# The political approach to the law and justice sector

## A think piece by Adrian Leftwich[1]

*Aid for the law and justice sector (though hardly a sector) is not well conceived of as being simply part of the 'security' sector. Nor is aid for the sector usefully thought of as technical or administrative support. Rather, we need to understand law and justice as central to governance and, in particular, to the processes of institutional development, understood as the formation and consolidation of the 'rules of the game' that shape stable human interactions within and between political, economic and social domains. These are necessarily and unavoidably political processes. Though technical and administrative support is often valuable, as is investment in infrastructure like buildings (court rooms or prisons, for instance), the shaping of institutions needs to be endogenously driven so as to ensure locally embedded legitimacy which will help to make the prisons or the courts work. Sustainable economic growth, human security, political stability, even-handed justice and inclusive social development all depend fundamentally on a secure institutional environment and the institutions of law and justice are at the core of this. Moreover, stability is not a passive condition. Stability it is a process, a set of understood, on-going and largely predictable actions and behaviours, whereby individuals and organizations can interact, cooperate and compete peacefully within accepted institutional arrangements for their individual and collective benefit. Helping to secure such arrangements requires a 'joined up' approach by the various agencies of the Australian government in the fields of aid, defence, law and diplomacy. Facilitating and supporting the emergence of developmental leaders and coalitions – at all levels and in all sectors and issue areas – who can negotiate the formation and shape of these institutions is one of the challenging tasks that external agencies need to take on. But it also requires a common understanding across the Australian government of the nature and place of justice and law as an institutional matter in the evolving patterns and forms of governance of developing societies.*

## Introduction

The law and justice 'sector' (although it is not a 'sector, but clearly includes issues of 'order' and enforcement) is often thought of as ideally suited to technical assistance which aims at improved administration and capacity building, especially of police and related judicial and security organizations

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and services.[2] This may be true (but not completely so) in stable *institutional environments* where the rules of the game are clear and unchallenged, where the division of labour between the legislative, executive, judicial and enforcement agencies are well established, and where the boundaries between them are respected. Under these circumstances it is much easier to improve the capacity of key *organizations* – such as the police, prosecuting and prison departments, and even the judiciary, as well as finding ways of improving and funding better access to the judicial system/s or speedier hearing of cases.

But this is much less true in many developing countries where there is seldom institutional robustness and, indeed, where often unconsolidated, competing, contested and unclear institutional arrangements exist or (as in Cambodia) are in the process of evolution or transition. In these contexts, questions to do with the law and justice sector are unavoidably political and are inextricably bound up with questions to do with:

> (a) institutional formation and reform

> (b) the political implications of 'new' or changed institutions which may alter the balance of power or rewards

> (c) state-building, understood as the process of establishing a stable 'political order', constituted by institutions (as rules) and organizations (as players), and the peaceful interaction of the latter in the context of the former.

In short, the question here is about which institutions (rules and laws) are to rule, which are considered 'just' and which are to be enforced? These are political questions, not administrative or technical ones.

So the purpose of this think-piece for the ODE 'Law and Justice Sector Evaluation' is to set out some thoughts about why a *political* approach to law and justice is needed and how that might affect the ways in which so-called technical assistance is  conceptualised, strategized and deployed, and how this ODE evaluation develops its recommendations.

## Assumptions

I start from the assumption that ODE's interest in the 'law and justice sector' is primarily concerned with its implications for, and contribution to, development. That is, it is concerned with how the sector might play a more central and effective part in promoting developmental processes and what the implications of this may be for aid strategy and practice, where 'development' is understood as sustainable economic growth, political stability, security and inclusive social development.

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[2] According to the ODE Concept Note for this Law and Justice Evaluation, some 60% of AUD$300 million, spent on the 'sector' was spent by the Australian Federal Police.

While achieving and maintaining **order** and security is unquestionably a key factor in promoting the conditions for development, 'order' on its own has limited value for stimulating developmental dynamics. Ensuring effective law and justice has its own substantive merits as a goal, of course, and is also crucial for economic growth, which is central to the Australian government's strategic goals for the region. However, a strictly and solely coercive basis for order, of various kinds (such as in the Soviet Union, China under Mao, in Egypt under Mubarak, in Myanmar and in South Africa under *apartheid*), can:

(a) be very expensive

(b) be hard to maintain

(c) be counterproductive for growth and development

(d) store up profound resentment and opposition which sooner or later bursts out into disorder, disruption and instability

(e) lead to forces of law and order (police and/or army, or both) becoming politicised and closely aligned with the regime and status quo and hence an obstacle to growth and perceptions about 'justice' (as in Egypt under Mubarak or in Zimbabwe under Mugabe and his party-military coalition) (see Bratton and Masunungure, 2011).

## Law, justice, development and the institutional order

Thus the only secure basis for a stable law and justice environment – that is, for order – *which is also conducive for development*, is where there is a structure of institutions that is locally legitimate, understood and agreed by the bulk of participating organizations and players. Such an 'order' hence provides the stable institutional context in which predictable economic, political and social processes can occur. While these processes will inevitably involve conflict and competition – as in any game – it will not threaten or tear apart the institutional order, because participating people and especially their organizations generally understand, accept and play by the rules. And enforcement in this context thus backs up and bolsters the legitimate institutions rather than creating or compelling adherence to them.

Nowhere has this been, or can it be, easily or quickly achieved. But the strategic goal for this sector must be to help shape and support a *locally appropriate and legitimate institutional order*, which may look quite different to that of the OECD countries in general, and Australia in particular, but which both provides stability and allows for change. This will involve close cooperation between development, defence, policy and diplomatic departments.

The paper therefore starts with an account of what it means to talk of 'stable' states (or polities). It goes on to elaborate what the 'political approach' means in this context. It then explores the fundamental 'law and justice' requirements for a stable state, and the tensions between that and developmental processes, by focussing on the question of institutional formation and change. It emphasises the need for a

consistent and coherent overarching view of law and justice as part of the processes of governance so that a properly conceived and integrated whole-of-government approach can be developed over the long term – one that can contextualise, shape and combine with technical assistance.

After all, an 'integrated approach' to the law and justice sector requires an integrated conceptual understanding of the forms, causes and conditions of stability, because a legitimate and respected law and justice sector is at the core of a stable polity. A common whole-of-government understanding of this is essential in order (a) to avoid disaggregated ad-hoc policy responses across government, and (b) to enable different departments of the Australian government to work cooperatively around such a common understanding and so to build a long-term strategy within which an effective and synergistic division of labour can be planned and put into practice.

The core argument here is that law, order, justice and enforcement need to be conceptualised as part of the process of *governance for development*, and not as a distinct and isolable 'sector'. That, in essence, is the political approach to the law and justice sector. The challenge for policy-makers therefore is how to help, support and facilitate the processes whereby local leaders and elites shape their own institutional arrangements that will meet local legitimacy tests, enjoy popular support, provide a consensual basis for the institutions of law and justice and hence provide a stable and predictable environment for commercial activities that lead to sustainable economic growth.

## Law, justice and stable states

### Putting the technical-administrative cart before the political horse

Along with other governments and multilateral agencies in the international community, the Australian government is committed to promoting stable states and reducing state fragility, especially in the Pacific region.

However, stability is often discussed as if it were a condition, like maturity; that is, as a platform or political status which, once attained, may be taken for granted as given and lasting. Moreover, stability and good governance are often conceptualised as if they were fundamentally to do with effective 'government' and the 'capacity' of public bodies to deliver services and respond to public demands through systems of accountability. This approach – which focuses on 'administrative systems' and 'the machinery of government' – has a strong techno-administrative character to it. [3]

There is an obvious truth to certain aspects of this understanding (an incompetent governmental machine will, for example, deliver very little). It is, however, not a helpful way to conceive of 'stability' or

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[3] See AusAID website at: http://www.ausaid.gov.au/keyaid/fragile_states.cfm

to approach the law and justice sector as a key element of stability, as it puts the administrative-technical cart before the political horse.

## Stability is a process, not a condition: the components of a stable society

Instead of regarding stability as a condition, it is therefore far more useful to conceptualise both governance and stability as a *process*, or set of closely related processes that have to be continuously negotiated, enacted, renewed and sustained. In the absence of this they can, and do, very quickly break down.

What are the constituent political elements of stability as a process? What are the key parts and agents in the processes of stability? Where and how does the law and justice sector fit in? While there are many, the key *political* components of a stable society are its *institutions* and its *organizations* and the pattern of interactions between and among them. Those interactions constitute the *processes of stability*.

## Institutions

The term institutions means the 'rules of the game' – that is the formal *and* informal **rules** that shape (but do not determine) economic, political and social behaviour and hence which frame how political power is obtained, used and controlled, how economic activity occurs and how relations between individuals and groups and the state are structured. Together, this network of institutions constitutes the 'governance' of a society in which the 'government' is only one (though important) part.

## Economic institutions

*Formal economic institutions* – at least the fundamental ones in market economies – define and protect property rights, determine the ease or difficulty and length of time it takes to start a business, facilitate exchange and promote and regulate organized coordination and competition. (In socialist economies, or subsistence economies, different institutions govern economic behaviour. They need to be clearly understood.) There are, of course, many other institutions which influence economic behaviour and which range from rules governing health and safety to those relating to the environment or the employment of children. Taken together, they form a more or less dense network that can either promote or frustrate economic activity and growth outcomes. But such outcomes also depend on the interactions of these economic institutions with political and social ones with which they often overlap – for instance political rules which enable or hinder cooperation and organization amongst workers.

*Informal economic institutions* include conventions, norms and traditions which might govern access to opportunities (or credit) as between genders or social groups, or which embody the rules which facilitate cooperation between some groups while excluding others. They are often almost indistinguishable from social institutions and also have political implications, such as caste in India. In China, for instance, the

informal networks known as *guanxi* ('relationships') are shaped by norms of 'trust and reciprocity' and have played a significant part in attracting and reducing the risks of investing in China. A similar pattern has been identified in Vietnam.

## Political Institutions

Whether in an acephalous polity, a chiefdom, democracy or autocracy, *political institutions* define how power is obtained, used and controlled, and by whom, and how authoritative decisions are made (and not only at the level of the state). Such decisions are often about economic institutions as well as about the respective rights and obligations of states and citizens *vis a vis* each other. **Formal political institutions** refer simply (at least in modern polities) to the formal rules, laws and, especially, constitutions which prescribe how official political power is sought, won, distributed and controlled at national and sub-national levels. These specify the formal rules of the political game, but are everywhere more or less penetrated by **informal political institutions** (again, often closely interleaved with social and cultural institutions) which sometimes support the formal ones as 'complementary' institutions, but often also may undermine, compromise or subvert them. Examples of the latter would include the rules governing patron-client chains, old-boy networks, patrimonial political relationships, *caciquismo,* and much more.

## Social Institutions

This refers to largely informal social and cultural institutions (including religious institutions) which are found in all societies. Although there are, increasingly, formal institutions governing social interaction and (especially) public behaviours, most cultural and social institutions are informal and they shape the areas of largely private and communal behaviours, relations and interactions between individuals and amongst many social groups, including those defined by age and gender. These informal institutions, embedded in the culture, tend to change quite slowly.

Taken together, in their forms and interactions, all these institutions constitute or configure the particular 'political order' of a society – that is the framework – or scaffolding – of law and custom within which people and organizations have to work. Issues of law and justice are inseparable from questions to do with these institutional configurations.

## Organizations

Where institutions are understood as the rules of the game, **organizations,** in both the public and the private sectors, are the formally or informally co-ordinated vehicles for the promotion or protection of a mix of individual and shared interests and ideas. In other words, they are best thought of as the fundamental 'players' that are needed to shape, maintain, enforce, interpret and change the institutional arrangements and to embody the processes of stability in their activities and practices.

Individuals are of course players too, but organizations (and especially their leadership) – which aggregate and articulate the interests and views of individuals – are far more significant. If organizations are to be effective players, they need to understand and abide by the rules, interact with each other according to the rules, and be both technically and politically capable of negotiating innovations and changes in the institutional arrangements governing political, economic and social behaviours. Organizations may of course be public (such as police, armies, government departments, legislatures) or they may be private (companies, trade unions, non-governmental organizations, professional associations, political parties, think tanks and universities).

So, to use an example from the law and justice sector in a typical western society, the police service as a public organization needs to have the capacity to interpret, apply and enforce the law (that is ensure that people abide by the institutions). They may even make formal representations about the content of the law through standard consultative processes. With the necessary human capital, training, resources and equipment, an 'effective' police-force will be able to fulfil its role in contributing to stability, in upholding the institutions. The same is true for most private sector organizations – their skills, capacities and understandings can be improved.

But where the institutions – the formal and informal rules of the game, that is the laws, agreed conventions about consultative procedures, regulations and statutes which the police or other agencies have to enforce – lack legitimacy, coherence or consistency, then however well-trained the police may be, there will be constant conflict between them and members of society (individuals or organizations). There is likely to be pervasive (and often intended) avoidance or evasion of the law and hence little 'stability'. Under those circumstances, where the 'law' (that is the institutions of rule, and hence the political order itself) is contested or held to be 'unjust' or inappropriate, the only basis for stability will be ruthless suppression, so common across the developing world from the Latin American strongman regimes until the 1990s, many post-independence African polities and others in Asia, and all of which entailed latent expressions (and often manifest outbreaks) of instability.

Finally, any stable society requires a means of **enforcement.** This is to ensure compliance with the institutional arrangements (law) and for maintaining order (and defence). Means of enforcement have ranged historically from simple forms of social control, through village defence militias (such as the *arbakai* in Afghanistan) to the modern system of policing. However, many societies have parallel and plural systems of enforcement and coercion which can be complementary, where they work synergistically. But where there is unresolved conflict between holders of coercive power in different groups, the end result is often civil conflict and human insecurity. And where village militias, for instance, turn from defence to predation, as is alleged to have happened in parts of Afghanistan, further severe problems may ensue.

Robert Bates makes the same point in his recent book, *When Things Fell Apart*, a study of state failure in late 20th century Africa. He shows 'order' and a peaceful polity emerge where the 'specialists in violence' (rulers and those with the weapons) choose to 'employ the means of coercion to protect the creation of

wealth rather than to prey upon it, and where private citizens choose to set weapons aside and devote their time instead to the production of wealth and leisure' (Bates, 2008: 5). That requires a stable 'political order', that is institutionalised rules and consensus with respect to relations between state and society, and the mutual rights and obligations of both.

All this underlines why Max Weber, the great German social theorist, stressed the importance of the official monopoly of violence in a state and why he defined the modern state in the following terms: '**The modern state is a compulsory association which organizes domination. It has been** *successful in seeking to monopolize the legitimate use of physical force as a means of domination within a territory*' **(Weber, 1958: 82-3).**

An analogy from the world of sport is a useful way of illustrating and summarising this conception of the key elements of *stability as a process* and hence the role of the law and justice sector in its promotion. A stable society is like an established and well-played game for the following reasons:

- The **institutions** (that is the rules/laws of the game e.g. of tennis or football or cricket) are clear, understood and agreed by all.
- A 'good' game will be played where the players or teams (**organizations**) understand, accept and abide by the rules, *and* where there is rough balance in standard between the players/teams. (A 'good' game is impossible between an international professional team and the local village team).
- Where the referee/umpire/governing association (**enforcement agent**) has the legitimate authority and power to ensure compliance and has not been 'captured' or corrupted (the same is true of the players).

### A fourth factor

While legitimate institutions, consensual participating players and authorised means of enforcement are the key element of a stable society, there may be a fourth factor, which is more of a condition than a component – and that is the degree of inequality, poverty and exclusion which is tolerable. We do not know, nor can we easily measure, how much inequality or exclusion must exist before trouble begins (it has varied historically and across contexts quite considerably). After all, 'stable poverty' is a phenomenon which can endure for some time.

We do know, however, that in the modern world where people are easily able to compare their lot with others, and where these levels of inequality are intense, it almost inevitably gives rise, sooner or later, to political or criminal instability, or both – as has been the case for periods in Colombia, South Africa, Brazil, Sudan or Sri Lanka – and hence human insecurity. The worryingly high levels of youth unemployment in many parts of the Pacific, for example, are hardly a recipe for stability. It is very difficult to ensure human security (and hence social stability) in conditions where (a) either the rules of the game are not held to be legitimate (fair, just) by a significant sector of the society; or (b) whether poverty, inequality and/or exclusion is so far-reaching that the poor or the excluded turn to violence and theft to

even up what they see as fundamental social imbalance and 'unfairness' (as in democratic Brazil and South Africa where levels of violence and robbery are so high).

### Stability, law and justice is not stasis

A society is a dynamic and on-going entity, with complex connections to other such entities. The point here is that *stability is not stasis*. It is a function of an on-going and peaceful process of interaction (playing the game by the rules) between people and organizations within the rules (institutions) that are perceived to be legitimate and are properly enforced.

In other words, *stability is an active* **not** *a passive process.*

But it is also a function of the degree to which significant swathes of the population are not excluded from the opportunity to prosper. The law and justice sector is central to these processes, where 'law' is understood institutionally as the structure of rules, and where 'justice' is defined and constituted by the perception by citizens of the fairness and appropriateness of the rules, their even-handed and impartial interpretation and enforcement, and where levels of inequality are tolerable.

That's why law and justice issues should never be thought of simply as technical or administrative matters, nor treated as distinct from all the key developmental issues to do with the governance and promotion of growth, inclusion and inequality. They are indivisible.

## Law, justice and development

When questions of development are introduced into the picture, things become more complicated. This is because, even if slow, *development* is, by definition, a turbulent process involving inevitable structural change in almost every aspect of a society and its members (Stiglitz, 2003). By structural change one means change in the structure or patterns of relationships – whether social, political or economic. Maintaining stability under those conditions is very, very difficult.

### Development and change

In the course of all trajectories of development there is pervasive change in the use of all resources – whether these be inanimate resources, like time (think about clocking on or off for work; timetables; schedules; diaries) or space; or whether they be standard economic resources, like the factors of production – land, labour and capital. How people think of changes, too. Long-accepted ideas about property, for instance, come under pressure. Once development commences (at least broadly capitalist development), individualism becomes more pronounced. Old bonds and ties (such as those of kin and clan) can become a constraint and no longer serve as 'security'. African civil servants or professionals, living in towns, often express frustration at the continuing demands and obligations of reciprocity placed

upon them by large networks of kin or clan or village. 'The core of the human development sequence is the expansion of choice and autonomy', making people 'materially, intellectually, and socially more independent', according to the World Values Survey (Inglehart and Welzel, 2007: 2).

These beliefs, values and practices do not change overnight, but slowly, and often multiple 'codes' of behaviour and values apply simultaneously, creating problems of choice (Roland, 2004). In the field of gender relations, for example, things change too, at the heart of the family and in relations between individuals in economy and society. And some of the most difficult transitions occur in these social domains. There is also a slow, often interrupted and uneven, shift from traditional or customary political orders – in which elders, chiefs, princes, emperors (usually male) may rule – to more participatory choices of leadership, and often they can be fused and overlapping.

### Development, law and conflict

The point here is that to promote or consolidate developmental processes, *new institutions* are required or demanded – at least by some. For instance, property rights in land may be the demand of budding farmers increasingly interested in, and involved in, the market, so they have an incentive to improve 'their' land. Traditional chiefs – for instance the Stools in Ghana – may regard such demands as a direct threat to their power (which customarily has been largely based on their right to allocate land). Which law is to 'rule'? Under these quite typical circumstances, institutional instability, flux and uncertainty become the norm. Multiple jurisdictions may apply. And where there is inter-personal conflict around these issues, people may have to choose which they would use for the settling of disputes (Crook, et al., 2010) and/or which officials they would have to turn to – lawyers, judges, priests or chiefs?

### Institutions, development and stability

So, establishing stable processes of interaction at the same time as there is institutional flux and the need for new institutional arrangements, and where different generations may hold sharply different world views, is very difficult. As a consequence it is quite common for 'political orders' to be constituted by 'hybrid' institutional arrangements (Boege, Brown, Clements and Nolan, 2008) or what Woolcock, Adler and Sage (2009) refer to as 'interim' institutions (see also Dinnen and Braithwaite, 2008 on Papua New Guinea). Of course all societies have to deal with uncertainty, as in any sporting 'game' – after all, who knows who will win? But the important difference here is that in the context of developmental change, it is not simply the outcome (who wins or loses or gets injured or fired from the team) that is problematical and uncertain, but the very rules by which the 'game' is played – economic, social or political.

### Growth, law and justice

Yet as indicated earlier, however complex developmental change may be, economic growth (sustainable economic growth) is crucial if (for example) youth and other forms of unemployment are to be reduced, per capita incomes raised and urban crime contained. Policing alone will not achieve that. But that in turn requires sensible policies for growth that are employment creating, rather than capital intensive. To illustrate: a colleague in South Africa, looking out of his window, saw a very advanced mechanical digger being operated by one man to dig a long ditch for new water pipes when, down the road, 40 or 50 unemployed men were gathered at a street corner doing nothing, hoping for a job.

The point illustrates the complexity and intimacy of law and justice issues in a developmental context, involving issues of institutional flux and formation and the problem any developing country has in devising an economic strategy and programme (and hence the institutions and organizations) that can reduce exclusion, poverty and inequality – the very things which can threaten 'law and order'.

## The political approach to law and justice (Or where do institutions come from?

I have suggested thus far that our approach to the law and justice 'sector' needs to recognise that it is fundamentally about the shaping and consolidating of appropriate institutions which are accepted as legitimate by individuals and organizations in society. Only these can provide for sustainable economic growth, political stability, inclusion and poverty reduction, and yet which can also sustain – indeed contain – the complex challenges of rapid change. At least that's how we need to think in the medium term, as a successful law and justice sector is not simply characterised by the enforcement capacity. Nor should it be thought of as coterminous with the 'security sector' or the simple maintenance of law and order (important as those both are).

Stability in any society flows fundamentally from consensus about the law and the laws, and hence the rules of the game (the institutional/political order), rather than from having an effective enforcement organization in place. And 'justice' is fundamentally about perceptions of the legitimacy and fairness of the institutional order and their even-handed implementation.

But the key question then is: where do institutions come from? How do they evolve and how are they formulated?

### The origins and evolution of institutions

The short answer is that forging stable institutions of law and justice (especially new ones) can only be established through a process of political contestation and negotiation, and can seldom be technically or

exogenously designed.[4] And this is why this paper stresses the political approach to the law and justice sector as part of our understanding of 'governance'. For some social scientists, institutions (both economic and political) arise endogenously to help 'capture gains from cooperation', so that individuals and organizations 'have incentives to cooperate' (Weingast, 2002: 670). But this is now regarded as a naïve view, especially with respect to how institutions are formed and their effects.

It is now much more widely accepted that institutions – whatever multiple functions they may have – are the product of political contestation. They are the 'object of ongoing political contestation, and changes in the political coalitions on which institutions rest are what drive changes in the form institutions take and the functions they perform in politics and society' (Thelen, 2004: 31). Another way of saying this is that institutional development is a contest between actors to establish rules that favour them in the way resources (understood in the widest possible sense) are distributed (Knight, 1992:40 and 126).

In short, shaping institutional expressions of law and justice is a political process, whether these are economic institutions concerning property rights, competition or taxation; whether they are social institutions concerning the age of marriage or whether girls go to school or the religious observance of a particular day of the week; or political institutions about freedom of press, the right to form political parties or trade unions, the respective rights and powers of upper or lower legislative chambers, or the number of consecutive terms of office that can be held by a President.

Yet taken together, or apart, all such institutions represent the fibres of an emergent state, or a political order. They define power, relations, rights, rules and duties of social interaction.

### Law, justice, institutions and leadership

What is clear is that the establishment of such institutions will both involve and require negotiation, consultation and – inevitably – some conflict. A key role in these processes will be that of leaders and elites. They may be political or party leaders, or they may be religious, tribal or regional leaders. Or they may be leaders of specific sectional, professional or functional interests – farmers, peasants, journalists, lawyers, teachers, traders, landowners. They may be NGOs and other civil society organizations operating in different issue areas – to do with human rights or gender or environmental issues.

The formation, negotiation and evolution of institutions which enjoy legitimacy, whether in macro economic or political areas, or in specific sectors (such as agriculture, education, tax, rights or health), requires the involvement of relevant interests and in particular the leaders and elites of relevant organizations – *where they exist*. Where they don't or where they are weak, they need strengthening.

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4 These processes overlap and are bound up with 'political settlements' (Parks and Cole, 2010).

## Not by politics alone: the importance of technical assistance and organizational capacity building – in context

This is therefore not to suggest that technical or administrative assistance or capacity building has no place in this field. On the contrary, it can and must provide crucial help and advice in drafting the detail and shaping the arrangements of law and justice institutions, but _only_ in the context of politically-negotiated local agreements about their principles, purpose, function and form.

Equally important will be to help support the emergence and development of organizations, in both public and private sectors. Organizations such as those mentioned above are crucial players, not only in negotiating and shaping the institutions of the society, but also contributing to the on-going processes of stable politics by:

- representing interests
- being involved in consultative processes about policy
- establishing wider networks
- fostering the flow of information between state and society.

They may be private organizations – professional lawyers' associations, chambers of commerce, business associations and trade unions. Or they may be the public organizations – bureaucracies, police services, specific departments of the state (such as revenue or judicial departments). Understood, as mentioned earlier, as the formally or informally co-ordinated vehicles for the promotion or protection of a mix of individual and shared interests and ideas, both public and private, organizations aggregate and articulate the interests of many different individuals. A key role of organizations in the politics of stable society is to interact with each other, and the state, in the processes of making public policy – that is in making law, and implementing it. Participation through consultation, discussion and communication contributes to the process of stability and the embedding of law.

An example is the DFID-funded Commonwealth Education Fund (CEF) which sought to strengthen the capacity of educational CSOs in developing countries in the education sector. Its main objective was to strengthen 'broad based and democratically run national education coalitions, with active membership across the country, to enable local voices and experiences to influence national-level policy and practice. CEF played a lead role in enabling civil society groups to present a coherent voice to government in all 16 countries it worked in' (CEF, 2009: 9)

> 'by forming broad-based national alliances, the coalitions and networks that engage with governments, parents, teachers, NGOs, faith-based organisations, businesses, the media and ordinary citizens could come together to make their voices heard and put education at the top of the agenda. Supported by CEF, these civil society coalitions could help implement educational reforms, track education spending and monitor progress...' (CEF, 2009:1).

We seldom interact with the state as individuals, except insofar as we are recipients of public services (sanitation, education, roads, court systems) by delivering departments. When it comes to policy influence, the interaction of most people with the state is mediated through organizations. Working with emerging leaders and helping to build the professional, diplomatic and negotiating capacities and skills of

their organizations is equally important, and a legitimate objective of aid policy in the law and justice field, and in other sectors too. The role of higher education in generating a pool of well-educated leaders – in both public and private sectors – who have the vision and capacity to appreciate the importance of institutions that provide public goods, is part of this too.

Helping to support such organizations will also help to build the relations and interactions between citizens and states and hence promote and professionalise the practices of consultation and negotiation so necessary in the on-going shaping and reforming of the *core institutions* of law and justice but also sector specific ones as well – especially in a developmental context.

# Conclusion: What is to be done? Some policy implications

The argument above suggests a number of policy messages and conclusions.

- The law and justice 'sector' is <u>not</u> best conceptualised as part of a 'security' sector.
- Recognise that though 'security' issues may at times be important and an urgent priority in the short term, in the medium and long term real security is a function of stable institutional arrangements and hence political processes.
- Law and justice issues are thus also not well conceived of as simply technical issues.
- They are best conceptualised as *institutional matters*, driven by political processes.
- By *institutional matters* we refer to the formal and informal laws, rules, conventions and regulations.
- Law and justice in the most fundamental sense are therefore matters of *governance*.
- That is, they are central to, and inextricably bound up with, the *governance* of any society, where 'governance' is understood as the network of institutions and organizations that constitute a 'political order', of which the institutions of law and justice are the core.
- It is important for Australian departments and agencies to develop and refine a *common over-arching and cross-government conceptual understanding* of law and justice as a governance and institutional question, and hence a political one.
- Only in the context of such an overarching understanding, it becomes possible (and necessary) for the respective specialist departments – police, justice, development aid, foreign affairs, defence, education, agriculture – to coordinate their support and organize a complementary division of labour around this common understanding.
- A high-level policy group, drawing on the advice of the best economists, political scientists, historians and anthropologists, can help to shape and refine the overarching understanding and allocate resources for programs and operations in coordination with requirements, initiatives and advice from posts.

- Address the need for AusAID and other agency work-forces – whether technical, military, social, economic or political – to be better prepared, trained and experienced in analysing, thinking and working in these terms, especially in the preparation of programs.
- Respect the principles of the Paris and Accra Declarations about 'doing no harm' and 'country ownership' by supporting the emergence and encouragement of local leaderships and coalitions to devise their own institutional arrangements.
- Develop the skills and expertise of the workforce specialising in development matters to be able to:
    - promote the processes of endogenous political settlements and consensus around the core institutions of the polity
    - identify opportunities to support local leaders in forging locally appropriate institutions, including those of law and justice
    - facilitate the emergence, professionalization and negotiating skills of local organizations and leadership which can represent their members' interests and concerns to government and negotiate institutional evolution in a development context
    - broker and facilitate contacts and negotiations between sectional, functional and political interests and organizations in developing countries to promote political settlements, wider reform coalitions and agreements about macro-issues and also sectoral ones
    - find opportunities for aligning interests of different groups around common goals and institutional possibilities and hence the specific content of local laws
    - help to develop the local technical skills of drafting law and regulations.

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