"Delivering Justice: Principles and Practice"

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A culture of justice

Let me begin with the story of Rosie. In September 2001, I visited a counselling centre for women victims of violence just outside Durban, South Africa. A new law to combat gender based violence had just been adopted. The centre was set up by the provincial government of Natal to help women submit their complaints to the police and get protection orders from local magistrates. The counsellor explained the process: simple, no hassle, low cost. Then she told me about Rosie, a poor, woman with five young children and no job or education, a victim of domestic violence. Her husband would get drunk and beat her up often. Then, one day he beat her so badly that she died. I asked the counsellor why hadn’t Rosie sought a protection order from the magistrate? What was wrong with the law? The counsellor replied: "There was nothing wrong with the law. Rosie just didn’t have the money for the bus fare to get to the Magistrate’s Court."

Rosie’s case shows how laws and institutions, even good, well-meaning ones, often fail to provide justice because they are disconnected from the lived experience of the poor. In a court of law the poor man or woman has no more rights than the rich. Equal protection of the law can sometimes create inequality because it is not concerned with the asymmetry of power, while poverty is about powerlessness.

If the rule of law is to have any meaning for the vast majority of the people in this world, it must seek to promote a culture of justice, not the kind of justice that we lawyers seek in courts but the kind that people instinctively recognize.

Justice is people-centered. Rule of law, on the other hand, is state-centered, having to do with institutions and governance, and the application of norms, procedures and regulations.

A culture of justice is about creating fair outcomes and an inclusive society, not just efficient legal and judicial systems. It is about fighting inequality, exclusion and marginalization.

One of the greatest economists of our time, Amartya Sen sets out a vision for such justice. In his book, *The Idea of Justice*, Sen rejects the "transcendental approach" to justice which concentrates primarily on getting the institutions right, irrespective of their actual consequences. He champions a comparative approach to justice - addressing the injustice we see around us rather than seeking to create a perfect state of justice - and on actual realizations of justice in societies, rather than on institutions and rules.

In the words of Sen:

"The question to ask is whether the demands of justice must be only about getting the institutions and rules right? Should we not also have to examine what does emerge in the society, the kinds of lives that people actually lead... justice cannot be indifferent to the lives of people."

He compares two concepts from ancient Sanskrit: *niti* and *nyaya*. Both denote "justice" in Sanskrit, yet have very different meanings. *Niti* is about following rules. *Nyaya*, on the other hand, is about a fair outcome.
Let me pick two recent court decisions to show you how these two approaches to justice - *niti* and *nyay*, procedural fairness or fair outcome - are both alive in modern jurisprudence and lead to very different outcomes for development.

Earlier this year the Supreme Court of El Salvador considered the request for an abortion by a woman whose life was endangered by her pregnancy and whose fetus at 26 weeks had been detected to be severely deformed. If born alive, the doctors said it would not survive for more than a few days. El Salvador's law forbids abortions. The Supreme Court ruled, 4:1, that El Salvador’s ban on abortion was absolute, and the woman could not have an abortion. That decision is a classic example of *niti*, a formal application of the rule with impeccable legal precision and respect for the principles of due process but without regard to the consequences.

Compare that to the decision of the Indian Supreme Court in March 2013 to reject the patent application by Novartis for its cancer drug, Gleevec, on the grounds that the company was merely "ever greening" an earlier drug, and that the Indian legislation and the TRIPS agreement allowed the social objectives of health care of people to be taken into account. Balancing corporate interests against public goals the judges acknowledged intellectual property but interpreted it in a manner consistent with the right to health. The overall result of this Court decision is that while the pharmaceutical industry's profits will be dented, millions of poor people in India will be able to access the drug they badly need. That, to my mind, is an example of *nyaya*, or a just outcome.

Should those who are too poor to buy essential medicines be put on the same footing as a large multi-national pharmaceutical company? Is the life of a pregnant woman equal to that of her unborn child? As Justice Albie Sachs so eloquently explained to us yesterday in his keynote address, the dilemmas of justice cannot be resolved without a commitment to human rights.

Human rights are constraints on state power (for instance, by prohibiting torture or restrictions on free speech), and they are enablers for state action (for instance, providing access to education or health care or housing). They are claims that the weak advance to hold the powerful account. They empower and confer dignity on the poor and marginalized.

Human rights were endorsed as the development paradigm of the UN system as far back as 2004. Unfortunately, a decade later, there remains considerable ambiguity among governments, scholars and practitioners as to where human rights fit in the context of development. For instance, the World Bank's Doing Business Index, which lists the performance of countries according to their state of governance and rule of law, makes little or no reference to human rights. There is much emphasis on transparent, accountable and fair laws and adjudication systems to encourage trade, investment and economic opportunity, very little on how laws and institutions can advance political, civil economic, social and cultural rights of people.

The post-2015 Development Agenda provides a unique opportunity for the international community to reaffirm the human rights based approach to development, and in so doing, put justice firmly at the core of law and development.

**Developing the justice sector**

The appreciation of a culture of justice - with human rights at its centre - is yet to take a strong hold in justice sector development programs which are largely focused on institution building.

Institution building has become a standard feature of rule of law assistance in post-conflict countries: from Afghanistan to Burundi, to the Central Africa Republic, Chad, Cote d’Ivoire, the DRC,
Guinea Bissau, Haiti, Iraq, Liberia, Sierra Leone, South Sudan, and I could go down the alphabetical list. That is not surprising given the important relationship between rule of law and peace-building.

Investing in legal and judicial systems are also a priority for many middle income countries or those aspiring in that direction because they provide a sound base for trade, investment and economic growth.

IDLO’s largest operation is in Afghanistan. We began more than a decade ago in 2003, rebuilding the legal archives destroyed by the Taliban. Over the years, and with the support of a number of donors and working in collaboration with the Afghan government and civil society actors, we have trained several thousand judges, prosecutors, investigating officers and lawyers, and strengthened the capacity of judicial and legal institutions. Today we are one of the largest providers of justice sector training in Afghanistan, with offices in 8 provinces and mobile training units covering other parts of the country. Our goal is to transition the capacity development activities to the Afghan government by 2015.

In South Sudan we are helping to build an entire new legal system, based on English common law. Earlier this year we completed the basic training of every single judge in the country. That is no mean feat.

In Kyrgyzstan, not only are we training judges but we are also helping to restore judicial independence and integrity through legislative reform, transparent appointment processes, ethics training and a modern computerised case management system.

In Kenya we are supporting the implementation of the new Constitution, including devolution. We worked with the judiciary on electoral dispute processes, which successfully handled the disputes following the recent elections - and in doing so, helped to avert the violence that had marred the previous election.

These are all important achievements. Strong well-functioning institutions are important for political stability and economic growth. But we in IDLO would be the first to acknowledge that they are only one step in the complex process of creating a culture of justice. As one academic described it, just as a rise in GDP is important for a country’s development but will not of itself eradicate poverty, so too reforming courts and training judges are important, but will not lead in themselves to a dramatic increase in justice, stability and security for ordinary people. Much more is needed to build a culture of justice. It is as much about cultural change as it is about institutional reform. It is a long-term endeavour.

Why is there not more effort to create a culture of justice? One key factor is that most rule of law assistance is focussed on quick, visible and measurable results, like legislative reform, judicial training, fixing court houses, and supplying computers. There is often no time or money or political will of donors or recipients to bring about the structural and organizational cultural changes that would make institutions more receptive and sensitive to poor people’s needs and demands for justice.

We look at performance: do institutions provide efficient services? We check out transparency, accountability and corruption. We ask about capacity and competency: are there enough judges, do they know the laws, is the budget enough, are they using the money efficiently? We track the volume of cases passing through the system; the speed of decision making and the kinds of decisions courts make.
What we need to ask more often is about the values and principles that should underpin institutions, the impact and outcomes they seek to achieve. What we should be doing more often is collecting information about who uses the justice system.

Most poor people do not use the laws or courts. They feel alienated from a system that does little to address their daily needs. Computerised case management strengthens the integrity of the judicial system and enhances the confidence of international business in the judiciary. It does nothing for the street vendor who has to bribe the police to let him set up his little stall. If anything the poor street vendor is more likely to be arrested for violating some municipal by-law.

In my view the best indicator that the rule of law is functioning is when the most marginalized members of society are able to access justice and get a remedy.

In Afghanistan, we run a program to develop prosecution units in the Attorney General’s offices for gender-based violence to put into effect the Elimination of Violence Against Women decree signed by President Karzai. Eight such units are now functioning in different parts of the country now. Alongside the prosecution units, we have helped to set up an Afghan-owned and operated non-governmental legal aid service, and several shelters for women, so that women who are compelled to leave their homes can get social support, legal advice and a remedy against violence. In the past year, some 2000 women sought help, some 700 complaints were registered, and several hundred cases prosecuted.

In May 2012 a story ran in the New York Times about Lal Bibi, an Afghan woman who was kidnapped and sexually assaulted by four men, including the local militia from her village. She had been given in baad, an Afghan custom under which a woman is handed over as restitution for a crime committed by a family member. Remarkably for Afghanistan, she and her family decided to speak out publicly and file a complaint against the perpetrators. Even more remarkably in November 2012, the court found the four men guilty of rape and sentenced them to 16 years of imprisonment.

The prosecutor handling Lal Bibi’s case had been trained under our program. We played no role in Lal Bibi’s case - the system kicked in and worked by itself. That is a key performance indicator. If the justice system works for women like Lal Bibi, then it is likely to work for also everyone else.

I am not naive. I realise that in a country where thousands of cases of gender violence are not even reported, a few prosecutions will not change women’s lives. Much more fundamental reforms are needed to make women safe. Unfortunately, the Afghan Parliament is not even willing to incorporate into law the Presidential decree on the Elimination of Violence Against Women.

Justice for whom?

That brings me to the issue of local ownership, voice and participation which we all know are essential to promote and sustain development. This can be very challenging in the sphere of legal and judicial reform.

Local voices are not always benign, nor in line with internationally accepted standards. In Afghanistan, there is strong opposition to women’s rights and women’s groups fear that whatever progress has been made over the past years could be set back if there is no pressure from abroad. In my own country, Bangladesh, there is huge popular support for war crimes trials that are judged by the international community to be flawed.

Getting local ownership of the justice agenda can be politically sensitive in post-conflict countries where different factions are vying for power. It can be deeply troubling in countries where there are
no democratically elected or genuinely representative bodies. If the government itself lacks political legitimacy, how can state institutions gain people’s confidence?

Voice takes on new meaning in such contexts and requires a sophisticated and careful understanding of who are the stakeholders and how to expand their participation. There needs to be both multiple stakeholder engagement and multiple entry points that bring in diverse range of voices and through diverse means.

Another challenge is engagement with informal justice systems. For most people in the world - the poor, women, people living in remote rural areas - customary, religious or informal rules and mechanisms are the most familiar, affordable and accessible way of resolving disputes or settling claims or seeking remedies. But these systems do not receive much international attention or assistance. They often do not match international standards or expectations. They tend to be flawed, biased against women and minorities, and captured by local elites.

Engagement with informal justice systems is not an easy proposition, but may be necessary because they are what most people turn to. It is only through sustained engagement and a proper understanding of the local context that these systems can be made to work fairly for everyone.

If we want to improve institutions, then we must empower people to demand accountability. As good economists know, stimulating demand is the best way to make the supply side work better. Creating demand for justice means investing in legal empowerment strategies, such as legal education, legal aid, paralegals, rights awareness, civil society organizations.

Legal empowerment has proven to be an important enabler of good development outcomes in many varied situations. One of IDLO’s most successful examples has been in the health sector. Working in collaboration with UNAIDS and UNDP, we have sought to strengthen legal services for people living with HIV and populations at risk. Affordable, accessible and quality legal services have allowed individuals and communities to fight discrimination and access HIV prevention and treatment services. Trained, sensitized lawyers and legal outreach workers have helped individuals living with HIV to resolve problems of child custody, inheritance, gender-based violence, and discrimination in housing and employment.

Unfortunately, market economics is sadly skewed in the justice sector. The demand side of justice is under-resourced, under-valued and often restricted. Many governments are wary of civil society and seek to stifle voice, participation and mobilization and challenge international support for local empowerment. Some donors are unwilling to challenge governments and find solace in the rhetoric of national ownership. Practitioners become pragmatic about delivering law and development, doing the best they can, here and there, in piece-meal fashion.

Future challenges

Globalization and global challenges are adding further complexity to the delivery of development in the justice sector, and the contribution of justice to the development sector. They raise particular concerns on voice, social contract and accountability - the three key enablers of development which the Law, Justice and Development Week is focusing on.

Take the expanding role of the private sector in developing countries. By their very nature multinational corporations operate across borders, making it difficult for any one country to regulate them, and especially problematic for countries with weak legal systems. Large companies are headquartered in one country, operate in multiple locations, raise capital in global markets and impact on the lives of millions of people in dozens of other countries. When their impact is damaging
or unfair, where can people go for a remedy? What does accountability mean when there is no extra-territorial legal responsibility of multinational enterprises? What does the right to participate mean when decisions that affect the lives and livelihoods of people in one part of the world are taken in boardrooms in countries thousands of miles away? Can there be a meaningful social contract when there is such asymmetry of power between the parties?

Or consider the advances of technology which create the opportunity to mobilize masses instantly through a twitter, but also the possibility for robots to kill with no human intervention or for shadowy entities to snoop with impunity on millions of people. Will the rule of law rise above national boundaries and national interests to ensure that the rights and well-being of the poor, marginalized and vulnerable populations are protected from the dangers and risks of rapidly advancing technologies? Or, on a more positive note, how can the rule of law help unleash the power of technology to create greater possibilities for voice, social contract and accountability so that development outcomes can be enhanced for all?

Or think of climate change which will hit hardest those who are the least culpable and the most marginalized. Even human rights, focused on the present, are ill-equipped to deal with the challenges of the future. Should we give more consideration to a paradigm of climate justice - advocated strongly by Mary Robinson, the former UN High Commissioner for Human Rights - so that our rights and those of future generations can be properly reconciled?

As practitioners in the field of law and development, we face numerous and enormous challenges in delivering justice, closing the gap between principle and practice. The legal landscape will in all likelihood get worse before it gets better. But I am optimistic because there are many on the frontlines of justice who are making a difference. Let me end, as I began, with the life story of such a woman.

She is from Kyrgyzstan. Some years ago, she was a student in the city, and while returning home to her village one day, a group of men accosted her outside her parent's house and tried to abduct her. She realized that she was about to become a victim of a custom in her part of the world called "bride stealing". She tried to save herself by clinging with all her strength to the trunk of a tree near the house, but then, to her horror, her mother came out of the house and, respecting the traditional ways, pulled her hands off the tree and handed her over to her kidnappers. The woman eventually escaped by lying successfully, convincing the kidnappers that she was pregnant and therefore not a "worthy" bride. She returned to the city, completed her studies and became a judge. She is now a participant in our judicial development program in Kyrgyzstan, a champion of justice.