STREAM READINGS

CRIMINAL JUSTICE

INSTITUTE FOR GLOBAL LAW & POLICY
HARVARD LAW SCHOOL

Thailand Institute of Justice
affiliated with the United Nations

IGLP SCHOLARS WORKSHOP | BANGKOK, THAILAND | JANUARY 6 - 10, 2019

Criminal Justice

Faculty

- **Osama Siddique** (Pakistan) Law and Research Policy Network
- **El Cid Butuyan** (Philippines) University of Hawaii

Description

Effective criminal justice reform thinking and implementation requires deep appreciation of national contextual realities as well as meaningful adaptation of what has proven to work well across national boundaries. In this stream we will develop an analytical framework to examine reform projects from multiple lenses: historical, sociological, institutional, legal, geographical and knowledge/data focused. We will evaluate reform as not only as a technocratic domain but equally as a political phenomenon and strategy. Informed by select international literature, our collaborative learning method will emphasize vital actual experiential insights from our diverse faculty as well as seasoned participants.

TABLE OF CONTENTS

Criminal Justice

The IGLP Asian Regional Workshop, Bangkok Thailand (2019)

Workshop: Criminal Justice System Reform and Implementation in the Developmental State

Dr. Osama Siddique
El Cid Butuyan

Reading Materials:

(1) Michael Trebilcock and Ronald Daniels, "Rethinking Rule of Law Reform Strategies" in Rule of Law Reform and Development: Charting the Fragile Path of Progress (2008) (Excerpts – Pages 332-333, 337, 338, 352-355)

(2) (A) Akhila Kolisetty, "BOOK REVIEW: The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward", Harvard Human Rights Journal (2015)
(B) Erik G. Jensen, "Postscript: An Immodest Reflection" in David Marshall, *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (Harvard University Press: 2014) (Excerpts – Pages 295 to 303)

(3) Zenaida N. Elepano, "Case Management Reform – The Philippine Experience" in Livingston Armytage, *Searching for Success in Judicial Reform: Voices from the Asia Pacific Experience* (Oxford University Press: 2009) (Excerpts – Pages 81, 85, 88, 89, 90, 91, 92, 96, 97, 99, 103, 104)

(4) Osama Siddique, "Caseflow Management in Courts in Punjab: Frameworks, Practices and Reform Measures" (Report and Recommendations to the Lahore High Court for improving Caseflow Management and Case Disposals) (European Union: 2016) (Page ix)

(5) Greg Berman, Phillip Bowen and Adam Mansky, "Trial and Error: Failure and Innovation in Criminal Justice Reform", National Association of Probation Executives – Executive Exchange 7 (2007) (Excerpts – Pages 7 to 9)

(6) K. Murali, "Institutional Apathy Towards Undertrial Prisoners, Economic and Political Weekly", Economic and Political Weekly, Vol. 41, No. 37 (Sep. 16-22, 2006) (Excerpts – Pages 3936 to 3938)

(7) Dhananjay Mahapatra, "Trials Through Video to Help Government Save Rs 100 Crore a Year", Economic Times (March 28, 2016)

(8) Manisha Sethi, "Why the Mahmood Farooqi Judgment is Deeply Flawed", available at http://www.hardnewsmedia.com/2016/08/whySmahmoodSfarooquiSjudgmentSdeeplySflawed, last visited October 27, 2017.

Michael Trebilcock and Ronald Daniels, "*Rethinking Rule of Law Reform Strategies*" in *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (2008) (Excerpts) (Pages 332-333, 337, 338, 352-355)

10. Rethinking rule of law reform strategies

INTRODUCTION: In this book we have made two parallel and mutually reinforcing claims. First, we have proceeded on the premise that, on a sufficiently parsimonious definition, the rule of law is a universal good tied inextricably to development. In making this claim, we have not supposed any particular form of political organization, economic philosophy, or even legal culture. Rather than engaging in the details of substantive law, we have therefore focused on the institutional structures responsible for administering the rule of law. At the same time, however, we have declined to accept the view that obedience to a given set of rules – the rule of rules or rule by law – is a normatively defensible conception of the rule of law. In order to infuse a normative basis into our institutional approach to the rule of law, we have elaborated a set of *procedural values* central to any effective, institutional approach to the rule of law. Broadly, these values encompass process values (transparency, predictability, enforceability, stability), institutional values (independence, accountability), and legitimacy values. We have then identified a set of institutions which constitute essential elements of the rule of law. Drawing wherever possible on international consensus we have, in the context of each institution, elaborated a set of structural conditions reflective of these core procedural values, although we freely acknowledge that particular institutional entailments or instantiations of the rule of law will be shaped by normative considerations particular to given social, historical, cultural and legal contexts (as is true also of developed countries).

Second, observing that states have had difficulty implementing even this baseline institutional structure, we have hypothesized that three classes of impediments – resource constraints, social/cultural/historical values, and political economy – are responsible for the relative failure of many rule of law reform initiatives to date. The boundaries between these three classes are not always sharp, and indeed in some circumstances, seemingly unitary factors can be cast in terms of two, or even all three, categories. Nevertheless, this typology is useful for two reasons. First, our empirical research has established beyond doubt, across institutional structures and geographic regions, that each of these three classes of impediment to reform has some role to play. Second, as we attempt to elaborate in greater detail below, we believe that conceiving of impediments to rule of law reform in this manner can help focus the international reform community, in terms of both the goals of rule of law reform and the methods appropriate to achieving those goals.

★ ★ ★ ★ ★

More generally, given the wide variety of institutional arrangements observable even in developed countries that seek to vindicate or instantiate rule of law values, it would be both presumptuous and counterproductive for the international community to attempt to

proselytize, let alone impose, some external blueprint of the rule of law paradigm – even a relatively parsimonious, procedurally-oriented conception of the rule of law such as we have espoused – on developing countries, each with their distinctive, social, historical, cultural and legal traditions and norms. Thus, the international community, before seeking to promote specific or concrete rule of law reform initiatives in developing countries, needs to seek firm evidence of domestic "ownership" of such initiatives reflecting the support of a broadly representative range of domestic constituencies, even though often not constituting, for various reasons canvassed below, a winning or decisive political coalition.

However, we would emphasize that sensitivity to particularities of context should not be elided with a radical relativism, nihilism or the naturalistic fallacy wherein the "is" becomes the "ought" and hence an excuse for policy paralysis. A major advantage of the relatively thin conception of the rule of law that we have adopted is that it would seem to be a necessary albeit not sufficient basis for any of a range of substantive conceptions of the rule of law or justice more broadly, and hence compatible with substantial forms of legal pluralism. Moreover, in our review of each of the major classes of legal institutions in this book, we have sought, wherever possible, to invoke as our normative benchmarks precepts endorsed in international covenants, codes, agreements and guidelines that have attracted broad consensus from many countries, developed and developing, hence seeking to minimize concerns that the benchmarks we employ reflect an externally imposed, ethnocentric conception of the rule of law.

★ ★ ★ ★ ★

We would add a fifth and related process lesson: it will often be appropriate for developing countries contemplating rule of law reforms to look for reference points not to developed countries primarily but to other developing countries with substantial affinities to the country in question who have achieved significant successes in the relevant domain (like Costa Rica and Uruguay in Latin America; Botswana and South Africa in Africa; Hong Kong and Singapore in Asia.)

★ ★ ★ ★ ★

V. REFORM STRATEGIES IN POLITICAL CONTEXT: Given the relative strengths of these various forms of political pressure, we offer a tentative range of conclusions about the role of the international community in rule of law reform. As we move along the spectrum from Type I states to Type III states, top-down, state-centric reform strategies become less feasible, and bottom- up, community-based reform strategies become a more promising option.

Type I states In these states, where broad political and popular support for rule of law reform exists, the role of the international community should be focused most heavily on alleviating resource constraints. While sociocultural factors and various forms of vested interests may still act as important barriers to reform, in these states it will be domestic governments, rather than the international community, who will be best placed to address these concerns. We think this point is self-evident with regard to sociocultural values, but it should apply

equally to lower level corruption.

The preferred method of intervention in the most favourable cases (admittedly rare) should be unconditional aid, leaving to the domestic government concerned choice of reform priorities and strategies and sources of technical advice unless for credible commitment and signaling purposes the recipient government requests conditionality. Domestic political support for rule of law reforms, by assumption strong in Type I states, is perhaps the most important success factor of unconditional or conditional aid. The "mallet"-like political pressure of accession mechanisms will play little fruitful role, because the state is already generally politically aligned with the viewpoint of reformers. Similarly, because trade policy does not direct new resources to rule of law initiatives, it will be irrelevant in these circumstances. Due to their punitive nature, sanctions would be entirely misplaced.

While making the case for conditional aid in more equivocal cases, however, it is important to emphasize again that government policy may be fluid, and that strongly pro-reform administrations can shift policies quickly, particularly where they come to power in a period of transition or during a key "constitutional moment." Donors must therefore be vigilant in monitoring the trajectory of Type I governments – and enforcing conditions where appropriate – an historical weak- ness of development agencies. Lessons can be drawn, for instance, from the experience of the World Bank with the government of Alberto Fujimori of Peru in the mid-1990s, discussed in greater detail in Chapter 2 (judicial reform). Funding of non-state drivers of rule of law reform such as local NGOs can also play a role in these states, as they can in almost any situation. However, in these cases, NGOs that cooperate with, rather than oppose government policies, are likely to be more effective.

Type II states In states with generally reform-minded political leadership but with a less secure political base and widespread opposition from vested interests within state agencies, including legal institutions and perhaps private sector parties who benefit from dysfunctional public institutions, a more diverse set of strategies will be necessary. In these cases, resources may still be scarce, but international agencies or external donors cannot responsibly commit to unconditional aid. Even where high-level political leadership supports reform, increased aid flows to antagonistic public or legal institutions can be misdirected and wasted or used for regressive purposes. With respect to conditional aid, as we noted above governments truly committed to reform may agree to conditional aid that binds them to a policy and protects them from internal special interests. A case can be made for conditionality through accession or trade preferences on similar grounds. Also, there may be a good case for non-state-led reforms through local NGOs or Alternative Law Groups operating more independently from the state in institutional contexts where independence of legal institutions is likely to be problematic.

Type III states Our discussion of international policy mechanisms suggests that governments unequivocally opposed to rule of law reform will rarely be sensitive to state-level pressure

mechanisms, a point made both in the context of sanctions and all forms of conditionality. As Preeg argues in respect of US sanctions (e.g. denial of MFN trading status) against China, "the basic reason why these unilateral economic sanctions are ineffective is that the foreign policy objective is to change the oppressive behaviour of an authoritarian or totalitarian government, which constitutes a direct threat to its control if not survival." While China is not our test case – US sanctions in this case were intended to stimulate democracy more than the rule of law – the point remains the same.

In these cases, the role of non-state actors should become a central aspect of rule of law reform efforts, with a particular focus on those local and international NGOs developing reforms independent of state agencies and the provision of financial and technical assistance to them. In China and Laos, NGOs have played an important role as *de facto* monitoring mechanisms for correctional institutions where the state has denied access to formal state-level monitoring channels. Properly designed and implemented non-state dispute resolution mechanisms, often based on traditional forms of community-based dispute settlement, can also be a vital element of access to justice in circumstances where courts suffer from chronic backlog, corruption or bias and hence a lack of legitimacy.

It will be obvious that over time states may evolve either negatively or positively from one stylized type to another in our foregoing typology, requiring the international community continuously to reassess its rule of law reform promotion strategies and to readjust its menu of strategies accordingly. However, even acknowledging this, and acknowledging further that all desirable rule of law reforms cannot be realistically embarked upon simultaneously, if only because of resource constraints and pressing demands on those resources, even in the most favourable (Type I) political environments issues of prioritization and sequencing will invariably arise. While these must largely be resolved by domestic constituencies committed to rule of law reform, as must the particular forms of institutional vindication or instantiation of rule of law values, nurturing an increasingly robust domestic constituency for the rule of law over time requires that a broadly representative range of social, economic and political interests come to see their interests and values as aligned with the promotion and preservation of the rule of law. In this respect, we question (along with others) the aptness of the relatively high priority often accorded to formal judicial reform by the international community in the rule of law reform initiatives that it has promoted in developing countries in recent years and the relative lack of attention to reforms that are more likely to affect the day-to-day interactions of the citizenry with the legal system – police, prosecutors, specialized law enforcement and administrative agencies (such as tax administration), access to justice initiatives such as informal community-based dispute resolution mechanisms (often reflecting adaptations to and elaborations of traditional dispute settlement mechanisms), and Alternative Law Groups, where more visible and immediate material benefits from successful institutional reform are likely to be experienced by a wide cross-section of the citizenry.

BOOK REVIEW:
The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward
Edited by David Marshall

Akhila Kolisetty[1]

In recent years, international institutions and organizations have transformed the reform of rule of law, particularly in post-conflict and fragile states, into an industry in its own right. Indeed, over 1,300 rule of law organizations have formed to address this problem, and over forty UN entities provide rule of law expertise in more than 15 countries.[2] Despite the money and time invested, experiments in rebuilding the rule of law have been attempted and failed in Afghanistan, Iraq, Haiti, and South Sudan – among others.[3] A new volume, "The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward," edited by David Marshall, examines this industry with a critical eye, considering ways in which this 'field' is currently structured and operating, the flaws and failures in its performance to date, and what measures could possibly move the sector forward in a positive way.

An initial question for the uninitiated reader might be: what exactly is rule of law, and why is the international community investing so much money in it? James Goldston answers these questions in the first chapter, "New Rules for the Rule of Law," in which he details the history of rule of law after the end of World War II and to the present day.[4] He does, however, note the definitional problem: rule of law is also attractive to institutions because it is conceptually so broad as to be almost limitless.[5] Despite the challenge, he advances possible definitions for the rule of law, and emphasizes the importance of culture in determining its varying interpretations.[6] Ultimately, rule of law, according to Goldston, is important because the lack of it "produces more violence, less security, and diminished economic capacity."[7]

---

[1] Akhila Kolisetty is a student at Harvard Law School, J.D. 2015. She has worked for and volunteered with a range of legal empowerment organizations, including Timap for Justice, BRAC's Human Rights and Legal Services Program, and Namati.

[2] David Marshall, *Introduction* to THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD xiii, xiv (David Marshall ed., 2014).

[3] *Id.* at xiii.

[4] James A. Goldston, *New Rules for the Rule of Law*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 1, 1–2 (David Marshall ed., 2014).

[5] *Id.* at 3–4.

[6] *Id.* at 5–11.

[7] *Id.* at 3.

And further, even if we know what rule of law is, we may wonder: is it really a 'field'? Deval Desai explores this in the second chapter, which seeks to define, understand, and organize the field in light of the fact that 'rule of law' is so broad and lacking in definitional clarity – a fact that is indeed embraced by some who are themselves within this field.[8] Ultimately, Desai urges that this field be determined more by the ability to tell stories and share knowledge than the substance of the rule of law.[9]

A number of contributors expose the rule of law's problems and suggest a rethinking of current practices as well as potentially promising new approaches. David Marshall, in the third chapter, draws from his own experiences with the UN in South Sudan and critiques the institution's current lack of clarity, narrow focus (particularly, an overemphasis on criminal justice systems), lack of introspection, and insufficient contextual knowledge when it comes to reforming the rule of law in fragile and post-conflict states.[10] Moreover, the emphasis on rapid deployment is seen as impractical, considering the fact that reforming rule of law and justice systems realistically requires a serious, long-term investment.[11] Ultimately, Marshall suggests a return to the human rights approach to rule of law, fewer objectives, a common vision for its work, and an emphasis on developing deeper contextual knowledge.[12]

In a similar vein of examining problems and suggesting improvements, in the fourth chapter, Haider Ala Hamoudi explores the flaws with the dominant centralist assumptions inherent within the rule of law field and suggests a move towards acknowledging and incorporating legal pluralism – including nonstate, customary, and religious law and actors.[13] Indeed, the state is often not the dominant player in the legal space; the vast majority of disputes around the world are resolved outside of court; unfortunately, this reality is not accurately captured in most rule of law work.[14] Building on this, Marieke Schomerus uses a case study of South Sudan's Western

---

[8] Deval Desai, *In Search of "Hire" Knowledge: Donor Hiring Practices and the Organization of the Rule of Law Reform Field*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 43, 43–46 (David Marshall ed., 2014).
[9] *Id.* at 73.
[10] David Marshall, *Reboot Required: The United Nations' Engagement in Rule of Law Reform in Postconflict and Fragile States*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 85, 85–88, 118 (David Marshall ed., 2014).
[11] *Id.* at 104–05.
[12] *Id.* at 118–19.
[13] Haider A. Hamoudi, *Decolonizing the Centralist Mind: Legal Pluralism and the Rule of Law*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 135, 135–37 (David Marshall ed., 2014).
[14] *Id.* at 140.

Equatoria to illustrate the challenges of considering "context" in rule of law programming, particularly where local notions of democracy, rule of law, and justice can be vastly divergent from those in the dominant rule of law discourse.[15] Vivek Maru adds to the discourse in the sixth chapter by emphasizing the importance of focusing rule of law efforts on community struggles to claim rights to their land and natural resources – often using innovative tools such as paralegals. His underlying assertion is that without supporting communities and social movements in upsetting existing power imbalances, the rule of law remains a narrow concern focused on elites.[16]

In the ninth chapter, Louis-Alexandre Berg, Deborah Isser, and Doug Porter assert that justice reform efforts are failing in large part due to donors' narrow focus on justice institutions and 'law and order,' prioritizing criminal justice over broader issues such as land and property rights. Further, donors assume that technical and organizational changes in these institutions increase their effectiveness, resulting in a top-down emphasis on formal state institutions and filling organizational deficits.[17] To move away from this conventional paradigm, the authors suggest three questions to examine contexts and suggest where assistance would be useful: What is the justice problem? How are justice problems being governed? And what is the appropriate role for external assistance?[18]

Next, even if we implement new programs and approaches in the rule of law, how do we know these measures and shifts in strategy are effective? Todd Foglesong discusses, in chapter seven, the value of utilizing indicators to concretely measure progress – and the varying value indicators may have for different actors within this space.[19] His piece further emphasizes that even modest changes can have a positive impact on developing rule of law and local justice, and also urges those in the field to think practically than expect immediate transformational change.[20] Margaux Hall, Nicholas Menzies, and Michael Woolcock further argue in chapter eight that

---

[15] Marieke Schomerus, *Policy of Government and Policy of Culture: Understanding the Rules of Law in the "Context" of South Sudan's Western Equatoria State*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 167, 186–87 (David Marshall ed., 2014).
[16] Vivek Maru, *Legal Empowerment and the Land Rush: Three Struggles*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 193, 193, 203 (David Marshall ed., 2014).
[17] Louis-Alexandre Berg, Deborah Isser & Doug Porter, *Beyond Deficit and Dysfunction: Three Questions toward Just Development in Fragile and Conflict-Affected Settings*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 267, 270–72 (David Marshall ed., 2014).
[18] *Id.* at 272–82.
[19] Todd Foglesong, *The Rule of Law in Ordinary Action: Filing Legal Advice in Lagos State*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 215, 232–33 (David Marshall ed., 2014).
[20] *Id.* at 234–35.

international rule of law and justice efforts must build in systems to better promote learning. An underlying problem is that of the separation of design, implementation and evaluation, and the fact that current programs often begin with expectations of certain development outcomes.[21] Using Sierra Leone as a case study, the authors suggest an experimentalist approach be employed, including iterative design and testing of alternatives; deployment of interventions that engage actors and address accountability problems at numerous levels; and measurement of impact of a broad range of outcomes, utilizing multiple methods.[22] The adoption of an experimentalist mindset in justice reform forces the field to humbly put aside assumptions about what we think we know, embraces uncertainty and the possibility of failure, and thus may be deeply instructive in helping us move towards better programs and outcomes.[23]

This volume accurately captures the complexity and breadth of rule of law and justice reform efforts, and diagnoses many of the problems inherent in existing and common approaches today. Maru's call to put the needs of ordinary people and the justice problems they face first is particularly compelling; he demonstrates how law can concretely be used to support community struggles. Perhaps this volume could be aided by writing and contributions from local organizations around the world, rather than largely international organizations and rule of law experts. Ultimately, improving rule of law may be about figuring out how justice systems and the law can work better to support ordinary people's needs and to promote their voice in policies and laws that affect them. In such a context, more perspectives directly from those working closely with people at the community level could only add to the analysis. A greater emphasis on beginning *with* affected people, understanding their needs, and prioritizing not only voices from the community level but also their genuine leadership in the national and international stage is also much needed in rule of law efforts, and could have been explored in greater detail. Finally, there is room to more deeply examine the possibilities of legal empowerment approaches to mobilize communities to change policies, institutions, and broader structures themselves. Regardless, the volume remains an incredibly timely call to action to international rule of law industry, exhorting those in the field to reexamine their work with a critical eye, and consider solutions to move forward if their efforts are to result in long-lasting change.

---

[21] Margaux Hall, Nicholas Menzies & Michael Woolcock, *From HiPPOs to "Best Fit" in Justice Reform: Experimentalism in Sierra Leone*, *in* THE INTERNATIONAL RULE OF LAW MOVEMENT: A CRISIS OF LEGITIMACY AND THE WAY FORWARD 243, 245–47 (David Marshall ed., 2014).

[22] *Id.* at 254–56.

[23] *Id.* at 259.

(Excerpts, pp. 295-303)

The International Rule of Law Movement
A Crisis of Legitimacy and the Way Forward

Edited by David Marshall

Human Rights Program Series
Harvard Law School

DISTRIBUTED BY HARVARD UNIVERSITY PRESS

Postscript: An Immodest Reflection

Erik G. Jensen

David Marshall is persistent. I was a reluctant participant in an authors' workshop at Harvard, and then eventually agreed to write an immodest reflection for this book. Ultimately, I agreed to both because the volume brings together a good collection of authors trying to vigorously bridge theory and practice. That most of the contributors are at least a half generation younger than I was an additional draw. And yet another draw was that David Marshall's restlessness, which I view as very constructive, if disruptive, was not unfamiliar to me.

This postscript is divided into three sections. The first is a brief personal account of my observations of and frustrations with the performance of the rule of law industry over nearly three decades. Somehow that unease connects me with the next-generation authors in this volume. In the second section, I deconstruct an example of received wisdom to illustrate the complexity of developing legal systems and the multitude of contingencies at play in doing so. The example should also serve as a caution to those who aspire to install legal institutions quickly. Finally, in the last section, I critically reflect on the contributions to this volume.

Background

I have enjoyed an existential relationship with the rule of law industry for nearly thirty years. I relish the numerous opportunities that I have had to engage with local collaborators in research and action. Through our work in the 1980s and early 1990s, we learned a great deal from one another as we tried to make a difference, exploring the relationship between law/legal

institutions and social, political, and economic development. We were self-critical and keenly aware of moral dilemmas. But our research was good, and some of our actions were novel. We sensed modest progress (a topic to which I will return later). Still, my apprehension grew as the rule of law industry mushroomed in size in the mid-to-late 1990s—and even more so in this century—compared to its very humble scope in the 1980s.

By the end of the 1990s, I had developed what I hoped was a constructive and well-informed restlessness about the gap between theory and practice. The deficiencies in the industry were manifest: too much of the practice seemed uninformed by empirical knowledge, history, serious comparative work, interdisciplinary connections, an understanding of political economy, or even a general knowledge of the arc of economic development and the role or potential role of legal institutions in that development. By the way, let's not glorify theory: it is a horse race between practitioners and academics as to who has published more pabulum about law and development. As a friend once said, "Those who write don't know, and those who know don't write." Now it seems that many who *should know* either do not know or have too much self-interest in perpetuating ideas and donor interventions that do not work. One channeling of my restlessness was a book that my colleague Tom Heller and I assembled, entitled *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (2003).

Deconstructing an Assertion about the Role of Law and Legal Institutions in Economic Development

In the 1990s, when the World Bank and other multilateral development banks began to support "rule of law" projects, they asserted time and again that a well-functioning judiciary is necessary for economic growth and development. A corollary assumption underlying their support for such projects was that substitutes for a well-functioning judiciary entail high transaction costs.

These assertions were supported by neoclassical economic theory,[1] but not by a realist's historical assessment of current developing countries and the few countries that have transitioned from underdevelopment to OECD-level development within the last fifty years. How and, importantly, *when* do formal legal institutions become consequential to economic growth and development? Neoclassical economic theory stresses the importance of formal legal institutions for the enforcement of contracts and the protection of property. According to this view, the sequence is clear and the causal arrow goes in one direction: build strong legal institutions and economic growth, and development will follow. This view seems to be correlated with outcomes. After all,

most OECD countries have relatively strong legal institutions. But those outcomes do not prove a causal story about how developed economies became developed or about when in that process legal institutions became more consequential to growth and development.

Indeed, even a cursory consideration of three of the most dramatic economic growth and development stories of the last fifty years confounds received wisdom.

Detailed accounts of the "East Asian miracle" (Hong Kong, Singapore, South Korea, and Taiwan) make virtually no reference to the role of legal institutions. India, under its economic reform program, achieved high growth rates for two decades with a court system that ranks at the very bottom in contract enforcement. And China achieved 9% growth over thirty years with a woefully underdeveloped legal system and an opaque property rights regime. China is responsible for nearly three-quarters of the reduction in poverty globally over that period of time.

Today, the East Asian Tigers all have reasonably strong legal institutions, China's legal institutions are improving (though very unevenly), and India's legal institutions, especially at the lower court level, continue to flounder (though, correspondingly, arbitration practice is booming). The point is that dramatic economic growth and development can ensue alongside poor legal institutions. And during these periods of growth, substitutes for well-functioning laws and legal institutions can proliferate and even flourish. Substitutes may be informal (e.g., relations, reputation, repeat dealing, and so forth), market-based, technological, or rudimentary (e.g., adjusting contracts depending on available institutions).

Collective demand and pressure from economic actors on judiciaries takes time to build as business actors use dysfunctional courts to their advantage. As an Indian banker once said, "If we have a strong case, we settle; if we have a weak case, we go to court." That strategy is often pursued until the complexity of economies reduces such advantages and obfuscates winners and losers. Thus, the need for effective legal institutions becomes pronounced at a later stage of development when economies become more complex.

I urge readers to compare this account of the historical evolution of legal institutions to the recommendations in the Brahimi Report. These recommendations, based on the finding that the "rule of law vacuum" is the greatest threat to states transitioning from conflict to peace, call for an almost SWAT-team-like installation of laws and legal institutions (United Nations Secretary-General 2000, analyzed in Marshall, this volume).

Critical Reflections on the Chapters in This Volume

Turning to the book in hand, we had an epiphanic moment at the authors' workshop when we took stock of the level of development in the countries under consideration in this volume. Many, though not all, of the countries are least-developed postconflict or conflict states. None of the least-developed states under consideration are in a position to allocate jurisdiction across secular, religious, and customary possibilities. Part of that stems from the fact that the some of them are juridical states but not empirical states.

Another reason is that legal pluralism endures over time, as Haider Hamoudi's chapter on Iraq nicely illustrates. So, even in more developed states such as Iraq, legal pluralism is a historical fact. Legal pluralism baffles and frustrates rule of law technocrats. Predictably, some of the donor experiments to centralize and coordinate that pluralism have been massive failures.

Doctrine, structuralism, and formalism continue to impede rule of law practice. For example, many rule of law promoters and consultants of my generation who were very critical of their own legal systems used to go to developing countries and advocate the US model as a pristine way to separate powers. Of course, as my colleague Gerhard Casper (1997) illustrates so well in his account of how power is separated in the United States, separating power is a negotiated, deeply contextualized, and highly contingent evolutionary process. Another example of doctrinal blinders from my generation is the way it pursued judicial independence as the *sine qua non* for the rule of law: if judiciaries were not independent, the rule of law could not exist. This binary approach to the rule of law belied the messiness and unevenness of the development of rule of law. The rule of law is not like pregnancy—you do not either have it or not. The reality is that rule of law has many gradations as it episodically develops across countries.

Many of the chapters in this volume capture important aspects of that complexity. Mareike Schomerus's account of the rule of law in the context of South Sudan's Western Equatoria State takes us about as far away from the doctrinalist camp as we can travel. She interrogates how power and authority are constructed in a traditional society and demonstrates how important that analysis is to understanding how institutions can or might evolve.

Louis-Alexandre Berg, Deborah Isser, and Doug Porter's chapter argues persuasively that technical and capacity-building solutions to institution-building may be necessary but are utterly insufficient unless they are situated within the political economy of contestation. The value of their chapter is in laying out the complexity of the field of contestation. This chapter should be read as a *caveat emptor* to any donor embarking on large rule of law projects that contemplate broad institutional reform. The likelihood of missing the

mark on large-scale institutional reform projects with bloated expectations is significant. Contestation analysis is important, but it needs to feed into change analysis. How is the equilibrium going to change in favor of excluded populations? Arnold Toynbee once observed that some people think that history "is just one damned thing after another." I would argue that in developing countries with weak institutions, change does not happen with one damned contestation after another. The need to aggregate strands of contestation in collective action and political settlement is manifest.

Margaux Hall, Nicholas Menzies, and Michael Woolcock probe another dimension of what the political economy of donors in rule of law focuses on: "success." Indeed, one explanation for stunted results in rule of law programs is risk aversion. In the Silicon Valley, 90% of technology start-ups fail (see, e.g., Kelly 2013). In the rule-of-law industry, failure is unacceptable. In this risk-averse industry, somehow doing the same things that do not work well (but that can be financially accounted for) is preferable to experimenting with projects that may fail in the frame of donor results but may succeed in producing knowledge and advancing learning.

Deval Desai undertakes an analysis of human resources practices in four international agencies that deploy a range of "rule of law experts." Who are these people anyway, and what are they qualified to do? I have argued for well over a decade that it is insufficient to examine just the political economy of any given country; one also needs to understand the political economy of donor assistance. Desai's inquiry into donor hiring practices is an important part of coming to grips with where money goes in rule of law assistance and why.

I would urge Desai and others to continue this line of research into the organizational behavior of donors in rule of law industry. An area ripe for research is requests for proposal and proposal writing. Most requests for proposals (RFPs) in rule of law assistance (and democracy assistance for that matter) make normative assertions that may or may not be supported by empirical evidence.[2] Proposals in response to the RFPs, if they are to succeed, must reassert the normative conjecture that was framed by the prospective donor. My hypothesis is that through repeated cycles with RFPs framed in a risk-averse, must-succeed environment and proposals reinforcing normative assertions, practitioners start to believe the assertions made. The machine in the development industry perpetuates and reinforces received wisdom.

The RFP-proposal process also incentivizes overpromising what can be achieved in any given project. Bloated expectations are everywhere. A point that I made repeatedly during the authors' workshop is that modest expectations and success within the scope of those modest expectations should be valued. That was my reaction to chapters by James Goldston, Todd

Foglesong, and Vivek Maru. Todd Foglesong tells a wonderful story about reform in the public prosecutor's office in Lagos, Nigeria. A modest project achieved results.

As the commentator on an earlier draft of Maru's chapter, I had three sets of comments. First, Maru is right: if you put the needs and demands of the common citizen first, you will quickly understand the centrality of land to a host of primary and ancillary problems that people care about in transitional countries. You will also learn about the primacy of administrative decision making for the vast majority of citizens. Second, for those of us who entered the field of law and development inspired to reduce levels of economic deprivation, Maru's grassroots stories from Uganda, Sierra Leone, and India remind us that microsuccesses can be significant. The role that paralegals played in these stories was vital. Community organizers who are aware of the law, legal rights, and potential legal rights—and who work to connect community needs and demands with lawyers able to help—are worth their weight in gold as actors in grassroots legal development.[3] Third, an earlier draft of Maru's chapter outlined the possibility of going global. My advice was to delete that section. The pressure to scale-up project impacts and tell a much bigger story often detracts from the small but significant successes achieved.

My advice was born of experience. During the 1990s, the Asia Foundation and the Ford Foundation provided assistance to a group of high-quality legal resource nongovernmental organizations (NGOs) in the Philippines who represented various disadvantaged sectors: fisherfolk, farmers, women, upland communities, and the urban poor, among others. These legal resource NGOs received referrals from paralegals, and they represented these disadvantaged communities, often before administrative agencies, to assure that the communities received fair treatment. The legal resource NGOs achieved many microsuccesses. But the strategic plans of each of the NGOs sought "structural change" in society and governance as their overarching goal. These fabulously productive NGOs have never achieved their ultimate goal, but along the way, they have done a great deal of good for the communities they represent.

Returning to Foglesong's story from Nigeria, his narrative also underscores the central importance of relationships to the quality of development achieved. Foglesong's group developed a relationship with the public prosecutor's office that leveraged a reform in which no monetary assistance was exchanged. The development industry, ironically, assumes that we are functioning in a postmodern transactional world of impersonal exchange in which technocratic benchmarks are set and achieved. Yet, to state the obvious, we are not functioning in countries that are part of the postmodern world. And even if we were, both the value and extent of impersonal exchange is exaggerated in the literature and also in the behavior of agents in some donor institutions. The best development work that I have done over the last three decades is directly related to the depth and quality of relationships that I enjoyed with nationals of the countries in which I worked.

Beyond bloated goals and objectives, two related dynamics exacerbate the view that the rule of law industry is rife with failure. One is that critics fail to ask the question, compared to what? In other words, what is the experience in other areas of the development industry? In my more cynical moments, I see multilateral banks' gravitation toward rule of law assistance as motivated in part by the even greater failures they experienced with civil service reform. Judiciaries are viewed as a smaller, more contained subset of the civil service. Yet, most rule law academics and practitioners do not have experience in other so-called sectors of development.

Another related dynamic is that lawyers like to write. A disproportionate volume of scholarship critiques the rule of law industry. Far be it from me to excuse wasteful funding that neither achieves modest success nor advances learning. But reading critiques, one would think that the rule of law industry wastes more funding than any other. Indeed, David Trubek and Marc Galanter's (1974) brilliantly written critique convinced a generation of American law students who simply did not know better that "law and development" was a failed field. The authors' expansive critique was based on a measly US$5 million of US-based donor assistance to strengthen the rule of law in Latin America.[4] And if you asked the beneficiaries—legal academics from Latin America placed in elite US law schools for postgraduate studies, and US legal academics placed in ministries of government and universities in Latin America—you would get a substantially different assessment of the value of the donor assistance (see, e.g., Pérez-Perdomo 2006).

So, is David Marshall's critical reflection on the role of the United Nations an overreaction fueled by his love of the pen? I think not. Large institutions are subject to mission creep, and they often conflate their conferences, workshops, and proclamations with progress on the ground. In addition, these institutions, while often slow to change, are nimble in adjusting their objectives to fit the development jargon of the day. For example, a multilateral development bank project to computerize the courts may have been justified during an earlier era as improving the environment for foreign direct investment. Later, that same project would be justified as decongesting the courts. And, later still, that same project would be justified as improving access to justice for the poor or even as strengthening national security. The same project on the ground has nimble objectives that can shift depending on the *carte du jour*.

Marshall's chapter outlines many reasons for mission creep regarding the United Nations' rule of law programs. I single out only one reason. It relates to Marshall's close reading of a 2011 special advisory group report that identifies critical capacity gaps in policing and justice. Related to these capacity gaps, the report also notes "evidence of many actors making aspirational claims of capacity, perhaps in the hope of generating resources" (United Nations General Assembly and Security Council 2011, para. 35[e]). That observation gets to the heart of the political economy of donor institutions (not just the United Nations, but many development organizations): some are more influenced by market opportunity than others. By the way, the Secretary-General is to be applauded for initiating a review process that included this special advisory committee. Candid and considered reports are part of the baseline needed for thoughtful reform, and they are not very popular with internal constituencies within development institutions.

As I embarked on this exercise, one question was in the back of my mind throughout: what positive change has occurred in the rule of law industry over the last decade? One positive change is a growing body of empirical research on law and legal institutions in developing countries. The quality of that research varies wildly, but there is more good research—in other words, papers and books that I find useful—published with each succeeding year. With research that increasingly employs mixed methods, inquiries can get at issues that actually matter. And that research should translate to better and more effective programs on the ground. In this immodest essay, I have selectively highlighted issues that actually matter that were raised either directly or implicitly by the authors. Now the easy part: bridging theory and practices.

References

Casper, Gerhard. 1997. *Separating Power: Essays on the Founding Period.* Cambridge, MA: Harvard University Press.

Jensen, Erik, and Tom Heller. 2003. *Beyond Common Knowledge: Empirical Approaches to the Rule of Law.* Redwood City: Stanford University Press.

Kelly, Samantha Murphy. 2013. "Why 90% of Startups Fail." *Mashable*, February 4. http://mashable.com/2013/02/04/why-startups-fail.

North, Douglass C. 1991. *Institutions, Institutional Change and Economic Performance.* Cambridge: Cambridge University Press.

Pérez-Perdomo, Rogelio. 2006. *Latin American Lawyers: A Historical Introduction.* Redwood City: Stanford University Press.

Schuler, Marge. 1986. *Empowerment and the Law: Strategies of Third World Women.* Washington, DC: OEF.

Trubek, David, and Marc Galanter. 1974. "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States." *Wisconsin Law Review* 4:1062–102.

United Nations General Assembly and Security Council. 2011. Identical Letters Dated 18 February 2011 from the Secretary-General Addressed to the President of the General Assembly and the President of the Security Council. UN docs. A/65/747–S/2011/85, para. 35(e).

United Nations Secretary-General. 2000. Report of the Secretary-General on the Implementation of the Report of the Panel on United Nations Peace Operations. UN doc. S/2000/1081.

Notes

1. Even Nobel laureate Douglass North, one of my all-time favorite economists who made Max Weber accessible to economists, thought that legal institutions and judicial enforcement were necessary to transition from a traditional economy to a developed economy: "Missing in the suq [bazaar economies engaged in regional trade] are the fundamental underpinnings of legal institutions and judicial enforcement that would make such voluntary organizations viable and profitable. *In their absence, there is no incentive to alter the system*" (1991, 124, emphasis added).

2. See the deconstruction above of one such assertion about legal institutions and economic development and growth.

3. Nearly three decades ago, Marge Schuler did pathbreaking work on legal empowerment for women in developing countries. Many in my generation learned from her seminal work, modestly entitled *Empowerment and the Law: Strategies of Third World Women* (1986). A handful of international NGOs and bilateral donors funded field work on legal empowerment for two decades before the United Nations claimed it through a high-level panel and a multitude of assertions about its perceived value.

4. Their article mentioned US assistance in Africa only in passing, and it did not even acknowledge significant British rule of law assistance at that time. James Goldston's chapter corrects that oversight.

Zenaida N. Elepano, "Case Management Reform - The Philippine Experience" in Livingston Armytage, Searching for Success in Judicial Reform: Voices from the Asia-Pacific Experience (Oxford University Press: 2009)
(Excerpts - Pages 81, 85, 88, 89, 90, 91, 92, 96, 97, 99, 103, 104)

1.0 Key Messages: In adversarial litigation, parties, especially defendants and their lawyers, have been known to abuse the right of due process through procedural manoeuvring in order to delay judgment and effectively deny fair and timely justice. Since 2003, the Supreme Court of the Philippines' pilot project on case and caseflow management (CFM) for trial courts has been a ground breaking reform in confronting this problematic situation. This project has challenged judges to assume a more activist-interventionist role in the management of cases. Through a scheme that requires strict enforcement of timelines and schedules, case events and the presentation of evidence are effectively organized and conducted in an expeditious way.

The approach principally uses caseflow management (CFM) techniques—which have been generally defined as the supervision or management of the time and events involved in the movement of a case through the court from the point of initiation to its disposition— to collapse timeframes and intervals into reasonable periods to enable a case to exit from the court with reasonable dispatch. This project has demonstrated that courts which consistently exercise firm control and supervision over cases under the CFM process can experience faster disposition rates compared to their non-CFM case disposal performance…

□□□□□
… These findings indicate that CFM can work and is effective in reducing delay in the disposition of cases, but only if the court is genuinely committed to seeing that all the events or stages of the case happen within the designated timeframes so that undue delay is averted.

□□□□□
2.1: Problems and Challenges: … Prior to 2003, the year the implementation of the Philippine Pilot Project on Case Management commenced, data from the Office of the Court Administrator of the Supreme Court (OCA) relative to trial court performance showed caseloads in the country's RTC at an unmanageable average monthly docket of 346 cases per court. The RTCs in the area selected for piloting case management had an average inflow of 268 cases per month and an outflow of only 234 cases for the year 2002. This was a good cause for raising a red flag, since courts could not even attain one twelfth an equal number of case inflow and case outflow to keep their caseloads steady. For the period of 2000 to 2002, the ninety-five first-level courts of Metro Manila had a total inflow of 82,104 cases, and a total outflow of 82,875, showing a dismal disposal of only 771 cases in three years.

□□□□□
Originally, case-management and CFM were thought of as the responsibility of lawyers and their clients, while judges merely refereed courtroom skirmishes. This was true of the Philippine legal situation where the manner and speed in the conduct of a court case was controlled to a great extent by lawyers.

Judges, on the other hand, allowed themselves to be passive, apathetic, and timorous actors in the adjudicative process, locked in the belief that they had no control over case input and output, case survival, and case life. This attitude was reinforced by a common fear that if judges enforced strict compliance with procedural rules and timelines, litigants would bring administrative charges for being too unfair, unreasonable, and oppressive! Also, and too often, judges found themselves at the end of an inhibition petition or a motion filed by lawyers with the OCA for change of venue of a case due to judicial partiality and bias which is mostly fictive and employed only to delay the case or to circumvent the rule against forum-shopping to get a more sympathetic court. A lot of these motions are eventually denied for lack of merit, but in the meantime, delay has already set in.

These practices have contributed, without doubt, to bursting caseloads and ‘rocket’ dockets. Judicial attitudes towards responsibility for case management, therefore, had to undergo a paradigm shift. Trial court judges had to be made to recognize that while a case is not yet filed and is still in the hands of the lawyer, responsibility remains with the lawyer; however once a case was filed, the case becomes the primary responsibility of the court. It was now time for the judges to step out of the judicial box, so to speak, be pro-active, and take the initiative of controlling the court environment through effective case management.

□□□□□

2.2.1 The Case Management Plan: In 2001, as part of its Action Programme for Judicial Reform (APJR), the Supreme Court of the Philippines (SCP) through PHILJA and the OCA, embarked on a pilot project on effective CFM as a strategy of case management for trial courts. Patterned after the American and Canadian models, the CFM Philippine version adopted as its underlying philosophy on caseflow Standard 2.50 on Caseflow Management and Delay Reduction formulated by the American Bar Association which states that:

From the commencement of litigation to its resolution, whether by trial or by settlement, any elapsed time other than reasonably required for pleadings, discovery and case events is unacceptable and should be eliminated. To enable just and efficient resolution of cases, the court, not the lawyers or litigants, should control the pace of litigation.

To implement the pilot project, the SCP, exercising administrative and supervisory powers over all lower courts of the country, organized a CFM committee composed of representatives from the different sectors of the justice system. The first task of the CFM Committee was to create a Technical Working Group (TWG) that would design a CFM Plan to be tested in a target area.

The CFM Plan was contained in a CFM Handbook prepared by the TWG, describing step-by-step the proposed CFM procedure for civil as well as criminal cases, consistent with the existing legal structure and rules of procedure. The CFM Committee proceeded from the premise that CFM involves reshaping rules of procedure to establish reasonable time standards, creating new case events to hasten case disposition, and eliminating events that caused unnecessary delay. It decided that since the rule-making power is vested by the Philippine Constitution in the SCP, the amendment of rules of procedure to suit CFM needs could be undertaken by the court itself, without need for intervention by Congress.

Eliminating or reducing undue delay entailed fixing reasonable time brackets for case events and their time intervals. In collapsing timelines into reasonable periods, the designers of the CFM plan were guided by the policy that time intervals between case events should be long enough to afford the parties time to prepare, but short enough to encourage them to prepare. This formula addressed the twin demand for swift disposal and fairness.

Additionally, the technique called DCM was adopted in which cases were clustered or categorized into those needing very little judicial intervention, those requiring more judicial attention; and those where ordinary judicial effort was sufficient. Fast track, complex track, and standard track processes were formulated for each case type to travel. From filing to disposition, each track had its own timeframes and case-processing requirements. The tracks would ensure that cases proceeded according to fixed deadlines.

□□□□□ Track assignment was determined at the time of filing or soon thereafter by the parties, their

lawyers, the judge, and the clerk of court. Parties are asked to indicate their preference in a case information sheet (CIS) which they fill out upon filing their initiatory and responsive pleadings. Ultimately, however, the determination is based on the court's and the lawyers' knowledge and experience about what level of judicial attention individual cases need. Basically, the criteria employed concerns the nature of the case, the claims and the defences, the kind of evidence to be presented, and the degree of proof required by law.

Introducing DCM to key justice sector players involved convincing them that not all cases in court are alike and therefore should not be subjected to the same time and processing schedules and needs. It was necessary to instill the idea that courts needed to abandon the 'first in—first out' policy of case handling. The traditional approach to case management simply was not working, ignoring as it did the nature, individual time, and processing requirements of each case.

The CFM Handbook described not only the tracking systems but also the particular functions of each of the key players in case management. It also contained sample forms for court orders, minutes for pre-trial proceedings, and other documents to be used by judges and clerks of courts. These proformae could be electronically generated by computer to save precious time and energy that otherwise would be spent in the manual preparation of such documents every time the need arose. These electronic forms are now considered one of the best features of the CFM system.

So that the courts could monitor the progress of cases through their assigned tracks, it was necessary to use technology. Initially, the management of data in the pilot project was to be done manually, since the project intended only to show that CFM worked as a strategy for delay reduction or elimination. During the CFM training programme, however, vital issues arose including the need for accuracy in monitoring case progress through the tracks as well as strict observance of pre-trial and trial events. Both were matters that could very well be solved with the help of automation.

★★★★★

2.3.1 Problems Encountered and Modes of Resolution: As in any experimental endeavour, the CFM pilot project had its share of roadblocks that needed to be cleared as soon as these appeared.

Resistance to the changes being introduced was discernible at the training programme and while the activity was underway. Judges and court personnel, especially the older ones mothballed in traditional slow-paced litigation, found difficulty in adjusting to, and keeping in step with, the new timeframes and schedules, as these entailed major changes in their work environment. They feared that gone would be the days when time was fully theirs and not circumscribed by rigid rules. This would upset the pattern of their professional and personal lifestyles. As a result, monitoring by the judges and clerks of courts became lax, and timelines were often ignored. Was the Filipino trait of '*ningas cogon*' already rearing its ugly

head?

★★★★★

Within the pilot period of two years, a significant number of judges and court personnel ceased to be connected with the courts due to generally unforeseen causes like promotions, resignations, early retirement or deaths (no, not because of CFM)! The replacements, especially those temporarily designated to take over vacancies, found it difficult to adjust to the CFM process because of lack of sufficient motivation and training, especially in the operation and management of the CFM software. Technology-wise, when computers bogged down or crashed, users did not know what to do, and technical assistance was slow in coming.

★★★★★

At end of the experiment, the courts did a self-assessment of their performance. At the level of the MeTC, 95 per cent of the CFM civil cases and 90 per cent of CFM criminal cases were disposed of according to their designated timeframes, disposals here being measured in terms of full-blown trials. At the RTC level, the disposal rate was a disappointing 23.5 per cent on the average for both civil and criminal cases. This could perhaps be attributed to the fact that some courts failed to strictly observe time limits due to disinterest, insufficient technical know-how, and unexpected vacancies that were not immediately filled. All of which ultimately resulted in failure of the monitoring process.

These findings nevertheless confirmed that CFM works and is effective in reducing delay in the disposition of cases, *but only if the court is genuinely committed to seeing that all the events or stages of the case happen within the designated timeframes so that undue delay is averted.* An additional but equally important finding was that the full support for the process by the SCP, the trial courts—judges as well as court personnel, the Bar and all other stakeholders is intrinsic to the success of any case management plan.

★★★★★

Furthermore, several important issues—drawn from this pilot project after dissection and analysis—were resolved into the following lessons learned:

1) The design of a successful case management programme should consider the following essentials:

A *policy statement or a statement of purpose for the case management plan* that serves as lodestar. Without a mission statement, the endeavour will be directionless with no specific goals to be achieved.

Firm judicial leadership—Judicial leadership involves more than just taking the lead in managing one's own court and pushing cases up to final disposition. A high degree of moral ascendancy or authority is demanded. This arises out of a legitimate cause and impels others in the litigation system to be morally obliged to accept and respect such authority, to be led, to follow, and to cooperate. Good leadership recognizes participatory management. It instils in the players a sense of ownership in the programme and empowers them to engage in a lively and frank exchange of ideas and concerns because they have a valuable stake in it.

An environmental scan of the existing legal structure—A review of statutes and rules of procedure

that allow or inhibit implementation is imperative. In this way, parameters of the case management structure can be determined, including what can or cannot be done; legal barriers that may be pushed beyond perceived limits; or legislative action necessary to implement a process.

An analysis of *the legal culture,* namely, the readiness and willingness of the justice stakeholders to accept and adjust to the changes brought about by case management reforms. This also refers to the attitudes, the needs of, and relationships between, the local Bench and Bar.

The *identification of key persons* who are to be involved in the project and the description and delineation of their individual roles in the planning and implementation. This ensures sustainability in terms of commitment to bring the programme to its desired result.

An inventory of *existing management information* systems to determine the availability or viability of the infrastructure, if any.

The level of *support/cooperation of the local government unit officials*.

Sustainability in terms of logistics for system maintenance, continuity of training programmes, and other related administrative concerns.

★★★★★

Osama Siddique, Caseflow Management in Courts in Punjab: Frameworks, Practices and Reform Measures: (Report and Recommendations to the Lahore High Court for improving Caseflow Management and Case Disposals) (European Union: 2016)

Executive Summary: Caseflow Management – The International Experience

Delay, case pendency and caseload reduction have received particular attention by the Pakistani judicial leadership, especially over the past decade and a half. Various initiatives have been undertaken in this regard and some headway made. However, they remain perennial challenges, as evidenced by various past and recent scholarly reports, third-party assessments and public perception surveys. This points to the continuing need for meaningful large-scale structural reforms, modernization of laws and processes, and fresh approaches to improving administration of justice.

- **Section 1** of this Report maps and discusses international reform experience that demonstrates that merely boosting judicial and court resources, incremental legal and procedural modifications, and automation of certain aspects of the legal process, offer limited assistance towards promotion of sustainable efficiency and predictability in legal processes and effective on-going management of delays and case backlog.
- Instead, there is now considerable evidence to show that the reform focus ought to be on scientifically measuring, tracking, monitoring and streamlining case processing times and judicial workloads as well as on meaningful identification and control of resilient barriers to effective case processing.
- In this context, there is now a vast, fast growing and deep literature on

various aspects of Caseflow Management that has evolved into an advanced domain of specialized thinking and practice. A close review of this literature reveals certain core purposes, vital characteristics and prominent aspects of Caseflow Management on which there is a general academic, policy-maker and practitioners' consensus amongst those who study, analyze and operate in this area.

- The upshot is that an effective, comprehensive, contextualized and dynamic Caseflow Management system is now widely believed to be the fundamental discipline, approach and mechanism required to ensure judicial independence, the administrative control of judges over litigation, and the efficient, effective and fair administration of justice.
- Closely connected to this idea is the conviction that in order to enable just and efficient resolution of cases, it is the court, and not the lawyers or litigants, who should control the pace of litigation and thus meaningfully monitor and address the problems of delay and backlog.
- Since courts are expected to play a pivotal role it is also deemed necessary that the judicial leadership must assume primary responsibility for the pace of litigation and that judges must be the formal leaders of any reform efforts.
- Caseflow Management involves (but is not limited to) the entire set of actions that a court takes to monitor and supervise the progress of cases, from initiation to conclusion, including organization and management of daily dockets, setting calendars and time standards, establishing case processing tracks, management of individual cases, management of the court's overall pending caseload, vision- setting and strategic planning, budgeting and resource utilization, and overall judicial policymaking, goal-setting and leadership.
- This Report sets out to examine the current state of Caseflow Management in Punjab by focusing on the following three important and inter-connected areas: (1) Actual pace of litigation in the district courts of certain selected districts and the impediments to efficient administration of justice; (2) The current legal framework for Caseflow Management in the province; and (3) The administrative edifice, personnel and processes at the Lahore High Court ('LHC') as well as in the districts for conducting and monitoring Caseflow Management in the districts.

★★★★★

Summer 2007

TRIAL AND ERROR: FAILURE AND INNOVATION IN CRIMINAL JUSTICE REFORM

by Greg Berman, Phillip Bowen, and Adam Mansky

(Excerpts from pp. 7-9)

Introduction

… Rather than focusing attention on well-known achievements in the field, therefore, this "red paper" — the product of semistructured interviews with criminal justice experts, researchers and practitioners, as well as a review of the literature on failure — seeks instead to provoke debate as to why some criminal justice reforms work and some do not. This exploration is not about failures of incompetence or corruption — these kinds of failures tend to be well-documented by the media (and contribute to a generally risk-averse environment). Rather, this paper is about the kinds of failures in which well-intended efforts fall short of their objectives: the enforcement strategy that criminals ignore, the compliance monitoring scheme that doesn't reduce re-offending or the seemingly successful job training program for ex-offenders that suddenly closes up shop.

This examination is intended for anyone interested in criminal justice reform but, in particular, seeks to reach local policymakers — probation officials, court administrators, leaders of state and local criminal justice agencies. By discussing failure openly, this paper seeks to help foster an environment that promotes new thinking and the testing of new ideas. By identifying lessons that could inform criminal justice practice going forward, this paper seeks to ensure that, at the very least, tomorrow's innovators are less likely to make the same mistakes as today's. The bulk of this inquiry, therefore, looks at the causes that contribute to failure…

Failure of Design

The most obvious source of initiative failure is the bad idea, the incorrect hypothesis. Sometimes, planners just plain get it wrong, anticipating — and hoping — for an impact and finding none. Why do criminal justice innovators launch initiatives with poor initial designs?

Poor understanding of target population: Discussing a project piloted twenty years ago that provided direct social services to prostitutes, Tim Murray, currently executive director of Pre-trial Services Resource Center, says "Most of our clients, about 60 in all, disappeared within the first 30 days . . . because the premise was lousy." Describing the untested assumptions the project made about client lifestyles, Murray believes that there were fatal mistakes in the project's design from the get-go.

Unrealistic expectations: Even when an initiative is working, it may still be damned by failing to meet expectations. The very qualities needed to build initial momentum and rally support from staff and outside stakeholders — optimism and drive — can actually lead planners to overestimate or over-promise the impact of reform. Management of expectations — whether those of agency decision-makers, stakeholders, the public or even program participants — can determine a program's success or hasten its failure. For example, Project Greenlight in New York City was a comprehensive prisoner reentry initiative that was cut short after arrest rates were found to be higher for participating prisoners than for those of two different control groups, including one that received no re-entry intervention whatsoever. In its review of the effort, the Vera Institute of Justice identified that the program had created unrealistic expectations about available social services, that participants' hopes were dashed when they accessed the services, which in turn affected their ability to successfully re-enter the community.

Unclear research guidance: Despite wide acceptance of the need for evidence-based decision-making, many areas of criminal justice remain under researched. Even where research does exist, it may be so loaded with caveats (not to mention written in a highly technical vernacular) that it offers little guidance for policymakers. In environments demanding quick decisions, policymakers need succinct assessments and researchers willing to make the most out of the available evidence. Without clear evidence, planners must sometimes make use of educated guesses — and guesses sometimes prove wrong.

Failure to perform adequate research: Adelle Harrell, a researcher at the Urban Institute, noted that some projects will steam ahead without investing enough time delving into a problem. Sometimes in the rush to get things done, officials don't examine research and end up choosing strategies that have already been tested and rejected in other locations. Ellen Schall indicated that the criminal justice world often finds it difficult to look beyond its own arena, and ignores ideas from other fields that might be relevant…

Failure of Implementation

The ability of innovators to implement what are apparently sound hypotheses is fraught with potential pitfalls. An innovator can have a great idea but be unable to pull it off. Assuming that a new idea makes sense, why do some projects fail at the implementation stage?

Resources: Simple deficiencies in resources are a natural constraint on innovation, whether they be budgetary constraints, staff limitations (both in numbers or skills) or the lack of access to information or technology. There just may not be enough staff, time, money — one can fill in the blanks—to do what's needed to get a great idea up and running. Funders, whether governmental or private often have limited attention spans; sustaining new programs over the long haul is a constant challenge…

Leadership: The lack of an effective leader can often be the death knell of a new initiative. Analysis suggests that the first drug courts succeeded in part because a group of committed mavericks could, by "the sheer force of personality alone…, overcome bureaucratic inertia and skepticism" (Fox & Wolf, 2004). Tim Murray, who helped establish the first drug court in Florida, emphasized the important role that charismatic personalities play in driving success. An effective innovator also must be an effective project manager…

Commitment: Short-term demands for accountability can terminate projects before they have had sufficient time to find their feet. While it is not unreasonable for funders and senior leaders to demand to know what is going on, innovative projects need the space to try different approaches, to adapt and move forward…

The local landscape: Lisbeth Schorr, professor at Harvard University, said, "In my experience, the biggest mistake . . . is thinking that because a program is wonderful, the surroundings won't destroy it when they plunk it down in a new place. But . . . context is the most likely saboteur of the spread of good innovations" (Berman & Fox, 2002). Put simply, failing to adapt to the challenges of the local context is a common cause of failure. What might work in Los Angeles might not work in a small Louisiana parish or a Midwestern city with different cultural values. At the very least, model programs will need to be tailored to local customs and political realities…

Failure to Manage Power Dynamics

The need to manage power dynamics and political realities surrounding an innovation is perhaps the hardest factor to discuss. (For purposes of this inquiry, "politics" and "political realities" are defined as external forces, *i.e.*, those *not* related to the merits of a project, which can affect its ability to succeed.) Criminal justice reforms can be buffeted by democratically-elected or politically-appointed officials but also by budgetary changes and everyday dynamics within bureaucracies and between agencies…

Political influences: Asked why she believes that reformers sometimes attempt to implement ideas already discarded by research, Adele Harrell contends that certain programs (like boot camps) are politically appealing even when the evidence suggests that they don't work. It is important to note, however, that political pressure is not always a bad thing. Politicians often reflect the democratic will of the citizenry. Moreover, sometimes political pressure is the only force capable of overcoming entrenched obstacles and interests.

Fiscal realities: Fiscal decisions and crisis management can alter the landscape of a reform at the drop of a hat. Today's priority can be tomorrow's victim of budget tightening. If an initiative appears non-essential — often the case when new programs are compared to the core business of making arrests and processing cases — it may be the first thing placed on the chopping block in a moment of crisis.

Inter-agency differences: Bureaucratic boundaries, erected by mission, staff attitudes, leadership, organizational vision and even incompatible technology systems, can produce a dynamic of its own that leads to suspicion, resentment or a lack of cooperation among agencies. These differences in agency culture could provide a serious barrier to mutual understanding and effective partnership. The Midtown Community Court's Street Outreach Services was an attempt to partner social workers with police officers to provide instant services to New York's homeless population. After some initial success, the project has encountered on-going challenges over time due to staff turnover at the court and the reassignment of police officers and local precinct commanders (including some not suited or committed to outreach work), leaving participating staff who were insufficiently trained in overcoming the cultural differences between the two agencies. (Street Outreach Services was also affected by the withdrawal of private foundation support — a frequent challenge that innovators must face given that very few foundations make long-term commitments.) **…**

References

1. Berman, G., & Fox, A. (2002). Going to scale: A conversation about the future of drug courts," *Court Review*, Fall.
2. Business Week (July 10, 2006). *How failure breeds success.* Retrieved July 10, 2006 from www.businessweek.com.
3. Fox, A., & Wolf, R. (2004). *The future of drug courts: How states are mainstreaming the drug court model*. Center for Court Innovation, 2004.
4. Welch, J., & Byrne, J. A. (2001). *Jack: Straight from the gut*. New York: Warner Books.

ANDHRA PRADESH **(Excerpts)**

Institutional Apathy towards Undertrial Prisoners

A study of prison conditions in Andhra Pradesh undertaken by the Commonwealth Human Rights Initiative reveals the denial of legal assistance to prisoners which has ultimately led to overcrowding, unacceptable overstretching of facilities and consequent terrible conditions.

K MURALI

Recently, the Commonwealth Human Rights Initiative has undertaken a study of prison conditions in Andhra Pradesh. The study reveals, among other things, many problems faced by the undertrial prisoners. The most important problem is the denial of legal assistance to prisoners that has led to chronic overcrowding, unacceptable overstretching of facilities and consequent terrible conditions in which mostly unconvicted persons must spend an unjustifiably long duration incarcerated without proof of guilt. These problems are not intractable or inevitable. They are to a large extent the result of institutional apathy, neglect of statutory duties, regulations and norms and, indeed, disregard of the law and directions of the Supreme Court and high court.

The population of undertrial prisoners has been steadily increasing in Andhra Pradesh for the past few years. In the past five years, from 2000 to 2005, the number of undertrials admitted into prisons per year has gone up from 1,41,641 to 1,55, 363. Annually, the number of undertrial prisoners is increasing at a rate of 2.4 per cent. At 2005, 65 per cent of the entire prison population was made up of people awaiting trial. The ratio between total number of convicts and the undertrials admitted into prisons is 1:9.

While reasons for increasing undertrial population may range from increased police effectiveness in apprehending criminals or unnecessary arrests, refusal of bails, non-availability of escorts, injudicious usage of videoconferencing to extend remand periods, ineffective hearings or other prosecution and judicial delays, the situation of overcrowding and unjust incarcerations can be significantly improved through better implementation of the right to have an effective legal representation.

Denial of Free Legal Aid

Though all prison officials like to claim that every undertrial prisoner was promptly provided free legal aid or a 'sarkari vakeel', in reality one can see number of them without any kind of legal assistance. We observed that only some of the prisons held printed legal aid application forms that are used for seeking legal aid. We also observed that information about legal aid was normally passed on to newcomers by older hands who had got to know about it but it did not come from any official.

During our interaction with undertrials, especially the new ones, it took us some time to explain that there is a system called free legal aid through which they could get legal representation for free. Many could not grasp the concept immediately or believe that they are entitled to an effective representation as a matter of right. As there is no system of formal induction for new prisoners, there is no systematic way of providing new entrants with information about availability of free legal aid as a matter of routine. Most prisons do have wall writings indicating that free legal aid is available. However, given that 48 per cent of all undertrials are absolute illiterates and 35 per cent are semi-literates,[1] the value of wall writings is at best limited to a very few assiduous readers, others simply don't have any way of knowing unless they get a chance on the information. Since the visits to jail by lawyers are also infrequent and irregular there is little opportunity to come by information

.....

...

Poor Legal Representation

The videoconferencing has been introduced as a means of dealing with lack of escorts and cutting down on time taken in toing and froing from court. However, now there is a need for a fresh look at the functioning of legal aid in the context of increasing usage of the videoconferencing system existing between courts and prisons. At present the videoconferencing is routinely used merely to extend remand periods of undertrials. In court, counsel would be present. However, it has become the habit for there to be no counsel present at the videoconferenced hearing. We did not witness a single instance in videoconference rooms of any courts in the state, where either defence counsels or legal aid counsels were present when extensions for remand were being decided. While the presence of legal aid counsels is specifically insisted upon when the accused is physically produced before the magistrate, like in Mahaboobnagar, in the subsequent hearings, it is not the same with the case of videoconference proceedings. The absence of legal aid counsel during the remand extension hearings can be a ground for removal of such counsels from empanelment of legal aid system. The demand for money, absence during remand extensions and negligence of duties by the counsels are all contrary to the guidelines issued by the state legal services authority (SLSA) of Andhra Pradesh.[2]

Documentary evidence of specific instance of non-availability of legal aid bears out our experiences and observations. As on December 25, 2004, there were 936 undertrial prisoners in Andhra Pradesh, who had completed more than one year behind bars. Of them 78 undertrials did not file a bail petition, the prison records say, for want of advocates. It is important to note that in almost all these cases, the police did not even bother to file chargesheets. After 90 days the prisoners would have been near automatically entitled to bail, if legal aid counsel was made available and charge-sheets were filed in all these cases as per the judgment of Supreme Court.[3]

The absence of strong monitoring systems to gauge the performance of the legal counsels appointed to each court is one main cause of the neglectful service provided. Another important reason for poor legal representation is the lack of information to the accused and his/her family about the particular counsel that has been designated to represent the case and the standards and services that the client is entitled to expect. Since even the orders from magistrates to prison officials informing them of allotment of counsels remain in English, remand prisoners are at the mercy of prison authorities for that information. This need of the accused is met by recent guidelines issued by the SLSA of Andhra Pradesh to display information of legal aid counsels at the courts in Telugu. To make it more effective, there is a need to display complete information about all the legal aid counsels in and outside of the prison ...

…

Lack of Escort

A major reason for long overstays in prison is non-production of the accused in court because of non-availability of an escort force. The government figures put the production rate at more than 85 per cent. But this indicates the overall average and does not take an account of particular segments, which are particularly badly affected by the alleged lack of escort. Women account for 5.6 per cent of the total prison population on any day in a year, but they constitute 13 per cent of total number of admissions throughout 2004-05. They are housed in all prisons primarily meant for men as well as in the state jail for women in Hyderabad and Rajahmundry. They come from several districts to these limited facilities. The police of East Godavari and Hyderabad have to provide female escorts and produce the women undertrials in courts situated outside those districts. There is a shortage of female escorts here as well as in other districts where women are confined.[4] Therefore, women prisoners more than their male counterparts are likely to miss hearings and have their stays routinely extended.

Another badly affected group come from amongst undertrials housed in sub-jails.

These problems show up more in the sub-jails of Rayalaseema region, but not exclusively.[5] The district level undertrial review committee of Mahaboobnagar,[6] pointed to the many cases pending before various courts in the district for want of production before the courts. At the end of year, there were 13 accused involved in eight cases in jails for more than one year. There were also 32 accused involved in 28 cases in jails of the district for more than six months. As on June 30, 2004, in Hyderabad and Secunderabad jurisdictions, there were 93 undertrial prisoners awaiting trial for more than one year and 96 were for more than six months. The district level review committee of Hyderabad[7] points out that these cases are pending because police fails to execute non-bailable warrants and does not file charge-sheets for years together.

The instances and situations have been observed in the course of visits over seven months to 20 jails across 16 districts of the state. There is no reason to believe that the situation is better in any particular district, or that these instances are not typical of the system, which can with a little coordination and oversight work far better and significantly reduce both the rights violations implicit in lack of attention to these matters and the acceptance by oversight bodies of poor practices. The poor condition of service in the prisons and in statutory authorities like the legal aid service does little to help the situation. However, this cannot be a reason for abjuring responsibility for providing regular services to the client group created by law or reduce the level of duty owed to the indigent prisoner. Similarly, in relation to lack of escort, it is the duty of the state to ensure that citizens are afforded every opportunity to be present at court and that the routinised practice of returning a warrant for appearance in court to the authorities with the comment that an extension for hearing be granted because there is no escort is to be deplored. This amounts to the prison/police authorities who are third parties to the case between state and citizen interfering in the process and amounts to a violation of the standards of fair trial. Such practice cannot be condoned.

If courts do not tolerate such routinsed means of retaining prisoners in jail for unfair and overlong period across the state, means will be found to remedy the situation, which now prevails. One solution lies in ensuring that undertrials are housed in jails closer to the courts in which their trials are pending and another necessary requirement is that each authority involved in ensuring an appearance including the legal aid counsel, the prison and the police escort responsible for producing the accused in court be required to coordinate so that the prisoner is not required to spend more time in jail than is absolutely unavoidable and so that fair trial guarantees are not defeated. That stringent adherence to these requirements will have the long-term effect of easing the chronic overcrowding in Andhra jails as well and send a salutary signal to all the authorities concerned in regard to their individual duties to produce the accused in court and not compromise the freedom of citizens for want of proper systems. EPW

Email: karnammurli@rediffmail.com

Notes

[The writer is grateful to Maja Daruwala, director of Commonwealth Human Rights Initiative (CHRI) for generous comments on the draft.]

1 National Crime Records Bureau, ministry of home affairs, government of India, 2002.

2 1 Legal Aid Counsel should give legal assistance to the persons in custody, for opposing remand applications, for filing bail applications and moving miscellaneous applications as may be required.

2 Legal Aid Counsel is under obligation to remain present, in the court assigned to him/her, during remand hour and such other hours as may be directed by the courts concerned.

3 Common Cause, a Registered Society vs Union of India AIR 1996 SC 1619.

4 Proceedings of the *High Level Committee on Production of Remand Prisoners in Courts*, January 20, 2005.

5 The average figures of prisoners are always very deceptive. The annual inflow and outflow of undertrial prisoners from sub-jails is more than 73,000 but authorised capacity of 120 sub-jails is 3,175. If we go by averages as on March 31, 2005, for instance, the sub-jails of Chittoor district are housing 37 per cent more undertrials than the authorised accommodation. Similarly, the central prison of Kadapa and district prison of Mahaboobnagar were housing 94 per cent and 258 per cent of more than their authorised accommodations.

6 Dated November 15, 2004.

7 Dated August 21, 2004.

THE ECONOMIC TIMES

Trials through video to help government save Rs 100 crore a year

By *Dhananjay Mahapatra*, TNN | Updated: Mar 28, 2016, 12.14 PM IST

Post a Comment

NEW DELHI: Nearly three lakh undertrial prisoners in jails are transported regularly to the courts to face trial which entails arranging for transport vehicle, escort vehicle, police personnel for security, their lodging in the court and taking them back to jail safely.

When an undertrial gets produced in court thrice a year it costs the government Rs 1,000. But now, undertrials need not be produced in courts as trial court proceedings can go ahead through video conferencing, which will help the government save Rs 100 crores per year. The facility is being installed at almost all district courts through the eProject piloted by the Supreme Court's eCommittee headed by Justice Madan Lokur.

Chhattisgarh HC had chosen the highest number of locations — 115 — for installation of video conferencing facilities, of which installation has been completed in 98 places.

Trial through video conferencing from jail would eliminate the incidents of brawls involving undertrials inside the jail van taking them to court, which had some times turned fatal for few of them. It would also rule out the chance of prisoners escaping.

The eCommittee in consultation with the high courts had selected 830 locations where video conferencing facilities were to be installed. By March 1, the facilities have been installed in 669 locations, that is in over 80% places the video conferencing facility was ready for use.

Chhattisgarh HC had chosen the highest number of locations — 115 — for installation of video conferencing facilities, of which installation has been completed in 98 places.

Odisha had identified 85 locations, of which 83 already have video conferencing facilities. Maharashtra too had the facilities installed in 72 of 76 places.

Apart from video conferencing facilities, the eProject has ensured that litigants do not need to pay a fee to their advocate anymore to find out when would their case be listed again. SMS services have been started in many courts, which alert litigants about the next date of hearing soon after an adjournment.

In India there are 1,387 jails housing 4.18 lakh prisoners of which 2.82 lakh are undertrials.

Why the Mahmood Farooqui Judgment is Deeply Flawed

Posted on : August 23, 2016 Updated on: September 8, 2016
http://www.hardnewsmedia.com/2016/08/why-mahmood-farooqui-judgment-deeply-flawed

The sentencing of writer and dastangoi performer Mahmood Farooqui on charges of rape has raised many issues about the new law and the manner in which it is encouraging carceral feminism. Author, academician and activist Manisha Sethi has serious views on this judgement. We are publishing her article for readers who are keen to engage more with this complex, but important issue [*Editor*]

Manisha Sethi, Delhi:

Criminal trials are not ritualised dramas. The harsh penal consequences flowing from prosecution demand that guilt is established beyond reasonable doubt. The prosecution's case and the sequence of events it alleges must be proved to be the only one possible – and not merely one of the probabilities. This is what distinguishes courtroom proceedings from drawing room gossip – or even television chat shows. And this, we must bear in mind while discussing the Mahmood Farooqui case. Idle chatter on social media and news debates are framing the case as an apocalyptic battle between righteous feminists and evil forces of patriarchy. A television anchor hosting a show on the case made a clever editorial decision: opposite a feminist, he cast a representative of some 'Male Protection Force'. The voice of patriarchy became the voice of all those doubtful of the conviction. It is being insinuated that any criticism of the sessions' court judgment – and indeed the new rape laws – is tantamount to participation in 'rape culture'. Ostensibly clinching evidence is being cited, and the Farooqui judgment is being hailed as the harbinger of a new era of justice in sexual crimes.

Facts around such cases are best discussed in courtrooms to protect the dignity of all involved, but given that the judgment and the events surrounding the alleged incident are being summoned in the public domain with such authority, it is best that those be placed in the right context.

The Emails

First, the issue of emails, which was discussed threadbare on a TV show. It is the prosecution's case that the complainant sent emails to Farooqui accusing him of rape. It was argued – and accepted by the court – that Farooqui's brief reply to the complainant "my deepest apologies" is an unshakeable admission of guilt. An article on the blog Kafila analysing the verdict also said: "Perhaps the most clinching evidence supporting the survivor's testimony is Farooqui's own apology when confronted with his crime, and his wife's response to the survivor's email accusing him of rape."

Stated this way, it does indeed appear to be so. However, does the first email, to which Farooqui replied allege rape? It professes "love", "respect" and "attraction" for Farooqui. It says that she "went along" and "in the end consented" to avoid escalation of the situation. If one were to go by the prosecution case strictly, in her first email, the complainant says she consented but not out of free will.

Is this then the question of interpretation of that consent – freely given in the mind of the accused, and forcibly given according to the complainant? In her complaint later, she also writes that she feigned an orgasm to end her ordeal. If by her own admission she is allowing the man to think that she is actually participating in the act by pretending to orgasm then did Farooqui have any reason to disbelieve at that time – even going by the prosecution's case – that the consent was not freely given?

"My deepest apologies" is hardly an admission of guilt or crime. And then, is a man who will stop at the woman's expression of pleasure, an unmistakeable rapist?

Also, does this email – where the complainant expresses hope that their friendship will remain unaffected by this incident – not conflict with the statement of the chief prosecution witness Danish Hussain that the complainant had earlier communicated to him, immediately after the incident, the trauma and rage at being sexually assaulted, both through WhatsApp messages and over the phone. Is it natural human conduct to express love and attraction, and hope for continued friendship when enraged? Moreover, when in her complaint later she writes that she did not resist because she was reminded of Nirbahaya's brutal murder and feared a similar fate. Is it natural human conduct to declare love to someone who has triggered the fear of violent death in you less than 48 hours ago?

It is only in her second email, two weeks later on12th of April that she explicitly accuses Farooqui of having violated her. At this time, Farooqui was already in rehab undergoing therapy for his bipolar condition. During this period, his wife Anusha Rizvi operated his email account to keep track of their professional commitments. She came across the complainant's second email. She was stunned to read the email and replied to it from her email account.

"I am deeply disturbed by your email. What you have described is an ordeal. I cannot imagine how you have dealt with it so far. Needless to say that I stand with you. If you require any help of any nature including legal, I will assist. This is completely unacceptable behaviour, especially for me since it happened under my roof."

She wrote what only an extremely sensitive person would have when confronted with such an allegation. She promised her support and wished her recovery from her ordeal. How does this email become clinching evidence of Farooqui's guilt?Farooqui was in rehab not accessing his email account; Rizvi was not in communication with him except for evening phone calls allowed by the rehab centre. Her email to the complainant was sent without speaking to her husband, as she clarifies in her second email to the complainant:

"I understand how angry you must be and therefore misread my categorical position on such matters. The reason I mentioned Bi-polar is because that is the reason why I don't have access to Mahmood and therefore I am unable to confront him at present. "

In essence, she is a third party, with no knowledge of what transpired that evening. Her emails can have no legal bearing on the case at all. The judgment, therefore, is fatally misconceived in holding that "The scrutiny of the emails sent by the wife of the accused to the prosecutrix shows that at no point of time she has refuted the allegations of rape made by the prosecutrix against the accused. Rather she has expressed her sympathy for the plight of the prosecutrix and advised her to take appropriate action."

Yes, indeed she sympathised, indeed she offered help; indeed she did not refute the allegations. But this shows her to be a sensitive person, willing to trust the complainant's word even without cross checking with her husband. In fact, there was no occasion to cross check with her husband. It is a leap of legal imagination to take her email to be 'clinching evidence' of her husband's guilt.

"The True Colours" of MahmoodFarooqui and AnushaRizvi

What is perplexing is Anusha Rizvi's vilification at the hands of the prosecution. It would hardly have been easy for her to respond to an accusation of such a nature against her husband. Yet, she reached out. To this the complainant's lawyer had this to say:

"Strangely, Anusha did not express even an iota of surprise on reading her emails describing how her husband forced oral sex on her. This leads to an inference that she was well aware of the accused's behaviour particularly in matters related to his sexual

conduct….The silence, apology and admission only imply that the accused and Anusha both knew that the accused had committed forced oral sex upon the prosecutrix. Subsequent actions of Anusha Rizvi and the accused upon learning about the registration of FIR as reflected in the CDRs revealed their true colours."

These kinds of nebulous speculations – whether Anusha Rizvi was surprised or not, even though her emails communicate a deep sense of shock – have little legal bearing, but are significant to creating an image of the accused as a habitual offender and the wife being used to his sexual misconduct.

Contextualising the Communications

It gives me no pleasure to quote personal communication, or records of who called who and how many times, but since the entire case in the court and in public imagination now rests on such communication, it is imperative that it be placed in context.

a. The prosecution tries to construct a picture of the accused pursuing the prosecutrix. It does so by showing that he invited her home for dinner, asked her to accompany him to Gorakhpur which was her area of research (which she declined), met her in Hauz Khas, and also asked her to come home for dinner on the day of the alleged incident. First, in none of these meetings was the accused ever alone with the complainant. The first was a dinner party, with other guests and his wife present; the visit to Gorakhpur was a trip with his wife and for a show organised by the Farooqui family where family and co-actors would have been present. Gorakhpur was, moreover the place of the prosecutrix's research and the reason for her contacting Farooqui in the first place; again the meeting at HauzKhas was in the company of others.

What this leaves out are the persistent messages and calls made from the prosecutrix to the accused, for meetings but also, on her birthday in the middle of her party to which Farooqui did not go (14th March); the day after invites him to "partake in a birthday drink" (15th March); then the following day, to her house, where she has "loads of leftover alcohol" (16th March).

Farooqui turned down each one of the invites.Therefore it is simply not true that the accused repeatedly issued social invitations to the prosecutrix and that she only contacted him for research work.

b. The Call Detail Records, in fact, negate a very crucial section of the complainant's statement. The complaint is as follows:

"On March 28th, 2015, I called Mr Farooqui to inform him I would need tickets to his performance the next day. He invited me to his house for dinner that night. Around 4 o'clock he called me + informed we would be going to a wedding instead, with who I presumed would be his wife."

There is no phone call or messages at all from accused to the prosecutrix on that day. In fact, there is no incoming or outgoing call on the prosecutrix's CDRs between 2.12 pm and 6.42 pm. At about 6.20 pm, she sends him a text message asking for his address, to which he does not respond. She calls him at 6.47 pm and then again at 6.51 pm. She sends the accused another message at 8.08 pm that she has booked the cab – again receiving no response. So, on that fateful day, Farooqui does not call her even once, or reply to her messages. She calls and messages him several times.

c. While these emails, particularly Farooqui's expression of contrition are being turned into the cornerstone of a supposedly watertight case, there is no explanation for the phone call Farooqui made to the complainant minutes after sending off the email. It is the defence's arguments that he replied to her email after reading the first few lines as he was on the phone constantly and not paying much attention to it. (CDRs show he was on the phone until the second before the mail was sent and confirm that he certainly was on the phone when the

email must have been composed). Only about an hour later when he was done with organising his day (they had a show the same day, and it was the week of ten years of celebration of dastangoi), that he read the complete email, and shocked at its contents, promptly called up the complainant. The CDRs show that he made a call to the complainant at 12.35 pm.

And yet, this phone conversation is not mentioned in her complaint, or her 164 statement. In her cross-examination, she denied the conversation and stated, "It is completely false". It is baffling that the email sent by the accused becomes the centrepiece of evidence, but the call made by him in quick succession is elided out of evidence, and the judgment altogether.

d. The WhatsApp messages and phone calls on the night of 28th March exchanged between the complainant and the prosecution witness Danish Hussain are cited by the complainant's counsel as evidence that "must be read together as a composite communication and a contemporaneous corroboration of the prosecutrix's testimony of rape". It is the prosecution's case that the complainant indicated a "sexual assault situation" when she whatsapped Danish from the house of the accused.

Here is the thread of the messages:
Complainant - Wtf
Danish Husain – What happened baby
Complainant – Mehmood baby it's a mess
Danish Husain – Why
Danish Husain – What happened
Complainant - I'm stuck here. He told me we were going to wedding; he got super drunk Anusha left him then is back I don't know what to do
Complainant – Dan I wish you were here
Danish Husain – What wedding baby
Danish Husain – You are stuck with Mahmood and Anusha is gone?
Complainant – I don't know I talked to him in the and then later he said wedding I got here, and he's crying. People are here anguish just got back. Locked in the room. I'm in the living room and can't get a cab.
Complainant – Dan when I get in auto I need to talk
Danish Husain – You mean at his home?
Danish Husain – Wtf is happening?
Danish Husain – Who else is here?
Complainant – Yes. I don't know two guys
Complainant – Yes at home

Danish Husain – Ok

Complainant – My uber is not working, and me won't get me. They ordered me cab
Complainant – I'm in dress for wedding, but I just want to go
Danish Husain – And MaFa is locked in his room and crying?
Danish Husain – Where is Anusha?
Complainant – No he's here. Anusha is locked in room
Danish Husain – Who are those two guys
Complainant – I can't remember names
Complainant – Baby
Danish Husain – Ok
Danish Husain – Just say goodbye
Danish Husain - Leave
Complainant – I am really upset
Complainant – Ok

Danish Husain – And you will find an auto at the exit of the colony

Sun, March 29th
Danish Husain – How are you, baby?
Complainant – Better just woke up

Complainant – I have to meet someone, but I'll talk to you in a bit

Danish Husain – Ok baby

First, these messages do not mention any sexual assault. Whatever one might read into them later, the messages make reference to many trivial things, but there is not even a hint of personal misbehaviour towards the prosecutrix.
Second, if the complainant's lawyer was so convinced that the WhatsApp messages were unimpeachable contemporaneous evidence of rape, why was the prosecutrix reluctant to place them before the court? The production of these messages was resisted by the prosecutrix even when the Defence moved an application for a copy. It was only when the FSL was directed to produce her laptop and phone did the complainant reveal that the messages had been deleted by her 'inadvertently'. It was demonstrated in the court by the defence counsel that deletion of a thread of messages would be a three-step act, and cannot be done by 'mistake'. Similarly, the prosecution witness Danish Hussain too claimed that the messages had been deleted from his phone when it crashed and caused loss of all data.

Third, the judge allowed printouts of screen shots of these WhatsApp messages as 'evidence'.This, as one will observe, is very a different standard of evidence than that applied to those witnesses who did not conform to the prosecution case.

Now, for the phone call conversation between the complainant and the prosecution witness. Danish claims that she described in detail her ordeal, including the pinning of the arms, and her resistance, as well as the invocation of her fears of being killed if she did not go along. If she had communicated to Danish her ordeal, two questions arise:

Why Danish failed to remain in touch with the complainant (as his CDRs show) after her narration of her traumatic rape? On the contrary, he maintained his relations with the accused, even sending him congratulatory message for an NDTV programme on dastangoi. It is only on 12th April, the day the complainant sends her second email (which she also forwarded to Danish) that he calls her.

Why the complainant adopts a different tone in her first email to Farooqui, which is at odds with her purported conversation with Danish.

The answer is perhaps that she never conveyed to Danish that she had been raped on the night of 28th. His subsequent statements are a reproduction of the email she had sent to Farooqui on 12th April where she first vividly described a specific act, and which she had forwarded to Danish.
The neutrality of Danish Husain that is being extolled by the world consists of failing to call the victim and extending warm appreciation to the perpetrator!
And what of the subsequent conduct which apparently revealed their true colours?

The prosecution argued that "the deletion of the email by AnushaRizvi as coming in the statement of the accused u/s 313 statement amounts of destruction of evidence and proves the complicity with the accused."

Firstly, the court threw out all charges of destruction of evidence at the beginning of the trial so it serves no purpose to continue to trump them up repeatedly. Second, when the

accused and his wife presented themselves at the police station upon hearing of the complaint being filed, and they, voluntarily, handed over the printouts of these emails to the police. This is hardly "destruction of evidence". When we are being asked to abandon all questions regarding the inconsistencies in the conduct and statements of the complainant and the key prosecution witness, on the grounds that those traumatized by sexual violence may behave in inexplicable ways, how sensitive is it to damn the accused's wife – dealing as she was with a husband in a rehab facility and an ailing father in the ICU, who passed away soon after.

Influencing the victim:

An article whose author claimed closeness to both the accused and the complainant has stated that the accused and his wife exerted pressure on the complainant to withdraw her complaint. The prosecutrix's lawyer has argued on similar lines in the court, and this allegation is repeated in the Kafila piece. On social media, this has acquired a life of its own, embracing within its ambit even the defence lawyer, who stands accused of attempting to engineer a 'compromise'.

Towards this, the testimony of Danish Hussain, and his SMS and call records on the intervening night of 19-20 June 2015, are being touted as evidence.

According to the Kafila article:

"SMS records showed that on the intervening night of the 19-20 June the wife of the accused Anusha Rizvi sent two SMS to Danish; one, on 20.6.2015 at 1:44 a.m, said "need to speak urgently. Very urgent" and another at 3:30 a.m said "Dan whatever we need to do will need to be done now. Thanks. Danish testified that he had been sleeping and saw the messages (one from Anusha's and another from Darrain's number) and called Darrain back. Danish testified that Darrain "handed over the phone to Anusha where they asked me if I can get in touch with the prosecutrix and intervene so that she does not press charges." He testified that he did then "call the complainant on which the complainant became very angry and said after the trauma she has gone through, she would not withdraw her complaint. She disconnected the phone, and I remember later that she called me back and reiterated the same which I conveyed to the wife of the accused and the accused the next morning."

a. What is so unnatural about calling up your old acquaintance and friend upon hearing the news that he is named as a confidante in a case against you, especially since he has never hinted to you that anything was amiss?

b. So, if Danish called up the complainant at the behest of Darain Shahidi and Anusha Rizvi, why is it that his CDRs show that it was, in fact, the prosecutrix who called him first and spoke to him for 12 minutes? It was only later that he called her.

c. Nowhere in his statement under Section 161Cr.PC, does Danish Hussain mention the attempt to influence the complainant, and neither does the complainant make this charge in her statement before the magistrate. Even by the prosecution's claim, there was no request made for any intervention before the night of 19th June. By this time, the FIR was already lodged. How would it have been possible to withdraw the complaint once it was lodged?

d.Most important of all, the prosecutrix herself denies any communication at all from Farooqui or his wife after 15 April. Indeed, she resolutely states in her statement to the Magistrate on 20 June that no one tried to influence her in anyway before filing the case.

e. DarainShahidi has denied the vague charges being made that he or Anusha Rizvi tried to influence the complainant through Danish's intervention. Why did the prosecution not examine him on this aspect, so that it could come in the evidence? Why allow such a charge to circulate as mere rumour and not crystallise it as evidence of a frank confrontation with the man who was supposed to have carried this influence to Danish Husain? In court records what

stands unchallenged is Darain's denial that he ever made any attempt to persuade the complainant to not implicate the accused.

Why was the testimony of Ashish Singh discarded?

Some evidence has not come on record. Like Ashish Singh's text message to his wife "Back to Mahmood's place with Roomi, will take sometime" sent at 10.02 pm (the time alleged by the complainant that she was alone with the accused), and where his tower location shows 12, SukhdevVihar (under which falls the accused's house) has been dismissed as not credible. Sure, the court gives a reason for discarding his testimony. The question is if this reasoning meets legal standards.

The evidence of the text message is discarded on the grounds that he had failed to give his mobile phone to the police initially. The judgment notes:

"I fail to understand what had prevented him from giving his mobile phone to the police to prove his veracity as to his coming in the house of the accused before the incident to prove the innocence of the accused. It is also to be noted that the said instrument was not sent to the laboratory for its authenticity. He introduced the facts of coming to the house of the accused before 10.00 p.m for the first time when he appeared in the court for evidence."

First, one must bear in mind that Ashish was a prosecution witness, not a defence witness. What beats logic is why a friend would conceal something so crucially in Farooqui'sfavour at such an early point in time if he were so partisan in Farooqui's interest. It could have shaken the very basis of the charge.

Then, he had indeed told the police that he was out for only 15 minutes. The prosecutrix's own case is that Ashish left soon after she reentered the drawing-room some 20 minutes after she had arrived, which would make it about 9.20-9-30. Ashish's CDRs also show his exit around that time. Where then is the concealment?

The court holds that this SMS "does not imply that he had reached the house of the accused, or he was inside the accused's home.It cannot be conclusively held that PW12 Ashish Singh was in the house of the defendant at the time of the alleged call."

This assertion by itself does not discredit the claim that Ashish was indeed present in the house. The text message, as well as the tower location, cannot just be explained away by the court's observation that it was not established that he was present in the house. What is there to disprove the fact of the message and the tower location?

Timing and the possibility of the alleged rape

The judgment holds that:

"Thus, the incident happened between the time from 22:09:04 to 22:11:47 which is the period of 2 minutes and 43 seconds…. There is no reason to disbelieve the claim that the said act as described by the prosecutrix on the part of the accused took place within the time frame as discussed by me above."

Concurring with the judgment, the Kafila piece tries to defray commonsensical understanding of rape as "a long-drawn-out, dramatic affair involving physical injury is what we are led to believe by popular culture. In reality, even two minutes is a long time – more

than enough for a man to pin a woman down, pull down her underwear and force oral sex on her."

They probably did not carefully read the prosecutrix's own statement as to what ensued between 22:09:04 and 22:11:47. Between this period, the accused and the complainant are said to have chatted "for a while", cracked jokes; the complainant is said to have rubbed/ ruffled his hair. In her cross-examination too, she accepts "conversation of a few minutes"; exchanging of jokes "later" as well as some discussion on her research. He is then said to have attempted to kiss her repeatedly. It is after that that the act of forced oral sex is said to have taken place; following this the doorbell rings, the accused goes to open the door, the complainant goes into the kitchen and observes Ashish and Roomy enter, returns to the living room and books a cab on her Meru App at 22.11.47.

The point is not to recall and deconstruct crude characterizations of sexual violence in popular culture but to ascertain the possibility of what is being alleged. Is it within the realm of the possible that all this – as stated by the complainant herself – could have taken place in the given period? We are after all discussing a criminal trial and evidence, on which depends the course of someone's life and liberty.

Post script

The Mahmood Farooqui trial was not to determine the definition of rape. Forced oral sex has already been incorporated into the definition of rape in the Criminal Law Amendment 2013. We did not need Farooqui's 'landmark' trial to establish this. What was on trial was whether there was conclusive proof of Farooqui'sguilt. The defence too operated within the existing framework of the law. Quoting sundry commentators (a la Mehrotra) or lawyers who distinguish between 'real' and 'unreal' rape on television is to tarnish the Farooqui defence by allusion and insinuation.

Yes, there is deep disquiet over the new law, both on account of the minimum sentencing rules and the expanded criminalisation it entails. There is as well a critique of carceral feminism and its unspoken alliance with a punitive state. But that calls for another reflection, unburdened by the specifics of this case.