

The Relationship Between Justice and Equality



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About the Grand Challenge

Inequality and exclusion are among the most pressing political issues of our age. They are on the rise and the anger felt by citizens towards elites perceived to be out-of-touch constitutes a potent political force. Policymakers and the public are clamouring for a set of policy options that can arrest and reverse this trend. The Grand Challenge on Inequality and Exclusion seeks to identify practical and politically viable solutions to meet the targets on equitable and inclusive societies in the Sustainable Development Goals. Our goal is for national governments, intergovernmental bodies,

multilateral organizations, and civil society groups to increase commitments and adopt solutions for equality and inclusion.

The Grand Challenge is an initiative of the Pathfinders, a multi-stakeholder partnership that brings together 42 member states, international organizations, civil society, and the private sector to accelerate delivery of the SDG targets for peace, justice and inclusion. Pathfinders is hosted at New York University's Center on International Cooperation.

About this Publication

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Executive Summary

At the heart of the 2030 Agenda for Sustainable Development is a vision of a “just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met.” This is a powerful vision. It is also part of a long history of global reform which seeks to make justice systems more inclusive. The first modern definition of the objective of law reform (now a century old) focuses on a government limited by law, equality under the law, and the protection of human and civil rights.¹

So what has gone wrong? A core issue is the assumption that if the justice system functions smoothly and efficiently, it will deliver justice.² This has distracted from key questions about the way in which the justice system records, reflects, reproduces, and reinforces power³ in society.

This avoidance of the question of power has set up a binary, which is too limited. Broadly, the assumption underpinning these approaches is that if the system works well (i.e., smoothly and efficiently), it will eventually deliver justice for politically and economically disadvantaged individuals and groups. This is the justice equivalent of economic “trickle-down theory.” A long history—and billions spent on justice system reform—suggests that it does not work.

Recent work on justice systems has focused on alternative approaches. In particular, the Task Force on Justice⁴ has argued for a focus on people-centered justice, noting that such an approach “starts with an understanding of people’s justice needs and designs solutions to respond to them. It is delivered by a justice system that is open and inclusive, and that works in collaboration with other sectors such as health, education, housing, and employment.”⁵

The focus on people-centered justice turns existing assumptions about justice reform on their head in three ways. First, it clarifies the fact that even the systems— which claim to manifest rule of law—disadvantage the poor, vulnerable, marginalized groups, women, and children. Second, it puts these groups squarely at the center of justice reform. Finally, and most importantly, it sets out practical ways of delivering people-centered justice.

1 Justice, the Social Contract, and Equality

1.1 Why even the best systems disadvantage the poor and vulnerable

Most countries claim to respect the rule of law and the related equality of all citizens. However, even the best examples are “patchy,”⁶ and justice problems affect people from varying social groups differently. In the vast majority of countries, people in lower-income and/or marginalized groups suffer far more serious livelihood and/or or life-threatening legal problems than is experienced by more politically and economically powerful groups and individuals.⁷

In order to understand this, we need to step back and understand why justice systems have so much power to affect people’s daily lives. This will be done by considering the ways in which justice systems affect political and economic equality.

1.1.1 – Political equality and justice systems

Justice systems provide legal opportunities through which power changes hands.⁸ Constitutions set out the opportunities for people to exercise influence on the state. This includes voting under representative democracy, and opportunities for engagement with the state in participative democracy. The justice system also governs responses to state power—for example, protests which create political pressure and the civic space for collective action to challenge injustices or campaign for change.

Justice systems protect opportunities for creating political pressure through rules and practices which allow collective action and protect nonviolent protest. As a normative concept, justice is fair. However, absolutely fair justice systems

do not exist. Fairer justice is key to ‘state resilience’—defined here as “the ability to manage the inevitable conflicts in society peacefully without resorting to violence”. Fair justice systems are therefore strongly correlated with peace, stability, economic growth, trust, and political engagement.⁹

States where the justice system is unfair embody the opposite. They tend to be characterized by the use of law to constrain people’s ability to participate democratically. The apparently neutral focus on voter registration in the US and the UK, for example, limits the ability of the poorest communities—i.e., Black, Indigenous, and people of color (BIPOC)—to vote, because they cannot afford acceptable ID documents. These states also tend to rely on coercion to silence dissent and maintain the status quo. Protection of civil and political rights, even when written into the law, is sometimes only implemented when the rights of the politically and economically powerful are at stake. For example, policing of protests can result in harsher responses to BIPOC communities. When protest is policed as if it were a crime, there is little legal opportunity to create and sustain political pressure. In addition, unjust systems provide little access to justice, particularly for marginalized communities, women, and children. These types of legal arrangements create or exacerbate economic and power differentials and unequal outcomes between different groups and identities. These identities therefore can—and often are—invoked in opposition to the state.¹⁰

Box 1 – Law in Apartheid South Africa

Apartheid South Africa is an example of a legal system which institutionalized racial inequality. It was designed to create and maintain white political and economic privilege.¹¹ Identity based on race was the foundation of law and practice, governing engagement in and exclusion from the polity at every level. Coercive force in South Africa was explicitly focused on maintaining white dominance and keeping white citizens safe from the “danger” posed by Black South Africans.¹² Black South Africans were declared to be citizens of ‘homelands’—for example Bophutatswana¹³—which were created by the Apartheid state. This had the effect of removing South African citizenship from Black South Africans in perpetuity. In addition, Black South Africans were prevented from participating in the economy. The best jobs were “reserved”¹⁴ for white people, and the legal regime ensured that Black people could access only poorly paid, often menial employment. |

1.1.2 – Economic equality and justice systems

Fairer justice systems also facilitate broad economic participation¹⁵ at every level (from market traders to corporations), regardless of political affiliation or identity. This inclusion underpins equitable economic growth.¹⁶ Unjust legal systems create and govern exclusive economic institutions, which in turn can facilitate economic inefficiency and therefore the poverty and lack of opportunity which is often correlated with conflict. These regimes create limited-access economies where the ability of some individuals and groups to engage economically is limited by the law.¹⁷ Limited-access economies do not grow consistently, and do not invest the benefits of development in ways that ensure state resilience.¹⁸ These states often use force to maintain economic privilege. They may not look weak, but they are rendered brittle by their rigid economies and control and are therefore vulnerable to shocks and rapid changes. The Arab Spring illustrates how a combination of repressive structures and closed-access economies can crumble rapidly in the face of popular resistance.

Legal arrangements which reflect extractive political settlements are part of the day-to-day experience of excluded groups. They are a constant irritant, make earning a living challenging. Where exclusion or the use of coercive force is mandated to maintain the status quo, they can also be life-threatening. The use of coercive force is a graphic illustration of societal power dynamics. Violence used to silence dissent often becomes a symbol of injustice, motivating further dissent, weaponizing identity and acting as a powerful rallying cry for violent collective action¹⁹ against the status quo.

Box 2 – Legal problems affect different communities differently

The Task Force on Justice notes²⁰ that “The burden of injustice also varies greatly within countries. Mexico City has more than 2,000 municipalities, but a quarter of all crimes happen in just four of them. In Bogotá, Colombia, 99 percent of homicides occur in just 1 percent of its streets. In Minneapolis in the US, half of calls for help to the police come from just 3 percent of neighborhoods.” |

1.2 Gender and identity significantly affect the impact of legal arrangements

Collective action by the Black Lives Matter movement has drawn attention to long-term systemic discrimination²¹ against Black citizens both within the United States and globally. There are also significant differences in the way men and women are viewed in law. The #metoo movement has foregrounded gendered disparities,²² which exist across the justice system, and are particularly evident in family law and in the way in which violence against women is dealt with both in formal and informal legal systems. Even when there is legislation establishing equal rights, inequality persists in the realization of the rights of women, people with minority gender identities, and BIPOC communities.

1.3 The justice gap—putting the poorest and most disadvantaged at the center of the focus on justice system reform

The Task Force on Justice did not ask what was wrong with the system, but who was least well served globally by existing justice arrangements. This question focused attention on the “justice gap”²³—the 5.1 billion people, or two-thirds of the world’s population—who lack meaningful access to justice. These are people who lack “the practical ability ... to activate their formal rights ... and seek redress for their grievances.”²⁴ The study shows that globally, this justice group consists of the politically and economically unequal, the poorest, ethnic minorities, and women and children.

Overall, this study found that people face problems in almost every critical area of human existence. These include earning a living, securing shelter, accessing credit to start a business, and accessing key services (e.g., power for heating, health, and education). In addition, poor and disadvantaged communities and individuals find it harder to manage significant life events. They find it harder to register births, and struggle to manage the consequences of family disruption—for example divorce and inheritance after the death of a family member. LGBTQIA+ communities still cannot marry and secure state recognition for their families in large parts of the world. Finally, poor and marginalized groups are excluded from the protection of the justice system. These groups are more likely to be coerced by the state than protected. In many parts of the world, for example, being in debt is punishable with imprisonment.

They also experience more criminal violence, and violence in these communities—for example violence against women—is under-policed.

1.4 Legal arrangements are a critical factor in perpetuating inequality

Laws and legal arrangements are powerful symbols of who counts in society. Few institutions in society have an impact as authoritative or immediate as that of the justice system. For the politically and economically powerful, although the justice system affects every aspect of their lives—from their commute to work to foundational institutions like marriage—it also makes their lives easier and is barely noticed. Roads, for example, are largely safe, but the police and emergency services come quickly if there is a traffic accident. For these citizens, the law plays a significant but often invisible role which facilitates day-to-day existence and does not interfere unduly with the need to earn a living.

For disadvantaged communities and groups, the justice system often compounds their disadvantage. The most common legal problems have clear links to different dimensions of poverty, at least suggesting negative impacts on human, economic, and social development. Some legal problems directly hinder antipoverty policies. For example, the extremely high rate of problems linked with child support payments undermines the objective of such payments, namely to prevent child poverty in the face of financial vulnerability in single-parent households.²⁵

Poor people are not sufficiently protected by the law. The police, instead of keeping people safe, may take bribes for turning a blind eye to criminal activity, or disproportionately use their powers within particular communities. At worst, interaction with the justice system can be violent and sometimes even fatal.

Box 3 – Racially disproportionate use of force against Black UK citizens by the British police²⁶

2019-20 data indicates that Black people were 5.7 times more likely to have force used on them than white people. The data further shows that officers were more than nine

times as likely to have drawn Tasers (but not discharged them) on Black people than on white people. Additionally, Black people were eight times more likely to be “compliant handcuffed” than white people and over three times more likely to have a spit and bite guard used on them. The damage caused by unexplained disproportionality can be far-reaching and long-lasting. It may lead to more Black, Asian, and minority ethnic people being drawn into the criminal justice system, disrupting their education and family lives, and reducing their work opportunities. It feeds perceptions among the public and police about Black people and crime, and may also influence how the police allocate and deploy resources. This in turn exacerbates the imbalances in the criminal justice system. |

This is powerfully illustrated by the analysis of the Task Force on Justice. Not only does the prevalence and seriousness of global legal failings make poor and vulnerable people’s lives harder—it also compounds their already disadvantaged and unequal position in society. The matrix below illustrates the areas where it is most difficult for people to activate their rights, and the way in which lack of access can exacerbate political and/or economic inequality.

Matrix 1 – Illustrating six areas that account for most justice problems globally and their relationship to their justice system²⁷

Common legal problem	Affects political equality?	Affects economic equality?	Impact of unfair justice systems
Almost a third of people have legal problems related to money and debt, or as consumers	Indirectly, entrenching poverty in specific areas, communities	Yes	Harsh penal consequences for debt. Legal system not geared toward marginalized people’s needs—e.g., no consumer protection, no consumer rights policies. No easy access to credit for the poor
Nearly a quarter of people are involved in disputes over housing or land, or conflicts with neighbours	Indirectly, entrenching poverty in specific areas, communities	Yes	If disputes are resolved unfairly in favor of particular ethnic/religious groups, this results in entrenchment of poverty and distrust, implying that little is to be gained from lawful conduct

<p>Around one in five people have problems related to violence and crime, in the public sphere, at work, and at home.</p>	<p>Yes: protection of the state not available to all. Coercive force of state wielded to repress particular groups</p>	<p>Yes: violence is expensive, as is avoiding it</p>	<p>Either lack of policing and therefore security in marginalized areas, or obstructive predatory policing (extraction of bribes for passage) of disempowered communities Differential reaction to violence against specific communities (religious, ethnic) and areas. Violence against women not taken seriously</p>
<p>One in five people have difficulties related to access and quality of public services</p>	<p>Yes, particularly if concentrated in marginalized communities or areas</p>	<p>Yes</p>	<p>In civil law countries where service delivery is governed by administrative or civil law, this has a direct impact on people's ability to access basic services. In common law systems this has less direct impact. But the lack of impact also makes it difficult to challenge poor service delivery</p>
<p>Almost one in eleven people are involved in family disputes, for example around divorce and inheritance</p>	<p>Yes, particularly for women²⁸</p>	<p>Yes: long family disputes can be a significant financial burden, which falls more heavily on poorer families</p>	<p>Particular problem for women. Domestic violence often ignored and treated as private. Failure to prosecute rape. Inheritance laws often biased against women</p>
<p>One in twelve people have legal needs related to problems at work, whether as an employee or business owner</p>	<p>Yes</p>	<p>Yes</p>	<p>Again, particularly affects poorer workers—of whom a large proportion are women or from ethnic minority communities</p>

In addition to compounding existing individual disadvantages, these legal failings hold back economic growth by impeding the ability of significant proportions of the population to contribute to the economy. The UN World Social Report 2020 finds that “... growing inequality not only harms people living in poverty and other disadvantaged groups. It affects the well-being of society at large. Highly unequal societies grow more slowly than those with low inequality and are less successful at reducing poverty.”¹²⁹

Box 4 – Managing in the face of a hostile system: Global Insights from the World Justice Project General Population Control in 101 Countries 2019

Justice problems are ubiquitous. Forty nine percent of people surveyed experienced a legal problem in the last two years. People face a variety of obstacles to meeting their justice needs beginning with their ability to recognise that their problems have a legal remedy – with fewer than twenty nine percent understanding that their problem was ‘legal’ rather than ‘bad luck’ or a community matter. Less than a third obtained advice that could help resolve the problem. More than one in four people reported physical or stress-related ill health as a result of their legal problem, while more than 1 in five people reported that the legal problem had cost them a job or forced them to relocate.³⁰ |

1.5 The same functions make the law a powerful factor in promoting equality...

The qualities that give justice systems the ability to act as a drag on people’s ability to forge a future can also be used in the opposite direction. The symbolic function of the law, its immediate impact, and the impact of its perceived fairness make the justice system a powerful factor in promoting and increasing equality. This is most obvious at critical junctures—moments when there has been a break with the past—for example, the election of a new government or a peace process. At these points, the promulgation of different legal arrangements is a powerful symbol of state intent. Changes (or even the announcement of changes) to laws that exclude or marginalize specific groups

can also play a powerful symbolic role, generating increased confidence and trust in their wake. If followed by respectful and fair administration of the law and implementation, such changes will generate or renew trust in the state among previously excluded groups. Trust increases compliance with the law and assistance from the populace in crime prevention.

Box 5 – Justice systems can promote or reduce inequality³¹

Justice is a critical sector in the relationship between states, communities, and people. Justice systems that work well can help strengthen trust in state institutions and give governments a license to steer recoveries. On the other hand, abuses by justice actors or a failure to provide the services and basic fairness that people need in their daily lives can lead to social breakdown, violent conflict, and a loss of trust that will render governments' job impossible and quash any dreams of social and economic progress. |

Fair justice systems have a multiplier effect. When people experience a justice system that operates to make their lives easier, backed by respectful treatment by institutions responsible for service delivery, they will organize to maintain and enhance that system. This also has an economic multiplier effect: policing by consent, for example, is cheaper than forcing compliance. When people find it easier to do business, costs are lowered, including the wider costs of corruption. Regulation of the working environment reduces the scope for employee abuse. When justice systems are people-friendly and easy to understand and use, the cost to the exchequer decreases.³²

1.6 ...and a powerful force for creating political pressure for change

The justice system is an important focus of ongoing negotiations for change in society. A call for justice and/or fairness is a powerful motivator for collective action. The justice system is both a site where injustice is most obvious and where—as noted above—change can be a powerful symbol of a new way of doing things. The different elements of the justice system can be used to

negotiate different types of change. Public interest litigation, for example, can set new precedents, which change the law not only for the litigants, but also for the wider public. Informal or customary justice systems can be used to air and mediate different views within the community. Legitimate protest which is protected by the police can refocus potentially destructive tension into legitimate pressure for change.

1.7 The role of police in justice systems

The police operate on the front line between state and people where crime and protests are concerned, and are therefore a clear indicator of who counts within a given context or area. Their posture, attitude, and how fairly they administer the law sends a critical message about the way society views particular individuals and communities. The police posture within a state may vary according to the population they are dealing with, creating different perceptions of whether the state has a fair justice system.

Under the Apartheid state, for example, Black South Africans were both over- and under-policed. Crime was defined in terms of activities that posed a threat to white hegemony and included, for example, being in white areas without a pass or at the wrong time. In white areas, Black South Africans could be punished for a vast range of infractions such as using a “whites only” facility, or entering a shop through the door designated for white use. Black areas were only policed insofar as they posed a threat to white citizens. Crimes within those areas were ignored. Consequently, Black areas were crime-ridden and violent. Any policing of those areas was focused on threats to white security and only resulted in greater violence against Black citizens.

Apartheid South Africa is an extreme illustration of selective or exclusionary justice in which one group is prioritized, and the other either coerced or ignored. It is the opposite of justice for all. But these tendencies are not confined to extreme examples. As the Task Force on Justice has illustrated, they are reflected in the way most justice systems operate to exclude poor and/or marginalized groups.

Box 6 – The International Commission of Inquiry on Systemic Racist Police Violence against people of African descent in the United States³³

This Commission reported that unarmed Black people are almost four times as likely as their white equivalents to be killed by police, and that police are seldom prosecuted for their crimes. They found the US guilty of crimes against humanity and other violations of international law.

The Commission also found that the US is:

- violating its international human rights obligations, both in terms of laws governing policing and in the practices of law enforcement officers, including traffic stops targeting Black people and race-based stop and frisk;
- tolerating an “alarming national pattern of disproportionate use of deadly force not only by firearms but also by Tasers” against Black people; and
- operating a “culture of impunity” in which police officers are rarely held accountable while their homicidal actions are dismissed as those of just “a few bad apples” |

The frontline role of the police and their closeness to the population’s experience of criminal justice means that changes in the operation of the state’s coercive function can be critical in building trust between citizens, excluded groups, and the state. A shift to more respectful engagement by the police is cost-effective and relatively simple to implement in a hierarchical organization. It can significantly reduce societal tensions and divisions, and increase space for negotiation rather than violence.

2 Toward Justice Systems that Enable Inequality

As the first section has made clear, the justice system—and therefore the justice gap—is not accidental, but is a function of power relations within a given context. The COVID-19 pandemic is “entrenching existing patterns of exclusion.”³⁴ In addition, for the first time in years, extreme poverty is rising and human development declining.³⁵ People who experience the justice gap do not live outside the justice system; they have to negotiate it every day. This may be because they need a license to sell crops; need to secure title to land; have to pay protection to carry out business; or have to avoid predatory police who demand bribes rather than protect and serve. Not only do they have no protection, but they also must manage in the face of a system that is often hostile.

2.1 Is system-wide top-down reform the answer?

The scale of the justice gap, and the levels of difficulty many people experience because of it, suggests that only whole system reform at scale can meet the challenge. However, large-scale justice reform has a disappointing track record.³⁶ There are a number of reasons for this, all of which are helpful in pointing the way forward.

2.1.1 – The relationship between the justice system, power, and politics is ignored

Although the understanding of the relationship between legal arrangements and the political settlement is not new, it has largely been ignored in justice reform—particularly reform which is externally funded. Critical junctures—moments when there has been a break with the past—e.g., elections, which have resulted in a change of government, peace processes, or national

reconciliation processes after popular revolt—are particular opportunities for reform. But they are often treated (particularly by outsiders) as an a-historical “carte blanche,” a moment when something new can be created. However, if the relationship between justice and power within society is ignored, then the “iron law of oligarchy”³⁷ (the idea that all institutions, no matter their intention, will inevitably succumb to rule by an elite few) will assert itself, and the justice system will continue to serve the few. This iron law is evident in justice systems where even positive and well-intentioned reform is never implemented because it has been sabotaged or subverted by powerful elites who fear a threat to their economic and political dominance.

Box 7 – the ‘Iron Law of Oligarchy:’ violence in Honduras

Violent organized crime continues to disrupt Honduran society and push many people to leave the country. Journalists, environmental activists, lesbian, gay, bisexual, and transgender (LGBT) individuals, and people with disabilities are among the groups targeted for violence. The government relies heavily on the military for public security. There have been efforts to reform public security institutions. However, these were stalled by the introduction of a new criminal code in June 2020. This included provisions that appeared aimed at reducing penalties for politicians linked to organized crime, by lowering sentences for corruption and related offenses. Consequently, impunity for human rights abuses, violent organised crime, and corruption remains the norm. |

In addition, history suggests that the sort of critical junctures which make a fresh start possible, also mean that the old has been disrupted and that something completely new has to be built. This is often a moment when the new is more “bloody, vicious and violent”³⁸ than what has been replaced. Nevertheless, much external legal reform assistance is concentrated on *carte blanche* moments and delivered as central government-led top-down reform focused on making systems more efficient. This has led to the exclusion of people and their day-to-day concerns in designing and implementing reforms.

2.1.2 – Justice system reform is treated as a technical exercise

The Task Force on Justice notes that in the past, “justice reform has focused primarily on buildings, processes and institutions.” It goes on to note that

“this has failed to close the justice gap for billions of people.”³⁹ The scale of the justice gap and the consistency of the marginalization of poor and disadvantaged communities suggest that most justice systems need rethinking, with a focus on people’s justice needs.⁴⁰ Nevertheless, most justice system reform is top-down and overwhelmingly focused on ministries of justice, judges, and other aspects of the formal system,⁴¹ which have very little to do with people’s day-to-day justice problems. Failing consideration about how they can be adapted to respond to the justice gap, they remain irrelevant.

When these types of reforms do focus on change, they again focus on top-down change—to laws. However, in reality, legislative change is only the beginning of the process. Seeing it as the end means that far too little attention has been paid to resourcing and evaluating implementation. When the focus has been institutional change, the emphasis is on increased efficiency or infrastructural provision. The hope, it seems, is that these changes will “trickle down” to justice users. They do not: if policymakers fail to understand the barriers people face in accessing justice, they will fail to make changes that work for them.

Informal justice systems are a relatively recent inclusion in justice reform. This is promising, but when they are included in system-wide reforms, they are treated as something of a “Cinderella”: poorly funded and an add-on, rather than a central plank of a strategy to fill the justice gap. It is possible to address these issues by taking an empirical approach, as opposed to a normative one; in other words, an approach which interrogates who and/or how to solve justice problems, rather than one which argues for the greater capacity offered by informal justice systems.

2.1.3 – Justice system reform is sometimes determined by multiple overlapping external policy interests, rather than by the justice gap

External governments and agencies, which support justice cite a range of objectives: poverty reduction, strengthening governance, reducing conflict, or alleviating their own fear of attack by violent extremists. Unsurprisingly, this has led to incoherence and contradiction, even with bilateral support from one government. These concerns are most obvious in relation to funding for responses to terrorism and security challenges. This often translates into support for an increase of coercive capacity—for example, rapid response paramilitary policing agencies which can be misdirected against vulnerable groups that oppose the government. Unforeseen outcomes can result. For example, providing weapons to police officers who are badly trained, and themselves poorly protected from violence because of, say, a lack of body armor, can expose people to severe, even fatal consequences. Such approaches

also erode the impact of other reforms, including support focused on increasing access to justice. They do this directly by decreasing said access, or indirectly by increasing distrust between people and the state.

Box 8 – British and American support to the Rapid Action Battalion, Bangladesh⁴²

A Human Rights Watch report published in May 2011 found that the Bangladesh Rapid Action Battalion (RAB) had detained, tortured, and killed hundreds of people with impunity over the previous two years. RAB was seen by the US and the UK as an effective counterterrorism partner in the region and had been providing support for four years since 2007, including training in "investigative interviewing techniques" and "rules of engagement." Despite torture and extrajudicial killings carried out by RAB, no credible evidence of terrorism was generated by the additional RAB presence and the money spent on increasing coercive capacity. At the time of writing the report, the Government of Bangladesh had failed to prosecute any perpetrators of terrorism. |

2.1.4 – Top-down centralized reform takes a long time to impact excluded individual communities and may never do so

Long delays erode trust in any promises of a new order. Legal reform, like any reform, takes a long time and the causal chain between large-scale legal reform and better "justice outcomes for the poor is too long and uncertain to be a credible foundation for programming."⁴³ This is the justice equivalent of economic trickle-down theory. Delay—sometimes counted by donor countries in decades—reduces cooperation and engagement and, therefore, the chances of success with the change process. Delay also reduces confidence in the justice sector as an effective source of change. At best, the justice gap remains untouched, and citizens and justice officials will revert to old familiar patterns of avoidance and predation. At worst, lack of trust can drive a turn to violence as the only tactic available for change.

2.2 The way forward

The scale of the justice gap presents something of a conundrum. Inequality is embedded throughout the justice system, but large-scale reform has a poor track record. So what is to be done? The next section sets out an agenda for moving forward.

2.2.1 – The vision

At the heart of the 2030 Agenda for Sustainable Development lies a vision of a “just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met.” We know what this should look like, because we can see how the politically and economically powerful experience the justice system. For the most part, aspects of the justice system operate smoothly and unobtrusively in the background of their lives. And if there is a problem, it can be smoothed by money. They are largely protected by the law, but if they require additional protection, the police can be counted on to provide it.

When justice systems are fair and practical, there is little need to use them. The “reasonable man”—a fictitious legal concept used as a benchmark for testing conduct—in reality interacts directly with the legal system rarely, and often only for rites of passage (e.g. marriage, death) or for major property purchases. This then is the first test of fair justice systems: whether the law functions so well to ensure life and livelihoods that it is seldom encountered, but operates in the background. The essence of prevention is systems, which work well enough that justice problems do not occur in the first place.⁴⁴

The objective of people-centred justice is therefore twofold. For the most part it should operate invisibly, ensuring that survival activities and rites of passage are simple and easy to operate. In the event of problems, the justice system should respond with protection provided equally regardless of status or position.

2.2.2 – People-centered justice is the central objective

As this paper has clarified, justice is not about a set of institutions and processes; it is about the relationship between people and the state. As the Task Force on Justice⁴⁵ notes, most justice systems are not helping people solve the justice issues they experience. They need to be reoriented so that they both prevent common justice problems and, when needed, respond to justice needs

effectively, quickly, and cheaply. The key question therefore is how to get to a justice system which serves the needs of the five billion in the justice gap.

2.2.3 – Prioritization

Fairer justice systems prioritize justice problems, which affect key aspects of people's lives. This is because a system, which responds to everyday justice problems prevents obstacles to equality, promotes fairness and inclusion, and enables simple cost-effective solutions.

2.2.4 – Context matters

The relative importance of these problems differs between countries and contexts, as does the way in which the problems manifest. When the crime rate is high, for example, people need urgent protection from violence. The nature and frequency of family disputes also differ from culture to culture, and are heavily influenced by gender norms and by the empowerment of women and of children. Many disputes are shaped by the type of economy. When it is focused on agriculture, there are more disputes over land. As countries become wealthier, disputes related to consumer issues become more prevalent. Solutions within each context need to respond to the specifics of the context.

2.2.5 – The objective

Within each of these areas, enabling equality through the justice system requires a focus on making key aspects of people's lives easier. The birth of a child should not entail endless struggles for identity documents, which the child will need throughout life. The death of a loved one should not result in destitution because gendered norms have infected the legal system, leaving the widow penniless. It should not be necessary to pay bribes for a market license so that small farmers can sell their surplus crops. In order to realize this objective, people need effective mechanisms to resolve their justice problems, stand up for their rights, and settle conflicts and disputes in a peaceful manner.⁴⁶

2.2.6 – Function

In addition to the substance of the laws, norms, and procedures, the functioning of the sites (e.g., courts or informal hearings) for settling disputes needs to be fair.

Officers of the law at every level both within the formal and the informal system need to operate fairly and, in particular, not apply their own personal views and biases in their professional roles.

Above all, the justice system needs to be accessible. When the justice system must be negotiated, it needs to be fair, easy to understand, and easy to manage without expensive legal assistance. If there is to be payment to officers of the law, it should not be in the form of bribes. In addition, officers of the law need to treat people with respect and fairness. As noted above, these objectives are more likely to be met when systems have been reoriented to meet the needs of those in the justice gap.

2.3 How do we get there?

2.3.1 – Effective reform starts with an understanding of the legal reality of poor and/or marginalized individuals and communities

As discussed, many of the failings in current responses stem from mistaken assumptions about the problem. To correct this, an empirical approach is first needed which interrogates 1) which individuals and communities experience problems with the justice system, and 2) which issues matter most. Much of the initial work has been done by the Task Force on Justice, but it will need to be complemented by further work which considers the particularities of context. Community justice organizations have multiple strengths in this regard. First, they are located in communities and areas they serve, and are therefore aware of the everyday justice problems that impede their communities' access to livelihoods and political equality. Second, they are adept at supporting individuals and communities in their attempts to solve these problems. They do this by increasing knowledge, and by providing legal assistance in the form of paralegals or legal aid.

2.3.2 – Access to justice is key

Rights mean little if people have no way of realizing them, or insufficient political equality to challenge the systems that do not prioritize their justice problems. The essence of access to justice is that it should address the practical ability of people to activate their formal economic and political rights.⁴⁷ Access to justice is therefore not only “a right in itself, but an enabling right in that it allows individuals to enforce their substantive rights and obtain a remedy when these rights are violated.”⁴⁸

2.3.3 – Effective justice responses start with incremental change...

Most law reform happens in contexts where there is significant distrust of authority and its messaging. Incremental reform is more effective than ambitious top-down central government-led reform because its gradual nature makes it “more powerful, harder to resist and ultimately, more durable.”⁴⁹ Law reform programs work when seen as a “gradual virtuous circle,” in which “each step is small and it makes sense to give in to a small demand rather than create a major showdown.”⁵⁰ To a certain extent the success of this sort of initiative is if it goes under the radar and does not appear to threaten entrenched interests. A nonthreatening approach also makes it possible to involve marginalized communities in the process of deciding the sequencing and prioritization of change. Changes within the legal system can lend themselves to the process of constructing a gradual virtuous circle.

2.3.4 – ...and are focused on the everyday justice problems faced by the relevant groups and communities.

The “Justice for All” report makes it clear that enabling better justice journeys for poor and marginalized groups is the route to addressing the justice gap and therefore to increasing equality. Such an approach works best when it is cost-effective and can be scaled as it continues to grow.⁵¹ This broad understanding needs to be “localized,” i.e., augmented by a detailed understanding at community level of the prevalence and prioritization of common justice problems. Many countries have an access to justice movement with a long history and a detailed understanding of different communities, as well as their justice problems and routes to solving them.⁵²

Community-based organizations, which provide community-level justice assistance focused on empowering people to understand and use the law to solve their everyday justice problems, are often well-placed to assist. They are often the first point of contact in people’s justice journeys, and are mandated to focus on relevant problems such as family disputes, land, and lack of access to government services.

Box 9 – Community paralegal work in Sierra Leone⁵³

Community justice organizations in Sierra Leone deployed paralegals to support marginalized and remote rural populations by conducting legal literacy campaigns and providing legal advice and consultation. This support provided access to justice by resolving disputes that would otherwise go unsettled. The interviewed clients considered that the services were accessible, helped meet their needs, and empowered communities. |

In addition, they are effective at creating bridges between the communities they serve and relevant justice officials, and are therefore well placed to negotiate both immediate and longer-term solutions to everyday justice problems. They are also better able to negotiate law reform and the institutionalization of aspects of people-centered justice within the national justice system.

Box 10 – Paralegals bridging power imbalances⁵⁴

A review of paralegal work in six countries (Indonesia, Kenya, Liberia, the Philippines, Sierra Leone, and South Africa) shows that paralegals have the greatest impact in situations of power imbalance, including citizens vs. the state or vs. large corporations, and of systematic biases in existing justice institutions such as women's rights. Paralegals also help to flag legal issues that individuals and communities might not, because of cultural or awareness barriers. |

Moreover, community justice actors can work with whichever part of the system is the most relevant and can influence its practice.

Box 11 – Engaging with and reforming Informal justice systems⁵⁵

Paralegals and organizations working on legal empowerment can play a key role in improving the functioning of informal justice institutions. Informal justice systems such as customary courts play a fundamental role in administering justice in low-income countries where judicial resources and legal services are limited and usually concentrated in the capital. However, in the absence of strong accountability mechanisms, these systems can also be plagued by corruption and the undue influence of local elites. As examples in Bangladesh⁵⁶ and Sierra Leone⁵⁷ show, paralegals and civil society organizations (CSOs) can exert a strong influence to control such abuses by empowering local non-elites (including women) and leveraging their knowledge of the formal law and justice system. |

2.3.5 – Incremental approaches deliver rapid effective impact fast

Nothing destroys trust faster than promises or commitments not followed by action. The huge benefit of incremental change is that it lends itself to rapid implementation, which in turn wins the time and space needed to complete more ambitious reform. When the focus is only on long-term reform, evidence suggests that violence or unrest can take hold long before there is experience of change, rendering progress impossible. The World Bank notes that creating “... legitimate institutions... is in plain language, slow. It takes a generation.” It goes on to note that “... grievances can escalate into acute demands for change—and the risks of violent conflict in countries where political, social, and economic change lags behind expectations.”⁵⁸

Box 12 – Community engagement prevents return to conflict

In 2013, two years after the initial uprising, Tunisia was poised once again on the brink of crisis. However, the negotiation of a new Constitution, with effective involvement and engagement of civil society and unions, has provided the confidence to carry on waiting. Tunisia’s period of calm after the Arab Spring was exceptional, especially when compared with the other “Arab Spring” countries and also the wider set of countries in conflict.⁵⁹ However, as hopes for reform have faded and the political system has defaulted to old patterns, even community engagement has not prevented more frequent outbursts of violence. |

Noting conflict recurrence, the Organisation for Economic Co-operation and Development's Development Assistance Committee (OECD DAC) has argued that "the pace of institution building will need to accelerate."⁶⁰ There is no evidence that this is possible. What is possible is phased incremental change, which can immediately demonstrate impact for marginalized communities.

2.3.6 – Incremental approaches focused on community problems have the potential to avoid the lack of impact on poor and marginalized communities associated with large-scale reform.

An influential report into the effectiveness of British funded security and justice (S&J) programs found that attempts " ...to build the capacity of central S&J institutions are not translating into better or more accessible services for the poor."⁶¹ The report notes that the "gulf between formal S&J institutions and the poor, in terms of geography, cost, cultural norms and power relations, is very difficult to bridge."⁶² The record of support to people-centered justice instead suggests that it is more effective, cheaper, and more reliable. The same report recommended that the Department for International Development (now the Foreign, Commonwealth & Development Office or FCDO) switch its focus to "tackling specific security and justice challenges in particular and local contexts."⁶³

The prevailing perception is that justice reform attempts have failed, and that they are complex and difficult. Such attempts raise concerns about corruption in government, as well as the use of donor-funded support to increase coercive capacity, which is wielded to repress civil society and marginalized communities.⁶⁴ These concerns have led to a decline in investment in access to justice.⁶⁵ This is happening at a time when inequality is growing, civic space is narrowing, and justice investment is needed more than ever. As the Task Force on Justice suggests, investing in justice is a practical and cost-effective way forward.

2.3.7 – Incremental approaches are therefore more likely to attract state and international financial support...

These concerns make international donors more likely to support CSOs that offer community-based legal assistance and advice. In some instances, governments themselves have been prepared to support community justice, significantly scaling up the advice function and reducing its costs.

Box 13 – The Sierra Leone Legal Aid Board: now formally part of the justice sector⁶⁶

Community justice started in Sierra Leone in 2002 with the formation of a single CSO: Timap for Justice, which deployed community-based paralegals. TIMAP’s work was so effective that in 2009 it spawned an initiative, supported by a number of donors, to provide national legal aid using the Timap for Justice paralegal model. The success of this led in turn to an advocacy campaign to secure formal recognition of paralegals, and to create the Sierra Leone Legal Aid Board. Sierra Leone’s Legal Aid Act became law in 2012. The Board was launched in 2015 and receives most of its funding from the Government of Sierra Leone. It employs sixty paralegals in every district and reports handling 20,000 cases per annum. |

2.3.8 – ...and can be scaled up

While it is clear that incremental problem-focused reform is effective, the risk is that it will produce “islands of excellence” which, while they model effective approaches, 1) have little chance of delivering “transformative change;”⁶⁷ and 2) go nowhere near solving the scale of the justice gap. Delivering at scale matters for programs focused on crucial issues with the potential to impede or roll back equality, and therefore national development. There are three ways of managing this.

First, because violent conflict has the potential to disrupt progress and erode development across nations and regions, it makes sense to focus justice approaches on resolving or preventing conflict. This starts with a focus on preventing societal violence—often an early warning sign of the fraying of the social contract.⁶⁸

Second, it is possible to translate the understanding acquired through the success of community-based programming into large-scale programs. As well as being less challenging, smaller incremental programs work for two reasons: they address specific problems, and they have incorporated different views and approaches by various constituents across the power spectrum into the heart of their programs. Large-scale programs can be structured so as to work on specific well-defined problems through more ruthless prioritization of—and between—common justice problems, and by increasing the possibility of their inclusion in reform programs.⁶⁹

Third, the detailed understanding gained through working on community justice can help CSOs, policymakers, and public interest lawyers to achieve a change in the function of law at the national level. Once change is achieved, CSOs are then well positioned to ensure it is implemented and reflected in practice. As illustrated in Box 15, CSOs can also be institutionalized and funded by the state to deliver services.

Box 14 – Community justice influencing national law in Botswana⁷⁰

Regular engagement in Botswana over three decades with women trying to manage legal problems suggested a need to focus on national law reform. In 1992, women’s rights groups successfully challenged discriminatory statutory citizenship laws in the Unity Dow case, giving women in Botswana equal rights to citizenship. This also had an impact on the law in other countries in the region. In 2013, the Mmusi vs. Ramentele case challenged the customary law practice of favouring male heirs for its contradiction of constitutional principles on equality—and the women’s rights groups won again. |

Conclusions

Legal arrangements are artifacts of the social contract. They record, reflect, reproduce, and reinforce power relations in society. In consequence, we would expect to see (and in fact do see) contests over power and resources within society operating along a spectrum defined by law. Most countries claim to respect the rule of law and the related equality of all citizens. However, even the best examples have only a “patchy” version⁷ in which legal problems affect people from varying social groups differently. In the vast majority of countries, lower-income respondents and/or respondents from marginalized groups report far more serious livelihood or life-threatening legal problems than higher income respondents.

More than five billion people lack meaningful access to justice, creating the “justice gap.” The justice system—and therefore the justice gap—is not accidental. It is a function of the social contract and deeply embedded in power relations within a given context. People who experience the justice gap do not live outside the justice system; they have to negotiate it every day.

Justice systems can and do perpetuate political and economic inequality. Unfair justice systems are part of the day-to-day experience of excluded groups. They are a constant irritant, can make earning a living challenging. Where exclusion or the use of coercive force is mandated to maintain the status quo, they can also be life-threatening. Fairer justice systems create and govern inclusive political and economic institutions. Very few justice systems, if any, have achieved this. The place to start is a consideration of which justice systems are the most difficult to operate, or pose the most problems for disadvantaged and/or marginalized groups.

The symbolic function of the law, its immediate impacts, and the importance of procedural justice make the justice system equally powerful in promoting and increasing equality. This is most obvious when there has been a break with the past—for example the election of a new government, or a peace process. At these points, the promulgation of different legal arrangements is a powerful symbol of state intent.

Endnotes

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- 10 See Stewart, F., "Horizontal Inequalities: A Neglected Dimension of Development." WORKING PAPER 1 *Centre for Research on Inequality, Human Security and Ethnicity, CRISE Queen Elizabeth House, University of Oxford* (2002), <https://assets.publishing.service.gov.uk/media/57a08cba40f0b652dd0014fa/wp1.pdf>. Stewart defines horizontal inequalities as "the existence of severe inequalities between culturally defined groups" (p.4). See also Stewart, F., "Horizontal inequalities as a cause of conflict, a review of CRISE findings." WORLD DEVELOPMENT REPORT 2011 BACKGROUND PAPER *Centre for Research on Inequality, Human Security and Ethnicity (CRISE), Oxford University* August, 2010, https://openknowledge.worldbank.org/bitstream/handle/10986/9126/WDR2011_0029.pdf?sequence=1&isAllowed=y which focuses on socially constructed (and legally reinforced) identities as a driver of conflict. She notes that mobilization by group identity has become the "single most important source of violent conflict" (p.6) and argues that this is more likely when identity is exacerbated by institutionalized inequality.
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- 19 Emmeline Pankhurst’s “Freedom or Death” speech is one of the best encapsulations of a rallying cry to violent collective action. “Suppose the men of Hartford had a grievance, and they laid that grievance before their legislature, and the legislature obstinately refused to listen to them, or to remove their grievance, what would be the proper and the constitutional and the practical way of getting their grievance removed? Well, it is perfectly obvious at the next general election the men of Hartford would turn out that legislature and elect a new one. But let the men of Hartford imagine that they were not in the position of being voters at all, that they were governed without their consent being obtained, that the legislature turned an absolutely deaf ear to their demands, what would the men of Hartford do then? They couldn't vote the legislature out. They would have to choose; they would have to make a choice of two evils: they would either have to submit indefinitely to an unjust state of affairs, or they would have to rise up and adopt some of the antiquated means by which men in the past got their grievances remedied.” Emmeline Pankhurst’s “Freedom or Death,” <https://awpc.cattcenter.iastate.edu/2017/03/09/freedom-or-death-part-1-nov-13-1913/>.
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- 64 **ICAI** report, p. 38.
- 65 In November 2014, for example, DFID suspended its Security Sector Accountability and Police Reform Project in DRC, following a finding by the UN that units of the Congolese National Police – although not those supported by DFID – had engaged in human rights violations, including extra-judicial killings. ICAI report, p. 24.
- 66 For a detailed discussion of the history of international donor financing of the sector since the 1950s see Manuel, M. and Manuel, C., pp. 16-20. For a detailed discussion of the history and impact of international engagement in the justice sector, see, Kleinfeld, R. “Advancing the Rule of Law Abroad, Next Generation Reform.” Carnegie Endowment, 2012.
- 67 **Manuel**, M. and Manuel, C., p. 31.
- 68 **ICAI**, p. 33. For a general discussion of justice programmes and their limited impact at scale see also pp. 27-33.

- 69 **Task Force on Justice, Justice for All**, pp. 81-85.
- 70 **Task Force on Justice, Justice for All**, pp. 108-9.
- 71 **Tazeen, H. and Z. Tanzer**, "Women's Movements, Plural Legal Systems, and the Botswana Constitution: How Reform Happens," *Policy Research Working Paper 6690* (Washington, D.C.: World Bank, 2013), <https://openknowledge.worldbank.org/bitstream/handle/10986/16924/WPS6690.pdf?sequence=1&isAllowed=y>.
- 72 **Task Force on Justice, Justice for All**, p. 65.

