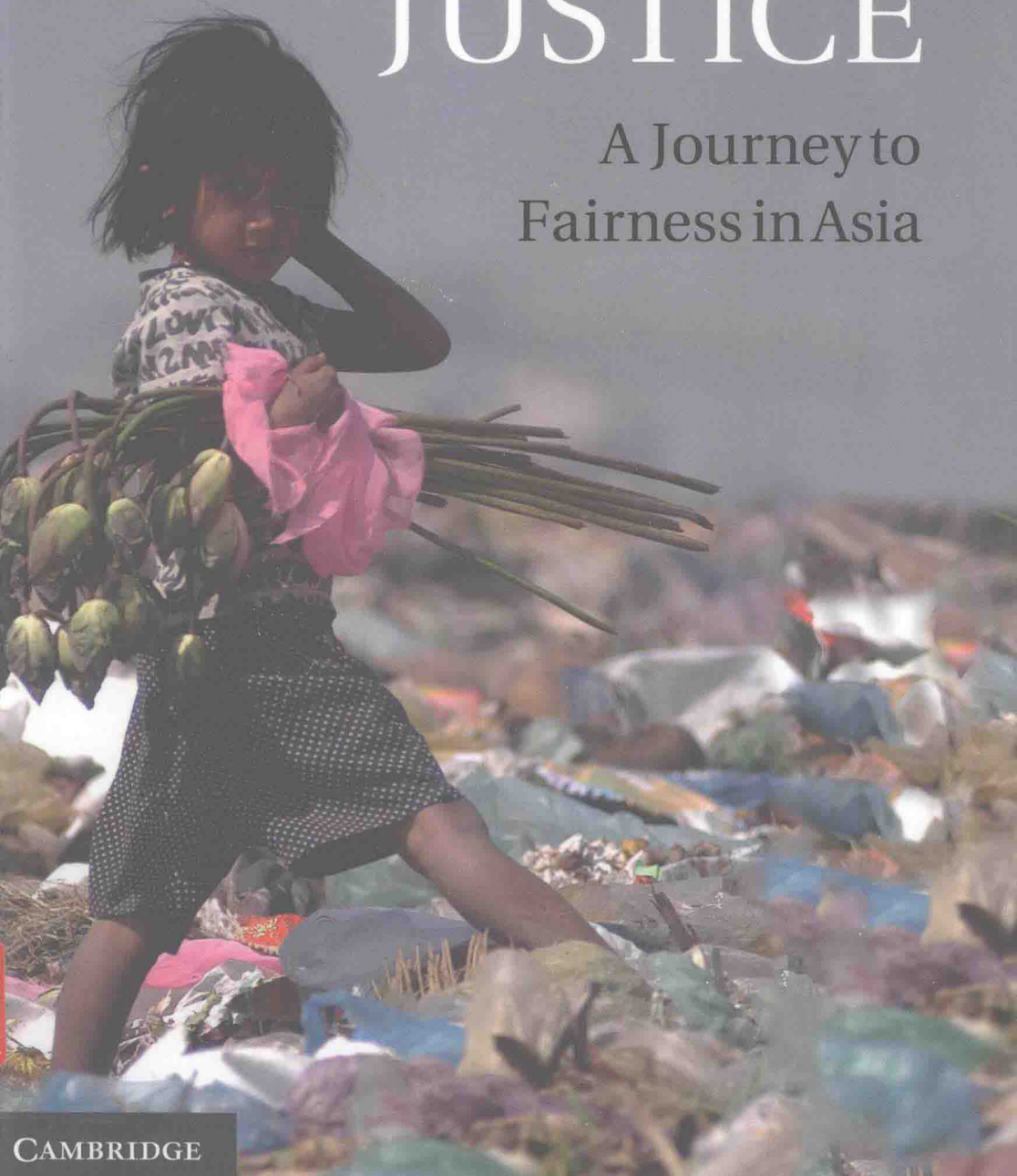


Livingston Armytage

# REFORMING JUSTICE

A Journey to  
Fairness in Asia



CAMBRIDGE

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LIVINGSTON ARMYTAGE



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## REFORMING JUSTICE

### A Journey to Fairness in Asia

*Reforming Justice* calls for justice to be repositioned more centrally in evolving notions of equitable development. Justice is fundamental to human well-being and essential to development. Over the past fifty years, however, official development assistance – foreign aid – has grappled with the challenge of improving the ‘rule of law’ around the world with often underwhelming and sometimes dismal results. Development agencies have supported legal and judicial reforms in order to improve economic growth and good governance, but are yet to address mounting concerns about equity and distribution. Building on new evidence from Asia, Livingston Armytage argues that there is now an imperative to realign the approach to promote justice as fairness and equity.

LIVINGSTON ARMYTAGE is a specialist in judicial and legal reform, advising governments, courts and international development agencies on improving justice systems around the world. He has worked in numerous senior roles on substantial reform programs for major development agencies in many countries from Afghanistan and Azerbaijan to Haiti, Palestine, Pakistan and Papua New Guinea. Livingston is Founding Director of the Centre for Judicial Studies, and Adjunct Professor of Law at the University of Sydney. His other books include *Educating Judges* (Kluwer/Brill 1996) and *Searching for Success in Judicial Reform* (OUP, 2009).

Miyako

Wife, best friend and ruthless slayer of dangling participles,  
whose dedicated companionship has sustained each  
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## Introduction

Night after night, in the long hours of the pre-dawn, I awake in Port Moresby, jolted by panic at the enormity of the justice problems, and what at those hours seems the almost laughable insufficiency of \$100 million to address them. Why is this? What is wrong? What can I do to help fix them?<sup>1</sup>

In this book, I search for answers to these questions: is judicial reform failing? If so, what can be done to improve it? My central argument is that judicial reform should promote justice. This book calls for justice to be repositioned more centrally in evolving notions of equitable development. This hard-edged, pressing concern is neither abstract nor idealistic. Justice is fundamental to human wellbeing and essential to official development assistance (ODA). Over the past fifty years, however, development has grappled with the challenge of improving the 'rule of law' around the world with often underwhelming and sometimes dismal results. It is now time to realign the approach to promoting justice. This book explains why and how.

There are infinite examples of injustices that blight people's lives. Too often, reform has been blind to these injustices in developing countries. Judicial reform is commonly charged to alleviate poverty through the promotion of economic growth, good governance and public safety. These are certainly worthy goals. But the evidence of practice shows that success has been elusive. This is not to suggest that these reforms have failed altogether; rather that judicial reform has not worked as well as expected, as is indicated by the mounting chorus of disappointment in the literature. The judicial reform enterprise has been misdirected. The core critique of this book is that these endeavours suffer from foundational conceptual, empirical and political deficiencies. It is now amply clear that

<sup>1</sup> Note from my diary, 23 March 2004, Port Moresby, PNG; see below, Chapter 9. In this study, money is denoted in US dollars (\$ = US\$) unless otherwise specified.

existing approaches are based on inadequate theory, selective evidence and insufficient evaluation.

In particular, I will show that these reform endeavours suffer from two principal shortcomings. First, there is no cogent theory with which to justify their purpose, to date. Second, there is a lack of any established consensus on how to evaluate success, stemming in part from this confusion over purpose. To address these shortcomings, I will offer two solutions: first, the purpose of judicial reform should be to promote justice as fairness and equity. Second, the evidence of success should be measured using extant frameworks of law.

By realigning reform endeavour to focus on promoting justice, there is a much greater prospect of measurable improvement across all aspects of civic wellbeing. I will explain why development agencies should invest in judicial reform for the purpose of promoting justice – that is, to promote outcomes that are more fair and just, rather than to promote economic growth. By promoting justice, opportunities for economic growth and other benefits will improve. In a just society, there is equitable access to rights, including the opportunity for economic wellbeing. The promotion of justice is as much the objective of development, where economic wellbeing may be seen as the consequence of equitable development, as it is a means of promoting it. This may not seem radical to the lay reader, but it will require a paradigm shift for those development agencies that have rendered justice as being instrumental to aggregate economic growth and indifferent to concerns about distribution.

I will explain that the goal of development is to promote civic wellbeing. In order to achieve this goal, judicial reform must promote justice because justice is foundational to social wellbeing. Justice in development embodies fairness and equity. It involves the exercise of rights, which are the political allocation of interests in law. In this sense, reforming justice is primarily concerned with enabling the exercise of rights, otherwise known as entitlements. These rights are embodied in law whether at the international, domestic or customary levels. Measurement of the success of these reforms is then demonstrable through visible improvements in the access to and exercise of these normative rights.

This book focuses primarily on reforming justice in terms of rights that have been allocated in law; that is, in the juridical sense, rather than in the executive sense, of allocating political interests. It focuses on reform as a distinct endeavour in assisting the judicial arm of the state – being the courts, judges and related personnel – to adjudicate the law and administer justice. It will shortly be seen that ‘judicial reform’ is often



associated – sometimes inseparably – with the more generic endeavour of ‘legal reform’, and is variously described as ‘law and development’, ‘rule of law’ or ‘law and justice sector-wide reform’. It will also be seen that this concept is evolving, in terms of encompassing customary as much as formal dimensions, and is increasingly seen through a broader political economy lens. This term is, therefore, to some extent imprecise and its boundaries may be contested. Development is an interdisciplinary enterprise, and there is an overarching need to integrate and reposition notions of justice and law more centrally within it. I will explain why justice must be elevated from its existing instrumental role of supporting economic growth or good governance to a constitutive role in development. Suffice for this introduction to highlight that my focus is primarily on those reforms which promote justice by supporting the courts and the administration by the state of justice for citizens, and secondarily and more broadly on development as a whole.

I will present three case studies from the emerging reform efforts in Asia to address the mounting criticism in the scholarly commentary on the disappointing performance and results of judicial reform over the past fifty years. This disappointment is variously attributed to many causes: among them, the absence of any systematic accumulation of knowledge about what is needed and what works, confusion over stakeholder expectations, and the lack of a compelling theory for reform approach. I will critique this commentary in the context of the particular reform experience in Asia, which, with a population of some 4 billion people, contains 60 per cent of the global population but has received surprisingly little scholarly analysis to this point. While endorsing much of the commentary, I will show that it is itself limited by substantial deficiencies in evaluating judicial reform. In effect, deficiencies in evaluation affect judgements on deficiencies in performance.

This book makes a number of contributions to the literature. It combines an analysis of the philosophical justifications for reform with a critique of the available empirical evidence of what works in practice as a way to appraise the validity of those theories. By combining an analysis of the literatures of judicial reform and of development evaluation, I will offer new insights into the nature and causes of the perceived deficiencies in practice, and the means to address them. I will then contribute a substantial body of empirical evidence from three case studies on the Asian reform experience with which to reassess the existing academic commentary on global reform practice. Finally, on the basis of these contributions, I will propose refinements to the theory and practice of this endeavour.