



REVIEW VIA THE WEB DISCUSSION FORUM - BACKGROUND AND GUIDE

The **overall aim of the review and validation process** is to promote ownership of the Handbook by APJRF members, and maximise the quality and relevance of the Handbook's content via a coordinated review and networking approach based on both remote and direct engagement strategies.

The **objectives of the review of first chapter drafts** are to:

- Provide chapter authors with objective feedback and constructive guidance on the *technical aspects* of their chapter contributions - to promote intellectual rigour and honesty throughout the Handbook's drafting.
- Promote *relevance* of the Handbook within the region by providing the APJRF's members with an opportunity to engage the Handbook's development.

Practical Guidelines in Providing Feedback:

1. **Scope of Drafts:** the development of chapter drafts is the culmination of a comprehensive consultation process with the APJRF's membership. Chapter topics and scope have been developed in consultation with the membership and approved by the member's representatives, the Project Board.

Contributions are still *drafts*, and consequently, they are largely unedited. Authors, however, should provide a comprehensive self-evaluation of why/why not the reform activities they are discussing were successful - and the implications of this.

2. **Scope of Comments:** comments provided should be informed by the 'Core Concepts Underpinning the Handbook.' These are based on the philosophy articulated in the Manila Declaration and the discussions at the APJRF round table meetings. They are, to:
 - Promote *standards of justice* established in international instruments.
 - Contribute to developing a *shared vision* across the region.
 - Empower and *enable reform actors* throughout the justice system.
 - Create a *practical tool* for exchanging learning and use by each other.
 - Describe our actual *experiences of common challenges*.
3. **Framework for Comments:** this has been developed to structure, and maximise the relevance of, the feedback received. It is intended as a *guide* for reviewers:
 - *Description* - is content clear, interesting and relevant for the reader?
 - *Communication* - are structure, format, writing style and words simple, concise, clear and compelling for the reader?
 - *Effectiveness* - does the content inform, provide insight, stimulate consideration to adapt and implement locally?
 - *Analysis of the Local Experience of What Works / Doesn't Work* - is there sufficient critical self-evaluation using (self-identified) criteria?
 - *Transformation of 'Know-how'* - are the 'Key Messages' relevant to others in region?
4. **Timing and Submission:** all comments on first drafts need to be submitted via the APJRF's on-line forum (<http://www.apjrf.com/discussion/>.) The forum will close at 5:00 pm, 14 March Australian eastern summer time (GMT +11 hours.)



Judicial Reform Handbook -

Draft Chapter 1: Development and Implementation of Reform Initiatives to ensure Effective Judiciaries

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ABBREVIATIONS AND ACRONYMS

- CSOs - Civil Society Organisations
- ICT - Information Technology
- IT - Information and Communications Technology
- MFIs - ??



1.0 KEY MESSAGES FOR THE CHAPTER

1.1 JUDICIAL REFORM THROUGH INVESTING IN JUDICIAL INSTITUTIONS

5 An analysis of the experience in judicial reform at the global level indicates that the traditional approach to judicial reform may not be effective unless there is clarity about the overarching **goal and role of the judiciary**.

Judicial reform would be more effective if the role of judicial institutions is explicitly aligned to justice, and if judicial institutions are oriented towards justice, by:

- 10 (i) providing substantive, value-based content to the idea of justice (i.e., justice as the enjoyment of the fruits of rights - not merely of rights; justice not merely as fair process);
- (ii) creating jurisdiction as well as and power to provide relief for injustice;
- (iii) liberalizing *locus standi* rules so as to provide maximum access to the poor; and
- 15 (iv) disregarding *traditional* doctrines of separation of power so as to be able to interrogate all spaces where injustice is alleged to inhabit.

An alternate approach to judicial reform would then be to:

- 20 a. take a **comprehensive approach** to the development of adjudicatory systems, focusing on institutions, their efficacy, their role and purpose;
- b. set a **clear vision of justice**, meeting international standards and expressed in national law, for the development of judicial systems; and
- c. allow adequate space and flexibility for the **organic development** of institutional frameworks for adjudication responsive to local conditions.

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1.2 DIAGNOSIS: SEPARATING SYMPTOMS FROM CAUSES; IDENTIFYING CAUSES

The traditional approach to judicial reform typically identifies two main sets of problems:

- 30 1. the symptoms and consequences of inadequate performance by courts (typically including delay, cost, access, corruption); and
2. the gap between 'desired' institutional structures and features, and existing organisational arrangements (e.g., independence, appointment, tenure, financing, infrastructure including use of ICT, etc.)

35 These symptoms are nearly identical across countries and hence the solutions advocated in judicial reform programmes are also nearly identical.

40 An alternate approach would to **distinguish symptoms and causes**. Causes typically vary from one country to another. For example, delay may be the consequence not only of unique legal and institutional arrangements but also the type and nature of the society in which courts are embedded.

The Indian experience of judicial reform (at the level of the highest two tiers of courts) began with the courts changing their social role and their relationship with society, rather than with either a supply or a demand side policy intervention from outside the judiciary.

45 This was implemented through a '*public interest jurisprudence*' focussing on human rights, democracy and environmental protection. This judicial initiative has achieved far greater results than the attempts to foster democracy, human rights and environmental protection from the outside through judicial reform projects.



50 The “symptoms” of delay and arrears are yet to be fully addressed in India.
However, the judiciary has transformed itself to a key force promoting not only
democracy, human rights and sustainable development but also economic investment
and growth. This was done by transforming the role of the judiciary to the protection of
justice.

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1.3 DEVELOPMENT OF SOLUTIONS

Traditional solutions contained in judicial reform programmes focus on reform of
institutional arrangements and enhancing efficiency. These are necessary, but not
sufficient.

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Appropriate solutions need to be developed that will ensure that the ultimate aim of the
judicial system is advanced, i.e., the enjoyment of justice by all. Such solutions will need,
for example, to address the vision and concept of justice guiding the judicial system.

65 Judicial reform will need to understand and take into account the broader social context
and political economy in which courts are embedded. In this light, judicial reform will
need to understand and analyse the jurisprudence of courts; and the social and political
role of courts in the concerned country.

70 In many countries, there are serious challenges pertaining to the internal institutional
culture of judiciaries that may be a cause of poor performance or a source of
ineffectiveness. Institutional cultural change may also therefore be an important
component of judicial reform. There are powerful vested interests that gain from existing
dysfunctionalities in judicial institutions; they will oppose reform. Reform strategies must
take into account potential opposition and include appropriate responses, and
programmes should have a major place for judicial education.

75

2.0 DESCRIPTION OF REFORM EXPERIENCE

2.1 PROBLEMS/CHALLENGES - CRITIQUE OF ‘TRADITIONAL APPROACHES TO EFFECTIVENESS OF JUDICIARIES AND THE GOALS OF JUDICIAL REFORM’

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There is over half a century of experience in judicial reform worldwide, covering a large
number of projects across several countries (data being collected). These judicial reform
programmes emerged in response to a serious crisis arising from the failure of
adjudicatory institutions in most developing countries to provide timely fair, predictable,
rule-based, independent, credible justice. The consequence is impunity, lack of effective
redress for civil wrongs, lack of enforceable social and political rights and weak
protection of property rights.

85

90 Development policy makers have increasingly recognised the central role of effective
adjudicatory systems for economic growth, social stability and democracy, especially
since the emergence of globalisation and the expansion of world trade and investment
starting in the 1990s.

95 In response to this crisis, judicial reform programmes have sought to induce and hasten
the development of adjudicatory institutions along a desired trajectory typically replicating
the basic institutional framework of adjudicatory systems in industrial countries (state
systems as well as alternative dispute resolution systems). Induced development of
adjudicatory systems contrasts with the ‘organic’ development of adjudicatory systems in



100 industrial countries along paths that reflected their own unique social and political development.

105 While induced development of adjudicatory systems seem to have achieved its objectives to a large extent in the colonial period, they seem to have had limited success in the post-colonial period. The reasons for this difference are not clear.

2.2 IMPACT OF TRADITIONAL APPROACHES ON THE SUCCESS OF JUDICIAL REFORM PROGRAMMES

110 There has not been adequate independent evaluation of judicial reform programmes. Although USAID has carried out such a review, the World Bank - one of the largest donors in this area - is yet to do so.

115 However, the continuing problems of impunity and weak protection of rights in most of these countries point to the lack of success of judicial reform programmes. In the absence of adequately effective adjudicatory systems, anti-social elements dispense justice in many of these countries at the behest of those who have money (such as use of thugs to recover loans; or the mafia to evict tenants).

120 Due to the absence of adequate framework for evaluation or adequate number of reports on evaluation, it is difficult to systematically draw lessons of experience from the large number of past judicial reform programmes with adequate confidence. An important difficulty is that there is no clarity or consensus about what constitutes a well functioning legal and judicial system, or about the evaluation criteria for judicial reform programmes.

125 Judicial reform has, therefore, largely invested in replicating institutional structures (including the goals, values and principles underlying them) prevailing in industrial countries (the 'supply side' of adjudication.) Consequently, judicial reform projects have assumed that an effective judiciary is one in which the qualifications, appointment, responsibilities and tenure of *judges* and the funding, autonomy, structure, methods and efficiency of *judicial organisations* meet accepted criteria. They have assumed that any decision made by such a judiciary is *ipso facto* assumed to constitute justice. Judicial reform initiatives therefore have focused on *judges* and *judicial organisations*.

135 Courts meeting these accepted criteria, however, can - and do - make unjust decisions (e.g., the Dred Scott case.) Judicial systems serve democracies as well as dictatorships; protect rights as well as deny freedom and equality.

140 Much of judicial reform has concentrated on *first dimension* reforms (enhancing independence of the judiciary including selection, appointment, tenure and accountability of judges; strengthening capacity of core institutions) and *second dimension* reforms (enhancing efficiency and effectiveness). Second dimension reforms have included considerable investment in information technology (IT) and information and communications technology (ICT) to improve court functioning.

145 However, judicial reform programmes have not adequately engaged in the *third dimension* challenge, i.e., the effectiveness of judiciaries in safeguarding justice.

150 These three dimensions are not sequential - rather, they are three mutually complementary areas that together make up judicial reform: the basic institutional



framework (first dimension - 'what'); institutional efficiency (second dimension - 'how'); and role and impact (third dimension - 'why').

2.3 ACTIONS TAKEN

155 2.3.1 India: Judicial Reform through Changing the Role of Courts

India offers an example of a different approach to judicial reform - one that seeks to transform a colonial adjudicatory system to a system that serves a democratic polity and a market-oriented economy. Indian judicial reform has been internally driven, with hardly any role for external donors. Nor has the process of institutional transformation been referred to as judicial reform.

In brief, the Indian judiciary has charted the transformation and development of the Indian judicial system in three phases. In the first phase (1947-1977), the judiciary firmly brought the new democratic state under the rule of law, establishing the principle that the State cannot undertake even essential and progressive social and economic transformation except through the law. In the second phase (1977-1991), the judiciary imposed on the Government accountability for honouring civil, political, social and economic rights. In the third phase, which began with the liberalisation of the Indian economy in the 1990s, the judiciary is today developing a framework to reconcile and balance competing rights of markets, the State and the individual.

A fourth phase is now starting to emerge - taking justice to the door step of people by rejuvenating local courts. All four phases are still proceeding in parallel - the challenge of efficiency, for example, is still a major challenge. The driving impetus of judicial reform in India has come from the *jurisprudence of courts on justice* (the central purpose of judicial institutions), rather than organisational reforms, thus reversing the traditional sequencing. Changes in jurisprudence led to a change in the social role of courts which in turn led to organisational reform (e.g. a new highly independent process for appointment of judges) and increased funds for the judiciary.

The Indian example is not necessarily an argument for reversing the sequence of judicial reform as currently approached. Rather, it is an argument for an integral approach to judicial reform that takes into account all three dimensions - institutional frameworks, efficiency and 'justice role'. It is also an argument for allowing greater flexibility and space for internal evolution of institutional structures for adjudication and of phasing. It is an example of the need for clarity about the role of the judiciary and the need for leadership by judges who are sensitive to the socio-political context of the country. The Indian experience of judicial reform thus more closely approximates the type of evolution that took place in industrial countries.¹

What is the lesson from the above? It appears from the above that there may be no short cut to the development of judicial institutions - they need to be *grown* rather than *manufactured*. The challenge then is to provide strategic direction to their growth rather than *construct or manufacture* judicial systems.

¹ For example, see Morton Horwitz, the *Transformation of American Law*.



3.0 ANALYSIS AND EVALUATION - DEVELOPING MORE EFFECTIVE JUDICIAL REFORM INITIATIVES

3.1 WHAT IS JUDICIAL REFORM?

200 There are currently varying definitions of what constitutes judicial reform. Global experience indicates that judicial reform initiatives consist mainly of the following ten broad types of interventions:

- 205 (1) Strengthening independence of Judges: To strengthen the independence of the judiciary, judicial reforms address issues pertaining to the working conditions of judges (such as appointment, tenure, performance review, review of judicial decisions (through appeals, review and revision) as well as accountability Issues. The 'reward and recognition system' is also strengthened.
- 210 (2) Strengthening Judicial Organizations: Increasing the number of courts and judges as needed, enhancing support and administrative staff capacity, planning and finance capacity;
- (3) Strengthening Physical Infrastructure: including IT infrastructure
- (4) Improving management Systems: including use of ICT, Informatics, etc.
- 215 (5) Strengthening Justice Stakeholders: the bar, police, prosecution, jails;
- (6) Enhancing legal literacy and awareness
- (7) Strengthening Non-court Dispute Settlement Systems: such as mediation, arbitration, etc.
- (8) Strengthening the knowledge and skills of judges: including through judicial education and enhancing knowledge resources available to judges;
- 220 (9) Process Re-engineering and Process Automation: and modernization of court management, case load management and case management as well as of judicial processes, using technology wherever possible to make judicial processes more efficient in terms of number of cases handled as well as speed and quality of disposal.
- 225 (10) Enhancing Access to Justice of the poor: provision of legal aid, enhancing legal awareness, building networks in the justice sector, improving access to information, improving quality of judicial and legal education and enhancing transparency of judicial processes.

230 Judicial reform also includes law reform to eliminate bottle-necks in judicial processes arising from the law as well as to strengthen the judiciary.

235 Donors specialize in certain types of intervention. So, for example, DFID emphasizes support to criminal justice systems (based on their Safety, Security and Accessible Justice agenda) while the US focuses on more of a freedom agenda, building judicial institutions that would support democracy and human rights. The World Bank and other (MFIs) seek to assist capacity building of judges such that competent courts are available to deal promptly with economic and investment disputes. In other words, the content of judicial reform is heavily influenced by donor programmes and priorities and
240 does not vary adequately from one country to another for the same donor.

245 "What is Judicial Reform" (i.e., the types of interventions listed above.) is a difficult question to answer because while the "inputs" and "outputs" of the types of judicial reform listed are measurable, the "outcomes" and "impacts" are less identifiable and measurable. The benefits of years of investment by USAID and the World Bank in



improving court infrastructure in Latin America, for example, are not fully obvious or measurable. On the other hand, there is no evidence that the *lack* of an independent judiciary in several East Asian countries has been a positive - or negative - factor in their economic development.

250

One criticism is that (e.g., Golub above), judicial reform has focused too much on the “supply side” and not enough on the “demand side” of judicial systems. Another criticism is that judicial reform has not adequately addressed or even considered reform of related social, political, economic and governmental practices so as to enhance the availability of justice in the country.

255

India offers an intriguing third variant. Most commentators would agree that in following a path of economic development within a democratic framework, India’s independent judicial system has played a significant and positive role.

260

An analysis of “What is Judicial Reform” shows that what is missing is an emphasis on the eventual outcome of justice. This “justice deficit” in the approach to judicial reform may be addressed by the “justice-oriented approach to judicial reform” suggested here.

265

A justice-oriented approach will require that both supply and demand sides be addressed. It will provide a basis for monitoring outcomes and impacts in terms of availability and exercise of rights. This approach will also reform the mission of courts so as to make them more justice-oriented as well as provide a vision of justice for guiding judicial reform.

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Judicial reform must therefore address the “supply side” (judicial institutions) as well as the “demand side” through the types of programmes discussed above. However, judicial reform must also address the key issue of the mission/role of courts and orient them towards a clear vision of justice. This may be accomplished by ensuring that courts are conferred adequate jurisdiction and power to intervene in matters of justice and to provide effective access to victims of injustice. A justice-oriented approach to judicial reform would thus address, in addition to the traditional components, the following aspects:

275

- (1) a clear definition of a vision of justice;
- (2) the role of courts at different levels in securing justice;
- (3) jurisdiction and power of courts to address issues of injustice (i.e., equality, freedom, dignity, equity and fairness);
- (4) adequate remedies available to the courts to grant effective relief; and
- (5) effective access to justice especially of the poor and socially and economically excluded

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3.2 HOW SHOULD JUDICIAL REFORM BE CARRIED OUT?

Judicial reform must be developed and implemented with the participation of all stakeholders in the justice system, civil society organisations (CSOs) and academia in addition to Government and the judiciary.

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Judicial reforms must be developed and implemented in accordance with a strategic management plan which has a clear road map and clear milestones. The agenda for judicial reforms must be developed and managed in a participatory manner, ensuring inclusion of ‘demand-side’ voices in the process.

295



300 Conventional wisdom is that reforms should be sequenced so that institutional reforms precede changes in the vision and mission of courts. This sequence can be reversed. Changes in the vision/mission/role of the judiciary can result in institutional reform.

305 A variety of models have evolved internationally for carrying out judicial reforms. International financial institutions, such as the World Bank and the ADB, have sought to carry out reforms mainly through the judiciary, with courts and judges playing a key role. Given the need for safeguarding the independence of the judiciary the central role of the judiciary is appropriate and required. However, judiciaries often lack the capacity and skills to develop and implement projects. Assistance from external agencies is therefore required.

310 Some donors (such as DFID and USAID) have also provided considerable funding to non-judicial agencies involved in the administration of justice such as police, prosecutors and corrections. Assistance for judicial education and legal education as well as for training of the Bar are also important components that should be implemented by the concerned entities.

315 What has been missing in many cases is a holistic vision to guide the judicial reform process. The Philippines developed such a long term vision for judicial reform through a consultative process. This process could be emulated by other countries.

320 **3.3 WHY JUDICIAL REFORM? A LACK OF CONSENSUS AND CLARITY ON GOAL OF JUDICIAL REFORM**

325 One of the reasons why there is little consensus on the success of judicial reform programmes is that the goals of judicial reform are not adequately clarified. Clarity regarding goals is essential for the success of any activity.

330 There are two main problems in this regard. The first is that there is no consensus on the goals of judicial reform. The second is that the goals of judicial reform provide inadequate clarity and guidance for planning and executing judicial reforms.

330 **3.1.1 Lack of Consensus**

335 Differences in goals are sometimes subtle, sometimes significant. It has been noted in a G-24 paper, for example, "*Although some consensus has been reached and several international institutions and bodies have begun promoting legal reform, the consensus is unwieldy as there are still many forces against reform and little agreement about what constitutes feasible legal reforms.*"²

340 The divergence of donor approaches to legal and judicial reform are well known to the donor community. DFID, the UK aid agency, describes its goals for legal and judicial reform as "...promot[ing] safety for all from violence and intimidation, security of personal property and equality of access to justice" - legal and judicial reform as a means to "Safety, Security and Access to Justice." Capturing the differences in donor approaches, DFID itself describes the legal and judicial reform goals of other donors as follows: "*The World Bank focuses on legal and judicial reform for the purpose of strengthening market*

² Florencio López-de-Silanes, *The Politics of Legal Reform*, G-24 Discussion Paper Series No. 17, April 2002 UNCTAD and Harvard's Center for International Development, at page 1.



345 institutions, and USAID on the 'rule of law'. Human rights are emphasised by the
Ford Foundation, the European Union and the Canadian and Swedish development
agencies.”³

350 In the 2002 book *Many Roads to Justice* the Ford Foundation - a donor with over half a
century of experience in funding legal and judicial reform - describes the goal of legal
and judicial reform as promoting the “use of law to secure human rights, improve[e] the
lives of people.....[and support] the advancement of disadvantaged populations and...
social justice.”⁴ On the other hand, the “law and policy reform” goals of the Asian
355 Development Bank are to “foster economic activity and sustainable development”,
broadly similar to that of the World Bank. In the context of domestic law in industrial
countries, judicial reform has been defined more as enhancement of productivity and
efficiency, as “...the continuous improvement of how we do business - our individual and
collective performance as judges, as a branch of government.”⁵

360 Donors tend to advocate legal and judicial reform models and institutional solutions that
mirror the legal systems they are most familiar with - their home country systems. Each
of these systems has underlying premises and goals. Some of these goals are not
mutually compatible (e.g., introduction of equity and trust principles into countries that do
not have a common law tradition or the introduction of inquisitorial approaches into
365 countries with common law traditions.) When Countries receive assistance from more
than one donor (as they often do), they run the risk of introducing contradictory goals into
their legal system.

370 Divergence regarding judicial reform goals reflects differences regarding *the purpose,
nature and role of the judiciary as an institution*. As is evident from the variety of
approaches of donors, judicial systems may be seen as

- Instrumental/teleological, falling into two categories:
 - (i) judicial systems as essential for the operation of a free market; or
 - (ii) judicial systems required for upholding the rule of law and good
375 governance.
- Deontological - a justice system as an end in itself, as inherently moral.

Some countries place emphasis on the purpose of courts (especially at the local level)
as:

- 380 1. finders of fact; and
 2. agencies for dispute settlement
- rather than for upholding of rights. These two goals could be inconsistent as upholding
of rights may create rather than resolve conflict in some circumstances - e.g., asserting
and upholding equal rights for women may compel marriages to be dissolved where such
385 rights are being violated.

The US judiciary, for example, has been described as “...a fundamentally antidemocratic
institution.”⁶ It restrains the legislature from violating the Constitution and has therefore
developed sophisticated tools for judicial review of legislative action. The UK, on the
390 other hand, upholds the principle of parliamentary supremacy.

³ Governance and Social Development Resource Centre co-sponsored by DFID, at
<http://www.gsdr.org/go/topic-guides/justice/donor-approaches-to-justice>; last visited on February 15, 2008.

⁴ The Ford Foundation, *Many Roads to Justice*, at page 1.

⁵ Roger K. Warren, President, The National Center for State Courts, USA.

⁶ Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (2007), at page 2.



395 Some judicial systems (e.g., the US) allow for plea bargaining and out of court settlement extensively (no more than 3% of US criminal cases, for example, are said to go on trial.) Others feel that a public trial is a necessary safeguard for safeguarding justice. Some countries extensively deploy judges who are not legally trained. Others (e.g., India and some civil law countries) require judges to be legally trained. Some countries rely on the jury system, others do not.

400 Nor is there consensus on whether legal and judicial reform should focus on: formal or informal institutions; or the “supply side” or the “demand side”. It has been argued that the international aid field of law and development focuses too much on law, lawyers and state institutions, and too little on development, the poor and civil society. In fact, it is doubtful whether “rule of law orthodoxy,” the dominant paradigm pursued by many international agencies, should be the central means for integrating law and development.
405 Legal empowerment “...*the use of legal services and related development activities to increase disadvantaged populations’ control over their lives*” has been suggested as a better alternative.⁷

3.1.2 Lack of Clarity

410 The second problem regarding the success of judicial reform, is that the goals of judicial reform are stated in rather broad terms, such that they rarely provide adequate clarity and guidance for planning and executing judicial reform (e.g., the goals described above).

415 Goals such as: “poverty alleviation”; “sustainable development”; “promotion of the rule of law and good governance”; and “promotion of human rights”, are at a high level of abstraction. They do not provide adequate clarity for the purposes of planning and executing judicial reform programmes. To the contrary, they raise more questions than they resolve. It has been argued, for example, the “...*the formalist rule of law advocated by the World Bank and other donors does not necessarily exist in the developed world...[and] attempting to transplant a common template of institutions and legal rules into developing countries without attention to indigenous contexts harms pre-existing mechanisms for dealing with issues such as property ownership and conflict resolution.*”⁸
420

425 If the goal of a legal and judicial system is stated as “continuous improvement” of the judicial system, for example, (see above), what is the measure of quality and improvement of a judicial system? Quantitative measures such as speed of disposal are accepted by all as a necessary - but not sufficient - feature of efficient judicial systems. However, there is little clarity regarding how the quality of a judicial system should be
430 measured. In a paper submitted to the American Society of International Law in 2006, this author has proposed the measurement of the availability of “law-dependent public goods” (public goods in the production of which the legal and judicial system plays an essential role) as a measure of the quality of a legal and judicial system. These “law-dependent public goods” would be identified in a participatory manner at the local level
435 taking into consideration internationally accepted norms.

Consequence of Consensus and Lack of Clarity

The absence of a clear set of judicial reform goals has made it impossible to scientifically assess the impact of judicial reform across programmes. “Goal congestion” and “goal

⁷ Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative*. Carnegie, 2003.

⁸ Frank Upham, *Mythmaking in the Rule of Law Orthodoxy*. Carnegie, 2002.



440 conflict,”⁹ have confused assessment of impact. As a result there is considerable
scepticism about the effectiveness of judicial reform programs, notwithstanding the scale
of assistance being provided. There is also suspicion about “hidden agendas” of donors
in terms of seeking to plan the “flag” of their national legal systems without adequate
concern about the impact on beneficiary judicial systems.

445

3.1.3 The Way Forward: Developing a Unifying Goal for Judicial Reform

“Goal confusion”, “goal congestion”, and “goal conflict” on judicial reform goals implies
that:

- 450 • Countries desirous of undertaking judicial reform programmes must give
importance to conscious and proactive “goal setting” rather than take goals for
granted. In so doing, care must be taken to avoid potential clash with goals of
other judicial reform programs. Goals must be realistic and capable of being
realized in the country context.
- 455 • An attempt is required at the international level to address the problem of “goal
congestion” and “goal conflict”. A unifying goal for judicial reform is needed.

Is a unifying goal for judicial reform possible? There are common threads that cut across
divergent judicial systems that do provide the opportunity to develop a unifying
framework that would address the various concerns underlying current approaches to
legal and judicial reform.

460

Such a framework is briefly summarized below.

465 A common thread in all approaches to judicial systems and judicial reform is that the
overarching purpose of judicial systems is the **quest for justice**. “Justice” is a
fundamental concept on which all judicial systems rest (e.g., the second aim of the US
Constitution is to “establish justice” - after “to form a more perfect union”; the first aim of
the Indian Constitution is to “secure justice” to all its citizens; and Article 39A of the
470 Indian Constitution provides that the “State shall secure that the operation of the legal
system promotes justice”). Whether or not Constitutions use the word justice, their
underlying goal is to establish or secure justice.

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***If the overarching purpose of judicial systems is to establish/secure justice, the
overarching purpose of judicial reform must also be to establish/secure justice.***

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What then is justice - not for the purposes of a jurisprudential discussion of justice but for
the purposes of developing a working definition that would guide the formulation and
implementation of judicial reform programs? As a practical matter, there is very little
clarity or consensus about what constitutes “justice”. Indeed there is very little discussion
480 of what justice is outside largely academic debates amongst jurists and philosophers.

480

“Justice” is understood by some as merely a “right” decision, e.g., of courts. If so, what
are the criteria by which such “rightness” is to be measured? Justice is understood by
others as *merely a description of the decision making process* (e.g., the symbol of
485 blindfolded justice holding the scales even). Justice is understood by yet others as the
outcome of the decision - distribution or retribution.

485

⁹ For example, judicial reform efforts in the transition economies have witnessed competing judicial reform
programs emanating from civil law and common law countries.



490 If a decision of a State is seen as “justice” we speak of “justice” being
“administered” or “delivered” (by the State) in a top-down manner, as if justice were a
product of the State. Viewing “justice” as merely a decision-making process or a
decision is inadequate to define justice. This is why, for example, a 19th century decision
of the Supreme Court of the United States in *Scott vs. Sanford* (in which a slave was
held by the US Supreme Court as *not* having *any* human rights) is seen as *injustice*
although it may well have met a “process” definition of justice.

495 An alternate concept of justice is as a standard of human conduct based on the values of
freedom, equality, dignity, equity and fairness. This concept of the justice is further
supported by one of the literal meanings of the Greek word justice, i.e., “connecting
together”. Thus “justice” is, literally, a process of connecting together or synthesising - in
500 reality for individuals - the enjoyment of the five values of: freedom; equality; dignity;
equity; and fairness by all individuals in society.

This concept of justice allows the integration of diverse views of justice and diverse
approaches to legal and judicial systems and legal and judicial reform. Human conduct
505 that upholds these values will result in strengthening the market economy as well as
protecting the human rights of the weakest and the poorest; in promoting the rule of law
(howsoever defined) and in underpinning good governance. These values are found in
internationally accepted human rights instruments and in Constitutions as diverse as the
US and the Chinese Constitutions.

510 For international organisations, justice is human conduct that meets standards specified
in international human rights and other applicable instruments. Therefore judicial reform
supported by international organisations must aim to enhance standards of human
conduct specified in international human rights and other applicable instruments. Norms
515 contained in customary international laws that fleshes out the basic values and norms
that are in international agreements and declarations may need to be crystallised before
they can be accepted as being normative.

520 The role of judicial institutions, working with other State institutions, is to obtain just
conduct. Therefore judicial reform must enhance the capacity of courts to obtain just
conduct. This approach shifts the focus of judicial systems and judicial reform to human
conduct and thus democratizes the idea of judicial reform. It provides the underpinning
for core human rights values that are necessary to achieve varied development goals.

525 While there will be few if any countries that reject the five values of: freedom; equality;
dignity; equity; and fairness by all individuals in society, there will be significant
differences between countries on how they interpret them. All legal systems in the world
provide a basis for defining and regulating these values through law.

530 **3.4 WHO SHOULD CARRY OUT JUDICIAL REFORM?**

535 Keeping in mind the need to protect the independence of the judiciary, judicial reform
programmes are typically carried out by the judiciary. Executive Branch agencies (such
as the Ministry/Department of Law and the Ministry of Finance) also play a key role in
developing and implementing judicial reform plans. One of the challenges for judiciaries
is that they lack the capacity to develop judicial reform policies which, as a result, come
mainly from the initiative of Executive Branch agencies.



540 Judicial reform programmes, therefore, need to be implemented in a manner that preserves the delicate balance between judicial independence and the effectiveness of reform programmes that requires expertise and knowledge that rests in Executive Branch agencies.

545 Leadership and management for judicial reforms need to be decided in accordance with country circumstances. The lead agency would need to have adequate:

- legal authority to develop and implement reforms;
- capacity to implement reforms; and
- 'objectivity' to be able to consider both 'supply' and 'demand' side reforms.

550 **3.5 HOW SHOULD JUDICIAL REFORM PROGRAMMES BE EVALUATED?**

555 As noted earlier, assessing the impact of judicial reform programmes is one of the most problematic issues facing judicial reform. What are the indicators to be taken into account? How will the judicial reform inputs be co-related to outcomes with reference to identified criteria?

560 The central difficulty in evaluating judicial reform programmes is the lack of clarity of goals of judicial reform as well as on the role of the judiciary. In the absence of such clarity; evaluation will be of limited value.

565 Evaluation of judicial reform programmes follows the priority of the donors and governments. Programs that assist strengthening of criminal justice programmes typically measure conviction rates and speed of trials. The main concern of governments and donors financing such programmes is preventing impunity rather than protecting innocence. Programs that support human rights and democracy goals measure awareness of rights and degree of enforcement of rights. Programs that support economic goals measure business confidence, transaction costs in enforcing rights and the extent to which rights are actually enforced as well.

570 For the most part, judicial reform programmes evaluate "outputs" rather than "outcomes" or "impacts". Improvement of quantity and timeliness of court disposal is often used as an indicator of the performance of a judicial system. Quality indicators are more difficult to establish in terms of court decisions and case disposals. Attempts have been made in a number of countries to measure "satisfaction" of court users and "confidence" in the judiciary. These are very useful and important measures, although the tools used are still evolving.

580 If a justice-oriented approach is taken to judicial reform, reform programs may be measured against benchmarks of levels of equality, freedom and dignity, using measurement instruments and surveys used by agencies in other sectors. As noted earlier, this author has also suggested identification and measurement of "law-dependent public goods" as a measure of the success of judicial reform programmes.



585 **ANNEX ONE**

COUNTRY CONTEXT BACKGROUND: INDIA

Yet to be completed

590 **A1.1 COUNTRY CONTEXT**

595 **A1.2 JUDICIARY AND THE COURTS**