JUSTICE
SECURITY AND JUSTICE THEMATIC PAPER

Deval Desai
Junior Associate, Justice Reform
The World Bank

Caroline Sage
Senior Social Development Specialist
The World Bank

November 5, 2010

The findings, interpretations, and conclusions expressed in this paper are entirely those of the authors. They do not necessarily represent the views of the World Development Report 2011 team, the World Bank and its affiliated organizations, or those of the Executive Directors of the World Bank or the governments they represent.
Introduction

There is broad recognition – across the political spectrum and in both ‘northern’ and ‘southern’ countries – that justice reform, and more generally the promotion of the ‘rule of law’, are central to development policy, particularly in conflict-affected, fragile and violent contexts. More recently an increased focus on global security and the interaction between security and development as put a renewed emphasis on such efforts. However, while legal, regulatory and ‘justice’ institutions are now seen as key 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. There often tends to be a clear misunderstanding of both the nature of the problem and (thus) of the solution. In this paper, we seek to provide some insight into these questions and sketch out a practical conception of effective justice reform in situations of conflict and fragility that may provide the basis for effective programming.

The nature of ‘justice’ in a society has been the subject of substantial intellectual and practical debate, with a focus on norms and values such as fairness (Rawls 1999; Sen 2009; Sandel 2007; Sandel 2009), and on process and institutions that deliver judgment or affect choice (North 1990; Sage and Woolcock 2008). In the context of looking at practical development outcomes in situations of conflict, we do not seek to engage with broader definitional questions; rather, we proceed from the axiom that ‘justice’ and ‘law’ are intrinsically linked to ‘conflict’ as the vehicles in which everyday social contest is contained. Regulatory systems articulate the rules of the game, meaning that they provide norms and institutions, allowing agents to debate and make decisions on this basis.

Following on from this axiom, we begin this paper by arguing first that “law” and “justice” are of fundamental importance to thinking and practice around responses to fragility, conflict and violence, as these are elements that can serve to ameliorate and prevent (violent) conflict. We argue this in response to a growing tendency to blindspot the functional and normative role of legal and regulatory systems that has been exacerbated by the recent preoccupation with security (such a preoccupation is outlined in the framing paper to this cluster by Caroline Sage and Bernard Harborne) and the sequencing of law and justice in a statebuilding context. The security agenda has tended to focus on state monopoly over force and be underwritten by an ‘opportunity/greed’ understanding of the drivers of conflict. This can lead to initiatives that undermine (sometimes even criminalize) local institutions that may be fundamental to containing the spread of violence (Waever 1995; Taureck 2006), and that focus on law, order and the control of ‘deviance’, with less consideration of rights and entitlements- “legitimate” grievances, and control and oversight over state power. Broader questions of the state legal architecture- the nature of a ‘rule of law’ state- and state/citizens relationships tend to be ignored.
Hybridity

Most legal institutions are innately hybrid—both in terms of their sources of legitimacy and authority and in terms of the legal and regulatory frameworks that underpin them. For example, common law courts often apply and decide between competing norms and rules from equity, statute and common law, while some civil courts in places like Egypt recognize religious norms. Many courts also draw on international or regional laws and norms. For example, signatory states to the European Convention on Human Rights draw on the jurisprudence of the Convention’s court when dealing with human rights matters (Berman 2007). Similarly, courts not only get their legitimacy from their constitutional and statutory mandates, their independence, or their adherence to certain practice and procedures, but also depend on the social acceptability of their pronouncements.

The concept of hybridity is relevant to development programming in a number of distinct ways. First, understanding that hybridity inheres to legal institutions makes template reforms problematic—transposing institutional forms will not take into account the multiple sources of law and norms in the new site. Second, understanding hybridity requires an awareness of the multiple legal spaces that people navigate, and the multiple sources of regulation and of institutional legitimacy that may exist in a given context. Third, a sensitivity to hybridity is particularly useful in situations where the state is limited or absent (of relevance in many conflict-affected or fragile states) and/or in contexts where multiple legal systems with many sources of authority and law exist. Understanding that multiple regulatory systems can-and in fact always have been—incorporated into a given reform efforts enables reformers to develop strategies that move institutions in a direction deemed necessary for effective development, without necessarily undermining existing sources of social stability and coherence. Reform can thus proceed iteratively, building on a range of interim, contextually-embedded institutions that support trajectories away from fragility.

All of the examples given below deal with reform efforts that have involved some degree of intentionally hybridity, from the hybrid tribunals established to try war crimes to programs supporting women’s legal empowerment in Aceh. As such efforts—and such hybrid institutions—exist at many different levels, we examine a range of institutions from local to international. It is our contention that this notion of ‘intentional hybridity’ is a useful one when thinking about the nature of effective reform in this area.

In this paper we outline some of the more recent trends in justice reform in conflict affected environments. While there is clearly a need to challenge some of the more conventional thinking and practice in this area, we try as much as possible to draw out more ‘successful’, and innovative approaches that have emerged in a variety of contexts. In general, those policy initiatives that try to address some of the tensions and complexity outlined in the framing document (such as the central versus the local, form versus function, positive vs adaptive expectations, and so on), have better outcomes; technical reform programs that lack conceptual foundations and do not engage with local context—political, structural and social—are destined to encounter difficulties. As highlighted in the first box, most effective initiatives seem to incorporate some level of hybridity as a reform strategy. At the same time, outcomes are rarely ‘ideal’, neat or linear and in some cases challenge classic liberal sensibilities, including ideals of the ‘rule of law’. Thus ‘success’, as much as ‘law’, is always normative.
Problematizing the Rule of Law

The rule of law is not inherently a good thing. At its bare minimum, a system of governance may be considered a ‘rule of law’ system if it is based on laws that go through a required and established legislative process, apply to everybody and are enforced without discrimination (Trebilcock and Daniels 2008). Yet, such a system can permit oppression and the unjust use of power: at one extreme, apartheid South Africa passed laws that met formal requirements of ‘legality’ – that is, they met the minimum process standards (Chesterman 2008). Clearly there is nothing innately ‘just’ about law per se.

Definitions of the rule of law amongst practitioners vary, from ‘minimalist’ definitions such as the one set out above, to broader ones that are infused with particular norms such as human rights, equity or the primacy of individual agency. More substantive definitions have tended follow the liberal tradition which tends to privilege the rights and entitlements of individual actors- where justice is understood in terms of certainty of individual rights and equality before the law.

In fragile, conflict or post-conflict states, the assumption that the ‘rule of law’ is innately a good thing is reflected in many reform efforts. First, attempts to build a rule of law system that have attempted to ignore or sidestep the normative basis of law, have tended to focus on form rather than function; at one extreme reforms look to build an imagined (or idealized) set of institutions and practices rather than building or supporting institutions that perform certain functions or are aimed at achieving certain goals. At worst, this can lead to initiatives that support corrupt or captured institutions. At best it can lead to a focus on institutions that are completely disconnected from the general population and the local regulatory systems. For example, in Timor-Leste, donors sought to build capacity in the judiciary and courts and, more generally, ensure the state’s monopoly on coercive power. As donors and the state looked to reform all aspects of the formal legal system by importing judges and building or reforming courts, there was a disconnect between the state and the reality of the provision of justice on the ground by informal justice mechanisms (Grenfell 2009; Brown 2009). Such efforts also often overload a state administrative capacity to absorb and implement programs (Grindle 2004; Grindle 2007). In Haiti, for example, there were not enough legally-trained magistrates to apply the laws emanating from the center that were developed in conjunction with donors following endemic violence in the country (Benomar 2001).

Part 1 of this paper outlines the context of justice reform in fragile and conflict-affected countries, focusing on the example of Haiti. Part 2 discusses in general terms the challenges faced when promoting “capabilities” in justice systems to contain conflict. The paper goes on to explore the issue of capability-building in more detail, looking at processes in national spaces (part 3), local spaces (part 4), transnational spaces (part 5) and using the thematic examples of land and labor law to tie these spaces together (part 6). Part 7 looks at managing expectations on the parts of donors, states and citizens. Part 8 concludes and provides some concrete policy recommendations.
1: Justice Sector Reform in Conflict-Affected Countries

Promoting capable legal and regulatory institutions is a complex and difficult task at the best of times. In violent contexts these institutions are often either captured – and thus part of the problem – or completely decimated. Justice sector institutions are prone to corruption, particularly in contexts where crime and violence is strongly associated with political or economic motives. In his report on a mission conducted in Mexico in 2001, Dato’Param Cumaraswamy, the special UN rapporteur for the independence of judges and attorneys, estimated that corruption affects 50 to 70 percent of federal judges and noted that the Council of the Federal Judiciary has never punished a judge for corruption (Jensen and Heller 2003: 283).

In most conflict-affected countries, formal justice systems are generally inaccessible to the vast majority of the population owing to economic, political, geographic or linguistic factors. State institutions lack infrastructure or institutional capacity, are incomprehensible, remote, unaffordable, delayed and seen as unfair, thus effectively denying legal protection to ordinary people. In many countries, customary systems operating outside of the state regime are often the dominant form of regulation and dispute resolution. For example, in Sierra Leone about 85 percent of the population is predominantly governed by customary law; with a population of approximately five million people the country had an estimated 125 legally trained personnel in 2003, 95 percent of whom were based in the capital Freetown (James-Allen 2004).

Despite these contexts, reforms have tended to engage with the formal system, seeking to replicate imported (Western) legal forms and build institutional capacity with little regard to social and political context (Samuels 2006a). In some situations, engagement with the formal sector is a useful course of action. In Kosovo, for example, the physical and institutional infrastructure of justice, while in need of improvement, remained relatively intact, from courthouses to sitting judges. The UN Interim Administration, sensitive to its limited legitimacy amongst the local population, sought to build on existing capacity (which was complicated by uncertainty over the applicable law and disputes over the ethnic composition of the judiciary in certain areas) (EULEX 2010; UN Commission on Human Rights 2000; USAID 2010; Yannis 2004). By contrast, in East Timor, the UN Transitional Administration reformed the formal sector, appointing judges despite the lack of individuals with prior experience and training. It ignored the informal sector and did not engage with developing a cadre of future lawyers and judges. As a result, formal sector capacity remained extremely weak and in 2005 the government dismissed all of its judges for failing government capacity tests (Samuels 2006a; Chopra 2002; Grenfell 2009; Hohe 2003).

In general, reforms have: focused on central state institutions; sought to use template reform; been technocratic and divorced from local context; prioritized a security response; and blurred the line between intervention and support for national reform, with donors operating as an executive in lieu of the state. As a result, incapable or distorted states have developed, with legal frameworks that are inadequate to contain conflict. This is illustrated by efforts in Haiti.
**Haiti**

Since 1994, various UN-led and UN-backed forces have been based in Haiti in response to military coups and widespread crime and violence. The violence has a political dimension and is often between *chimères*, or gangs, that are linked to political and military leaders: military leaders took control of gangs to topple President Aristide in 2004 (Beidas *et al* 2007). Institutional capabilities at both the local and national levels to hold people to account for violence are lacking. Policing has been affected by a response from the international community that prioritized security issues. From 1996, five times as much money was spent on the Haitian National Police (HNP) as on the rest of the ‘justice’ sector combined (Beidas *et al* 2007). Some donor efforts focused on embedding policing in local contexts and building accountability through civilian oversight: Canadian-led programs attempted a ‘community policing’ approach, engaging with the community through school visits, sports activities, market day visits and participation on radio programs, while providing reports on police activities to the local authorities. However, control of the HNP program passed to the French *gendarmerie* in 1996, who adopted a crowd-control focused approach, while the US continued to accord funds to antinarcotics efforts rather than systemic programs (Beer 2004). It is notable, however, that the HNP reportedly enjoyed a public support rate of 70% in 1997 owing to the contrast between that institution and pre-UN security forces, although the accuracy of this figure is the subject of debate (Beidas *et al* 2007: 85, 109).

The problems faced by the police reforms were compounded by donor approaches to the other aspects of the justice system, which suffered from a combination of comparative neglect and lack of funding, and a focus on formal institutions which had extremely low capacity and legitimacy. The distortive effects of funding can be seen in pressure on the penal system: as of December 2006, 85% of all prisoners were being held on pre-trial detention (Bassu 2008; Benomar 2001). As regards a focus on formal institutions, the formal legal system has little influence over most Haitians given its limited capacity, legitimacy and physical reach. Judges and prosecutors are often unaware of laws, while business is predominantly conducted using French written procedures, which is incomprehensible to the majority of the population (Benomar 2001). More importantly, the judiciary struggles to operate in context of politically-motivated violence given their vulnerability to either violent threats or the payment of rents (Benomar 2001, Beidas *et al* 2007).

In local contexts, the vast majority of the population in Haiti lives in a social order dominated by a segmented social structure based on the family, which is the primary unit for dispute resolution. Justices of the peace have often experienced acceptance and have legitimacy in this context given their ability to adapt to local norms and practices, however they lack capacity (more than half of justices of the peace have no law degree) and in many cases these institutions have been overwhelmed (Bassu 2008). This, combined with the collapse of the state and state policing (despite the donor attention paid to it), has given rise to vigilante groups such as neighborhood *brigades de vigilance*, who maintain order through violence, such as vigilante killing and lynching (Beidas *et al* 2007).
2: Promoting ‘Capabilities’ in Justice Institutions

The examples above highlight the complexities of legal reform in fundamentally heterogeneous and complex situations of violence and social breakdown or collapse. They also underline the largely unsuccessful responses of the donor community. We have found that donors have failed to engage with the inherent complexity of legal reform in these contexts.

The cause of this complexity, and the starting point of our analysis, is the WDR’s insight into the changing nature of violence. The WDR moves from old models of conflict and post-conflict contexts, in which reform focused on stopping conflict between competing communities and then building legal institutions from the ground up (reflecting a model of short-term crisis management and long-term state-building: OECD 2010). It recognizes that this view sits in a broader context of pervasive violence that undermines development goals, from serious levels of urban crime in Mexico City to local level intra- or inter-group violence in the arid lands in Kenya to the serious levels of gender-based violence in nearly all conflict-affected areas around the world. In these situations, institutions have to be flexible enough to contain a range of violence and they may struggle to deal with every situation.

When examining ways to contain mutative violence, the WDR looks at ‘capabilities’ in a society. ‘Capabilities’ refer to the ability of societies to respond to a range of stresses in non-violent ways. Legal and regulatory institutions play a central role in the management of conflict in a given society; legal institutions define and enforce rights, and provide mechanisms and spaces for non-violent contestation. Actions in the constitutional, administrative and civil realm have an impact on, and are affected by, actions in other parts of a given regulatory system- some parts of which are discussed in other papers in this cluster. Capabilities consist in part of capacity (resources and technical knowledge) and in part of leadership, shared values and social cohesion. Thus the values and norms embodied in a legal framework and institutions are key and dictate whether such institutions are deemed legitimate, authoritative and ‘just’.

The inherently normative dimension of a legal ‘capabilities’ means that ‘justice’ aspects of reform cannot be limited to the short term or deferred until stabilization has occurred or statebuilding has begun (OECD 2008: 29) – norms, and thus law, must frame all aspects of programming. This represents a misapprehension that ‘justice’ is a tool, to be deployed and withdrawn, rather than a lens through which other tools are deployed in the aim of creating ‘just’ programming. This means effective programming will depend on the context of violence, the institutional framework and the level (international, national and local) in which the problem is set: for example, a strong state or an absent state, ethnic violence or urban gangs/organized crime. In order to highlight how the nature, context and geography of conflict shape the nature and effectiveness of certain policy initiatives we explore a range of examples in different conflicted-affected contexts. We offer no prescriptive answers, but rather highlight the considerations required for the development of strategic policy choices.
3: Defining the State: Processes of Constitutional Reform

At the national level, civil conflict, ethnic violence, or more structural violence – such as that perpetrated by a dictatorial regime – often reflects the collapse or lack of a system of meta-rules to manage ongoing disputes among a fractured polity, or alternatively the capturing of such a system so that competing claims are purely suppressed. Following situations of nationalized violence, national actors, supported by international counterparts, often turn to constitutional processes as a starting point for national (re)construction and a symbol of nationhood. Constitutions are used to institutionalize peace pacts (by structuring the state and delineating powers, rights and responsibilities), build a rule of law system – in particular providing legitimacy to processes of selecting and changing rules and rulers (Ndegwa, Eriksen and Woolcock 2009) – and provide the basis for ongoing state-building efforts; these goals may be in tension as the state develops. It is thus essential that a constitutional process speaks to local and national constituencies, conditions and concerns. It is also important for constitutions to be able to evolve as the state moves on from the peace pact (Samuels 2006b: 17).

While it is normal and common for countries to borrow ideas and structures from other countries, constitutions ultimately need to reflect local realities, political agreements and compromises. Constitutions- as all laws- need to be socially embedded, resulting out of a process that is deemed legitimate and is understood by the constituency. While some scholars have argued that conformity to international standards (such as human rights standards) is something “that national constitution-drafting in the era of globalization can afford to ignore altogether”, they acknowledge that this must be done so “in many different ways, reflecting national traditions, policy choices, and value judgments.” (Franck & Thiruvenkadom 2003: 516-7).

However, it is not uncommon for national governments, supported by donors, to adopt constitutions that take as their starting point an idealized form of liberal representative system. For example, in the Democratic Republic of Congo (DRC), donors actively supported the government to introduce a constitution that:

... ...embodies in great detail a highly representative system, separates power between the branches of the government and mandates a decentralised (sic.) political framework. The formal constitution stands in stark contrast to the way government works, founded as it is on a precarious political settlement composed of factions based around personalities. Applications of its principles in organic laws have met long delays in the legislature as a result. Donors have been very active in supporting efforts to roll out a legal architecture from the constitutional starting point, but it remains to be seen what impact this will have in the everyday management of conflict. (OECD 2010: 96)

In contrast, the Kenyan experience reflects the difficulties in reaching a united national vision that can then be enshrined in a constitution. The process for drafting a new Constitution for Kenya began in 2001 with the composition of a constitutional commission and conference, which canvassed public opinion and which drew representatives from political parties; districts; religious groups; trade unions; and
NGOs (Cottrell and Ghai 2004). Divisions arose around the central allocation of powers (particularly of the executive branch); regional devolution of power (particularly a proposed national land commission, which concerned pastoralist groups); the role of economic and social rights; and the incorporation of customary and religious law (particularly around recognition of Muslim *Kadhi* courts) (Chege 2008). This was overlaid on a process that was captured by strong political parties and which marginalized civil society groups. Membership of key committees was filled by members of the ruling party and legal challenges to the constitutional process were posed to delay its outcome (Cottrell and Ghai 2004). It is possible to connect the outbreak of electoral violence in 2008 with the lack of a constitution that could mediate between the claims of different ethnic groups in Kenya – “[the lack of] a democratic federalism capable of enforcing basic citizenship rights across the country while giving political space to competing provincial interests” (Chege 2008: 138).

Ethiopia provides an example of an innovative – albeit extremely contested – constitutional process aimed at dealing with a complex and divided polity fractured by a long history of ethnic division and a lengthy ethnic civil war against the Derg, a Socialist military dictatorship that promoted the idea of a unitary Ethiopian identity (Keller 2005: 92-3). The constitutional process was driven by the Ethiopian People's Revolutionary Democratic Front (EPRDF), a coalition of ethno-nationalists formed from key rebel groups during the civil war period and dominated by the Tigrayan ethnic group. The EPRDF limited the participation of “pan-Ethiopian” perspectives (including members of the former elite and urban intellectuals from Addis Ababa) (International Crisis Group 2009: 4) and who had to endorse any draft of the constitution before it could be put to a popularly-elected Constitutional Assembly.

As passed, the constitution enshrines a plurality of identities, deriving its authority from the ‘Nations, Nationalities and Peoples’ of Ethiopia, of which more than 80 are formally recognized (Habtu 2003). It guarantees them the right of secession, a subject of dispute during the constitutional ratification process but seen as essential by the EPRDF and its allies as a bulwark against any resurgence of pan-Ethiopianism (Vaughan 2003). It gives responsibility for constitutional interpretation, including the validity of claims to the right to secede, to the House of Federation, a chamber of the legislature. Members of the House of Federation are nominated (and can be removed) by state legislative councils to be representatives of a Nation, Nationality or People.

The constitution reflects the difficult tensions faced between managing local conflict or perspectives, and adopting an internationally-supported liberal state model. Given that ethnic identity was a driver of conflict against the Derg, ethnic federalism can be seen as having contained the potential for large-scale ethnic violence following independence (Selassie 2003: 82-4). It provided an institutional process enabling Eritrea to secede through a legal framework and by agreement with the Ethiopian government (Horowitz 1998). The House of Federations, which deviates from traditional notions of the separation of powers, can be seen as a politically-sensitive, non-technocratic arbiter of this politically-charged issue of identity, allowing for popular participation in constitutional discourse. Nevertheless, the constitution has been criticized as promoting division, undermining national unity and the principles underpinning a liberal state; thus the constitutional structure reflects a legacy of the exigencies of the peace pact and is unable to look forward to a ‘state-building’ context (Selassie 2003: 69).
At the same time, other critics are concerned that regional ethnic representation is being supplanted by nationally organized and structured party politics, dominated by the predominantly Tigrayan EPRDF (Herther-Spiro 2007). This concern is reflected in the current practice of members of the House being nominated by EPRDF-dominated state legislative councils, which may undermine the nature of the House as a safe space for ethnic politics. Others have gone further still, arguing that such one-party dominance is leading to renewed ethnic violence along with allegations of severe human rights abuses (International Crisis Group 2009). However, it is not clear whether further civil strife would have been avoided in the absence of such a controlling presence.

Thus far, owing to EPRDF dominance of political institutions, there has been a confluence of national and regional political will. However, this may change if, for example, a strong regional party emerges. It will certainly affect the power of constitutional norms and processes relating to ethnic identity, such as secession, as they may be suborned to Tigrayan national-level politics and denied or adapted through the House of Federations. Importantly, the Ethiopian constitution leaves space for political development in either direction, without the need for a Constitutional amendment. If there was a desire to realign the house with local polity, legislation could be passed by the House of Peoples’ Representatives to ensure members were elected directly by the Nation, Nationality or People and be required to eschew party membership. The possibility of engaging in a series of future transitions without requiring a change in the constitutional order increases the space for legitimate reform.

**Embracing the Local: Institutional Reform in Pluralistic Environments.**

While constitutional processes and a focus on state legal structures may be of fundamental importance when dealing with large-scale civil or ethnic strife, the preoccupation with (often idealized) state legal structures means that resilient local structures that serve to contain the levels or spread of violence are often overlooked. Clearly local level structures are also often overwhelmed by a range of stresses and by violent conflict itself; they can also be distorted and captured for abusive purposes. However, given they are still often more sensitive to local contexts and local norms, more legitimate, accountable to the community, and because they are often the only mechanism available to the management of conflict, they are an important focus for reform and support.

Reforms focusing on local non-state institutions tend to work in three ways. Some look at building on existing local capacity and mechanisms to provide more effective non-violent conflict resolution. In other cases there is an effort to establish ‘meta-rules’ by which conflicts between systems can be resolved. This provides a jurisdiction that is grounded in local contexts and normative systems, but that speaks across groups. A third policy focus is on the links between the state and local institutions, balancing the importance of state oversight of local norms and processes with the desire to avoid undermining the locally-embedded nature of these processes and thus their effectiveness at the local level. This approach is reflected in things like the constitutional recognition of customary law in many African and other constitutions to the establishment of system of ‘hybrid’ local courts which reflect both local norms and state principles of procedural fairness and oversight.
Given the locally embedded nature of such institutions, context and local knowledge are key. In Somalia, Xeer, a system of customary law, has been affected by the civil war and IDPs, which has brought outsiders into clan areas. Criminal acts have increased and elders often no longer know many of the individuals before them, affecting their ability to judge by consensus. In this context international support is being given to strengthen Xeer and build links to the formal system without harming its effectiveness as a dispute resolution mechanism (Gundel 2006). In Burundi, in the wake of the 2003 ceasefire that halted its civil war, the formal system was unable to deal with issues including impunity for crimes, judicial corruption, vigilantism, reconciliation, conflict over land and resources and the (re)settlement of IDPs. This led to inter-tribal conflict that the government and its international partners sought to solve using bashingantahe, or a system of ‘wise men’ (Dexter and Ntahombaye 2005). Such institutions are also key in range of regionally specific conflicts that have not necessarily captured the attention of the state or the international community. For example, the arid lands region of Northern Kenya has been marked by pervasive but low-lying conflict between communities and ethnicities. This has been driven by natural resources (including access to water), theft (especially cattle rustling) and political conflict. It has been exacerbated by the institutional context: at the local level there is a range of disparate community-based legal or normative systems, with different concepts of the use of natural resources and different methods of conflict resolution (Chopra 2008a: 8-10; Chopra 2008b: 8-13). The formal system, which is supposed to be the main vehicle for dispensing justice and maintaining law and order, is limited. Access is hampered by serious shortcomings: distance, high cost of travel and filing cases, inefficient and lengthy case processing, non-conducive work environments for magistrates, poor physical conditions of court houses, the lack of public defense lawyers, the lack of official legal aid and the lack of private lawyers (Chopra 2008a: 11-16). There is also a more fundamental issue of normative dissonance: there are substantive and substantial differences between norms of the formal system and local norms as regards what constitutes misconduct and who is responsible for a crime. While some acts are defined as criminal under the formal law (gambling, possession of firearms, brewing of alcoholic beverages), they are not necessarily perceived as a crime or source of conflict among the local communities, and the pursuit of such cases through the formal legal system compounds mistrust of official institutions that is caused by lack of access (Chopra 2008a: 12-20).

In order to find a solution to the lack of meta-rules between local systems, local women in North-Eastern Kenya came together to attempt inter-community peacebuilding and mediation, developing into a formalized ‘peace and development committee’. Local and international NGOs and donors fostered the establishment of more committees, integrating a broad range of local stakeholders and applying features of local systems. (Chopra 2008b: 14-22). The committees are hybrid, developed out of common denominators between different cultural systems. Different ethnic communities in one area meet and negotiate common terms for the resolution of frequently occurring types of conflicts, known as ‘declarations’ or ‘agreements.’ Their implementation involves executive authorities at the local, district and provincial levels in the arid lands, creating a quasi-legal regime. However, these declarations may conflict with the normative principles of the formal system, creating a contest (and the potential for more conflict) between the two. While national law supervenes, its application is contingent upon the reach of the judiciary and the ability to bring cases (Chopra 2008a: 30-37; Chopra 2008b: 23-28). Peace committees have proven to be effective interim solutions; however, as the WDR argues, donors must be
sensitive to the ways in which conflict and violence can shift and mutate from large to small scale and from inter-community to intra-community.

**Women’s Empowerment in Aceh**

While the context in Northern Kenya is of inter-community violence, gender empowerment programs in Aceh have had an intra-community focus. A history of violent conflict in the region has left many in the community with limited access to basic services, livelihoods and security; women are disproportionately affected by both violence and its aftermath. The range of non-state legal systems that do exist have tended to perpetuate a range of discrimination. Reforms in these contexts have focused on the relationship between informal systems and the formal system. They have a much stronger normative dimension than inter-community contexts: rather than relying on the contextual and normative embeddedness of local systems, donors place greater emphasis on changing the normative context of the local institution to stop violence against a marginalized sub-group. This is part of a broader discussion. In Peru, for example, rondas campesinas (informal night-watch patrols) tackle a range of crimes owing to the ineffectiveness of the police and judiciary in certain areas. They have meted out punishments for rape that have ranged from the payment of a small sum to the victim’s family to compensate for the loss of honor to public whippings of the perpetrator (Faundez 2003). This conflicts with donor norms regarding the treatment of women but also equal treatment before the law, both of which are part of the formal system.

The Acehnese context is distinct as local communities were distanced from the state during an extended civil conflict. Between 1990 and 2005, between 6000 and 14000 people were killed and around 100000 displaced (Ross 2005). Sexual violence and harassment was used as a tool to intimidate communities (Clarke and Samsidar 2008). This significantly weakened public access to and trust in formal legal institutions and broadened jurisdiction for both syariah, or religious, law, and adat, or customary, mechanisms. Women face constraints from a variety of legal and non-legal factors including cultural and religious norms, general development challenges faced by rural Acehnese communities and limited representation in decision-making bodies. Discussing legal issues directly is perceived as being sensitive and confrontational, implying that problems exist and challenging the predominant belief that ‘local problems’ should be ‘kept local’ (UNDP 2006).

The tsunami of 2004 and subsequent peace agreement opened a space for significant donor contributions in a province where international engagement had previously been restricted. Working through local civil society organizations, the World Bank’s Justice for the Poor program used this space for donor action to engage with violence against, and the marginalization of, women through legal awareness, engagement with local leaders and creating links to the formal system.

Various studies in Aceh have highlighted that a lack of legal awareness mean that women are less likely to access formal legal channels, placing added importance on local and adat (or customary) mechanisms as the first ‘port of call’ for dealing with legal issues. Programs have focused on challenging norms in these systems by working with groups with local legitimacy that are embedded into community structures, such as prayer and micro-finance groups. Programs have also challenged the norms of key
local actors in leadership structures and dispute resolution mechanisms. They are predominantly men who uphold norms that may conflict with women’s rights. Programs thus identified and built relations with local champions. In addition, respected outside government and religious leaders were engaged to work with local leaders and promote the importance of implementing adat based on constitutional principles and national law, building legitimacy through links to supervening state norms. Programs also sought to forge links with the formal system through dialogues between women’s groups and representatives from legal institutions. These demystified the institutions and slowly built legitimacy while sensitizing the representatives of the formal system to the issues facing women in their local contexts.

The success of these approaches can be seen from a post-program survey, which found that women participants had significantly higher levels of awareness of legal issues and were more than twice as likely to participate in village consultation processes. This has important spillover effects: where women already played an active role in village governance structures, such as meetings on health and development issues, these processes were progressively strengthened to encompass broader issues. Justice for the Poor’s experience in Aceh also highlights key challenges. First, there is the question of affecting macro-level policy change, particularly in situations of normative conflict. During the course of these programs, the Provincial Parliament passed a new Syariah law; this specific law has been portrayed as detrimental to women’s rights. A second, related issue is one of scale: programs working with rural women’s groups deal with specific, targeted villages. This raises the issue of the extent to which such programs can be scaled up to address the needs of communities more broadly, and the related issue of how to link these initiatives to the formal system, which operates in that broad space.

Building Links: Towards Transnational Actions

In violent contexts in which international norms have been transgressed and/or which involve transnational actors, and in which an absent or weak state is unable or unwilling to enforce those norms and hold those actors to account (by the standards of the international community), the international space provides a means for the containment of conflict and resolution of violence. Hybrid tribunals are an example of mechanisms used to enforce international norms and challenge impunity, while corporate social responsibility mechanisms provide opportunities for transnational actors to be held to account.

Hybrid Tribunals

While transitional justice issues are dealt with in another input paper in this cluster, we are concerned with hybrid tribunals insofar as they affect the broader operations of legal institutions in the state.

International/national hybrid tribunals have been established to deal with crimes arising from large-scale violence in East Timor, Kosovo, Sierra Leone, Cambodia and Bosnia and Herzegovina. These are predominantly crimes under international humanitarian law, and so represent mass, often inter-
community, violence at the national or regional level. They are usually based on an agreement between the national government and the UN, and while generally international in composition and outlook, they reflect differing priorities: the Timorese Panels were strongly UN driven; the Kosovar Panels resulted from the UN Mission in Kosovo (UNMIK)’s inability to establish a justice system that was satisfactory to Serbs and ethnic Albanians and that could deal with those awaiting trial for war crimes (Dickinson 2003); while the Special Court for Sierra Leone (SCSL) was the result of a treaty between the government of Sierra Leone and the UN (and is independent of both).

These tribunals reflect the tension between international priorities to try ‘war criminals’ under international law, and national priorities of holding people to account under national law. At the same time, they arguably derive legitimacy from their links with national or local actors and processes, and their basis in international law. Their link to national institutions means that they can contribute to long term capacity-building amongst local judges, legal actors and institutions through exposure to international judges and legal professionals; and properly constituted, they allow for the participation of non-dominant groups/losing groups in a civil war, thereby avoiding “victor’s justice” (Tolbert and Solomon 2006; Burke-White 2003).

The place, relative merits and relative drawbacks of hybrid tribunals can be seen when placed alongside other local and international processes to deal with war crimes. At the local level, gacaca courts in Rwanda (local, non-state mechanisms) have been used to try thousands of cases related to the genocide in order to provide some sort of resolution. However, these have been critiqued for failing to provide for procedural rights and minimum standards of fairness from the point of view of several donors (Mburu 2001; Gabisirege and Babalola 2001). At the international level, international ad hoc tribunals dealing with war crimes in Rwanda and Yugoslavia adopt international humanitarian law and concomitant procedural standards. They have struggled to cope with caseloads, connect to local citizens, be easily comprehensible to local dialects and idioms and forge links with local legal professionals and systems (Higonnet 2006). In general, hybrid tribunals have been praised for their ability successfully to bring prosecutions; however, a focus on such “big ticket” crimes can obscure a range of other low-level but pervasive harms and grievances, such as low-level corruption (Miller 2008).

In practice, the relative success of hybrid tribunals has depended on the ability of international interests to be sensitive to and accommodate national interests. The Timorese courts were criticized for a lack of ‘Timorisation’ and the use of Portuguese as their official language (Katzenstein 2003; Linton 2001), while the Kosovar panels were faulted for failing to engage with local judges and build local judicial capacity (OSCE 2002). The Sierra Leonean court was criticized for a lack of engagement with national courts but hailed as a success for its outreach programs, links with national and local media and its sensitivity to local languages and idiom in its process and dissemination of its materials (Human Rights Watch 2005). This allowed it to be sensitive to and influence the expectations of local population, and link their expectations to those of the international community.
Corporate Social Responsibility (CSR)

The effectiveness of legal and regulatory frameworks in areas of localized violence can be complicated by the presence of multinational corporations. As such situations tend to involve transnational actors interacting with local communities or citizens, it is important to build links to the local and international spaces to provide norms and frameworks in which conflict and tensions can peacefully be managed. We do not seek to suggest that national spaces or international standards be bypassed; rather, we use CSR instrumentally, to provide examples of (in)effective local-international dispute resolution is fragile or conflict-affected contexts.

Companies can bring investments, jobs and be a source of economic opportunity. However, they can also perpetrate violence, provide material or financial support to violent groups or act as a conflict-causing stress (for example by exploiting natural resources or polluting water) (Ratner 2001; Fairhead 2000: 154-159). The legal framework by which corporate activity in such contexts is regulated is composed of relevant law in the host state and in some circumstances by applicable law in the company’s home state (such as restrictions on trading with certain people, entities or organizations). An absent, weak or captured host state means that there is little or no formal regulation of corporate actions. At the national level there may thus be a gap in regulation of corporate activity and a lack of meta-rules to mediate between corporate and community conceptions of what is legally and normatively appropriate. The institutional framework of weak or absent host states thus struggles to contain corporate-community conflict and corporate exacerbation of pre-existing crime and violence (OECD 2006).

In the absence of national spaces for dispute resolution, a range of spaces of varying degrees of formalization have arisen at the local and international levels (Rees and Vermijs 2008). Some are bespoke to the particular context of a corporate-community engagement, such as a complaints mechanism for communities affected by operations of the Baku-Tbli-Ceylan oil pipeline. Others are purely internationalized, such as the process that sought to apply a unified set of human rights norms to the extraterritorial operations of all businesses (UN 2003b; Weissbrodt and Kruger 2003).

A third set of reforms seeks to provide some sort of mechanism in the home state to contain corporate-community conflict. States have mobilized a range of laws to provide extraterritorial regulation (such as bankruptcy or tax law) over their companies for a range of behaviors (Avi-Yonah 2003), including some that can lead to conflict: the US Foreign Corrupt Practices Act, for example, criminalizes bribery by corporations, or agents thereof, that have publicly-traded US securities. NGOs have successfully used the Alien Tort Claims Act, a piece of eighteenth-century American legislation that provides tortious remedies for breaches of customary international law, to sue American companies in American courts for aiding or abetting breaches of international human rights norms. While the number of cases is limited and no final judgment has been passed against a company under the statute, there have been several high profile settlements (Zerk 2006: 200-216). At the multilateral level, the OECD Guidelines for Multinational Enterprises provides a means for the examination of broader issues that often have a distributional impact, including labor issues. They are a legal commitment by OECD countries to ensure certain standards of behavior in the operations of their multinationals and are backed up by an
enforcement mechanism (a ‘National Contact Point’) that can field complaints about corporate behavior and issue reports. However, most NCPs are ineffective or unable to pressure corporations: for example, the US NCP lacks its own institution and is part of the Office of Investment Affairs (Desai and Zerial 2009). More broadly, the process bypasses states and does not require consultation with communities, with the OECD and companies as primary actors and NGOs and civil society bringing complaints. Both examples show the importance of well-organized and capable NGOs as representatives of communities in host state processes; in their absence, it is unlikely that communities will have access to this space and that corporate contributions to violence will abate.

A fourth set of reforms looks to link the international and local levels directly, seeking an internationalized solution to problems at a series of local levels. The Voluntary Principles on Security and Human Rights is a human rights-based code of conduct for companies looking to provide security for their operations, developed in response to corporate-community violence at natural resources sites, which generated substantial negative publicity for companies (Le Billon 2003: 267-71; Pauwels 2003). The space is used for dialogue between companies and NGOs, who are seen as representing an agglomeration of the interests of affected communities.

In situations of state weakness or absence, a range of hybrid processes appear to regulate corporate-community conflicts, using a range of geographic spaces from the home state to the local to the international. The most contextual are ones that link a particular community and company directly, such as the Baku-Tbilisi-Ceylan pipeline. Common to the other spaces – that is, the ones that engage with home states or the international - is the importance of NGOs or civil society. These mechanisms require them to pressure corporations through publicity campaigns to bring them to the table, and then adequately to represent the community’s interests in that mechanism. This has distinct normative implications: given the international character of the companies and the best-resourced NGOs, it increases the likelihood that an internationalized set of norms will form the basis for contestation in these mechanisms. If these norms prove too removed from the local context, or if adaptive expectations of communities are not raised to meet these norms, these mechanisms may struggle to contain corporate-community conflict (Rees 2008).

**Spaces for Coalitions: Land and Labor Law**

In looking at ways in which justice reform has operated in violence-affected contexts at the local, national and international levels, land and labor laws provide a useful analytic entry point. Both can drive or resolve conflict and are affected by violent outcomes. These legal contexts provide useful examples of the benefits and pitfalls of hybrid legal institution-building at various levels in inherently unstable contexts.

**Labor Law**

There are two key interfaces between endemic violence and labor law. First, labor issues can trigger violence, for example in Papua New Guinea, where Imbun (2006) argues mine workers in Porgera and
Bougainville resorted to violent strikes owing to a lack of alternative channels for dissent. Second, violence can lead to labor-related abuses such as exploitative working conditions (Ballentine 2003).

The examples below of mechanisms dealing with labor law issues in conflict, fragile and post-conflict settings have two key characteristics in common: first, they are hybrid, and second, they provide a safe space for coalitions of actors to form and act. These are important to labor law as consumer-driven accountability often goes beyond ‘hard law’ in ascribing fault for harm up and down the supply chain to the company selling the good (McBarnet 2009), requiring spaces with these characteristics.

Several mechanisms engaging with labor law at the local level have been driven by a combination of NGOs, academic institutions, donor countries and multinational corporations (Rees and Vermijs 2008). The Workers’ Rights Consortium (WRC), a coalition of companies, local NGOs and universities, has adopted codes of conduct for member manufacturing companies based on International Labor Organization (ILO) and UN standards. It was originally set up to assist universities with protecting the rights of workers producing apparel and other goods bearing university names and logos. It monitors working conditions and investigates grievances, working alongside trade unions and worker-allied NGOs and issuing reports but imposing no sanctions. The Fair Labor Association (FLA) built on initiatives under the Clinton Administration to provide a code of conduct for, and investigate grievances regarding, labor practices in the apparel industry’s supply chain. It operates globally, with a range of high-profile participating companies such as Adidas and Nike. Both the WRC and the FLA look to provide a channel for dispute resolution between labor, employers and companies further up the supply chain. Their grievance mechanisms do not engage the state (although they are sensitive to local labor laws), filling a void at the local level.

At the national level, the Cambodian Arbitration Council is an example of a grievance mechanism that has taken account of the state. Hotel staff in Cambodia who felt they were being mistreated by employers engaged in violent strikes and demonstrations. This took place in the context of broader poor labor conditions in Cambodia: a study of the textile industry at the time indicated wide-spread long hours, forced overtime, sub-minimum wages, health and safety violations and proscribed unions (Hall 2000; Kolben 2004). At the time, there was also international consumer pressure over labor conditions (leading to the closure of a Cambodian Nike factory) and negotiations over a Cambodia-US Trade Agreement in 1999.

Employees and employers in Cambodia thus sought a viable institutional setting that would provide a legitimate forum for their complaints. Available fora – judicial and administrative mechanisms – were seen as suffering from bias and weak institutional capacity. An ILO labor dispute resolution project provided assistance to the Ministry of Labor to consult with unions and employers and design an Arbitration Council. The Council’s decisions are non-binding unless parties elect otherwise, and arbitrators are nominated by the government, unions and employers. Within five years of its establishment, the Council had received 388 cases, with 68% being resolved successfully (Adler and Woolcock 2009).


**Land Law**

Land law and violence are linked in two distinct ways. First, disputes over land can drive conflict. Second, conflicts or violence can lead to insecurity of land rights or absolute dispossession of land. Two characteristics of land law exacerbate the severity of land-related violence: land is absolutely fundamental to livelihoods in many fragile, conflict-affected or post-conflict settings; it is also often the site of a key mismatch of value systems, as different understandings of land and its purpose come into conflict.

Given the high stakes, it is unsurprising that claims over land can be a source of conflict and violence. In fragile, conflict-affected or post-conflict contexts, land rights and their enforcement can be complicated by institutional weakness and mass displacement/return of individuals owing to conflict. Fundamentally, land remains a central concern for many polities in conflict-affected areas (McAuslan 1998: 527). Cousins (2002: 8) argues that conflict is the norm with respect to land, and that the main issue facing policymakers is containment of conflict in safe spaces. Land disputes can also be a trigger for or symbol of underlying tensions between individuals or groups: Claassens (2000: 254) argues that “the irrevocable nature of land transfer is an effective alarm clock for latent social tensions.”

However, given the WDR’s emphasis on sensitivity to the changing nature of violence, it is important to note that a substantial number of conflicts over land involve members of single households (Deininger 2005: 225). In Uganda, “Kigezi in the west and Mbale in the east, where the land scarcity is felt most intensely, have among the highest rates of land disputes, and the highest numbers of disputes are intra-familial involving women” (Tripp 2004). This has important implications for the types of land-related conflict, which may tend towards disputes relating to inheritance or family land (although this does not necessarily imply a link between these disputes and propensity to violence when compared with other types of dispute). It also increases the need to be sensitive to gender rights when examining land issues and violence.

Conflicts over land have severe development impacts owing to land’s role as a resource of fundamental importance in many economic and social systems. It is an important, immovable and almost indestructible economic asset (particularly as collateral); it acts as a social safety net; it can be a constitutive part of social identity; and it can be a key part of the ordering of society (particularly with regard to women), affecting the bargaining power of households and individuals (Deininger 2005).

This is compounded by the fact that in many areas, it is extremely difficult to regulate claims over land. An important cause of this difficulty is the plurality of ways by which people conceive of land and land rights, for example on a spectrum between communal and individual goods. Fernandez-Gimenez and Batbuyan (2004) study land privatization in Mongolia. When interviewing a Mongolian pastoralist regarding a murder in a fight over a campsite, he said:

“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 climactic 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."

Here, privatization and formalization, not its lack, was seen as creating problems owing to the particular economic and environmental conditions in parts of Mongolia (154-5).

On the other hand, there are occasions when policy-makers deal with these issues and thereby generate conflict: South Africa struggled with the concept of communal rights over land, as conflict arose over competing definitions of a ‘community’ (Cousins 2002). This leads to situations in which policy makers avoid dealing with these issues for fear of the potential for conflict: for example, the Ugandan government avoided creating a Land Board in the Buganda region for fear of reviving historical conflicts (Boone 2007).

It is important to look beyond a “customary/formal” divide when examining plural conceptions of land and understanding conflict risk. Customary systems can offer competing ways of looking at land, as can the formal system. Towards the end of the civil conflict in Nicaragua in 1990, insecurity arose over land issues in the context of the imminent repeal of the Sandinista Agrarian Reform (SAR). Jonakin (1996) argues that, along with the return of many former property owners whose lands had been confiscated under the SAR, instability was generated by competing legislation:

Attempts to consolidate the SAR beneficiaries’ tenure rights were made by Sandinista legislators shortly after the 1990 elections when, as “lame-ducks” in the two-month transition period, they passed legislation that granted so-called definitive property titles. Yet far from clarifying and legitimizing the rights to these lands, these efforts proved to be the opening salvo in a deluge of contradictory legislative statutes, presidential vetoes and juridical rulings which emerged early in the Chamorro government. (1185)

He goes on to argue that legal institutions worsened the situation: “a revanchist spirit intent on changing laws or using courts or force to reverse the SAR seemed only to worsen the uncertainty surrounding property rights” (1188).

Several authors have highlighted the merits of hybrid institutions to engage with competing conceptions of land. Daley and Hobley (2005: 5-6) suggest that hybrid institutions, with donor efforts targeted at the ‘meso’ level between local and state, can provide effective spaces to mediate between them. Deininger (2005) argues for engagement with customary systems based on the recognition of customary norms and the creation/codification of internal rules and mechanisms for conflict resolution. Cousins (2002), looks to codification, registration of customary and statutory land rights and reforming rules and procedures for land rights management (i.e. creating a system of meta-rules); however, he urges caution with regard to: the freezing effect codification may have on customary law; the risk that “custom” as a system of indirect state rule may serve interest groups; and the risk that entrenched dualism (what we might call “poor justice for the poor” and a lack of access to the economic benefits of statutorily-titled land) might generate future violent conflict.
Expectations

The WDR framework sees expectations as influencing conflict in two ways: first, public expectations about the legitimacy and capacity of the state will affect their attitudes regarding its authority: in other words, public expectations regarding their social contract(s). This will in turn impact the strategic worth of violence as a technique to acquire goods, services and resources. In the context of legal frameworks, expectations can be analyzed in a positivist manner – as part of the broader social context – or in a normative manner – as part of programs to shape adaptive preferences. Second, expectations of the international community on the state and communities/citizens will affect the nature and pace of reform; for legal frameworks, this means avoiding unobtainable institutional goals and managing these expectations to provide realistic guides to success.

Public expectations

The WDR argues that citizens expect the state (or other powerful institutions) to overturn injustices, protect and reward those who try to live within the law, and punish those who break it. Expectations are thus inherently normative, defining ‘injustice’ and appropriate rewards and punishments. This means successful reforms must be sensitive to varying and competing normative contexts.

Following genocide, occupation and civil war, Cambodia came under the aegis of a UN peacebuilding mission in 1992; international donors subsequently prioritized agendas of democratization, good governance and the rule of law. These have been translated in line with national interests owing to a lack of sensitivity on the part of donors to the context of the Cambodian patronage system (Bull 2008). At the national level, prime minister Hun Sen has co-opted these agendas to continue patronage governance, the primary modality of which is informal relations throughout society based on the support of a tightly knit network of extended family that is particularly strong in rural Cambodia. A central feature of this is a promise to protect the population from renewed past terror and increasing poverty in exchange for unconditional support. The fear of relinquishing customs that have only just been rebuilt after the Khmer Rouge outweighs people’s mistrust of the state. Social transformation, including anti-corruption and democratization agendas, thus represents a threat to established power and support structures at both the local and national levels, undermining its effectiveness (Chandler 2000; Ledgerwood 2001; Slocomb 2006; Hensengerth 2008). For example, following the government’s 2003 ‘Rectangular Strategy for Good Governance’, the prime minister detailed his policy of the ‘iron fist’, which allows him to combat corruption by removing corrupt judges and government officials from office. It has also allowed him to remove those civil servants who refuse to follow the government’s line (Danida 2005; EIC 2006).

Donors can also engage with people’s expectations through the lens of their own conceptions of ‘justice’, looking to alter the perceptions of those who have internalized and accepted mistreatment and helping to build the ‘capacity to aspire’ (Appadurai 2004; World Bank 2006). For example, in the Acehnese context, it is insufficient to understand the norms and values surrounding the role of women. Legal empowerment programs sought to change the expectations of women through education and
empowerment. The Rwandan context provides a contrast and a trade-off: *gacaca* courts were used to provide an effective form of justice and deal with thousands of cases that the formal system could not manage, despite concerns over procedural fairness. Seeking normative changes can act as a stress, but can also build capabilities. Donors can seek to engage marginalized groups around values - in this case, women’s rights and equity. Engagement may reduce the potential for conflict; however, it may also increase it, as individuals or groups feel “wronged” against newly-introduced norms (World Bank 2006).

Whichever normative framework is being used, it is clearly important for reformers to communicate that framework at the local and national levels and allow for feedback and contestation. The experience of the Special Court for Sierra Leone has shown that this system of feedback will allow for the management of public expectation while sensitizing the state and reformers to what is expected of them. The Special Court for Sierra Leone also shows the importance of a proactive approach to engaging communities in post-conflict contexts: as networks of communication may have been destroyed, programs such as the Special Court’s media outreach and capacity-building ones become key. Communication and participation increase the legitimacy of reforms and help validate the state’s participation in them.

**Donor expectations**

Donor expectations of the effectiveness of reform, or the ability of the state or people to engage in reform, can lead to pressure on a state to deliver results that are impossible, casting the state as a failure and leading to another round of reform. This can have a number of effects. It can effectively overload the state’s capacity. For example, in Timor-Leste, “the approach to date appears to have been one of trying to address every thing [sic] and all at the same time” (AusAID 2008: 6); in the policing sector alone, the following actors were pushing for different reforms in early 2009: the UN mission, UNPOL, UNDP, the ISF, the Australian Federal Police, New Zealand, Portugal, China, Norway, France and Japan (Funaki 2009).

Reform overload can be exacerbated by two interrelated factors. First, states may lack the “capacity to engage” (Pugh, Cooper and Goodhand 2004: 36) effectively with donors in order to shape policy and influence reform trajectories in a manner sensitive to domestic political economy; in other words, they may not have the technical and political capacity to speak effectively to donors or meet complex rules and procedures for donor aid. Second, there may be multiple, possibly conflicting demands on institutional capacity: for example, Bowles and Chopra (2008) argue that a lack of effective co-ordination undermined rule of law reform in East Timor. Donor expectations should not be treated as homogenous. The Haitian example shows the impact of conflicting donor expectations – Canadian ‘community policing’, French command-and-control policing and American antinarcotics operations, for example – that can raise goals in multiple sectors that the state fails to meet owing in part to donor incoherence. If this sparks further reform, it can lead to cycles of failure and a distorted system that is oversized in those areas in which failure is occurring. It is interesting to note, however, that Grenfell (2009) and Marriott (2009) argue that the presence of multiple donors with different mandates in Timor in fact allowed for flexible responses to a changing political situation: for example, in 2006 the World Bank called for the Timorese state to link customary law to formal law, while the UN called for formalization of traditional institutions in order to incorporate human rights norms (Grenfell 2009; Marriott 2009).
Donor expectations of an ‘imagined state’ can also set up a cycle of aid dependency and state deficit. In Malawi, the EU and DFID supported reform to reduce a backlog of homicide cases in the formal system following the introduction of jury trials. In 1999, they provided complete funding for the judiciary, police, lawyers, jury members, witnesses and doctors in these cases. By 2003, government funding for homicide trials had effectively ceased, with donors creating and funding a system that was unsustainable in the Malawian political context (Piron 2006).

Setting a high threshold for success is compounded by the difficulties of measuring success in justice sector reform, owing to its inherently complex, pluralistic and normative aspects (Messick 1999). This is particularly true in the context of evolving forms of violence: as this WDR posits, a range of violence, from large-scale inter-group conflict to low-level, granular violence can impede or undermine the realization of development objectives. Whereas traditional analyses of the effects of legal reforms on violence have focused on civil wars and large-scale conflict (see, for example, Lie, Binningsbø and Gates 2007), establishing clear empirical links between such reforms and the success or failure of stopping a range of violent outcomes poses a challenge that states may not be able to meet, even if reforms are anecdotally successful.

Implications and Recommendations

- **Contexts, norms and values**

Donors need to be sensitive to the contexts of the host area, particularly the contexts of violence and institutional frameworks. They must also be sensitive to national and local norms and values and the risks of normative dissonance before designing reforms. This must be balanced at the conceptual level with the norms and values important to the donor – for example, the risk of promoting ‘second-best’ justice. It must also be balanced at the practical level with the difficulty and resource-intensive nature of understanding plural normative systems and getting to the desired normative result.

By implication, this underscores the importance of effective and broad-based political economy studies that incorporate historical and social trajectories of fragility (Woolcock, Szreter and Rao 2009) on which effective justice programming can be based.

- **Sequencing**

*Justice as a lens, not part of a sequence*: ideas of ‘justice’ cannot be deferred to the medium term or kept in the short term, before or after “statebuilding” or “stabilization”. In order to avoid harmful path-dependencies, actions in the short term need to be understood in the context of the longer term justice aim (for example building the rule of law).

*Funding*: there should be sufficient funding for adequate legal frameworks and oversight mechanisms, particularly in relation to security and policing (for example in Haiti). It is also important to fund effective and functional institutions, including informal ones.
Measures of success: justice has no clear solutions and the effectiveness of programs is hard to measure. Choosing to move from one phase of reform to another will often be contingent on political context rather than on the quantifiably successful end of a phase of reform (for example, in the Ethiopian constitutional process).

Short-term confidence-building initiatives

This paper argues that justice reform in fragile, conflict or post-conflict countries is not primarily about sequencing or designing a overarching sector strategy, but are rather about a lens through which to view programming—basically a focus on function over form, and the normative, substantive basis of law. The building of justice institutions is a long-term process (UNDP et al 2009); however, states can enact or undertake shot-term confidence-building measures in post-conflict situations marked by broken state-citizen relations and weak or absent social contracts.

These measures are generally symbolic and increase confidence in the reform process, building citizen confidence in the government’s commitment and ability to uphold and enforce rules and to provide dispute resolution. Many of these come under transitional justice, dealt with in another paper in this cluster; however, some deal with civil and administrative law and institutions.

Reinstating basic access to justice institutions can be a quick and effective symbolic move. In immediate post-invasion southern Iraq, major provincial courthouses were looted and damaged. While full repair would take a long time, cleaning the courts allowed them to return to some form of functionality, providing a site for dispute resolution. Local low-level magistrate courts, which tended to be undamaged, were able to take on an overflow of cases in the interim (U.S. Army, 2009). In post-conflict Guatemala, language proved a barrier to access, with 24 local languages being widely spoken. USAID supported the construction of local ‘justice centers’, or sites for community dispute resolution; however, the emergency provision of short-term translators alongside the medium-term training of other translators provided immediate improvements in access to justice (Hendrix 1999).

Linked to access are issues of corruption and transparency. In the DRC, passing and implementing freedom of information legislation was suggested as a confidence-building program (Kodi 2007). Liberia has passed legislation mandating the creation of an anti-corruption commission (Republic of Liberia 2008), although Reno (2008) has argued that the effective design and functioning of the institution is still lacking. Reinstating land rights following a period of upheaval can be an important symbol with regard to the state’s ability to provide and uphold law and may also allow for quick and effective return of IDPs (Fan 2006). However, competing claims over land (coupled with a post-conflict scramble for access to land by people, commercial interests and the state) can overwhelm the slow process of formal land titling, which requires both legislation and an effective institutional mechanism to establish and rule on claims to title (International Council on Human Rights Policy 2006). Unruh (2004) argues for caution, as ineffective land re-titling can be a source of future violence; rather, short-term processes should look to understanding and building links to existing non-state systems of claims over land.
Hybridity

Given the absence/weakness of the state in many of these contexts, donors must face the challenge of providing effective justice while simultaneously building the state’s capacity to provide justice. As a first step, this requires building the state’s capacity to engage with donors to shape policy choices.

The policy choices that are eventually made may, in contexts such as in Kosovo, entail working almost exclusively with a strong and resilient formal sector. However, in most of the contexts studied in this paper, this challenge entails engaging with resilient local systems or effective international systems to develop hybrid institutions in multiple spaces and meta-rules to mediate between them. It also requires confronting issues of power and capacity asymmetries between participants to ensure equitable contests (Wanis St-John 2000; EarthRights International 2009).

It is essential to manage the relationship between these spaces, forging links without destroying resilience and effectiveness. Key actions need to be taken at a range of levels:

- **Grassroots level**: support downward accountability and empower weak and marginalized groups to demand better quality service from informal justice.
- **Mezzo level**: develop capacity and technical skills of local/non-state institutions and actors.
- **Beyond the village**: Enhance access to the formal justice system in order to open up options and enlarge the shadow of the law.
- **National and regional government policy change**: support upward accountability regarding interaction with the formal sector and principles for equitable and inclusive non-state justice that it is consistent with international or constitutional standards (Stephens 2009).
- **International level**: engage with civil society groups and national/local processes to contextualize international norms and processes and look for synergies that use international capacity to build local expertise.

Programming

What is clear is that more effective programming tends to share certain similar traits that are lacking in ineffective programming. Effective programs tend to grapple with the inevitable tensions that arise in such contexts, and thus tend to:

- focus more on problems and the institutional functions required to address them, rather than privileging (or transplanting) a specific institutional form;
- engage with justice on a plurality of levels and in a plurality of systems, balancing the desire to build a robust state with the need to engage with resilient and effective systems that may not be part of the state;
• recognize the inherently interim nature of law, and thus be seen as a stage in a longer evolving and dynamic process of emerging, multi-step trajectories out of fragility, rather than being based on ideal or ‘end state’ institutions;

• engage with key actors and gatekeepers at the local level, both as sources of local knowledge and context, and as essential parts of resilient local institutions;

• focus more on citizens’ perspectives, engaging with the adaptive nature of their expectations (Nussbaum 2000) and seeking to shape them normatively when appropriate;

• embrace a level of hybridity- drawing on different sources of knowledge, norms and legitimacy- in order to respond to the twin challenges of normative dissonance and a range of players and interests; and

• focus on the cross-sectoral nature of conflict management and rights based concerns.
References


Chopra, Tanja


Grindle, Merilee


North, Douglass (1990), Institutions, institutional change, and economic performance. Cambridge: Cambridge University Press.


OSCE (2002), Kosovo’s War Crimes Trials: A Review.


Samuels, Kirsti


Sandel, Michael


UN


Zerk, Jennifer (2006), Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law. Cambridge: CUP.