JUSTICE, CONFLICT AND DEVELOPMENT

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Access to Justice Thematic Discussion

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What might Max Weber say to this group if he was alive today? He died at the age of 56, my current age. I don't intend for this talk to be my eulogy, but I would like to take this opportunity to say what I think needs to be said about the development industry generally, as well and its nested subset, the rule of law industry: we are in a seemingly constant state of reinvention rather than evolution. I think that hope (and, importantly, results) can be borne out of intellectual honesty and the two – hope and intellectual honest -- need not be mutually exclusive. I promise you that 15 minutes from now I am going to end on a realistic note of hope to which I think the WB's Justice for the Poor Program has contributed, and can contribute much more with an increasing focus.

Access to Justice

Access to justice is a "big tent" for law programs broadly writ and has been so for over 25 years. Traditionally, A2J has been treated as a category of interventions rather than a heuristic device from which to learn and experiment. For example, years ago a friend was interviewing a CJ of a Central American country who, when the topic of access to justice came up, sprung to his feet, walked over to the window and looked out on a half-empty parking lot next to the court and said: "we have no problem with access to justice, there are plenty of unused parking spaces."

In the old, old days, access to justice meant legal aid, support for narrow categories of human rights cases (so-called test case litigation), discrete support for formal

legal institutions, and – at least through The Asia Foundation and Ford Foundation – discrete support for community based mediation and nascent civil society groups that supported paralegals. During this period, well before the MDBs entered into the field of rule of law, there were lessons that one could learn, if one was open to doing so. (Remember, the amount of resources and number of so-called rule of law donors in the field was a small, small fraction of what it is today.) What were some of those early lessons?

First, results from so-called A2J interventions were unlikely to be dramatic in the short term. In this respect, I think that the 2011 WDR, drawing on the available empirical evidence, has dramatically put a point on the long-term nature of justice, conflict and development. Perhaps the WDR theatricalized conflict, but the jolt was necessary, and empirically based. The WDR puts front-and-center the fact that economic development practice as usual with all of the implicit assumptions of practitioners about the inevitability of modernization theory across countries is not enough.

Second, for those of us interested in maximizing welfare, traditional legal aid proved to be expensive: beneficial at an individual level, but *de minimis* in its impact on larger groups. Maximizing welfare one case at a time did not fair well in a cost-benefit analysis, despite the good intentions of many who supported and participated in the delivery of legal aid. Bar association based legal aid, in my experience, was particularly problematic, since the guilds themselves rarely had the incentives to disturb an equilibria from which they benefited substantially.

Third, and related, courts rarely lead social, economic and political change. With all of the bravado of post-card, or epistemological jurisdiction pioneered by Justice Bhagwati in India in the 1980s, expecting the least dangerous branch of government to shake well-established equilibria, was wholly unrealistic in the vast majority of developing countries and it still is. Without a serious alignment and pressure of social, political and/or economic forces, formal legal institutions will not lead. As

Jerry Rosenberg (University of Chicago), Michael Klarmen (Harvard) and Pam Karlan (Stanford) have shown, the ACLU could have brought a case like Brown vs. Board of Education decades before, but chose not to because social and political forces were not ripe.

Fourth, while it is true that bureaucracies may be part of the problem, it is also true that they are part of the solution in improving A2J. After the industry defined justice as a sector, the essential bureaucratic dimensions to rule of law were placed outside the box despite the fact that judiciaries and bureaucracies often compete for decision-making authority. ROL ideologues give preference to judicial decision-making over bureaucratic decision-making *per force*. And that ideological preference has caused institutional design problems that we may discuss later. (By the way, I have argued, apparently unpersuasively that justice is not a sector.)

Fifth, understanding the prospects for issue-based collective action in A2J work must be front-and-center, not an afterthought. Karl Marx may not have gotten it all right, but he certainly understood the importance of demand in the development of law and legal institutions.

In the 1980s I wrote to my boss, the then president of The Asia Foundation, and said I didn't want to work on interventions with the formal judiciary or traditional legal aid institutions anymore because they weren't game-changers in breaking an unjust equilibria. This led to a long conversation about problem analysis and the importance of defining the problem before rushing to support formal or informal institutions. Again, another topic to which I hope we return during the discussion.

Problem: Fetish-izing Formal or Informal Institutions

Before getting into the problem of fetishizing formal or informal institutions, let's step back and take a look at the danger of labels and categories. In the mid-1990s, a case management project could be justified with the ultimate goal of increasing FDI;

the same project later in the 1990s it could be justified as improving governance; early in this century it could be justified as reducing poverty; and perhaps now it could be justified as enhancing equity or reducing conflict. My point is a simple cautionary note: don't just change the labels of interventions to achieve a thin version of an institutional mandate.

Without a doubt, in the 1990s, as MDBs entered the field of ROL, distortionary funding was placed in a court-centric approach to justice. That funding was largely driven by ideology and the normative assertion that a well-functioning judiciary was necessary for economic growth and development. (Parenthetically, the critique of law and development famously argued by Marc Galanter and David Trubek back in the 1970s was also ideologically driven.)

Deconstructing the flaws of a fetish in formal institutions was one central message in a book that I published back in 2003 entitled *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*. The Bank has learned lessons along the way. The Bank's own evaluation of a judicial reform project that it launched in about 1999 in Bangladesh laid bare the flaws a formalistic fetish. And subsequent empirical research by the Bank that Saku Akmeemana led showed, among other things, that the most legitimate dispute resolvers in Bangladesh are elected local officials. That is exactly the type of empirical work that should have been done before the WB contemplated a major judicial reform project. It is also the kind of empirical work that should be done before contemplating a so-call customary justice project.

My concern at this juncture is twofold: I am concerned that the pendulum is swinging the other way with equal velocity, fetishizing informal or customary institutions, driven by both the failure of the formalistic fetish and by a countervailing ideology. If we fetishize the informal or customary, we are surely headed for informalism gone-wild that will be no more satisfactory that the formalism gone-wild era from which we have just emerged.

Problem: Forging Linkages Between Formal and Informal Institutions

I am also concerned that proposals to link formal and informal systems fail to take account four fundamental realities:

(1) the weak Weberian capacity of formal systems,

(2) the social, political or economic forces that gave life to informal systems in the first place,

(3) the capacity of external actors – short of something akin to a coordinated colonial presence – to forge those linkages, and

(4) the likelihood that the enduring legitimacy of those linkages will be problematic.

We have a test case now in Afghanistan of forging those linkages; it's too early to evaluate that project, but I am skeptical that such binary thinking about formal and informal institutions will succeed even modestly.

I think that it is more constructive, creative and promising to think of evolution of institutions rather than force-feeding linkages between formal and informal institutions. That evolution tends occur around issues that constituencies care about, rather than mother-load institutions of general jurisdiction. [Mother-load institutional reform programs face a perpetual collective action problem where the costs of reform are high, and the benefits are modest and speculative.]

Michael Woolcock and Daniel Adler tell the story of the evolution of a tribunal that arbitrates collective labor disputes in the garment industry in Cambodia, applying what they call an "interim institutional approach" that identifies "good" (i.e. more equitable) struggles rather than pre-packaged institutional design *ex ante*. As it turns out, that tribunal has become increasingly formal in response to the demands of its users. The project <u>as it was implemented</u> did not presuppose the level of formality the institution would accrete over time. The evolution of the tribunal is a

story embedded in a dynamic of local unions, the legitimation of collective action and international trade. (It is also a story about ignoring large swaths of the output demand in the initial project document.)

I commend Michael and Daniel's article to you and a number of others in the growing body of empirical literature. Let me split hairs with the question they cleverly ask in the title to their paper: "Justice without the Rule of Law?" I have argued over the years that rule of law is not like pregnancy: you either have it or you don't. Rather, it grows and evolves and figuring out how it will or might in locally specific contexts is our central challenge.

[Sri Lankan Mediation Boards and Baranguay Justice in the Philippines during discussion period.]

To Even Begin to Hope, Empirics Must Trump Ideology and Doctrine

If the empirical work is done well, it is a tool to break through ideological and doctrinal barriers and begin to identify zones of potential programming. Empirics should lead our efforts to discover, build or create "legitimate and effective justice institutions." Across a number of countries, I and a number of others, have used a variety of methods to get at some very basic baseline issues such as, among others: What kinds of disputes are arising? Where are people going to resolve their disputes? And what is the level of satisfaction with (legitimacy of) the fora accessed?

The access to justice prong of the Justice for the Poor Program has done this initial empirical work, as I understand, in the Solomon Islands. To me, this baseline empirical work is almost a precondition to any strategy that purports to build legitimate and effective justice institutions. And, I would argue, that this strand of research that the Justice for the Poor Program is supporting is foundational not just

to the J4P, but also for the knowledge base that the Bank and other donors should have in work across sectors.

Personal Note: Another Reason to Hope for the Next Generation of ROL Practitioners

I always tell my students that their generation must to a better job than mine in understanding the complex phenomenon involved in strengthening the rule of law and act based on empirical evidence. As one who has trained, mentored and taught in this field for decades, I see reason for hope. When I started my career, I couldn't understand all of the formalism in the law and development field. In US legal history, I thought that the Realists won out over the Formalists in the middle of the last century. Yet, so many rule of law promoters over time forgot the critical heritage from which they came as they transplanted formalistic institutional designs in other lands. Parenthetically, I now have a fear of what we might do with informal institutional designs.

They also forgot a key admonition of the Realist School: that lawyers must interact with, among others, social scientists. That interaction has intensified. The number of PhD/JDs in my classes at Stanford have grown year-on-year, and the number of my students engaged in interdisciplinary studies in law school has exploded. More broadly, the ease with which the best of rule of law practitioners of the next generation interact and collaborate with social scientists has grown exponentially. And some of those of the next generation to whom I refer are amidst us here.

If Max Weber were here today, he would be surprised that so many didn't understand him a century ago – though he wrote in inaccessible and contorted German prose. But I think he'd share my sense of hope that we are slowly learning and evolving, and I think he'd understand too the promise of the Justice for the Poor Program's contribution and prospective contribution to empirically based programs in access to justice. Thank you.