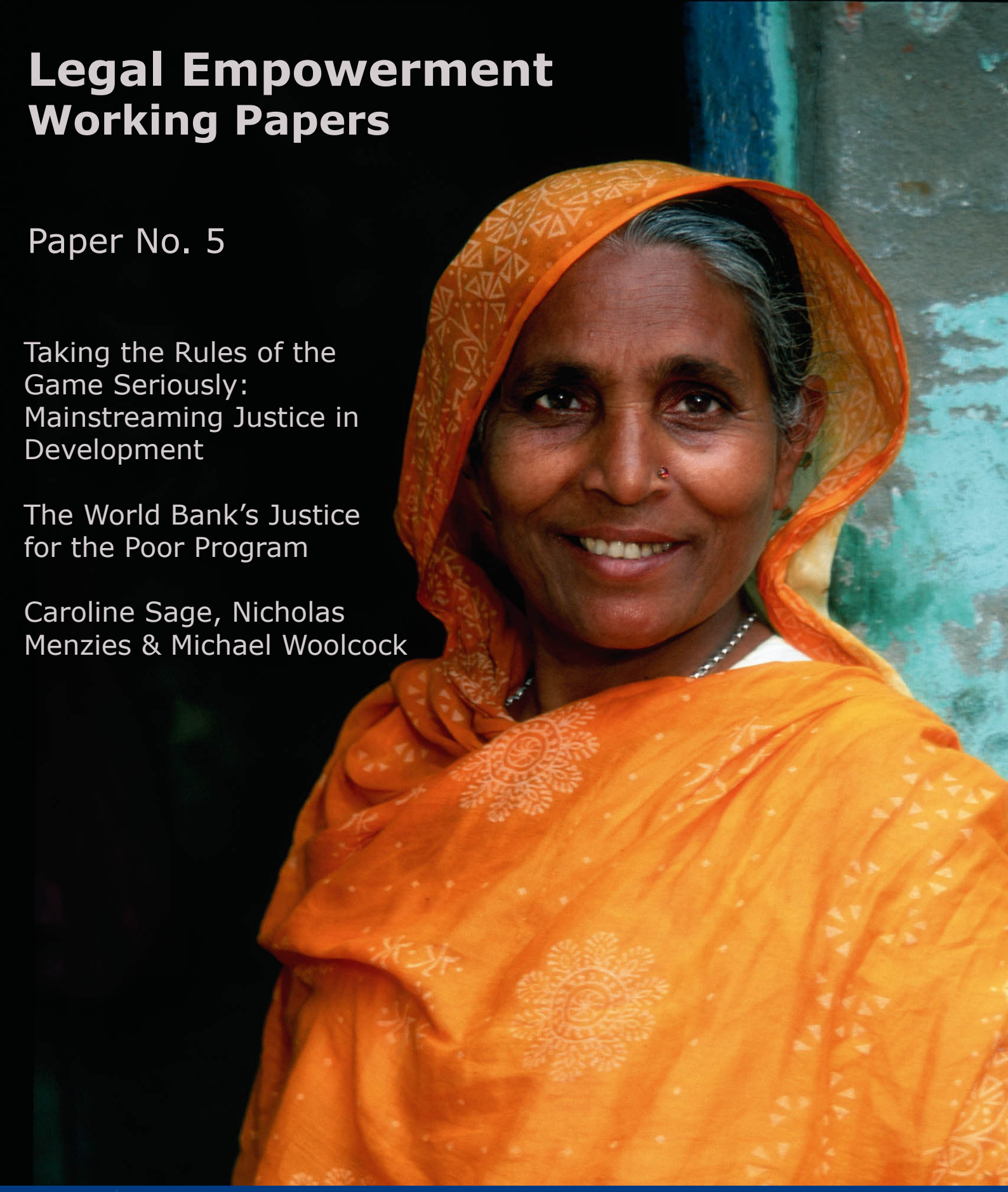
Legal Empowerment Working Papers

Paper No. 5

Taking the Rules of the Game Seriously: Mainstreaming Justice in Development

The World Bank's Justice for the Poor Program

Caroline Sage, Nicholas Menzies & Michael Woolcock



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Published by:
International Development Law Organization
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TAKING THE RULES OF THE GAME SERIOUSLY: MAINSTREAMING JUSTICE IN DEVELOPMENT
THE WORLD BANK'S JUSTICE FOR THE POOR PROGRAM

Caroline Sage, Nicholas Menzies and Michael Woolcock[1]

Executive Summary

This paper explains the ideas and approaches that underpin the World Bank's Justice for the Poor (J4P) program. J4P is an approach to legal empowerment that focuses on mainstreaming socio-legal concerns into development processes, in sectors ranging from community-driven development and mining technical assistance to labor rights advocacy and classic judicial reform. It has developed out of a perspective that legal and regulatory frameworks and related justice concerns cannot be conceived of in terms of a 'sector' or a specific set of institutions, but are integral to all development processes. Further, while there is broad agreement that justice reform and building an equitable justice sector is central to good governance and sustainable development, there is limited understanding of how equitable justice systems emerge and how such processes can be facilitated by external actors. J4P addresses these knowledge gaps with intensive research aimed at understanding the ways in which development processes shape and are shaped by local context, and in particular how the poor engage with – and/or are excluded from – the multiple rule systems ('legal pluralism') governing their everyday lives. Through three cases studies of the Program's work, this paper illustrates how understanding the various roles of law in society provides an innovative means of analyzing and responding to particular development problems. The cases also demonstrate the principles that underpin J4P: development is inherently conflict-ridden; institutional reform should be seen as an iterative and thus 'interim' process; building local research capacity is critical to establishing an empirically based and context-driven reform process; integrating diverse sources of empirical evidence is needed to deeply engage in local contexts; and rule systems are ubiquitous in all areas of development, not just the 'legal sector'.

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Introduction

This paper sets out the ideas and approaches that underpin the World Bank's Justice for the Poor (J4P) program and provides some examples of how a particular approach to legal empowerment is being used to support more equitable and effective reform processes, both within formal justice institutions and across other development sectors. As such, J4P is best understood as an approach to justice and development that focuses on mainstreaming socio-legal concerns into development processes, with an emphasis on understanding and improving the processes by which marginalized and excluded populations seek justice and claim their rights.[2] The program is based on a number of key principles (outlined below) and a particular theory of social change.

J4P has developed out of a perspective that legal and regulatory frameworks are fundamental to all development processes. Development is ultimately about developing and distributing rights, resources and responsibilities; justice systems play a key role in shaping this distribution of power and vice versa. This concern is hardly new. It is now widely accepted that effective and equitable justice systems are central to good governance and sustainable development.[3] Despite this emerging consensus, however, there is limited understanding of how equitable justice systems materialize, and thus how (and by whom) they can be promoted. A major reason for this limited understanding, we contend, is the fact that, in any given context, state law is but one of a number of rules systems in play, with some of the systems offering diametrically different understandings of problems, solutions and jurisdictions. The presence of more than one legal order in a given context is often called "legal pluralism".[4] In many developing countries, non-state legal orders (such as customary law and religious law) have a significant influence on the way in which societies are governed, order is maintained, disputes are resolved and development is experienced. Moreover, all rule systems rest on underlying social norms even as they are embedded within, and serve to mediate, multiple layers and forms of state law (e.g. criminal and commercial law, at the local and the national levels). An underlying premise of the J4P program is that development practice – both classic justice sector work but, more importantly, development programs more generally – could benefit from a deeper analysis and understanding of the role of law in society and the ways in which justice institutions develop.

This paper provides an overview of J4P's central ideas and approach by: (i) looking at the common ways justice is currently conceived in development; (ii) outlining the approach the program has developed in response; (iii) highlighting three cases – from Kenya, Cambodia and Sierra Leone – that exemplify some key characteristics of J4P's work; (iv) offering some concepts to guide the future conduct of justice and legal empowerment work; and (v) concluding with some continuing challenges.

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[2] J4P is led from the Justice Sector Reform Unit of the World Bank's Legal Vice Presidency and brings together a multi-disciplinary team from across the World Bank. J4P has team members based in-country across East Asia and the Pacific, and in Africa. Further details about the program can be found at <www.worldbank.org/justiceforthepoor>.

[3] See, for example: World Bank, *World Development Report 2006: Equity and Development* (2005).

[4] The literature, from a diverse range of disciplinary perspectives, is littered with debate about the meaning and definition of the term 'legal pluralism'. See, for example, J Griffiths, 'What is Legal Pluralism?' (1986) 24(1) *Journal of Legal Pluralism and Unofficial Law* 1; S E Merry, 'Legal Pluralism' (1988) 22(5) *Law and Society Review* 869; F von Benda-Beckmann, 'Who's Afraid of Legal Pluralism?' (2002) 47 *Journal of Legal Pluralism and Unofficial Law* 37.

1. Justice in development – classic and alternative approaches

The ways in which justice has been both thought about and practised in development raise a number of questions. These questions can be thought about within two interwoven strands: the way justice is conceived of in classic 'justice sector reform' work; and the frequent failure of other types of development programs to take seriously the multiplicity of rules systems and justice issues.

1.1 Classic justice sector reform work

There has been a growing consensus among development practitioners and scholars about the importance of legal and regulatory systems for development.[5] These systems are deemed important because they are the basis of property rights, which in turn are vital for encouraging investment and promoting economic growth, and also because they are central to public administration, which in turn is the basis of public revenue generation and service delivery. More recently, there has been an increasing recognition that judicial systems shape the rules and structures that influence the opportunities available to different segments of the population. With all this has come an increase in scholarly and programmatic attention to justice issues. However, these initiatives have tended to focus on legal and judicial institutions, invariably state-based and most often at the national level. This approach has numerous shortcomings, with some arguing that "examples of significant, positive and sustained impacts are few".[6] At the very least it would seem that there is a lack of knowledge[7] about what is trying to be achieved, what 'success' means, and what does and does not work**.**

Various explanations have been offered for the inability of classic approaches to declare clear successes more frequently, but for present purposes three can be identified:

1.1.1 Missing theory

Much justice sector work has proceeded without a clear theoretical basis of social and institutional change. While the importance of the rule of law is widely accepted and commonly invoked, there remains little understanding of *how* to build systems that embody its attributes (which include fair laws that are effectively enforced and that bind even the state itself). Legal systems are inherently political, involving legitimate negotiations between different institutions and interests.[8] Yet development agencies have tended to frame these issues as predominantly technical concerns. Accordingly, the policy response has therefore favored the input of technical solutions – expert missions, sharing of best practices, training programs – but the outcomes regularly fail to meet expectations. Western legal systems are held up as models to aspire to, but little historical interrogation is undertaken of how these systems developed and the underlying bargains they represent.[9]

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[5] See for example, the history outlined in C Sage and M Woolcock, 'Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries' in A Dani and A de Han (eds) *Inclusive States: Social Policy and Structural Inequalities* (2008) 3. The United Nations' recent *Commission on Legal Empowerment of the Poor* <http://www.undp.org/legalempowerment/> is another manifestation of this consensus on the importance of the issue (if not what should be done in response to it).

[6] C Sage and M Woolcock, 'Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries' in A Dani and A de Han (eds) *Inclusive States: Social Policy and Structural Inequalities* (2008) 4.

[7] T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 15.

[8] For an explication of the roots of both instrumental and non-instrumental views of law, see, among others, B Z Tamanaha, *Law as a Means to an End* (2006).

[9] In this sense, the legal sector is hardly alone: similar approaches to institutional replication are commonplace in finance, health and education. See J C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998);

1.1.2 Missing context

In implicitly or explicitly importing assumptions about alleged best practices from rich country systems, justice-oriented development work often fails to properly understand local contexts. It can be particularly blind to the limits of the state and the continuing strength of non-state governance systems. Development practice in all sectors focuses predominantly on the institutions of the state; justice work is no exception. The systems that are held up as models are invariably those with a well-resourced and functioning state apparatus. However, in many countries where the 'rule of law' is said to be most needed, the state is weak, has limited reach and legitimacy, and may be many years from being able to function and provide the services of a modern bureaucratic ideal. Justice reform initiatives have tended to work with justice institutions as if they existed within broad and broadly functioning systems of governance. Even those justice reform efforts that take a sector-wide approach – not focusing on single institutions in isolation, but instead address the array of institutions said to constitute the 'justice sector' (judiciaries, ministries of justice, police, prosecutorial services, legal aid, etc.) – can be compromised by weaknesses in the other arms of the state governance apparatus necessary for functioning justice institutions.

Government weakness is often attended (and in some cases reinforced) by the continuing strength and importance of other rule systems in ordering society. In such instances, state law and legal institutions are only one of a number of intersecting rules systems used to govern and resolve disputes. These non-state systems – such as those guided by customary, religious or aid project rules – can reflect very diverse underlying norms and have different sources of legitimacy. State law will have limited power where the institutions of the state have limited reach, and the principles under which such institutions operate have limited meaning and legitimacy for everyday citizens. In these contexts, in short, the 'rule of (state) law' is only a small subset of the overall 'rules of the game', and as such, an exclusive concentration on state law by development practitioners is unlikely to yield the results hoped for.

1.1.3 Missing justice

In focusing on the institutions of the state, classic justice sector reform often fails to promote justice for broad cross-sections of society. The content and implementation of prevailing state systems often reflect the rules and interests of the wealthy, elite, urban and educated, who can capture and/or disproportionately influence state institutions. As such, the processes and principles that underpin state legal institutions are often markedly different from those of the wider population and are therefore not seen as just or legitimate, even in those circumstances where the weak state apparatus manages to serve more than a small minority of the population.

1.2 The missing law in development

Properly functioning legal and judicial institutions are clearly important and the above shortcomings should be explored to see whether justice sector work can be made more effective. In addition, however, concepts of law, regulation, rules systems and justice need to be infused more broadly into development programming. Put more forcefully, 'justice' is best understood not as a stand-alone sector in development – at least not in the same way that agriculture, energy and transport are sectors – but rather, as a sector that infuses most aspects of almost every development activity. Every policy in every development sector, for example,

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L Pritchett and M Woolcock, 'Solutions when the Solution is the Problem: Arraying the Disarray in Development' (2004) 32 (2) *World Development* 191.

is ultimately actionable and enforceable to the extent that it is articulated in and/or supported by law, and all behavior – whether by individuals, groups or organizations – is a function of a complex web of rules systems ranging from social norms to national constitutions.

Beyond just correcting failures in the conception and practice of justice sector reform work, development needs to address the larger issue that most development processes fail to even consider rules systems,[10] despite the routine invocation of popular expressions endorsing the importance of 'understanding the rules of the game'. Rules underpin all aspects of everyday life and are the key to understanding how conflicts form, escalate or get resolved. Yet, development, by design, puts all these rules systems in flux: it reorders society and alters the distribution of rights, responsibilities and resources. Moreover, it alters social relations, especially those pertaining to gender, occupation, and the relative political strength of particular social groups. As such, it is inherently accompanied by conflict. By establishing legitimate spaces and processes for negotiating competing interests, aspirations and interpretations, development actors can potentially become part of the solution to such conflicts.

A detailed consideration of rule systems, in all their various manifestations, is therefore critical to understanding development processes, and the design, implementation and assessment of policies/projects enacted in response to them. A basic starting point should be an understanding that plural legal orders exist in most contexts, and that the nature and extent of this pluralism is often 'invisible' to outsiders; that is, it is 'illegible'[11] to the dominant modalities of research and operations that characterize most (large) development agencies.

Rules systems, even in their most model forms, are always evolving. In fact, arguably the best rule-of-law governments are those in which the rules systems are suitably malleable to channel the constantly competing interests of a dynamic society in a peaceful, equitable and orderly manner.[12] As a result, law and justice reform should not be seen as forging some perfect rule or institutional form; rather, it is more accurately conceived of as a process of encouraging more equitable, evolving processes whereby different interests and aspirations can be reconciled. Rule systems in their various forms – sometimes overlapping, sometimes competing, always evolving – have a number of functions in society, and as such can have a role in both undermining and enhancing development processes.

J4P's response to the shortcomings associated with these two strands of approaches can best be seen by examining a number of cases highlighting work that has been undertaken. From this, J4P suggests a different way of thinking about governance, justice reform and legal empowerment. Justice reform needs to be thought of as one part of the governance and state building agenda, but importantly one that takes seriously the non-state rules of the game. Moreover, as Briggs rightfully stresses, our analysis of rules systems should point beyond the narrower (if more technical) approaches of game theory – "how the players play particular games" – to "why those games, and not others, arise in the first place, why some players, and not others, get to play, how rules of engagement shift … and how players acquire the

[10] The term 'rules systems' is used here to emphasize that more than just state laws and regulations (and their associated institutions and processes) are important in governing societies. Social norms and religious precepts, for example, can exert a powerful influence on behavior and what is considered 'just'.
[11] J C Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (1998).
[12] D Adler, C Sage and M Woolcock, *Interim Institutions and the Development Process: Opening Spaces for Reform in Cambodia and Indonesia*, Brooks World Poverty Institute Working Paper No. 86 (2009).

resources – both tangible and intangible – with which to play."[13] As a result, legal empowerment is best approached not by a singular justice sectoral approach, but by assessing and improving the ways in which justice is experienced through the whole range of development programming.

2. Exploring rules systems: three J4P case studies

When looking at justice reform, either in the classic sense or as part of development interventions, it is critical to analyze the role of law thoroughly, including at multiple levels. Rules systems, of which 'the law' (i.e., state law) is but one constituent element, operate as mechanisms to achieve certain ends. The following cases approach development problems by asking what the role of law is and could be in each circumstance. Using law in this way provides an innovative means of analyzing concrete development problems and also suggests new ways of addressing broader development challenges.

2.1 Mechanisms for managing freedom, solidarity and order: peace and development committees in Northern Kenya[14]

2.1.1 Overview

In northern Kenya, peace and development committees ('peace committees') are an innovative mechanism that have been developed to create spaces for resolving some of the issues arising in a context of legal pluralism. They consciously draw upon the principles and the legitimacy of multiple local rules systems, while also attracting authority from and respecting some tenets of state law. In doing so, the peace committees are attempting to fulfill a classic role of law, namely a mechanism for managing freedom, solidarity and order in society. They represent a legitimate forum in which social compacts can be negotiated and re-negotiated. While not without problems, they are particularly noteworthy because they seek to accommodate the various claims and jurisdictions that inhere in multiple, contesting rules systems.

2.1.2 Context

The arid lands of northern Kenya are inhabited predominantly by pastoralist communities. The region, one of the poorest in Kenya, is characterized by frequent droughts, as well as vast and often inaccessible terrain. Conflicts center largely on access to scarce natural resources, such as grazing land and water supplies, and loss of livestock during droughts that can lead to castle rustling. A history of conflict and violence has more recently been accelerated by access to firearms, many acquired from adjacent conflict-affected countries. The sources and incidence of conflict are laid out across a number of ethnic groups and their associated socio-cultural systems. These systems vary and come into contact in a number of ways, such as through the movement of populations in search of grazing land as well as from an influx of refugees (e.g. from Somalia).

The people of these arid lands largely live outside the scope of the services, including justice services, provided by the state. Key state justice institutions, such as the police and the courts, are rarely accessed. Courts are remotely located, and travel is unreliable and costly; even if they can be reached, the time and expense needed to pursue a case makes it prohibitive. Lawyers able to assist parties to navigate the

[13] X de Souza Briggs, *Democracy as Problem Solving: Civic Capacity in Communities Across the Globe* (2008) 22.
[14] The following case study is built on research laid out in the J4P research reports: T Chopra, *Reconciling Society and the Judiciary in Northern Kenya* (2008a); T Chopra, *Building Informal Justice in Northern Kenya* (2008b); B Ayuko and T Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya* (2008). Available at <www.worldbank.org/justiceforthepoor>.

process are rare.[15] Police tend to be located closer to large population centers, but often lack resources to be able to investigate incidents and apprehend suspects.[16]

Increasing access to state justice services by, for example, instituting mobile courts, supporting legal aid and addressing fees, will not necessarily ensure just outcomes. As important as logistical constraints, the conceptual gulf between residents and the state legal regime make the police and courts unattractive to most communities. Prevailing ideas about what constitutes a wrong and who is responsible for an action, the processes taken to resolve conflict and the determination of appropriate outcomes can all markedly differ between communities and the state. Understandings of seemingly familiar concepts of 'individuality' and 'group', for example, vary widely, and there are many ideas of where the balance should lie between freedom and solidarity.

The application of the 'rule of law' (as determined by the state), therefore, is not always a benign good, as normative differences in what is considered a fair and appropriate outcome in one community is seen as unjust by others. Even when state institutions are not being consciously captured to further certain interests or repress others, the mere application of state laws leads to injustice. By applying the formal law, state agents run the risk of alienating communities and failing to build a reputation as being 'just'. Police enforce sanctions against crimes such as gambling, possession of firearms and the brewing of alcohol, which do not necessarily constitute offences in pastoralist socio-cultural systems. Courts try individual offenders, but in many pastoralist societies the larger kin group may have responsibility. The determination of criminal responsibility in court, therefore, has little impact on solving conflict, which is perceived to be between groups. A kin group may feel entitled to take redress if certain acts are taken against one of their members, but in criminal matters, the state courts focus their orders only on the individual offender. The payment of compensation between groups is a common means of re-establishing peace, reinforcing the social contract both within and between groups. For these reasons, it is not uncommon for kin groups to seek to have matters withdrawn from the court to be dealt with in communities. When such applications are not granted, the parties can effectively frustrate the proceedings by refusing to appear as complainants and witnesses.

Historically, intra-communal conflicts have been managed by community chiefs and elders. Given the gulf with the state in all other matters of everyday life, this remains largely the case today. However, state and non-state spheres are not completely distinct. Tribal chiefs have become employees of the provincial administration and as such one of their functions is to maintain law and order. Furthermore, communities do approach the police to try and influence the outcome of disputes undergoing more traditional resolution processes. Individual magistrates also try to take processes outside the court into account, but are given little official guidance or professional support. The resolution of matters by chiefs and elders in communities is not without problems. The more powerful members of communities can use the cloak of tradition to solidify their position at the expense of the poorest and most marginalized. Inter-communal disputes have often proven more challenging for chiefs to resolve as they involve more than one set of rules system. Thus, not only are power imbalances and competing interests at play, but competing and sometimes overlapping rules systems further complicate the justice equation.

[15] A system of *Kadhi* courts attempts to address some of the issues of distance and cost. *Kadhis* are often co-located with magistrates in areas with Muslim populations. They are governed by a national statute and have jurisdiction over civil cases, applying *Sharia* law. Some *Kadhi* courts have appointed imams or other scholars in remote areas as a grievance advice and referral mechanism.

[16] It is reported that only 7 per cent of the national population report cases to the police. While no relevant data is available for the arid lands, the proportion is very likely lower. See the *National Integrated Household Baseline Survey Report* (2006) commissioned by the Governance, Justice, Law and Order Sector Reform Program, in T Chopra, *Reconciling Society and the Judiciary in Northern Kenya* (2008a) 5.

2.1.3 Legal empowerment initiative – peace committees

Peace committees are an innovative attempt to address both the challenges of conflicts that arise between communities as well as the divide between communities and the state. The committees grew out of efforts in the 1990s to bring an end to particularly entrenched conflicts between specific arid lands communities. Peace committees are formed by communities at the district level, with the support of non-government organizations and donors, and with the participation of local authorities. Given the heterogeneity of most districts, any given committee usually includes more than one ethnic group. Their popularity is evident since they are now found across the region. Each peace committee typically comprises a broad range of members who are locally perceived as relevant for conflict resolution. In some instances, the process of constituting peace and development committees has led to the drafting of detailed declarations, which in turn act as a local system of regulation for the district. Declarations commonly include development objectives, the nature of issues in dispute, ground rules and procedures to be followed in cases of conflict, and the punishments to be applied. For example, one declaration spells out rules to solve problems associated with cattle rustling, the use of pasture and water, and the trafficking of firearms.

Some declarations refer to the state law and outline matters that should be referred to the police and the courts. The provisions of the declarations are not always wholly consistent with state law or principles of equality. For instance, one declaration originally stated that the death of a man should be compensated by 100 cows or camels, while the death of a woman is valued at only 50 cows or camels.[17] Another provision of a declaration reintroduces a customary system of permission from respective elders and chiefs to enter certain grazing lands that the state regards as common property. In one circumstance, communities moved into a neighboring district to graze their cattle in breach of the provision; the District Commissioner who removed them in accordance with the declaration has been taken to court by the cattle grazers (where the case remains pending).

The popularity and success of the declarations is said to arise from their recognition of local concepts and socio-political structures as well as their ability to define ground rules between different local systems. The success of the peace and development committees, as well as the associated declarations, has led to them being supported by the Office of the President and the subsequent drafting of a national framework. The draft recognizes some weakness in state law and processes, and seeks to promote increased 'traditional conflict handling'.

To be sure, peace committees and declarations are not without problems and limitations. The selection of committee members by communities can highlight disagreements about representation and competence. Rifts in communities arise over whether elders, the educated or the democratically elected are the most legitimate and able. Once elected, committee members can act as gatekeepers with access to information and power. Complaints have been made about both inadequate participation of women in the process and unfair treatment that they receive in some of the declarations. Peace committees and declarations do not neatly solve the interaction between state and non-state systems, but at least provide a coherent, legitimate and accessible step towards a system that meets communities' governance needs.

J4P formed a partnership with an established legal aid and advocacy organization, the Legal Resources Foundation Trust (LRF), to undertake work in Kenya. Building on the program's ethnographic research experience, J4P was able to support LRF in the development of methods to understand and record local governance and dispute

[17] It has since been amended to add that the offender must be handed over to the police.

mechanisms. In particular, J4P was able to assist in the capacity to make such research relevant to broader policy reform processes. The outcomes of the work are being used to inform the development of national policies with respect to governance and dispute resolution in local communities; in particular, LRF has provided advice to the Kenya National Commission on Human Rights. J4P also worked closely with the World Bank's Arid Lands Resource Management Project (ARLMP), one component of which was providing support to the peace committees, and is furthermore informing the design of a more classic justice sector support program.

2.1.4 Conclusions

When developed over time, forged in legislatures and applied by the courts, state law can act as a powerful expression of a society's shared values and reflect a social compact between citizens and the state. In many contexts, non-state law plays a similar role at a more local level. This role of law is often challenged in circumstances of legal pluralism, where there may be a range of very different norms regarding the legitimate spaces in which to forge an agreement, and the processes to be followed to reach it. When people from disparate rule systems interact, there is a need to talk across the systems. State law can sometimes play this role. But in circumstances where the state has little legitimacy or reach, its effectiveness is limited, and can in fact increase perceptions of injustice.

Working through peace committees represents one potential entry point in northern Kenya for responding to this challenge, but doing so requires detailed context-specific knowledge of the prevailing ways in which state and non-state justice systems are interacting. J4P has been able to actively contribute to the building of this knowledge base. The peace committees of northern Kenya are a valuable organizational innovation since they aim to reduce conflict by creating a mechanism that incorporates the disparate norms of multiple local rule systems and state systems. They highlight the fact that state and non-state are not separate spheres, but are fluid and dynamic, and continue to influence each other. In this context, the peace committees are one constructive attempt to try to harness the power of all available governance and dispute resolution mechanisms in a joint quest for more equitable processes of dispute resolution.

2.2 Mechanisms for aligning global, national and local: Cambodian Arbitration Council

2.2.1 Overview

In societies with a strong executive, neo-patrimonial power relations and dysfunctional courts, it can be difficult to find equitable spaces for legal empowerment. A consideration of labor relations in Cambodia demonstrates how laws can be used to align global, national and local interests, and be harnessed to allow the poor to claim their rights, even absent hard enforcement mechanisms. The case also illustrates the benefits of creating iterative, interim institutions for legal empowerment in contexts where the prevailing legal and administrative structures are averse to recognizing the rights of the poor. The creation of more equitable spaces for dispute resolution can be of benefit as a pragmatic precursor to ensuring detailed and enforceable rights in law.

2.2.2 Context

In the wake of the 1993 adoption of a liberal democratic constitutional framework and the eventual end of civil conflict, a debate is ongoing regarding the relative merits of Cambodia's progress, with improvements in economic and some social indicators pitted against the continuation of an illiberal governance regime. Strong

economic growth in recent years has seen marked increases in the gross domestic product (GDP) per capita, significant reductions in poverty, and improvements in key social indicators, but Cambodia remains one of the poorest countries in Asia and inequality has risen rapidly. Increases in inequity are commonly attributed to elite capture, corruption and entrenched patronage systems. The executive and, more particularly, the ruling political party, maintains a firm grip over the institutions of state – including the judiciary – from national to local levels. The court system remains compromised as a forum in which to resolve disputes and exercise rights: judges are subject to direction from the Executive; many court officers are open to bribery; and inadequate funding and low capacity further hampers effectiveness.

Cambodia's economic growth has been accompanied by a growing workforce in formal employment, particularly in garment manufacturing and tourism. The country emerged as a garment exporter in the 1990s, and following the end of the civil war, tourism numbers have increased dramatically. Employee growth in both sectors has been marked.[18] Access to major markets for garment manufacturing and the direct experience of foreign clientele in tourism have also drawn international attention, including from international labor rights groups, at a time when local employee growth was bolstering union membership.

Cambodia's formal labor governance framework is relatively comprehensive and progressive in protecting worker rights. The Constitution enshrines the major international human rights instruments and Cambodia is a signatory to the primary International Labour Organization (ILO) conventions. The 1997 Labor Law, drafted with ILO support, incorporates key labor rights such as the right to unionize, bargain collectively and strike. Problems with the regime lie in the gap between the formal law and practice, including the willingness of the state to monitor compliance and the availability of spaces in which parties can seek to enforce their rights.

A 1999 bilateral trade agreement negotiated between the United States and Cambodia had a large impact on the development of labor relations in Cambodia. The agreement established quotas on Cambodian garment exports and critically tied yearly increases to improvements in working conditions. The agreement aligned global, national and local interests by seeking to "improve the working conditions in the textile and apparel sector, including internationally recognized core labor standards, though the application of the Cambodian labor law."[19] The agreement similarly aligned incentives for employers, unions and the government to improve application of the law. Employers sought compliance as a means of increasing business through higher quotas. The unions' incentives were better working conditions and more jobs that would arise from higher quotas. The government sought to gain from increased revenue through increased business activity and the allocation of quotas between businesses.

Given administrative and judicial inadequacies, the immediate challenge facing the scheme was the ability to establish legitimate monitoring systems and dispute resolution processes. Attempts to create new independent structures were likely to be blocked or captured. In practice, implementation of the trade agreement rested on two key arms: an enterprise monitoring project and the creation of a labor dispute resolution body. The latter is the focus here.

[18] Employees in the garment industry increased from 80,000 workers in 1998 to over 320,000 in 2006, and employment in the tourism sector, from 10,000 in 1994 to over 100,000 in 2009, in D Adler and M Woolcock, 'Justice without the Rule of Law? The Challenge of Rights-Based Industrial Relations in Contemporary Cambodia', in T Novitz and C Fenwick (eds), *Workers' Rights as Human Rights* (forthcoming) 170.
[19] *Cambodia Bilateral Textile Agreement 1999*, quoted in Adler and Woolcock, above n 18, 178.

2.2.3 Legal empowerment initiative – Arbitration Council

The dispute resolution body created is a tripartite Arbitration Council, composed of members nominated by unions, employer organizations and the government.[20] Each case is brought before a Council panel of three. Both employer and worker parties to a dispute choose an arbitrator, while the third arbitrator is selected by the two arbitrators already chosen. The panel has wide powers to grant civil remedies, yet decisions are generally non-binding.[21] On the other hand, if either party wants to formally enforce a decision, then a court order must be sought. Given the nature of the court system, this makes the awards practically unenforceable. While the Arbitration Council has its critics, it can also be said to have had enjoyed considerable success, especially given the governance context and the nature of the parties involved. Its caseload has steadily increased and it has managed to find "for the most part, workable resolutions minimally acceptable to all parties".[22] A measure of the achievement can be seen by the creation of a viable mechanism "for conducting negotiations between a weak neo-patrimonial state, well-resourced international companies, and fledgling labor unions representing the interests of a membership comprised disproportionately of young women…"[23]

Why has the scheme had some positive effect? Undoubtedly, the direct influence of international perceptions and the way in which this has (re)aligned incentives provide an important mechanism facilitating the operation of the Arbitration Council. The selection of Council members, which was heavily influenced by the ILO and the balanced composition of the panels in each case, has contributed to a general perception that the Council is fair. The publication of reasoned decisions for each case adds to transparency and legitimacy. The Council is also carefully positioned so as to be associated with the state and garner authority from it, yet also able to remain sufficiently independent so that it is not captured by the state.

2.2.4 Conclusions

The World Bank was a lead donor in justice sector reform in Cambodia, but there was limited political will to drive reforms in a difficult context. J4P's analysis of enterprise monitoring mechanisms and the operation of the Arbitration Council provided opportunities for the World Bank to understand and inform innovative approaches to law enforcement and dispute resolution in a context where classical administrative and judicial responses are (and remain) highly problematic. The classic justice reform response would have been to work with the state institutions, and a classic legal empowerment response would have been to support the most marginalized in their interactions with the state. Given the context, however, both these approaches have serious shortcomings.

The ultimate success of the scheme in transforming labor relations has been said to lie in "embedded social dialogue, the provision of public information and trade preferences rather than more conventional recourse to national or international law."[24] The creation of a hybrid between a rule of law institution and a forum for social dialogue, building on the specificities of international attention, enabled certain rights to be realized. Law was a significant though not exclusive reference point around which negotiations took place – and has had influence even absent traditional mechanisms for enforcement.

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[20] The Arbitration Council was provided for in the Labour Law but had not been created.
[21] Unless the parties have agreed in writing to be bound by the decision or are bound by a collective agreement incorporating binding arbitration, either party can file an opposition to the decision and it will have no legal effect.
[22] Adler, Sage and Woolcock, above n 12, 10.
[23] Ibid.
[24] Adler and Woolcock, above n 18, 182.

2.3 Mechanisms for defining and enforcing rights: mining in Sierra Leone

2.3.1 Overview

In Sierra Leone, J4P has conducted analyses of mining that bring together international operators, national level agencies and multiple local communities. An array of legislation governing mining development has often failed to ensure peaceful resource extraction and equitable benefit sharing. J4P's analysis of legal empowerment is grounded in the view that all development processes have the potential to cause disputes as they are invariably about the re-distribution of rights, resources, and responsibilities and the realignment of social relations between different groups. The benefits of development are frequently a source of contention, particularly if they are not equitably negotiated and distributed. An understanding and analysis of the disputes inherent to the very nature of development is too often neglected. The channeling of disputes into fair processes can be a productive means of negotiating interests and aligning them in agreed settlements. If no structure exists to address disputes, then they can flare into more serious, sometimes violent, conflict. In Sierra Leone, the state's legal framework governing mining development fails to adequately incorporate detailed and appropriate dispute resolution authorities and procedures. J4P's work was conducted to complement broader government-led reforms of the mining sector and worked with a World Bank technical assistance project to support the improvements in the mining authority at the national level. J4P's analysis has led to the design of pilot projects to see how increasing access to information can address the justice issues facing communities. J4P teams are also designing aspects of a community-driven development program supported by the World Bank.

2.3.2 Context

There is particular sensitivity surrounding the management of the mineral sector in Sierra Leone. Sierra Leone was subject to civil war from 1991 to 2002. While the reasons for the start of the conflict are debated, the mismanagement of Sierra Leone's mineral wealth is a well-documented theme in narratives of civil strife. The extraction and sale of diamonds fuelled the continuation of the war. J4P's work had to be undertaken with care, and highlighted the importance of research and analysis for understanding the potential for mining to trigger or exacerbate conflict. Perhaps as important as conflict over access to the minerals is the inequality that can arise as a result of their exploitation. As Sierra Leone's Truth and Reconciliation Commission concluded, "while the elite and their business associates in the diamond industry have lived in grandeur, the poor have invariably been left to rue the misappropriation of the collective wealth."[25]

Sierra Leone's mineral sector is an important driver of the country's development, second only to agriculture as a source of employment and income.[26] Mining occurs on a range of scales and has recently seen the return of several large-scale foreign operators who suspended operations prior to the war. Global mining company investment is sensitive to the risk of local conflict. The International Finance Corporation's Foreign Investment Advisory Service states that "resistance from local communities was the most common reason for an international mining company to withdraw from an investment."[27] Conflict risk is also assessed on a sub-national scale, affecting the location of mining investments within countries. According to a

[25] Truth and Reconciliation Commission of Sierra Leone, *Witness to Truth*, Vol 3B (2004) ch 1, 3.
[26] World Bank, *Mining Sector Reform: A Strategic Environmental and Social Assessment, Sierra Leone* (2007) 18.
[27] Foreign Investment Advisory Services, *Competitiveness and Corporate Social Responsibility in Sierra Leone: Industry Solutions for Tourism and Mining* (2006) 4 in K Rogers, *Governing Sierra Leone's Mining Sector: The Mining Sector's Accountability to Host Communities* (Unpublished draft on file with authors) (2009) 13.

2005 study in Sierra Leone, 34 per cent of companies surveyed decided against investing in a particular location on account of human rights issues, including potential conflict with local communities, relocation issues, and security concerns.[28]

The mineral sector in Sierra Leone is governed by numerous national laws and regulations, which have been subject to recent reform. In practice, the mining governance system is characterized by: inconsistencies and ambiguity in the rules; the number of agencies involved, which requires a high level of coordination and capacity across government (which in turn are often overwhelmed and understaffed); and high levels of complexity, which makes it difficult for communities to understand and claim their rights and to hold both mining companies and authorities to account. Monitoring and enforcement of the entire governance scheme remains inconsistent. It frequently relies on pressure from communities and civil society, which are typically inadequately informed and resourced to properly fulfill this role.

The most pressing flaw of the legal framework is the failure to include appropriate dispute resolution processes. The Mining Ministry is the only body legally designated to arbitrate disputes involving mining companies, yet there is no guidance as to the types of disputes the Ministry will handle, nor the principles and procedures for resolution. More accessible avenues for communities to seek redress, such as through a nationwide system of local courts,[29] are prohibited from hearing cases involving mining companies. Paramount chiefs, the top authority in each of Sierra Leone's 149 chiefdoms, can hear cases but the process is voluntary and non-binding.

A complex state legal regime intersecting with diverse local rule systems makes it difficult to determine and track benefits. Communities have rights, entitlements and benefits that arise from different sources, which are calculated in various ways, distributed by a range of authorities, and given to different beneficiaries. Under state law, one community may be entitled to surface rents, compensation for disturbance and damage, a percentage of sales from nationally managed development funds, employment and commitments to community development projects.

Though important and justified, a number of additional legal considerations further complicate the picture. National law provides that minerals are owned by the state,[30] and that landowners have to grant consent to mineral rights holders prior to any operations taking take place on their land. Most land in Sierra Leone is held by communal groups and remains unregistered. The nature of land ownership makes it difficult to determine the appropriate consent giver(s), as well as the processes for offering consent. The government benefits from mining through revenue derived from a number of sources including: annual mining licence fees; royalties; export duty on diamonds; import and export fees; corporate tax; council taxes and fees to the National Social Security Insurance Trust.

Thus, even with time and access to information, an understanding of the system is challenging. Information about the law and mining operations is not readily available and is frequently difficult to access even within the state authorities themselves. This lack of transparency fuels accusations about what has been promised and who is receiving what. Community grievances can thus be maintained even when there is little basis in fact. Companies can be following the law but still encounter problems.

[28] Ibid.
[29] Local courts, also known as native administration courts, are the lowest level of the formal justice system, with typically one or two courts per chiefdom. See R Manning, *The Landscape of Local Authority in Sierra Leone: How 'Traditional' and 'Modern' Justice Systems Interact* (2009) World Bank Justice and Development Working Paper Series, Vol 1 (1).
[30] The authority to grant access for small-scale and artisanal miners has been delegated to the sub-national (chiefdom) level.

For communities, it becomes difficult to claim their rights and hold both mining operators and authorities to account.

Local-level disputes are a common cause of conflict. Within communities, some benefit more than others. Those who control interactions with mining companies and the state can entrench their power, particularly through the dispersal of benefits. This can further disadvantage the poorest and most marginalized groups. Mining representatives often feel that they are interacting with communities appropriately by dealing with the leaders, but this opinion is often not shared by the general populace. A common complaint in mining communities in Sierra Leone is that the people do not know the terms of the agreements their leaders have struck with outsiders. Intra- and inter-community disputes arise when some obtain employment in the mines and others do not. Local traders may benefit from increased economic activity while some landowners are forced to resettle. Depending on the local rules systems governing land, some landowners may be willing and able to offer consent while their neighbors may not. These all serve to cause divisions in communities. Traditional mechanisms are not often equipped to deal with such disputes, especially in the face of the rapid social change that industrialization precipitates.

2.3.3 Responding to disputes: the Village Resettlement Committee

Despite a paucity of information, the complexity of the governance regimes and a lack of formal dispute resolution mechanisms, communities have not been without some power in affecting the conduct of mining operations and mineral policy in Sierra Leone. In December 2007, the national government suspended operations at a large-scale diamond mine[31] following a series of disputes with local communities. A local pressure group had organized a demonstration at the mine site, using the occasion to present a list of demands on issues including crop compensation, relocation, employment and community development. Demonstrators entered the site and soldiers hired by the mine operator opened fire. Shots were reportedly also fired from within the crowd. In the violence, two protestors died and eight others were injured. This triggered the Sierra Leonean President's intervention and a suspension of mine operations. The President established a commission to investigate the circumstances surrounding the incident. The commission had three months of hearings and released a report and recommendations in March 2008. This led to the drafting of a government white paper based substantially on the recommendations. The white paper suggests fundamental changes to mining policy.

The lifting of the mine suspension shortly after the release of the white paper prompted a flurry of criticism by members of the affected communities, some civil society organizations and certain sections of the media. The government responded to the criticism by inviting the company and the community pressure group to a series of meetings aimed at resolving outstanding matters. Considerable headway was made and the agreements arising from the meetings helped to improve relations, including between communities and their paramount chief, who had been siding with the company. The government also established a committee on the reopening of the mine, with representatives from the local pressure group and the company, the Paramount Chief, the local mining warden, the Minister, Permanent Secretary and Director for Mines and the Member of Parliament for the area. Through this process, many of the original community demands were eventually met. One outcome was the creation of the Village Resettlement Committee in conjunction with the local pressure group, the Mineral Authority and the Ministry of Agriculture.

Given the lack of any standing judicial or administrative procedures, this dispute resolution process had to be fashioned *ad hoc* in response to the particular event.

[31] The Koidu Kimberlite Project operated by Koidu Holdings Limited.

The dispute resolution process was not in place to prevent the dispute becoming violent. Furthermore, it has not been enshrined to deal with future disputes, either at the same site or elsewhere, raising the chance that disputes could again turn violent without a forum in which to resolve them. Even so, it represents a good faith effort by all parties to identify a constructive and context-specific way forward in an environment otherwise characterized by pervasive institutional fragility.

2.3.4 Conclusions

Interests and disputes concerning mining occur along several axes, and the law is often used as one mechanism to align these interests and establish a process for dispute resolution. Communities often welcome mines as a source of development resources, but disputes regularly arise as promises are not fulfilled or some benefit more than others. National governments gain from the tax and royalty revenues, but have to balance the risk of local conflict with the desire to attract investment. Mining companies seek to maximize profit, but are also aware of the potential of local conflict to disrupt operations and their global corporate responsibility.

The input of intense, large-scale development processes into a context of weak national governance as well as local rules systems not attuned to processes of rapid change is highly likely to cause disputes and/or exacerbate existing ones.[32] When actors at the local level act collectively, they are often able to assert their interests against national and global actors, and achieve more equitable outcomes. In these contexts, one aim of the law should be to establish "good contests",[33] that is, relatively more equitable negotiation and dispute resolution processes in which the interests of actors can be debated and more closely aligned following principles of fair process. When these processes are established on an ongoing basis, they can help channel disputes in a non-violent manner.

The J4P approach of garnering user perspectives of justice issues around important development processes highlights the pervasive nature of intra-community issues in causing disputes. It also highlights the difficulty that communities face in knowing and claiming their rights when information is scarce and established processes are lacking. Insights into these perspectives can be invaluable in informing national policy-making and reform for more equitable development. This is leading to the design of pilot interventions in the mining areas and to informing the design of a planned mining governance project. The knowledge and experience gained is being used directly by the J4P team beyond mining areas in the design of a community-driven development program.

3. Justice in development – some principles for an alternative approach

What do the above cases tell us about the way we should think about and conduct justice reform, and what role external players can play in the reform process? J4P used research processes and outputs as a fundamental part of the development process. These research projects opened up spaces for dialogue and contestation around reform agendas, brought local perspectives and evidence to the reform debate, and were used to inform the design of more locally embedded, equitable and conflict-sensitive interventions.

These cases, and J4P's broader experience, have highlighted a number of summary principles which are important in their own right, but together constitute the beginnings of an alternative framework for the theory and practice of legal reform.

[32] P Barron, R Diprose and M Woolcock, *Contesting Development: Participatory Projects and Local Conflict Dynamics in Indonesia* (forthcoming).
[33] Adler, Sage and Woolcock, above n 12.

These principles center on justice and legal empowerment strategies that are developed in conjunction with mainstream development programming, and that emerge through a sustained commitment to undertaking the detailed research necessary to understand local contextual realities.

3.1 Development *is* conflict

Too often, development practice focuses only on the product – be it a new health facility, road or piece of legislation – and fails to realize that all development activity has the potential for conflict, since the distribution of resources and power will create winners and losers. Even when project managers are sensitive to conflict issues, however, too often effective development programming is seen as a matter of trying to design conflict away; success is seen as perfecting the approach so that disputes do not occur. Notwithstanding that eliminating disputes through design may be overly optimistic, and that conflict can clearly become tragically violent, J4P argues that conflict can also be a good thing, a means by which the participation and voice of diverse interests in the re-ordering of society are harnessed. It is through equitable processes of contestation that new agreements and procedures are formed, and their legitimacy acquired.

In matters pertaining to the enfranchisement of women and minority groups, however, or the inclusion of marginalized communities in everyday economic and social life, the change trajectory is more likely to be a J-curve – things get worse before they (possibly) get better. Moreover, the depth and length of the J curve is often impossible to discern *ex ante* – human rights campaigners often embark on such risky ventures knowing full well the likely costs to themselves, their families and careers, and that change may not even occur in their lifetime. Played out across countries and regions, especially those that are ethnically diverse, broad processes of democratization and economic development can thus be expected to generate considerable levels of conflict, with a high likelihood of that contention becoming violent. In this sense, Sierra Leone and Cambodia are both countries that have experienced extreme violence as a result of failed and/or misguided attempts at modernization, and where the devastating institutional aftermath has made it only more difficult to bring about and sustain equitable reform.

In less graphic circumstances, development projects of all kinds are inherently part of such processes of social change, but especially those targeted to the poor and to disadvantaged groups (or areas). And precisely because the trajectories of change are likely to be non-linear, even or especially when policies and projects seeking to bring this about are diligently implemented, very different analytical tools are needed to design and assess those policies and projects. It could therefore be the role of those interested in justice and legal empowerment to facilitate the creation and consolidation of spaces for peaceful, more equitable and more inclusive conflict, as part of the process of reform.

3.2 Institutional reform as an 'interim' process

In forging responses in contexts characterized by legal pluralism and weak, corrupt or captured state systems, it can be useful to focus on hybrid and interim approaches to furthering the rights, interests and aspirations of the poor and marginalized. Support for the development of interim institutions in certain contexts, such as the Cambodian Arbitration Council, embodies a historically grounded theory of social change. It recognizes that the modern rules systems and institutions of government, familiar to those in prosperous, rule-of-law states, emerged as a

product of and continue to be forged by political processes[34]. Governance and justice institutions are not static and therefore 'perfectable' bodies, but rather are continually shaped and re-shaped in response to the demands of society. The very nature of modern systems is that, as society changes, they are able to incorporate and reflect new principles in an orderly and peaceful manner. One of the positive features of most developed country systems is their ability to continually, incrementally and peacefully change – rather than being subject to periods of stasis followed by violent rupture. Legitimate justice institutions are integral to achieving this more positive feature. When it comes to conducting justice work, it can be useful to think about creating institutions that have the ability to change in equitable ways.

Justice institutions are also not laid bare on the landscape, but in all contexts there will be systems – often incredibly strong – for ordering society and dispute resolution. Any justice reform initiative, such as the peace committees in northern Kenya, has to take these into account and can benefit from their legitimacy and familiarity. Since legitimate institutions have to develop through a process of equitable political contestation ('good struggles'), their content is largely unknowable in advance. From a policy perspective, it is therefore best to approach the design and reform of institutions with a mindset less concerned with what the end-state institution will 'look like' and wary of importing a blueprint of best practices from elsewhere.[35] One might even be agnostic with respect to final institutional form, but this does not mean that development practitioners should not care about the outcomes. Rather, a key goal of the outcomes should be the promotion of rule-based, transparent and accountable decision-making, not the replication of a particular institutional form. For development practitioners this leads to the questions: "What spaces exist for the negotiation of development conflicts? How can these be filled with institutions that both respond to the realities of power as it is currently exercised and provide the potential to transform these in the direction of greater equity and participation?"[36]

3.3 Building local research capacity

Governance and justice reform are qualitatively different to other types of development work, such as building roads and irrigation systems. Since rules systems are a reflection of and responsive to local norms, their legitimacy rests on being 'home-grown'. Therefore, the *ways* in which development actors support such justice reform are critical to their ability to have a positive influence, and the modalities used for other development programs are not necessarily applicable. Governance and justice work are less amenable than other types of work to the use of 'tool kits' and the application of 'best practices'. Equitable political contestation and widespread scrutiny is necessary for legitimacy and therefore sustainability of rules.

This does not mean that there is no positive role for outsiders, as the Cambodia case clearly highlighted. Development organizations can also assist in other ways, such as through support for local capacity to conduct the kind of empirical research necessary to understand the user's perspective and inform policy-makers. J4P's long-standing partnership with LRF in Kenya illustrated how development practitioners can contribute – in this case, research and policy experience – to increased local capacity, leading to effective national level advocacy. Even if, at a certain level of abstraction, the peace committees share many features with similar organizations

[34] See Adler, Sage and Woolcock, above n 12; Robert Bates, *Violence and Prosperity: The Political Economy of Development* (2000); D North, J Wallis and B Weingast, *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History* (2009).
[35] S Haggard, A MacIntyre and L Tiede, 'The Rule of Law and Economic Development' (2008) 11 *Annual Review of Political Science* 205.
[36] Adler, Sage and Woolcock, above n 12.

elsewhere in the world, the context-specific details matter, just as do the reality that these details, and the legitimacy they confer, are the fruit of local research conducted and communicated by Kenyans themselves.

Development agencies will also continue to support development programming in many sectors, leaving a clear role for justice practitioners to ensure that these programs take an integrated approach to justice and legal empowerment – as shown by J4P's work with the Arid Lands Resource Management project in Kenya and the design of a community-driven development project in Sierra Leone. In Sierra Leone, J4P's work was conducted to complement broader government-led reforms of the mining sector and worked with a World Bank technical assistance project to support improvements at the national mining authority.

3.4 Deep engagement with local contexts

J4P understands 'law' in a broad sense, incorporating the whole range of rules systems that are relevant for governing communities and resolving disputes. This is informed by theories of legal pluralism. Even a brief consideration of most countries where J4P operates highlights the continuing importance of legal orders outside the state in governing people's lives and the difficulty that the state has, and will continue to have in many contexts, in providing judicial services to the majority of its population. J4P understands that rules systems are embedded in local norms; such systems cannot be effectively modified without also addressing the attendant changes that must take place in society.

By focusing on the particular context, the program makes sure to start with 'what is' rather than the common risk of importing assumptions about what should be, or jumping to an idealized end product. In this sense, it is the underlying function of rules and institutions that is important (i.e. what they 'do'), not the form (what they 'look like'), which they may take in any one place. An approach that explores the different *roles* of law in society – not just its legislative or institutional manifestation – helps to reveal the importance of context in shaping how rules systems in general and the law in particular are experienced and navigated by marginalized groups. Crucially, given the complexity of the context, the time that reform takes, and the frequent shortage of trained researchers to help policy-makers more adequately understand both context and reform processes, it is especially important to develop a strong commitment to building local capacity to conduct supportive research and associated (long-term) advocacy.

3.5 Integrating diverse sources of empirical evidence

An understanding of context is further served by conducting in-depth research to form an empirical basis for reform. The program recognizes that, in many contexts, development agency decisions about reform – and not just reform concerning justice issues – are made without sufficient evidence and understanding of the most pressing challenges that people face or sufficient understanding of the available means by which they are addressed (or not). While evidence alone is not sufficient for making good policy, it becomes extremely difficult without it.

It is also critical that the right sort of research is carried out and that appropriate methodological approaches are deployed. Many development fields and organizations, including the World Bank, favor quantitatively gathered data. Such data can, of course, be useful as a starting point in justice and legal empowerment issues, and for discerning wider trends, but complementary qualitative methods are needed to understand: the real meaning of rules systems to those over whom they preside; the trajectory that processes of reform take and the different *aspects* of reform as experienced by those most affected by them; the dynamics that determine

whether reform efforts succeed or fail; and the lessons that flow from such dynamics. In formal methodological terms, such issues are often 'unobservable' via orthodox household survey techniques, but can be carefully explored and more accurately understood by qualitative methods.

As such, the J4P approach uses mixed methods in an attempt to more closely discern and understand processes of change, but is primarily community-focused, and starts from the perspective of the users of justice systems. By focusing on the most common justice issues, the program recognizes the importance of demand in building sustainable justice reform, linking with the conception of legitimate rules systems as the product of local political processes.[37] A user perspective can also be useful in illuminating the most pressing reforms in a legally plural environment. In Sierra Leone, for example, J4P conducted extensive field research with communities in mining-affected areas to identify the impact of development processes and to determine the ability of communities to enforce their rights and claim entitlements. By starting from a user's perspective, it became clear that access to information about rights, as well a forum in which to assert them, was as important as the content of the rights themselves. Moreover, by ascertaining and disseminating community perspectives on justice, J4P's approach empowers those voices to inform policy. The program also looks for successes, especially openings where collective action by the poorest and most marginalized has been able to make some headway in terms of overcoming power differentials and achieving more equitable outcomes. An analysis of 'success stories', usually achieved in circumstances otherwise less than conducive to equitable reform can inform and inspire other such efforts elsewhere.

J4P is also concerned with grounding its analysis of the field research data in an explicit theory of social change. In-depth qualitative research, informed by history, the political economy and the socio-cultural context in which reform is being undertaken,a is central to this task. As noted above, social change is often non-linear, violating one of the most common assumptions of empirical efforts to assess project efficacy.[38] Knowledge of such trajectories is important not only for understanding processes of social change at the local level, but also for discerning the impact of policy/project interventions designed in response to them. In Indonesia, a full arsenal of social science tools, from ethnographic investigation and newspaper analysis to household surveys and case studies have been deployed to better understand and document these processes.[39]

3.6 The ubiquity of rule systems in all areas of development

Since all development processes impact on rules systems and have potential to cause conflict, justice issues should be looked at across all aspects of development. Ideally, justice work is best designed and implemented not as stand-alone programs, but together with the whole range of development projects and reform processes. J4P's work exemplifies this, ranging from mining and community driven development to cash transfers and labor rights. J4P works closely with larger Bank projects which are aligned to a government's development priorities and reform agenda.

[37] In this sense, research evidence is useful not only for understanding processes of change, but for monitoring the extent to which any promised policy reforms are actually implemented and to which these reforms are effective. To this end, researchers can be active contributors to the efforts of broader constituencies for change, which can include civil society groups and the media.
[38] M Woolcock, 'Toward a Plurality of Methods in Project Evaluation: A Contextualized Approach to Understanding Impact Trajectories and Efficacy' (2009) 1(1) *Journal of Development Effectiveness* 1.
[39] The documentation concerning both the methodologies deployed and their outcomes are available at <http://www.conflictanddevelopment.org> and <http://www.justiceforthepoor.or.id/index.php?lang=en> at 6 August 2009.

A predominant area of work focuses on land and natural resource management, since this is regularly the most common source of disputes and conflicts in communities with which the program is engaged. Land and natural resources often represent rural communities' most valuable asset and are inextricably linked with group identities, values and ways of making sense of the world; as such, issues of ownership and use raise key rights issues for citizens. In developing countries, land and natural resources, in particular extractive industries, can also be a major source of income for both states and communities. Natural resources are thus an important area of study from both the perspective of individual resource-affected communities and the broader polity.

Conclusions and continuing challenges

The process-driven approach advocated by J4P does not fit easily with the prevailing imperatives of most development institutions, which strongly prefer manageable inputs and knowable, predictable outcomes – or at least outcomes that are stated as such *ex ante* (whether or not they reveal themselves in the fullness of time). The J4P approach, which prioritizes the development of local capacity to establish in-depth evidence as a basis for reform, can be resource-intensive. Furthermore, it involves a necessarily slow process that requires commitment beyond the timeframes typically provided for in development project cycles. It also runs counter to justice reform conceived of as a primarily technical problem, one which simply requires outside 'experts' to provide their knowledge of 'best practices' via intensive short courses for jurists, senior civil servants and other government officials in capital cities. These may sometimes have their place, but they are unlikely to have much enduring traction and credibility unless they are also grounded in the more labor-intensive and time-consuming work required to understand the nature of the broad array of rules systems shaping the lives of the poor and the dynamics of change (and resistance to it) to which they give rise. These processes are inherently complex, difficult to conceptualize, measure and assess, and it precisely for these reasons that they need a deft articulation of theory and evidence.

J4P is acutely aware that it must not offer itself as a new 'silver bullet' solution for legal reform. Indeed, it confronts on a daily basis its inherent limitations and constraints, and the vexing ethical issues emanating from them. The interim institutional approach, for example, may be seen as accepting institutional forms which do not meet the standards of developed countries and/or international norms of best practice. Does this mean accepting 'not as bad' justice for poor communities? What does it mean for the goal of advancing supposedly universal and inalienable rights? The danger of adopting incremental and iterative approaches is that the powerful may accede to small initial improvements as a means of relieving (and it is hoped, from their perspective, snuffing out) any further pressure for reform. Establishing and sustaining coalitions for reform is difficult and sometimes even dangerous, while windows of opportunity may be scarce, leading to pressures to maximize any gains made. While such courses of action can be optimal with the benefit of hindsight, the history of successful justice reform suggests that incremental steps are often the most sustained, and are the best places to address the conflicts to which they necessarily give rise.

Consistent with its own principles, the J4P approach is itself an iterative process, one that seeks and welcomes 'good contests' over the most effective and equitable strategies for bringing about more accessible and responsive justice systems for all. In this crucial sense, the program aims to be part of an ongoing and evolving conversation about how best to build accessible, effective and equitable justice systems for and by the poor.