight over state power.[64] Broader questions of the state legal architecture—the nature of a rule of law state—and state/citizens relationships tend to be ignored.

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60 Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850–2000*, in *The New Law and Economic Development: A Critical Appraisal* 19 (David Trubek and Alvaro Santos ed., Cambridge U. Press 2006).

61 David Kennedy, *The "Rule of Law," Political Choices, and Development Common Sense*, in *The New Law and Economic Development: A Critical Appraisal* 95 (David Trubek and Alvaro Santos ed., Cambridge U. Press 2006).

62 Martin Carnoy & Diana Rhoten, *What Does Globalisation Mean for Educational Change? A Comparative Approach*, 46 Comp. Ed. Rev. 1, 7 (2002).

63 WDR 2011, at xvi.

64 Desai & Sage, *supra* note 2; and *supra* notes 18 and 19, and accompanying text.

The first moves in this conceptual and policy reorientation are being made. We are starting to see a discursive engagement with nonstate justice at the policy level in the WDR 2011,[65] at the analytic level through the work of the Justice for the Poor program,[66] and at the operational level (discussions currently taking place around the next phase of the Afghanistan Justice Sector Reform Project envisage building links between state and nonstate institutions).[67] More broadly, emerging research on societal fragility[68] attempts to shift the locus of fragility from the state to society. It remains to be seen, however, whether such concepts will receive the fulsome embrace of reconceptualization or the minor recognition of marginal fixes at the institutional and/or operational level.

In the coming few years, donors will have to adapt to a new and rapidly changing conceptual terrain. They will have to acquire the capacity to react to changing concepts and to engage with the realities in the field.[69] Given the recondite, evolving, and dynamic nature of justice reform in FCSs, any prescriptions for donor policy or action are likely to prove unhelpful. This brave new world, however, will undoubtedly open up spaces for experimentation,[70] and actors will explore what works in this new space. In this spirit, let us conduct an early exploration of what this emerging space might look like through some modest sketches and brief suggestions that might support effective experimentation to underpin future efforts in this field, doing so through the lenses of *analysis*, *operations*, and *policy.*

The WDR 2011 is an appropriate frame for such efforts. The key findings of the WDR 2011 as regards justice in FCSs respond to the four problems with models outlined above:

- Exclusion of significant portions of the population (be that on the basis of ethnicity, religion, geography, etc.) from political voice, access to services, and economic opportunity establishes the conditions for triggering and

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65 WDR 2011, at 155–6, 169, 260.

66 Sage, Tamanaha, & Woolcock, *supra* note 44. *See,* generally, Justice for the Poor website, at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTICE/EXTJUSFORPOOR/0,,menuPK:3282947~pagePK:149018~piPK:149093~theSitePK:3282787,00.html>.

67 As discussions are currently taking place, the nature of the project is in flux; this view represents that contained in World Bank, Afghanistan Justice Sector Reform Project: DRAFT Concept Note (2011) (copy on file with the authors).

68 World Bank, *Societal Dynamics and Fragility: Engaging Societies in Responding to Fragile Situations* (World Bank 2011).

69 We do not seek to diminish the importance of national policymakers to effective reform, and we stress that the arguments advanced in this chapter are inspired by the insights afforded to us by national policymakers from Afghanistan and Liberia.

70 We also appreciate the cautionary note in Aldous Huxley's eponymous novel, which painted a picture of a world organized to be the antithesis of local experimentation. Just as Huxley wrote of dystopian human homogeneity and highly stratified and rigid social structures and hierarchies, we, too, caution against the continued use by donors of presumptions of human homogeneity and of rigid human and social models: Aldous Huxley, *Brave New World* (HarperCollins 1998).

fueling conflict (requiring a response to state-centrism and organizational isomorphism).[71]

- Institutions, particularly nonstate institutions, that can mediate conflict and navigate and manage complex change are essential if societies are to emerge from cyclical conflict and endemic fragility (responding to *state-centrism* and, as a challenge to the idea of postconflict transitional moments, responding to short time frames).[72]
- The state-society compact needs to be broadened over time so that political settlements have broad-based legitimacy, which is a foundational requirement for a functioning rule of law (responding to short time frames).[73]
- Developing institutional capability and legitimacy is an inherently uneven (responding to linear trajectories of change) but endogenous process (responding to organizational isomorphism) that is generational in timescale (responding to short time frames).[74]

Implications for Analysis

Minister Tah provides clear guidance from the perspective of the daily realities faced by policymakers in the field. She highlights the importance of going beyond state-centrism and taking a holistic approach to available justice institutions in FCSs, outlining the tension between the expectations placed by the people on the government as a resolver of grievances[75] and the social fact that most citizens turn (at least initially) to nonstate institutions in their quest for justice.[76] She also stresses that what we have termed organizational isomorphism ("a cookie cutter approach")[77] remains inadequate: the particularities of FCSs—in the case of Liberia, a country where a "persistent traumatized population [routinely encounters] weakness in capacity-building programs due to lack of foundational preparedness of trainees and, most importantly, a disintegrated value system"[78]—suggests that there needs to be an enhanced appreciation of the importance of context as the foundation for effective engagement.

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71 *See*, for example, WDR 2011, at 6, 13, 18.

72 *See*, for example, WDR 2011, at 119, 156.

73 *See*, generally, WDR 2011, at 193–97 (arguing that international support—rooted in local context—can help broaden state-society compacts, creating a double compact between state and citizen, and state and international community).

74 WDR 2011, at 251.

75 "The public . . . expects all grievances, past and present, to be redressed by the government with immediacy and without regard to resource limitations." Azimi & Tah, *supra* note 1, at 9.

76 "A public that for so long has been alienated from the formal justice system." Azimi & Tah, *supra* note 1, at 9.

77 *Id*., at 12.

78 *Id*., at 10.

As a result, donors need broad-based analytical capacity to try to make sense of complex, often fractured settings—in other words, to enable "a diligent inquiry into the deep[-]rooted causes that will guide an innovative and unique perspective."[79] The implication of these words is to appreciate the importance of justice beyond the narrowly defined "justice sector" to engage with a range of sources and drivers of societal stress, to which development initiatives themselves can contribute.[80]

Such capacity will allow donors to put the state into context and to be sensitive to nonlinearity in the evolution of the justice sector in FCSs. For example, trade-offs need to be made, such as between "the immediate release of those held in violation of their constitutional right to a speedy trial" per the demands of human rights advocates, and "the general public demands that the accused individuals remain incarcerated indefinitely to ensure that public safety is not compromised."[81] This will help build donor capacity to navigate transitional steps out of fragility, with an appreciation of the value of interim institutions and processes.[82]

This involves bringing to bear a much more plural set of expertise, disciplines, and methodologies than is the current norm (which disproportionately bears the imprint of lawyers, political scientists, and economists).[83] The disciplines that inform these might include the following:

- History, particularly the history of the dynamics and legacies of conflict. Chief Justice Azimi of Afghanistan noted the difficult legacy of the capacity and capability of judges that postinvasion Afghanistan inherited.[84] Minister Tah commented on the flight of trained legal personnel during the civil war.[85]

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79 *Id*., at 12.

80 The WDR 2011 supports this view, seeing justice as, in part, a set of "institutions required to address underlying disputes that contribute to violence": WDR 2011, at xvi.

81 Azimi & Tah, *supra* note 1, at 9.

82 Desai & Sage, *supra* note 2, at 5–6.

83 Yves Dezalay & Bryant Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* 163–85, especially 163–76 (U. of Chicago Press 2002). *See,* generally, David Kennedy, *The Mystery of Global Governance*, 34 Ohio Northern U.L. Rev. 827 (2008).

84 "[W]ithin the judiciary over many years, all kinds of people were in office occupying the position of judge or court administrator. Most particularly, there were unqualified people and illegally appointed people. Personnel of the court system had been appointed during different political regimes, different governments, including the communist government, then the Mujahedeen government, then the Taliban government, then even after the Bonn Conference." Azimi & Tah, *supra* note 1, at 2.

85 "Legal institutions barely functioned as many of the well educated and well trained citizens in law enforcement and the law fled the country in the 1990s." Azimi & Tah, *supra* note 1, at 8.

- Psychology, noting Minister Tah's comments on psycho-social trauma[86] but also the ways in which perceptions of legitimacy, credibility, and effectiveness can vary among different actors, with serious consequences for the sustainability and efficacy of reform efforts.
- Sociology, to provide, for example, insights into the patterns of normative "disintegration" during periods of societal transition, the dynamics of conflict that accompany these transitions as power oscillates between different groups, and understandings of the conditions under which different aspects of people's identities become politically salient.[87]
- Anthropology, to generate, for example, a closer understanding of, and provide explanatory force for, the social role played by "trial by ordeal."[88]
- Communications (including drama and performance), especially between groups who have very different ways of making and interpreting knowledge claims (such as illiterate villagers and social scientists).[89]

Implications for Operations

Donor interventions in Liberia expect "the justice system to function today as any other justice system in the region and, in some instances, on international standards, without regard to cultural diversity, limited resources or consideration of the abyss from which the country has ascended."[90] If this situation is to change, donors must avoid organizational isomorphism and the presumption of linear trajectories of change, instead developing an understanding of the situation in which they are intervening before designing operations. For example, they need to be sensitive to long-run time horizons and the tradeoffs that need to be made in the short term in order that a state-society compact might be built in the long term. Minster Tah's call provides an important framework for donor experimentation.

Operations need to be highly sensitive to the context of the situations in which they intervene. This is not a new observation.[91] However, this chapter's

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86 "Security, rule of law, and the level of productivity in the country all depend on how well we address the psycho-social problems of the society and restore to the country the value system that was so badly damaged during the years of war." Azimi & Tah, *supra* note 1, at 10.

87 *See*, on the contribution of sociology to enriching legal understandings of norms and norm diffusion, Robert Ellickson, *Law and Economics Discovers Social Norms*, Yale Law School Faculty Scholarship Series Paper 407 (1998), available at <http://digitalcommons.law.yale.edu/fss_papers/407>. *See,* generally, on the importance of interdisciplinary approaches to studying and understanding social norms, Robert Axelrod, *An Evolutionary Approach to Norms*, 80 Am. Pol. Science Rev. 1095 (1986).

88 Azimi & Tah, *supra* note 1, at 10. On the potential role of ethnographic field research on this issue in Liberia, *see* Isser, Lubkemann, & N'Tow, *supra* note 42.

89 *Supra* notes 80 and 81.

90 Azimi & Tah, *supra* note 1, at 9.

91 *See,* for example, World Bank: Report on Headline Seminar, *supra* note 18; Rodrik, Subramanian, & Trebbi, *supra* note 14; Sage, Tamanaha, & Woolcock, *supra* note 44.

analysis of the two paradigms, coupled with Minister Tah's analysis, suggests three new ways to reconceptualize interventions:

- Levels of intervention: the limits of states in FCSs often (but not always[92]) coupled to settings of deep legal pluralism, imply that operations should be decentralized (including engagement with legal pluralism) rather than privileging state-centrism.
- Type of intervention: the nature of interventions designed to strengthen the operation of justice systems and institutions, especially at the local level, might be broadened in two ways. First, they might be targeted at specific issues underlying fragility at the social as well as the state level (e.g., to combat psycho-social trauma[93] among the Liberian population[94]). Second, they might be designed to shift social norms and expectations,[95] particularly through communication and education strategies[96] targeted at the public (e.g., "public education as to evidentiary standards"),[97] avoiding organizational isomorphism.
- Modality of intervention: given the contexts in which they occur, interventions need to have long time horizons[98] and modest aims, particularly because they need to be sensitive to policy trade-offs, avoiding short time frames and linear trajectories of change.

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92 The Kosovo context, for example, was one of a state that retained significant formal capacity in spite of the conflict: Alexandros Yannis, *The UN as Government in Kosovo*, 10 Glob. Governance 67 (2004).

93 *See,* for example, Cheryl de la Rey & Ingrid Owens, *Perceptions of Psychosocial Healing and the Truth and Reconciliation Commission in South Africa*, 4 Peace & Conflict: J. of Peace Psychology 257 (1998). *See* also, for a critical perspective, Laurel Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 Hum. Rights. Q. 573, 638–9 (2002), which concludes that "a comprehensive community-based approach that includes the opinions and ideas of those whose lives have been most directly affected is critical," but that "international interventions should be implemented in the context of an ecological understanding of social repair."

94 Azimi & Tah, *supra* note 1, at 10, 12.

95 This builds on the work by Martha Nussbaum, Arjun Appadurai, and others on adaptive expectations: *see,* for example, Martha Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge U. Press 2000); Arjun Appadurai, *The Capacity to Aspire: Culture and the Terms of Recognition*, in *Culture and Public Action* 59 (Vijayendra Rao & Michael Walton ed., World Bank 2004). *See* also Pablo de Greiff, Comments (World Bank's Law, Justice and Development Week, Nov. 2010) (on file with authors) (arguing that justice needs to engage with "adaptive preferences . . . the argument is that people who are under constant conditions of the prevision, in order to avoid constantly defeated expectations, adjust their preference forward, and that this has an impact on the way in which they participate in, among other things, economic activities").

96 *See,* for example, on community literature, theater, and radio, Milena Stefanova, Raewyn Porter, & Rod Nixon, *Leasing in Vanuatu: Findings and Community Dissemination on Epi Island*, 5(4) Justice for the Poor Briefing Note 1 (2010); Saumya Pant, Arvind Singhal, & Usha Bhasin, *Using Radio Drama to Entertain and Educate: India's Experience with the Production, Reception, and Transcreation of Dehleez*, 13 J. Dev. Comm. 52 (2002).

97 Azimi & Tah, *supra* note 1, at 9.

98 "[T]he transformation we so impatiently desire will occur over time." *Id*.

As a result, it might be useful to experiment with justice projects that seek to internalize norms in a particular social setting, that favor the provision of equitable spaces, or that support institutions engaging with a wide range of social fault-lines and fractures.[99]

Implications for Policy

Donors engaged in promoting justice in FCSs need to make context-sensitive policy. A first step in this direction could be to launch experimental programs that respond to the analytical and operational implications outlined in the preceding sections. Pilot programs and reports based on methodologies beyond the orthodox (historical analyses, for example) can provide an evidence base for effective, context-based policymaking that avoids state-centrism, organizational isomorphism, short time frames, and linear trajectories of change. For example, a donor might devise a strategy for engagement with nonstate systems, or might develop an holistic approach to avoid lopsided policy that supports one institution (such as the police) at the expense of the system as a whole.[100]

At the same time, however, donors need to ensure that counterparts in FCSs have the *capacity to engage* when determining policy and priorities. Afghanistan provides a cautionary tale. Chief Justice Azimi recounts that

> although the international community sought from us a list of our priorities, a plan for the future development of the judiciary and the priorities we wished to apply, we did not adequately express our needs. Up until only four years ago, we failed to specify what we needed, to set our priorities or to estimate the likely costs of those priorities. This led the international community to assume that everything was okay in the judiciary. Some simple donor-funded training programs were conducted from time to time, which seemed the best thing to be done; and donors were happy that these efforts were meeting our expectations.[101]

Donors thus need to rethink their engagement with the state, incorporating or reemphasizing building the state's policy expertise into their policy development practices.

Conclusion

The default assumption in most development work is that weak implementation systems are in large part a function of capacity constraints on the part of line ministries in recipient countries, and that as such performance can be best improved by engaging in various concrete activities—training sessions,

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99 *See* Daniel Adler, Caroline Sage, & Michael Woolcock, *Interim Institutions and the Development Process: Opening Spaces for Reform in Cambodia and Indonesia*, Brooks World Poverty Institute Working Paper No. 86 (Mar. 2009).

100 Azimi & Tah, *supra* note 1, at 12.

101 *Id.*

policy change, infrastructure provision, organizational reform—designed to strengthen the prevailing structures and upgrade the skills of the agents working within them. Moreover, in a world of development assistance in which skepticism is high, time horizons are short, and resources are stretched, high-uncertainty issues such as enhancing justice in fragile and conflict-affected states generate multiple pressures for donors to show some form of short-term accomplishment; all too often, these pressures are relieved by pointing to changes in institutional form (what institutions look like)—laws passed, courthouses built, reporting procedures altered—as opposed to function (what they actually do), and by justifying actions on the basis that experts elsewhere have deemed them a best practice. Some of this work has been successful, but the considered assessment of most rule of law reform efforts, whether undertaken in the name of state building or economic development, is that, at best, much remains to be learned.

So understood, capacity deficits are as much a problem for international agencies as for FCSs themselves, and improving the effectiveness of justice initiatives therefore requires revisiting the theories and corresponding practices that inform current approaches.

Justice reform is best understood as an adaptive rather than (primarily) technical problem, one that requires a sustained commitment to understanding the idiosyncrasies of the context(s) in order to more correctly identify binding constraint problems and possible solutions. With this in mind, donors should seek to improve their capacity to broaden the range of groups with whom they engage at the operational level, the methodological base on which key decisions are made, and their willingness and ability to engage with actors beyond the state—and the formal justice sector itself—in the larger task of enhancing the quality and accessibility of justice for all.