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Four Cardinal Questions (and answers of a sort)

Toward Just Development in FCS

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Justice and the rule of law are regularly cited as fundamental to addressing so many development challenges: poor investment climate, conflict and insecurity, gender inequality, poverty and low human development outcomes.² While causal connections between various aspects of the rule of law and these outcomes are not always straightforward,³ few would contest the crucial importance of effective and legitimate institutions to manage disputes, grievances and claims of injustice in the effort to achieve the Bank's core goals of eliminating extreme poverty and boosting shared prosperity.

The role of justice institutions in underpinning development has especially come to the fore in fragile and conflict-affected situations.⁴ After at least two decades of intensive efforts to promote the rule of law and strengthen justice systems in these contexts, we are learning what works, and what does not, but projects often struggle to achieve results. Technical best practices are legion – ranging from how to write market-friendly laws, to administrative procedures to enhance

judicial independence, to management systems that improve the efficiency and access to courts. But it's clear there's no magic wand to bring those fixes about, especially amidst the broader challenges of conflict and fragility. While there are successes, there are also numerous examples of problematic results: institutions that are only foreign mimics ill-suited to context, that engender opposition and resistance, and that lead to unsustainable and damaging investments.⁵ Moreover, efforts that focus on a narrow set of justice sector institutions may result in little impact on peoples' justice concerns.

What, then, can we do? We suggest that there is quite a lot, but it requires starting with different questions. Drawing from the Bank's justice strategy *New Directions in Justice Reform*⁶ and our experience in the Justice for the Poor program, especially in fragile and conflict-affected situations, we have distilled an answer, or rather a process. Four simple questions to guide us toward the not so simple path of promoting just development:

¹ This essay draws on Porter, D., D. Isser and L.A. Berg, "The Justice-Security-Development Nexus: Theory and Practice in Fragile and Conflict-Affected States," *Hague Journal on the Rule of Law*, Vol. 5, no. 2 (2013): 310-328.

² Most recently, justice is a key theme of *World Development Reports* 2011 (Security, Conflict and Development) and 2012 (Gender Equality), and has been highlighted by the High Level Panel on Post 2015 Development Agenda, the G7+ New Deal for engagement in fragile states, and the 2012 UN General Assembly Declaration on rule of law.

³ For a review of the evidence, see Berg, L.A. and D. Desai, "Overview of the Rule of Law and Sustainable Development: Background Paper for the Global Dialogue on Rule of Law and the post-2015 Development Agenda." (NY: UNDP, 2013); and Haggard, S. and L. Tiede. "The rule of law and economic growth: where are we?" *World Development* Vol. 39, no.5 (2011): 673-685.

⁴ The World Development Report 2011 (Security, Conflict and Development) highlighted security, justice and jobs as the key ingredients for transition from fragility and conflict.

⁵ See Desai, D., D. Isser and M. Woolcock, "Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies," *Hague Journal on the Rule of Law*, Vol. 4, no. 1 (2012); Andrews, M, *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions*. (Cambridge: Cambridge University Press, 2013).

⁶ *New Directions in Justice Reform*, The World Bank (2012)

Question 1: What is the justice problem?

The question sounds straightforward enough, but it is surprisingly tricky. Too often the problem is diagnosed as broken or deficient justice sector institutions – laws that do not meet international standards; judges that lack independence; courts with insufficient case management systems. The solution then is to fix them by filling in those gaps. Surely these deficiencies are problematic, but they may be largely irrelevant to the way people experience justice.

An alternative approach is to move *beyond an understanding of justice as a particular set of institutions to understanding justice as an outcome in all development sectors*. *New Directions* argues that “reform strategies should take on concrete functional problems, rather than pursue some ideal justice system model.” To identify those problems one needs to look beyond the institutions that may claim to manage them to the grievances and disputes – i.e. the justice problems – that citizens experience. Taking this further we might say that justice interventions need to look beyond any particular institution, system or model, to focus on justice as a development outcome.

So how do we figure out what the justice problems are? Based on our experience so far, we have found it useful to look at three categories of justice problems. Recent J4P research in Solomon Islands illustrates the kinds of disputes and grievances that typify each category:⁷

- (1) *Social order*. This category encompasses grievances, disputes and crimes that affect security, safety and public order, which often arise from interpersonal disputes and family matters. In Solomon Islands these arise around the illegal production and use of narcotics, sometimes leading to violence, and the disintegration of social norms around marriage, propriety and intergenerational obligations and conduct.
- (2) *Regulation of economic assets*. This includes disputes about rights to possess and use property

and the accumulation of rents from the commodification, trade, and transfer of assets. In fragile and conflicted settings, these typically involve natural assets – land, water, minerals, forests etc. In Solomon Islands this was most pronounced where customary rights related to land development and natural forest logging were being contested.

- (3) *Allocation of public wealth*. The most corrosive grievances and disputes often arise around how public wealth is allocated, distributed and accessed in the form of public services, entitlements and other benefits. In Solomon Islands this manifested in disputes around access to benefits from the flow of aid or from the constituency funds distributed by national politicians.

Each of these categories of injustice may play out along gender, intergenerational or ethnic lines that exacerbate perceptions of systematic injustice. Indeed these were prominent features of disputation in all categories in Solomon Islands.

The result of asking this question is to break the silos in development practice that separate the attentions of those concerned with ‘justice’ from those concerned with the broader range of development challenges – how markets are regulated, budgets are made to allocate public wealth and services are delivered.

Question 2: How is the justice problem being managed?

Once we have identified the salient justice problems, the next step is to understand how those problems are currently being managed. This immediately takes us *beyond justice as a problem of the justice sector to justice as a core function of a wide range of public authorities*.

There are two key points here. First, we abandon the perspective of how we think things should work and examine empirically how justice problems are actually managed. Most likely we will discover a wide range of institutions, rules and actors – formal and informal – that play the role of mediating the rights and entitle-

⁷ Allen, M., S. Dinnen, D. Evans and R. Monson, “Justice Delivered Locally: Challenges and Innovations in the Solomon Islands”, World Bank Justice for the Poor Research Report (2013).

ments at stake. Research on justice in Liberia, for example, found that outside of the capital, Monrovia, formal court processes are virtually non-existent. Instead, an array of actors, from elected politicians, chiefs to churches, women, youth and market associations, and other communal structures are primarily involved in contesting and mediating justice.⁸

Second, if we limit ourselves to examining the ways conflicts and disputes are resolved after they escalate, we may have little space to influence justice outcomes. Justice problems often begin at the front end – where laws and regulations are enacted by a broad range of public authorities, including both formal state agencies and non-state actors. In Liberia, J4P is collaborating with the Ministry of Internal Affairs and Land Commission to examine the sources of grievances around land use and concessions, and engaging relevant public authorities across the natural resource value chain, from how deals are negotiated and benefit sharing agreements are made, to the arrangements made to transfer resources, settle ongoing claims and oversight each step in the process. The aim is to institute more effective means of mediating contests that arise at crucial points in that chain. In this case courts may play a limited role, while local authorities, private investors and a range of local and national government agencies also contribute to justice outcomes.

Question 3: Under what conditions will more effective and legitimate institutions to manage the justice problem emerge?

Now that we have the lay of the land – the justice problem and the key actors and institutions – we turn to the question of how can justice processes and outcomes be improved? But first we need to understand what accounts for the performance of current arrangements. This question takes us *beyond deficit and dysfunction to a deeper understanding of the political economy of justice*.

The most common approach by development actors is to diagnose deficits and dysfunctions in the form of flawed rules, lack of human capacity and infrastruc-

ture gaps relative to international standards for a particular set of institutions, and to prescribe a remedy of fixes in the form of law and procedural reforms, training, equipping and building. The logic of this approach is that donors can bring about justice outcomes by building a set of rules and organizations that could – if the various constraints are overcome – deliver a set of goods more effectively.

Yet the history of institutional formation and development suggests otherwise. Institutions – perhaps most notably justice institutions – emerge from political and social processes that coalesce into specific forms of contestation, political bargains, normative tensions, and at times agreements to alter a set of organizations.⁹ Poor institutional performance is thus rarely only a question of capacity; it usually serves the interests of various actors who interact through complex political and social processes. Successful reforms to justice institutions thus require a whole range of underlying processes of change, underpinned by such elements as political openings, supportive coalitions, the ability to advance changes in the face of organizational resistance and vested interests, and the normative foundation for the changes to embed in the practice and behaviors of officials and users.

How do we engage with these dynamics in practice? First, we need to understand enough about the context that shapes the performance of institutions, in order to identify opportunities for change. Three core lines of inquiry can help us unpack these complex dynamics:

1. *Political settlements*. How do the nature and dynamics of political coalitions impact on the capability of institutions to deliver credible responses to particular justice problems? What kind of pressures, threats and incentives can cause elites to vest institutions with the capabilities and legitimacy to more equitably manage justice contests?¹⁰ Is it possible to identify “critical junctures” in which key constituencies and/or external actors have mobilized support to elite reformers as a basis for finding future openings?

⁸ Isser, D., S. Lubkemann and S. N'Tow, “Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options,” USIP Peaceworks 63 (2009).

⁹ For a review of relevant literature, see Hickey, S. “Thinking about the politics of inclusive development: towards a relational approach”, ESID Working Paper No. 1. (2013). Available: at http://www.effective-states.org/_assets/documents/esid_wp_01_hickey.pdf.

2. *Organizational change.* How do organizational forms shape opportunities and constraints to institutional change? Even the most committed reformers have foundered in the face of organizational resistance and vested interests. Institutions that deliver justice confront particular challenges, ranging from complex relationships among executive, legislative and adjudicative authority, to the multiplicity of organizational entities and actors. Is it possible to identify the seeds of institutional change in a particular set of organizations?
3. *Normative foundations.* How do prevailing social perceptions and values shape the written law and its implementation? Institutional change often arises as a result of normative tensions that serve as opportunities to reshape authoritative rules. Where do relevant cleavages lie as understood by local actors? What channels and institutional mechanisms can best promote the emergence of an effective and legitimate normative framework?

Question 4: What is the appropriate role for external assistance?

This fourth question takes us *beyond an approach that separates design from implementation to one based on continued engagement, learning and adjustment.* It reminds us to be diligent in our analysis, modest in our ambitions and flexible and responsive in our implementation, while taking a realistic view of what can be achieved within our own institutional frameworks and incentives.

As several evaluations demonstrate, donor efforts (on justice and otherwise) tend to have three effects, in rough order of frequency.¹¹ First, engagements bounce, or at best leave a few skid marks, and are largely irrelevant. They often neglect or outright evade the key contests and binding constraints, focusing on the non-contentious spaces, leaving behind organizations and practices that are quickly abandoned, or pulling out at the slightest sign of resistance.

Second, also from bitter experience, they do harm. This can happen because they create new sites for

contest around rights and entitlements at the wrong time or place, or via institutions that are not 'fit for purpose'. They reproduce patterns of privilege and power about which people have serious grievances.

Third – and here is what we are aiming for – by using this chain of questions to develop a deeper understanding of the context, and of how change occurs, we can identify tractable pathways to improved justice outcomes in particular contexts.

We have begun to explore this way of approaching justice challenges. In Solomon Islands, for example, our analysis points to the futility of reviving local courts, for which no alignment of political and constituent interests can be identified. Institutionalizing a hybrid model involving 'community officers' embedded in local and national governance arrangements to manage local social order contests and liaise with government authorities appears more promising. In neighboring Vanuatu, where grievance over the development of customary land is prominent, we aim to piggy-back on recent political alignments that have carried legislative reforms through Parliament. We will provide support to a few key institutions in and around government which can be incentivized by popular demand and a thrust by political champions to establish mechanisms including advisory services to customary landowners to improve the equity of land transactions. In Afghanistan, where the role of traditional justice actors is critical to dispute resolution but highly politicized, we are building on local innovations and linkages between formal and informal justice actors, while also strengthening core governance functions within the formal justice sector. This approach seeks to avoid ideological responses while promoting practical measures of improving justice service delivery.

We will explore these initiatives in greater depth in later installments of Just Development.

There is also a fifth question: How do we know if our intervention is helping address the justice problem? This takes us into the world of development effectiveness. This one we'll save for another day.

¹⁰ For an illustration of how these dynamics work in Solomon Islands, see Craig, D. and D. Porter Political Settlement in Solomon Islands: a political economic basis for stability after RAMSI?, Australian National University Issues Briefs, State, Society and Governance in Melanesia Program, (2014). Available at: <http://ips.cap.anu.edu.au/publications/political-settlement-solomon-islands-political-economic-basis-stability-after-ramsi>

¹¹ Craig, D & D Porter, Development Beyond Neoliberalism: Governance, Poverty Reduction and Political Economy. (London: Routledge, 2006).