



## **Reflections on Improving Justice Systems**

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Tetra Tech DPK Celebration of its 20th Year  
September 17, 2014, Washington, D.C.

A commentary by James Michel

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I'm grateful to Tetra Tech DPK for inviting me to participate in today's celebration and to offer some thoughts on the subject of justice system improvement and the important role Bill Davis has played in furthering that area of public policy.

Bill's career reflects his commitment to the principle that a fair and efficient justice system is an essential aspect of a stable, just, and prosperous society – one in which people enjoy the benefits of freedom, security, and rising standards of living. Over the years, Bill has demonstrated a special ability to help justice system operators and stakeholders in the United States and abroad to improve the policy environment and the operational capacity for a reliable administration of justice that will fairly and efficiently resolve disputes, protect rights, and hold governments accountable to their citizens.

An important factor in his success, I believe, is that before he learned about the intricacies of judicial policy, organization, and operations he learned a lot about people and politics. Equally important, he kept learning throughout his career. Therefore, he always recognized that this work was about incentives, persuasion, and helping local actors achieve practical outcomes in political contests that advanced reforms without destroying institutional or social cohesion.

Over the course of Bill's career there has been a growing international appreciation of the importance of the rule of law for successful societies. The rule of law has been extolled by scholars, multilateral organizations, and political leaders as an integral element of the foundation for peace and stability, inclusive growth, equal rights, and broad participation in political, economic and social activity.

One of the more effusive statements is the November 2012 declaration of the high-level meeting of the United Nations General Assembly on the rule of law. On that occasion, the assembled heads of state and government and heads of delegation expressed their conviction "...that the rule of law and development are strongly interrelated and mutually reinforcing, that the advancement of the rule of law...is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights..."

The broad international consensus about the value of the rule of law for human progress has motivated efforts to promote that value in programs of development cooperation. A remarkable aspect of those efforts has been the growth in the level of resources being invested. In the early 1980s, when the United States was initiating the current generation of rule of law programming, we had little success in interesting other donors in this work and our initial

legislative authorization, which was for administration of justice in Latin America and the Caribbean, had a statutory ceiling of \$20 million per year. By comparison, according to the OECD statistics on official development assistance, by 2003 donors were spending more than \$360 million for “legal and judicial development,” including about \$98 million from the United States. By 2012, those annual totals had grown to more than \$3.2 billion, with about \$1.9 billion from the United States.

Both the World Bank and the United Nations have created structures to help coordinate these substantial investments. Today, the global community is defining the post-2015 development agenda to be launched at the close of the period for implementing the Millennium Development Goals. Proposed new sustainable development goals and targets are central to these efforts. One of them is to “promote the rule of law at the national and international levels, and ensure equal access to justice for all.”

As the expectations for the rule of law’s contribution to development have grown and donor investments in this field have increased over the years, so too have expressions of dissatisfaction with the results in this field of international cooperation.

Of course, there is a long history of aid skepticism, going back to Senator Robert Taft’s assertion that a US investment in the newly created International Monetary Fund would be “pouring money down a rathole,” a colorful expression later applied more generally to development cooperation by Senator Jesse Helms. Former World Bank economist William Easterly attracted considerable attention when he titled his critical analysis “The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good.” There are other examples as well as a number of less sensational criticisms by thoughtful scholars and practitioners.

But the criticism of rule of law programs seems especially harsh. It has included suggestions that rule of law practitioners, in particular, have been insensitive technocrats who sought to impose inappropriate external models without sufficient consideration of local needs, priorities, history, culture, or political and economic power structures. There have been calls for a new generation of reforms that reject a perceived technocratic, top-down overly centralized, one-size-fits-all approach that is said to have characterized past efforts.

I have been puzzled by these assertions of lack of appreciation for local ownership and of disregard for local culture and political economy. This criticism sounds much like the complaints about the law and development movement of the 1960s, which had been criticized by some of its participants as overly ethnocentric. In the 1980s the members of the team working in Washington on how to begin had all read Professor James Gardner’s “Legal Imperialism” and we were determined to learn its lessons. In preparing for today’s event I dug out some of the 1980s and 1990s documentation and confirmed that we pretty much had these concerns in mind.

In 1983 I testified on justice issues before the National Bipartisan Commission on Central America, the Kissinger Commission. I shared our caution with the Commission members, saying: “any U.S. assistance must be undertaken with a sense of prudence and clear objectives....Our role, I believe, must be as a catalyst of regional cooperative efforts to address what are, in most cases, common problems....we must work with existing and new regional institutions, and rely on the involvement of Latin Americans who themselves have the required expertise in the areas to be addressed.”

In 1991 the first USAID Policy on Democracy and Governance emphasized the political dimension of international support for democratic governance and the importance of context-specific approaches. The policy document cautioned: “USAID strategies...should be country-specific, tailored to local needs and responsive to local development constraints. There is no single approach that is applicable to all countries or regions.”

Statements of US policy in international meetings conveyed these same themes. For example, I said at a regional seminar of Latin American Justice Ministers and Supreme Court Presidents in 1993: “effective and efficient administration of justice is far more than a technical matter. It is a reflection of the values and priorities of the broader society....external support must not be intrusive and donor resources cannot substitute for local initiative.”

International guidance emerged as governance and rule of law cooperation increased. The initial OECD development assistance guidelines on participatory development and good governance, adopted in 1993, expressed sensitivity to local ownership and called for additional research “on acquiring a better understanding of the individual developing country, its history, culture, institutions, political circumstances, and social and gender factors.”

A consistent strand in the criticism of past efforts is the assertion that they were wrongly focused on the performance of institutions rather than on the ends to be served. This criticism often includes a suggestion that informal procedures or customary law mechanisms tend to better suited to local needs than laws enacted by parliaments or reliance on the courts that enforce them.

This distinction between attention to ends and attention to institutions seems too facile. Of course, we need to be concerned with the results being sought. A focus on results is one of the four principles of effective development cooperation agreed to by the global community in the 2011 Busan Partnership Declaration. The 2013 USAID Democracy, Human Rights, and Governance Strategy, likewise, is designed to emphasize results. But one of the results it specifies is “greater accountability of institutions and leaders to citizens and the law.” This seems to acknowledge that institutions are often the instruments for achieving desired results and, also, that the results that count the most are those achieved in sustained local performance rather than just the performance of an aid project.

At a general level, there is broad agreement that an effective state is a necessary factor for political, economic, and social development. Indeed, substantial efforts are devoted to helping

fragile states to become less fragile. An effective state depends on public and private institutions that operate with competence and integrity. Many leading scholars have shown how the success or failure of societies depends largely on the quality of their institutions. This is a major theme, for example, in Daron Acemoglu and James Robinson's impressive *Why Nations Fail*.

In particular cases, support for expanding access to justice services through networks of paralegals, enhanced indigenous systems of community justice, local mediation services, and other means may be a highly appropriate subject for international cooperation. But we should be careful not to downplay or discourage linkages to international law standards and commitments, constitutional protections, national laws, and judicial oversight. And we should not neglect the performance of the institutions of the formal institutions. Otherwise, we risk creating parallel justice systems for rich and poor, separate and unequal. The guiding principle should be local priorities, not donor preferences.

To be sure, efforts by outsiders to support local efforts to improve the performance of national and subnational justice systems have often been frustrating and disappointing. In many cases substantial and prolonged external support was provided but local performance did not improve. However, this frustration and disappointment cannot be attributed to ignorance by practitioners of the importance of well-known principles of effective cooperation. It is instructive that this dissatisfaction has hardly been limited to rule of law assistance. Strengthening institutional capacity has been a challenge in virtually all fields of development cooperation.

The independent evaluation of the 2005 Paris Declaration on Aid Effectiveness found that "capacity constraints are the most prevalent source of difficulties in completing aid reforms and, even more important, for carrying out the essential functions that aid is intended to support. Capacity development has been recognized as an urgent priority for decades, but progress has mostly been slow and difficult."

Professor Matt Andrews reviewed World Bank and other evaluations of international programs that were intended to help improve institutional performance. He found a high rate of project failure in a variety of fields. In many cases the failure could be attributed to divergence in actual practice from the reliance on local leadership and good fit with local context that have long been advocated by thoughtful scholars and practitioners. His findings are consistent with another study by a British research organization that concluded "there is still a big gap between declared policy and actual behavior."

Andrews joined with Harvard's Lant Pritchett and the World Bank's Michael Woolcock to suggest a four-step approach to more context-appropriate practice in support for institutional strengthening. They called this approach "problem-driven iterative adaptation" The four steps are:

1. Aim to solve particular problems in particular local contexts *via*
2. Create an “authorizing environment” for decision making that encourages experimentation and positive deviance, *giving rise to*
3. Active, ongoing and experiential learning and iterative feedback of lessons learned *doing so by*
4. Engaging broad sets of agents to ensure that reforms are politically supportable and practically implementable.

This approach recognizes that institutional reform is a complex process involving many decision points and interactions beyond the control of external actors. Elinor Ostrom won the Nobel Prize for Economics in 2009 for her work in this field of complex polycentric governance systems, in which she demonstrated the value of shared knowledge, adequate communication among diverse actors, and incentives for collaboration and trust.

One student of her work, Ben Ramalingam, has suggested that the complexity of the development process should cause donors “to focus less on attribution of impacts (“we achieved this!”), but on the more modest and realistic goals of contribution to outcomes (“here is how we helped change knowledge, attitudes, relationships, and behaviors!”), while recognizing that the impacts are largely determined by multiple factors outside any given agency’s control.

Approaching institutional reform as a complex, multi-centered process requires that donors suppress their understandable desire to attribute progress to their actions and to claim credit as a way to justify their continued efforts and funding. They cannot operate, as they sometimes do, as if development was a linear process in which their inputs could predictably produce intended outputs, outcomes, and impacts. To the extent this has been a challenge in development cooperation in general, it has had a negative impact on cooperation in support of justice systems.

I gave a talk to a USAID conference of democracy and governance officers in 2000, using rule of law examples. I suggested to them that they would be naïve to believe that their programs would be decisive or produce rapid change and I recommended that they temper their enthusiasm with qualities of:

- Caution, to nurture local ownership and commitment and not seek to impose imported solutions for complex problems of how societies govern themselves;
- Patience, to allow time for local actors to build the capacity, the demand, and the will for sustained progress, and to allow for adjustments to setbacks and opportunities as they arise; and
- Humility, to enable us to see our support as one among many factors and to help us choose interventions that are realistic and most likely to contribute to the success of local actors.

I thought I had given them sound advice. I was surprised by the strength of the reaction by several of them. They pointed out that they would have great difficulty getting approval to proceed with any proposed activity after describing it to Agency decision makers as one requiring caution, patience, humility, and a long-term perspective.

Fortunately, appreciation of the complexity of development cooperation is deepening and there are indications that this awareness is helping to align the practice of development cooperation more closely with declared policy and rhetoric.

- Change is evident in the Busan Declaration, with its vision of moving beyond the effectiveness of aid to the effectiveness of development. Busan includes encouragement for international cooperation to help strengthen local institutions through efforts led by developing countries and adapted to local context.
- Change is also evident in the rapidly evolving structure of development finance, in which the once-dominant role of aid is being displaced by non-aid transfers such as private investment and remittances, and even more by local government spending. Local financing enhances local ownership.
- Change is evident in the increased availability of tools to facilitate self-assessment, performance measurement, and peer review by developing country institutions. Particular examples in the justice field include the court self-assessment tool developed by the International Consortium for Court Excellence and the Rule of Law Index of the World Justice Project.
- Change is evident in the proliferation of development agency guidance and research initiatives to enhance reliance on local systems. Examples include the new USAID Local Systems Framework, adopted in April 2014, which is explicitly “rooted in the reality that achieving and sustaining any development outcome depends on the contributions of multiple and interconnected actors.” Other examples include the DFID-financed research program of the Effective States and Inclusive Development Research Center, and the series of case studies of institution strengthening in fragile states conducted by the Danish Institute for International Studies.
- A particularly encouraging development has been the organization of about 60 countries and multilateral organizations as the Effective Institutions Platform under the auspices of the Global Partnership for Effective Development Cooperation, an international coordinating body established under the Busan Partnership Declaration. The Platform works through five “pillars”: change management, indicators, country systems, domestic resource mobilization, and accountable and inclusive institutions.

Throughout all the changes in international development cooperation there have been examples of consistently sound analysis and practice. Bill Davis is not unique, but he is representative of that consistency.

While reading Bill's paper and reflecting on some of the experiences I've shared with him, I was struck by how closely his observations as a practitioner track with those of highly respected academic experts in economics and sociology, even though there are differences in terminology. For example, when Bill describes a justice system at an early stage of development it sounds a lot like what Douglass North called a "limited access order" and what Acemoglu and Robinson called an "extractive institution."

And when Bill urges a focus on the positive elements of local systems it sounds very much like what Andrews, Pritchett, and Woolcock, among others, describe as paying attention to positive divergence from the norm.

Bill's discussion of teamwork, collaboration, vision, and ownership sounds very much like the Busan Declaration's principles of local ownership, focus on results, inclusive partnerships, and mutual accountability based on transparency.

It's important to note that Bill's observations are based on experience. I have described gaps between knowledge and practice in development cooperation, including in programs to support the rule of law and justice institutions. And I have mentioned that there also examples, as in Bill's experience, of consistency in applying what has been known, but not always applied, as sound development policy. It seems to me that the research agenda on how better to align practice with policy should include a systematic review of the experience of successful practitioners.

I want to close by calling attention to one additional parallel. Bill describes his first "principle to support change" as recognizing the humanity of all as "a framework for working with people everywhere as equals." Reading that, I was reminded of the report of the UN Secretary General's High Level Panel of Eminent Persons on the Post-2015 Development Agenda. The Panel called for a post-2015 agenda underpinned by a "new spirit of solidarity, cooperation, and mutual accountability" in a partnership "built on our shared humanity." Bill Davis and the High Level Panel have both identified our shared humanity as the foundational principle for continued efforts to advance the administration of justice, the rule of law, and sustainable progress toward greater human security, well-being, and dignity. This is wise guidance for policy makers and practitioners alike.