

**Security and justice: measuring the
development returns**

A review of knowledge

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List of acronyms

ADB	Asian Development Bank
AJR	Acemoglu, Johnson and Robinson
CIM	Contract-investment money ratio
DALY	Disability Adjusted Life Years
DFID	Department for International Development
FDI	Foreign direct investment
GBV	Gender-based violence
GDP	Gross domestic product
GNP	Gross national product
HIV-AIDS	Human Immunodeficiency Virus-Acquired Immunodeficiency Syndrome
HRW	Human Rights Watch
IADB	Inter-American Development Bank
ILO	International Labor Organization
MDGs	Millennium Development Goals
NGO	Non-government organisation
OECD	Organization for Economic Co-operation and Development
OECD-DAC	Organization for Economic Cooperation and Development – Development
p.a.	Per annum
PAHO	Pan-American Health Organization
ROL	Rule of law
S&J	Security and justice
SMEs	Small and medium-sized enterprises
SSAJ	Safety, security and access to justice
UN	United Nations
UNDP	United Nations Development Program
UNODC	United Nations Office for Drug Control
US	United States
USAID	United States Agency for International Development
WHO	World Health Organization

Executive summary

This paper reviews the state of knowledge on the role of security and justice (S&J) in the development process. The purpose is to enable DFID and its partners to gain a better understanding of the returns available from investments in this area, in terms of economic growth, poverty reduction and achievement of the Millennium Development Goals (MDGs). As well as presenting the evidence available from the literature, we are asked to assess the state of knowledge, describing the methodological challenges and how they are being addressed, and proposing areas for further research.

The literature proves to be full of theoretical disputes and methodological pitfalls. It is clear that there is a strong association between justice and development, in the sense that prosperous countries generally have more complex legal systems and deliver a higher quality of S&J services to citizens. However, association is not causation, and the causal chains are complex and difficult to disentangle. It may be that it is the economy that drives the development of the legal system. Historical studies of East Asian development suggest this is the direction of causation. Some authors have suggested that there is no general rule on causation but rather, as Messick puts it, a series of “on and off connections”, with the two variables causally interdependent at some stages of the development process and autonomous at others.¹ For the policy maker, the key question is therefore: to what extent and in what circumstances is the justice system an independent variable, offering a promising entry point for development assistance?

The paper looks at theories on the links between S&J and development, and the evidence used to test them, across a number of areas. It begins with the two main branches of research in the field: econometric studies on the impact of law and justice on economic performance; and bottom-up analysis (variously called access to justice or legal empowerment) on how insecurity and injustice affect the lives of poor people. It then considers evidence of linkages across four specific areas identified by DFID in the TORs: property and housing; crime and violence; gender discrimination; and governance.

Justice and economic growth

New Institutional Economics, with its emphasis on the role of institutions in shaping economic behaviour, provides the conceptual foundations for econometric studies on the relationship between justice and growth. It sets out two broad propositions: that efficient markets require a legal order able to protect private property rights and enforce contracts; and that the interaction between the market and the public sector should be governed by a stable body of rules, known in advance and enforced by independent adjudicators.² The literature focuses in particular on security of contracts and property rights, on the premise that businesses will be willing to invest only if they are reasonably certain of being able to reap the rewards in the future.

There are two kinds of evidence available to support these propositions. The first is surveys of businesses, asking them about the impact of legal insecurity on their operations. For example:

¹ Messick, R., “Judicial Reform and Economic Development: A Survey of the Issues”, *The World Bank Research Observer*, vol. 14, no. 1, February 1999, 117-36, p. 123.

² Ogus, Anthony, “The importance of legal infrastructure for regulation (and deregulation) in developing countries”, Centre on Regulation and Competition, University of Manchester, Working Paper No. 65, June 2004.

- In Peru, almost a third of businesses responding to a World Bank poll said they would not switch from a trusted supplier to an unknown one, even if a lower price were offered, for fear that the supplier could not be held to the bargain.³
- In-depth interviews with Brazilian entrepreneurs suggested that domestic investment would increase by 10% if the Brazilian judiciary were on a par with those found in advanced economies.⁴

The second kind of evidence is econometric studies testing the relationship between the performance of legal institutions and development indicators, in particular GDP growth. They use proxies for the quality of legal institutions, such as surveys of businesses or cross-country ratings by international experts, and employ statistical methods to test the level of association and direction of causation. Among the best-known findings are:

- La Porta (1997)⁵ found that countries with better rules on corporate finance had better developed financial markets and higher rates of growth. To test for causality, the study used ‘legal origin’ – namely classification of countries as common or civil law – finding that common law countries enjoyed higher economic growth by an average of 0.7 percentage points *p.a.* However, the legal origins has been extensively questioned on both theoretical and empirical grounds.
- Acemoglu, Johnson and Robinson (2001)⁶ found that the variation in income levels across countries is closely associated with investor perceptions of the likelihood of expropriation of property. This study is widely cited for the twin propositions that the level of foreign direct investment (FDI) is an important component of growth in developing countries, and that a crucial factor in attracting FDI is a stable, consistent, fair and transparent legal and judicial system.
- Kaufman and Kraay (1999)⁷ used a combination of cross-country investor surveys and polls of experts to capture data on 6 governance indicators, including the rule of law. They found that an increase of one point on their 6-point rule of law index was associated with between a 2½ and 4-fold improvement in *per capita* incomes and infant mortality, and a 15-25% increase in literacy.

However, there are substantial criticisms in the literature of these econometric studies. There are suggestions that they misinterpret the direction of causality, that the proxies used to stand for the quality of justice institutions are unreliable, and that their findings contradict historical evidence from Western and East Asian experience. Dani Rodrik doubts that the link between justice and development displays the kind of empirical regularity that can be captured statistically: “There may not be universal rules about what makes countries grow.”⁸

³ Dakolias, Maria, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform*, World Bank Technical Paper No. 319, Washington DC, 1996.

⁴ Castelar Pinheiro, Armando, “Economic costs of judicial inefficiency in Brazil”, Report to the Tinker Foundation, Sao Paolo, 1998.

⁵ La Porta, Raphael et al., “Law and finance”, *Journal of Political Economy* 106(6), 1998, pp. 1113-55. See also La Porta, Raphael et al, “Legal determinants of external finance”, *Journal of Finance* Vol. 52, 1997, pp. 1131-1150.

⁶ Acemoglu, D., S Johnson and J. Robinson, “The colonial origins of comparative development: an empirical investigation”, *American Economic Review* Vol. 91, 2001, pp. 1369-1401.

⁷ Kaufman, Daniel, Aart Kraay and Pablo Zoido-Lobaton, “Governance matters”, World Bank Institute, Policy Research Working Paper 2196, 1999.

⁸ Rodrik, Dani, “Introduction: what do we learn from country narratives” in Rodrik (ed.), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton: Princeton UP, 2003), pp. 9-10.

The evidence suggests that the causal links between justice and economic growth are bi-directional, complex, poorly understood and in all probability variable across different country contexts and stages of development. Cross-country econometric studies positing a general relationship between legal institutions and development need to be treated with some care. Legal institutions both facilitate and develop in response to economic development. Investing in complex legal institutions before there is a demand for them is unlikely to yield significant returns. However, there may be moments in the development process when strategic investments in the justice system may help reinforce or accelerate positive economic trends.

Justice and poverty alleviation

Bottom-up approaches to justice and development are concerned primarily with the micro-level impacts of insecurity and injustice on poor households and communities. Drawing on different ideas of development (human development and rights-based approaches), they argue that justice is not just a means of achieving development, but an intrinsic part of the development process. In 2008, a Commission on the Legal Empowerment of the Poor headed by Madeleine Albright and Hernando de Soto will release a major report advocating for this approach. It argues strongly that informality of business and property rights is a major barrier preventing poor people from lifting themselves out of poverty.

Legal empowerment research begins by analysing the barriers faced by poor people in accessing the formal justice system. These include shortcomings in the law itself, inefficiencies and biases in justice institutions, and attributes of poor communities such as their lack of financial resources and distrust of formal institutions. It proposes a range of interventions to overcome these barriers, including law reform, public awareness, community mobilisation, low-cost legal representation (e.g., legal aid, public interest law centres and paralegals), alternative dispute resolution and non-state justice systems (both customary and modern, civil-society based mechanisms). It emphasises the importance of contextual analysis and participatory approaches, and of using political analysis to understand the mechanisms by which power relations are entrenched and reproduced within the legal system.⁹

The development benefits said to result from bottom-up approaches include reductions in physical insecurity and economic vulnerability, and increased ability to assert rights, demand public services and agitate for social change. Evidence in support of these propositions is drawn mainly from reviews of access to justice projects, and includes benefits such as empowerment of women, suppression of discriminatory practices, community mobilisation and improved delivery of development projects and government services.¹⁰

The evidence base, however, is weak, relying on donor-sponsored reviews of small-scale, civil society-based projects, and offers little guidance on the scale of returns available. Given the tendency of the legal system to reflect wider power relations and discriminatory attitudes, there may be limits to its capacity to act as an avenue for empowering the poor. However, legal empowerment may be effective when combined with other development interventions.

⁹ Sage, Caroline and Woolcock, Michael: 'Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries, 2005.

¹⁰ Golub, S., "Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative", Rule of Law Series Working Papers No. 41, Carnegie Endowment for International Peace, Washington, 2003.

Land and housing

There have been many programmes in recent decades to protect and formalise property rights, based on two main rationales. One is that it relieves poor people of an acute source of vulnerability: the threat of loss of housing and livelihood. This is a growing danger in new urban areas, with 50% of the urban or peri-urban population in Africa and more than 40% in Asia living with insecure property rights.¹¹ Many slum dwellers face a constant risk of dispossession, forcing at least one family member to remain in the home at all times.¹²

The second rationale is that land ownership encourages growth by encouraging the poor to invest, and giving them access to credit by enabling them to mortgage their property. Evidence includes de Soto's famous study of two poor Peruvian communities with different land tenure status (illegal settlement vs. full ownership rights), which found that the community with ownership of its land invested more in the quality of housing, and as a result enjoyed significantly higher property values.¹³ Other studies include:

- Alston (1996) found a positive contribution of land titling to levels of investment and land values in Brazil.¹⁴
- World Bank studies found that farmers in Thailand with property title increased their output by 14-25%, compared to those working untitled land of the same quality. In Vietnam, poor rural households with clear rights of control and disposition committed 7.5% more land to crops requiring a greater initial outlay and yielding returns over several years. Land titling has increased property values by 14% in Manila, 25% in Guayaquil, Ecuador and Lima, and 58% in Davao, Philippines.¹⁵

However, many of the studies on land titling show more nuanced results. Davis and Trebilcock cite a range of studies showing that the formalisation of indigenous land systems in Africa has made no contribution to agricultural productivity. It can lead to loss of traditional usage rights, and may disadvantage the poorest households who, in the absence of social safety nets, may be forced into distress sales to pay for food or medicine. In urban areas, land titling may increase insecurity for the poor by driving up land prices and rental costs.¹⁶ The argument that land titling leads to greater access to credit is also questioned. Some authors suggest that the primary need of the poor is for small loans that are not securitised due to the high transaction costs.

¹¹ Deininger, Klaus, "Land policies for growth and poverty reduction: key issues and challenges ahead", World Bank 2005, p. xxv.

¹² Dam, Kenneth, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington D.C.: Brookings Institution, 2006), p. 138.

¹³ De Soto, Hernando, *The Other Path: The Invisible Revolution in the Third World*, trans. June Abbott (New York: Harper & Row, 1989).

¹⁴ Alston, Lee, Gary Libecap and Robert Schneider, "The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier", *Journal of Law, Economic and Organization*, Vol. 12, 1996, p. 25.

¹⁵ World Bank, *World Development Report 2005: A Better Investment Climate For Everyone* (Washington D.C.: World Bank, 2004), pp. 80-1.

¹⁶ Payne, Geoffrey, "Urban Land tenure policy options: titles or rights?", Habitat International 25, 2001.

Crime and violence

Compared to other S&J areas, there is a well-developed literature on the economic costs of crime and violence, with a number of methods available for measuring them. They have been used extensively in Latin America and the Caribbean, where crime is recognised as a key development issue. However, there is much less data available on other developing regions.

The literature sets out various causal linkages between crime and development:

- crime forces households and business to spend money on protecting themselves, diverting resources from more productive uses;
- crime depletes physical capital, including housing, business assets and infrastructure like schools and public transport;
- crime erodes human capital through mortality and injury, increased absenteeism and suppressed labour force participation;
- crime erodes social capital by damaging norms of trust and reciprocity, and suppressing social networks essential for the alleviation of poverty;
- crime vitiates government capacity by displacing expenditure into crime-related services (criminal justice; health; social services), promoting corruption and undermining public trust in the political system.

Various methods have been used to quantify these costs. Accounting methods, which aggregate both private and public costs into a single figure, have produced findings such as:

- Holder and Mutota (2006)¹⁷ estimate the costs of crime in Trinidad and Tobago in 2003 at US\$160 million, or 1.6% of GDP. This includes lost worker productivity, funeral costs and business security expenditure.
- Francis *et al.* (2003)¹⁸ attempt a comprehensive study of the costs of crime in Jamaica, including both private and public costs, coming up with a figure for 2001 of 3.7 percent of GDP. However, this excluded private security costs to firms, non-monetary costs to victims, inter-generational effects and long-run impact on capital accumulation and economic growth.

A second method is econometric studies of the impact of crime on growth using cross-country regressions, such as:

- A major study of crime across the Caribbean by UNODC and the World Bank¹⁹ regressed GDP on homicide rates. It found that if homicide rates for Jamaica (33.8 per 100,000 people) were reduced to the level of Costa Rica (the lowest in the region at 8.1 per 100,000), it would result in a gain of 5.4 percentage points of annual GDP growth.
- A similar World Bank study in Brazil, where the average homicide rate between 1991 and 1995 was 28.7 per 100,000, found that that if the rate had been just 10% lower (around

¹⁷ Holder, Y. and F. Mutota, "Guns and Criminology: A Case Study of Trinidad and Tobago", Background paper prepared for the World Bank study on Crime and Violence in the Caribbean, Washington D.C.: World Bank, 2006.

¹⁸ Francis, A. et al., "Crime and Development: The Jamaican Experience." University of the West Indies, 2003.

¹⁹ UNODC and World Bank, "Crime, violence, and development: trends, costs, and policy options in the Caribbean", Report No. 37820, March 2007.

25), *per capita* income would have been higher by between 0.2 and 0.8 percentage points in the subsequent 5-year period.²⁰

Perhaps the most important knowledge gap is on the impact of criminal justice programmes on crime rates. Stone notes that there is no general evidence that increased expenditure on the criminal justice system results in lower overall crime rates.²¹ This weakens the case for spending on criminal justice, however high the costs of crime. However, there is evidence that focused efforts can reduce specific crimes in particular locations. If this is the case, then the best strategy may be to identify and focus efforts on the crime-related issues with the most direct impact on business.

Justice and gender

Literature on justice and gender discrimination focuses on two main areas: women's property rights and gender-based violence. There is ample evidence that both problems are widespread in developing countries, with often severe impact on poor households.

Discrimination against women in property systems is widespread. Globally, women own less than 10% of the world's property.²² Under customary systems of property tenure, which account for at least 75% of the land in most African countries,²³ women are rarely accorded equal rights. Women's rights to property are usually determined by their relationship with men. Upon termination of a relationship, women may lose their homes, land, livestock and household goods, undermining their social status and often plunging their households into destitution. This undermines agricultural productivity and can lead to accelerated urbanisation.

The economic and social consequences of gender-based violence (GBV) include many of those of violent crime in general (lost productivity; a drain on health and other services),²⁴ as well as costs specific to GBV such as mental health problems among women, the breakdown of family life and reduced primary school attendance among girls.

- A study conducted by the IADB in Chile and Nicaragua²⁵ found that women who were victims of violence earned far less than non-abused women, and that the value of lost earnings in 1996 was equivalent to more than 2% of GDP in Chile and 1.6% of GDP in Nicaragua. The Nicaraguan research found that 63.1% of the children of female victims had to repeat a school year, and that those children left school on average 4 years earlier than other children. Moreover, children who witness abuse or are victims themselves tend to imitate that behaviour and perpetuate the cycle.

²⁰ World Bank, "Crime, violence and economic development in Brazil: elements for effective public policy", Report No. 36525, June 2006, p. 27.

²¹ Stone, Christopher, "Crime, justice, and growth in South Africa: towards a plausible contribution from criminal justice to economic growth", CID Working Paper No. 131, August 2006.

²² Commission on Legal Empowerment of the Poor, "Making the law work for everyone", Vol. II Working Group Reports, 2008, p. 77.

²³ Sage, Caroline and Woolcock, Michael, "Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries", 2005.

²⁴ World Bank, *World Development Report 1993: Investing in Health* (Washington, D.C.: World Bank, 1993), pp.25-29.

²⁵ Morrison, Andrew and María Orlando, "The Socio-Economic Impact of Domestic Violence Against Women in Chile and Nicaragua", Women in Development Unit, IDB: Washington, 1997.

- Sánchez *et al.* (2004)²⁶ find that the Colombian national government spent approximately US\$73.7 million in 2003 on services to survivors of intimate partner violence, an amount equal to 0.6% of the national budget. In Bogota, victims of GBV would have earned \$60 more per month without the victimisation, or \$100 more for severe violence. Compared to mean monthly earnings of \$142, this is a substantial loss.

A gap in the knowledge is the extent to which the justice system is able to influence entrenched patterns of discrimination against women, given that justice institutions themselves tend to reflect the prejudices of wider society. Even if laws are reformed to address gender discrimination, women tend to be poorly equipped to use the legal system to assert their rights, and justice officials may block implementation of the reforms.

Justice and governance

The linkages between law and governance are very difficult to reduce to a simple causal chain or capture empirically. Law is fundamental to the construction of state authority; one cannot exist without the other. The issue for policy makers is whether and in what circumstances the quality of justice is an independent variable that can help strengthen the performance of government.

There are two competing themes in the literature regarding the importance of the justice system to government performance. The first is the role of the legal system in limiting misbehaviour by the state. This includes protecting the market from arbitrary interference, and creating accountability mechanisms that limit corruption and compel the state to treat citizens equally.

The other view emphasises the role of law in the *construction* of state power. It sees law not as a constraint on the state, but as a tool it can use to promote development. Contemporary economic theory emphasises the role of law in correcting for market failures. Recent policy work on fragile states stresses that the justice system is both a tool for establishing the authority of the state, and a protective service offered by the state to citizens. It is not only a precondition for the delivery of other public goods, but also constitutive of the state itself.²⁷

While corruption can have a crippling effect on economic growth and government performance, there is little evidence in the literature that investments in improving the efficiency of justice institutions can resolve a generalised problem of corruption. However, there is evidence that development projects are more successful when the responsible officials are accountable through complaints mechanisms accessible to beneficiaries.²⁸

Conclusions

Overall, the literature makes a strong case that there are times and place where investments in S&J can be a very effective means of promoting development. Yet it is also clear that many of the claims made in the literature go beyond the available evidence, and need to be treated with

²⁶ Sanchez et al. (2004), cited in Morrison, Andrew and María Orlando, “The costs and impacts of gender-based violence in developing countries: methodological considerations and new evidence”, World Bank, November 2004, p. 7.

²⁷ McLean, Andy and Eric Scheye, “Enhancing the delivery of justice and security in fragile states”, paper for the DAC Fragile States Working Group, draft 2007.

²⁸ See Isham, Jonathan, Daniel Kaufman and Lant Pritchett, “Civil liberties, democracy and the performance of government projects”, *The World Bank Economic Review*, Vol. II(2), 1997, pp. 219-242 and the studies cited on p. 222.

some care. As one author put it, the idea of the rule of law may become “conceptually overburdened when it is invoked for too many potentially opposed reasons.”²⁹

To disentangle the web of causality involved, it may be useful to distinguish between four different potential linkages between S&J and development:

1. Justice and poverty alleviation
2. Justice and efficient markets;
3. Justice and social change;
4. Justice and government performance.

Justice and poverty alleviation: Insecurity and injustice can be an acute source of vulnerability, due to loss of land and housing, crime and violence, or persecution and discrimination. The returns available from investment in S&J for poverty alleviation depend on the scale and nature of the underlying problems. For example, if the management of slum settlements is becoming a major issue, then the return on investment in urban S&J programmes may be very high. Likewise, if dispossession of widows is causing widespread destitution among female-headed households, then investments in property rights will emerge as a priority. The causal links between S&J and poverty alleviation are therefore strongly context-dependent. S&J programmes offer a set of tools that can be used in conjunction with other measures to address specific, observed causes of poverty.

Justice and efficient markets: The balance of evidence suggests that the commercial justice system needs to evolve in tandem with the market itself. There is unlikely to be much value in investing in commercial laws and institutions before there is a demand for them. In low-income contexts, reform of laws and justice institutions may facilitate foreign investment, although care should be taken to identify the specific needs in each country context. Where crime is a significant impact on business, policing resources can be channelled to specific places or to address particular crimes. This might include providing neighbourhood security in areas with a high concentration of household businesses. The priority given by the Commission on Legal Empowerment to legalising the informal sector needs to be further tested empirically. There may be options for building legal ‘bridges’ between the informal sector and the formal economy, to enable micro-business to access public goods and private services and trade more effectively.

Justice and social change: Legal systems both reflect and reinforce power relations and social exclusion, creating barriers that prevent certain social groups – women, caste groups, slum residents, ethnic minorities – escaping from poverty. Where this occurs, reform to laws and justice institutions may provide an avenue for social change. The legal empowerment literature argues persuasively that the answer is not generic investments in the justice system, but politically informed strategies to help the poor use the legal system to their advantage. However, where the justice system itself is a structural cause of inequality, it is by no means certain that it can become part of the solution. Legal empowerment may be most effective where promising dynamics (e.g., signs of judicial activism) are already observable, and when combined with other advocacy approaches in civil society or the political sphere.

Justice and governance: States must provide a minimum level of justice and security, or the vacuum is quickly filled by violence and disorder. All states therefore need to build and maintain a basic institutional infrastructure for making and enforcing laws. In circumstances of state

²⁹ Bergling, Per, *Rule of law on the international agenda: international support to legal and judicial reform in international administration, transition and development co-operation* (Antwerp: Intersentia, 2006), p. 18.

fragility, investing in these institutions may be the overwhelming priority. Beyond establishing legitimate authority, states need the capacity to use law as a tool of policy, if they are to promote development. At a minimum, they need a basic set of rules and institutions to enable the market to operate. As their development goals become more ambitious, states need the capacity to use law to correct for market failures and address policy goals like environmental protection or public service provision. This suggests that the priorities are (1) to construct and maintain a basic institutional capacity to provide security and justice; and (2) to ensure that the development of these institutions keeps pace with the demands of the market and the willingness and capacity of the state to pursue development goals.

It is apparent that there is a need for a conceptually clearer and more empirically based ‘storyline’ of the role in S&J in development. However, it also appears that the evidence does not support the idea of a single, causal chain, applying across different countries and stages of development. Rather, the S&J field offers a repertoire of tools and techniques that developing countries and donors can bring to bear on specific development challenges.

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1. Introduction

This paper reviews the state of knowledge on the importance of security and justice (S&J) to the development process. The purpose is to enable DFID and its country partners to gain a better understanding of the development returns available from investments in this area. The focus is on the importance of S&J in non-conflict affected environments to economic growth, poverty reduction and achievement of the Millennium Development Goals (MDGs).

The paper explores both negative correlations – the development costs associated with an absence of S&J – and evidence on positive development impetus resulting from improvements in S&J. However, the focus is on academic and cross-country studies, rather than reviews of specific S&J programmes. The paper does not consider how to deliver S&J programmes, but rather how to assess the potential returns on investments in S&J, relative to other uses of development finance.

As well as presenting the evidence available from the literature, we were asked to assess the state of knowledge, describe methodological challenges and approaches to resolving them, identify under-researched areas and propose practical approaches for filling the knowledge gaps. These findings will assist DFID in commissioning future research.

It is clear from the evidence that there is a strong association between justice and development, in the sense that prosperous countries generally have more complex legal systems that deliver a higher quality of S&J services to citizens. However, association is not causation, and the causal chains are complex and difficult to disentangle. It may be economic growth that drives the development of the legal system. Studies on East Asian development have suggested that this is the primary direction of causation. It is also possible that the development of the economy and the legal system are both dependent on a third factor, such as the balance of political power. Some authors have suggested that there is no general rule on causation between justice and development but rather, as Messick puts it, a series of “on and off connections”, with the two variables causally interdependent at some stages of the development process and autonomous at others.¹ For the policy maker, the key question is therefore: to what extent and in what circumstances is the justice system an independent variable, offering a promising entry point for development assistance?

Though the focus of this paper is the link between S&J and broader development objectives, we note that an important part of the literature treats S&J not as instrumental, but as constitutive of development. Writers such as Amartya Sen have argued persuasively that freedom, justice and human rights should be intrinsic to our understanding of development. Evidence of wider connections to development may not always be necessary to justify investments in the area. Nonetheless, it is valuable for donors to know what returns to expect on their investments, when decide on the balance of assistance across multiple needs.

The literature proves to be full of theoretical disputes and methodological pitfalls. There are many different hypotheses on the causal links between justice and development. Some authors set out to test the impact of legal institutions on the efficiency of the market. Others argue that legal systems perpetuate poverty by reinforcing unequal power relations. Still others argue that injustice is intrinsic to poverty, and that strengthening justice is a constitutive part of the development process. These very different starting points determine the kinds of evidence that

¹ Messick, R., “Judicial Reform and Economic Development: A Survey of the Issues”, *The World Bank Research Observer*, vol. 14, no. 1, February 1999, 117-36, p. 123.

authors offer in support of their conclusions – from econometric studies using proxy variables for the legal system, to historical accounts of political and social development, through to participatory poverty assessments and micro-level case studies. To further complicate matters, the data sources are incomplete at best, with the quality of information falling away for the poorest countries.

In this review, we are primarily interested in empirical evidence. However, if we are to critically assess the available studies, we also need to engage to some degree with their underlying premises, to determine whether the available evidence supports the conclusions placed upon it. For this reason, we begin each chapter by setting out the theoretical premises pertaining to the particular section of the literature, before moving on to present the empirical evidence. We then review how the evidence and the conclusions drawn from it have been critiqued, on both theoretical and methodological grounds. Each chapter ends with brief conclusions on the state of knowledge.

We begin in chapters 2 and 3 by examining the two main fields of research on justice and development: econometric studies on the impact of legal institutions on economic performance; and bottom-up approaches (variously called ‘access to justice’ or ‘legal empowerment’) which look at the impact of the justice system on the lives of poor people. Chapters 4 to 7 then examine four S&J topics identified by DFID in the TORs as policy-relevant:

- property and housing rights;
- crime and violence;
- gender discrimination; and
- the justice system and the quality of governance.

The final chapter reviews the state of knowledge, and assesses the implications for development policy. Recommendations for filling the knowledge gaps are set out in Annex 1.

2. Institutions rule: justice and economic growth

2.1 Theory

New Institutional Economics, with its emphasis on the role of institutions in shaping economic behaviour, provides the conceptual foundations for econometric studies on the relationship between justice and growth. It sets out two broad propositions. First, efficient markets require a legal order able to protect private property rights and enforce contracts. Second, the interaction between the market and the public sector should be governed by a stable body of rules, known in advance and enforced by independent adjudicators.²

The literature asserts that individuals and firms will be willing to invest only if they are reasonably confident in their ability to realise the fruits of those investments in the future. Without such confidence, they will choose consumption over investment or, in a global market place, shift their investments to other jurisdictions. Williams asserts that, in the absence of enforceable contracts, firms will turn to vertical and conglomerate integration, turning arms-

² Ogus, Anthony, “The importance of legal infrastructure for regulation (and deregulation) in developing countries”, Centre on Regulation and Competition, University of Manchester, Working Paper No. 65, June 2004.

length transactions into inter-firm ones, resulting in higher overall transaction costs.³ The World Bank's 1997 *World Development Report* stressed the dependence of the market on effective property rights, including protection from theft and violence, protection from arbitrary government interference and a reasonably fair and predictable judiciary. It concluded that 'lawlessness syndrome' in the developing world raises costs, discourages risk-taking and depresses the velocity of economic transactions.⁴

In an influential 1990 book, Douglass North asserted that the absence of a low-cost means of enforcing contracts is "the most important source of both historical stagnation and contemporary underdevelopment in the Third World."⁵ He offered a vivid historical account of the state of business in 19th-century Latin America in the absence of an impartial justice system, which still effectively characterises the situation in many developing countries today.

"The interventionist and pervasively arbitrary nature of the institutional environment forced every enterprise, urban or rural, to operate in a highly politicized manner, using kinship networks, political influence, and family prestige to gain privileged access to subsidized credit, to aid various stratagems for recruiting labor, to collect debts or enforce contracts, to evade taxes or circumvent the courts, and to defend or assert titles to lands. Success or failure in the economic arena always depended on the relationship of the producer with political authorities – local officials for arranging matters close at hand and the central government of the colony for sympathetic interpretations of the law and intervention at the local level when conditions required it. Small enterprise, excluded from the system of corporate privilege and political favors, was forced to operate in a permanent state of semi-clandestinity, always at the margin of the law, at the mercy of petty officials, never secure from arbitrary acts and never protected against the rights of those more powerful."⁶

2.2 Evidence

There are two kinds of evidence available to support the proposition that stronger legal institutions lead to more efficient markets and faster growth. The first is surveys of domestic and foreign businesses, asking their views on the impact of legal uncertainty on their own operations. For example:

- In Peru, almost a third of businesses responding to a World Bank poll said they would not switch from a trusted supplier to an unknown one, even if a lower price were offered, for fear that the supplier could not be held to the bargain.⁷
- A similar survey in Ecuador found that businesses were hesitant to invest because of the uncertainty of and lack of timeliness in enforcing contract rights. In-depth interviews with Brazilian entrepreneurs suggested that domestic investment would increase by 10% if the Brazilian judiciary were on a par with those found in advanced economies.⁸

³ Williams, Oliver, "The institutions and governance of economic development and reform" in Michael Bruno and Boris Pleskovic (eds), *Proceedings of the Annual World Bank Conference on Development Economics* (Washington DC: World Bank, 1995).

⁴ World Bank, *World Development Report 1997: The State in a Changing World* (New York: Oxford University Press, 1997).

⁵ North, Douglass, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), p. 54.

⁶ *Ibid.*, pp. 116-7

⁷ Dakolias, Maria, *The Judicial Sector in Latin America and the Caribbean: Elements of Reform*, World Bank Technical Paper No. 319, Washington DC, 1996.

⁸ Castelar Pinheiro, Armando, "Economic costs of judicial inefficiency in Brazil", Report to the Tinker Foundation, Sao Paolo, 1998.

- In 1997, in a World Bank survey of 3,600 firms in 69 countries commissioned for the *World Development Report*, more than 70% of respondents stated that an unpredictable judiciary was a major problem in their business operations. The report concluded that overall level of confidence in the institutions of government, including the judicial system, correlated closely with levels of investment and other measures of economic performance.⁹
- World Bank surveys in Brazil and Argentina have revealed that firms operating in provinces with better performing judicial systems enjoy greater access to credit.¹⁰

The second kind of evidence is econometric studies testing the relationship between the performance of legal institutions and national development indicators, in particular growth in *per capita* Gross Domestic Product (GDP). These studies select proxies for the quality of legal institutions, typically surveys of foreign and domestic businesses regarding their confidence in legal institutions, or cross-country ratings by international experts. The studies then use various statistical methods to test the level of association and the direction of causation.

One of the best known studies was carried out by La Porta *et al* in 1997.¹¹ It focused on two elements of corporate finance (the protection of minority shareholders and bankruptcy rules), collecting expert assessments on both substantive legal provisions and the efficiency of the legal system in enforcing them. Using data from 49 countries, including developed and developing countries, the study found an association between the performance of the legal system and economic growth, via the development of financial markets. To test the direction of causality, the study used ‘legal origin’ – namely a classification of countries as civil or common law – as an instrumental variable. (Because legal origin was determined by historical patterns of colonisation, it is correlated with the performance of legal institutions but not to current economic performance, and was therefore considered an appropriate instrument.¹²) La Porta found that countries in the common law tradition had better protection of minority shareholders and creditors, and as a consequence enjoyed higher economic growth by an average of 0.7 percentage points *p.a.*

This study has become better known for the proposition that common law countries outperform civil law ones, rather than its primary conclusion that the justice system influences economic growth via the development of financial markets. La Porta hypothesised that the judge-made common law had evolved in England to defend individual property rights against incursion by the state, whereas the 19th-century Napoleonic civil code had been developed as a tool for reinforcing the power of the state. This hypothesis was affirmed in a subsequent study by

⁹ World Bank, *World Development Report 1997: The State in a Changing World* (New York: Oxford University Press, 1997), p. 36.

¹⁰ World Bank, *World Development Report 2005: A Better Investment Climate For Everyone* (Washington D.C.: World Bank, 2004), p. 86.

¹¹ La Porta, Raphael et al., “Law and finance”, *Journal of Political Economy* 106(6), 1998, pp. 1113-55. See also La Porta, Raphael et al, “Legal determinants of external finance”, *Journal of Finance* Vol. 52, 1997, pp. 1131-1150.

¹² Instrumental variables are used in econometric analysis to test the direction of causation when endogeneity or reverse causality is suspected. An instrumental variable is one that is correlated with the explanatory variable, but not with the dependent variable. By showing that legal origin influences the performance of legal institutions, La Porta was then able to demonstrate that the direction of causation is from the performance of legal institutions to economic growth. However, if legal origin is a poor predictor of the current performance of legal institutions, then its value as an instrumental variable is questionable.

Mahoney¹³ in 2001, looking at the same variables across 96 countries, which concluded that growth in common law countries was higher by one percentage point compared to civil law countries, and that the causal mechanism was the greater role for the state relative to the citizen.

However, the legal origins thesis has been criticised in the literature on a number of grounds. La Porta's classification of countries as civil or common law was done very superficially. For example, Latin American countries were classified together with Francophone ones as civil law, even though the importation of Iberian law into Latin America preceded the great 19th-century codifications. Furthermore, the particular areas on which they focused – corporate finance and bankruptcy – are usually governed by statute law, even in common law countries.¹⁴ Other criticisms include the fact that Britain itself did not outperform France in economic growth for most of the time period covered by the studies.¹⁵ If civil law is conducive of growth in France but not in former French colonies,¹⁶ it suggests that there may be other, underlying explanatory variables, such as governance conditions, which determine the performance of the legal system. Woo-Cummings points out that, while English law took some 150 years to hammer out a workable system of limited liability, France was able to emulate it within 10 years, suggesting that civil law might be a more effective tool for promoting development given the right conditions.¹⁷

Another influential study was carried out by Acemoglu, Johnson and Robinson (AJR).¹⁸ Using cross-country survey data, it found that the variation in income levels across countries is closely associated with investor perceptions of the likelihood of expropriation of property. To test the direction of causality, AJR went back to settlement patterns during the colonial period. The authors hypothesised that colonies in the tropics with greater health hazards were less likely to be settled by Europeans, and more likely to acquire purely 'extractive' or exploitative legal institutions; while colonies with milder climates that were extensively settled, like Australia or New Zealand, adopted legal protections of property rights as a result of pressure from the settlers. The study therefore used settler mortality rates as the instrumental variable, establishing that greater protection of property rights is a causal variable for national income. This study is widely cited for the twin propositions that the level of foreign direct investment (FDI) is an important component of growth in developing countries, and that a crucial factor in attracting FDI is a stable, consistent, fair and transparent legal and judicial system.

¹³ Mahoney, P. G., "The Common Law and Economic Growth: Hayek Might be Right" (1999) draft prepared for Corporate Governance conference at the Davidson Institute, University of Michigan, September 24-25, 1999.

¹⁴ Dam, Kenneth, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington D.C.: Brookings Institution, 2006), p. 33.

¹⁵ *Ibid.*, 38-9.

¹⁶ Merryman, John, "The French deviation", *American Journal of Comparative Law* vol. 44(1), 1996, pp. 109-119. Another study suggested that it is the facility with which transplants from another legal system have occurred, rather than the nature of that system, that is the crucial factor: Berkowitz, Daniel, Katharina Pistor & Jean-Francois Richard, "Economic development, legality, and the transplant effect", *European Economic Review* vol. 47, 2002, pp. 165-195.

¹⁷ Woo-Cummings, Meredith, "The rule of law, legal traditions, and economic growth in East Asia", UNU Research Paper No. 2006/53, May 2006.

¹⁸ Acemoglu, D., S Johnson and J. Robinson, "The colonial origins of comparative development: an empirical investigation", *American Economic Review* Vol. 91, 2001, pp. 1369-1401.

Box 1 Further econometric studies on the link between legal systems and economic growth

Barro used the International Country Risk Guide, a commercial risk assessment service based on surveys of foreign investors, to measure the attractiveness of the investment climate on a scale of 0 to 6 according to various factors, including the rule of law. Regressions were carried out for GDP growth across 85 countries using multiple independent variables, including school enrolment rates, life expectancy, fertility, the government consumption ratio, growth in the ratio of import to export prices, inflation, and perceptions of democracy and the rule of law. It concluded that a one-point improvement in the rule of law ranking increased GDP growth by 0.5%.

R. J. Barro, *Determinants of Economic Growth: A Cross-Country Empirical Study* (Cambridge: MIT Press, 1997)

Clague tested the impact of three measures of security of property rights and contracts on GDP growth: (i) the ICRG index (subjective measures of the quality of bureaucracy, level of corruption, likelihood of government repudiation of contracts, expropriation risk and overall rule of law); (ii) the Business Environment Risk Intelligence index (subjective measures of contract enforceability, quality of infrastructure, nationalisation risk and bureaucratic delay); and (iii) the contract-investment money ratio (CIM).¹⁹ Across a sample of 101 countries, it found that an increase of 9 points on the ICRG scale (1-50), an increase of 2% on the BERI scale or an increase of 0.27 in the CIM ratio were all associated with a 1% increase in annual *p.c.* GDP growth, with the causal mechanism being increases in investment rates.

C. Clague *et al.*, "Institutions and Economic Performance: Property Rights and Contract Enforcement" in Clague ed., *Institutions and Economic Development: Growth and Governance in Less-Developed and Post-Socialist Countries* (Baltimore: Johns Hopkins University Press, 1997)

Mauro measured the significance of Bureaucratic Efficiency (BE) – an aggregate of the Business International Corporation indexes for corruption, quality of the legal system, quality of bureaucracy and level of red tape – for growth. Using multiple regressors (*inc. p.c.* GDP, education levels, ratio of government consumption expenditure to GDP, number of revolutions, coups and assassinations), Mauro found that a 1 point increase in the 10-point BE scale correlated with an increase of 0.2 percentage points in average annual *p.c.* GDP growth for the period 1960–1985. Introducing investment as an independent variable revealed that the causal mechanism was via investment levels.

P. Mauro, "Corruption and Growth" (1995) 110 *Quarterly Journal of Economics* 681-712

Levine found that legal systems that emphasise protection of investors and allow for recovery of full present value of debts have better developed financial intermediaries and higher rates of growth. He concluded that the level of priority given to secured over unsecured creditors is the key variable for financial market development.

R. Levine, "Law Finance and Economic Growth," (1999) 8 *Journal of Financial Intermediation* 8-35

Feld and Voigt tested the impact of judicial independence on economic growth across 65 countries. They used a combination of 23 *de jure* variables (i.e., whether judicial independence was entrenched in law, using measures such as appointment procedures and tenure rules), and 8 *de facto* measures (e.g., average terms of judges, stability of the judicial budget). The analysis was limited to the highest court in each country. They found that *de jure* variables had no association with growth. In fact, countries with very independent judiciaries on paper (e.g., Georgia and Kuwait) often had poorly performing judiciaries in practice, while many OECD countries ranked low on formal independence (the US was 30th in the list; Switzerland was 67th). However, the study found that *de facto* independence had a positive influence on economic growth. The authors concluded judicial independence supports economic growth by providing higher levels of economic freedom.

Feld, L. & S. Voigt, "Economic growth and judicial independence: cross country evidence using a new set of indicators", 2002

Islam found that a stronger judiciary is associated with more rapid growth of both small and large firms.

Islam, Roumeen, "Institutional reform and the judiciary: which way forward", World Bank Policy Research Paper 3134, 2003

¹⁹ CIM is the proportion of non-currency money in the total money supply. This was thought to be an appropriate proxy for security of property because the willingness of businesses to engage in non-money transactions depends on security of property rights and contract enforcement.

The importance of the legal system for growth also emerges from a group of studies conducted by the World Bank Institute into the impact of governance in general on economic performance. For example, Kaufman and Kraay used a combination of cross-country investor surveys and polls of experts to capture data on 6 governance indicators, including the rule of law. The rule of law indicator drew on perceptions of the level of crime, the effectiveness and predictability of the judiciary and the likelihood of contract enforcement. The study found that a one-standard increase in any one of the 6 governance indicators was associated with between a 2½ and 4-fold improvement in *per capita* incomes and infant mortality, and a 15-25% increase in literacy.²⁰ (See Box 1 for additional studies of this type.)

2.3 Critique

The literature contains extensive critiques of these econometric studies, at both the theoretical and methodological levels. The main criticisms can be classed as follows:

- issues relating to the direction of causality;
- the validity of the proxy variables used to represent the quality of the legal system;
- the existence of contrary, country-specific evidence.

Causality

Some authors assert that the balance of evidence shows the legal system to be the dependent variable, developing in response to wider economic, political and social changes.²¹ This may be partly to do with the resource requirements of an advanced legal system – developed countries may simply be able to invest more in justice services.²² More likely, economic development drives social and political changes, which then propels the development of the justice sector. A well-developed market generates a demand for a more sophisticated regulatory framework and a more efficient and reliable means of resolving disputes. Economically empowered citizens and firms are in a stronger position to demand protection from crime and arbitrary interference by the state. If the underlying causal mechanisms are political in nature, then investments in justice institutions may not promote economic growth, unless they form part of broader changes in

²⁰ Kaufman, Daniel, Aart Kraay and Pablo Zoido-Lobaton, “Governance matters”, World Bank Institute, Policy Research Working Paper 2196, 1999. A later study by Kaufman found a strong correlation between levels of FDI and governance – stronger than between FDI and any measure of macroeconomic performance: Kaufmann, Daniel, “Human rights and development: the empirical challenge”, New York University School of Law, 2004, p. 139.

²¹ Golub, S.: Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative, Rule of Law Series Working Papers No. 41, Carnegie Endowment for International Peace, Washington D.C., 2003, p. 10; Pistor, Katarina and Philip Wellons, *The Role of Law and Legal Institutions in Asian Economic Development: 1960–1995* (New York: Oxford University Press, 1999), p. 19.

²² Posner, R., “Creating a legal framework for economic development”, *World Bank Research Observer*, Vol. 13, No. 1, 1-11.

political governance.²³ The development of the legal system therefore needs to be part of a wider and more long-term process of social and political conflict and adaptation.²⁴

Some authors have questioned the conclusion that levels of foreign investment is responsive to the quality of the legal system. Perry concludes that the link between the justice system and foreign investment is “neither straightforward, nor proven, nor uniform”.²⁵ Kennedy notes that it is not clear that investors rely on the courts at home very much, let alone that they expect to do so when investing in developing countries.²⁶ Hewko disputes the premise that the foreign investor “is a passive spectator of the reform process, hesitant to enter the fray until a modification or overhaul of the legal system has occurred”.²⁷ He argues that foreign investors respond to the availability of business opportunities and general perceptions of a country’s stability, rather than to any specific element of the legal system. They may prefer an efficient legal system, all other things being equal, but this is not usually a decisive factor. If business opportunities exist, they will come regardless, and then use their influence to press for any necessary legal reforms. Hewko notes that foreign investors are rarely interested in the sweeping reforms demanded by development practitioners; rather, they tend to have a short laundry list of issues for which they seek a solution. As a result, foreign investment is more likely to be a driver of legal reform than a response to it. Carothers also comments that:

“there is a notable lack of proof that a country must have a settled, well-functioning rule of law to attract investment... The presence of at least certain types of foreign investors may contribute to the development of the rule of law through their demands for legal reforms.”²⁸

A number of authors have made the point that causal linkages found during the historical development of Western economies may not hold for contemporary developing countries. Golub challenges the use of questionable parallels from Max Weber’s interpretation of European history.²⁹ Trubek and Galanter have denounced much of the research on law and development as “ethnocentric and naïve”.

²³ In econometric terms, this would lead to ‘omitted variable bias’ on the part of the studies cited here. For example, the Acemoglu work using settler mortality rates as an instrumental variable may in fact be picking up a completely different causal mechanism: that colonies with substantial settler populations developed different political systems, which in turn influenced both economic development and development of the legal system.

²⁴ Ogus, Anthony, “The importance of legal infrastructure for regulation (and deregulation) in developing countries”, Centre on Regulation and Competition, University of Manchester, Working Paper No. 65, June 2004, p. 19.

²⁵ Amanda Perry, “International Economic Organizations and the Modern Law and Development Movement” in Seidman, R. and T. Walde (eds), *Making Development Work: Legislative Reform for Institutional Transformation and Good Governance*, (New York: Kluwer Law International, 1999), 19–32, at 28

²⁶ David Kennedy, “The ‘rule of law,’ political choices, and development common sense” in Trubek, David and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006).

²⁷ Hewko, John, “Foreign direct investment: does the rule of law matter?”, Carnegie Endowment for International Peace, Rule of Law Series No. 26, 2002, p. 3.

²⁸ Carothers, Thomas, “The problem of knowledge” in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington D.C.: Carnegie Endowment, 2006).

²⁹ Golub, S., “Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative”, Rule of Law Series Working Papers No. 41, Carnegie Endowment for International Peace, Washington D.C., 2003, pp. 9-10.

“Empirically, the model assumes social and political pluralism, while in most of the Third World we find social stratification and class cleavage juxtaposed with authoritarian or totalitarian political systems. The model assumes that state institutions are the primary locus of social control, while in much of the Third World the grip of tribe, clan, and local community is far stronger than that of the nation-state. The model assumes that rules both reflect the interests of the vast majority of citizens and are normally internalized by them, while in many developing countries rules are imposed on the many by the few and are frequently honored more in the breach than in the observance. The model assumes that courts are central actors in social control, and that they are relatively autonomous from political, tribal, religious, or class interests. Yet in many nations courts are neither very independent nor very important.”³⁰

It is also possible that, at certain levels of development, informal institutions may provide an effective substitute for the formal legal system. Morality, reputation, self-enforcement and informal justice mechanisms may all serve to support non-simultaneous transactions in developing countries, even if this has the effect of limiting business dealings to within defined social groups.³¹ Some studies have suggested that, in certain contexts, informal systems for resolving disputes may be as effective as the formal justice system.³²

This has led a number of authors to challenge the proposition that the relationship between law and development displays the kind of empirical regularity that can be captured through statistical analysis. If the causal mechanisms themselves are context dependent, then the picture is much more complicated than the above studies suggest. Messick writes:

“Hirschman’s (1994) suggestion about the relationship between political and economic progress may apply equally to the relationship between judicial reform and development. He argues that political and economic progress are not tied together in any straightforward functional way. Rather, given the historical record, the relationship is probably better modeled as a series of on-and-off connections, or of couplings and decouplings. At some stages in the development process, the two may be interdependent, while at other stages they may be autonomous.”³³

Dani Rodrik is similarly skeptical about the ability of econometric studies to capture the relationship empirically.

“Econometric results can be found to support any and all... categories of arguments. However, very little of this econometric work survives close scrutiny... or is able to sway the priors of anyone with strong convictions in other directions. Moreover, there is little reason to believe that the primary causal channels are invariant to time period, initial

³⁰ Davis, Kevin and Michael Trebilcock, “What role do legal institutions play in development?”, University of Toronto, 1999, pp. 1080-81.

³¹ *Ibid.*, p. 51.

³² Ogus, Anthony, “The importance of legal infrastructure for regulation (and deregulation) in developing countries”, Centre on Regulation and Competition, University of Manchester, Working Paper No. 65, June 2004, p. 8; Fafchamps, M. and B. Minton, “Property rights in a flea market economy”, *Economic Development and Cultural Change*, Vol. 49, 2001, 229-67; Kamarul, B. and R. Tomasic, “The rule of law and corporate insolvency in six Asian legal systems” in K. Jayasuriya, *Law, Capitalism and Power in Asia: The Rule of Law and Legal Institutions* (London: Routledge, 1999).

³³ Messick, R., “Judicial Reform and Economic Development: A Survey of the Issues”, *The World Bank Research Observer*, vol. 14, no. 1, February 1999, 117-36, p. 123.

condition, or other aspects of a country's circumstances. There may not be universal rules about what makes countries grow."³⁴

Rodrik supports the proposition that institutions have a causal effect on growth, but warns that "Our ability to disentangle the web of causality between prosperity and institutions is seriously limited."

"Rich countries are those where investors feel secure about their property rights, the rule of law prevails, private incentives are aligned with social objectives, monetary and fiscal policies are grounded in solid macroeconomic institutions, idiosyncratic risks are appropriately mediated through social insurance, and citizens have recourse to civil liberties and political representation. Poor countries are those where these arrangements are absent or ill-formed. Of course, high quality institutions are perhaps as much a result of economic prosperity as they are their cause. But however important the reverse arrow of causality may be, a growing body of empirical research has shown that institutions exert a very strong determining effect on aggregate incomes. Institutions are *causal* in the sense that a poor country that is able to revise the rules of the game in the direction of strengthening the property rights of entrepreneurs and investors is likely to experience a lasting increase in its productive capacity."³⁵

He cautions against the "property rights reductionism" found in much of the literature, pointing out that there are always many other variables in play. He also warns against reducing legal institutions to current legal rules, which leads to policy implications that are "at best irrelevant and at worst misleading".³⁶ He points out that functions commonly provided by the justice system in Western countries may be performed by different institutions in developing countries.

"And since there is no unique mapping from function to form, it is futile to look for uncontingent empirical regularities that link specific legal rules to economic outcomes. What works will depend on local constraints and opportunities. The best that we can do as analysts is to come up with contingent correlations—institutional prescriptions that are contingent on the prevailing characteristics of the local economy. At the moment we are very far from being able to do this for any but a few institutional areas."³⁷

Proxies

The proxy indicators used to represent the quality of legal institutions have also been widely criticised. Most depend upon subjective assessments by foreign or local businesses, often on quite narrow questions such as whether they consider their investments to be safe. It is often very difficult to tell which institutions are responsible for making them feel more or less safe.

Rodrik argues that investor perceptions are heavily influenced by the business environment in general, rather than institutional performance. Thus, investors consistently rate China a better risk than Russia, even though China offers no recourse to the courts for protection of property rights. Similarly, they expressed satisfaction with the state of legal institutions in Asia prior to the Asian financial crisis, but scepticism thereafter. Davis and Trebilcock argue:

³⁴ Rodrik, Dani, "Introduction: what do we learn from country narratives" in Dani Rodrik (ed.), *In Search of Prosperity: Analytic Narratives on Economic Growth* (Princeton: Princeton UP, 2003), pp. 9-10

³⁵ *Ibid.*, p. 1.

³⁶ *Ibid.*, p. 2.

³⁷ *Ibid.*, p. 9.

“With respect to the administration and enforcement of laws, often crude criteria such as judicial independence and delay, bureaucratic red tape and corruption are aggregated into some form of rule of law index that provides very little purchase on precisely what features of what institutions charged with the administration and enforcement of laws are critically relevant to a country’s development prospects.”³⁸

Chang points out that an institution like property rights is actually an amalgam of a complex set of institutions, including land law, urban planning, tax, inheritance, contract, company law, bankruptcy, intellectual property and customary practices over land, to name only the most important.³⁹ They cannot be aggregated into a single proxy variable, without losing explanatory value.

Contrary evidence

Country-specific accounts of law and development also cast doubt on the conclusions generated by the econometric studies. There is a considerable volume of research indicating that economic growth in East Asia occurred in spite of an absence of legal systems guaranteeing property rights and contracts. For example, Clarke, Murrell and Whiting argue that the thesis that private property rights are essential for economic development “has little explanatory power for China.”⁴⁰ They argue that legal changes played no part in initiating China’s dramatic economic transformation in the 1980s. It was only once the market had reached a certain level of sophistication that it can begin to drive the development of the legal system in areas like contract and competition law. This led to an explosion in the number of lawyers, from 8,600 in 1983 to more than 100,000 in 2005, with 40,000 new law graduates each year. However, even now, individual property rights are strictly limited, there is no scope for citizens to bring legal actions against the state, and the courts, which play little role in commercial life, are subject to direct control by the Communist Party.

However, other Chinese institutions – in particular the political system itself – may provide an alternative form of security of property. Investors commonly engage in joint ventures with local authorities, which then have a stake in the success of the investment. Contracts are enforced not by legal institutions, but by dense personal networks extending into the public administration. Decentralisation has also given local authorities strong incentives to build their own revenue base by supporting private investment.

“In sum, our tentative conclusion is that passably secure property rights might have provided a basis for China’s economic growth during the first two decades of reform, but the legal system probably had little to do with the creation and enforcement of these rights. The rights were a product of the politico-economic equilibrium, in which important ingredients were, for example, the central government’s transparent desire for a growing economy, rather than class struggle, and decentralization, which was a natural product of both China’s size and the events in the decades before reform.”⁴¹

Their research also casts doubt on conventional proxies for the performance of the legal system.

³⁸ Davis, Kevin and Michael Trebilcock, “What role do legal institutions play in development?”, University of Toronto, 1999, pp. 106-7.

³⁹ Chang, Ha-Joon, “Understanding the relationship between institutions and economic development - some key theoretical issues”, Paper for the UNU-WIDER Jubilee Conference, Helsinki, June 2005.

⁴⁰ Clarke, Donald, Peter Murrell and Susan Whiting, “The role of law in China’s economic development”, George Washington University School of Law Working Paper No. 187, 2006.

⁴¹ *Ibid.*, p. 30.

“We have largely ignored evidence from the many country-wide measures of the strength of institutions developed by economists and political scientists. The reason for bypassing this evidence is that we have found that it is at variance with our detailed contextual analysis, in a way that leads us to doubt the validity of the country-wide measures. For example, on one widely used survey, the World Business Environment Survey (2005), company managers were asked, ‘To what degree do you agree that the legal system will uphold contract and property rights?’ The percentage of Chinese respondents answering with agreement (rather than disagreement) was higher than for the world as a whole, higher than the average for countries in China’s income group, and also higher than for many countries (such as the United States) with legal systems that most commentators would consider stronger than China’s.”⁴²

Meredith Woo-Cummings also argues that the key variable in East Asian development has been the role of the government in the economy and the economic policy framework, to which the legal system is secondary.⁴³ She argues that law played little role in Japan’s development after 1945, when economic policy was implemented through informal mechanisms of administrative guidance, consciously shielded from control by the courts. Despite the American influences, the judiciary rarely intervened in business affairs, and foreign investors had no recourse to the courts to protect their interests. In Korea, it was only after the 1997 financial crisis that the state went from direct administrative control of the economy towards establishing general rules for the operation of the market. Conversely, Malaysia’s common law tradition and strong systems of judicial review did not prevent the Mahathir government from introducing a (largely unsuccessful) policy of direct administrative control of the economy. In sum, she finds no support from the East Asian experience for the proposition that economic growth depends upon any specific set of legal rules or institutions, while concluding that, in a region with relatively strong states, governments have faced little difficulty in adopting the legal reforms required to implement their chosen economic policy frameworks.

2.4 Conclusions

The literature reviewed here shows that a wide variety of often contradictory conclusions have been drawn from generally insufficient or unconvincing evidence. The literature makes it clear that there is an important association between the performance of legal institutions and economic growth, and it appears fair to conclude that the quality of laws and legal institutions is at least to some degree a causal influence on economic performance. However, the causal relationships are bi-directional, complex, poorly understood and in all probability variable across different country contexts and stages of development. Cross-country econometric studies positing a general relationship between legal institutions and development therefore need to be treated with some care, beyond the general proposition that “institutions matter”. There is considerable doubt as to whether the impact of the legal system on economic growth can be quantified in a meaningful way.

There is also a strong basis for concluding that, over the longer run, legal systems develop in response to economic, social and political development. Law both responds to and facilitates these wider development processes. This has important policy implications. It suggests that investing in complex legal institutions before there is a demand for them is unlikely to yield

⁴² *Ibid.*, p. 52.

⁴³ Woo-Cummings, Meredith, “The rule of law, legal traditions, and economic growth in East Asia”, UNU Research Paper No. 2006/53, May 2006.

significant returns. However, there may be moments in the development process when strategic investments in the justice system may help to reinforce or accelerate positive economic trends.

The other point to note from the East Asian literature is the role of law as a tool of development policy. Effective states with a clear development agenda depend heavily on law and legal institutions to support their policies. Conversely, changes to laws and legal institutions that are not anchored in wider development strategies are unlikely to have a strong causal effect on development. It may therefore be helpful for donors to think of the legal system less as a sector in its own right, than as a component of wider institutional and policy frameworks.

A number of important questions are left unanswered by this literature, and might usefully be addressed through further research.

- At what stages in the development process does the legal system have the greatest influence on economic growth? Are there particular indicators (e.g., levels of FDI, stock market capitalisation or sophistication of financial markets) that could guide policy makers as to when to investments in the legal system become a priority?
- Which legal institutions are most significant for development? Are there specific aspects of commercial justice (e.g., commercial courts, corporate governance, corporate finance, judicial review of the administration) that matter most for foreign and domestic investors?
- Do informal justice mechanisms provide an adequate substitute for the formal justice sector at particular stages of development? Which institutions matter for growth in the informal economy?

3. Bottom-up effects: justice and poverty alleviation

Over the past decade, a new school of research and practice on justice and development has emerged, which emphasises bottom-up approaches and is usually referred to as access to justice or legal empowerment. Being more concerned with the micro-level effects of insecurity and injustice on the lives of poor people, authors in this area use very different types of evidence to support their claim to a share of development resources. This section assesses the evidential base underlying these claims.

3.1 Theory

Bottom-up approaches emerged as a reaction to the perceived failures of conventional approaches to law and development in earlier decades. Top-down approaches depended on a standard package of assistance to the formal legal system, such as judicial training, improved case-management systems for courts and assistance to law schools and bar associations. Writers such as Stephen Golub charged that the causal link between the formal legal system and economic growth was unproven, that interventions were based on institutional templates rather than the local context, and that they ignored the power relations embedded in the formal legal system that prevented it from meeting the needs of the poor.⁴⁴ These critiques prompted the emergence of an alternative paradigm that took the perspective of the poor as its starting point.

⁴⁴ Golub, S., “Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative”, Rule of Law Series Working Papers No. 41, Carnegie Endowment for International Peace, Washington D.C., 2003.

The new paradigm also reflected changes to the conventional understanding of development, from an exclusive concern with economic growth to the multi-dimensional concept of human development. As poverty reduction became the explicit rationale for development assistance, attention was directed to particular groups or sections of society where poverty was prevalent. Participatory poverty assessments revealed that injustice, physical insecurity and powerlessness were at the heart of the subjective experience of poverty. Human-rights based approaches became an increasingly mainstream part of development thinking. The influential writings of Amartya Sen argued that strengthening human freedoms and capabilities was not just a means for achieving development, but the essence of the development process itself.⁴⁵

The starting point for the access to justice literature is analysis of the barriers faced by the poor in accessing justice. These include aspects of substantive law, such as anti-poor or gender biases, alien or formalistic language, the lack of clear citizen entitlements, incoherence between laws and clashes between law and social practices. They include problems with justice institutions, such as corruption and impunity, anti-poor bias, lack of judicial independence, the slowness and cost of court proceedings and the failure to enforce judgments. They also include attributes of poor communities themselves, such as their geographical distance from the formal system, lack of financial resources, lack of understanding of the law and their rights, distrust of the state, economic dependence on employers, landlords or husbands, and factors such as informal housing status that discourage them from accessing the legal system.⁴⁶

The literature proposes a range of interventions to help the poor overcome these barriers. They include law reform, public awareness, community mobilisation, low-cost legal representation (e.g., legal aid, public interest law centres and paralegals), alternative dispute resolution and non-state justice systems (both customary and modern, civil-society based mechanisms). The literature emphasises the importance of contextual analysis and participatory approaches for identifying the right set of interventions and developing tailor-made, localised solutions. It emphasises the importance of political analysis in order to understand the mechanisms by which power relations are entrenched and reproduced within the legal system.⁴⁷ It stresses the importance of the justice system as an avenue through which the poor can agitate for political, social and economic change.

The development benefits said to result from bottom-up approaches are mainly at the micro-level, accruing to particular groups of poor people and reflecting the small scale of most access to justice interventions. They include reductions in physical insecurity and economic vulnerability, and increased ability to assert rights, demand public services and agitate for social change. McClimont and Golub write:

“law is a tool not only for the vital goals of bringing concrete benefits to marginalized groups, advancing their human rights, and promoting their development, but for raising their capacities to generate, participate in, and sustain social change on their own.”⁴⁸

A few writers go beyond the micro-level to assert benefits accruing at the societal level, such as enhanced performance of development projects, improved implementation and enforcement of

⁴⁵ Sen, Amartya, *Development as Freedom* (Oxford: Oxford University Press, 1999).

⁴⁶ Golub, S. and M McQuay, “Legal empowerment: advancing good governance and poverty reduction”, Asian Development Bank, 2001.

⁴⁷ Sage, Caroline and Woolcock, Michael: ‘Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries, 2005.

⁴⁸ McClimont, Mary and Stephen Golub, *Many Roads to Justice: The Law-Related Work of Foundation Grantees Around the World* (The Ford Foundation: Washington, 2000), p. 6.

laws, improved responsiveness and accountability of government officials, and greater participation of poor people in public-sector decision making.⁴⁹

The Commission on the Legal Empowerment of the Poor, chaired by Madeleine Albright and Hernando de Soto and funded by a range of donor governments, will in 2008 release a major publication advocating bottom-up legal approaches. The draft working papers currently available make a series of ambitious claims for the development potential of legal empowerment. The Commission calls for reforms to the justice system to provide poor people with the “institutional environment, protections and incentives that they will need to realize their full capabilities and reap the maximum potential return on their existing assets.”⁵⁰ The areas emphasised by the Commission include:

- legal identity (up to 71% of children in Least Developed Countries are not legally registered by their 5th birthday, which may bar them from accessing public services);
- property rights (registration of the informal property of poor communities, to provide greater security of housing and allow the securitisation of assets);
- human capital (labour rights);
- entrepreneurial rights (the registration of informal businesses, to give them greater access to public services and financial markets, and reduce risks and transaction costs);
- rights to public goods like basic utilities, a healthy environment, public security and a social safety net.

The Commission argues strongly that informality of business and property rights is a major barrier preventing poor people from lifting themselves out of poverty.

“There are some 500 million working poor earning less than \$1 per day (ILO 2004). The vast majority earn their living in the informal economy, occupying land they do not own, working in small, informal businesses, and relying on family or friends for informal money lenders for loans. Often, they have limited access to broader economic opportunities and are especially vulnerable to the uncertainties, the corruption and even the violence prevalent outside the rule of law. They have little or no access to settling disputes using the legal machinery. Without legal rights or protections, they are in a continual state of legal and political vulnerability. Informality, therefore, limits the opportunity for economic and social development for individuals, families, businesses, communities, and even entire nations.”⁵¹

The Commission concludes that regularising the informal economy and providing an adequate regulatory and institutional environment is “the single most important element in an economic growth strategy.”⁵²

“At the base of the private sector are millions of small, micro, and mini entrepreneurs, who provide the bulk of the raw material for formal sector production, engage intermittently as labour in the formal enterprises, and use products made in the formal sector... Those who work in the micro-enterprises, and own-account workers within supply chains that lead into

⁴⁹ Golub, S. and M McQuay, “Legal empowerment: advancing good governance and poverty reduction”, Asian Development Bank, 2001.

⁵⁰ Commission on Legal Empowerment of the Poor, “Making the law work for everyone”, Vol. II: Working Group Reports, 2008, p. 2.

⁵¹ *Ibid.*, p. 198.

⁵² *Ibid.*, p. 213.

the formal sector, have to be accorded legal protection on a par with enterprises and workers in the formal sector.”⁵³

3.2 Evidence

There is not much empirical work in the legal empowerment literature. Little attention has been given to developing an evidence base, for several reasons. First, much of the literature is devoted to debunking earlier law and development approaches. Second, the access to justice approach is only a few years old, and has not yet generated a sufficient body of experience to support detailed analysis. Third, the literature reflects a different understanding of development impact. If injustice and powerlessness are constitutive elements of poverty, then interventions to address them are a direct contribution to development, without the need to prove wider social or economic impact. Sen argues that the question – is legal development helpful for development as a whole? – is in fact a misleading one.

“Even if legal development were not to contribute one iota to economic development..., even then legal and judicial reform would be a critical part of the development process.”⁵⁴

The evidence available comes from accounts of the impact of access to justice or legal empowerment programmes, drawn from project reviews commissioned by donors. For example, Golub⁵⁵ offers the following evidence from a range of project reviews:

- In Ecuador, poor women who had received legal assistance and awareness raising from NGOs reported experiencing significantly less domestic violence, higher child support payments and enhanced self-esteem.⁵⁶
- In the Philippines, surveys, focus groups and interviews with government officials all indicated that farmers who had received legal services and capacity-building support from NGOs were able to realise greater benefits from agrarian reform than those who did not receive such assistance. The benefits included greater productivity, improved income, higher levels of investment and improved housing quality.
- In Bangladesh, two broad-based NGOs that integrated legal assistance with other development interventions made a positive impact on poverty alleviation in several ways, including reducing illegal dowry practices, improving citizen participation in and influence over local government decision making, fostering positive attitudes towards women’s rights, more equitable use of government-managed land, and reducing the dominant role played by local elites in dispute resolution.
- In Nepal, a USAID-funded programme trained 100,000 women in literacy and numeracy, microenterprise development, legal awareness and group advocacy skills. In comparison to a control group of non-beneficiaries, these women initiated eight times as many actions for social change (e.g., community development and health projects, campaigns against domestic violence), participated 30% more in the allocation of family finances and had a better understanding of the importance of keeping their daughters in school.

Similar reviews of project-level results have been carried out by the Asian Development Bank, the World Bank and the Ford Foundation. An ADB study of legal empowerment programmes

⁵³ *Ibid.*, p. 199.

⁵⁴ Sen, Amartya, “What is the role of legal and judicial reform in the development process?”, World Bank Legal Conference, Washington, 2000, p. 10.

⁵⁵ Golub, S., “Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative”, Rule of Law Series Working Papers No. 41, Carnegie Endowment for International Peace, Washington, 2003.

⁵⁶ World Bank, “Impact of Legal Aid: Ecuador”, 2003: <http://go.worldbank.org/0JM0W48Z00>.

across seven countries concluded that the approach “helps to advance good governance and to reduce poverty in both substantial and subtle ways.”⁵⁷ The review found impacts including improved awareness of human rights in China and Cambodia, improved basic legal skills in areas like how to register a marriage or manage inheritance procedures, improved access to the legal system and public decision making, improved implementation of laws and greater accountability of local officials. It also claimed some material benefits, including enabling farmers to benefit more from agrarian reforms in the Philippines.

A World Bank review of the impact of legal services NGOs across multiple countries found that they had helped the poor to engage with local government and assert their social and economic rights, as well as promoting a stronger role for women in development.⁵⁸ The Ford Foundation’s 18-month review of its grant making in legal services makes various claims as to development impact, particularly in respect of its human rights work. For example, a case study on using law to promote social change concluded:

“The vision and courage of Ford grantees described above have led to significant successes in their efforts to further human rights and social justice. By the late 1990s, a cohesive and growing community of organizations and lawyers was involved in advocacy, education, community organizing, litigation, and policy work in the public interest. Discussions about human rights issues in these countries have become more informed and more open than in the past. Academics, law faculties, NGOs, and professional organizations have joined this dialogue. More important, these programs have produced concrete improvements in the lives of affected populations.

These achievements must be balanced by considering some obstacles still faced by the grantees. The human rights and public interest law communities are still small, and their influence on policy limited. While Ford support has contributed to a better and more frequent use of legal and social actions that demand accountability from the government and large enterprises, many lawyers still report that citizens remain distrustful of judiciaries, and are reluctant to use all the legal instruments available.”⁵⁹

Golub acknowledges that robust methodologies for measuring impact are still being developed, but argues that the results nonetheless

“suggest the possibility of a powerful impact that affects poverty more directly and cost-effectively than does the dominant ROL [rule of law] paradigm. Those results also indicate that legal empowerment holds great potential for mainstream socioeconomic development efforts.”⁶⁰

⁵⁷ Golub, S. and M McQuay, “Legal empowerment: advancing good governance and poverty reduction”, Asian Development Bank, 2001, p. 50.

⁵⁸ Manning, Daniel, “The Role of Legal Services in Attacking Poverty”, background paper for the World Development Report 2001, World Bank.

⁵⁹ Fruhling, Hugo, “From dictatorship to democracy: law and social change in the Andean Region and the Southern Cone of South America” in Stephen Golub and Mary McClimont (eds), *Many Roads to Justice: The Law Related Work of Ford Foundation Grantees Around the World* (Ford Foundation, 2000), p. 80.

⁶⁰ Golub, S., “Beyond Rule of Law Orthodoxy. The Legal Empowerment Alternative”, Rule of Law Series Working Papers No. 41, Carnegie Endowment for International Peace, Washington D.C., 2003, p. 33.

3.3 Critique

Considering that bottom-up approaches emerged from a strong critique of earlier law and development movements for their “questionable assumptions and unproven impact”,⁶¹ it is notable that the legal empowerment literature displays many of the same shortcomings. The literature is written by a small number of committed advocates for the approach, and few impartial assessments are available. Some of the claims as to impact appear exaggerated. In most of the programmes reviewed, the legal component is only one part of a broader, civil-society based intervention, and no attempt is made to pin down attribution to the specific legal empowerment activities.

Christopher Stone writes:

“The contribution of SSAJ programs to poverty reduction follows from its orientation towards the needs of the poorest residents in these countries, dealing directly with issues of their insecurity, unequal treatment, and exclusion. Yet the contribution to poverty reduction is usually stated as an assumption rather than as a focus of management attention... The mechanisms that link a secure and stable environment to economic growth and poverty reduction are only now beginning to be specified more closely and tested.”⁶²

Van Rooji points out that evidence from project reviews commissioned by donors should be treated with caution, because they are always to some extent self-serving.⁶³ He points to the methodological challenges of identify societal-level impacts from small, bottom-up interventions, and distinguishing these from the impact of larger interventions by organisations like the UN and the World Bank. He also points out that most S&J programmes still involve significant top-down components (e.g., judicial reform) that are similar to those used in previous eras. The heavily reliance on civil society organisations to deliver legal empowerment also raises questions as to the scale of the impact that can be achieved.

Regarding the potential of legal empowerment to bring about social and political change, a study by Lev in Indonesia argues that “law movements” (political movements agitating for legal control of state power) can develop “among groups that are disadvantaged by existing patterns of political, economic, and social regulation and have begun to regard old authoritative relationships in the state as morally bankrupt.”⁶⁴ However, such movements tend to be largely middle-class in composition, led by doctors, journalists, academics and other professionals, and depend on lawyers to articulate their claims in legal language. This brings into question the premise that legal interventions can empower the poor to become agents of change in their own right. Given the importance attached to political analysis by the legal empowerment movement, the barriers to political mobilisation of the poor receive little attention.

Rosenberg also argues, based on US history, that the capacity of the courts to bring about major social change is largely a myth. Courts “cannot transcend the political conflicts in which social

⁶¹ *Ibid.*, p. 5.

⁶² Stone, Christopher, Joel Miller, Monica Thornton and Jennifer Trone, “Supporting security, justice and development: lessons for a new era”, April 2005, p. 12.

⁶³ van Rooji, Benjamin, “Bringing justice to the poor: bottom-up legal development cooperation”, World Bank, 2007, p. 9..

⁶⁴ Lev, D., “Judicial authority and the struggle for an Indonesian *Rechtsstaat*”, *Law and Society Review* 13: pp. 37-71.

problems are so deeply embedded.” He concludes that problems unsolvable in the political sphere are rarely resolved by the courts.⁶⁵

The working papers of the Legal Empowerment Commission are rather evangelical in tone, and do not offer a dispassionate assessment of the evidence. The Commission’s most detailed recommendations concern the legalisation of informal businesses and property. This follows closely Hernando de Soto’s famous thesis regarding the unlocking of ‘dead capital’, which is considered below in the chapter on property. The working papers make little reference to contemporary debates on the merits of legalising the grey economy. We have not reviewed this literature in any detail, but we note that at least some authors have drawn precisely the opposite conclusions from the evidence collected by de Soto in Latin America. De Soto describes in detail the vibrancy of the informal sector in Peru, as compared to a formal sector that has been stifled by excessive regulation and government interference.⁶⁶ In effect, he proves the possibility of sustained, complex economic activity, at least on a small scale, without formal legal protection. His analysis does not consider the possibility that, in the real-world conditions prevailing in Peru and many other developing countries, legalisation might carry costs and risks for the informal sector that counterbalance or outweigh the benefits. Upham writes:

“What is most perplexing is that they have amassed rich empirical data about economic and social success in the real world of corruption and government incompetence and yet appear totally uninterested in the lessons that these data may hold for developing countries. More specifically, they seem uninterested in the possibility that a formal legal system of the type they advocate could stifle growth... Nor do they consider the possibility that the formal legal system that they envision could not exist within the context of real-world politics...

In seeming defiance of their own evidence, they leave untouched the assumption that productive capitalism cannot develop without formal adjudication, scrupulously enforced contracts, and inviolable property rights. They are not interested in whether the informal practices that supported growth in Lima could be replicated elsewhere or whether they might be superior, at least in a cost-benefit sense, to a formal legal system. De Soto never considers, for example, whether it might be more cost effective to introduce some of the successful informal mechanisms into the stultified formal sector, instead of formalizing the informal sector.”⁶⁷

3.4 Conclusions

The access to justice or legal empowerment literature makes a strong case that insecurity and injustice are constituent parts of poverty, not only increasing the suffering and vulnerability of poor communities, but also reinforcing the social structures and power relations that can trap communities in poverty. It also shows that, at least in some contexts, interventions in legal empowerment may help to alleviate the conditions of poverty, by reducing poor people’s vulnerability to exploitation, improving their access to services and providing them with an avenue to assert their rights. For donors committed to human rights and human development, this amounts to a strong case for investing in the justice sector.

However, the literature provides little evidence on the scale of impact, to enable policy makers to assess the returns available compared to alternative uses of development finance. Furthermore,

⁶⁵ Rosenberg, Gerald, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: Chicago University Press, 1991), p. 338.

⁶⁶ De Soto, Hernando, *The Other Path: The Invisible Revolution in the Third World*, trans. June Abbott (New York: Harper & Row, 1989).

⁶⁷ Upham, Frank, “Mythmaking in the rule of law orthodoxy”, Carnegie Endowment for International Peace, Rule of Law Series No. 30, 2002, p. 12.

the evidence available relates to fairly small-scale activities, and it is quite likely that these activities would quickly encounter diminishing returns if they were scaled up.

Importantly, the evidence seems to suggest that legal empowerment approach is most effective when used in combination with other development interventions. For example, the World Bank's experience of land reform in the Philippines showed that the reforms were implemented more effectively and fairly where legal empowerment support was offered to the beneficiaries. Along the same lines, programmes to support SMEs or provide credit to informal entrepreneurs might usefully incorporate elements of legal empowerment. Programmes to address gender or other discrimination might seek out opportunities within the justice sector, as well as in civil society and the political system.

In short, it is likely that there are scenarios where the legal empowerment approach, when employed in conjunction with other interventions, could show significant returns for relatively small investments. For this reason, it might be useful for donors to think of legal empowerment not as a sector, but as a cross-cutting theme or set of techniques that can be mobilised in support of a range of development activities.

In terms of future research, the legal empowerment area lends itself to detailed case studies that would help develop a better understanding of how the legal system can serve the poor. This would involve not just reviews of current legal empowerment programmes, but also studies of the role played by legal institutions in social change in different country contexts. It would be useful to have more information on what kinds of intermediary institutions are most likely to take up causes that assist the poor (e.g., NGOs, public interest lawyers, churches, trade unions). It would also be interesting to explore under which conditions the middle classes and professional groups become involved in lobbying for law reform and greater government accountability, and in which circumstances institutions like courts and ombudsmen offices have the capacity to influence the political process. Legal empowerment is most likely to be effective where it supports and reinforces dynamics that are already observable. Donors need the capacity to recognise these opportunities when they arise.

The assertions made by the Commission on Legal Empowerment regarding the link between formalisation of business and economic growth also need to be further tested empirically. It would be useful to know both the benefits and the risks of formalisation for the informal sector. It would be useful to know what kinds of legal disputes are faced by micro-businesses, and how they are resolved, what commercial and public services they most require, and to what extent informality is a barrier to accessing them. Surveys of microcredit beneficiaries might reveal interesting findings on which legal institutions are most important to their survival and growth.

4. Land and housing

Programmes to formalise and register rights to land and housing have been a staple of development programmes over the past two decades. The World Bank and other donors have promoted tenure reform in rural areas, to recognise and record traditional or informal rights to land. This is sometimes combined with programmes to redistribute property, by breaking up large estates or granting land titles to tenant farmers, although this is always difficult to accomplish. In recent years, urban property rights have emerged as a major issue in the management of growing cities in the developing world. In Africa and Asia, the urban population

is expected to double between 2000 and 2030.⁶⁸ Much of this increase will be poor people, often living in slum settlements, causing an intensification in problems such as homelessness and street children.

4.1 Theory

There are two main rationales offered for the reform of land and housing rights. The first is that it contributes to growth and poverty reduction by encouraging investment in agricultural productivity and by giving the poor access to credit by enabling them to securitise their most valuable asset. The second is more protective in nature: that securing property and housing rights addresses one of the most acute sources of vulnerability for poor people – the threat of loss of housing and livelihood.

The World Bank's *World Development Report 2006* makes strong statements on the links between land ownership and growth. It argues in favour both of pro-poor land redistribution and increased security of tenure. It states that security of tenure in both rural and urban areas leads to higher productivity through a higher propensity to invest in developing assets and greater access to credit. It states that there is a positive relationship between land ownership and both educational attainment and reduced household sizes, and that the landed poor in rural areas have greater voice in local politics. However, the report acknowledges mixed experiences with land redistribution. Though land reform has sometimes succeeded in displacing rural elites and emancipating the poor, the record on improving rural livelihoods has been limited.⁶⁹

In urban areas, it is argued that tenure legalisation in slum settlements provides incentives for the poor to improve the quality of housing, prevents costly disputes and increases access to credit. The latter point is particularly associated with Hernando de Soto, who argues that the most significant asset of the poor, their housing, is 'dead capital' because it cannot be used to secure credits.⁷⁰ He argues that formalisation of title would provide a major boost to investment and economic growth. Other common arguments in favour of land titling include creating more efficient land markets to open up access to land and housing for the poor, and creating a property tax base to improve local government services.

The Commission on the Legal Empowerment of the Poor offers a strong restatement of these arguments. It asserts that the link between property rights and growth has not received sufficient attention in development thinking. According to the Commission, before the beginning of the 19th century when property rights began to be formalised, "the global economy grew very slowly... The transformation from predominantly extralegal property systems to formal property rights entrenched in law has since come to support functioning market economies and politics."⁷¹

The Commission points to four key functions played by the property system:

1. It provides a system of rules defining the bundles of obligations among people and assets.

⁶⁸ Figures from the UN Population Fund, cited at: <http://www.citymayors.com/society/urban-population.html>.

⁶⁹ World Bank, *World Development Report 2006: Equity and Development* (Washington DC: World Bank, 2006) – Ch. 8, "Justice, land and infrastructure".

⁷⁰ De Soto, Hernando, *The Mystery of Capital* (London: Bantam Press, 2000).

⁷¹ Commission on Legal Empowerment of the Poor, "Making the law work for everyone", Vol. II: Working Group Reports, 2008, p. 66.

2. It provides a system of governance, which is a “central facet of state functionality”. The institutional order of the state depends upon rules governing relationships among stakeholders, including land ownership, housing tenure, land use planning, taxation and so on.
3. It provides a functioning market for the exchange of assets, allowing land, housing, moveable assets, equity and ideas to be bought and sold. This turns property holding into strategic investments. It notes that property rights are a necessary but not sufficient condition for functioning property markets.
4. It acts as an instrument of social policy. The provision of public housing, the redistribution of land and the provision of infrastructure are all essential tools of development policy.

Regarding direct effects upon poor people, the Commission notes the need for legal services that concentration on major transitions, such as the death of the head of the family, divorce, termination of land use, leaving employment, leaving a community, changing business relationships or soldiers returning home. Because access to property tends to be relationship-dependent, these transitions are often accompanied by costly conflict that can be reduced by effective legal services.

4.2 Evidence

The most direct impact of insecurity of property rights on the poor is to increase their vulnerability to loss of housing, which can lead to destitution. This danger is most acute in urban areas, with 50% of the urban or peri-urban population in Africa and more than 40% in Asia living with insecure property rights.⁷² Dam states that in many urban slums, the poor face a constant risk of dispossession, forcing at least one family member to remain in the home at all times. Many city dwellers, especially women, are thereby deprived of the opportunity to work outside the home.⁷³ The poor may be required to pay local criminal elements for protection services. In Dhaka, the fastest growing city in the world, slum dwellers are obliged to purchase illegal infrastructure connections from criminal middlemen. They are at constant risk of eviction by the city authorities, who engage in occasional slum clearances without resettlement plans.⁷⁴ The Commission on Legal Empowerment of the Poor writes:

“The reality of urban slum dwellers is sub-standard housing conditions, forceful evictions, extortion, social exclusion, and environmental degradation, among other problems.”⁷⁵

Regarding the positive linkage between property rights and prosperity, De Soto’s study of land titling in Peru compared two poor communities with different tenure status (illegal settlement vs. full ownership rights). He found that the community with ownership of its land invested more in the quality of housing, and as a result enjoyed significantly higher property values.⁷⁶ This study was widely cited in support of urban land titling and market-driven urban development

⁷² Deininger, Klaus, “Land policies for growth and poverty reduction: key issues and challenges ahead”, World Bank 2005, p. xxv.

⁷³ Dam, Kenneth, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington D.C.: Brookings Institution, 2006), p. 138.

⁷⁴ World Bank, “Dhaka: Improving living conditions for the urban poor”, Bangladesh Development Series Paper No. 17, World Bank, Dhaka, 2007.

⁷⁵ Commission on Legal Empowerment of the Poor, “Making the law work for everyone”, Vol. II: Working Group Reports, 2008, p. 65.

⁷⁶ De Soto, Hernando, *The Other Path: The Invisible Revolution in the Third World*, trans. June Abbott (New York: Harper & Row, 1989).

projects by the World Bank and other donors during the 1990s.⁷⁷ Other studies with similar results include:

- Alston (1996) found a positive contribution of land titling on levels of investment and land values in Brazil.⁷⁸
- World Bank studies found that farmers in Thailand with property title increased their output by 14-25%, compared to those working untitled land of the same quality. In Vietnam, poor rural households with clear rights of control and disposition committed 7.5% more land to crops requiring a greater initial outlay and yielding returns over several years. In Peru, half of those with title to property in Lima's squatter settlements have invested in improvements, compared to 13% of those without title. Land titling has increased property values by 14% in Manila, 25% in Guayaquil, Ecuador and Lima, and 58% in Davao, Philippines.⁷⁹
- In Thailand, access to credit is three times greater for those with title to land.⁸⁰

However, much of the literature on land titling contains contradictory or more nuanced results. For example, in both Cairo and Karachi, only 10% of eligible families took up the offer to formalise their property, presumably due to the administrative charges involved or concerns about subsequent liability for taxes and charges. However, those who did so demonstrated increased investment in their properties.⁸¹ A study in Ecuador found that land titling in rural areas had no impact on infrastructure development, crop yields or use of housing as collateral.⁸² Davis and Trebilcock cite a range of studies showing that the transformation of indigenous land systems in Africa has made no contribution to increasing agricultural productivity. Furthermore, registration on some occasions led to increased uncertainty, due to the complexity of reflecting traditional usage rights in a formal legal system. Women, pastoralists, caste people and those with secondary (usufruct) rights to land tended to be disadvantaged. Local elites are often in a position to manipulate the registration process to their own advantage.⁸³

The *World Development Report 2006* notes that land titling is expensive and time-consuming (in Thailand, the process took 20 years to complete), and that alternatives are available, especially in urban areas.⁸⁴ The report notes that in some African countries (e.g., Burkina Faso), indigenous

⁷⁷ Payne, Geoffrey, "Urban Land tenure policy options: titles or rights?", Habitat International 25, 2001.

⁷⁸ Alston, Lee, Gary Libecap and Robert Schneider, "The Determinants and Impact of Property Rights: Land Titles on the Brazilian Frontier", *Journal of Law, Economic and Organization*, Vol. 12, 1996, p. 25.

⁷⁹ World Bank, *World Development Report 2005: A Better Investment Climate For Everyone* (Washington D.C.: World Bank, 2004), pp. 80-1.

⁸⁰ Deininger, Klaus, "Land policies for growth and poverty reduction: key issues and challenges ahead", World Bank 2005, p. 49.

⁸¹ Payne, Geoffrey, "Urban Land tenure policy options: titles or rights?", Habitat International 25, 2001.

⁸² Hendrix, Steven, "Myths of Property Rights", *Arizona Journal of International and Comparative Law*, Vol. 12(1), 1995, p. 183 at pp. 193-4.

⁸³ Davis, Kevin and Michael Trebilcock, "What role do legal institutions play in development?", University of Toronto, 1999, p. 43.

⁸⁴ For example, a 1998 law in Trinidad and Tobago introduced three incremental levels of property security: (i) the right to somewhere to live, (ii) a 30-year lease transferable in the event of death, and (iii) a 199-year lease effectively conferring ownership rights upon survey and payment for the land. Eighty percent of informal settlers on state land chose to apply for the first level, which involved relatively low cost and complexity.

rights appear to be sufficiently secure, and that the most effective way of securing property rights is not tenure reform but measures to develop socially legitimate institutions for dispute resolution, and to create bridges between the customary and formal legal systems.

Evidence of the impact of land redistribution is very mixed. Many land reforms have simply failed to make headway in the face of entrenched resistance from landed elites, particularly in Latin America with its vast inequalities of landholdings.⁸⁵ Successful land reforms of the past, such as in Japan, Korea and Taiwan after the Second World War, took place in historical circumstances of tremendous upheaval, making it unlikely that they can be replicated. The World Bank concludes that redistribution of land alone is usually insufficient to overcome inequities and promote sustainable rural livelihoods.

Regarding the development of land markets, the World Bank concludes that land sales may not be the most effective means of redistributing land in favour of the poor, owing to high transaction costs, lack of credit markets, high land prices and the distorting effect of agricultural subsidies. They may also disadvantage the poorest households who, in the absence of social safety nets, may be forced into distress sales to pay for food or medicine. Rental markets may be a more cost-effective and less disruptive means of redistributing land in favour of more efficient producers. For example, in Colombia rental markets have been more effective than government-sponsored land reforms in allocating land to productive and poor producers.⁸⁶ However, the Bank concludes that rental markets do not generate pro-poor results in countries with high inequality in ownership and power relations.

There may also be a link between property rights and environmental protection. Deininger asserts that a major cause of deforestation in the Brazilian Amazon is the absence of property rights, which leads to short-term strategies for the exploitation of land.⁸⁷ A World Bank study of 53 countries found that a modest improvement in the protection of property rights could reduce the rate of deforestation by as much as a third.⁸⁸ There is also evidence of links to soil erosion in Ethiopia, as farmers without title are less likely to plant trees and build terraces.

4.3 Critique

Critiques of land reform and titling programmes are mainly concerned with the risk of unintended consequences. Payne notes that in most cities, there is a continuum of tenure categories, ranging in levels of security from pavement dwellers to freehold owners. Programmes that attempt a dramatic transformation of title tend to distort land markets and expose vulnerable tenants to eviction and destitution. More cautious, gradual reforms, building on tenure categories that already exist, are more likely to achieve the desired outcome. He challenges de Soto's 'dead capital' thesis, noting that the urban poor do not tend to take on large debt, because they cannot afford to service it. Rather, their need is for small credits, which are not collateralised due to the high transaction costs involved. Conventional micro-credit is therefore more likely to promote entrepreneurial activity than land titling.

⁸⁵ World Bank, *World Development Report 2006: Equity and Development* (Washington DC: World Bank, 2006).

⁸⁶ Deininger, Klaus, Raffaella Castagnini & Maria Gonzalez, "Comparing land reform and land markets in Colombia: impacts on equity and efficiency", Policy Research Working Paper 3258, World Bank, 2004.

⁸⁷ Deininger, Klaus, "Land policies for growth and poverty reduction", Washington: World Bank and Oxford University Press, 2003, p. 41.

⁸⁸ World Bank, *World Development Report 2005: A Better Investment Climate For Everyone* (Washington D.C.: World Bank, 2004), pp. 81.

Payne notes the tendency of land registration to generate perverse consequences. By increasing property values, it may encourage the illegal subdivision of land and unauthorised development. In countries with highly unequal income, land reforms to facilitate individual and corporate ownership may trigger a run on valuable property, advantaging those with access to capital. For many of the poor, land titling may reduce security of tenure by driving up rental costs. One study in Cairo showed 21% displacement from an illegal settlement when it was regularised.⁸⁹ Thus, the reform may end up harming those it is intended to help. Payne concludes that it is often the lack of land titles that keeps housing prices low and therefore affordable for the urban poor. The challenge is therefore to find forms of tenure that provide reasonable access and security for the poorest segments of the population.

Dam notes that land titling will only result in greater access to credit if mortgaging of property, and therefore foreclosure, is feasible. These kinds of financial instruments are rarely available in rural areas in developing countries. There may be social norms preventing the poor from offering land as collateral, which could result in its transfer outside the community. Financial institutions and courts may also be unwilling to evict the poor. In addition, Dam notes that land titling is an extremely expensive process, requiring cadastral surveys and land registries, and may be uneconomic at certain levels of development.⁹⁰

Davis and Trebilcock argue that customary land tenure may not be the constraint on development that is often assumed. Customary systems are in fact quite dynamic, responding to changing conditions and population pressures. For rural households, security of possession may be more important than legal title. By reducing both group rights and use rights, legalisation may therefore harm the poorest members of the community.⁹¹ They offer the example of reform of the traditional, inalienable *ejido* system of land tenure in Chiapas in Mexico, which inadvertently contributed to the indigenous uprising because it was seen as a threat to traditional agriculture.

Evans argues that the idea that property rights can be arrayed along a simple, ordinal scale – from less to more protection of individual rights – is not plausible. Development is more likely to depend on how property rights are allocated, and which kinds of property rights are enforced for the benefits of which sections of the population.⁹² Evans describes a study by Nugent and Robinson⁹³ of four coffee-producing countries in Latin America that began with very similar resource endowments. Costa Rica and Colombia concentrated on smallholder production, and ended up with double the *per capita* income and much higher levels of human development than Guatemala and El Salvador, where coffee production were concentrated in large estates, resulting in depressed investment and growth. While land was privately owned in all four countries, in Guatemala and El Salvador the elites did not face strong political challenge, and were able to use their large plantations to exercise monopsony control over labour. In Costa Rica and Colombia, the elites were less unified and faced higher levels of political competition, which prevented them

⁸⁹ Cited in Payne, Geoffrey, “Urban Land tenure policy options: titles or rights?”, *Habitat International* 25, 2001.

⁹⁰ Dam, Kenneth, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Washington D.C.: Brookings Institution, 2006), p. 143.

⁹¹ Davis, Kevin and Michael Trebilcock, “What role do legal institutions play in development?”, University of Toronto, 1999, p. 43.

⁹² Evans, Peter, “Extending the ‘Institutional’ Turn: property, politics and development trajectories”, UNU-WIDER Research Paper No. 2006/113, October 2006, p. 3.

⁹³ Nugent, Jeffrey and James Robinson, “Are endowments fate? On the political economy of comparative institutional development”, CEPR Discussion Paper 3206, London: Centre for Economic Policy Research, 2001.

from doing so. Thus, the key variable was not the protection of property rights, but the distribution of property and the underlying forms of political competition it reflected.

4.4 Conclusions

The following propositions emerge most clearly from the literature. First, insecurity of land and housing can be a source of acute vulnerability for the poor. Interventions designed to protect the poor from arbitrary eviction and to improve access to affordable housing are therefore a well-justified priority for poverty reduction programmes.

The formalisation of housing in urban settlements may be an appropriate solution to insecurity of housing, in certain circumstances. However, it may also produce perverse effects that harm the most vulnerable members of the community. To control against unintended consequences, the literature advises incremental over radical changes, and suggests that intermediate protection short of full property title may be the better solution, at least in the short run. This might include legal recognition of possessory interests, protection against arbitrary eviction and improved access to legal services.

The case that titling of informal property leads to economic growth, as argued strongly by de Soto and the Commission on Legal Empowerment of the Poor, is unproven. There may be conditions in which this is correct, and it may be true over longer periods of time. In the short-term, however, it is just as likely to lead to perverse consequences, such as driving up rental costs and making housing in titled areas unaffordable for the poor. The suggestion that land titling encourages growth by giving the poor greater access to collateral also needs to be treated with care. It will not usually hold true in rural areas in developing countries, where there are no financial intermediaries available and foreclosures on mortgages are not feasible. Arguably the chief need of the poor is for small loans that are not worth securitising. If the objective is to increase access to credit for the poor, conventional micro-credit may be more appropriate.

The literature notes that formalising property title entails cadastral surveys, land registries that are kept constantly up to date, mechanisms to encourage the poor to record their transactions, schemes to legalise property in informal settlements, and so on. It therefore carries major cost implications. Policy makers should therefore think in cost-benefit terms, and consider whether there is an easier way to achieve the intended results.

Future research needs would include case studies of successful and unsuccessful property reforms in different development contexts, to provide policy makers with more knowledge of the options available to them, and the consequences (intended and otherwise) that may flow from them. Priority areas for research would include:

- How to provide greater security of housing for urban slum dwellers, in particular a better understanding of legal protection short of full property title.
- Policy options for managing illegal construction of housing, to control the number of new informal settlements.
- Policy options for integrating land reform into rural development programmes.

5. Crime and violence

Compared to other S&J areas, there is a well-developed literature on the economic costs of crime and violence, which contains both more data and more explicit consideration of competing methodologies for analysing it. These methodologies have been developed in OECD countries

to assess the cost-effectiveness of crime prevention initiatives. They have also been used extensively in Latin America and the Caribbean, where crime has been recognised as a key development issue for some time. However, there is much less data available on other developing regions, in particular Sub-Saharan Africa (other than South Africa).

5.1 Theory

The literature sets out a number of causal linkages between crime and violence and development.

First, violence requires households and business to spend resources on protection, such as alarms, security guards and private policing.⁹⁴ This expenditure may displace investment in productive assets. As the poor are less able to afford these costs, they suffer disproportionately from the effects of crime. The weaker the criminal justice system, the more these costs are displaced onto private individuals.

Second, crime depletes physical capital, in particular housing and business assets. The risks to physical capital impacts on the business climate, reducing investment rates. It also impacts on public infrastructure, such as schools and public transport.

Third, crime erodes human capital. Using techniques from the public health field, researchers have tracked the effects of crime on the health and productivity of workers and levels of absenteeism.⁹⁵ Crime in school leads to higher rates of absenteeism among teachers and poorer educational outcomes. It also suppresses labour force participation by women, who may be unwilling to undertake long commutes or work nights. Urban areas known to have a high crime rate may suffer 'area stigma', which makes it difficult for individuals from those communities to enter the labour market. Violence against women has a range of additional costs considered in the next chapter.

Fourth, crime erodes social capital. It damages norms of trust and reciprocity, and suppresses social networks considered essential for the alleviation of poverty. The World Bank writes:

“Other costs to social capital due to crime and violence include: disaffection and migration of the urban middle class; reduced access to social services; dysfunctional families; and an overall climate of fear that replaces the spirit of cooperation and participation in community life, so that any sort of community organization not based on fear and coercion cannot function.”⁹⁶

The negative impact on family life also gives rise to inter-generational effects. Children brought up in high-crime environments and in families affected by crime are more likely to fall into criminality.

Fifth, crime vitiates government capacity, through a number of mechanisms. Expenditure on the criminal justice system displaces expenditure on other areas with a more direct contribution to poverty alleviation.⁹⁷ High rates of crime contribute to corruption, such as the participation of

⁹⁴ Anderson, M., “Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs”, IDS, 2003.

⁹⁵ World Bank, *World Development Report 1993: Investing in Health* (Washington, D.C.: World Bank, 1993), pp.25-29.

⁹⁶ World Bank, “Violence and Urban Poverty in Jamaica: Breaking the Cycle”, September, 1996.

⁹⁷ Ayres, Robert, “Crime and Violence as Development Issues in Latin America and the Caribbean”, Washington, D.C.: The World Bank, Washington, 1998.

police and other government officials in protection rackets. More generally, crime undermines public trust in the political system, and in its most extreme form can lead to vigilantism and undermine the legitimacy of the state itself.

The literature offers various schemes to categorise these different costs. The World Health Organization (WHO) has developed what it calls an ‘ecological model’ of the impact of crime, measured at the individual, relationship, community and societal level. It also draws a distinction between the direct and indirect costs of interpersonal violence (see table).

World Health Organization schema for the costs of interpersonal violence	
Direct costs	Indirect costs
<ul style="list-style-type: none"> • Legal services • Medical costs • Perpetrator control • Policing • Incarceration • Foster care • Private security • Economic transfers to perpetrators 	<ul style="list-style-type: none"> • Lost earnings and time • Lost investments in human capital • Indirect protection costs • Life insurance costs • Productivity • Domestic investment • External investment and tourism • Psychological costs • Other non-monetary costs

The Inter-American Development Bank measures the costs of violence under four different categories:

- Direct: health systems, police, justice, housing, social services;
- Indirect: higher morbidity and mortality due to homicide, suicide, substance abuse, depressive disorders;
- Economic multiplier effects: macroeconomic impacts, labour market effects, intergenerational productivity;
- Social multiplier effects: impact on interpersonal relations and quality of life.⁹⁸

Moser and Bronkhurst assess the impact of violence across the following categories: labour (access to jobs); human capital (education and health); social capital (trust and participation); household relations (the ability of the household to function as a unit); and productive assets (including housing).

The *World Development Report 2006* argues that the combination of inequality, crime and violence add up to an inequality trap in many developing countries. The poor are less able to afford expenditure on private protection, and are required to spend more of their time protecting their housing and property. Government responses to criminality tend to favour well-off

⁹⁸ Quoted in Moser, Caroline, Ailsa Winton and Annalise Moser, “Violence, fear and insecurity and the urban poor in Latin America” in World Bank, “Urban poverty in Latin America”, forthcoming. See also Buvinic, M. and Morrison, A., “Technical Notes on Violence Prevention”, Washington, D.C.: Inter-American Development Bank, 1999.

communities, which have stronger bargaining power. Crime and violence can therefore become a barrier preventing poor communities from escaping from poverty.

The literature also acknowledges that the causal chain run equally strongly in the other direction, from underdevelopment to crime and violence. Poverty, but even more so sharp inequalities of income and opportunity, tend to increase criminality, creating a self-reinforcing cycle.

5.2 Evidence

Most attempts to calculate the costs of crime and violence use what is sometimes referred to as an ‘accounting’ methodology: they specify a range of different cost categories, and simply sum the costs under each category, based upon the best data available. The direct costs to individuals and firms is therefore added to the costs to society of the public services that have been utilised. Sometimes an attempt is also made to incorporate intangible costs, such as pain and suffering. For example, in US studies, average court awards for pain and suffering have been used as a means of quantification, although these figures are not comparable across countries.⁹⁹

Box 2 Urban violence in Latin America¹⁰⁰

Globally, the average homicide rate is 5 deaths per 100,000 people. In developed countries, 10 is considered a dangerously high level. In Latin America, the average is 27.5, making it by far the worst affected region in the world. El Salvador, Guatemala and Colombia have the high rates, while Argentina and Chile are below the global average. Violence is the leading cause of death in Brazil, Colombia, Venezuela, El Salvador and Mexico.

Homicide is particularly an urban phenomenon. The biggest cities – Rio de Janeiro, Sao Paulo, Mexico City, Lima and Caracas – each account for more than half of their national totals. However, city growth rates are a stronger indicator of homicide than city size, suggesting that rapid urbanisation is the root of the problem.

Socio-economic conditions affect both the levels and type of crime. Robbery is understandably more common in prosperous areas, and the levels of violence associated with robbery is on the increase. However, the most serious violence, including homicide, continues to be concentrated in the poorest areas. It also has clear age links, with young men most likely to be both victims and perpetrators of violence.

The escalation of urban violence in Latin America is closely linked to drug trafficking and consumption, including gang warfare, robbery to fund drug use, violent quarrels among drug users and murders of drug addicts by ‘social cleansing’ groups. In the most extreme cases, drug barons have taken over the institutional structures of entire communities. Some drug lords establish their own compacts with the communities in which they operate; in return for impunity for their own operations, they offer internal security or fund services such as medical or day care centres. However, the drug trade generates a wide range of criminal externalities, such as greater availability of weapons and the normalisation of a culture of violence.

The aggregate of costs under these different categories is sometimes expressed as a percentage of GDP. However, this is simply a statement of the relative magnitude of the costs, rather than an attempt to estimate GDP growth lost as a result of crime.¹⁰¹

⁹⁹ World Health Organization, “The economic dimensions of interpersonal violence”, WHO: Geneva, 2004, p. 12.

¹⁰⁰ Data taken from Moser, Caroline, Ailsa Winton and Annalise Moser, “Violence, fear and insecurity and the urban poor in Latin America” in World Bank, “Urban poverty in Latin America”, forthcoming.

The accounting method allows diverse sources of data to be neatly summarised as a single figure, which can be used for international comparison or for cost-benefit analysis of crime-prevention measures. It has the advantage that estimates or proxies can be substituted when hard data is not available. Its weaknesses are that the specification of categories is always to some extent arbitrary, and care has to be taken when comparing results across countries that the same definitions have been used.

Data on the direct costs of crime to individuals and firms includes:

- Moser *et al* estimate that in Trinidad and Tobago households pay an average of US\$3,696 for security installations (fencing etc.), and annual expenditure on armed guards and private security services of between \$1,200 and \$30,000.
- In Caracas, Venezuela, surveys have revealed that 73% of people have paid for private security for their houses and 41% for their vehicle, and 39% have contributed time or money to community initiatives to combat crime.¹⁰²
- A study in Guatemala found average losses per business of US\$5,490 as a result of crime.¹⁰³
- A study on Colombia estimates that up to 1.4% of GNP is invested in private security measures.¹⁰⁴ An Inter-American Development Bank study estimates the direct costs of crime and violence in Colombia to be roughly 12 times greater than the net profits of the 50 largest industrial enterprises in the country.¹⁰⁵
- Across Latin America and the Caribbean, Knaul estimates lost income and destruction of property at between 5 and 15 percent of the region's GDP.¹⁰⁶
- According to the IADB, a doubling of homicide rates in US cities is associated with a 12.5% decline in property values.¹⁰⁷
- Although the effects were not quantified, a survey on the costs of crime to business in Jamaica cited by UNODC and the World Bank found that the greatest impact was increased costs of security (51% of respondents), followed by negative impact on plans for business expansion and repression of investments to improve productivity. The survey found that 8.5% of businesses were paying protection money, and 5% were subject to direct extortion. The impact on small business was the greatest, amounting to an average of 17% of revenue, compared to 2% across all firms. In a similar survey from the Dominican Republic, 63% of respondents reported that crime is an obstacle

¹⁰¹ Moser, Caroline and Elizabeth Shrader, "Crime, violence and urban poverty", World Bank, 1998, p. 8.

¹⁰² Moser, Caroline, Ailsa Winton and Annalise Moser, "Violence, fear and insecurity and the urban poor in Latin America" in World Bank, "Urban poverty in Latin America", forthcoming.

¹⁰³ *Ibid.*

¹⁰⁴ Mauricio Rubio, "Los costos de la violence en Colombia: El estado del debate," World Bank, Washington, DC, 1998.

¹⁰⁵ Mauricio Rubio, "Crimen y crecimiento en Colombia," in Inter-American Development Bank, *Hacia un enfoque integrado del desarrollo: ética, violencia y seguridad ciudadana, encuentro de reflexión* (Washington, D.C.: 1996), p. 68.

¹⁰⁶ Londoño, J. and Guerrero, R., "Violencia en América Latina. Epidemiología y costos", Working Paper R-375, Inter-American Development Bank, 1999 – cited in Knaul, Felicia and Miguel Ramirez, "Family violence and child abuse in Latin America and the Caribbean: The cases of Colombia and Mexico", Inter-American Development Bank: Washington, 2005

¹⁰⁷ Inter-American Development Bank, "Violence as an obstacle to development", IADB Technical Note 4, 2002.

to investment. Only 10% of respondents had been victims of crime, but 57% reported that their access to finance was affected by perceptions of crime rates.¹⁰⁸

Some estimates of the costs of service utilisation in response to crime and violence include:

- In 2002, Brazil spent the equivalent of 10.2% of GDP on combating criminal violence, which is twice as much as on education, 5 times as much as on health and 50 times as much as on public housing.¹⁰⁹
- In 1995, El Salvador spent 6.0% of GDP to control violence.¹¹⁰
- Altbeker reports that South Africa spent 3.1% of GDP on criminal justice in 2004, compared to an average of 1% around the world.
- In Colombia, expenditure on crime prevention and on the effects of crime (health and social services) is estimated to be as high as 13% of GDP.¹¹¹
- According to the Pan American Health Organization (PAHO), 30% of all hospital admissions in Latin America are a result of violence. Costs to health services resulting from violence are calculated at 1.5% of GDP in Mexico, 1.9% in Brazil, 4.3% in El Salvador and 5% in Colombia. In El Salvador, the institutional costs of treating victims of crime runs to US\$18.9 million, which is 21% of the national hospital budget and 12% of the total health budget.

On principle, these costs can be combined to produce an aggregate figure on the cost of crime. In reality, however, most attempts to do so are incomplete, due to multiple data shortages. Furthermore, cross-country comparisons are made very difficult by variations in data and inconsistent methodologies. Some attempts to produce aggregate figures include:

- Holder and Mutota (2006) estimated that the costs of crime in Trinidad and Tobago in 2003 amounted to US\$160 million, or 1.6% of GDP. This included the value of lost productive years due to both fatal and non-fatal injuries, lost productivity of former criminals who have reduced earnings capability after serving jail time, funeral costs and business security costs. However, the cost of criminal justice was not included.¹¹²
- Francis *et al.* (2003) attempted a comprehensive study of the costs of crime in Jamaica, including both private and public costs. They included health costs (both the public health system and costs paid for by private citizens), the value of lost production due to crime-related mortality and injuries, and both public and private expenditure on security. Based on the percentage of emergency room treatments related to crime, Francis estimates total annual cost to the public health system in 2001 of J\$996 million or 0.3% of GDP. The government's total budget for security services, including defence, justice, correctional services and the police, totalled 3.1% of GDP, of which a proportion was

¹⁰⁸ UNODC and World Bank, "Crime, violence, and development: trends, costs, and policy options in the Caribbean", Report No. 37820, March 2007.

¹⁰⁹ CICS, "The impact of armed violence on poverty and development", University of Bradford, March 2005.

¹¹⁰ Inter-American Development Bank, "Violence as an obstacle to development", IADB Technical Note 4, 2002.

¹¹¹ Caroline Moser, "Urban Poverty and Violence: Consolidation of Erosion of Social Capital," paper prepared for the Second Annual World Bank Conference on Development in Latin America, Bogota, July 1996, p. 4.

¹¹² Holder, Y. and F. Mutota, "Guns and Criminality: A Case Study of Trinidad and Tobago", Background paper prepared for the World Bank study on Crime and Violence in the Caribbean, Washington D.C.: World Bank, 2006.

considered crime-related. Based on the number of people hospitalised as a result of violence and data on the average cost of hospital stays, treatment and medication, total private medical costs were found to be J\$254 million, or just under 0.1% of GDP. Other private costs included lost work and funeral costs. The value of lost production was calculated as a multiple of the average productivity of homicide victims in the year of their decease. In total, the authors found that the total costs of crime in 2001 came to J\$12.4 billion, or 3.7 percent of GDP. However, this excluded private security costs to firms, non-monetary costs to victims, inter-generational effects and long-run impact on capital accumulation and economic growth.¹¹³

- Couttolene et al (2000) estimate the direct and indirect costs of crime in Rio de Janeiro (including medical costs, disability adjusted life years lost, public spending on justice, insurance costs and the value of stolen items) at 5% of 1995 municipal GDP. Velasco and Viegas (2003) conducted a similar study in Belo Horizonte, and produced a figure of 4.1% of 1999 municipal GDP.¹¹⁴
- Bourignon estimates the aggregate cost of crime in Latin America at 7.5 per cent of GDP.¹¹⁵

Some studies of developed countries can offer a basis for comparison.

- According to the US National Crime Prevention Council, the total costs of violent crime in the US in 1999 was \$46.8b, or 0.5% GDP. This included loss of employment and productivity, as well as psychological costs to victims.¹¹⁶
- Brand and Price (2000) estimate the total costs from crime in England and Wales at US\$63.8 billion. Of this, 63% was attributable to violent crime. This tally included both direct costs, including the police and judicial system, and indirect costs such as foregone output and physical and emotional effects.¹¹⁷
- At the global level, Pfizer (2001) estimated that crime and violence together cost the equivalent of 5.0% of the GNP of industrialised countries, and as much as 14% of the GNP of low-income countries.¹¹⁸

A second method of calculating the costs of crime and violence comes from the public health sphere. It is based on Disability Adjusted Life Years (DALY), or the amount of time spent by individuals in particular states of health, thereby measuring crime-related mortality and injury. It therefore takes account of the fact that the majority of homicide victims are young (15-30 years).¹¹⁹ It does not purport to offer a comprehensive assessment of the costs of violence, but

¹¹³ Francis, A. et al., "Crime and Development: The Jamaican Experience." University of the West Indies, 2003.

¹¹⁴ Couttolene (2000), cited in World Bank, "Crime, violence and economic development in Brazil: elements for effective public policy", Report No. 36525, June 2006, p. 23.

¹¹⁵ Cited in Davis, Kevin and Michael Trebilcock, "What role do legal institutions play in development?", University of Toronto, 1999, p. 73.

¹¹⁶ National Crime Prevention Council, "Saving money while stopping crime" 1999, cited in World Health Organization, "The economic dimensions of interpersonal violence", WHO: Geneva, 2004.

¹¹⁷ Brand, S., and R. Price, "The economic and social costs of crime", Home Office Research Study 217, London, 2000.

¹¹⁸ Cited in World Health Organization, "The economic dimensions of interpersonal violence", WHO: Geneva, 2004, p. 15.

¹¹⁹ Moser, Caroline, Ailsa Winton and Annalise Moser, "Violence, fear and insecurity and the urban poor in Latin America" in World Bank, "Urban poverty in Latin America", forthcoming.

is more readily used as a basis for international comparison, and allows for a comparison of the impact of crime with other public-health threats, such as motor-vehicle injuries.

DALYs can be recorded as simple totals, or translated into a monetary value. However, there are methodological difficulties in qualifying the value of a life lost. According to WHO, studies around the world put the costs of a single life lost at between \$3.1 and \$6.8 million, with a mean of \$4.2 million. The available methodologies draw on estimates of the quality of life, wage premiums demanded for risky jobs and the willingness of the public to pay for safety measures, but all of these methods are subject to limitations. Lost productive time is usually a major component, but if based on average wage rates it tends to heavily underestimate the cost of crime in developing countries.

Examples of findings using DALY measures include:

- A study based on 1995 data calculated that violent death cost 178,000 DALYs in El Salvador, 60,792 in Peru and 163,136 in Rio de Janeiro alone. In Rio, violence accounts for 19% of all DALYs lost.¹²⁰
- Londoño and Guerrero (1999) produced a valuation of the DALYs lost as a result of violence in Latin America equivalent to 1.9 percent of regional GDP, which is equal to the primary education budget for the region.¹²¹

A third methodology is econometric studies of the impact of crime on growth in *per capita* GDP, using cross-country regressions. International comparison of crime statistics is complicated by high levels of underreporting. For that reasons, most studies use homicide rates, which suffer the least from underreporting and have standardised definitions, although they provide only a partial picture of overall levels of violence.

Examples of this methodology include:

- A major study of crime across the Caribbean by UNODC and the World Bank¹²² regressed GDP on homicide rates, controlling for income inequality, cost of investment and average male and female education. Crime data was averaged over 5-year periods. The study found that homicide had a significant negative impact on growth. The study calculated the potential gains from crime reduction. Costa Rica, at 8.1 per 100,000, had the lowest homicide rate in the region, while the rates in Jamaica, Haiti, Guyana and the Dominican Republic for the nearest comparable period were 33.8, 33.9, 16.1, and 16.5, respectively. The gain to GDP growth from reducing the homicide rate in these 4 countries to the level of Costa Rica rate would be 1.8% for Guyana and the Dominican Republic, and 5.4% for Jamaica and Haiti. Over time, this would amount to a very large cumulative effect on welfare.

¹²⁰ Buvinic, M. and Morrison, A., "Technical Notes on Violence Prevention", Washington, D.C.: Inter-American Development Bank, 1999.

¹²¹ Londoño, J. and Guerrero, R., "Violencia en América Latina. Epidemiología y costos", Working Paper R-375, Inter-American Development Bank, 1999 – cited in Knaul, Felicia and Miguel Ramirez, "Family violence and child abuse in Latin America and the Caribbean: The cases of Colombia and Mexico", Inter-American Development Bank: Washington, 2005.

¹²² UNODC and World Bank, "Crime, violence, and development: trends, costs, and policy options in the Caribbean", Report No. 37820, March 2007.

- A similar method was used in a World Bank study on Brazil.¹²³ It found that, across Latin America, a decrease of 10 in a country's completed homicide rate (per 100,000) produces an increase in *per capita* GDP over the next five years of between 0.7 and 2.9 percentage points. In Brazil, the average homicide rate between 1991 and 1995 was 28.7 per 100,000 people. If this had been just 10% lower (around 25), *per capita* income would have increased between 0.2 and 0.8 percentage points over the subsequent 5-year period. Applying this to actual income figures, it would have resulted in an increase of \$14-60 in *per capita* income over the observed historical levels. Multiplying this by estimates of Brazil's population in 1996 yields a sum of between US\$2.2 and \$9.4 billion.
- Ayres (1998) estimates that homicide in Columbia costs 2 percentage points annually in GDP growth, with a cumulative effective on GDP of 32%.¹²⁴

One other quantitative method involves modelling the impact of crime on housing and land prices, but this is rarely used in developing countries owing to the lack of developed property markets. The models typically control for characteristics of dwellings and neighbourhood amenities, such as distance to public transport and population density.¹²⁵ In developed countries, the homicide rate is one of the few neighbourhood variables that is statistically significant as a determinant of rent. In Sao Paolo, a 10% reduction in the homicide rate is associated with a 1.5% increase in monthly rents.¹²⁶

There have been separate studies of the costs of crime to the tourism industry in the Caribbean. A UNODC/World Bank study reports that in 2004, the Jamaican tourism minister said that Jamaica's unprecedented crime level was threatening to derail the tourism industry by scaring away visitors and hurting investment. A survey of people working in tourism found that crime and violence were perceived as the main problem afflicting the industry.¹²⁷ Albuquerque and Elroy (1999) showed that property crime tends to be disproportionately directed at tourists. King (2003) showed that the odds of being victimised as a tourist in the Caribbean are low, but posited that tourism is primarily affected by media portrayal of the threat of crime. Alleyne and Boxil (2003) examined the relationship over time between tourist arrivals and crime in Jamaica and concluded that, while crime has discouraged tourists, particularly from Europe, this has been largely offset by increased expenditure on promotion and the development of new kinds of accommodation package.

There have been very few attempts to quantify the costs of crime in other developing regions, in particular Sub-Saharan Africa, presumably due to the difficulty of obtaining data. In place of quantitative assessments, the literature offers qualitative descriptions of spiralling crime rates in many parts of the developing world, and the often devastating impact it has on local communities.

¹²³ World Bank, "Crime, violence and economic development in Brazil: elements for effective public policy", Report No. 36525, June 2006, p. 27.

¹²⁴ Mauricio Rubio, "Crimen y crecimiento en Colombia," in Inter-American Development Bank, *Hacia un enfoque integrado del desarrollo: ética, violencia y seguridad ciudadana, encuentro de reflexión* (Washington, D.C.: 1996) p.94 – cited in Davis, Kevin and Michael Trebilcock, "What role do legal institutions play in development?", University of Toronto, 1999, p. 73.

¹²⁵ UNODC and World Bank, "Crime, violence, and development: trends, costs, and policy options in the Caribbean", Report No. 37820, March 2007.

¹²⁶ Hermann & Haddad (2003), cited in World Bank, "Crime, violence and economic development in Brazil: elements for effective public policy", Report No. 36525, 2006, p. 24.

¹²⁷ Dunn, H. and L. Dunn, "People and Tourism: Issues and Attitudes in the Jamaican Hospitality Industry", Kingston, Jamaica: Arawak Publications, 2002.

One key theme is the rising problem of crime in big cities in the developing world, in particular in slum settlements. Examples include:

- A World Bank survey in Dhaka, Bangladesh found a range of costs associated with crime, without attempting to quantify them. These included the costs of medical treatment, lost productivity due to injuries and direct financial costs to the poor, such as from muggings, burglary or illegal ‘tolls’ (many garment workers routinely pay 10% of their wages to local gangs or to the police in protection money). Non-monetary costs are also substantial. In the more violent slums, there is a lack of social cohesion and high levels of fear and mistrust, which prevents local communities from organising. Many respondents, especially women, report being afraid of moving about their community after dark. The survey found a deep lack of trust by the urban poor in the criminal justice system. Sixty percent of the victims of crime never report it to anyone, and those who do usually go to elders and community leaders. Only 3% of crimes are reported to the police.¹²⁸
- In the *favelas* of Rio de Janeiro, where a third of the city’s poor live, drug gangs have come to provide a kind of perverse social capital. Low self-esteem, social stigma and lack of job opportunities mean that drug gangs offer an attractive route to social status for young men. With policing ineffective or non-existent, a set of behavioural codes has emerged that provide a measure of security for the local community (e.g., only gang members are allowed to carry guns), in exchange for impunity for gang members. The homicide rate among young men is extremely high. The cost of violence is also exported to other communities. For example, in 2002 an upsurge of violence in one middle-class neighbourhood (Tijuca) caused property values to drop by 60 percent.¹²⁹
- In Nairobi, Kenya, armed violence increased dramatically during the 1990s, connected with the effects of structural adjustment programmes that led to mass drop-outs from the education system and a sudden acceleration of urbanisation. Surveys show that 40% of Nairobiens have been victim of armed robbery, losing an average of \$40 in property and cash each time (much of the population lives on less than \$1 per day). A further 18% have been physically assaulted. Hold-ups of commuter buses are commonplace, which is estimated to add 25% to the cost of commuting. Extortion of other businesses is also common. Expenditure on private security firms has increased dramatically, as have insurance premiums. The wider economic costs include suppression of tourism, which is highly sensitive to crime rates, and capital flight.¹³⁰

Impacts of armed violence on rural communities can also be severe.

- In Northern Kenya, the proliferation of small arms has been associated with a dramatic increase in livestock raiding, which has accelerated impoverishment and is now a more serious problem than drought. In southern Turkana, household herd sizes have dwindled to the point where they are becoming materially insignificant, forcing a shift away from a livestock-based existence towards dependence on cash income, in an environment where there are earning opportunities available.¹³¹

¹²⁸ World Bank, “Dhaka: Improving living conditions for the urban poor”, Bangladesh Development Series Paper No. 17, World Bank, Dhaka, 2007.

¹²⁹ CICS, “The impact of armed violence on poverty and development”, University of Bradford, March 2005.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

- Loss of livestock is also a major problem for households in Southern Sudan. In Bahr el Ghazal, an estimated 40 per cent of households have lost all of their animals, while in Ruweng County in Upper Nile the herds of the traditionally pastoralist Ngok Dinka were reduced by 75 per cent during the Nuer raids of 1996 and 1997, forcing many households to switch to purely agricultural activities.¹³²

In the most extreme cases, crime and violence can reach levels where it undermines the legitimacy of the state itself, causing it to lose its monopoly on legitimate violence.

- In Nigeria, rival gangs of young people ('Area Boys') are regularly engaged in armed combat with each other and with security forces, with civilians often caught in the crossfire. An estimated 53,000 people were killed between 2001 and 2004 in gun violence across the country. With light arms freely available, gun culture has become normalised among the youth population, turning existing cleavages (social; ethnic) into lines of violent confrontation. There have been more than 50 outbreaks of ethno-religious violence since 1999, displacing an estimated 800,000 people. The state security services are heavily implicated in the violence, reportedly selling and leasing military weaponry on the black market. Vigilante groups have emerged to provide private security services, and extra-judicial killings of alleged armed robbers are commonplace. However, vigilante groups have also become involved in protection rackets and inter-group violence. Violence has come to play a major role in local politics, with politicians using armed youth gangs to kidnap or kill political rivals, intimidate voters and disrupt elections. Traditional social capital has been destroyed by the constant fear of impending violence. With all of the major markets controlled by armed gangs, economic activity is suppressed by extortion, illegal taxes and looting. For example, bus and taxi services are controlled by gangs, who levy illegal 'taxes' on commuters. As a result of the violence, the state has sharply reduced capacity to deliver services.¹³³

One issue that has not been assessed in any detail in this review is the extent of reverse causation – that is, the extent to which rates of crime respond to poverty, food insecurity and inequality. Moser *et al* note that the causal roots of urban violence are not well understood, but appear to relate not to poverty *per se*, but to inequality and exclusion. Income distribution appears less significant than specific exclusion factors around employment, education, health and basic infrastructure.¹³⁴

5.3 Critique

There is a higher degree of consensus on the premises underlying research on the costs of crime, compared to the other areas reviewed here. Although there are concerns regarding the quality of data, the causal linkages appear relatively uncontroversial. However, there are also some important critiques in the literature.

In a study on the costs of crime in South Africa, Christopher Stone writes that the area is marked by "many hypotheses and few certainties".¹³⁵ He warns that the available methodologies have

¹³² *Ibid.*

¹³³ *Ibid.*

¹³⁴ Moser, Caroline, Ailsa Winton and Annalise Moser, "Violence, fear and insecurity and the urban poor in Latin America" in World Bank, "Urban poverty in Latin America", forthcoming.

¹³⁵ Stone, Christopher, "Crime, justice, and growth in South Africa: towards a plausible contribution from criminal justice to economic growth", CID Working Paper No. 131, August 2006.

been developed in high-income countries based on data from central government sources, which are not available in most low- and middle-income countries. Much of the data comes from hospital-based records, in which lower income countries are at a significant disadvantage.

He states that many common hypotheses on the cost of crime, while plausible, are also largely anecdotal. We do not have the kind of detailed survey data that would enable us to understand the trade-offs that individuals make in the presence of high crime rates. For instance, there is evidence that people are more willing to take on high-risk jobs than a purely rational calculus would suggest. If people in high crime areas normalise the risks, then the effects on economic behaviour may be correspondingly less.

He assesses two “serious hypotheses” on the costs of crime: that it reduces business profits and deters investment; and that perceptions of high crime leads the population to curtail its work and business activities. He cites evidence that the costs of crime for the median South African business is 1.1% of sales, 3% of net value added and 5% of labour costs – similar to the figures from Brazil, Russia, Peru and the Philippines. The costs to small, informal business may be higher, with some proprietors finding that the risk of robbery makes the business unviable, although this is highly location-specific. The wider proposition that high crime rates harm the general business environment seems to depend more on perceptions than on the actual incidence of crime. For example, South Africa has enjoyed some success in tackling certain crimes – car-jacking, bank robbery, murder – but this has not been reflected in perceptions. Therefore, the problem may be one of communication.

Stone notes that there is no general evidence that increased expenditure on the criminal justice system results in lower crime rates. Altbeker also writes that expenditure on criminal justice is not the principal determinant of crime levels in any country. There is some evidence from South Africa that spending on social services has been more effective in reducing certain types of crime, although it may also be true that crime levels are independent of any government spending.¹³⁶ However, focused efforts can reduce specific crimes in particular locations. This suggests that the best strategy is to identify the crimes that have the most direct impact on businesses, and to focus efforts accordingly.

Stone concludes by suggesting the need for “healthy scepticism” about the potential of the criminal justice system to spur growth. He recommends further research into the costs of crime for the formal business sector, to determine the principal costs involved (insurance, corruption, protection etc.) and target the relevant crimes with special units. He proposes measures to improve community safety in areas with a high concentration of household business, and improved communications to build overall confidence in the criminal justice system and reduce negative perceptions.

5.4 Conclusions

One clear conclusion emerging from the literature is the rather obvious point that nexus between crime and development is much higher in countries suffering from high crime rates. There are certain areas of particular concern, including much of Latin America and the Caribbean and parts of Sub-Saharan Africa with a high concentration of small arms. Crime is also emerging as a major issue in the management of rapidly growing urban settlements in the developing world.

¹³⁶ Altbeker, Antony, “Paying for crime: South African spending on criminal justice”, ISS Paper No. 115, July 2005, p. 15.

The literature suggests that the main economic costs of crime are the direct costs for business and individuals, the impact of perceptions of crime on economic behaviour (e.g., investment and labour force participation) and the diversion of public expenditure into the justice and health sectors. It is likely that the specific composition of these costs varies across different country contexts.

A major gap in the literature is the absence of clear evidence of the impact of expenditure on criminal justice on crime levels. If authors such as Stone and Altbeker are correct, and crime levels are largely independent of public expenditure, then the case for channelling development resources into the justice sector is relatively weak, whatever the economic costs of crime. A key priority for future research should therefore be on the impact and cost-effectiveness of different kinds of policy response to crime.

However, it is also likely, as Stone argues, that criminal justice interventions may be effective at particularly times and places in repressing particular kinds of crime. If so, rather than investing in the justice sector in general in the hope of boosting economic growth, a better strategy might be focused efforts targeting specific crime-related problems with the most direct impact on growth and poverty. The research needs are therefore highly context-specific: to understand which categories of crime pose the greatest threat to growth, or have the greatest impact on poor people, in particular locations, and to identify the measures most likely to impact on that type of crime.

6. Justice and gender

This section looks at the potential of justice institutions to address gender discrimination in developing countries. Literature in this area focuses mainly on two issues: women's property rights and gender-based violence. There is ample evidence that both problems are widespread in developing countries, with often severe impact on poor households. However, there is limited evidence on the capacity of the justice system to resolve them.

6.1 Gender and property rights

Discrimination against women in property systems is widespread. Globally, women own less than 10% of the world's property.¹³⁷ Under customary systems of property tenure, which accounts for at least 75% of the land in most African countries,¹³⁸ women are rarely accorded equal rights with men.

Human Rights Watch writes that, in most countries in Sub-Saharan Africa, women's rights to own, inherit, manage and dispose of property are under constant attack from customs, laws and individuals, including government officials. Women have limited legal rights, and risk being ostracised by their community if they try to assert them. Women's rights to property are usually determined by their relationship with men. Upon termination of a relationship, women often lose their homes, land, livestock and household goods, undermining their social and economic status. Dispossession of rural women contributes directly to poverty and uncontrolled urbanisation. The threat of loss of property makes it difficult for women to leave abusive relationships. Widows may also be subject to customs such as 'wife inheritance' and 'ritual

¹³⁷ Commission on Legal Empowerment of the Poor, "Making the law work for everyone", Vol. II Working Group Reports, 2008, p. 77.

¹³⁸ Sage, Caroline and Woolcock, Michael, "Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries", 2005.

cleansing', which heightens their risk of HIV infection. HRW notes that violations of women's property rights are a result not just of the substance of laws and customs, but also institutionalised gender bias within legal institutions and communities.¹³⁹

UNDP writes that women's insecure property rights are a core cause of Kenya's economic troubles, contributing to low agricultural production, food shortages, underemployment and rural poverty.¹⁴⁰ Women account for only 5% of registered land ownership, despite comprising over 80% of the agricultural labour force. Women generate approximately 60% of farm-derived income, yet female-headed households own on average less than half the farm equipment owned by male-headed households. Women head 37% of all households, a number which is growing rapidly as a result of the HIV-AIDS epidemic. It is devastating for these households when women lose their land.

The Commission on Legal Empowerment of the Poor concludes:

“Ensuring that women’s names appear on land records, that their rights are enshrined in communal property systems, and that inheritance rights of widows and daughters are established and protected, would go a long way towards improving their condition. This is essential to empowerment and the promotion of entrepreneurial activity and should be placed at the centre of property reform efforts...

...Creating enforceable property rights is essential to empower women in both rural and urban settings. Women who own property or otherwise control assets directly gain from such benefits as use of the land and higher incomes as well as having a secure place to live. Empowering women with property rights does a great deal to alleviate poverty and malnutrition, as women who earn more spend a higher proportion of their income to keep their children healthy and well-fed. Providing women with the right to use, own, and transfer moveable and immovable property is important to promote entrepreneurial activity and to provide women with a platform for building strong families and strong businesses.”¹⁴¹

However, formalisation of land tenure has not always worked to the advantage of women. Most tenure reform ends up providing title to men, who gain an absolute right that transcends traditional obligations and rights of usage. In some cases, land has been turned into a commodity that men can sell without the approval of their clan or family. Men may also assert sole rights to the agricultural surplus, even though women provide most of the labour.¹⁴²

6.2 Gender-based violence

The economic and social consequences of gender-based violence (GBV) include many of those of violent crime in general, in particular lost earnings and productivity due to mortality and injury, and a drain on health and other social services.¹⁴³ There are also costs that are specific to GBV. Fear of violence against girls can reduce primary school attendance. Mental health

¹³⁹ Human Rights Watch, “Double Standards: Women’s Property Rights Violations in Kenya”, HRW Report, Vol. 15, No. 5, 2003.

¹⁴⁰ Cited in Human Rights Watch: Double Standards: Women’s Property Rights Violations in Kenya, HRW Report, Vol. 15, No. 5, 2003.

¹⁴¹ Commission on Legal Empowerment of the Poor, “Making the law work for everyone”, Vol. II Working Group Reports, 2008, p. 65.

¹⁴² Human Rights Watch, “Double Standards: Women’s Property Rights Violations in Kenya”, HRW Report, Vol. 15, No. 5, 2003.

¹⁴³ World Bank, *World Development Report 1993: Investing in Health* (Washington, D.C.: World Bank, 1993), pp.25-29.

conditions among abused women is a common cost that often goes unrecognised. The breakdown of family life also has important intergenerational effects.

Measuring the prevalence and economic cost of gender-based violence (GBV) uses similar methods to those described above for assessing the cost of crime in general. There are three main methods described in the literature for quantifying the costs.

1. Calculating a share of the budgets of relevant service providers attributable to GBV. This is usually done by determining a unit cost of service provision (based on surveys of service providers) and multiplying it by the incidence of GBV (from population surveys);
2. An accounting methodology, based on an aggregate of various direct and indirect costs, including DALYs;
3. Imputing the cost of lost incomes and productivity through econometric methods. A common technique is propensity score matching, which pairs women who have been victims of GBV with women who have not, but have a similar estimated *a priori* probability of being victimised,¹⁴⁴ in order to generate a control group to assess the impact of GBV on earnings and other economic behaviour.

All three methods have limitations in developing country contexts, owing to the shortage of data.

Some findings regarding prevalence rates include:

- HRW reports that GBV in Kenya is commonplace, affecting 60% of married women in a 2002 survey. In another study, 83% of women reported being physically abused in childhood, and nearly 61% as adults.
- A World Bank study reports that prevalence rates of spouse abuse in Latin America range from 15 to 65%.¹⁴⁵
- Morrison reports that lifetime victimisation rates among women range from 13% in Japan to 62% in Peru. Rural rates are always higher than urban areas.¹⁴⁶
- In a recent World Bank survey in Dhaka, 30% of female respondents reported being victims of GBV in the past 12 months. This was a very high figure, as usually special survey techniques are required to overcome women's reluctance to report on GBV.¹⁴⁷

Note, however, that most domestic violence goes unreported, making prevalence difficult to establish.¹⁴⁸

Among the findings in the literature on the impact of GBV are:

¹⁴⁴ Duvvury, Nata, Caren Grown and Jennifer Redner, "Costs of intimate partner violence at the household and community levels", International Center for Research on Women, 2004.

¹⁴⁵ Heise, Lori, "Violence Against Women: The Hidden Health Burden", World Bank Discussion Papers No. 255, 1994.

¹⁴⁶ Morrison, Andrew and Maria Orlando, "The costs and impacts of gender-based violence in developing countries: methodological considerations and new evidence", World Bank, November 2004, p. 5.

¹⁴⁷ World Bank, "Dhaka: Improving living conditions for the urban poor", Bangladesh Development Series Paper No. 17, World Bank, Dhaka, 2007.

¹⁴⁸ World Health Organization, "The economic dimensions of interpersonal violence", WHO: Geneva, 2004.

- A study conducted by the IADB in Chile and Nicaragua found that women who were victims of violence (not just family-based violence) earned far less than non-abused women, and that the value of lost earnings in 1996 was equivalent to more than 2% of GDP in Chile and 1.6% of GDP in Nicaragua. The Nicaraguan research also found that 63.1% of the children of female victims had to repeat a school year, and that those children left school on average 4 years earlier than other children.¹⁴⁹ Moreover, children who witness abuse or are victims themselves tend to imitate that behaviour and perpetuate the cycle.
- Sánchez *et al.* (2004) find that the Colombian national government spent approximately US\$73.7 million in 2003 on services to survivors of intimate partner violence, an amount equal to 0.6% of the national budget. In Bogota, victims of GBV would have earned \$60 more per month without the victimisation, or \$100 more for severe violence. Compared to mean monthly earnings of \$142, this is a substantial loss.¹⁵⁰
- UNICEF cites World Bank data from the 1980s that, across developing countries, between 5 and 16 percent of DALYs lost are attributable to GBV. It finds a significant impact on education, with 63% of children from families involving GBV repeating a grade and an average drop-out age of 9, compared to 12 for other women.¹⁵¹
- Knaul and Ramirez cite a study on the health impacts of domestic violence in Mexico City, which found that 1 in 6 DALYs lost among girls aged 5 to 14 is due to violence.¹⁵² They also note the extensive impact of GBV during pregnancy on maternal and child health, as well as longer-term psychological impacts and poor educational attainment of mistreated children in Chile.¹⁵³
- A major study by Morrison and Orlando using propensity score matching for data from Peru, Haiti and Zambia found significantly lower earnings among victims of GBV, but little impact on labour force participation.¹⁵⁴ It found that victims had a higher probability of suffering miscarriages or problems during childbirth, and that their children were more likely to suffer from a range of health conditions. It found some evidence of inter-generational transmission, with women who had been victims of GBV more likely to use violence to discipline their children. It found no significant impact on children's nutritional status, and an unexpectedly positive effect on educational attendance, suggesting that women in violent households may keep their children in school longer as a means of protecting them.

¹⁴⁹ Morrison, Andrew and María Orlando, "The Socio-Economic Impact of Domestic Violence Against Women in Chile and Nicaragua.", Women in Development Unit, IDB: Washington, 1997.

¹⁵⁰ Sanchez et al. (2004), cited in Morrison, Andrew and Maria Orlando, "The costs and impacts of gender-based violence in developing countries: methodological considerations and new evidence", World Bank, November 2004, p. 7.

¹⁵¹ UNICEF, "Domestic violence against women and girls", *Innocenti Digest*, June 2000.

¹⁵² Lozano (2000), cited in Knaul, Felicia and Miguel Ramirez, "Family violence and child abuse in Latin America and the Caribbean: The cases of Colombia and Mexico", Inter-American Development Bank: Washington, 2005, p. 1.

¹⁵³ Larraín, 1997; Larraín, Vega and Delgado, 1997 – cited in *ibid.*, p. 2.

¹⁵⁴ The findings on labour force participation were unexpected. Morrison and Orlando hypothesise that the expected results these may be because victims seek paid employment to give them a means of leaving an abusive relationship, or that women in employment suffer a higher rate of abuse. They call for more qualitative research to disentangle the different effects. Morrison, Andrew and María Orlando, "The Socio-Economic Impact of Domestic Violence Against Women in Chile and Nicaragua.", Women in Development Unit, IDB: Washington, 1997, p. 10.

The variation across these findings in areas such as labour force participation and effects on children suggest that there is a continuing need to refine the methodologies and conduct more rigorous studies. However, it will continue to be very difficult to apply these methods in countries where the majority of working women are engaged in small-scale agriculture and informal employment. This makes it very difficult to place a valuation on reduced output and productivity.

6.3 Justice institutions and discrimination

A notable gap in the literature is on the extent to which the justice system is able to influence entrenched patterns of discrimination against women, given that justice institutions themselves tend to reflect the prejudices of wider society.

There is some reason to be sceptical that the justice system is the best starting point for addressing discrimination, compared to other possible methods like public education, mobilisation of women's groups or political campaigning. There is evidence that, even if laws are reformed to address gender discrimination, women tend to be poorly equipped to use the legal system to assert their rights, and justice officials may block implementation of the reforms. This was the experience in Tunisia following changes to family law to abolish traditional Islamic divorce and prevent the abandonment of women.¹⁵⁵ There are limits to the extent to which legal institutions are willing and able to move ahead of broader social trends.

Customary and informal justice systems are perhaps even more prone to reflecting prejudice against women. Faundez rights that the community-based *Rondas* system of dispute resolution in Peru is only accessible to women via male members of their family.¹⁵⁶ Customary legal systems tend to emphasise restorative justice and the preservation of the family. This makes them poorly equipped to deal with problems like GBV or inheritance disputes.¹⁵⁷

However, there may be conditions in which courts or other justice institutions are willing and able to lead on addressing discrimination. Dasgupta offers an account of the role of the Indian Supreme Court in changing attitudes towards women.¹⁵⁸ India has pioneered the use of public interest litigation, introducing procedures that allow volunteer lawyers or citizen petitioners to bring a case on behalf of a victimised group that does not have access to legal services. Although there are few rights relating specifically to gender in the Indian constitution, the Court has interpreted other rights liberally in order to take an active stand on the issue. The Court has formally eliminated a range of discriminatory laws, although it has also faced a lack of cooperation from police and other government agencies. The author concludes that the Court has succeeded in promoting greater public awareness of women's issues, due to widespread media coverage of its decisions.

The extent to which law can act as an agent of social change is a problem of considerable theoretical and empirical complexity. Sage and Woolcock point out that, in most countries, the

¹⁵⁵ Davis, Kevin and Michael Trebilcock, "What role do legal institutions play in development?", University of Toronto, 1999, pp. 90-1.

¹⁵⁶ Faundez, J., "Non-State Justice Systems in Latin America. Case Studies: Peru and Colombia", Paper prepared for the DFID Workshop on Working with Non-State Justice Systems, 6-7 March 2003.

¹⁵⁷ Scharf, Wilfried, "Non-state justice systems in Southern Africa: How should governments respond?", University of Cape Town, 2003, p. 20.

¹⁵⁸ Dasgupta, M., "Social Action for Women? Public Interest Litigation in India's Supreme Court", *Law, Social Justice and Global Development Review*, vol. 1, 2002.

legal systems serves to perpetuate existing power relations by controlling the distribution of resources and opportunities, producing legal inequality traps. However, the justice institutions, being embedded in the rules, practices and norms of the societies in which they operate, are also a product of these structures of inequality. There are multiple, circular causal relationships involved that are difficult to disentangle.¹⁵⁹

Perhaps the best conclusion is that, while there is little reason to believe that improvements to the efficiency of the justice system *in general* will help to address gender discrimination, there are nonetheless circumstances in which a legal empowerment approach can offer a credible strategy, particularly when combined with other measures. Careful analysis, however, is required in order to identify these opportunities.

7. Justice and governance

That the quality of legal institutions affects the quality of governance is an intuitively appealing idea, but one that is very difficult to establish empirically. The literature is characterised by many assertions (often contradictory) as to the role of law in government performance, but little empirical work.

7.1 Theory

The most prominent theme in the literature is the role of the legal system in limiting various forms of misbehaviour by the state. Dam traces this strand of thinking back to the historical development of the rule of law in Europe, when economically empowered citizens began to demand protection from predatory rulers who would seize their property or default on loans. The rule of law emerged as a form of political bargain to control the power of the sovereign.

This was also an important tenet of the ‘Washington consensus’, which advocated using law to limit state interference in the economy by preventing infringement of property rights and other arbitrary interference by the state in the affairs of citizens. Douglass North wrote that states have more often been harmful than helpful to economic growth, and that the key is to limit their role to impartial ‘night watchmen’.¹⁶⁰ The role of the legal system is to create a clear framework of rules governing the interaction between the state and economic actors, with efficient and impartial third-party adjudication.

In contemporary governance thinking, the equivalent is the emphasis on legal accountability, to limit corruption and compel the state to treat citizens fairly. For example, the Commission on Legal Empowerment of the Poor advocates judicial review of the administration and citizen complaints against government as a tool to protect poor people from exploitation by government officials.

What these approaches have in common is a tendency to see the power of the state as a threat to development, and the legal system as a mechanism for controlling it. This is the dominant perspective in the literature.

¹⁵⁹ Sage, Caroline and Woolcock, Michael: ‘Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries, 2005.

¹⁶⁰ North, Douglass, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), p. 35.

There is a competing view that emphasises the importance of law in the *construction* of state power, in order to enable it become an active agent of modernisation and development. This perspective sees law not as a constraint, but as a social engineer – a force which can be moulded and manipulated to alter behaviour and promote development. Meredith Woo-Cummings dismisses the dominant emphasis on controlling the power of the state as a relic of pre-industrial society.

“As the Federalist Papers long ago noted, the point of this state form was to disperse and confine political power, to divide it into three branches of government that would check and balance each other, to have the legislators keep an eye on the executive, the local states corral and confine the central government, and the judges watch them all. It was a form of politics suitable to an agrarian economy of yeoman farmers, and as that economy slowly became urban and industrial, no less than Thomas Jefferson condemned this transformation in the name of the pastoral ideals that underlay his conception of American governance. That was more than 200 years ago, of course, and for the past 150 years the central problem was not how to restrain power, but how to create it in the first place.”¹⁶¹

Of course, Woo-Cummings writes as a supporter of the East Asian “developmental state”, which played a more prominent role in the economy than is advocated in current development doctrine. However, contemporary theory does emphasise the importance of market failures, and the role of the state in correcting for them. In areas from environmental protection to trade practices, law is seen as a tool for buttressing the market and delivering on public policy goals.

Furthermore, as donors have shifted resources into the social sectors, this has led to a new strand of thinking on law and development which emphasises the importance of a framework of citizen entitlements to public services, and the role of justice institutions in enforcing those rights. In effect, the legal system is seen as one of the instruments by which the state (especially a decentralised state) achieves its goal of providing universal primary education and health care and basic infrastructure.

However, Kennedy points out that this more affirmative idea of the role of law in development turns not just on the rule of law (an effective framework of laws and institutions), but on the way in which law is mobilised to serve particular development policies. The legal system is only a tool. Concentrating purely on the legal system can mask the fact that the primary issue is the underlying policy framework and the politics that gives risk to it.

“In each period, policymakers allocated resources, taking from some and giving to others, to maximize the potential for the broad social and economic transformations evoked by the word ‘development’ as they understood it. The broad development strategies – import substitution, export-led growth, and neoliberal market development – expressed quite different background ideas about how and to whom resources should be distributed to maximize development. These distributive commitments – to take from agriculture and give to industry, to transfer from public to private management, to favour foreign over domestic investors or vice versa – were then written as law...”

The idea that building ‘the rule of law’ might *itself* be a development strategy encourages the hope that choosing law *in general* could substitute for all the perplexing political and

¹⁶¹ Woo-Cummings, Meredith, “The rule of law, legal traditions, and economic growth in East Asia”, UNU Research Paper No. 2006/53, May 2006, p. 13.

economic choices that have been at the centre of development policy making for half a century.”¹⁶²

Across all of the law and development literature, there is remarkably little consideration of the role of law in allocating resources.

The role of law in the construction of state power has also become more important as donors have grappled with the problem of weak or fragile states. A recent DFID publication on state building¹⁶³ emphasises the importance of establish a critical set of ‘survival’ functions following new political settlements, which include the provision of security and the capacity to rule through law. The justice system is both a tool for establishing the authority of the state, and a protective service offered by the state to citizens. The rule of law also provides guarantees for those who agree to support political settlements that undertakings will be respected, thereby lowering the risks of participation.

The returns on investments of S&J in fragile states may therefore be of a different order than in other development contexts. A recent OECD-DAC paper argues that S&J is not only a precondition for the delivery of all other public goods, but also constitutive of the state itself.¹⁶⁴ S&J differs from other government services because the security organs themselves may be an underlying cause of insecurity. Establishing civilian authority over the security sector may therefore be a fundamental state-building task. In sum, engaging with the security sector in fragile states may be an imperative that donors simply cannot avoid. The hard question is not whether to do so, but how to do so effectively.

7.2 Evidence

It is very difficult to establish any of these propositions empirically, and the literature makes little attempt to do so. The most that it offers is elaborations on or illustrations of different causal links between justice and governance.

Writings on the justice system and the performance of public institutions includes the following.

- A starting point for much of the literature is Hirschman’s classic formulation that, while markets induce efficacy through choice, governments are principally disciplined by the exercise of voice. Citizens therefore need avenues through which to challenge government performance. The legal system, and specifically judicial review of the administration, provides one of those avenues.¹⁶⁵
- In another classic text, Drèze and Sen (1989) assert that no country with a free press has ever had a major famine. They postulate that the free flow of information pushes even

¹⁶² David Kennedy, “The ‘rule of law,’ political choices, and development common sense” in Trubek, David and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal* (Cambridge: Cambridge University Press, 2006), p. 168.

¹⁶³ Whaites, Alan, “States in development: understanding state-building”, DFID Working Paper, 2008.

¹⁶⁴ McLean, Andy and Eric Scheye, “Enhancing the delivery of justice and security in fragile states”, paper for the DAC Fragile States Working Group, draft 2007.

¹⁶⁵ Hirschman, Albert, *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States* (Cambridge, Mass.: Harvard University Press, 1970).

undemocratic regimes into a public response.¹⁶⁶ Legal safeguards on freedom of speech may therefore contribute directly to improved government performance.

- The *World Development Report 2006* stresses the important of enhancing judicial independence in order to constrain state power. It defines the role of justice institutions as watchdogs on the public sector, and stresses their importance in combating discriminatory norms and practices.¹⁶⁷
- Andersen argues that public corruption increases the financial burden on the poor through illegal charges for essential services such as health, access to water and power and basic administrative services. He argues that political accountability consists of two elements: answerability (public official are required to explain their actions) and enforceability (legal sanctions against officials who break the law).¹⁶⁸
- There are a number of World Bank studies showing that development projects perform better when the responsible government officials are held accountable for implementing them, through complaints mechanisms accessible to beneficiaries.¹⁶⁹
- Isham regresses the economic rate of return on World Bank investment projects in different countries against the Freedom House index of civil liberties, finding a strong link between stronger civil liberties and improved project performance.
- The Commission on Legal Empowerment of the Poor argues that judicial review of the administration can make a substantial difference to the delivery of government services.

Government bureaucracies responsible for delivering essential services and for interventions in relationships between citizens should have a well-functioning system for providing enforcement and mediation services, addressing complaints, resolving disputes, and providing redress. These systems should be cost-efficient, transparent, user-friendly and swift.¹⁷⁰

The Commission argues in favour of a package of reforms, including freedom of information legislation, impact statement requirements, whistleblower protection and procedure reforms to support public interest litigation.

- In a project commissioned by the Asian Development Bank, Golub makes a range of claims for the impact of legal empowerment programmes on governance. He argues that legal empowerment advances good governance by encouraging greater public participation in “administrative and other public decision making and related governmental processes”. It contributes to the fair implementation of laws to promote development. Among the achievements of past programmes are improved awareness of human rights, increased knowledge of specific legal issues, greater citizen confidence and expectations of government, more citizen monitoring of government performance, and strong political advocacy around policy and law reform.¹⁷¹

¹⁶⁶ Drèze, Jean and Amartya Sen, *Hunger and Public Action* (New York: Oxford University Press, 1989).

¹⁶⁷ World Bank, *World Development Report 2006: Equity and Development* (Washington DC: World Bank, 2006).

¹⁶⁸ Anderson, M., “Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs”, IDS, 2003.

¹⁶⁹ See Isham, Jonathan, Daniel Kaufman and Lant Pritchett, “Civil liberties, democracy and the performance of government projects”, *The World Bank Economic Review*, Vol. II(2), 1997, pp. 219-242 and the studies cited on p. 222.

¹⁷⁰ Commission on Legal Empowerment of the Poor, “Making the law work for everyone”, Vol. II Working Group Reports, 2008, pp. 50-1.

¹⁷¹ Golub, S. and M McQuay, “Legal empowerment: advancing good governance and poverty reduction”, Asian Development Bank, 2001.

A number of contrary points can be noted from the literature. First, though we have not reviewed the literature on the relationship between corruption and growth, there is ample evidence of countries that have grown rapidly despite the presence of high levels of corruption. Second, Ogus makes the point that one cannot expect the legal system to be an effective tool for addressing corruption when corruption within justice institutions is part of the problem.¹⁷² There is no reason to believe that justice institutions are easier to reform than the administration, and the reverse may well be true. It is notable that many anti-corruption programmes focus not the judiciary, but on specialised institutions like anti-corruption commissions.

Third, Carothers notes that the links between the justice system and democratic politics are difficult to pin down.

“The idea that specific improvements in the rule of law are necessary to achieve democracy is dangerously simplistic. Democracy often, in fact usually, co-exists with substantial shortcomings in the rule of law. In quite a few countries that are considered well-established Western democracies – and that hold themselves out to developing and postcommunist countries as examples of the sorts of political systems that those countries should emulate – one finds various shortcomings: (1) court systems that are substantially overrun with cases to the point where justice is delayed on a regular basis; (2) substantial groups of people, usually minorities, are discriminated against and unable to find adequate remedies within the civil legal system; (3) the criminal law system chronically mistreats selected groups of people, again, usually minorities; and (4) top politicians often manage to abuse the law with impunity, and political corruption is common...

...Countries struggling to become democratic do not face a dramatic choice of ‘no rule of law, no democracy’ but rather a series of smaller, more complicated choices about what elements of their legal systems they wish to try to improve with the expectation of achieving what political benefits.”¹⁷³

8. Conclusions

The link between S&J and development emerges as an area with many controversies and few certainties. Overall, the literature makes a strong case that there are times and place where investments in S&J can be an extremely effective means of promoting development. Yet it is also clear that many of the specific claims made in the literature go beyond the available evidence, and need to be treated with some care. As one author put it, the idea of the rule of law may become “conceptually overburdened when it is invoked for too many potentially opposed reasons.”¹⁷⁴

To disentangle the web of causality involved, it may be useful to distinguish between four different potential linkages between S&J and development:

1. S&J and poverty alleviation;
2. S&J and efficient markets;

¹⁷² Ogus, Anthony, “The importance of legal infrastructure for regulation (and deregulation) in developing countries”, Centre on Regulation and Competition, University of Manchester, Working Paper No. 65, June 2004, p. 13.

¹⁷³ Thomas Carothers, “The problem of knowledge” in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington D.C.: Carnegie Endowment, 2006), p. 18.

¹⁷⁴ Bergling, Per, *Rule of law on the international agenda: international support to legal and judicial reform in international administration, transition and development co-operation* (Antwerp: Intersentia, 2006), p. 18.

3. S&J and social change;
4. S&J and government performance.

8.1 Justice and poverty alleviation

The evidence of direct impacts of a lack of S&J on poor people in many developing countries is very strong. Insecurity and injustice can be an acute source of vulnerability, tipping households into destitution. The source of vulnerability include:

- loss of land and housing (and often, by extension, livelihood) as a result of insecure property rights;
- becoming victims of crime, which involves direct costs (injury and mortality; lost property) and indirect costs (lower participation in the workforce; worse educational outcomes);
- discrimination or persecution at the hands of more powerful individuals (landlords; government officials; employers), in particular discrimination against poor women (lack of economic opportunities; mistreatment and dispossession of widows) or human rights violations such as detention without trial.

As a result of these phenomena, legal inequality and lack of access to justice can become a contributing cause of extreme poverty.

The management of rapidly growing urban centres in the developing world emerges as a topic of particular importance. Large numbers of poor people are living in informal settlements without clear legal status, exposing them to a range of exploitation. Providing secure and affordable housing, to reduce homelessness and street children, is a key priority. If the state is unable to provide security and justice, the gap is quickly filled by criminal gangs and protection rackets, who suppress local development, damage social capital and generate violent externalities, such as the drug trade and a normalisation of gun culture. Young people growing up in this environment may suffer from ‘area stigma’ that inhibits their access to society and leaves them with little choice but to lapse into criminality.

The development returns from S&J programmes designed to support poor communities will be mainly the direct impact on reducing vulnerability and destitution. There may in addition be certain positive externalities, such as reduced crime and social problems and greater participation of poor communities in the economic life of the country.

The development returns available will be proportional to the scale of the underlying problems. In a context where slum settlements are growing rapidly and where extreme poverty has become increasingly an urban phenomenon, the return on investment in S&J programmes may be very high. Likewise, if dispossession of widows is widespread leading to destitution among female-headed households, then investments in women’s property rights will emerge as a priority.

In other words, the causal links between S&J and poverty alleviation are specific and context-dependent. It may therefore be useful for policy makers to think of S&J programmes as offering a set of tools to address particular, observed causes of poverty.

By the same token, when tackling problems such as slum housing or dispossession of widows, S&J activities are likely to be only a component of a broader strategy. For example, providing affordable housing for the poor is unlikely to be solely a question of property registration or more efficient land markets. It may often be the case that S&J programmes are most effective

when linked to other development activities. Furthermore, many social policies and programmes may be enhanced by beneficiaries having a better understanding of their rights and improved avenues for asserting them.

8.2 Justice and efficient markets

While there is clearly a strong association between effective legal and judicial systems and efficient markets, it is difficult to make definitive statements about the direction of causation. It does appear, however, that the commercial justice system needs to evolve in tandem with the market itself. There is unlikely to be much value in investing in the development of sophisticated commercial laws and institutions before there is a demand for them. Furthermore, the evidence suggests that, once the market has reached that point, adopting a set of laws to support its continuing development is unlikely to be a major problem for most countries. Writing laws is a relatively low-cost activity, and there is ample specialist support available.¹⁷⁵

The more important question for DFID is whether and in what circumstances investments in the legal system can help to promote growth in low-income countries. There are a number of points to note from the literature.

First, evidence on the relationship between legal institutions and foreign investment is equivocal. There is ample survey data suggesting that businesses are concerned about the security of their investments. However, the data is open to different interpretations, and there are some doubts as to whether businesses really look to the courts to protect their investments. They may be more influenced by their overall perceptions of the country's stability and the level of political support for foreign investment. The question of whether specific deficiencies in laws or legal institutions are discouraging foreign investment is an empirical one that needs to be assessed in each country context.

Second, there is evidence that crime levels can impact on business in a variety of ways. Crime can cause business to divert resources away from productive investment and into security. It can discourage expansion of business, or cause business to relocate out of high-crime areas. It can be a cause of absenteeism, and discourage workers from taking on night-shift work. It can lead to capital flight and brain drain. All of this suggests that countries that are serious about promoting investment must be able to keep crime at manageable levels. There is also a suggestion in the literature that business may be more responsive to perceptions of crime, than to actual crime levels. This suggests that improved communications may need to be part of the solution.

The impact of S&J on the informal business sector is potentially very important, but also poorly understood. The Commission on the Legal Empowerment of the Poor argues that informality itself is the primary constraint on informal business growing to scale and joining the formal economy. Informal businesses are unable to borrow funds, enforce contracts or access public services because of their uncertain legal status. According to the Commission, bringing the informal economy within the protection of the law would unlock its growth potential.

This needs to be further tested empirically. There may be many reasons why micro-businesses prefer to remain informal. It may be that formalisation in the conditions prevailing in many

¹⁷⁵ Dani Rodrik writes: "Once growth is set into motion, it becomes easier to maintain a virtuous cycle with high growth and institutional transformation feeding on each other." Rodrik, Dani, "Getting institutions right", Harvard University, April 2004, p. 10.

developing countries would do as much harm as good. However, the Commission does make an important point about providing informal business with ‘bridges’ to enable them to interact with government and the formal economy. Further research could usefully explore to what extent there is unfulfilled demand among micro-businesses for public goods (e.g., infrastructure) and private services (e.g., finance), what legal barriers (e.g., informal land tenure; lack of standing in court) they face in accessing them, and what kinds of legal services or institutions would most likely assist them.

In addition, there is evidence that, in some contexts, crime and insecurity can be a major disincentive to micro-businesses. As Stone points out, the problem is likely to be location-specific. There may be good case for concentrating policing and other security measures on areas with a high density of household businesses.

8.3 Justice and social change

The concept of legal inequality traps, developed by authors such as Sage and Woolcock,¹⁷⁶ are potentially very important to social development. The legal system both reflects and reinforces power relations and social exclusion. Legal institutions may create barriers for certain social groups – women, caste groups, slum residents, ethnic minorities – that prevent them from escaping from poverty. Where this occurs, there is the possibility that reforms to laws and justice institutions may be an avenue for social change.

The legal empowerment literature argues persuasively that the answer is unlikely to be generic investments in improving the efficiency of the justice system, but rather politically informed strategies to help victims of injustice to use the legal system to their advantage. This may include law reform, procedural changes to the justice institutions to allow for public-interest litigation and class actions, investments in informal justice, awareness raising and community mobilisation.

However, some of the claims made by the legal empowerment movement need to be treated with caution. If analysis reveals that the justice system itself is one of the structural causes of inequality, then it is by no means certain that it can be turned into part of the solution. All legal systems are deeply embedded in their social and political context, and their capacity to act as an independent agent of change may be very limited. Investments in legal empowerment may therefore be most effective where promising dynamics (e.g., signs of judicial activism) are already observable. S&J programmes may be able to reinforce those dynamics. Legal empowerment strategies will also be most effective when combined with other strategies, in civil society or the political sphere. For DFID, this suggests that social development advisers should have a knowledge of the potential of legal empowerment approaches, and the skills to identify situations where they may be effective.

8.4 Justice and government performance

The linkages between law and governance are very difficult to reduce to a simple causal chain, or to capture empirically. Law is fundamental to the construction of state authority; one cannot exist without the other. The issue for policy makers is whether and in what circumstances the quality of justice institutions is an independent variable that can help strengthen the performance of government.

¹⁷⁶ Sage, Caroline and Woolcock, Michael, “Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries”, 2005.

Much of the S&J literature treats the power of the state as a problem to be controlled through law. This casts the role of law in primarily negative terms: preventing arbitrary interference in the economy; protecting property rights against expropriation; controlling against corruption and misuse of state power. From this perspective, constitutions have become instruments of development, creating checks and balances that limit and disperse state power.

This review has not covered the complex linkages between corruption and development. There is ample evidence of the crippling effect that corruption can have on economic growth and the performance of public institutions. There is also evidence of countries that have grown successfully despite high levels of corruption. There is not much evidence in the literature demonstrating that investments in improving the efficiency of justice institutions can help to reduce a generalised problem of corruption. As DFID's own Drivers of Change analysis has demonstrated, in societies where political power is constructed through personal contacts and reciprocities and there is no clear distinction between the public and private realms, it is unlikely that legal prosecution of corruption can be anything other than token. In short, there is not much scope to believe that effective policing of the administration holds the key to turning neo-patrimonial states into Weberian ones.

It may therefore be more promising to conceptualise the link between law and governance in more positive terms, as the construction of state authority – a strand of thinking that is emerging from policy work on fragile states. States need to be able to provide a minimum level of justice and security. If they fail to do so, the authority of the state crumbles, and the vacuum is quickly filled by armed rivals or by generalised outbreaks of violence and disorder. To maintain their monopoly on legitimate violence, all states need a basic institutional infrastructure for making and enforcing laws. In circumstances of state fragility, investing in these institutions may become the overwhelming priority.

Beyond the immediate goal of establishing legitimate authority, states need the capacity to use law as a tool of policy, if they are to be at all effective in promoting development. At a minimum, they need to establish a basic set of rules and institutions to enable the market to operate. These rules and institutions need to become more sophisticated as the market develops, and as they seek to integrate with the global economy.

As their development goals become more ambitious, states need the capacity to use law to correct for market failures and address policy goals like environmental protection. In some circumstances, such as states facing environmental degradation or rapid onset of climate change, this capacity may become more important at an earlier stage of development. They may also seek to establish a framework of citizen entitlements to core public goods, like primary education and health and basic infrastructure, using law as an instrument to help mobilise state resources and institutional capacity in support of development goals.

For the policy maker, this suggests that the priorities are (1) to construct and maintain a basic institutional capacity to provide security and justice; and (2) to ensure that the development of these institutions keeps pace with the demands of the market and the willingness and capacity of the state to pursue development goals.

Annex 1 Future research suggestions

This review has argued that many of the claims made for a universal or overall link between S&J and development are unconvincing. In particular, econometric studies purporting to establish an empirically regular relationship between S&J and economic growth contradict the qualitative evidence, which suggests that the relationship is contingent on country context and level of development.

It follows that a convincing research agenda is one focusing on context-specific linkages between S&J and particular development goals. Priority areas for research indicated by the review include the following.

Justice and economic growth

At what stages in the development process does the legal system have the greatest influence on economic growth? Are there particular indicators (e.g., levels of FDI, stock market capitalisation or sophistication of financial markets) that could guide policy makers as to when investments in the legal system become a priority?

Which legal institutions matter most for foreign and domestic investment? If, based on existing survey evidence, businesses are concerned with the insecurity of their investments, then the need is for qualitative investigations into which institutions (legal or otherwise) are responsible for making them feel more or less secure. There is also a need for research testing the relationship between perceptions and institutional reality. If perceptions are found to be influenced by other variables, then it may suggest different policy conclusions.

What are the main impacts of crime on business? Are the costs to business a function of overall crime levels, or of particular crimes in particular places?

The assertion by de Soto and the Commission for Legal Empowerment that informality of small business is a major barrier to economic growth is an important one that needs to be tested, both theoretically and empirically. Which laws and justice institutions are most important for promoting the growth of informal household businesses in low-income countries? Is there an unmet demand for legal services (e.g., dispute resolution)? To what extent do legal issues (e.g., lack of registration of business; informal land title) affect their access to public goods (infrastructure; the formal legal system)? To what extent are they a barrier to trading with the formal economy? What kinds of financial services do micro-businesses require, and is there a case for promoting mortgage-backed lending? What would formalising micro-businesses actual entail, and are there risks or perverse outcomes associated with it? Are there options short of full formalisation that would help address constraints on growth in the informal economy?

Justice and poverty alleviation

The evidence available on the development potential of access to justice or legal empowerment approaches is limited to donor-sponsored project reviews, and is not particularly robust. Some possibilities for strengthening the evidence base include:

Qualitative sociological or anthropological studies describing how legal systems reflect and reproduce the structures of inequality that trap poor people in poverty. This might involve taking a situation of social exclusion or inequality, based on caste, ethnicity, social origin or region, and examining to what extent laws and justice institutions help reproduce this over time.

Conversely, in what circumstances have legal institutions served as instruments of social change? Which legal institutions play the most important role (e.g., legislatures; courts; bar associations)? What legal or procedural reforms can encourage public-interest litigation? What kinds of intermediary organisations (e.g., NGOs, public interest lawyers, churches, trade unions) are most likely to take up causes that assist the poor? How can donors recognise when circumstances are promising for legal empowerment approaches?

The management of slum settlements in rapidly urbanising cities in the developing world is a major new frontier for poverty reduction. The problems are well documented. The research need is on the side of policy options. What are the options for providing secure and affordable housing for the poor? Can stronger land markets (sales or rentals) assist the poor with access to land and housing? What are the options for responding to illegal construction? What types of legal protection, from possessory interests up to full ownership, can be offered to protect the poor against loss of their housing without causing perverse effects?

The literature makes a good case that discrimination against women in employment and business and insecure women's property rights is not only a cause of extreme poverty, especially for female-headed households, but also a constraint on rural productivity and growth. Further study is needed on how the legal system reinforces gender inequality, and how this dynamic could be altered. There are good, theoretical arguments to suggest that providing women with land ownership might have a catalytic effect on promoting sustainable livelihoods. There is a need for case studies documenting whether or not this true, and in what circumstances.

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