Applying the "Sectoral Approach" to the Legal and Judicial Domain

CILC's 20th Anniversary Conference

THE HAGUE, NOVEMBER 22, 2005

CENTER FOR INTERNATIONAL LEGAL COOPERATION

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Introduction

BY MARJA LENSSEN, PROJECT MANAGER, CILC

Over the past decade, international development cooperation strategies have shifted from project-based funding towards a more sector-based approach. Has this approach been a success? Which factors influence the effectiveness of sectorwide programs? What impact have paradigm changes in the field of international legal cooperation had on rule of law programs? How have they affected the history of the Center for International Legal Cooperation (CILC)? How has the sectorwide approach manifested itself in two of the countries whose rule of law activities have received support from CILC, Ukraine and Ethiopia?

These were some of the questions addressed at CILC's 20th anniversary conference on "Applying the 'Sectoral Approach' to the Legal and Judicial Domain," held at the Council of State in The Hague on November 22, 2005. CILC Chairman Marten Oosting, who is a member of the Council of State, presided over the conference. It was cofinanced by the National Committee for International Cooperation and Sustainable Development (NCDO), and the Dutch ministries of justice and foreign affairs.

After a word of welcome by Dr. Oosting, the conference was officially opened by Ruud Treffers, Director-General for International Cooperation at the Dutch Ministry of Foreign Affairs. He congratulated CILC on its 20th anniversary, and praised its past and present Boards, management and staff "for creating the vibrant and relevant organization CILC is today."

Mr. Treffers noted that the positive effects of a programmatic and sectoral approach have become apparent in recent years. However, he underscored that if there is to be sustainability, greater emphasis should be put on conditions of governance. The trend towards further mainstreaming of legal and judicial reform in governance, and of governance in overall development programs, is likely to have implications for CILC's strategy and tactics. Therefore, further discussion on how best to handle external demand for CILC's pool of highly valued Dutch legal professionals should be encouraged, Mr. Treffers said.

At the conference CILC Director Kees Kouwenaar brought up an idea expressed in the 2004 white paper on good governance published by the Dutch Ministry of Foreign Affairs. He explores it in depth in the article he contributed to this conference publication. Here he identifies the different stages of the hierarchy of needs in rule of law development, which can be compared with Maslow's hierarchy of needs in human psychology. Without saying that there should be a fixed sequence of steps, Mr. Kouwenaar believes that it can be argued that some steps have to precede others.

In his presentation, Jan Michiel Otto, Director of Leiden University's Van Vollenhoven Institute for Law, Governance and Development, surveyed CILC's history against the framework of paradigm changes in the law and development field, and traced CILC's adaptation of its strategies to these changes.

He described how the field has come under severe criticism in recent years for overly concentrating on law, lawyers and public institutions at the expense of development, the poor and civil society. There are calls for a more balanced approach. The growing demand for applied legal knowledge in many development sectors is an invitation to jurists to become involved in development work.

Prof. Otto advised CILC to invest in its knowledge base, follow up on its activities with NGOs, and examine the need for legal assistance in areas directly related to development. Moreover, to avoid dependence on "fashions in development economics," CILC should more actively participate in international debates on law and development.

The vision that rule of law reform can and should make a major contribution to the development process, and above all benefit the poor, was shared by World

Bank Lead Counsel Maria Dakolias. She agreed with Mr. Treffers that sustainability lies in good conditions for governance or, as she put it, in well-functioning institutions and appropriate processes. But how does one assess progress? It may be difficult to judge the success of rule of law projects because of the length of time required to see results, differences between legal systems, and the difficulty of measuring qualitative results.

In her paper, Ms. Dakolias reviewed legal and judicial reform indicators. She mentioned a number of studies and databases that have facilitated the dialogue on measurement and evaluation, but she stressed the need for the continued development of indicators.

A unique database of key indicators for the legal and judicial sector is that set up by the World Bank. While not exhaustive, the indicators, which should be used in the context of the legal and judicial system, serve as a starting point for debate on improvement and broader development. Data help determine what kind of reforms would have a positive impact on the rule of law and ultimately on the economy. In discussing the application of data to country programs, Ms. Dakolias looked at the example of East Asia, in particular China and Indonesia. She pointed out that increased attention to data and information is critical to enable reformers to develop strategies and priorities for rule of law reform in their countries. New methods of evaluation should be taken into account when reforms are launched.

One of the countries that have taken a sectorwide approach to legal and judicial reforms is Ethiopia. As Judge Menberetsehai Tadesse, Vice-President of the Federal Supreme Court of Ethiopia, explained at the conference, his country's current institutional reform program focuses on enhancing good governance and rule of law and improving economic performance. The program is coordinated by the Ministry of Capacity Building. A piecemeal approach is discouraged.

The Justice System Reform Program component is comprehensive in its coverage both of institutions and of problem areas within them. To ensure full stakeholder participation, all judicial institutions are represented on steering committees set up at federal and regional level. Judge Tadesse said that it was important for the Ethiopian reform process to benefit from the experiences of other countries, but local peculiarities could not ignored. Choosing suitable policies involves dilemmas, especially for poor countries. But however difficult, reform is not impossible to achieve, he asserted. He attributed the progress Ethiopia has made on judicial reform so far to a combination of serious political commitment, reform-oriented leadership, careful programs and a participatory approach.

Halyna Freeland, former Executive Officer of the Ukrainian Legal Foundation (ULF), outlined political developments in the Ukraine since it gained independence from the Soviet Union, including the Orange Revolution of late 2004 and subsequent events. She highlighted the legal reforms achieved through a sector-based approach. She called the Dutch contributions very positive, in part because the experts were pragmatic and results-oriented. Ms. Freeland's talk is unfortunately not included in this publication.

The presentations were followed by a discussion with the audience. It was generally agreed that rule of law activities can achieve better results if they are based on a broad assessment of the sector in close consultation with the different stakeholders. A broad assessment leads to a comprehensive view of which small-focus activities should be included. Ideally, the strategy towards a sectorwide approach should be jointly determined by local governments and donor organizations. This is not always the case, however, which may influence sustainability. What also influences sustainability is the allocation of short-term funding to the inherently long-term sectorwide approach. How can this be dealt with?

The effect international legal organizations can have on reform is often visible only in the long run. While Ms. Freeland did not spare international organizations criticism, she indicated that they can undoubtedly add value in the reform process if they operate carefully.

A final issue was the restoration of the rule of law during and after civil war. The view was that rule of law activities should be initiated as peacebuilding and peacekeeping mechanisms are being established in the country concerned.

With the publication of these conference papers, CILC hopes to advance the ongoing debate on how to make legislative and judicial reform a meaningful part of a broader development strategy, as well as on how to establish, measure or ascertain its positive impact on society.

Floris ten Have's undergraduate thesis on the concept of the rule of law in the context of the World Bank is included in the Appendix. Mr. Ten Have was a student assistant at CILC at the time of the conference and assisted in its organization. His thesis takes a descriptive approach, with a critical note on the side.

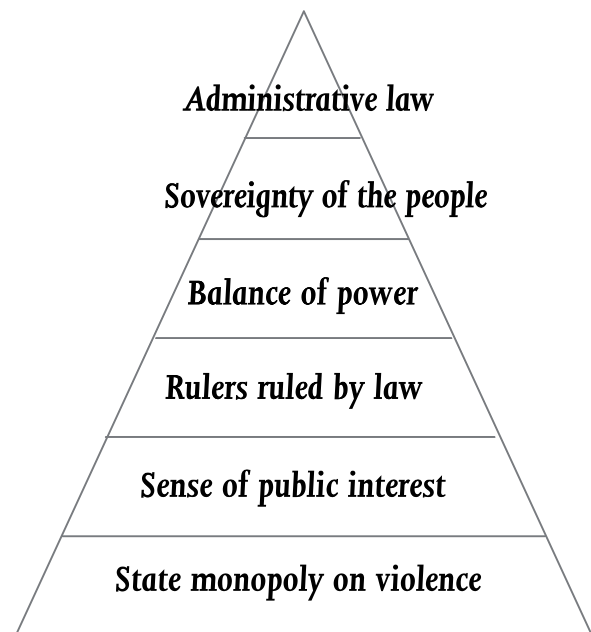
Hierarchy of Needs in the Development of the Rule of Law

BY KEES KOUWENAAR, DIRECTOR, CILC

Promoting the rule of law involves the strengthening of legal and judicial infrastructure. While the function of these institutions within the fabric of state, government and society is far too complex to analyze here, it is important for organizations like CILC and the experts involved in our projects to be familiar with the concepts on which our definition of the rule of law is based, even if our views are not always shared in every country with which we work. Here I attempt to sketch these underlying ideas, because understanding them can increase the effectiveness of efforts undertaken in a concerted sectoral approach for legal and judicial development within the overall development strategy of a country.

Political thinking on the formation of states and the role of law within both state and society has evolved over the centuries. Western conceptions of the state and the rule of law are rooted in the ideas of the Enlightenment. Other parts of the world have experienced their own development of those basic concepts, but in the past 100 years the Western state ideology has become predominant.

I will begin by considering whether the conceptual steps in political philosophy can be seen as a counterpart to Maslow's well-known hierarchy of needs in human psychology. A similar hierarchy of needs could be applied to the development of a legal and judicial system. Without committing too strongly to such a fixed sequence of steps in rule of law development, it can be argued that some steps may have to be preceded by others. Having raised the question at CILC's 20th anniversary conference on November 22, 2005, I explore it further in this article for the conference publication. The idea is not original: It was expressed, in slightly different form, in the white paper on good governance issued in July 2004 by the Dutch Ministry of Foreign Affairs' Good Governance, Human Rights and Peace Building section.



State Monopoly on Violence

At the bottom of our imaginary pyramid is the state monopoly on violence, or the public monopoly on enforced conflict resolution. The phrase "state monopoly on violence" was coined by Max Weber, but the premise that the human race is engaged in a "war of all against all," and is consequently prepared to surrender its sovereignty to a state or a ruler with absolute power, dates back to Hobbes' *Leviathan*. The role of the state in regulating the use of force is generally acknowledged, except by anarchists. Some societies, such as the United States, grant individual citizens a constitutional right to bear arms and use force. But there is acceptance in most states and societies of a public monopoly on enforced conflict resolution,

including the use of armed force, albeit with specific measures to counterbalance this power of the state.

It may, however, be useful to bear in mind that the Lockian willingness to submit to an absolute state may be greater in so-called failed states and other situations that indeed resemble a "war of all against all."

Res Publica

In the Classical Age, Greek and Roman thinkers developed ideas about the public nature of government. The concept of *res publica* itself was by no means clearly defined; it could refer to the Constitution, to the Republican era between the period of the Roman kings and that of the Roman Empire, to public property, to politics, etc. But common to all these applications was the presupposition that there is such a thing as the public good and that government should serve it over the private interests of the rulers.

Following the Middle Ages, the idea that the king held his kingdom as his private property again began to be eroded. We can see this in the development in England of the distinction between the Privy Purse and the Public Purse, i.e. the private and public funds at the sovereign's disposal. Acceptance of the public nature of government was gradually imposed on monarchs throughout Europe, usually because government expenditure, especially in times of war, exceeded their financial capacity and obliged them to increase taxes. The idea that a lord held his subjects as private property was probably stronger at the lower end of feudal society than at the level of the king. But here too the need for ready cash played a key role in abolishing serfdom in many parts of Europe.

Is there any country in the world today where the notion that holders of government office can treat their office as private property for their own private benefit has completely disappeared? At the same time, when examples of this attitude come to light we regard these acts of corruption, as we call them, as anomalies that must be fought and punished.

Of course, the ideology of *res publica* prevails in developing and transition countries as well in the West. But is this ideology internalized in people's minds, beliefs and feelings to the same extent that we believe it is in ours? Do political leaders in some developing countries, and their followers, believe that political power is a prize which may – and should – be used, at least in part, for the private well-being of the leaders and their followers?

This is not to say that we should accept it as a fact of life, but if there is some truth to the notion that *res publica* may not be as omnipresent as we think, then it is wise to be aware of the problem when working to strengthen the rule of law in developing and transition countries.

Rule of Law

It is one thing to have an autocrat ruler who protects the public interest rather than his private interest, and another to have the ruler bound by law. Many of the autocratic rulers in history were not quite as above the law as they professed to be; customs ruled and limited their discretionary power. Still, there is a big difference between customary limits on the ruler's power and a formal acknowledgment that the ruler is subject to the law.

The first step in this process is the distinction between the king's discretionary decisions and formal rules and laws which have been promulgated by the king but by which – at least until revocation – he is bound no less than his subjects are. In China, the Legalist school of philosophy claimed that rulers should rule by laws that were clear and public, treated all subjects equally and were adequately enforced.

But a word of warning is appropriate: Legalism held that the emperor should weave such an intricate web of detailed and possibly contradictory laws that any subject and any servant could be deemed to be at odds with at least one law through any action or any circumstance. The emperor's discretionary decision as to whether or not to prosecute gave him more absolute power than the total absence of a legal system would have done. So much for the rule of law as a tool to protect citizens against their government. In fact, Chinese Legalism can be seen as the tool by which the emperor overcame feudal lords and installed a state power monopoly and a sense of statewide public interest in the first place.

It is unlikely that in the 21st century we would still be able to find any country where the rule of law was not accepted as a formal principle, even by authoritarian governments. It is probably more strongly rooted in the psychology of people across the globe than the principle that the government should further only the public interest and not the private interests of the rulers.

Yet Legalism may be more widespread in practice than on paper. Laws can be a very useful tool of government power rather than a restraint on it. One might ask if the rule of law as an instrument of autocratic rule is really a step up in the hierarchy.

Balance of Powers

King Solomon was a wise and just king. King Louis IX of France was not only just but a saint as well. By modern standards, however, these rulers fell short of the most basic standards of the rule of law by assuming the roles of legislator, judge and chief executive all in one. There was no separation or balance of power.

It is all very well to have an autocratic ruler who strives for the public good and abides by his or her own laws. But history has shown time and again that not every ruler conforms to that pattern. Absolutism in the 17th and 18th centuries convinced Enlightenment thinkers such as Montesquieu and Locke of the need for checks and balances to protect the people from absolutist power. Montesquieu's *trias politica* defends the balance of power with iron logic: complete separation between the legislative, the executive and the judicial powers.

Not many countries today follow this logic to the full. The executive often has a formal role in the legislative process and the judiciary an informal advisory role. Nevertheless, it is a generally accepted principle that not all power should be in the same hands and the executive should not have judicial and limited legislative competence.

We should be cautious about blindly transferring the *trias politica* or other mechanisms of checks and balances to developing and transition countries. The principle of separation of powers may be – and is – uncontested. But in a society in which public power is seen as the prize of the winner, to be used at discretion and for private gain, a system of checks and balances may in fact serve more to distribute the prizes among more factions than as a tool to curb the power of the rulers over the ruled.

One key element in the concept of the balance of powers would seem incontestable: the need to have a judiciary that is proficient and independent and can dispense justice without undue interference from the executive.

Sovereignty of the People

In modern thinking, the sovereignty of the people is the first and foremost principle. The whole concept and structure of the state, the government and the legal and judicial system are built on this paradigm.

But what if "the people" as such do not exist? What if within a state there are groups of people who believe that they are not one people but various distinct peoples, perhaps in conflict with one another? Who is then the sovereign entity with the authority to define and organize the powers of the state, to balance between the legislative, executive and judicial powers?

If the parliamentary assembly is more like a battlefield of warring factions and a Polish Diet than an assembly of representatives of "one people," what will come of that?

Is the sovereignty of the people as the guiding principle confined to the nation-state, or at least handicapped in non-nation-states? This question may be as relevant in the European Union as it is in many of the developing and transition countries that are the main focus of this conference publication.

Administrative Law

Finally, a few words on administrative law, which regulates how and when the executive branch can regulate the public order of things. Whereas in private and criminal law the paradigm is that things are allowed unless they are forbidden, administrative law holds that branches of government are not allowed any action unless it is permitted by law. One might argue that this is not so much a difference between private and criminal law and administrative law as it is the difference between the function of law vis-à-vis the citizens (to spell out and limit the things that are forbidden), and the function of law vis-à-vis the executive government (to spell out and limit the things that are allowed).

Administrative law as a branch of public law safeguards citizens against arbitrary or unlawful actions of the executive branch. As such, administrative law can be seen as a practical translation of the underlying principles of *res publica*, the balance of power and the rule of law. There are no rigid boundaries between executive and judiciary power when it comes to administrative justice. It is not uncommon that the first recourse against a seemingly unjust administrative decision is one of "objection" (to the part of the executive government concerned), rather than "appeal" to a part of the judiciary. An institution such as the Ombudsman's Office could be seen as the summit of the pyramid of the human needs for the rule of law – provided, of course, that the Ombudsman's Office is not dominated by the executive government which it is supposed to keep in check.

In conclusion, I hope that this article has in its small way contributed to an understanding of the fundamental principles of a law-based state. In order for our efforts to be effective, all of us who work in the field of international development cooperation need to have a sound grasp of what it is we mean when we talk about strengthening the rule of law.

Opening Address

BY RUUD TREFFERS, DIRECTOR-GENERAL FOR INTERNATIONAL COOPERATION, DUTCH MINISTRY OF FOREIGN AFFAIRS

Thank you for inviting me to participate in the happy occasion of CILC's 20th birthday celebration. When exactly was the actual date of birth, on May 1 (according to the charter), or on September 27 (the first Board meeting)? The first Annual Report of the Netherlands Council for Cooperation with Indonesia in Legal Matters speculated that this might become the subject of dispute among historians.

The personal commitment of the Council's executive office is clear from that Annual Report: The financial statement does not reflect income and expenditure, but rather profits and losses.

The Council started out with a General Board of no fewer than 20 members, and a five-member Executive Board. The first chairman was Jan van Dunné; he was succeeded by Hugo Scheltema. Ernst Hirsch Ballin and Jan Michiel Otto were also involved from the beginning. An evaluation team in 1987 included Harry Buikema, today our ambassador in Bamako. In 1988, Jan van Olden reported on a visit to Indonesia.

The Council had been in the making for some time, due to the growing interest in expanding the existing focus, represented by the *Stichting Rechtswetenschappelijke Samenwerking*, of Dutch-Indonesian legal cooperation beyond the academic sphere.

The Council's 1989 Annual Report refers to cooperation as taking place in a "most satisfactory way" through academic, legislative, judiciary and legal information programmes. Maybe it is appropriate, in the context of today's theme, to see these branches as constituting a nascent sector-wide approach.

However, this process was nipped in the bud when in 1992 external forces constrained the Council to trim its sails away from the Far East. The prevailing wind then led the organisation to, and beyond, the new EU candidates in Eastern Europe. Relations with my ministry shifted to the Matra programme and resulted in many successful and highly appreciated projects.

Over the past five years CILC, having consolidated its base, branched off again by returning to Indonesia and becoming active in a variety of new countries, which is underlined by the esteemed presence today of Judge Menberetsehai Tadesse from Ethiopia.

CILC has clearly shown its adaptability to changing environments, and I would like to congratulate its past and present Boards, management and staff for creating the vibrant and relevant organisation CILC is today.

During the past ten years or so, in development thinking we came to see the potential benefits of a more programmatic and sectoral approach. These include, among others, planning, coordination and monitoring by the partner country, as well as the consolidation of donor efforts.

At the same time, we began to put more emphasis on the conditions of governance: If development achievements are to be sustained, sectors like education

or water supply require institutions that are both effective and legitimate.

Despite the existence of CILC and the even longer history of legal technical assistance in other donor countries, it is only fairly recently that we have made strengthening the rule of law an explicit component of our development effort in governance.

If we now consider these parallel processes in connection with each other, we see that 80% of our governance expenditure in 2004 was in the form of projects, which implies that budget support is not the prevailing modality in matters of governance. Two notable exceptions are the Justice, Law and Order Sector Programme in Uganda, and the Partnership for Governance Reform in Indonesia.

The trend is likely to be towards the further mainstreaming of legal and judicial reform in governance, and subsequently of governance in overall development programmes. This may well have implications for CILC's strategy and tactics, such as defining and propagating its "unique selling point", as a marketing expert would say, and pitching it to the parties that preside over poverty reduction and sector programmes.

A central pillar of CILC's niche is of course its pool of experts. They represent a wide range of legal backgrounds and bring regional knowledge, cultural sensitivity and linguistic skills to their work. They come from various segments of society, but I would like to highlight the primary producers of justice, so to speak: prosecutors, judges, prison directors and court clerks.

Being aware of the pressures on these primary producers in the domestic market and the focus on the "near abroad" when looking across borders, I will take this opportunity to encourage our Ministry of Justice – which regularly shows its commitment to CILC activities – to think about how best to handle external demand for highly valued Dutch legal professionals. The Canadians may inspire you: Their Department of Justice, working closely with the Canadian International Development Agency, recently embarked on a series of international legal programs in developing countries. They are motivated by a new whole-of-government concept, along with the realisation after 9/11 that one's own legal order has a compelling international dimension. For us, the basis is even found in our Constitution, which directs us to promote the international legal order.

I wish to conclude by wishing CILC many happy returns. One thing is clear: There will be no dispute among future historians as to the date of the party at which CILC celebrated its 20th birthday!

Methods for Monitoring and Evaluating the Rule of Law

BY MARIA DAKOLIAS[1]

Rule of law reform initiatives have been underway for some time. Initially the focus was on the drafting and revision of laws and legal codes. But once it became clear that laws, whether good or bad, are of little use unless attention is paid to their implementation and to enforcement mechanisms, the scope of rule of law programs expanded to target overall improvements in the efficiency and competence of the judicial sector. Successful legal reform is not confined to the revision of existing laws and the introduction of new laws and regulations; it should also address the establishment of appropriate processes and help ensure well-functioning institutions. Any rule of law program must be measured in a comprehensive context, i.e. in terms of "whether an activity has a significant impact on economic performance, particularly to benefit the poor."[2]

Rule of law reform can make a major contribution to the development process.[3] Strengthening legal and judicial institutions is increasingly seen as a means of furthering not only the rule of law but economic and social development in general. Research has shown "a large causal effect running from improved governance to better development outcomes."[4] The rule of law tends to lead to higher investor confidence, more equitable

The rule of law prevails when:

(1) the government itself is bound by the law;
(2) every person is treated equally under the law;
(3) the human dignity of each individual is recog nized and protected by law; and
(4) justice is accessible to all (The World Bank, *Initiatives in Legal and Judicial Reform*, 2 [2004])

1 I prepared this article while working in the United Kingdom's Department for Constitutional Affairs. I am currently Lead Counsel in the World Bank's Legal Department. The opinions expressed here are my own and not necessarily those of the institutions for which I work or have worked in the past. I would like to thank the following people for their comments: Diana Hulin, Ben Billa, and Hongxia Liu.

2 The World Bank, Legal Vice Presidency, Initiatives in Legal and Judicial Reform, 16 (2004).

3 Ibidem, 23.

4 Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobatón, *Governance Matters: From Measurement to Action*, *Finance & Development*, vol. 37, no. 2 (June 2000), available at http://www.imf.org/external/pubs/ft/fandd/2000/06/kauf.htm

development and greater transparency. But as the efforts of the past two decades have demonstrated, there are no easy remedies; solutions are long-term.

Many reforms have been undertaken. How successful they have been is a matter of debate. There is more of a consensus on what they should be promoting, namely the rule of law and democratic institutions. However, multilateral and bilateral organizations have entered the field with different and sometimes ill-defined objectives. These can include economic development, poverty reduction, democracy, human rights, due process, equity, etc. In 2001, the stated goal of the legal reform programs supported by the Asian Development Bank (ADB) was the legal empowerment of disadvantaged populations to enable them to take more control over their lives.[5] In 2003, the ADB changed that objective to poverty reduction.[6] In Germany, the Federal Ministry for Economic Cooperation and Development lists as desirable legal and judicial reform outcomes poverty reduction, sustainable development, democracy, human rights, crisis and conflict prevention, and rule of law at the international level.[7] The United Nations Development Programme (UNDP) promotes the rule of law in order "to build capacity for good governance," which it believes must be undertaken in a comprehensive manner to support democratic values.[8]

If the ultimate objective is not clear from the outset, it is difficult to measure the success of a program or that of its individual components, for example the training of judges in a particular subject area. Organizations that have been working in the field for 20 years, such as the United States Agency for International Development (USAID), are still looking for effective ways of measuring success. Recent USAID evaluations have produced descriptive reviews in the form of case studies.

Due to the lack of consensus on how to define and measure success, some people in the development field even argue that efforts to promote the rule of law or legal and judicial reform have failed. More research into measuring and studying the success of such projects is needed so that donors can justify their investment and, more important, so that governments can determine what has worked and what has not, and why. Many donors focus on short-term impacts instead of looking at the process over a longer period of time, i.e. for closer to 15 years rather than periods of three to five years.

One area that has received little attention is information on court performance. In addition to measuring progress, this kind of information can boost confidence in the rule of law and in the economy. But while data on numerous economic indicators is collected and disseminated yearly, judicial indicators are often neglected.[9] Nevertheless, there is growing interest in gathering information on the rule of law as a complement to economic and social indicators.

The development of legal and judicial indicators is fairly wide-ranging. Studies and methodologies vary depending on their purpose. The focus may be on highly quantitative rule of law indicators against which to measure economic growth; measures of the cost to taxpayers of a weak judicial system; performance standards for self-assessing court performance; or qualitative assessments of legal reform effectiveness. Some studies use only a couple of indicators while others use hundreds. Some try hard to identify objective quantifiable measures and others rely on subjective perceptions. They might look at only a few judicial indicators, or specific types of commercial legislation, or specific legal aid projects, or they may examine a broader range of legal and judicial reform issues.

The relative usefulness of the different measures is largely determined by the objectives. All the methodologies have their strengths. For instance, the highly quantitative econometric analyses can be quite helpful in understanding the effect of a weak judiciary or judi-

5 ADB, *Law and Policy Reform at the Asian Development Bank* 2001, 7, available at http://www.adb.org/documents/Others/Law_ADB/lpr_2001.asp?p=lawdevt

6 ADB, *Law and Policy Reform at the Asian Development Bank* 2003, 3, available at http://www.adb.org/documents/Reports/Law_Policy_Pov_Red/default.asp

7 Federal Ministry for Economic Cooperation and Development, *Legal and Judicial Reform in German Development Cooperation*, 5-6 (August 2002), available at http://www.bmz.de/en/service/infothek/fach/spezial/spezial064/90.pdf

8 UNDP, Management Development and Governance Division, *UNDP and Governance: Experiences and Lessons Learned*, MDGD Lessons-Learned Series, no. 1, 11, 22 (October 1998), available at http://magnet.undp.org/docs/gov/lessons1.htm

9 For example, the World Bank Development Reports present selected world development indicators yearly, but no judicial indicators alongside measures relating to poverty, land, health, government size, budgets, etc. See Maria Dakolias, "Court Performance Around the World: A Comparative Perspective," *Yale Human Rights & Development Law Journal*, vol. 2, 87 (1999).

cial independence on per capita income. Such studies are useful for those who want to show that the rule of law influences economic growth. In addition, legal and judicial reform specialists need a detailed understanding of which strategies and reforms actually affect the rule of law and how. Economic analysis is important for demonstrating the broad impact of legal and judicial reforms, and at the same time, a comprehensive set of indicators is necessary if practitioners are to evaluate and monitor progress.

In their efforts to strengthen the rule of law, many countries have sought assistance from international financial organizations and donors. More than 14 years have passed since the World Bank granted its first loan specifically targeting legal and judicial reform. By 2005 the Bank had conducted around 1,300 activities in this sector. Other donors have had a longer engagement. Yet until recently, few evaluations of the legal and judicial sector programs were carried out. Today there is considerable interest in assessing progress.

The logical question to pose is whether these projects have been successful. But first, what were their objectives? To improve the rule of law, establish democracy, reduce poverty, promote economic growth? Are these objectives attainable? Can they be measured? If, for example, the objective is to improve the quality, efficiency, transparency, integrity and accessibility of justice, then that is what the monitoring and evaluation mechanisms should be geared to. However, each project has its own objectives, and specific indicators that are consistent with those objectives are required. It is therefore difficult to measure progress for individual projects, as well as regionally and globally.

The World Bank's first judicial reform project was in Venezuela. [10] The goals were to improve judicial efficiency and lower the costs of dispute resolution, thereby improving conditions for private sector development and reducing the private and social costs of justice. It has been argued that these were the wrong priorities because the most pressing challenges facing the Venezuelan justice system were judicial independence, lack of autonomy and corruption.[11] The objective of other projects, such as that in Bolivia, was to create a judicial system that would contribute to economic growth by facilitating private sector activity, and promote social welfare by guaranteeing the basic rights of all citizens. The legal reform project in Russia sought to improve the performance of the legal system in order to support market institutions.

Since each country has its own set of priorities and challenges, each project develops its own set of indicators depending on the objectives. Projects financed by the World Bank must conduct an Implementation Completion Report (ICR) to assess success.[12] For example, the Bolivia project's outcome was rated as "satisfactory," its sustainability as "unlikely," and the impact on institutional development as "modest." What kind of evaluation criteria have been used thus far? Some have looked at whether drafted laws were enacted, or whether training of lawyers was carried out. But the enactment of a law does not explain the impact on the courts or on the economy, and the number of lawyers or judges trained does not explain the impact of the training on future cases. The main impact is expected to be a change in behavior, which is difficult to measure in the short run. Another option is to focus on areas which can be easily measured, such as caseloads, but this too is only part of the story.

Rule of law projects are particularly tough to measure due to the length of time required to see results, the differences between legal systems, and the difficulty of measuring results that cannot be directly translated into economic terms. This has meant that the evaluations have not always been positive, leading some in the community to brand the entire effort a failure.[13] For example, programs in Russia have been criticized as being overly ambitious.[14]

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10 The Bank's first legal reform project was in China.

11 In 1996, the Lawyers Committee for Human Rights (LCHR) and the Venezuelan Program for Human Rights Education and Action published a report which criticized the Bank for designing the project without broad government, judicial or civil society commitment and participation. *Halfway to Reform: The World Bank and the Venezuelan Justice System*.

12 See the ICR website: http://web.worldbank.org/external/wbcat/main?contentMDK=20087585&theSitePK=222993&pagePK=214926&piPK=214932

13 Thomas Carothers calls into question the status of rule of law promotion as an established field of international aid, arguing that it lacks a well-established rationale, a clear understanding of the problem, a proven analytical method, and an understanding of the results achieved. "Promoting the Rule of Law Abroad: The Problem of Knowledge," Carnegie Endowment for International Peace, *Democracy and Rule of Law Project*, no. 34 (Jan. 2003), available at http://www.ceip.org/files/pdf/wp34.pdf

14 Stephen Holmes notes that expectations must be realistic.

The U.S. General Accounting Office (GAO) reported in April 2001 that "the U.S. government's rule of law assistance efforts in the new independent states of the former Soviet Union have had limited impact … and results may not be sustainable in many cases."[15] The GAO pinpointed limited political consensus on reforms, a lack of domestic resources, and design and management failures by U.S. agencies. It also noted that "none of the U.S. agencies … have effective monitoring and evaluation systems in place to assess fully the longer-term results and sustainability of their efforts and reorient their projects based on a thorough understanding of the lessons learned."[16]

However, the fact that measurement is difficult does not mean that there should be no evaluation of progress. Further evaluation, research and empirical studies are needed to facilitate dialogue. One such initiative is the World Bank's "Legal and Judicial Sector at a Glance" database and the legal and judicial sector assessments, which provide valuable baseline data for measuring progress.[17] Without such evaluations it will be hard to improve reform strategies based on determining which activities most positively impact the rule of law, economic growth and poverty reduction.

"Can Foreign Aid Promote the Rule of Law?" *East European Constitutional Review*, vol. 8, no. 4, 69 (Fall 1998). Kathryn Hendley contends that the proliferation of new laws in Russia, often patterned on those of more developed legal systems, was unlikely to make a substantial impact unless attention was given to the "demand" side of reform. She argues that the legacy of Soviet legal culture – the view of the law as a tool of the state and not the public, ill-fitting transplanted laws, poor execution of reforms, weak legal and enforcement institutions, lack of legitimacy on the part of the Russian state, and the availability of substitute means of dispute resolution – have discouraged Russians from using their legal system. "Rewriting the Rules of the Game in Russia: The Neglected Issue of the Demand for Law," *East European Constitutional Review*, vol. 8, no. 4 (Fall 1998).

15 GAO, *Former Soviet Union: U.S. Rule of Law Assistance Has Had Limited Impact*, GAO-01-354, 3 (April 2001), available at http://www.gao.gov/new.items/d01354.pdf

16 *Ibidem*, 4.

17 Available at http://www4.worldbank.org/legal/database/Justice/default.htm The first World Bank legal and judicial sector assessment was completed in 1994 for Ecuador: World Bank Report no. 12777-EC (August 19, 1994). USAID also conducts such assessments; see, for example, *Strategic Assessment of Legal Systems Development in Uruguay and Argentina* (1994), available at http://pdf.usaid.gov/pdf_docs/PNABT455.pdf

A Review of Legal and Judicial Reform Indicators[18]

There are several examples of econometric analyses relating the rule of law to economic growth. Kaufmann, Kraay and Mastruzzi's *Governance Matters III* constructs aggregate indicators for six dimensions of governance, one of which is the rule of law, from 25 separate data sources.[19] The sources measure the rule of law in different ways, but the most common themes are enforceability of contracts, property rights, perceptions of the court system and judicial process, crime and judicial independence. The rule of law indicator, like the others, provides an overall indication of the trend in a country, i.e. whether the rule of law is improving over time. For example, despite some movement, countries such as the United Kingdom have remained steady over time. However, since 1996 the rule of law deteriorated in Ethiopia, Namibia, West Bank/Gaza and Argentina.[20] As a complement to the aggregate indicators, the authors suggest that in-depth diagnostics and surveys be completed with specific country data.

The World Bank's "Doing Business" index assesses government regulations and their effect on business, especially on small and medium-sized domestic firms.[21] The index's data is derived from research on laws and regulations, drawing on standard questionnaires as well as on input and verification from more than 3,000 local government officials, lawyers, business consultants and other professionals who routinely administer or advise on legal and regulatory requirements. The figures provided are a mixture of objective and perception-based data and describe the regulatory burden in terms of time, money, procedural requirements and other measures. The "Doing Business" indicators are comparable across 155 economies, enabling analysis of specific regulations and their effects on investment, productivity and growth. The

18 I would like to thank Shana Lee for her research on this section.

19 Daniel Kaufmann, Aart Kraay and Massimo Mastruzzi, *Governance Matters III: Governance Indicators for 1996-2002* (The World Bank, April 2004), available at http://www.worldbank.org/wbi/governance/pubs/govmatters3.html

20 Kaufmann, Kraay and Mastruzzi, *Governance Matters IV: New Data, New Challenges*, 4 (The World Bank, May 2005), available at http://www.worldbank.org/wbi/governance/pdf/Synthesis_GovMatters_IV.pdf

21 Available at http://www.doingbusiness.org/

indicators include measures relating to starting a business, securing licenses, employing workers, registering property, obtaining credit, protecting investors, paying taxes, trading internationally, enforcing contracts and closing businesses. For example, a look at the indicators relating to contract enforcement shows that enforcing a contract in Australia involves 11 procedures, takes 157 days, and costs an average of 14.4% of the debt sought to be recovered. In Indonesia the corresponding figures are 34 procedures, 570 days and 126.5%. The two countries rate very differently in the rule of law indicator. Reducing the number of required procedures and raising efficiency could help the ratings.

In his study on India, Köhling looks first at the relationships between the quality of the judiciary and different factors that affect productivity, and then at the impact of these factors on per capita income.[22] This allows him to estimate the indirect effects of judicial quality on per capita income. His prediction is that a weak judiciary will increase the transaction costs involved in economic activity and thereby decrease economic development and per capita income. Judicial quality is measured here according to the speed of the judiciary in deciding trials (average years of backlog); and by the predictability of trial outcome (ratio of dismissed appeals to total number of appeals). He finds that "a weak judiciary has a negative effect on economic and social development, which leads to: (i) lower per capita income; (ii) higher poverty rates; (iii) lower private economic activity; (iv) poorer private infrastructure; and (v) higher crime rates and more industrial riots." These results support the need for attention to the rule of law and the measurement of the impact of such reforms on the economy.

In another highly quantitative study, Feld and Voigt introduce two indicators for judicial independence to try to determine whether judicial independence specifically (as opposed to the rule of law more generally) affects economic growth.[23] The first indicator, "de iure," is based on 12 variables made up of 23 characteristics concerning the legal basis for judicial independence (including institutional arrangements, appointments, tenure, salaries, transparency, etc.). The second indicator, "de facto," is based on eight variables measured over time in 75 countries, which show the degree of judicial independence in practice (effective average term length, changes in number of judges, income, court budget, etc.). Not surprisingly, the main finding of the study is that simply having judicial independence written into legal documents is insufficient if it is not implemented in practice, and that de facto judicial independence is what matters for economic growth. Indeed, de iure and de facto independence appear to be almost completely unrelated, as there was no overlap whatsoever between rankings of the top ten countries measured by de iure indicators and those measured by de facto indicators. As a result, clearly the rule of law depends on how the legal and judicial system functions in practice.[24] Evaluation and measurement should therefore concentrate on the functioning of the system and not on the formal written laws. The UK's experience without a written constitution would support this argument.

Also on the more quantitative end of the spectrum are several studies by the Perryman Group, an economic research and analysis firm, which attempt to measure the economic costs of judicial inefficiencies.[25] While the studies focus more directly on the judiciary (as opposed to abstract correlations between the rule of law and growth), they still tend to be fairly broad in dealing with court costs generally, rather than correlating them with specific weaknesses in the judiciary, much less other factors. Their methodology is to calculate the actual costs of the state tort system by regressing U.S. litigation costs against other variables that are highly correlated with the costs of U.S. litigation; and are available at both the state and national levels (i.e. income, employment, gross product, etc.). They then calculate what the costs would be without the judicial inefficiencies and other current problems, and run a second set of simulations to determine what the costs would be if tort reforms were enacted. They use data from a neighboring state

22 Wolfgang K. C. Köhling, "The Economic Consequences of a Weak Judiciary: Insights from India," Center for Development Research, University of Bonn, Germany (November 2000), available at http://ideas.repec.org/p/wpa/wuwple/0212001.html

23 Lars P. Feld and Stephan Voigt, "Economic Growth and Judicial Independence: Cross Country Evidence Using a New Set of Indicators," (2002), available at http://www.isnie.org/ISNIE03/papers03/voigt.pdf

24 Maria Dakolias, "A Strategy for Judicial Reform: The Experience in Latin America," *Virginia Journal of International Law*, vol. 36, no. 1, 167, 172-75 (Fall 1995).

25 See, for example, The Perryman Group, "The Negative Impact of the Current Civil Justice System on Economic Activity in West Virginia" (2000), available at http://www.instituteforlegalreform.com/resources/020303.pdf

that underwent reforms. After allocating direct judicial system costs across industrial sectors (according to state-level legal services coefficients), an impact assessment measures the total and potential economic losses derived from excessive tort system costs. It does this by using input-output analysis based on survey data, industry information and corroborative source materials.

Perryman then calculates the effects of the weak judicial system in terms of total annual expenditures, gross state product, annual personal income, annual retail sales and employment. For instance, one of the studies states that the cost of Mississippi's poor civil justice system to the typical Mississippi household in terms of higher prices and lower personal income is equivalent to a $324 annual "tort tax" relative to the U.S. average, and $641 per household relative to Alabama, where comprehensive judicial reforms were recently enacted. While this result is as broad as the other rule of law vs. growth econometric correlations, it tries to be more concrete by putting a price on judicial inefficiencies. As is, its use is basically limited to convincing policymakers that the weak judicial system has negative effects on taxpayers and the state economy and should therefore be reformed. It would be interesting to see whether the analysis could be developed further, perhaps expanding it to different types of law and justice issues and problems, and costing the benefits of different types of legal and judicial reforms. This could even be amenable to cross-country comparisons, assuming purchasing power parity adjustments are made. In addition, such an analysis would focus on outcomes and results rather than simply on inputs and outputs, which is a common criticism of many evaluation attempts to date.

Continuing down the quantitative-qualitative scale, in the United States National Center for State Courts (NCSC) produced a detailed Trial Court Performance Standards and Measurement System (TCPS),[26] now used in many courts across the country. It was the result of an eight-year effort by a commission of trial judges, court managers and scholars to develop a common language for describing, classifying and measuring trial courts.

The TCPS was designed to be more of a self-assessment/self-improvement tool rather than a basis for cross-country comparisons. It sets forth 22 performance standards in five areas: access to justice; expedition and timeliness; equality, fairness, and integrity; independence and accountability; and public trust and confidence. How well courts are meeting these standards is assessed through 68 field-tested measures, which consist of both objective and subjective data. Data collection is an involved process, conducted by court officials, volunteers and expert consultants, and consisting of court and case record reviews, tallies, systematic observations, structured interviews, surveys, simulations, group activities and public opinion polls. The TCPS gives detailed instructions for planning and implementing the collection of each measure, as well as on how to analyze the data and prepare relevant reports. There is also a desk reference manual providing examples of different court initiatives that respond to each of the standards.

The TCPS is a very complex and thorough system of analysis. Its ultimate usefulness may depend on one's objectives and resources. Because it is not intended to be used for comparative purposes, it does not necessarily generate easily comparable measures. Moreover, it could be highly time-consuming and costly to implement, which would limit its replicability, especially in developing countries. That said, it does provide a comprehensive means of analyzing court performance, and may be well suited to tracking changes or the impact of reforms over time. Other benefits are that its measures focus on citizen/user preferences and desired results rather than those of government actors, and emphasize the outcomes of performance measurement (results and impacts on the court and community) rather than simply inputs and outputs. Taking into account the expectations of reforms is critical to evaluation.

Another extensive assessment tool is USAID's Commercial Legal and Institutional Reform (CLIR) Assessments Diagnostic Methodology.[27] This quantitative and qualitative tool was developed by Booz Allen Hamilton in November 1999. It facilitates comparisons across countries and between areas of law by quantifying qualitative judgments with numerical values. The assessment methodology analyzes 11 areas of commercial law (anti-money laundering and terrorist financing, bankruptcy, company, competition, contract, commercial court administration, commercial dispute resolution, foreign direct investment, international trade, real property, and

26 May 2003, available at http://www.ncsconline.org/d_research/TCPS/index.html

27 USAID, Seldon Project for Global Trade Law Assessment and Assistance, available at http://www.bizlawreform.com/PROJECT.HTM

secured transactions) across four dimensions: written laws, implementing institutions, supporting institutions, and the social dynamics of commercial legal reform. This matrix format allows for a detailed analysis of both legal and judicial/institutional issues as well as of demand, giving it a multi-faceted perspective that is missing from many of the other, more limited indicator strategies.

In the first reports using the CLIR methodology, the indicators are organized in three tiers varying in degrees of abstraction: high-gloss indicators that broadly quantify the particular area of law for high-level policymakers; somewhat more specific indicators that measure the separate dimensions of each area of law for use by senior program or country-level officials for program design, planning and evaluation; and more nuanced, less abstract quantitative and qualitative measures for those specialists who make detailed analyses of specific areas of commercial law in a given country or between countries. [28] The three-tier organization of indicators seems to have been abandoned after 1999, however.[29] Research for the CLIR assessments consists primarily of Internet research and a review of laws, existing project documents and assessments, and other background sources, combined with interviews and local meetings in the field.

Notwithstanding its thematic focus on commercial law, the CLIR methodology takes the most holistic approach to rule of law indicators. By looking at the legal framework, related institutions and the social dynamics of reform for each area of law, it can offer a detailed, comprehensive view of the issues and players involved. Most of the other indicator methodologies are more narrowly focused on either legal or judicial issues and pay little attention to other factors. Additionally, the original tiered structure of the indicators made the system useful across the spectrum of broad policymaking needs and comparisons, as well as for more detailed analysis and project design. The quantitative nature of the indicators could also facilitate more intertemporal assessments of reforms. However, the subjectivity of some of the data poses potential challenges, since reliance on personal perspectives opens up the possibility of human error, judgments based on hopeful anticipation that do not bear out in the end, shifting standards, etc.

The Judicial Reform Index (JRI) of the American Bar Association's Central European and Eurasian Law Initiative (ABA/CEELI) is a set of 30 indicators which reformers can use to identify baseline data, develop targeted judicial reform programs, and monitor progress.[30] The JRI does not attempt to provide an overall assessment of the judiciary. Rather, it uses both subjective and objective criteria to assess a cross-section of factors critical to the judicial reform process. It does so by evaluating countries against a series of 30 statements that deal with issues of quality, education and diversity of judges; jurisdiction and judicial powers; financial and structural safeguards; accountability and transparency; and issues affecting the efficiency of the judiciary. Data is collected through interviews with 25-30 judges, lawyers, law professors, government officials, NGO leaders and journalists, and is compiled into a standardized format that gives a short explanation in response to each of the 30 statements, and a more in-depth analysis of the particular issue. While the JRI has tried to avoid using a formal scoring mechanism, each statement is correlated with a "positive," "negative," or "neutral" value.

Assessment results are available in the JRI database, which provides a summary page of each country's correlations to the 30 statements, and a more detailed page for each statement presenting the conclusion and correlation, analysis, matters pending and government response. Such a system provides a mechanism to track progress over time as well.

The Legal Indicator Survey of the European Bank for Reconstruction and Development (EBRD) aims to quantify the views of lawyers and other professionals on the effectiveness and extensiveness of laws fostering investment in a given country.[31] The indicators generated are based on perceptions rather than facts, which may be appropriate given that studies have shown that it is not the actual laws on the books but the perceived effectiveness of legal institutions that can have the greatest impact on investment levels. The survey quantifies

28 See, for example, USAID and Booz Allen Hamilton Inc., *Commercial Legal and Institutional Reform (CLIR) Diagnostic Assessment Report for Poland*, 6 (Jan. 1999), available at http://www.bizlawreform.com/country_assess/PolandAssessment.pdf

29 See *Commercial Legal and Institutional Reform (CLIR) Diagnostic Assessment Report for Croatia* (March 2000), available at http://www.bizlawreform.com/country_assess/Croatia%20Assessment.pdf

30 Available at www.abanet.org/ceeli/publications/jri/home.html

31 See Anita Ramasastry, "What Local Lawyers Think: A Retrospective on the EBRD's Legal Indicator Surveys," *Law in Transition* (EBRD, Autumn 2002), available at http://www.ebrd.com/pubs/legal/5410.pdf

how well law reform is perceived to be implemented by generating numerical ratings (1 through 4) for the extensiveness and effectiveness of a country's commercial and financial laws, and an aggregate rating in each law category. Extensiveness indicators quantify whether laws exist, their scope, and whether they meet internationally accepted standards. Effectiveness indicators measure how clear and accessible laws are, and the extent to which they are supported administratively and judicially in terms of implementation and enforcement.

The annual survey is useful for showing general trends in how lawyers' opinions of legal reforms may differ from assessments of the laws on the books. It seeks to evaluate how well laws are understood, implemented and enforced in practice. Comparison between the perceived effectiveness and extensiveness of laws can show how lawyers' perception of a given law may change over time even though the law itself has not been changed (perhaps due to positive initial responses to new laws before problems surface); how greater use of laws in some jurisdictions allows lawyers to become more aware of their weaknesses than laws that are not in regular use; or how lawyers' general perceptions and standards may change over time as legal systems become stronger and more sophisticated. The results of such a subjective methodology may be more interesting than useful for serious evaluation, however, unless combined with more objective appraisals.

The GAO took a more qualitative approach when it conducted an evaluation in 2001 of U.S. rule of law assistance programs in the former Soviet Union.[32] The U.S. Congress had asked the agency to assess the extent to which rule of law assistance programs had had an impact on the development of the rule of law, and whether program results were sustainable, and then to analyze the factors that may have affected the programs' impact and sustainability. Having decided to focus its efforts on four countries, Russia, Ukraine, Armenia and Georgia, where USAID defined rule of law development as a strategic objective, the GAO collected data and information both from Washington and from the field. In Washington, the agency conducted interviews with headquarter officials from USAID, the State Department, the Treasury and the Department of Justice, met with experts on criminal justice system reform, and reviewed project documents. It then conducted fieldwork in Russia and Ukraine (which had received at least half of the U.S, rule of law assistance in the region), consisting of meetings with senior U.S. officials and program staff, interviews with host country officials and civil society representatives, and visits to training schools for judges and prosecutors, law schools and several demonstration projects.

The result is an evaluation that tends to be more descriptive and results-oriented than analytical. The overall conclusion is that the "impact and sustainability of US rule of law assistance programs have been constrained by a number of factors, including limited political consensus on reforms, a shortage of domestic resources for many of the more expensive innovations, and weaknesses in the design and management of assistance programs by US agencies." The assessment recommends that the development agencies require projects to include "(1) specific strategies for achieving impact and sustainable results and (2) monitoring and evaluation of outcomes."[33]

Due to the highly descriptive and qualitative nature of this assessment, which does not develop indicators, it is most appropriate for evaluating the basic outcomes of a particular project, and does not easily lend itself to either cross-country or intertemporal comparisons or measurements. Though it presses for measurement, it is an example of what many assessments have done, which is to be descriptive.

Also more qualitative was a recent evaluation by the International Center for Research on Women (ICRW) of women-initiated community-level responses to domestic violence.[34] The study's objectives were to document the process of community responses to domestic violence; to assess the impact of these responses and to derive indicators for evaluation; and to build the institutional capacities of community organizations in areas of research, process documentation, and evaluation. Three different types of community responses were studied in different areas of India: women's courts, federations of village-level collectives that functioned as advocacy groups, and traditional dispute resolution performed by women's collectives.

The research design comprised documentation of

32 GAO, *Former Soviet Union: U.S. Rule of Law Assistance Has Had Limited Impact* (April 2001), available at http://www.gao.gov/new.items/d01354.pdf

33 *Ibidem*, 3-4.

34 Available at http://www.icrw.org/docs/DVIndia_Report5_702.pdf

the process and strategies involved in the different dispute resolution forums; documentation of the history and evolution of these initiatives; a quantitative impact analysis of existing institutional records; and a qualitative impact assessment in each site consisting of case studies, focus group discussions, semi-structured interviews, surveys, and profiles of community activists.

The actual assessment process began with visits to and workshops in the communities, during which the research design and methodology were developed, and subsequent research pilots, simulations to practice research skills, and ongoing workshops to share experiences, debrief and undertake analysis. These studies aimed to generate indicators that addressed the impact of the community activities on the women, their families, the community/society, the organization, the activists, the perpetrators, and the administration and other institutions. The indicators tended to be fairly subjective assessments based on interviews and surveys, which limited the ability to quantify the results.

The study was interesting in its portrayal and appraisal of the different methods of addressing domestic violence in India, but its highly subjective nature could restrict its use as an evaluative and comparative tool.

How To Improve the Measuring of Success

While the studies and databases discussed above have facilitated the dialogue on measurement and evaluation, further development of indicators is needed. This means that more research information is needed for effective project evaluation. As the World Bank has become more involved in legal and judicial reform projects, for example, one of the important roles it has assumed is the collection of empirical information.[35] Without it reformers end up working in isolation; they fail to benefit from the experience of other reformers and are unaware of how other systems resolve similar problems.[36] Funded projects benefit from the availability of information in terms of both design and evaluation.

In addition to helping judiciaries and other legal institutions in planning their reforms, these analyses can help them improve their ability to gather performance-related data. Since in some countries data remains difficult to find and may be unreliable, such efforts could lead to wider availability of the data. The reform programs should be evaluated with specific data and the results disseminated, resulting in growing confidence in the process on the part of the judges themselves, court personnel, the government and most of all the public at large. Dissemination enables more understanding of the problems and new opportunities for consensus building. The likelihood that the reforms will address those problems is therefore greater.

The public availability of such data is important for raising awareness of the problems surrounding the judiciary and encouraging public debate on the topic. Civil society's participation in the dialogue can assist in the legal and judicial reform process. Development depends on an informed public. The public may demand improved policies. NGOs can work together with public information to instigate and promote new norms by pressuring the political actors to adopt new policies.[37] If data is available they can promote change by reporting facts and information.[38] This has been successful in the areas of human rights, women's issues and environmental protection. It was used in the area of judicial reform when the Lawyers Committee for Human Rights (now called Human Rights First) gathered a group of interested parties together to discuss the reforms being implemented in Venezuela and press for change.[39] Furthermore, the

35 See Edgardo Buscaglia and Maria Dakolias, "Judicial Reform in Latin American Courts: The Experience in Argentina and Ecuador" (The World Bank, 1996). See also Linn Hammergren, Use of Empirical Reserch in Refocusing Judicial Reforms: Lessons from Five Countries, 2003. http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/premnote65.pdf

36 Stephen Golub argues that the lack of project assessment is a symptom shared by all recent democratization efforts, not just judicial reform. He sounds a call for more studies assessing the democratic development projects of Western donor and exchange organizations. "Assessing and Enhancing the Impact of Democratic Development Projects: A Practitioner's Perspective," *Studies in Comparative International Development*, vol. 28, no.1 (Spring 1993).

37 See Kathryn Sikkink, "Transnational Advocacy Networks and the Social Construction of Legal Rules," paper presented for the Conference on New Challenges for the Rule of Law: Lawyers, Internationalization, and the Social Construction of Legal Rules, Santa Barbara, California, November 7-9, 1997.

38 *Ibidem*.

39 Lawyers Committee for Human Rights and the Venezuelan Program for Human Rights Education and Action, *Halfway to Reform: The World Bank and the Venezuelan Justice System* (Lawyer's

media can play a role in disseminating information to encourage accountability and transparency.

Developing Indicators

To promote greater dialogue on legal and judicial reform, the World Bank established a unique database[40] of key indicators for the legal and judicial sector.[41] These indicators include the number of cases filed in each court, the number of cases pending, the budget of the judiciary, the overall public sector budget, the number of lawyers, etc. While not exhaustive, the indicators were selected to provide a snapshot of performance, a baseline, and what could most likely be measured. It should be noted that there are difficulties involved in measuring even these indicators, and comparing countries is not exact. But it is a starting point for discussion on improvement and broader development. It is also an effort to call attention to the major problem of litigation time. Lengthy proceedings risk sacrificing accuracy due to stale evidence, early settlement, and pricing out poorer groups who cannot afford the financial or time resources to enter into lengthy proceedings.

The indicators discussed above cannot be considered alone, but must be understood within the context of the

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Committee for Human Rights, 1996).

40 "Legal and Judicial Sector at a Glance: Worldwide Legal and Judicial Indicators," managed by the Knowledge Management Cluster in the World Bank's Legal Vice Presidency Unit (http://www4.worldbank.org/legal/database/Justice/).
It is the only online, publicly available database to provide comprehensive, updated legal and judicial statistics and information. It presents, for over 100 countries, a wide range of quantitative and qualitative information: basic country data involving general population and budget questions; basic judicial sector data consisting of budget questions, personnel and salary surveys, and sector descriptions; narratives on functional organizations, with descriptions and basic statistics of the various judicial sector institutions; data on civil, family, and commercial court jurisdictions; and descriptions of alternative dispute resolution, the judicial profession, and self-funding mechanisms of courts. The descriptive texts, legal and judicial statistics, and links are gathered by governments, educational institutions, firms and consultants working in countries across the world. Researchers collect information based on a standard survey (http://www4.worldbank.org/legal/publications/ljrmanualGlance.pdf).
No other offerings on the Internet provide such a vast array of data. Some websites contain basic descriptive information on legal and judicial systems, but few statistics. The Bureau of Justice Statistics' World Factbook of Criminal Justice Systems (http://www.ojp.usdoj.gov/bjs/abstract/wfcj.htm#I) consists of simple narratives on criminal justice systems in 45 countries, while JURIST Legal Intelligence (http://jurist.law.pitt.edu/world/index.htm) contains descriptive paragraphs on constitutions, governments and legislation, and courts and judgments.
Some websites only have links to legal and judicial sector institutions and organizations. FindLaw for Legal Professionals (http://www.findlaw.com/12international/countries/index.html) features links to assorted legal online services. The Justice Studies Center of the Americas (CEJA) website (http://www.cejamericas.org/newsite/ingles/index_in.htm) has links to constitutions, criminal codes, criminal procedure codes, and inter-American human rights treaties.
Some websites provide extensive statistics on public sectors but do not focus solely on legal and judicial sector data. The European Commission's Eurostat (http://www.europa.eu.int/comm/eurostat) and the Organisation for Economic Co-operation and Development (OECD) (www.oecd.org) collect and present data related to the economic and demographic development, but not the legal and judicial sectors, of the EU member states.
Some websites present comprehensive statistics on legal and judicial systems in individual countries, but have no mechanisms to compare descriptions between different legal and judicial systems. Websites such as that of the British Home Office (www.statistics.gov.uk/CCI/nscl.asp?ID=5004), Spain's Instituto Nacional de Estadística (http://www.ine.es/), and Costa Rica's Poder Judicial (http://www.poder-judicial.go.cr/) provide extraordinary amounts of information on particular national systems, but not the data needed to compare these systems to those of other countries.
Finally, some organizations, like CEJA, are developing judicial information systems, but they are not yet publicly available on the Internet, or are in an experimental stage. The European Commission for the Efficiency of Justice (CEPEJ), under the Council of Europe, has published a pilot study compiling judicial statistics for 40 Council of Europe members for 2002 (http://www.coe.int/T/E/Legal_Affairs/Legal_co-operation/Operation_of_justice/Efficiency_of_justice/). The data is based on self-reporting by the member states.

41 The database offers official qualitative and quantitative information regarding a specific legal and judicial system. This includes a general overview of the legal and judicial system; a description of the organizations and institutions within it; and information on the judicial career, income sources, alternative dispute resolution mechanisms, court statistics by jurisdiction, the justice sector budget, personnel and salaries, legal education system, and the legal profession. A glossary defining key legal and judicial terms used throughout the application is provided.

legal and judicial system.[42] For example, the number of personnel per judge depends on the kind of procedures that are in place and on the legal culture. Many reform programs have prioritized procedural reform aimed at making the courts more efficient, accessible and transparent. As procedures are reformed, there appears to be movement toward promoting judges that manage the process. That may explain why some countries perform differently than others, as described above. Looking at individual countries and regions with various data may help determine what kind of reforms are needed to have a positive impact on the rule of law and, ultimately, on the economy.

How to Apply the Data to Country Programs: East Asia[43]

Despite the differences between the various countries, the Asian financial crisis of 1997-2000 impacted the region as a whole. The formula that had helped propel the Asian "tigers" into fast-paced economic development for more than two decades came under scrutiny. The crisis highlighted weaknesses in the financial sector and inadequacies in the enforcement of laws. It also spurred governments to engage in crisis-driven law reform, affecting in particular laws that had been transplanted or adapted from other countries, and led to calls for greater transparency in government. But legal institutions were not addressed. It is not enough to have state-of-the-art legal rules on paper; in a market-based economy there must be legal institutions and processes that can act to protect property rights and economic opportunities on behalf of individuals who lack traditional political and economic power. These reforms must be undertaken for real improvement to come about.

While many East Asian countries adopted market-oriented policies that required changes to legal frameworks, financial-regulatory and institutional changes were not considered as urgent as the need for legal reform. As long as economic growth continued at a rapid pace, the imperative for institutional reform and transparency was sidelined. This remained true until the financial crisis. When the Thai currency was devalued in 1997, cracks began to show in the existing legal and judicial framework underpinning the financial system. Years of borrowed, and perhaps not fully adapted, laws, and their weak enforcement, created a situation that shook investor confidence in Thailand's economy, and later in the region's, as well as the public's confidence in their government. The short-term result was the quick adoption of certain laws to more fully protect investors from government intervention in a variety of sectors. However, the medium- and longer-term priorities should include strengthening the region's judicial systems to provide better enforcement, create greater transparency within the system through the promotion of judicial independence, and improve access to justice.

Whether reforms were undertaken unilaterally, regionally, through the Association of Southeast Asian Nations (ASEAN) and Asia-Pacific Economic Cooperation (APEC), or through the impetus of obligations arising from multilateral organizations and through membership in the World Trade Organization (WTO), one consequence has been to highlight the differences in regulatory frameworks across the region.[44] Legal traditions include whether a country is based on civil or common law. Among the surveyed East Asian countries, Indonesia, the Philippines, Thailand, Japan and Korea have civil law systems; Malaysia and Singapore have common law systems; and China, Vietnam, Laos and Cambodia maintain socialist legal systems.

The region's diverse legal and judicial systems, coupled with traditionally inward-looking economic policies and the disparities in levels of economic development, do not easily lend themselves to the process of fully integrating into the world economy. Therefore, it is not wholly surprising that regional arrangements such as ASEAN[45] and APEC[46] are primarily vehicles for

42 The United Nations Development Programme (UNDP) and the European Commission have jointly published a compilation of indicators relating to governance generally: *Governance Indicators: A Users' Guide* (2005), available at http://www.undp.org/governance/docs/policy-guide-IndicatorsUserGuide.pdf

43 This section is based on an unpublished paper that I wrote on East Asia in 2002. I would like to thank Alexey Proskuryakov, Rowena Gorospe, Beth Dabak for their background research at that time.

44 See Bernard Hoekman and Michael Kostecki, *The Political Economy of the World Trading System* (Oxford University Press, 2001).

45 Its members are Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.

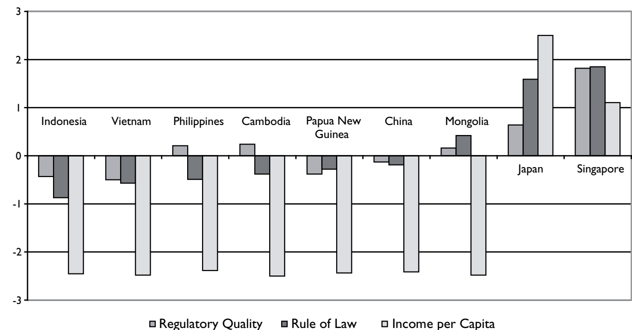
46 Its members are Australia, Brunei Darussalam, Canada, Chile, the People's Republic of China, Hong Kong China, Indonesia, Japan, Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, the Philippines, Russia, Sin-

cooperation rather than for the harmonization of laws and legal institutions and processes. Nevertheless, the past decade has seen a gradual increase in legally binding agreements among its member countries, particularly in the area of trade.[47]

As East Asia lacks a homogenous set of laws or institutions, a new model is needed to explain and classify existing legal and judicial systems in the region. One such model is to classify each of the country's systems based on the following indicators, as defined in *Governance Matters II: Updated Indicators for 2000-01*[48]: government effectiveness, regulatory quality, rule of law and control of corruption.[49] The graph below is based on two of the governance indicators of 2000-01 and shows that while there is no dependence of each indicator on the other, it can be said that countries that have better regulator quality and rule of law also have high incomes per capita.

Based on these indicators, the region's 23 borrowing countries fall into four main groups: the East Asia 5; transition economies (large and small); post-conflict; and the Pacific Islands. The main features of each of these groups are described below.

EAP Sorted by Rule of Law



The first group, East Asia 5, comprises Indonesia, Korea, Malaysia, the Philippines and Thailand. These are upper- and lower-medium-income countries, with the exception of Indonesia, a low-income country, and they have the most advanced legal and institutional infrastructure. The governments for the most part have strong institutions and relatively good control over corruption. Nevertheless, inward-looking economic policies and less than fully developed institutions have led to weak regulation and enforcement of laws, which was cited as a major cause of the 1997-2000 fiscal crisis.

The transition economies include countries with differing levels of economic development, ranging from China, a low-middle-income country, to Vietnam, a low-income country. Despite differences in income, size, population and stage of economic reform, the governments in this group are redefining the role of the state within a tightly circumscribed set of reforms. Economic reforms, orienting policy toward increased external trade and greater international integration are the main facets of this group's reform programs. Both countries have legal systems characteristic of their socialist past, which provide disproportional protection for the state and lack many checks and balances.

The small transition economies group is a subset of the previous group. It comprises two low-income countries, Laos and Mongolia, which historically have been more dependent on external influences. They have also transplanted many state institutions from other countries, including parts of the justice sector. These countries are facing the tremendous challenge of reforming their legal institutions under severe resource constraints, which will

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gapore, Chinese Taipei, Thailand, the United States and Vietnam.

47 The most notable agreement is the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (1992).

48 Daniel Kaufmann, Aart Kraay and Pablo Zoido-Lobatón, *Governance Matters II: Updated Indicators for 2000-01* (The World Bank 2002), available at http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2002/02/27/000094946_02020704044576/additional/130530322_20041117161111.pdf

49 *Ibidem*, 5-6. Government effectiveness: combines perceptions of the quality of public service, the quality of the bureaucracy, the competence of civil servants, independence of the civil service from political pressure, and credibility of the government's commitment to policies. The focus of the index is on "inputs" required for the government to implement good policies and deliver public goods. Regulatory quality: focuses on the policies themselves, and measures incidence of market-unfriendly policies (price controls, inadequate bank supervision) and burdens imposed by excessive regulation of foreign trade contracts. Control of corruption: measures the perception of corruption, conventionally defined as the exercise of public power for private gain. Includes effects of corruption on the business environment, corruption in the political arena, and the tendency of elite forms to engage in "state capture." The presence of corruption manifests a lack of respect for the rules which govern interactions, and represents a failure of governance and business development. Rule of law: measures the success of a society in developing an environment in which fair, predictable rules form the basis for economic and social life, and includes the extent to which agents have confidence in and abide by the rules of society.

remain a challenge at least in the medium term.

Two low-income countries, East Timor and Cambodia, are in the fourth group of post-conflict economies. These countries are facing the triple challenge of post-conflict reconstruction, economic development and, particularly in the case of East Timor, building the basic institutions of statehood. In the rule of law area, protecting people from violence and setting the stage for peaceful coexistence is a major priority. In terms of development, donor coordination to maximize reforms while not overburdening weakened institutions is a salient issue.

The fifth group, the Pacific Islands, contains three countries: Fiji, the Solomon Islands and Papua New Guinea. The Solomon Islands are considered a low-income country, and Papua New Guinea and Fiji low-middle-income countries. The opportunities for economic development lie in forestry, fishery and tourism. The legal institutions are rooted in both traditional and colonial traditions, and are vulnerable to political instability and corruption.

The basic principles of legal and judicial systems is that they should be efficient and effective, independent yet accountable, accessible, and operate with integrity and transparency with the overall objective of producing quality results. The next section describes examples of these principles in a few selected countries in the region.

Core Principles

Efficiency is broadly defined as the capacity of a judicial system to provide judicial services to litigants with reasonable cost and speed. This includes enforcement of judgments.

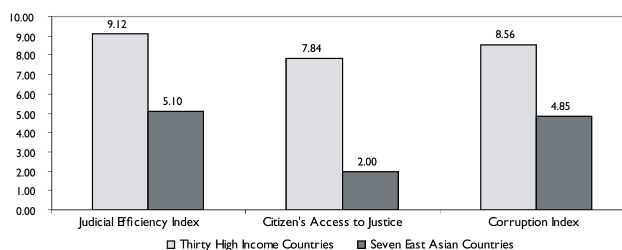
Quality includes the predictability of the judicial system, decisions that are based on appropriate application of the law, and the competence of judges and their staff.

Integrity implies that the judicial system operates independently, decision-making is impartial, decisions are respected, and that the judiciary is accountable and free from interference.

Transparency relates to the rules and procedures by which decisions are made and to the disclosure of information pertaining to decision-making processes.

Access to justice is overcoming economic, psychological, informational and physical barriers to assert individual and property rights.

Perceptions of Judicial Efficiency: High Income vs. East Asian Countries



On average, judicial efficiency is rated higher in high-income countries; for the most part, East Asian borrowing judiciaries are seen as inefficient. The same is true for access to justice and perceptions of corruption in the judiciary. Among the East Asian countries for which data is available, Malaysia is perceived to have the most efficient judiciary and Vietnam the least efficient. It should be noted that Malaysia also has greater accessibility and less corruption. However, efficiency and accessibility are only important if a system produces independent decisions which are based on law and enforced. Access to justice can be increased through informal dispute resolution mechanisms. In addition, alternative dispute resolution, the presence of an active media, and civil society organizations also affect how the legal and judicial system functions. The graph compares the top thirty high income countries to Cambodia, China, Indonesia, Mongolia, Papua New Guinea, Philippines, and Vietnam in relation to judicial efficiency.

Indonesia

Judicial efficiency is a critical issue in Indonesia. While the backlogs at the district court level are generally minimal, the Supreme Court has maintained a backlog of 15,000 cases for more than a decade.[50] From 1993 to 1995 clearance rates decreased from 41.1% to 31.3%, which was partly attributed to the justices' lack of motivation due to low salaries and poor facilities.[51] As of 2003, the ADB calculated that each justice would have to settle at least one case per working day just to prevent the backlog from increasing.[52]

50 ADB, *Country Governance Assessment Report: Republic of Indonesia*, 114 (2004), available at http://www.adb.org/Documents/Reports/CGA/CGA-INO-2004.pdf

51 Ali Budiardjo and Nugrohol Reksodiputro, *Diagnostic Assessment of Legal Development in Indonesia* (CYBERconsult, 1997).

52 ADB, "ADB Statement on Legal and Judicial Reforms

The main causes of the backlog are a failure to keep the 51 justice positions filled, and extraordinarily high rates of appeal from the administrative and high courts. Most Supreme Court appointments are made close to retirement age, resulting in high turnover,[53] and the replacement process is slow.[54]

While the 1945 Constitution gave oversight of judicial matters to the judiciary and administrative matters to the executive, as of April 1, 2004, Law 35/1999 vested management of the judiciary exclusively in the Supreme Court, enhancing the independence of the judiciary. New judges start at the bottom and work their way up.[55] Several hundred candidates are chosen each year. Candidate judges work for a year in a district court before undergoing a series of selection tests to enter a 180-day training program from the Ministry of Justice. Those who pass the training then work for one to two years as district court clerks. If recommended by the president of their court, they proceed to additional selection procedures, including an ethics test, to qualify as a junior judge, after which they are usually assigned to a small district court. After five years, or three if they serve in an isolated region, junior judges qualify for additional training and promotion to a larger court. The training rarely takes place, however, and promotions are granted without it. In theory, promotion to the presidency of a district court also requires training, but in practice it generally occurs without the additional training.

These training deficits, as well as the lack of quality mentorship which results from placing new judges in smaller courts with fewer high-quality older judges, have led to the most frequently heard criticism of lower court judges in Indonesia: that they lack competence.[56] Other contributing factors are a lack of reference materials, such as laws, regulations, decisions of higher and other lower courts, and legal textbooks; lack of training on new laws and regulations, and on important new precedents; and little specialization.[57]

The quality of decisions depends on the individual judge's ability and the incentives to render a fair and legally correct decision. High rates of appeal are likely the result of low judicial competence at the lower levels and of the lack of published opinions. Court decisions and reasoning do not have to be published, even at the Supreme Court level.[58] Appeals are especially common in civil and administrative cases. In 2000, 35% of district court civil cases were appealed to high courts, as were 65% of administrative cases. Only 3% of criminal cases were appealed. Once a final decision is reached, it must be enforced to have impact. It has been observed that the business community is less willing to comply with decisions, leading to Indonesia's poor record of judicial enforcement.

There is a public perception of bias in the judiciary, as well as substantial evidence of corruption. In criminal cases in particular, judges are viewed as partial to the state's interests. Since it has been argued that the judicial process is not insulated from outside interference, appropriate sanctions are necessary for such behavior. The means of allocating cases to judges are not transparent, and it is commonly observed that court presidents will retain the most lucrative cases for themselves.[59] Judges can extract bribes through changing or delaying a verdict as well as allowing or disallowing the presentation of certain evidence.[60] Some judges even receive monthly stipends from lawyers.[61] Internal supervision is lacking, since the Chief Justice and team leaders in the Supreme Court are too busy to effectively supervise other justices, and justices appointed to oversee high courts also lack the time to carry out their supervisory duties.[62]

Respect for judges and courts is low, as is their use. According to a survey by the Asia Foundation, citizens are substantially more familiar with the procedures for bringing problems before a community mechanism (93%) or religious leaders (74%), than they are with court procedures (25%).[63] Of those who use informal mechanisms, 99% choose the *musyawarah* ("decision-

– Indonesia CGI" (December 2003), available at http://siteresources.worldbank.org/INTINDONESIA/Resources/CGI03/13th-CGI-Dec10-11-03/ADB-Legal.pdf

53 ADB, *Country Governance Assessment Report*, 109.

54 *Ibidem*, 118.

55 *Ibidem*, 112.

56 *Ibidem*, 117.

57 *Ibidem*, 118.

58 *Ibidem*, 113. The Supreme Court publishes a legal magazine, which is not a collection of case reports but only summaries of verdicts together with law articles.

59 *Ibidem*, 110, 116.

60 *Ibidem*, 115-16.

61 *Ibidem*, 116.

62 *Ibidem*, 113.

63 The Asia Foundation and ACNielsen, *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector: Preliminary Findings and Recommendations*, 4 (The Asia Foundation, 2001).

making through deliberations"[64]) for legal disputes.[65] The prohibitive cost, delays, lack of transparent rules, and perception of bias are among the many factors that deter those who have legitimate claims from using the courts. Additionally, the lack of published opinions and the lack of time and material resources necessary to render quality decisions further undermine public respect for judicial institutions.[66] Courts are often located too far away for people to get to them. The vast majority of Indonesians are aware neither of their rights nor of the mechanisms in place to help them enforce those rights. Although legal aid organizations have existed for many years, only 50% of the citizens are aware of their services.[67] Finally, there is perceived gender bias in the courts.

China

In China, there has been an emphasis on reform, and one of the most recent includes the new Judges Law. The party leaders' growing realization of the courts' inadequacies has turned judicial reform into a mainstream issue that is now being openly talked about.[68] The Chinese Communist Party (CCP), in the report of its Sixteenth National Congress, promised to reform the financial and personnel arrangements of the courts. The implementation of the Supreme People's Court's second five-year reform plan, issued in October 2005, and of a proposed amendment to the Organic Law of People's Courts, will show whether Chinese leaders are truly committed to fundamental reforms.[69] In addition to corruption, the following problems are routinely cited with regard to courts' poor performance: lack of judicial independence, very low caliber of judges, an inadequate system of court financing, courts' lack of identity vis-à-vis administrative bodies, an inadequate system of judicial selection and appointment, lack of transparency and accountability, lack of finality in adjudication, and poor enforcement of judgments.

Although the Chinese constitutional structure and political theory distinguish between executive, judicial and legislative powers, the judicial system has the status of a service delivery agency under the control of the legislature. It stands on equal footing with, and is organized parallel to, the government administration and the prosecutor's offices. Each of the branches is accountable to the National People's Congress and its local equivalents.

The four levels of courts make up an administrative pyramid. The Supreme People's Court serves as a court of final jurisdiction and oversees the administration and overall performance of the court system, including implementation of the Party directives. Difficulties in exercising its hierarchical authority over lower courts have been caused by a decentralized court financing system that has effectively placed control of the courts in the hands of local governments rather than according to the theory laid out in the constitution.

While judges at each level are formally appointed by the People's Congress at the equivalent level, in reality their selection, like that of other state officials, is controlled by the CCP's powerful Organizational Departments. In consultation with leaders of local courts these departments select and nominate candidates for confirmation by the People's Congresses. Direct Party interference in court decisions is increasingly uncommon, however; no longer is the CCP a monolithic bloc with only one set of interests.

In addition to nomination, appointment, tenure and compensation, independence of the judiciary is also affected by its financial dependence on local governments. The process of setting a court budget is a process of negotiation between courts, which are usually asked to submit a proposed budget, and local governments, which are usually represented by their finance departments. The courts' budget proposals are based on courts' estimations of what they can get from their local government and historical baselines. In China's most prosperous cities and counties, such as Shanghai, Guangzhou and Beijing, the governments appear to have both the financial means and the commitment to adequately fund their courts. In Shanghai in particular, one commentator argues that economic as well as cultural advantages, specifically an

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64 Website of the Embassy of Indonesia in Ottawa (http://www.indonesia-ottawa.org/page.php?s=1000state).

65 The Asia Foundation, *Survey Report*, 6.

66 ADB, *Country Governance Assessment Report*, 119.

67 The Asia Foundation, *Survey Report*, 111.

68 Several commentators are skeptical of the actual commitment of Chinese political leaders. Mei Ying Gechlik observed such skepticism in interviews with two professors and a Supreme People's Court judge. "Judicial Reform in China: Lessons from Shanghai," *Columbia Journal of Asian Law*, vol. 19, 97, 135 (2006). Minxin Pei argues that China's communist system has transitioned into a system of crony capitalism through which elites can perpetuate their privileged positions. *China's Trapped Transition* (Harvard University Press, 2006).

69 Gechlik, "Judicial Reform in China," 135.

emphasis on rules rather than on *guanxi* (connections), have enabled a more hospitable reform climate.[70] But in some rural areas underfunding is an acute problem as the local governments are either too poor or too corrupt to fund the courts properly.

Prosecutor's offices have sweeping powers in supervising the administration of justice. They have the right to review the decisions of courts and file protests, which can lead to retrials. Their authority extends beyond criminal cases to civil litigation, in which they have shown increasing interest in recent years. On the whole, though, the prosecutor's offices are unlikely to be a serious impediment to the judiciary's institutional growth because the courts resist their interference, and also due to the growing influence of Western concepts and models, which limit their authority.

The judiciary is not in a good position to improve its efficiency as it has little control over its human and financial resources. Local influence has proved a far greater force than any attempts of the center to make the judiciary work better. The parallel lines of accountability – those going to the Peoples' Congresses, higher level courts, prosecutor's offices and the Party – create a perfect opportunity for playing these diverse interests against each other and preserving the status quo. However, in Shanghai, the High Court has been permitted since 1998 to nominate presidents of basic courts provided they are approved by the party leaders.[71]

There are unnecessary levels of decision-making that undermine not only the independence of individual judges but also court efficiency. For instance, the panel or individual judge who heard a case must submit a report on it, together with recommendations on how the court should handle it, to either the chief judge or the deputy chief judge for approval. The recommendations can be revised or rejected. The judiciary cannot review and decide the constitutionality of legislation, though some judges have been venturing in this direction.[72] It would be worthwhile to analyze this new trend and understand what underlying factors contribute to this behavior. Such behavior may bring changes to the qualifications and aspirations of future judges in China who may likely become a positive force, not obstacle, in deepening and liberalizing legal and judicial reforms.

The fact that case backlog is not a problem is not an indication of court efficiency, but rather reflects the simple nature, compared to other countries, of many Chinese judicial proceedings, particularly in criminal cases. Judges also have many responsibilities unrelated to resolving cases, such as participating in legal education and enforcement campaigns, attending meetings convened by other government departments, and writing speeches for court leaders.

China has about 300,000 judges and court staff.[73] Despite the large number of court personnel compared to other countries – the Supreme Court employs approximately 150 judges and over 600 staff in total – no specialized administrative support system exists for judges or for case management. There is a category of staff who function as secretaries to judges, but their duties are limited to taking notes and filing case documents.

Judicial corruption is regarded as pervasive. While empirical information about the extent of corruption is not publicly available, the consensus among Chinese and foreign observers is that the problem has greatly worsened since the late 1980s.[74] Judicial corruption can be attributed to judges' low pay, even though salaries have been improved in recent years, their weak sense of professional duty and dignity, and the pressure from corrupt outside elements. In response to a rising chorus of complaints about improperly handled cases and judicial corruption, People's Congresses have begun to assert their supervisory role more aggressively. While unlikely, the possibility that this supervision will evolve into an institutionalized practice of intervention in specific cases cannot be ruled out.

An analysis of the court and legal fees is not available. Nevertheless, it is reasonable to assume that at the current level of legal and judicial reform, issues of access to justice primarily relate to the public's lack of litigation knowledge and mistrust in the corrupt court system. Traditionally, out-of-court grievance mechanisms, such as the Party and the prosecutor's offices, have been rather effective and are likely to remain in use for some time. As the demand for litigation grows, one can expect the

70 *Ibidem*, 133.

71 Veron Mei-Ying Hung, *Judicial Reform in China: Lessons from Shanghai*, Carnegie Papers, no. 58, April 2005, 13.

72 Jim Yardley, "A Judge Tests China's Courts," Making History, *The New York Times*, November 28, 2005, http://www.nytimes.com/2005/11/28/international/asia/28judge.html?ex=1290834000&en=ace85e8658820210&ei=5088&partner=rssnyt&emc=rss&pagewanted=all

73 Hung, *Judicial Reform in China*, 6.

74 *Ibidem*, 17.

legal profession and economic considerations to play a greater role in access to justice.

Setting Priorities for the Future

Throughout the region as with the rest of the world there is a need, at all levels of society, for a deeper understanding of the rule of law, i.e. the adherence of legal and judicial systems to the core principles of efficiency, quality, integrity, transparency and access to justice. Yet care must be taken in the application of these principles as the country's institutions adapt them to the local cultural, social, economic and political environment. The Asian financial crisis highlighted the importance of improving corporate governance and greater government transparency. The crisis created the political momentum for reforms on all fronts, and as a result, stricter standards of transparency have been adopted in most countries. Transparency, however, is not a one-off process but a long-term strategy that must be implemented on a number of levels within the government for it to fully create benefits for all of society.

In general, governments are placing more emphasis on better public services at lower costs, due to slower economic growth and smaller state budgets. Governments for the most part are being held more accountable by their citizenry. Issues of decentralization, public expenditure, management and civil service reform are high on many countries' reform agendas. Significant sections of the legal framework for the region's financial institutions were modified in the wake of the financial crisis. Still, additional and longer-term reforms are needed to deepen and strengthen the corporate governance framework. While laws and institutions have been adapted – and at times wholly transplanted – from other regions, laws must be tailored to the local context.

Where feasible, longer-term legal and judicial reform strategies can dovetail with improved governance, corporate governance and anti-corruption programs to maximize the reform potential. It should be noted that none of these reforms is, in fact, a precursor to another. Regular dialogues with the countries will help to refine and pinpoint areas of greatest concern for the region. Open consultations with key stakeholders and civil society in particular can lead to improved understanding of the priorities in the legal and judicial system. Given the regional disparities, legal reform strategies and the medium-term targets are likely to vary. Based on the country classifications described above, the following policy mixes for legal and judicial reform could be considered:

East Asia 5. A strategy could aim at institutionalizing the independence of the judiciary by ensuring proper checks and balances, strengthening enforcement mechanisms, and improving access to legal information to enhance the quality of judgments; further strengthening of the corporate governance framework; and adapting laws through an open and participatory manner, involving all relevant stakeholders.

Transition Countries. Improvements in the legal system to support market-oriented reform should be a priority. Toward that end, strengthening institutional efficiency where necessary will be important. The quality of judicial decisions and opinions rendered can be enhanced by providing better legal information and training on new laws to judges, court personnel and lawyers.

Post-conflict Countries. A holistic approach could be taken, with the emphasis on deepening the understanding and perception of the rule of law. This can be done through increasing access to legal information and improving stakeholder participation in the rebuilding of society; these are key aspects of building credible institutions.

Pacific Islands. Improving access to justice by the poor should be a priority. At the same time, apparent weaknesses in the law and justice sectors should be assessed and analyzed.

Until now, the main impetus for economic growth, and later for reform, has come from within the region's governments (primarily the executive branch), but more attention should be given to involving civil society in the reform process. Moreover, cultural attitudes in some East Asian countries have contributed to a greater reliance on external conflict mediation rather than court-based solutions. With the increasing complexity of the economies and of commercial conflicts, the reliance on mediation has created difficulties.[75] In the post-crisis era, new concerns have appeared on the horizon: environmental damage, corruption, money laundering, trafficking in human beings, drug trafficking, piracy, cross-border terrorism, ethnic and religious tensions, and post-conflict situations. The

75 See the discussion of insolvency law and related practices in ADB, *Guide to Restructuring in Asia* 2001, 12 (2001), available at http://www.adb.org/Documents/Reports/Restructuring_Asia/default.asp#contents

legal and judicial systems must be included in the reform program if countries expect to address these issues effectively.

Conclusion

As discussed, increased attention to data information is critical to develop strategies and prioritize reforms for countries. To set these strategies, reformers need to analyze the experience implementing these kinds of reforms in their own country as well as other countries with similar levels of the rule of law and development in general. With this kind of knowledge and analysis, countries will be able to pursue priorities that will assist them in achieving the core principles described above. Such analysis relies on effective evaluation and monitoring. As a result, more attention is needed on taking stock of recent rule of law reform efforts.[76] The challenge is to examine which goals were initially established, and ask to what extent these have been met. This applies to developed and developing countries alike. For example, in the U.K. goals included steps to renew democracy, rebuild trust, make government more transparent and accountable, decentralize power, and modernize institutions.

In developing mechanisms to evaluate progress, one should consider what kinds of outcomes the public expects. Many countries have undertaken programs to strengthen the rule of law, good governance and democratic institutions. The logical question is whether these reforms have been successful. What does success mean? Does it mean an increase in the respect for the rule of law or an increase in good governance? Or will it mean that there is greater public understanding of the rule of law? Has the rule of law been incorporated into legal, social and political frameworks? Finally, have the rule of law reforms impacted the poor?

Interest in addressing the impact of reforms has grown.[77] Given the limited resources available to countries, understanding how reforms can expect to impact the rule of law, democracy, human rights and other objectives is essential to policy-making.

For example, an evaluation framework was developed to assess the impact of legal aid in Ecuador. Local NGOs provided legal aid to eligible women and their children, with the emphasis on the poor and the most vulnerable. The evaluation focused on how effective the program was at changing the economic status of women by means of improving their access to child support awards.[78] The results showed that women who used the legal aid centers were better off legally, economically and subjectively, as reflected in qualitative and quantitative measures. Specifically, participation in the legal aid clinics increased the probability of receiving child support payments, decreased the incidence of domestic violence after separation, and is associated with a more positive outlook toward the judicial system.

Similarly, McQuay[79] evaluates the impact of a legal empowerment program, sponsored by the ADB, on the implementation of agrarian reform in the southern Philippines.[80] Such studies are still few and far between. In the future, the evaluation process should consider these kinds of methodologies and be taken into account at the start of the reforms. However, further methodologies and measurements must first be developed and tested.

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76 The following paragraph is from Maria Dakolias, "Are We There Yet? Measuring Constitutional Reform in the U.K.," forthcoming in Vanderbilt Journal of Transnational Law Vol. 39 2006.

77 UNPD insists that "evaluation methodologies must be rethought and performance and progress indicators developed." UNDP, *supra* note 8, § 4.6. See UNDP, *Empowering and Engendering Governance Indicators*, Report of the UNDP-ICSSR Technical Workshop on Governance Indicators for Pro-Poor and Gender-Sensitive Policy Reform, April 20-22, 2005, available at http://www.undp.org/oslocentre/docs05/cross/Empowering%20and%20engdering%20governance%20indicators%20-%20workshop%20report.pdf

78 Bruce Owen and Jorge Portillo, *Legal Reform, Externalities, and Economic Development: Impact of Legal Aid in Ecuador*, Discussion Paper by the Stanford Institute for Economic Policy Research (2003), available at http://scid.stanford.edu/events/Bruce%20Paper.pdf

79 "The Impact of Legal Empowerment Activities on Agrarian Reform Activities in the Philippines," in ADB, *Law and Policy Reform at the Asian Development Bank 2001: Legal Empowerment: Advancing Good Governance and Poverty Reduction*, Appendix 1 (2001), available at http://www.adb.org/documents/Others/Law_ADB/lpr_2001_Appendix1.pdf

80 For details on similar initiatives, see ADB, *Law and Policy Reform at the Asian Development Bank 2001: Legal Empowerment: Advancing Good Governance and Poverty Reduction* (2001), available at http://www.adb.org/documents/Others/Law_ADB/lpr_2001.asp?p=lawdevt

Dutch Legal Cooperation and Paradigm Changes in the International Field

BY JAN MICHIEL OTTO, DIRECTOR, VAN VOLLENHOVEN INSTITUTE FOR LAW, GOVERNANCE AND DEVELOPMENT, LEIDEN UNIVERSITY

Last week the United States granted $285,000 in financial assistance to the Indonesian police, and $750,000 to the public prosecutor's office for training and technical assistance (*Hukum OnLine* 2005; U.S. Embassy 2005; Guerin 2005). Washington had already given $20 million to Indonesia's Supreme Court a few months earlier. That may seem like big money, but it can be even bigger: In July the U.S. gave Indonesia $120 million to support effective and democratic governance. These events illustrate certain trends in international cooperation.

In 1985, CILC's predecessor organization, the Netherlands Council for Cooperation with Indonesia in Legal Matters, was one of the few organizations anywhere running a legal cooperation program funded with government development aid money. No other program of legal cooperation with Indonesia existed on such a large scale. Its establishment was warmly welcomed in both Indonesia and the Netherlands. How did this Dutch experience in international legal assistance coincide with or diverge from trends in the field? And what can we in the Netherlands learn from past and current international debates on rule of law programs?

"An Idiotic Enterprise"

The birth of the new institution met with opposition in some quarters. Prof. Wim Wertheim from Amsterdam University, for example, called it "an idiotic enterprise."[1]

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1 Wertheim's reaction recalls an older, deep-rooted conflict of Dutch colonial rule. In the early 20th century there was a debate between those who wanted to introduce a uniform European civil code in the Dutch Indies, which would apply to all population groups and was considered favorable for business and economic growth, and those who believed that good government required full recognition of customary *adat* law, including Islamic law, as the law of the indigenous population. Members of the colonial administration faculties at Leiden and Utrecht universities fought the bitter "Leiden-Utrecht conflict," the subject of a recent book by Australian scholar Peter John Burns. Leiden was associated with the so-called "ethical policy." Utrecht, funded by the Dutch oil industry, accused Leiden of being "soft on colonial policy" (Burns 2004: 77), and of providing academic instruction that "bred a rebellious spirit towards Netherlands authority" (*ibidem*: 79). The Leiden professors, led by Cornelis van Vollenhoven, explained that their ideas were based on the knowledge of local people's actual behavior and perceptions. It was completely unrealistic, they argued, to lump all inhabitants of the archipelago together in one legal category, as the colonial administration suggested; it would make the vulnerable groups even more vulnerable. In his book *The Indonesian and His Land* (1919), Van Vollenhoven attacked the legal drafters in Batavia and The Hague for being ignorant centralist arm-

Wertheim was a famous socio-legal scholar who had taught students in Indonesia and the Netherlands. He studied law in the 1920s at Leiden University, where Van Vollenhoven was preparing future colonial legal practitioners to deal with the living, customary laws of the Dutch Indies. Wertheim began working in the Dutch Indies in 1931, as a court clerk, in the central government and as a law professor. Following Indonesia's independence he supported and advised the Sukarno government.

To Wertheim as well as other leftists in the Netherlands, the renewal in the 1980s of Dutch cooperation with the jurists of Suharto's authoritarian government was unacceptable. They believed it would legitimize the generals and not help the poor and vulnerable population groups. Wertheim had been a strong supporter of Indonesia's first president, the leftist Sukarno, whose initial policies aimed at democracy and social justice. After the regime change in 1965-66, Wertheim became a harsh critic of the brutal way in which the army under Suharto had taken control of the country and eliminated opponents, including friends and students of Wertheim who supported Sukarno.

Wertheim's position was in line with international trends such as the self-criticism by American development lawyers and the rejection of law by development economists.

Law and Development

In the U.S, in the 1960s and 1970s, several hundred lawyers had started legal development work in Africa, Asia and especially Latin America, funded by the United States Agency for International Development (USAID). Their focus on reforming commercial and civil law, law schools and the courts was based on the assumption that the spirit of law reform and justice would then trickle down and impact on social justice in society as a whole.

They encountered considerable difficulties. Law schools were unwilling to update their old-fashioned curricula, and judges were not prepared to change their formalistic interpretations. Few signs of trickle-down were observed. The initial enthusiasm faded away and some American experts severely criticized their own activities. Imposing U.S. law abroad ran counter to the critical attitude of many American legal academics towards their own legal system. It was a self-estranging experience, they wrote. It was not only impossible but of questionable merit. It was ethnocentric, naive, ineffective and counterproductive. USAID heeded these critics and before long its funding for law and development programs had dried up completely (Tamanaha 1995; Trubek 2003).

USAID's and other donors' interest in legal cooperation was also not helped by the then current theories of development economics, which held that law was an impediment to development. In the remarkable research he conducted in the late 1970s, the young Peruvian economist Hernando de Soto calculated the precise costs and time involved when small entrepreneurs actually tried to comply with the law. His conclusion was that regulations and bureaucracies tended to destroy small businesses rather than support them, and therefore development policy should not support law projects. De Soto's theory of the informal sector became a paradigm, and when in the late 1970s and early 1980s the law and development movement withered away in the U.S., the development community could not have cared less.

Indonesians Request Support

In 1985, the founders of CILC were hardly aware of these debates. They heard other voices, notably those of Indonesian jurists – policymakers, drafters, judges, lawyers, academics – who were all stressing the need for support from the Netherlands, which had left them with a legal legacy that was now in many ways failing them. Dutch and Indonesian diplomats such as Lodewijk van Gorkom and Koesnadi were active promoters. Even the human rights activist Buyung Nasution gave his qualified support. The program cautiously and implicitly balanced pro-market law with pro-human rights law. CILC's first chairman, Hugo Scheltema, a former Dutch ambassador to Indonesia, and its director, Jan van Olden, succeeded in convincing the Dutch Ministry of Foreign Affairs, the Indonesian counterparts and the skeptical Dutch press that the new organization had some useful ideas. The Ministry of Foreign Affairs was ready to provide more than three million guilders a year.

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chair bureaucrats, and argued for decentralization and legal pluralism, preferring a localist over a centralist perspective. He was ultimately able to convince the colonial policymakers in The Hague.

From Indonesia to Eastern Europe

Initially CILC's activities were focused exclusively on Indonesia. Projects included legal drafting, training judges and law enforcement officers, legal education and joint research. The participants were usually compelled to comply with the repressive, bureaucratic style of the New Order, but occasionally a more critical bottom-up approach could be smuggled in. Given the remarkable similarities between the two legal systems, at least on paper, the Dutch and Indonesian legal communities, including the ministries of justice, the judiciaries and the law faculties, participated with enthusiasm.

In 1992, however, tensions arose between the two countries in the wake of official Dutch condemnation of gross human rights violations committed by Indonesia in East Timor. In March, an angry Suharto cancelled bilateral aid from the Netherlands altogether.

But in the meantime major global changes had occurred, and CILC's experience in the field of international legal cooperation enabled it to survive by turning to other parts of the world. After the fall of the Berlin wall, the need for new legal systems in the former members of the socialist bloc created the greatest demand for international legal assistance ever. EU enlargement later added to that demand.

Following the sporadic international legal cooperation with Asia and Africa of the 1980s – the Dutch program in Indonesia was an exceptional pilot effort – by the 1990s rule of law issues were making a huge impact on Eastern Europe. Apart from the collapse of Communism, the single most important reason was a radical paradigm change in development theory. Neoinstitutional economics now assumed a crucial role for legal systems in economic development, both in transitional and in developing countries. The World Bank embraced this theory in its 1992 report on governance and development, and launched a new development policy focusing on the rule of law. Other donor institutions followed suit.

Increasing Challenges

In the early 1990s, CILC became a much sought-after partner thanks to its years of useful experience in the field. The virtual explosion of international legal assistance transformed CILC. Competition from American, British and German companies and agencies forced it to think and act more commercially. During this period CILC was chaired by development economist Ynto de Wit, and continued to be successfully led by Jan van Olden. Many projects could follow standard prescriptions. However, while CILC's staff were working hard to identify, submit and carry out their many projects, the institutional context changed. The Dutch government, notably the Ministry of Justice, the judiciary and some universities signalled that, due to cutbacks and work pressure, they would be providing fewer experts than in the past, and to fewer countries. The Ministry of Foreign Affairs indicated that it might step up its rule of law program if CILC could clarify how it would employ law to promote key development goals such as poverty alleviation. This was not an area familiar to most jurists. A lack of "development lawyers" was one of CILC's limitations. The sort of expertise offered in CILC projects was mostly that of knowledge of Dutch law and practices.

Rule of Law for *Whom?*

How were such problems and challenges dealt with in the U.S.? There, a booming rule of law industry worth billions of dollars was created within a short period of time, with law firms, consultants, academics and the international financial institutions working closely together. But in 2003 this again became the target of criticism in the U.S. Objections were voiced at law and development conferences at Harvard, Cornell, the University of Chicago and elsewhere. David Trubek, now a senior professor at the University of Chicago, argued that there were actually two different rule of law projects going on: one market-oriented and the other democracy- and human rights-oriented. The attempt to merge the two had given rise to a foreign aid sector that suffered from several serious contradictions (2003:116). Both Trubek and Thomas Carothers (2003) from the Carnegie Endowment for International Peace questioned the knowledge base as well as the underlying assumptions of rule of law programs, such as "the rule of law is necessary to attract foreign investment," or "technical improvements in the administration of justice are necessary for democracy." David Kennedy at Harvard University argued in his article "Laws and Developments" (2003) that rule of law programs could not be just technical, without political and distributive consequences; he urged policymakers to realize that this was a myth. Former consultant Scott Newton at the School of Oriental and African Studies in London wrote that most rule of law programs had a very narrow economic, in his words "economistic," rationale and lacked the flexibility to take cultural diversity into account (2004).

Stephen Golub at Berkeley wrote, "The international field of law and development focuses too much on law, lawyers and state institutions, and too little on development, the poor and civil society." He mentioned "a central reality that [the rule of law orthodoxy] overlooks: In many developing countries, laws benefiting the poor exist on paper but not in practice unless the poor or their allies push for the law's enforcement" (2003:3). The "top-down state-centered approach concentrates on law reform … to build business-friendly legal systems that presumably spur poverty alleviation …. The problems with the paradigm are … its questionable assumptions, unproven impact, and insufficient attention to the legal needs of the disadvantaged. An alternative, more balanced approach often is preferable: *legal empowerment - the use of legal services and related development activities to increase disadvantaged populations' control over their lives.* This alternative paradigm, a manifestation of community-driven and rights-based development … can translate community-level work into impact on national laws and institutions" (2003:3).

Legal Expertise in Demand

In spite of these critiques, there is today a rising demand for applied legal knowledge in many development sectors, such as in low-income housing and rural development, which call for legal expertise in land tenure security. De Soto now promotes the idea of legalizing the informal assets of the poor in order to create capital and help reduce poverty. There are serious questions about that, but the importance of the legal dimension is beyond any doubt. Likewise, water management projects now call for expertise in water laws. Gender projects call for family law expertise. Democratization projects require improved local government and election laws, as well as legislation on new watchdogs such as constitutional courts, ombudsmen and national human rights institutes.

In addition, some key experts in development administration have finally joined the law and development debate. They stress that it does not make sense to work on legal systems without addressing the strategies and policies that drive the law (Esman 2004). Similarly, human rights lawyers who have succeeded over the past 30 years in getting human rights enshrined in national legal systems, have a strong interest in making these systems work. This all invites the jurists to become really involved in development work, on the ground.

Lessons for the Future

Meanwhile, Ernst Hirsch Ballin and later Marten Oosting, both prominent figures in the Dutch legal community, took over the chairmanship of CILC. Jan van Olden was succeeded as executive director by Kees Kouwenaar. What could CILC's new leadership conclude from this short history of CILC and the changes in its international context?

1. Wim Wertheim was wrong when he called CILC's predecessor organization an idiotic enterprise. On the contrary, CILC played a helpful role in preparing Indonesia for the rule of law after Suharto's fall. It is important and useful to strengthen legal systems, i.e., laws and legal institutions, and CILC should continue to work in this field.
2. If they do not include people's perspectives and an alternative paradigm of people's empowerment, state-centered programs such as CILC's have repeatedly attracted strong criticism. Simple assumptions of trickle-down are questionable. Over time this could endanger the credibility of and political support for rule of law programs.
3. CILC should invest in its knowledge base, and in particular be well informed about recent initiatives of the Asian Development Bank and the World Bank in areas such as legal empowerment, land policy and justice for the poor. These programs demonstrate more attention to pluralism, decentralization and people's perspectives. CILC's first engagements with NGOs and people-centered programs need proactive follow-up.
4. CILC could explore the need for legal assistance in areas more directly related to development and poverty alleviation. It could enter new fields of law, such as labor law, and new levels of intervention, for instance at community level. This might also bring CILC in closer contact with non-state justice, a complex area with both opportunities and pitfalls.
5. CILC could participate in the international debates on law and development or the rule of law. The future of international legal assistance should not once again depend on fashions in development economics. CILC should share its experiences with other practitioners and academics in these forums. In turn, CILC could benefit from their practical and conceptual insights, for example into the often confused meanings of "rule of law" and "governance" and their respective relationships to development, which is more than economic growth. CILC could also learn from socio-

legal studies on the effectiveness of law and legal institutions
6. CILC may need to invest in and develop a pool of well-informed experts in law and development, the development lawyers. The Dutch government should provide ways to make working in this area more attractive from a career perspective.

Next year when CILC turns 21 it will truly come of age. I hope it will be given the opportunity to continue its work for many years to come. With the support of the Dutch legal community and the government, CILC can make a valuable contribution to the complex and challenging learning process that is now called "the rule of law and development."

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Approaches to Reform in Ethiopia

BY MENBERETSEHAI TADESSE, VICE-PRESIDENT, FEDERAL SUPREME COURT OF ETHIOPIA

Ethiopia is one of the few countries in Africa that follow the continental legal tradition. Many of the substantive as well as procedural legislations that are in force today were enacted during the 1960s when Emperor Haile Selassie was in power. Although the substantive legislations were mainly borrowed from continental Europe, Ethiopia's civil and criminal procedure codes have picked many features of the adversarial tradition as well. The Civil Procedure Code, for example, was a verbatim copy of the then Indian Civil Procedure Act. These legislations were enacted with the explicit intent of modernizing the legal system. It has been nearly half a century since parts of the codes were enacted but some aspects of the relationships do not seem to have been affected by this ambition of modernization. In many parts of the country, traditional and customary and religious rules still play an important role in governing relationships. The process of enforcement of rights is not governed by as many modern procedural adversarial principles as we find in the procedural codes.

The Federal Democratic Republic of Ethiopia has had a new constitution since 1995. The Constitution changed the landmarks of the legal system considerably, introducing a federal form of government to replace the previous unitary system and giving the nine regional states wide-ranging law-making, executive and judicial powers. The federal powers are enumerated in the Constitution and the residual powers are reserved to the regions. The new political structure follows ethnic federalism and recognizes the right of self-determination up to secession. Article 39 of the Constitution provides that:

1. *Every nation, nationality and people in Ethiopia has an unconditional right to self-determination, including the right to secession.*
2. *Every nation, nationality, and people in Ethiopia has the right to speak, to write and to develop its own language; to express, to develop and to promote its culture; and to preserve its history.*
3. *Every nation, nationality and people in Ethiopia has the right to a full measure of self-government, which includes the right to establish institutions of government in the territory that it inhabits, and the right to equitable representation in state and federal government.*

The right to self-determination is envisaged as one of the democratic rights recognized by the Constitution, and as a result Article 39 forms part of the third Chapter, which deals with fundamental rights and freedoms and takes up about one-third of the Constitution.

The Constitution affirms that aspirations for economic development, building a democratic order and ensuring rule of law are inseparably linked to the protection of the fundamental rights. The first two paragraphs of the constitutional preamble assert the following:

Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development

Firmly convinced that the fulfillment of this objective requires full respect for individual and people's fundamental freedoms ...

The Reform Agenda

A few years ago the Ethiopian government announced a set of reform programs aimed at achieving a rapid breakthrough in the overall performance of government institutions, with a particular emphasis on good governance, the rule of law and better economic performance. The reform programs have six main components: information and communication technology (ICT) capacity building; tax system reform; justice system reform; civil service reform; district level decentralization; and urban management capacity building.

All components are coordinated by one line ministry, the Ministry of Capacity Building. There are mechanisms designed to ensure participation of all the stakeholders. Implementation is handled by the agencies themselves.

The Comprehensive Justice System Reform Program

As one can easily gather from the name of the program itself, a piecemeal approach to judicial reform is discouraged in Ethiopia. It was believed that the way reform programs are designed affects their rate of success, and that our reform can attain its objectives if one takes a comprehensive approach to identifying the problems and developing and implementing the programs.

The Justice System Reform Program is comprehensive at least in two senses: its coverage of institutions and of problem areas within individual institutions.

The reform programs include all the agencies within their ambit. Maximum care was taken not to exclude any judicial institution from the reform strategy, which therefore comprises reform in five areas: the judiciary; the lawmaking process; law enforcement institutions (the public prosecution service and the police force); legal education; and justice information.

Each reform program covers a number of highly interrelated components within its strategy. No one component is singled out; instead, efforts are made in all areas simultaneously.

The judicial reform program aims to ensure the effectiveness of judicial organs and public confidence in them, as well as their efficiency, accessibility, and accountability.

The Ministry of Capacity Building is responsible for the Justice System Reform Program, but the justice agencies are integrated into the whole process through the National Steering Committee, which is composed of the institutions involved in the administration of justice. Thus the judicial organs are involved in the initiation, development and implementation of the programs that affect the justice sector. This approach assures the participation of the eventual implementers of the programs right from the beginning, and minimizes the risk of failure stemming from resistance to change. Moreover, inclusion of the institutions at the highest level is vital for securing their leaders' commitment to the reforms. It also facilitates the exchange of information about progress in the other areas, so that all the stakeholders have relatively updated and complete information about the process and the level of change in their fellow institutions whose performance would affect their progress.

Diversified Solutions

The Ethiopian judiciary piloted a Court Administration Reform Program in selected federal and regional courts. Although this reform initiative has been successful in many of its components, it was mainly limited to addressing the administrative problems of the judiciary, and will not fundamentally change the situation of the courts. The current judicial reform program is more ambitious. It is based on the firm conviction that changing one aspect of the judicial process does not necessarily ensure a better service to court users. In fact, changing only some aspects of the problems might even aggravate other aspects. We believe that not only are the problems within the judicial system closely linked, but they affect, and are affected by, other problems within the legal system. The recurrent problems in the judicial system do not have a single source and explanation; their causes are diversified, and their solutions should be as well.

Ensuring Participation

Successful reform requires commitment by the political leadership as well as by the leaders in the judicial institutions. Reform packages should therefore give adequate attention to this vital dimension from the outset. The degree and timing of participation of all stakeholders is also important to prevent resistance to change becoming so strong that some of the objectives are stillborn. The setup of the reform process has tried to take this into

account by allowing an adequate level of participation from the very beginning.

Two structures, at federal and regional level, are designed to ensure participation of all the stakeholders. At federal level the National Steering Committee is chaired by the Minister of Capacity Building and composed of representatives of the judiciary, the federal parliament, the Ministry of Justice, the Federal Police Commission, and the Justice and Legal System Research Institute. Because each institution is represented by its highest executives – the parliament by the speaker, the judiciary by the court presidents, the Ministry of Justice by the minister – the institutional decision-makers are integrated into the reform process. A directorate in the Ministry of Capacity Building facilitates implementation of the programs, but the actual implementation is often left to the institutions themselves. Thus the Federal Supreme Court is responsible for the implementation of the components that are directly related to the judiciary.

The organization at regional level is similar. The regional steering committees are chaired by the presidents of the regional states. Many of the judicial institutions are members of these committees.

Apart from the horizontal coordination at both federal and regional level, there is vertical coordination between the federal and regional institutions that undertake similar programs. Thus the federal and regional courts are coordinated by the Federal Supreme Court.

Challenges

The justice system in Ethiopia is beset by many problems, and the judicial branch is no exception. The root causes for many of the problems it faces are not necessarily to be found within the judicial sphere. While capacity problems, lack of proper case flow management, the excessive administrative workload of judges, and unbridled control of the judicial process by litigants rather than by the judges themselves are all major factors behind court congestion and trial delays, the ailments in other parts of the legal system also contribute.

For example, Ethiopia's Civil Code, which was adopted in 1960, provides detailed rules on the registration of immovable property and transactions affecting the creation and transfer of rights related to it. But the administrative setup required for the implementation of these activities is not yet in place in many parts of the country. As a result, cases that would have been avoided through proper registration keep coming to the courts. This situation affects the supply side of the judicial process (by increasing the number of incoming cases), and therefore contributes to court congestion.

Delays in criminal proceedings can also be attributed in part to institutions other than the judiciary itself. Of course the proper enforcement of the minimum standards for handling criminal cases requires that the courts conduct their business fairly, that they be independent and that they have the professional competence to follow the legal procedure that is intended to help them arrive at the truth (rectitude of decisions). But the pace of criminal proceedings and the outcomes depend to a large extent on the way things are handled during the investigation and the prosecution stages, on relations between the police and the prosecution service, and on the existence or non-existence of legal aid available to suspects, etc.

Needless to say, delays in the judicial process also affect activities elsewhere in the legal system. For example, witnesses for the prosecution may be summoned to court long after the crime was committed. In the meantime witnesses change their address, forget the facts or become unwilling to tell the story as they first saw it. Only a few of the criminal cases brought by the prosecution ever reach the trial stage, resulting in a very high attrition rate. In non-bailable cases, many defendants remain in custody for a lengthy period of time, only to be told that their case has been terminated or withdrawn. If their case finally does go to trial, it is often difficult for a defendant to produce defense witnesses. These instances affect the rights of defendants, the rights of crime victims and the public interest. They definitely affect the rule of law, democratic governance and protection of human rights.

The problems are compounded by the sheer size of the country, and by the fact that many people who want to receive court services have an income far below the poverty line. As mentioned earlier, the Constitution entitles every nation, nationality and people to a full measure of self-administration. People are entitled to use their own language in the courtroom, but we have legislations that are only written in one local language (Amharic) and in English. Our determination to undertake more substantive reform is leading to a rise in the demand for judicial services. The resources allocated to the courts cannot be increased to handle the growing number of cases, and at any rate there is a limited supply of legal professionals, as up until a

few years ago Ethiopia had only one law school, which produced an average of 40 graduates a year. Thus the demand for more court services resulting from recent local and international developments is not accompanied by optimal material and human resource allocations.

The challenges are immense. While our reform efforts should benefit from the experiences – both successes and failures – of other countries, we must be able to take inventory of the local peculiarities. Choosing the appropriate policy options involves dilemmas. Implementation and financing require know-how and resources, some of which may not be available in the country.

Successes

One of the lessons we have learned from our reform efforts over the past few years is that reform is difficult to undertake but not impossible to achieve, even in a poor country like ours. Through the Court Administration Reform Program (CAR) in the federal and some regional courts, we have come to see that with proper strategies, commitment and participation of the stakeholders, such chronic problems as delays and backlogs can be minimized and even completely avoided. In some places we have courts with no case backlogs at all; they were eliminated through backlog reduction strategies implemented over a number of years.

Despite having encountered strong resistance at first, the introduction of IT systems has helped improve efficiency, accessibility and accountability. The average duration of cases has been cut tremendously in many courts covered by the CAR program, partly due to our ability to reduce the downtime in processing information. The electronic filing system being piloted right now in some federal courts has helped us eliminate the extra time judges needed to read documents when there was only one copy, which had to be circulated among them, as well as the additional adjournments granted because of misplaced files. Hearing witnesses via video-conferencing has made distance irrelevant and opened access to poor people who would have otherwise avoided the appellate process for fear of cost. The introduction of audio recording and transcribing systems to record witness testimony not only speeds up criminal trials but has a direct impact on increasing the likelihood of arriving at correct decisions.

When we started the computerization programs, many people told us we were wasting money that should have been spent on more important areas. Some claimed that the quality of justice could not be improved by automating the judicial process. Still others complained that it was too expensive. They were all proven wrong. In sum, the small things we have tried have shown us that with the appropriate combination of serious political commitment, reform-oriented leadership, careful programs and participatory approaches, change is possible even in as neglected an area as the judiciary and in a country as poor as ours.

Program Financing

Reform programs obviously need a big initial investment. So far we have been using the project approach, with donors directly financing a specific activity with the relevant government authority. This approach is changing with the introduction of the Public Sector Capacity Building Program (PSCAP), whereby the donor contribution goes to the government budget and is distributed through the appropriate channels to the implementing agencies. The federal government and the regional states develop their own plans which, if approved, are financed from the money that comes from the budget as well as from the donors. Many donors, including the World Bank and the Canadian International Development Agency (CIDA), have joined the new scheme. Under the current arrangement the federal government takes 20% of the funds, and the remaining 80% goes to the regions.

CILC's baseline study for reform of the Ethiopian justice system was recently published. It assesses the various institutions and presents recommendations for action. The National Steering Committee, of which the Federal Supreme Court is a member, was involved in the project throughout.

Sustainability

A viable reform agenda cannot disregard the issue of sustainability. It includes development of local capacity who will eventually take over when the donors leave. This must be an integral part of the whole strategy lest the reforms collapse when the expatriate experts' contracts expire. We believe that training programs are an intrinsic element of reform, which is one of the reasons why the government has set up the Training Center for Judges and Prosecutors, of which I am director.

The Rule of Law Concept in the Law and Practice of International Organizations: The World Bank

UNDERGRADUATE THESIS BY FLORIS TEN HAVE, UNIVERSITY OF AMSTERDAM
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Foreword

This thesis examines the concept of the rule of law in the context of the World Bank. I chose the topic while working as a student assistant/volunteer with the Center for International Legal Cooperation (CILC). As a non-governmental organization, CILC works to strengthen the rule of law in developing and transition countries.[1] CILC is interested in research on legal and judicial reform, the rule of law, and development cooperation in a broad sense, and contributes to academic debate by hosting conferences and seminars at which professionals in the field can exchange views.

One of my tasks as a volunteer was to assist in the preparation of the CILC conference "Applying the 'Sectoral Approach' to the Legal and Judicial Domain" in November 2005. In the course of my research for the event I discovered that there is no single, universally accepted definition of the concept of the rule of law. I wanted to know whether or not the concept is similarly defined by organizations that promote the rule of law.

I originally planned to compare the World Bank's definition of the rule of law concept to that of the European Union, but it soon became clear that such a comparison would exceed the scope of an undergraduate thesis. I therefore decided to focus on the World Bank, partly because of its high-profile role in the development cooperation field, and partly because I was intrigued by the importance of the concept to the Bank's policy. This thesis can be seen as a descriptive approach, with a critical note on the side. Eventually I plan to undertake a similar study of the rule of law concept in the EU context, after which it would be possible to compare the definitions. This may become the subject of my master's thesis.

Introduction

Many international organizations, governmental and non-governmental, view support for the rule of law as a crucial element of their activities. They regard the rule of law as a *sine qua non* for effective poverty reduction and the sustainable development of a society in transition. Moreover, it is increasingly seen as a precondition for a successful and just state. Although not all of these organizations cite the rule of law in their primary, legally binding documents, such as founding treaties, they often refer to the rule of law in their policy and program documents, mission statements and publications. Some key examples:

The EU
"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and *the rule of law*,[2] principles which are common to the Member States."
Article 6 of the Treaty on European Union

The Council of Europe
"The governments signatory hereto, being members of the Council of Europe, ... Being resolved, as the governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and *the rule of law*,[3] to take the first steps for the

1 http://www.cilc.nl/Profile&MissionStatement.pdf

2 Emphasis added.
3 Emphasis added.

collective enforcement of certain of the rights stated in the Universal Declaration…."
Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms

The Organization for Security and Co-operation in Europe (OSCE)
"They recognize that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms, the development of human contacts and the resolution of other issues of a related humanitarian character. They therefore welcome the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and *the rule of law*.[4]"
Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the Conference for Security and Co-operation in Europe

The United Nations
"Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by *the rule of law*[5]…."
Preamble to the Universal Declaration of Human Rights

The World Bank
"The World Bank's mission is to promote economic growth and reduce poverty in its member states. One of the critical lessons from the East Asian financial crisis and the collapse of some of the Eastern European transition economies in the 1990s was that, without *the rule of law,*[6] economic growth and poverty reduction can be neither sustainable nor equitable."
Legal Vice Presidency, "Legal and Judicial Reform: Strategic Directions"[7]

This thesis offers a descriptive analysis of the role of the rule of law concept in World Bank policy, and it asks whether that role is appropriate in view of the Bank's self-imposed legal boundaries.

The World Bank is committed to fulfilling its mission of aiding sustainable economic development and poverty reduction[8] without interfering in the "political affairs" of its member states.[9] Yet at the same time it integrates the rule of law concept into its activities. This raises questions precisely because that concept, which survived over two millennia of societal change, seems to have an inherent political connotation.

The World Bank has often come under attack. Some of the criticism is directed at its internal organization and the disproportional influence of certain member states, while other critics disagree with the economic theories on which Bank policy is based. This thesis will focus on claims that the Bank is "undermining the national sovereignty of recipient countries."[10] It examines whether the integration of the rule of law concept in Bank policy causes a de facto breach of the prohibition on political activity stipulated in the Bank's Articles of Agreement.

Chapter 1 of the thesis presents a theoretical approach to the rule of law concept. This is followed by an overview in Chapter 2 of the role of the rule of law concept in the activities of the World Bank. The third chapter deals with the question of whether the concept's integration into Bank policy contradicts the restraint on political involvement.

Chapter 1: The Concept of the Rule of Law

As noted above, a number of major international organizations include the concept of the rule of law as an integral part of their policy and activities. In the case of the EU, respect for the rule of law is a prerequisite for membership.[11] Considering the concept's importance for these organizations, one would assume that each of them has established a fixed definition of it. However, as will become clear from the discussion below, defining the rule of law is not an easy task.

Although a great deal has been published on the subject of the rule of law (or *rechtsstaat, der Rechtsstaat, l'État de droit,* etc.), a universal definition does not exist. Nevertheless, implicit in the practice of world leaders, leading academics and the press is a consensus that the rule of law is "the preeminent legitimating political ideal in the world today."[12] Because the rule of law has this legitimat-

4 Emphasis added.
5 Emphasis added.
6 Emphasis added.
7 The World Bank, Washington, D.C., 2002.

8 International Bank for Reconstruction and Development (IBRD), Articles of Agreement, Article 1.
9 IBRD, Articles of Agreement, Article IV, section 10.
10 http://en.wikipedia.org/wiki/World_Bank#Criticism.
11 For the Copenhagen criteria see Bull. EC 6-1993.
12 Brian Z. Tamanaha, *On the Rule of Law*, Cambridge: Cambidge

ing connotation in various social and political contexts,[13] it can be described, at least partly, as a normative concept.[14] It originated in ancient Athens and survived over 2,500 years of political, ideological and societal change. Therefore, its content is and will be constantly influenced by political views at any given time.[15]

In addition to the varying definitions that arise as a result of the concept's normative character, the continental European conception differs from the Anglo-Saxon one. For example, the German *Rechtsstaatsprinzip* does not include democracy and a multi-party system, while the Anglo-Saxon "rule of law" does.[16] It goes without saying that there are differences between continental European countries as well, but these will not be discussed here.

Taking the above into account, the rule of law can be described as a historical, dynamic concept without a fixed meaning. However, various methods for indicating the various elements of the concept have been presented, and there is a certain degree of consensus regarding some of the elements. Different ways of analyzing the concept, and its various definitions, are discussed below. These approaches will serve as explanatory instruments (working definitions) in examining the view of the World Bank in Chapter 2.

1. Rule Book vs. Rights

Ronald Dworkin distinguishes between what he calls the "rule book" and the "rights" conceptions of the rule of law. [17] The first formulation implies that the state can exercise power vis-à-vis its citizens only in accordance with rules that are explicitly laid down in a "public rule book." The rules that regulate the changing of rules in this rule book should also be laid down in the rule book. This could be said to be the rule of law in the most literal sense. The approach further implies that no substantive demands are made regarding the content of these rules because this is "a matter of substantive justice, and substantive justice is an independent ideal, in no sense part of the ideal of the rule of law."[18]

The "rights" conception, on the other hand, implies the existence of moral rights and duties between citizens, which means rules of a substantive nature, such as "thou shalt not steal," and the political rights of the citizen vis-à-vis the state (human rights). These rights should be codified in a rule book to enable citizens to effectuate them through the courts. Contrary to the rule book approach, the rights conception does not distinguish between the rule book and substantive justice; the codified moral rules, which are of a substantive nature, are the very core of the rule book and the rule of law.[19] In other words, rules that do not meet a certain substantive standard cannot be regarded as law or binding, and a society with such rules cannot be seen as one that respects the rule of law. The rights conception requires rules to meet a certain substantive standard, while the rule book conception does not care about the content of the rules as long as they are codified.

It is obvious that in their abstract form both conceptions can be problematic. If a state always acts in accordance with the rule book, but the content of the rule book could be considered unjust at the same time, the state could still be described as unjust but nonetheless in accordance with the rule of law. This is the case in the rule book approach.

The rights conception raises questions of a philosophical nature in respect to the preexistence of moral rights. If there were preexisting moral rights, i.e. rights that "exist" before they are codified by an authority, who would decide on their content and would they be universal? "The rights conception therefore seems to open the objection that it presupposes a philosophical point of view that is itself controversial."[20] There is also a practical issue. Moral rights of individuals are only useful if they can be effectuated; otherwise they could be considered a dead letter.

By distinguishing between these two conceptions, Dworkin demonstrates the ambiguity of the rule of law concept. He makes clear that one can approach the concept from different angles and that both angles have

University Press, 2004.

13 Tamanaha, p. 26.

14 Martina Huber, *Monitoring the Rule of Law*, 2002, Netherlands Institute of International Relations (Clingendael), 2002.

15 Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners,* Carnegie Endowment for International Peace, Washington, D.C., 2005.

16 Sabine Schlemmer-Schulte, Ko-Yung Tung, eds., *International Finance and Development Law, Liber Amicorum Ibrahim F. I. Shihata*, The Hague: Kluwer Law International, 2001.

17 Ronald Dworkin, *A Matter of Principle,* London: Harvard University Press, 1995

18 Dworkin, p. 11.

19 Dworkin, p. 12.

20 Dworkin, p. 13.

21 Wetenschappelijke Raad voor Regeringsbeleid (Scientific Council for Government Policy), *De toekomst van de nationale rechtsstaat, Sdu uitgevers,* The Hague, 2002, p. 23.

their theoretical problems, which is interesting in view of the practical importance of the concept in the law and practice of international organizations.

2. A Layered Concept

Another view holds that the rule of law should be looked at as a "layered" concept.[21] One should distinguish the several layers of the concept in order to prevent misunderstandings when analyzing it. The underlying fundament of the concept (the first layer) can be described as the basic concept of the rule of law. This merely demands that there is a form of government present that binds the authorities to law in order to prevent arbitrary treatment.

Built on the first layer, the second layer consists of the basic principles of law. These principles are regarded as essential in order to realize the form of government sketched in the first layer: Basic civil (human) rights have to be recognized, law should govern the actions of authorities, separation of powers and independence of the judiciary are present.

The third layer is the de facto organization of government institutions, which should be in accordance with the basic principles.

The fourth and final layer consists of behavior, laws and legal decisions. It contains the specific norms deduced from the basic principles of the second layer.

The third and fourth layers can differ from country to country and are subject to political developments, while the first and second are more static and are commonly accepted as being part of the concept.[22] This implies, for example, that two countries which have organized their institutions differently could both be seen as respecting the rule of law. Thus a state that respects the rule of law should at least have the characteristics mentioned in the first and second layer. In what way these principles are then translated into the governmental organization and society is primarily up to the state's discretion. In terms of values and norms, the second layer can be seen as containing the underlying values of the concept, while the fourth produces the specific norms.

3. Ends or Institutional Attributes

In this approach the various definitions of the rule of law concept are classified into two categories.[23] The first category comprises definitions that focus on specific ends which the rule of law intends to achieve in a society, e.g. government bound by law, equality before the law, law and order, predictable rulings and human rights.

In the second category, definitions describe the institutional attributes necessary to effectuate the rule of law, such as comprehensive laws, well-functioning courts and trained law enforcement agencies. In this view the institutional approach turns the (reform of) institutions into ends, assuming that properly organized and well-functioning institutions will automatically effectuate the rule of law.

4. Formal Characteristics or Substantive Outcomes

In this case, definitions of the concept are classifiable according to whether they emphasize formal (objective) characteristics or substantive outcomes.[24] Formal definitions measure the rule of law on the basis of the presence or absence of specific, observable (institutional) criteria: i.e. laws that are public, the absence of retroactive laws, limitations on the discretion of the police, etc. Legal content will be irrelevant; the focus is exclusively on whether the procedural requirements are met.[25] Of course, choosing which formal standards should be used is controversial and there is no definitive list. Nevertheless, formal theories can be regarded as relatively politically neutral because normative discussion of "fairness" and "justice" is avoided. After the standards/procedural requirements are established and accepted, it is relatively easy to determine whether a state meets the criteria.

Substantive definitions include formal elements but imply more. They measure the rule of law on the basis of certain outcomes that are influenced by a moral vision of a "good legal system." Outcomes such as "fairness" of rulings and "justice" are involved. Determining whether a state or the law in a state is fair or just depends on subjective views, with the result that purely substantive definitions are highly dynamic and not pragmatic.[26]

In the formal and substantive approaches, more and less inclusive categories can be distinguished. For example, the least inclusive formal theory is limited to the fact that the government itself is bound by (codified) law (Dworkin's rule book conception), while more inclusive formal theories could imply democracy (to the extent

22 *Ibidem*, p. 25.

23 R. Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, Washington, D.C.: Carnegie Endowment for International Peace, 2005.

24 Tamanaha.

25 Tamanaha, p. 57.

26 Also Dworkin, p. 12.

that a democracy can be described in terms of formal characteristics). In terms of the substantive approach, a "thin" version would only guarantee individual rights, such as the right to contract, or the right to property or to privacy, while a "thicker" version would also include social welfare rights in the sense of social, cultural and economic rights.

Several of the above-mentioned approaches clearly overlap. They are not mutually exclusive but complementary. Ends-based definitions contain both formal and substantive elements. The "layered concept" approach, however, includes most of the other approaches in its several layers.[27] The first layer could be interpreted as including a formal approach and/or of a more ends-based nature and also containing Dworkin's rule book conception. The second layer contains both formal, substantive and institutional attribute elements as well as Dworkin's rights conception. The third and fourth layers are more dynamic but also imply formal elements as well as institutional attributes.

The layered concept approach would therefore appear to be the most useful analytical instrument for examining the approaches of the different international organizations. Keeping the other conceptions in mind, however, can shed light on the various meanings of the concept that are used in the law and practice of international organizations.

Chapter 2: The World Bank: the Rule of law in financial development co-operation

Having provided a theoretical framework for analyzing and explaining the rule of law concept, I will look at the concept's role at the World Bank. I will start with a brief outline of the organization.

The World Bank is a UN specialized agency.[28] Specialized agencies have limited competence and are linked to the UN by special agreements.[29] They are usually established in order to achieve specific goals in line with the overall objectives of the UN[30]. The World Bank comprises the International Bank of Research and Development (IBRD) and the International Development Association (IDA). The World Bank Group includes three additional agencies. This thesis is limited to the World Bank.

The Bank's objectives, conditions for membership and provisions on the organization and management are set out in the IBRD and IDA Articles of Agreement. The purpose of the Bank is:

(i) "To assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries."[31]

In short, the World Bank seeks to promote economic growth and the sustainable reduction of poverty in its member states.

Recognition of the Role of the Rule of Law

Unlike a number of other international organizations, the World Bank does not refer to the rule of law in its founding documents (see Chapter 3). As explained in Chapter 1, the concept is considered a legitimizing political ideal with no fixed consensus on its content. At first glance there would seem to be no direct correlation between it and the stated aims of the World Bank. But the rule of law concept is in fact integrated into its financial development activities. Years of experience led to an awareness, at least in World Bank circles, that effective economic changes can only be realized if certain aspects of good governance[32] are present. In particular, long-term changes will be successful only if a country's government has the institutional capability and structure to implement them.[33] The term "good governance" was introduced in 1989, appearing in a World Bank report on sub-Saharan Africa in which for the first time the importance of good governance for sustainable economic development was officially recognized.[34] A recently

27 Dworkin's approach, among others, is considered in the formulation of the layered definition: *De toekomst van de nationale rechtsstaat*, p. 24.
28 Article 57 of the UN Charter.
29 Article 63 of the UN Charter.
30 Philippe Sands, Pierre Klein, eds., *Bowett's Law of International Institutions*, London: Sweet & Maxwell, 2001.
31 IBRD Articles of Agreement, Article 1.
32 For a definition, see Chapter 3.
33 The World Bank, *Governance and Development*, Washington D.C., 1992.
34 The World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth, A Long-Term Perspective*, Washington, D.C., 1989.

published report, *Governance Matters IV,* [35] reaffirms the Bank's belief in a strong causal relation between good governance and economic prosperity.

At the World Bank, the rule of law represents the legal dimension of good governance by a country.[36] Therefore the Bank increasingly cites the rule of law as one of the standards for good governance necessary for sustainable economic development. Ibrahim Shihata, senior vice-president and general counsel of the Bank until 1998, wrote that "reforms aimed at ensuring the rule of law … are of obvious importance in achieving the order essential for economic growth, as well as the opportunity for society as a whole to benefit from such growth."[37]

As of the end of the 1980s, the rule of law concept became a solid foundation for the Bank's activities, especially in the legal and judicial reform pillar, as part of the Bank's "Legal Framework for Economic Development," which is now a crucial element in the Bank's financial assistance strategy.[38]

The Bank's Definition

In light of the importance of the rule of law for World Bank policy,[39] it is relevant to identify the definition used by the Bank, as well as the framework of specific norms and benchmarks it uses to measure the extent to which the rule of law is being respected in a given case.

Given that the rule of law is not mentioned in the Articles of Agreement, indicators for a definition have to be sought elsewhere. Reflecting the Bank's growing emphasis on promoting good governance, the Legal and Judicial Reform Practice Group was set up within the Legal Vice Presidency. Some of the documents it has published provide information on how the Bank defines the rule of law.

It is clear that the World Bank recognizes the lack of consensus on a definition because one of these documents states: "*While defined in various ways*,[40] the rule of law prevails where the government itself is bound by the law; every person in society is treated equally under the law; the human dignity of each individual is recognized and protected by law (human rights)[41]; justice is accessible to all."[42]

In addition to these basic principles, a state that respects the rule of law should possess: "meaningful and enforceable laws, which are transparent and provide equitable rules; enforceable contracts; basic security; access to justice."[43] There are many similarities with the layered concept approach described in Chapter 1. This confirms my hypothesis that the basic principles of the rule of law concept are commonly accepted. Moreover, it can be said that the elements "equality before the law," "government bound by law," and "justice accessible to all" would fall within an ends-based definition. The "government bound by law" element also reflects Dworkin's rule book conception.

The characteristics into which these principles are translated can be classified partly as the institutional attributes approach ("meaningful and enforceable laws" and "enforceable contracts"), and partly as the ends-based approach ("basic security" and "access to justice"). In terms of the formal and substantive approach, it can be concluded that only the demand for "equitable rules" and the human rights element would fall within the substantive category. All the other elements can be classified under the formal approach.

Norms and Benchmarks

Above I have compared the World Bank's definition of the rule of law to, and classified it in, the various approaches described in Chapter 1. How are these quite abstract principles, which are open to multiple interpretation, translated into the concrete norms and benchmarks which the Bank uses to determine which aspects of a country's legal system should undergo legal and judicial reform?

As a first step towards creating a framework for legal and judicial reform in a beneficiary country, the Bank undertakes a "sectoral assessment." Its purpose is to identify where reforms are most needed, taking into account the Bank's definition of respect for the rule of law.

35 Daniel Kaufmann, Aart Kraay, Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996-2004*, The World Bank, Washington, D.C., 2005.

36 Schlemmer-Schulte, Yung Tung.

37 Ibrahim F.I. Shihata, *The World Bank in a Changing World: Selected Essays and Lectures*, vol. 2, The Hague: Martinus Nijhoff, 1995.

38 See the Legal Vice Presidency policy document *Legal and Judicial Sector Reform: Strategic Directions,* The World Bank, Washington, D.C., 2002.

39 At least in the World Bank's view.

40 Emphasis added.

41 Officially the World Bank deals only with social and economic rights and obliged to refrain from dealing with civil and political rights. Whether this corresponds to reality will be discussed in the next chapter.

42 *Legal and Judicial Reform: Strategic Directions.*

43 *Ibidem.*

It consists of specific questions, most of them focusing on institutional and formal issues, e.g. "Does the country have an administrative code or equivalent statute?" or "Are all first-instance decisions appealable?" Several questions concern the impartiality and independence of the judiciary, e.g. "Is there a judicial supervision authority or inspectorate of the judiciary?" Some questions cover more substantive issues, especially in the area of human rights, e.g. "Does the country have legislation protecting the rights of minorities and indigenous peoples?"

However, the sectoral assessments are primarily limited to objective institutional and formal issues. They contain few questions related to human rights issues. For example, the Legal and Judicial Sector Assessment for Ecuador concludes that the country should pursue "the strengthening of judicial in dependence" by "preparing and introducing a new Organic law of the Judiciary," the fight against corruption by "introducing legislation in conformity with the requirements of international treaties against corruption," and "the improvement of access to justice" by, among other things, "enabling individuals in rural and marginal zones for cases involving small claims."[44]

It is clear that the World Bank supports the idea that promoting the rule of law through legal and judicial reform in beneficiary countries is an essential element in financial development assistance. The Bank basically uses the same theoretical principles underlying its rule of law concept as are found in most of the approaches sketched in Chapter 1. When it comes down to the specific norms into which these principles are translated, however, the World Bank uses formal characteristics as benchmarks for the rule of law. These benchmarks primarily emphasize institutional and procedural elements of the judiciary and the lawmaking process, without making demands on a substantive level, except in the case of human rights issues.

The next chapter deals with the question of whether the World Bank's interpretation of the rule of law complies with the Bank's claim to be apolitical.

Chapter 3: The Rule of law and 'political involvement'

As we saw in the previous chapter, the rule of law, in its mainly formal interpretation, forms the legal dimension of what the World Bank describes as "good governance," which it regards as a *sine qua non* for sustainable economic development and effective poverty reduction. At the same time the Bank is obliged to refrain from political involvement in the countries in which it is active. This is mandated in Article IV, Section 10 ("Political Activity Prohibited"), of the Articles of Agreement:

"The Bank and its officers *shall not interfere in the political affairs of any member*[45]; nor shall they be influenced in their decisions by the political character of the member or members concerned. *Only economic considerations shall be relevant to their decisions,*[46] and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I."

Is it possible, theoretically and in practice, to integrate the concept of the rule of law into an organization's policy without getting politically involved?

Ibrahim Shihata argued that as long as economic considerations are the underlying motives for legal and judicial reform (which, as noted above, has been considered crucial to development ever since the end of the 1980s), World Bank reforms are in accordance with the Articles of Agreement.[47]

The Bank obviously agreed because it later defined the term "governance" as "the manner in which power is exercised in the management of a country's economic resources for development," and "good governance" as "sound development management."[48]

This definition of governance aims to establish the theoretical illusion that because "governance" is defined in economic terms only, all actions undertaken in its name are necessarily in accordance with the World Bank's mandate of only taking economic considerations into account. This theoretical trick does not tell us anything about practice, however.

Although Shihata admits that "there is some overlapping between the meanings given to the words 'governance' and 'politics,'"[49] he claims that distinctions can be made between aspects of governance that are

44 Legal Vice Presidency, *Ecuador: Legal and Judicial Sector Assessment*, Washington, D.C., 2002.

45 Emphasis added.

46 Emphasis added.

47 Shihata, *The World Bank in a Changing World, Selected Essays and Lectures*, vol. 1, Dordrecht: Martinus Nijhoff, 1991.

48 Julio Faundez, Mary E. Footer, Joseph J. Norton, eds., *Governance, Development and Globalization: A Tribute to Lawrence Tshuma*, London: Blackstone Press, 2000.

49 Shihata, vol. 1.

in accordance with the World Bank mandate and those that are not.[50]

Yet if one compares the broadest, most inclusive definition of the rule of law, namely the rule of law as a layered concept,[51] to the Oxford English Dictionary's definition of the word "politics" ("the science dealing with the form, organization and administration of a state"), [52] it is very hard to believe that promoting the rule of law, in its layered concept meaning, is compatible with the restraint on political involvement.

A counterargument could be that, as established in Chapter 2, the World Bank primarily uses a formal approach to the rule of law that focuses on the formal and institutional characteristics of a state's organization and does not impose substantive demands on a state's laws.[53] Even if this were true in the case of the Bank, would it mean that the Bank's legal and judicial reform policy is necessarily apolitical because it focuses on a state's institutional organization? Using the OED definition of politics, the answer would undoubtedly be no.

At the same time, there is value in the distinction between formal and institutional reform and substantive demands. It could be said that imposing substantive demands on countries' legislation would be an element of further political involvement than only institutional reform. However, simply because the former is a case of more political involvement does not mean that in the latter case there is no political involvement at all.

Conclusion

The opinion of *The Economist* regarding the World Bank's claim of being apolitical is perfectly clear when it observes that "the World Bank now talks increasingly about politics, even if it does so in euphemisms such as 'good governance'"; and "It is committed to understanding the political institutions of the countries in which it operates. Haltingly, hesitantly, it is also committed to changing them."[54]

The Articles of Agreement in which the apolitical nature of the World Bank was established were drawn up after World War II. It was impossible at the time to foresee how views on the correlation between economic development and a country's legal system would change.

The World Bank officially recognized this correlation at the end of the 1980s,[55] when the concept of good governance entered into Bank policy. Since then the World Bank has been fighting an unwinnable battle by arguing that its apolitical character can be maintained despite this new view.

The rule of law concept, as a part of the good governance policy, does have an inherent political connotation. Some approaches may be more (substantive approach) and others may be less (formal and institutional approach) "political" in terms of becoming involved in a country's governance issues.[56]

The World Bank primarily focuses on the institutional approach. But it also deals with human rights issues, which are substantive by nature. At first the Bank dealt with human rights in relation to economic and social issues. Now it recognizes that civil and political rights are also essential to its economic development agenda.[57] This is another indicator that holding onto its claim of refraining from political involvement will be increasingly difficult for the World Bank.

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Editor: Marja Lenssen
Copyeditor: Cara Michelle Morris
Photos: Alexander Vinogradov
Layout: Ruparo (Ivo Sikkema, Joyce Limburg), Amsterdam
Printing: Ruparo, Amsterdam

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