

## Research Brief

# The Role of Judicial Reform in Development and Transitional Justice

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Postconflict societies are characterized by lack of the rule of law, past and present gross human rights violations, impunity, and economic devastation and decay. In response to past human rights violations, a variety of measures have been developed, including prosecutions at both international and domestic levels, truth commissions, and reparations for victims. All these options need strong institutions. In postconflict and post-authoritarian societies, this often requires reforming or rebuilding the judicial system and its supporting services. This paper draws connections between judicial reform, transitional justice, and development in transitional contexts.

## Elements of an Effective and Legitimate Judicial System

The key elements of an effective and legitimate judiciary that reform efforts should seek in transitional contexts include independence, accountability, representativeness, oversight, gender sensitivity, and access to justice. Judicial independence requires that judicial power exist separate from and independent of executive and legislative power, and that it repose in the judiciary as a separate organ of government. Judicial independence and accountability are closely related. A society must support and protect the judiciary because judges are targets for those wishing to generate partisan political capital. In return, society can expect judges to accept fair and temperate criticism of judgments and to maintain appropriate standards of ethical behavior.

Administering justice to all persons represents a considerable challenge for judges. If they are to enjoy the confidence of the people, they must be representative—that is, drawn from a wide array of backgrounds to ensure a better understanding of the experiences of those with whom they will be dealing. Another key project in postconflict countries is the development of oversight institutions and mechanisms over and above the courts, designed to promote and protect human rights and the concepts of good governance, accountability, and the rule of law. These institutions include human rights commissions, anti-corruption commissions, and ombudsman.

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## Research Project

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### Transitional Justice and Development

This project examines the relationship between transitional justice and development, two fields that, academically and in practice, have proceeded largely isolated from one another. The project identifies and analyzes specific synergies between justice and development, and articulates how the two types of initiatives ought to be designed and implemented in order to reinforce the shared goals of citizenship, social integration, governance, and peacebuilding. The project is managed by Roger Duthie, Research Associate in the Research Unit at the ICTJ.

It is also important to ensure that national legal systems provide accessible and gender-sensitive redress for women who are victims of human rights violations. There is a need to deal with the aspects of custom and customary law that undermine women's rights. This is particularly important in postconflict states in Africa, where the majority of people in some countries regulate their lives in accordance with customary law. Finally, accessibility requires that courts and other agencies charged with the promotion and protection of human rights be accessible to the population that the institutions are designed to protect. Accessibility is determined in part by factors such as public knowledge of the institution, physical location, diversity of composition, and affordability, as well as legal literacy.

### **Judicial Reform and Development**

Many developing countries throughout the world receive development support for judicial reform, at least in part because such reform is widely understood by donors to be good for development purposes. Judicial reform can be thought to relate to development in two main ways—constitutively and instrumentally—and through a number of broader concepts—legal reform/development, rule of law, governance, and social capital. One particularly common development-related justification for judicial reform is that it will positively affect economic growth/development.

Judicial reform can be thought to relate to other elements of development through notions such as the rule of law, governance, and social capital. In postconflict countries, the establishment of the rule of law—of which judicial reform can be a part—has generally been accepted as essential for reconstruction and long-term stability. The rule of law can contribute to development and reform by conferring impersonality, legitimacy, and to some extent stability on the political structure of the nation state. Judicial reform and the rule of law can also be linked to development through the still broader concept of governance; empirical work demonstrates a positive and causal effect of governance on economic development.

Some challenges faced by development work in the area of judicial reform are related to institutional legitimacy. The legitimacy of judicial institutions can be impeded through social, cultural, and historical factors, which can include the role of those judicial institutions in past abuses. This is where an important role can be played by transitional justice measures, as they may shape judicial reform in a way that helps it overcome historically related obstacles.

### **Judicial Reform and Transitional Justice**

The relationship between transitional justice and judicial reform exists at three levels. First, judicial reform can constitute an element of transitional justice. Second, judicial

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reform may facilitate transitional justice, and in some instances may be a precondition of certain justice measures, particularly criminal prosecution for human rights violations. Third, transitional justice may contribute to judicial reform efforts.

One type of institutional reform can be a direct form of transitional justice, and can be applied directly to the judicial system: vetting, the process of screening for and dismissing human rights abusers from public institutions. Vetting can conceptually be considered to be both a transitional justice measure and a development measure.

Some degree of judicial reform may facilitate transitional justice or may be necessary before it can be pursued. This is most likely to be the case with domestic criminal prosecutions for massive human rights abuses, which require the institutions and infrastructure of the judicial system more so than other transitional justice measures. Development support to judicial reform can contribute to strengthening domestic judicial systems so that they have the capacity to engage in transitional justice efforts.

Transitional justice efforts may contribute to the reform of judicial systems. At a broad level, transitional justice measures may reinforce judicial reform programs—and their contribution to development—by strengthening the rule of law and improving governance, and by increasing levels of trust between citizens and state, thereby raising levels of macro-social capital. At a more direct level, prosecutions and truth-telling in particular can contribute to judicial reform. Hybrid tribunals or courts can potentially affect domestic judicial systems through promotion of a culture of rule of law and human rights through adhering to a set of standards; through their contribution to human-resource and professional development within the domestic system; through their physical infrastructure; and through their contribution to law reform.

Truth commissions may contribute to judicial reform through appraising the role of the judicial system in past abuses and exposing compromised personnel; making recommendations to improve the efficiency and independence of the judiciary; promoting a richer understanding of the rule of law; stimulating debates about what constitutes a “good society”; and promoting trust in the institutions of the judicial system.

Transitional justice practitioners can take steps to improve judicial systems, and in doing so they can draw on the approaches and experiences of, and coordinate with, development practitioners working toward similar goals. Externally, however, their impact on judicial reform will depend on factors such as the political context in which justice measures are designed and implemented, and whether donor support is substantial, extended, coordinated, and strategic enough to implement things such as outreach campaigns to accompany locally driven processes. Ultimately, the impact of transitional justice measures will depend on other reforms to the judicial system and other efforts related to the rule of law and conflict transformation.

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### About the Authors

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## Conclusion

Judicial reform is a part of one element of development, and it is related to other elements of development; judicial reform itself can be a measure of transitional justice, and it can be a precondition or enabling condition for transitional justice elements, especially criminal prosecutions; and transitional justice may contribute to judicial reform, depending on internal and external factors. The following recommendations are offered:

- Transitional justice and development practitioners should consider how their contribution to judicial reform may impact each other's work. In particular:
  - Transitional justice measures such as prosecutions should be designed and implemented giving consideration to the issues of feasibility and timing that may depend on judicial reform and on development support to judicial reform. They should also develop specific strategies, when appropriate, for contributing positively to judicial reform.
  - Development actors should consider directly supporting transitional justice efforts, such as prosecutions, that may have an impact on judicial reform. They should also consider the potential value from a justice perspective in providing support for judicial reform.
- Transitional justice and development actors whose work may impact judicial reform should acknowledge the strong need for dialogue, coordination, and joint planning of activities with an eye to maximizing mutual reinforcement and minimizing tensions.
- Transitional justice and development actors should learn from each other as they face similar challenges, such as in the areas of resources and capacity, political context, process, legitimacy, and coherence with broader reform.

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