

# Innovations in Rule of Law

## A Compilation of Concise Essays

Published in support of the High-level Meeting  
of the UN General Assembly on the Rule of Law,  
on 24 September 2012

Juan Carlos Botero, Ronald Janse, Sam Muller and Christine Pratt

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A Compilation of Concise Essays

## Hiil and The World Justice Project

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3 September 2012

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# Summary: Policy recommendations

## **Make justice more qualifiable and quantifiable**

- Recent successes show: significant additional justice mileage can be gained by empowering justice actors – judges, legislators but also civil society organizations and business, as well as common citizens – with mechanisms that make justice more qualifiable and quantifiable. They can learn where to focus efforts, measure their own performance, and work on improvement.
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## **Integrate the national and the international perspectives**

- Rule of law strategising should integrate the national and international perspectives from the start. If this is done well, there are better results.
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## **More bottom-up justice**

- Research and evaluations over the last few years clearly show that building top-down institutions is not everything; the bottom-up perspective is also critical for the rule of law. There have been a lot of concrete successes in this field, which we should build on. These have focused on building justice around problems, and have not focused entirely on state-based law but have also involved informal justice mechanisms.

The technology, IT and social media revolution of the last decade has created room for new and more effective tools to deliver legal information to people. There are some very innovative examples, like the Legal Tools Database and Case Matrix Network, and mobile courts. More investment in this field can achieve sizeable results.

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## **State-building is political**

- Rule of law in conflict-affected and fragile states remains very difficult. Quick results are not realistic, long term horizons essential, and things are often more political than technical. Evolutionary approaches work. So does linking rule of law and public administration.
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# TABLE OF CONTENTS

Introduction	6
Section 1: Measuring the Rule of Law	7
<b>The Rule of Law Measurement Revolution: Complementarity Between Official Statistics, Qualitative Assessments, and Quantitative Indicators of the Rule of Law</b>	8
Juan Carlos Botero, Joel Martinez, Alejandro Ponce and Christine Pratt	
<b>Strengthening the Rule of Law by Measuring Local Practice, One Rule at a Time</b>	12
Todd Foglesong and Christopher Stone	
<b>Promoting the Rule of Law through Evaluation and Performance Measurement in Nigeria: Challenges and Prospects</b>	16
Innocent Chukwuma and Eban Ebai	
<b>Data as a United Nations Rule of Law Programming Tool: Progress and Ongoing Challenges</b>	21
Jim Parsons and Monica Thornton	
Section 2: The Nexus Between the National and International Rule of Law	25
<b>The Nexus Between the National and the International Rule of Law</b>	26
André Nollkaemper	
<b>Strengthening National Capacity to Prosecute Genocide, Crimes Against Humanity and War Crimes within the International Criminal Court System</b>	29
Emilie Hunter	
<b>Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?</b>	33
Michael Maya	
Section 3: Legal Empowerment and other Bottom Up Approaches to Rule of Law Promotion	37
<b>The Past, Present and Possible Future of Legal Empowerment: One Practitioner's Perspective</b>	38
Stephen Golub	
<b>Land Rights and the Rule of Law</b>	42
Roy Prosterman	
<b>Legal Empowerment of Rural Poor: A Pathway Out of Poverty</b>	46
Dubravka Bojic, Christopher Tanner, and Margret Vidar	
<b>Timap for Justice and the Promise of Paralegal Initiatives</b>	49
Simeon Koroma	
<b>Five Strategies Towards Basic Justice Care for Everyone</b>	52
Maurits Barendrecht	
<b>Customary Justice: Challenges, Innovations and the Role of the UN</b>	55
International Development Law Organization (IDLO)	
<b>Informal Justice Systems: Challenges and Perspectives</b>	58
Tilman J. Röder	
<b>An Overview on Legal Information Building and Sharing in the Arab World</b>	62
Joyce Hakmeh	

## TABLE OF CONTENTS

Section 4: Statebuilding and Rule of Law in Conflict-Affected and Fragile States	66
<b>The Heart of Developmental Change: Rule of Law Engagements in Situations of Fragility</b>	67
Luc van de Goor and Erwin van Veen	
<b>Transitional Justice in Postconflict and Fragile Settings: Progress and Challenges for Reparations, Truth-Telling, and Children</b>	72
International Center for Transitional Justice (ICTJ)	
<b>Extending Rule of Law Promotion beyond Criminal Justice: Rule of Law and Public Administration in Conflict, Post-Conflict and Fragile States</b>	75
Richard Zajac-Sannerholm	

## Introduction

On September 24, 2012, the heads of State and Government will participate in the High-level Meeting of the 67<sup>th</sup> Session of the General Assembly (UNGA) on the Rule of Law at the National and International Levels. Following a series of reports by the Secretary-General and resolutions by the UNGA, the high-level meeting is set to adopt a new action-plan to promote the (inter)national rule of law in the years to come.

The importance of the (inter)national rule of law for peace, fairness, and economic growth is generally acknowledged inside and outside the United Nations. However, there is mounting scepticism regarding the success of rule of law promotion by the UN and other international organizations and donors at the national and international levels during the past two decades.

While this scepticism is justified in some respects, it risks overlooking areas where innovations have been made, important insights have been gained, and tangible successes, fragile or more robust, have been achieved in the past 5-10 years.

This publication aims to highlight some of these innovations and insights through a series of concise papers by key experts and organisations in the area of rule of law. Based on these papers we have also prepared a publication “Innovations in Rule of Law – Visions for Policy makers”, where summaries of the four sections and policy recommendations can be found.

The report thereby hopes to contribute to the debate in the UN General Assembly on 24 September, and to subsequent discussion and action by states, international organizations, governments and civil society.

# Section 1: Measuring the Rule of Law

The Rule of Law Measurement Revolution: Complementarity  
Between Official Statistics, Qualitative Assessments,  
and Quantitative Indicators of the Rule of Law

Juan Carlos Botero, Joel Martinez, Alejandro Ponce and Christine Pratt

Strengthening the Rule of Law by Measuring Local Practice,  
One Rule at a Time

Todd Foglesong and Christopher Stone

Promoting the Rule of Law through Evaluation and Performance  
Measurement in Nigeria: Challenges and Prospects

Innocent Chukwuma and Eban Ebai

Data as a United Nations Rule of Law Programming Tool:  
Progress and Ongoing Challenges

Jim Parsons and Monica Thornton

# The Rule of Law Measurement Revolution: Complementarity Between Official Statistics, Qualitative Assessments and Quantitative Indicators of the Rule of Law

Juan Carlos Botero, Joel Martinez, Alejandro Ponce and Christine Pratt  
The World Justice Project (WJP)

**Keywords:** indices – indicators – performance measures – rule of law – governance – justice and security

## The measurement revolution

A measurement revolution has taken place in the fields of governance, justice, and the rule of law. Not only have the quality and amount of available data exponentially increased in the past two decades, but more importantly, the knowledge about precisely how to effectively use these data to advance reform in the field has greatly improved. This paper offers a brief account of progress made and lessons learned during the past two decades in the rapidly growing field of rule of law measurement, and offers some suggestions about remaining shortcomings and the path forward.

Systematic cross-country data about political systems, governance, and the rule of law was very scarce two decades ago. Analysis at the global, regional, and national levels was largely based on purely anecdotal evidence, or a few crude indicators. In contrast, there are over one hundred systems of measurement in this field today. These tools are based on rigorously collected data at the country level or across countries. While there is enormous variation in the intrinsic quality of these measurements, data are no longer scarce. Some of these measurements are built upon systematic analysis of qualitative information, others on highly sophisticated aggregation of existing indices, and yet others on massive quantitative data collection efforts in particular regions or around the world. Some of the most salient improvements of the past decade in cross-country indicators include the work of the World Bank, Transparency International, Freedom House, CEPEJ, Global Integrity, Hiil-TISCO, The Economist Intelligence Unit, the AfroBarometer, the World Economic Forum, ABA-ROLI, the OECD, IDLO, the Vera Institute of Justice, and The World Justice Project.<sup>1</sup> A variety of UN entities have also contributed to this process.<sup>2</sup> This measurement revolution resembles in some degree the phenomenal transformations that took place in the fields of economics and public health one hundred years ago.

This measurement revolution in the field of governance and the rule of law has a number of implications for everybody, from multilateral organisations, donor agencies, governments, the business community, and civil society. Better data leads to better planning and evaluation of government programmes and institutional reform; better targeting of donor resources; more accurate assessment of political risk by the business community; and increased ability of civil society organisations to hold governments accountable to their citizens.

## Major remaining challenges

Despite the aforementioned improvements, the field of governance and rule of law measurement continues to lag seriously behind. We may be decades away from developing the required knowledge and practical expertise at the country level, that would enable the creation of a credible equivalent to the “infant mortality rate” for the justice sector. There appears to be a growing consensus among leaders in this field that the required knowledge to produce such indicators already exists, but this knowledge remains buried in the hands of a handful of experts scattered around the world. It has not been fully internalised by the rule of law community, and it remains largely ignored by government reformers in all corners of the world today.

The most fundamental barrier appears to be a deeply rooted culture among government officers and practitioners in this field that is hostile to measurement. In all corners of the planet judges and lawyers often act as if they were allergic to numbers, or when these numbers are collected, they are neither systematically analysed nor publicly disclosed. This peculiar culture is not the exclusive domain of least-developed nations; it is pervasive even among quantitatively oriented and technically sophisticated nations. For instance, in the United States major decisions about baseball are based on rigorously and systematically collected statistics, such as batting, pitching or fielding statistics; moreover, all relevant actors, from team managers to players to ordinary fans, have access to the same data and all of them make decisions based on it. In sharp contrast, statistics as simple as the total number of cases filed before trial or appellate courts in a particular jurisdiction; the disaggregation of cases by the litigants' socio-demographic characteristics; the ratio of cases decided in a particular period; or the average time to decide a case, are simply not collected in the majority of jurisdictions in the USA and Canada. Moreover, when these data are collected, they are not systematically analysed by the courts, nor they are made available to the public. The average North American college graduate has a far more sophisticated understanding of numbers and ratios as tools for decision-making in baseball, football, and basketball, than in the operation of government in all branches, particularly the judiciary.

Some argue that this pervasive disregard for data in the rule of law sector is by necessity; that justice is the domain of enlightened judges, an exquisite art beyond the reach of ordinary people. It is undeniable that justice is among the most elusive aspirations of the human race.<sup>3</sup> However, we posit that the delivery of justice by formal courts, the performance of policing institutions, and the system of checks and balances of power among branches of government - to name but a few rule of law areas—are not so fundamentally different from economic or public health variables. The notions of economic development and health are equally complex and elusive aspirations of the human race, and yet we do not walk in absolute darkness in these fields. Indicators such as maternal and infant mortality rates, or the GDP, the GINI and the consumer price index, are far from perfect. However, they provide a picture that is reasonably coherent around the world, and one which is widely employed by decision-makers and ordinary system users alike.

Measuring is key to advance the rule of law. Quantitative and qualitative indicators are useful tools to evaluate performances, draw attention to issues, establish benchmarks, monitor progress, and evaluate the impact of interventions or reforms.<sup>4</sup> Effective programmes should not be based on a priori assumptions. Interventions are more effective if they are matched to the extent possible to the true underlying situations, as revealed by data. A culture of measurement - and decision-making based on measurement - must be promoted in the rule of law field worldwide.

A second major challenge is the pervasive misuse of indicators among government officers and reformers everywhere. Government agencies collect large amounts of data but they rarely use these data effectively. Moreover, there appears to be a fundamental confusion between raw data and an effective system of indicators. Data may be easily manipulated and misused.<sup>5</sup> Indicators are only tools. How appropriate and useful they are for policymaking in particular situations largely depends on the context. When indicators are used in isolation and taken out of context, they tend to lead to ineffective outcomes. Unfortunately, users of indicators - even very sophisticated ones - often forget or deliberately disregard their limitations. They often do so in order to hide the underlying agenda or policy decisions and assumptions that determined the development or use of the indicator in the first place.

There are several key requirements that must be met by indicators - all types of indicators, from those developed by local government agencies based on official statistics, to those produced by international organisations for cross country analysis - in order to be both technically acceptable and of practical utility. First, the quality of the conceptualisation of what is being measured is extremely important, and it's crucial for end-users to understand the underlying assumptions and value structure of what is being measured. Second, one must check the indicators' technical dimensions, such as the rigor of the data collection, aggregation, imputation, weighting, and normalisation methods which are used to produce them. In addition, uncertainty and sensitivity analyses, and other methods of explicit reporting of margins of error, are essential tools to understand the meaning of numbers. While these statistical analyses are generally beyond the reach of

ordinary citizens, they cannot be ignored by governments, donor agencies and other constituencies who attempt to base or track policy decisions on these indicators.<sup>6</sup> Finally, specific indicators must be used in context.

An effective indicator system not only provides information on whether and to what extent progress is being made in one particular aspect, but also how progress in achieving one government objective may negatively affect another. This is true at the micro level, such as the case of a local police chief trying to solve more crimes with less intrusion on citizens' liberties - which is clearly described by Foglesong and Stone in another piece of this publication. It is also true at the macro level, such as the uneasy interaction between guaranteeing order and security at the country level, while providing effective protection of fundamental rights in low and middle income countries, as suggested by the WJP Rule of Law Index data. An effective system of indicators tracks different dimensions of the system together, and provides information about interaction among these dimensions over time. This is particularly important after intervention measures are implemented.

The third major challenge is lack of complementarity. While there has been an impressive development of regional and global indicators in the rule of law field during the past ten years, these indicators must be seen only as useful tools to complement the core body of rule of law data, *i.e.*, official statistics.

Government statistics and independent NGO research provide the raw material to track performance of specific dimensions of the system, while cross-country indicators serve to track performance of the system as a whole and to place such performance in relative perspective.

Government statistics are essential, but they are not flawless; they often have important technical shortcomings and are vulnerable to political manipulation and corruption. Different indicators complement each other. They should be used in conjunction to get the full picture and to avoid manipulation and misuse. Moreover, different orders of data (official and privately-produced; local and global; quantitative and qualitative), are not incompatible; effective reformers are cognizant of the relative advantages and shortcomings of each of them, and use them all in an integrative manner. Even countries with highly sophisticated official judicial statistics, such as the USA and Canada, may benefit from simple, cross-country comparable, privately-developed, independent and impartial, global indicators. For instance, in both countries high-ranking government officers or members of the judiciary have relied on the findings of the *WJP Rule of Law Index*<sup>8</sup> to highlight areas in need of improvement in these countries, as compared to other high-income countries.

The fourth challenge is the uneven distribution of existing data. Rule of law indicators have improved in quality, but there is a lot of work to be done, particularly at the micro level. Take corruption for example; there are many cross-country indicators. But aside of bribery, there are very few micro indicators at the country level.

## **The path forward**

The following three suggestions are made:

1. Improve rule of law data collection and analysis at the country level. Sustained investments in enhancing local government officer's capacity not only to collect statistics but also to develop comprehensive systems of indicators to inform policy based on these data, is a key component of long-term rule of law advancement.
2. Generate incentives (both positive and negative) for governments and judiciaries to systematically and periodically release data to the public.
3. Motivate governments and other users to integrate layers and orders of rule of law data (official and privately-produced; local and global; quantitative and qualitative) in their decision-making process.

## Endnotes

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<sup>1</sup> The authors have been responsible for the development of the *World Justice Project Rule of Law Index* for the past five years, and two of them were also previously involved in the development of the World Bank's *Doing Business* indicators.

<sup>2</sup> Parsons and Thornton, *Data as a United Nations Rule of Law Programming Tool: Progress and Ongoing Challenges*.

<sup>3</sup> See, e.g., *What is Justice?* Hans Kelsen

<sup>4</sup> Botero, Martinez and Ponce, *Justice by the Numbers*. forthcoming

<sup>5</sup> Botero, Nelson and Pratt, "Indices and Indicators of Justice, Governance and the Rule of Law: An Overview". *Hague Journal on the Rule of Law* 2011, Volume 3, Issue 2.

<sup>6</sup> Botero, Nelson and Pratt, "Indices and Indicators of Justice, Governance and the Rule of Law: An Overview". *Hague Journal on the Rule of Law* 2011, Volume 3, Issue 2.

# Strengthening the Rule of Law by Measuring Local Practice, One Rule at a Time

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**Keywords:** justice measurement – effective practices – measuring performance – indicators – pre-trial detention – (professional) culture of measurement – rule of law improvement

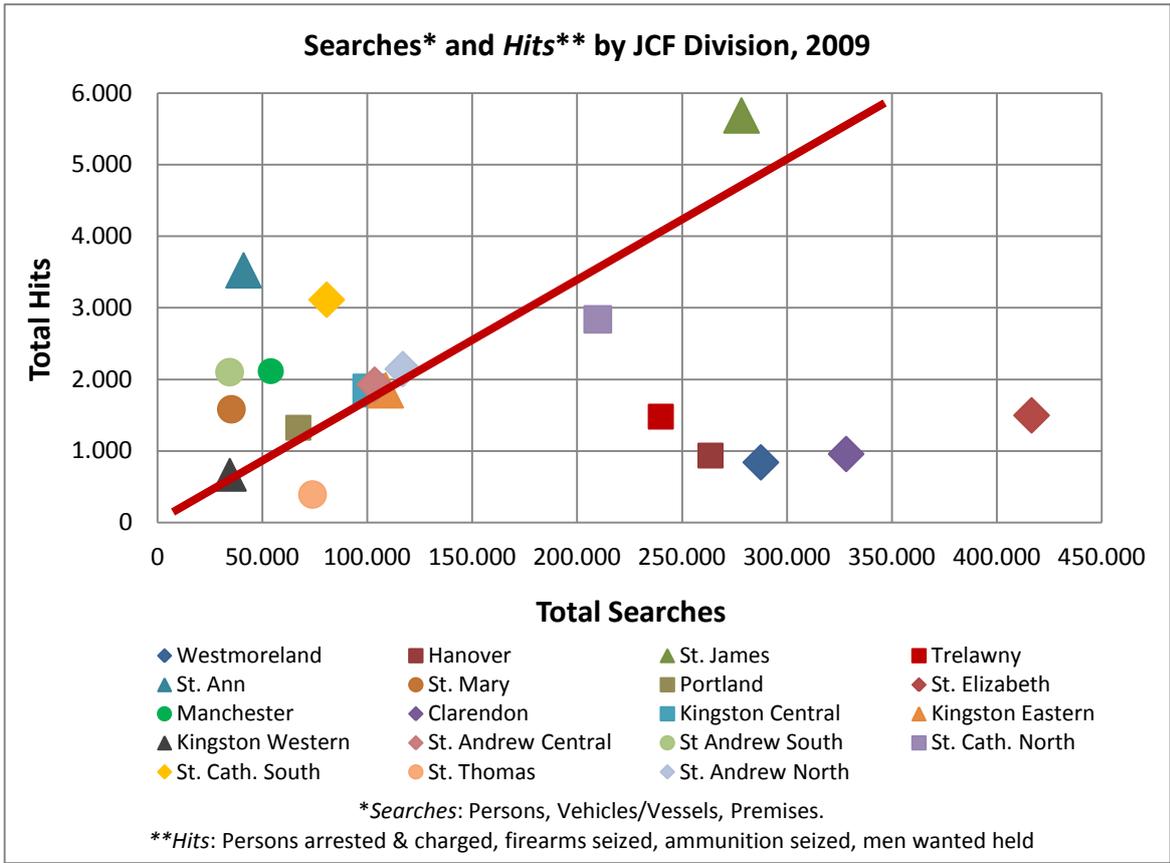
The quality of justice, many insist, cannot be measured by an index or an indicator. True enough, at least of justice in the aggregate, or justice with a capital J, but not necessarily of its component parts; and it is on those component parts of justice that reformers must work. In each individual country, province, and city, reformers must strengthen the rule of law one part at a time. Measurement and indicators are essential tools in this work, and fortunately it is well within the capacity of most skilled and creative practitioners to fashion indicators for their local purposes.

Consider the plight of the Commissioner of the Jamaican Constabulary Force, a police service long the object of domestic and international reform efforts, and yet still struggling in 2009 to reduce frightening rates of homicide and armed violence in much of the country, reduce the use of lethal force by members of the JCF itself, improve the quality of evidence for use in court, improve its treatment of crime victims, and reduce internal corruption, all while improving the full range of basic police services. Years of reform projects, countless training programmes, and legions of consultants had, by that year, left the JCF with lots of new forms, record books, monthly tallies, annual statistics, but few people in or out of the JCF believed the numbers, and with good reason. In the compilation of statistics, even basic terms (such as a “raid” or a “search”) had multiple meanings not only in different police districts but on different shifts in the same district. Meetings of the command staff at a district police station would typically move from anecdote to anecdote, with commanders instructed to respond to the latest incidents, but with no reliable sense of trends or discussion of indicators. These were largely data-free meetings in a district headquarters littered with unread volumes of meaningless numbers and toppling stacks of useless records. It is a sorry picture recognisable around the world.

What options are available to such a police chief, determined to strengthen the rule of law but wary of adding to the legacy of failed reform? In fact, what the Commissioner did in 2009 was to scavenge his department for usable data. With the help of the Program in Criminal Justice Policy & Management at the Harvard Kennedy School, his staff assembled a set of crude statistics about the searches each division was conducting, the guns each was seizing and the offenders each was arresting. These were data had long been collected and long been ignored; but by plotting them on a single scatter-chart, the Commissioner had an easily visualised indicator of the relationship between each district’s intrusiveness and its success at gathering evidence (see Figure 1). Most police districts fell along a trend line that represented a straightforward trade-off: the more searches, the more “hits” (that is, the more guns seized, wanted suspects apprehended, etc.). But there was a group of districts - the “low yield districts” - conducting many more searches than the others, yet recording no more hits than districts intruding much less frequently onto the liberties of Jamaican citizens. And there was a second group, the “high yield districts” - conducting relatively few searches but obtaining lots of guns and arresting many wanted suspects.

The Commissioner realised he could use such an indicator in a command meeting to highlight effective practices of some district commanders and *shame the low-yield districts into improving their performance.*

Figure 1. Searches and “Hits” in Law Enforcement Activity, Jamaica, 2009



Source: Research Planning and Legal Services Branch, Jamaican Constabulary Force

Over the next eighteen months, station clerks and police officials worked together to harmonise definitions, improve data quality, and standardise reporting, while simultaneously working with station commanders in a pilot district to shift attention from the traditional measurement of quantity of enforcement actions (the more raids and arrests, the better) to this more sophisticated indicator of the balance between enforcement activity and enforcement success.

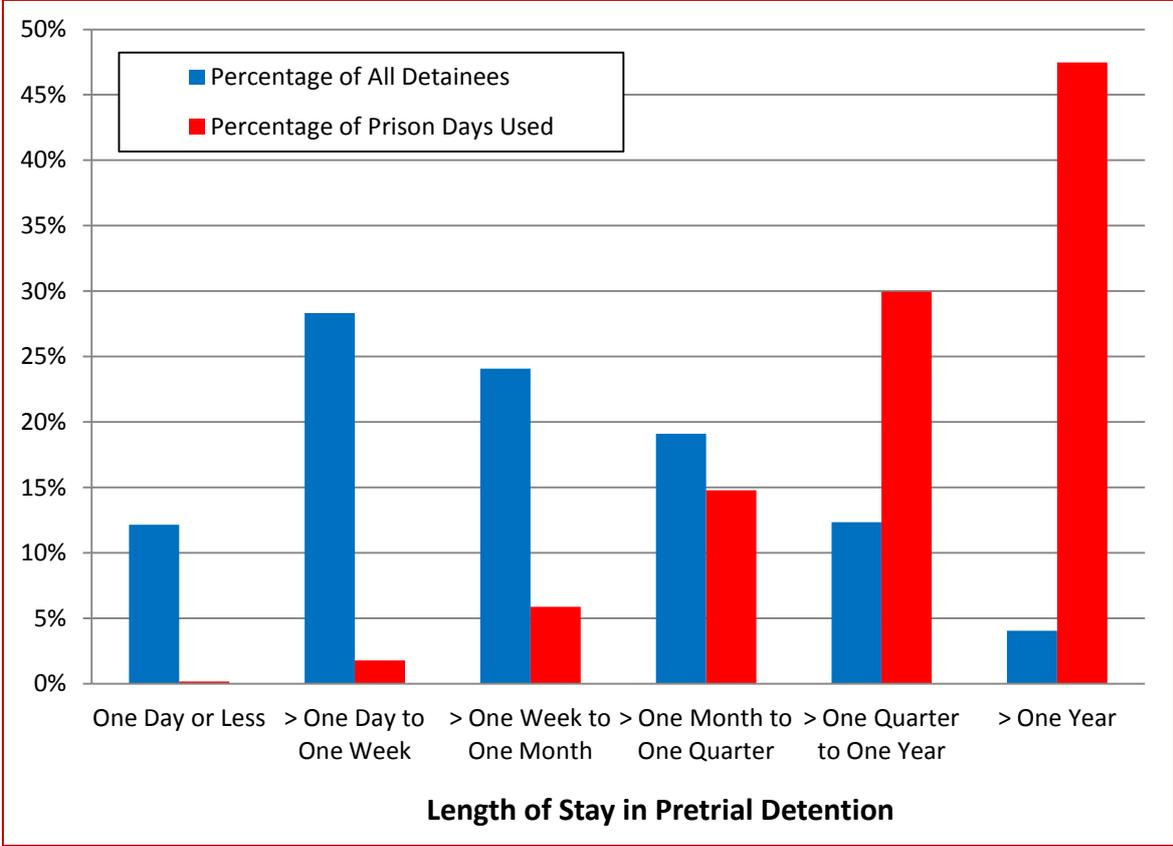
At the same time, in Nigeria’s Lagos State, the Attorney General faced a similar cacophony of complaints about law enforcement: high crime, ineffective investigation, interminable court proceedings, corruption, and perversion of the law. Yet he, like the Commissioner in Jamaica and countless officials in such circumstances around the world, was determined to improve things, to establish something recognisable as the rule of law. Where to begin?

The Attorney General chose pretrial detention, an unlikely choice as he exercised no control over the prisons, nor over the police prosecutors who handled the vast majority of prosecutions. To make any progress reducing the unbearable overcrowding among remand prisoners in Lagos State, he needed a tool to galvanise the efforts of multiple government departments only some of which reported to him. An indicator, he knew, would help.

No useful, standard measure of detention exists. The most commonly used measure of the extent of pretrial detention (the percentage of prisoners on any given day who are un-convicted) is sometimes useful to advocates highlighting the problem of pretrial detention, but not helpful at all for those trying managing its reduction. What the Attorney General needed was a measure of the duration of pretrial detention, disaggregated to reveal the specific courts and prosecutors responsible for the greatest share of the problem.

As in Jamaica, a scavenger hunt for data in the largest prison in Lagos States unearthed a useful set of previously ignored data: in this case the data came from the daily log books in which prison officers recorded the movement of prisoners back and forth from the courts. These data allowed a local NGO working with the Attorney General’s office and the Harvard programme to calculate the length-of-stay for a representative sample of those completing a period of pretrial detention. The results shows that a very small percentage of remand prisoners received by the prison remained in detention for a year or more, but this group accounted for almost half of the prison spaces occupied by pretrial detainees. The vast majority of remand prisoners remained for less than a month - a fact quite different from the impression held by the public and indeed by prison officials themselves (See Figure 2). Once he could see this bi-modal distribution (a common pattern for pretrial detention around the world), the Attorney General could use these measurements to focus the courts on the actions that would make the most difference. Those courts responsible for the hundreds of short-term remand prisoners should reduce the numbers detained in the first place, while those responsible for the small number of remand prisoners still in detention after a year should focus on completing those cases within the next few months.

**Figure 2.** Detainees and Prison Space Used by Length of Stay in Detention, Ikoyi Prison, Lagos Nigeria



Source: CLEEN Foundation and Harvard Kennedy School of Government, prison exit samples

By themselves, these individual efforts in Jamaica and Lagos State do not establish the rule of law, but they help. Efforts like these rarely even solve the specific problem on which they are focused (there are still too many ineffective raids in Jamaica and pretrial detention remains a problem in Lagos), but they do produce improvements and they do so by advancing elements of the rule of law itself. And they begin to create a culture of measurement in the service of justice.

It is precisely because the pursuit of justice is so gradual, indeed perpetual, that indicators like these are so valuable. If we are never to see justice fully realised or the rule of law permanently established, at least we should be able to see the police solving more crimes with less intrusion on our liberties, and courts able to reduce the time that un-convicted suspects spend in detention. The multiplication of such indicators in a single justice system should gradually provide an approximate measure of the rule of law, but the goal is not so much an accumulation of individual measurements as a professional culture that values measurement as an essential part of the preservation and extension of justice. The goal of those who would promote the rule of law in justice systems around the world should be the establishment of such a professional culture and the promotion of officials and citizens adept at the invention of new measures suited to their own needs, drawing on the data they have at hand. Fundamentally, strengthening the rule of law is not a technical, but a cultural achievement.

# Promoting the Rule of Law through Evaluation and Performance Measurement in Nigeria: Challenges and Prospects

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**Keywords:** rule of law – crime statistics and impact – performance measurements

## Introduction

The contemporary interpretation of the doctrine of the rule of law refers to a cluster of ideas, the best known being related to the principle of legality, prescription of procedural standards in the administration of justice, the separation of powers, promotion of material justice and individual rights and the maintenance of public order (Fombat, 2005). Very recently, economists and development specialists have begun to discuss the “Rule of Law” as the enforcement of private contracts (Mullarkey, 2010).

To promote uniformity in usage and understanding of the rule of law, the UN Secretary General in his report to Security Council in 2004, provided a detailed definition:

*‘The “rule of law” refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’*

This definition of the rule of law thoughtfully presents the concept as a collection of principles that can be used to inform the structure, operation, reform, and evaluation of law-related institutions across societies. It emphasises equity, accountability, and avoidance of arbitrariness, and it is rooted in fundamental principles of human rights, as well as the more traditional concept of the supremacy of the law. Cognizant of this, programmes to foster the rule of law in Africa have mushroomed in the last decade. However, well-grounded knowledge about what factors ensure successful outcomes from these programmes, and why, remains scarce.

Ignatieff and Desormeau (2005:1) argue that ‘a measurement revolution has been underway in the fields of development and governance’, a phenomenon which can be recognised through the ever-increasing volume of and spreading influence of numerical indices in measuring development and governance in issues like corruption, human rights, crime and safety as well as the rule of law. Alemika and Chukwuma, (2007) state that, sub-Saharan Africa appears to have been left behind in this “measurement revolution”, as decisions of government and other policy makers are not based on systematically collected and analysed information. This tends to produce a culture of planning and administration based on anecdotal evidence, experience, tradition and hunches with attendant ineffectiveness and inefficiency on the rule of law (Chukwuma, 2008). Against this background and through the use of surveys and justice indicators the CLEEN Foundation has identified challenges, areas of strength, and paths to pursue in order to promote the rule of law in Africa, with a specific focus on Nigeria.

## Challenges for Successful Promotion of the Rule of Law in Nigeria

1. **Lack of constitutionalism and constitutional democracy:** results from national public perception surveys, key informant surveys, and administrative data collection and analyses conducted by the CLEEN Foundation (as well as other indicators) show that a major challenge to the promotion of rule of law is the lack of constitutionalism and constitutional democracy. The problem has not been the absence of constitutions, but rather the ease with which constitutional provisions are abrogated, subverted, suspended, or brazenly ignored.
2. **Efficient and Ineffective Legal and Judicial systems:** The formal legal systems do not provide the expected outcomes in terms of justice delivery, and they lack the capacity and logistics to perform their duties. The Electoral Laws and systems in most African countries, including Nigeria, have not provided fair ground for democratic accountability and the rule of law. There is also the prevalence of widespread impunity for government actors and elites, increasing violent crime, political instability, pervasive corruption, disease, and poverty, all of which present huge challenges to the rule of law in Nigeria/Africa.
3. **Collection of reliable official statistics on the rule of law:** Various institutional, operational and capacity failures with respect to information management as tool of planning, decision making, monitoring and evaluation have presented a major challenge.<sup>1,2</sup> This challenge is particularly acute with specific reference to crime and victimisation statistics. Some countries in the developing world, including Nigeria, do not prioritise grounding of public policy and decision-making on reliable information and statistics. The rule of law sector in these countries, neglects collection, analysis, and utilisation of rule of law information as essential input to their planning, operations, and administrations. Countries and rule of law sectors that ignore or fail to collect and utilise vital statistics for planning and administration usually lack necessary capacity and political will to do so.
4. **The lack of performance measurement and impact assessment:** Through the use of surveys and indicators to measure performance and assess impact in the rule of law sector, the CLEEN Foundation found that the low public confidence in the Nigerian criminal justice system constitutes a major challenge in the promotion of the rule of law. The level of confidence was measured through the rate of reporting of crime to the police or the formal justice sector. In a 2005 survey, 29.7% of respondents reported crimes, and in 2006, this figure dropped to 11.4%. The 2011 edition of the National crime and safety survey (NCSS) found that 56% of all victims of crimes reported to family and friends and only while only 16% reported to the police. Respondents who reported to the police were asked if they were satisfied with the handling of their complaints by the police and nearly half of them (48%) said they were dissatisfied and 37% felt satisfied. When asked why they were not satisfied, perceptions related to police ineffectiveness were the most commonly cited, ranging from police did not do enough (59%) to police were slow to arrive (12%). Other issues highlighted included corruption (18%) and incivility (10%). in previous surveys of the CLEEN Foundation in 2005 and 2006 similar responses were obtained. 22.1% of respondents asked this question in 2005 and 36.2% of those asked 2010 said the police did not do enough to apprehend the offenders. Also, 13% (2010) said the police demanded money (bribe). A careful analysis of the reasons noted by respondents indicates that their dissatisfaction derived from three principal ineffectiveness of the police, police disrespect of complainants and lack of integrity/ corruption. These developments not only indicate declining rates of public confidence in the police in Nigeria, but also represent a challenge to rule of law and formal justice systems.

5. **Corruption:** This is another challenge to the criminal justice system in Nigeria, as the police was said to be the most corrupt criminal justice institution with 29.7 % of respondents reporting it as corrupt; the same score was 3.9% for lower courts, and 2.8% for the high court. These levels of corruption present huge challenges to the criminal justice sector and thus the proper functioning of the rule of law. In Nigeria, as in many African countries, policies on rule of law reforms are often formulated, implemented and discarded without any rigorous data analysis on whether they worked or not. And if they did not work, what were contributing factors, etc. This no doubt highlights the need to search for a way out.

### **Important innovations, insights, and/or positive trends to addressing rule of law challenges**

There are several innovations, insights, and positive trends addressing the challenges facing the promotion of the rule of law in the region. African countries, including Nigeria, have overwhelmingly subscribed to most international and regional human rights and rule of law norms and standards, ratified numerous major human rights treaties, and enshrined these norms and standards in their constitutions and national legislations. Yet, significant gaps remain in their realisation.

1. **Acceptance of alternative or supplementary sources of information on the promotion of the rule of law:** In Nigeria policy makers have realised that there are alternative, supplementary sources of information to promote the rule of law to those collected by the police, courts and prisons. For instance, the two Presidential Commissions on police reform and reform of criminal justice administration in Nigeria established in the last several years have relied heavily on the findings of crime and safety surveys conducted by the CLEEN Foundation in carrying out their assignments. Their recommendations have also reflected the findings of the same surveys. The Presidential Commission on reform of criminal justice administration recommended the development of a national crime prevention strategy that would incorporate the views of the community in the determination of policing priorities.<sup>3</sup>
2. **Openness to capacity building and other skills acquisition:** The police and other criminal justice actors are open to human rights and rule of law capacity building to enhance their daily activities. CLEEN Foundation, with the support of the Justice for All programme of UK Department for International Development (DFID), has conducted several training programmes for the police, including Training of Police Conduct on Electoral Duty, and ongoing Police Training on Human Rights and Conflict Prevention. Feedback from these trainings exercises indicate police's interest in capacity development.
3. **Growing Interest in use Indicators to Measure Performance of Justice Institutions:** Criminal justice agencies such as the public prosecution, police and correctional services are beginning to show keen interest in using low cost and tailored justice indicators as management tools for measuring the impact of their reform programmes and evaluating the performance of key officials in delivering their institutional goals. CLEEN Foundation in collaboration with the Harvard Criminal Justice Program and the Lagos State Ministry of Justice in Nigeria, has over the past three years successfully piloted and demonstrated the usefulness of simple and easy to measure justice indicators in identifying major challenges plaguing effective management of pretrial detention, the types of reforms needed to address the challenges and measuring the impact of the reform programmes in addressing the problems. The success of the intervention has not only encouraged the Lagos State Government to extend the use of justice indicators in measurement of victims satisfaction in the state's criminal justice system but has also attracted other states such as the Imo State in the Southeast of the country to understudy the Lagos experience with a view to replicating it.

In April 2012, the State collaborated with the CLEEN Foundation and Open Society Justice Initiative in organising a summit on management of pretrial detention in the state, which brought together stakeholders from the police, judiciary, prisons, ministry of justice, civil society organisations and public prosecution to strategise on the use of data and indicators in driving reform of pretrial administration in the state and general promotion of rule of law and performance measurements in the justice system.

### **How the international policy community, (UN), could contribute to increase the impact of these innovations/insights/trends**

There is need for the UN and international policy community to encourage African countries to democratise and open up through constitutional and institutional reforms to ensure separation of powers and accountability amongst governmental institutions.

Resource - both human and material - should be provided through civil society organisations and state actors to build capacity of state officials in the criminal justice sector. Research and planning departments should be incorporated in all criminal justice institutions to measure progress and impact of reform programmes as well as performance of key officials.

There is need to address the poor working conditions, and to increase the work force in the criminal justice sector in order to enhance the operation of the system in accordance with the rule of law. Holistic forms of reform should not be imported and implemented in Africa without the input of local realities.

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# Data as a United Nations Rule of Law Programming Tool: Progress and Ongoing Challenges

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**Keywords:** indicators – United Nations – rule of law – measurement – evaluation – research – data – justice

In recent years, there has been a marked increase in the demand from donors to demonstrate the impact of United Nations (UN) initiatives across all sectors, including rule of law programming. The importance of measurement is recognised at the highest levels of the UN, as the following quote from a 2011 report of the Secretary-General illustrates:<sup>1</sup>

*‘The United Nations must base its rule of law assistance on thorough assessments, baseline data and ongoing monitoring and evaluation. Measuring the effectiveness of assistance will increase recognition of successful methods and encourage new approaches to improving results.’*

The increased focus on measurement and accountability has led to the development of a number of data collection initiatives designed to inform rule of law programming and, in some cases, demonstrate impact. However, as a result of the fragmented governance structure of the organisation, and because a wide range of entities are involved in rule of law programming, measurement initiatives have been developed and implemented within the various UN agencies with limited coordination. As a result, the data collection initiatives that have been developed to date are as diverse as the agencies providing rule of law support, ranging from one-off assessments of local justice programmes in a single jurisdiction to large sector-wide initiatives covering several countries. Some of the organisations with large rule of law data collection initiatives include the United Nations Office on Drugs and Crime (UNODC), the United Nations Development Programme (UNDP), the United Nations Children’s Fund (UNICEF), the Department of Peacekeeping Operations (DPKO), and the Office of the High Commissioner of Human Rights (OHCHR).

A comprehensive review of rule of law data collection activities across the UN system is beyond the scope of this short paper. As a useful alternative, we present examples of progress within the UN in the use of empirical measurement to inform rule of law programming over the last decade. The paper concludes with a discussion of the ongoing challenges facing UN rule of law assessments that may limit their effectiveness.

## Building national capacity

There is a well-founded acknowledgement within the international community that national ownership is an essential component of sustainable rule of law reform. However, principles of national ownership and capacity transfer are less commonly applied to data collection initiatives. There are, however, some notable exceptions. For instance, the UNDP Oslo Governance Centre (OGC) supported the Mongolian national government to develop a series of Democratic Governance Indicators. These measures included a subset of twelve “MDG-9” indicators, designed to assess compliance with the Universal Declaration of Human Rights, freedom of the media, access to information, and measures of democracy and freedom from corruption.<sup>2</sup> Working with OGC, the Mongolian government produced a methodological guide that provides conceptual definitions of the indicators, data sources, data collection, and analysis techniques.

The OGC has taken substantial steps to institutionalise governance assessment within the government by: translating methodological guidelines into local languages; conducting trainings on indicators in provinces across the country; and working with the National Statistics Office and universities to incorporate questions on corruption and the independence of the mass media into ongoing national public perception surveys.

## Tracking improvements and highlighting good practice

The joint DPKO/OHCHR United Nations Rule of Law Indicators provide a detailed and multi-faceted assessment of the progress of the police, courts and prisons towards a range of rule of law goals in post-conflict and unstable settings.<sup>3</sup> These indicators are designed to be tracked over successive implementations, highlighting areas where the rule of law is registering improvement as well as those sectors where justice institutions are failing. By tracking performance over time, indicators can spur reforms and strengthen government accountability by acknowledging progress and directing donor resources towards programmatic gaps. The project includes 135 indicators measuring the performance of justice institutions, their capacity, integrity (including transparency and accountability), and the treatment of vulnerable groups. For example, the integrity and independence of the court system in a given country is assessed using four indicators, including: reviews of policies regarding judicial tenure; surveys asking experts whether judges are protected from arbitrary removal; and public opinion polls to assess perceptions of judicial corruption and independence.

## Addressing corruption

Data can help counteract the kind of endemic corruption and lack of accountability that often undermines efforts at strengthening the rule of law. For instance, in 2010 UNODC partnered with national statistical offices in seven countries in the Western Balkans to conduct public surveys assessing the prevalence of corruption.<sup>4</sup> The survey, which sampled between 3,000 and 5,000 people in each country, included a range of questions to assess the prevalence of bribery, the professional groups implicated in corrupt practices, the form of corruption (requests for cash, food and drink or other forms of bribery), and rates of reporting to authorities. In each of the participating countries the survey found that police officers were amongst the four professional groups most likely to request bribes and, in several countries, judges and prosecutors were also heavily implicated. Well-constructed surveys provide an opportunity to document the experiences of people from across a country including marginalised groups, who may suffer the most at the hands of corrupt officials. These data are an important tool for combating corruption, providing empirical evidence of an activity that is often hidden and typically defined in terms of anecdote.

## Focus on vulnerable groups

UNICEF and UNODC have developed a series of indicators that specifically focus on the experiences of children in conflict with the law.<sup>5</sup> In a similar fashion to the Rule of Law Indicators, the Juvenile Justice Indicators combine de jure measures, describing the policies and institutional mechanisms, alongside de facto measures of the treatment of juveniles. For example, policy (de jure) indicators assess whether the country has a specialised juvenile justice system, mechanisms for conducting regular inspections of detention facilities and investigating complaints, and national plans for preventing child involvement in crime. Eleven administrative data indicators describe a range of issues, including rates of child involvement in the justice system, duration of sentenced and pretrial detention, conditions of confinement, sentencing, diversion and aftercare. In contrast to other rule of law data collection initiatives, the juvenile justice indicators are designed to be incorporated into ongoing government data collection initiatives, as a way of enhancing national ownership and sustainability.

## Ongoing challenges

These initiatives encompass a number of significant steps that the UN has taken towards empirically informed rule of law programming over the past decade. Nevertheless, there are a number of serious ongoing challenges that limit the ability of the UN to use data effectively. Not least of these is the problem of data availability. In many countries where the UN provides rule of law assistance, existing data on governance, security and justice are hard to find and often suffer from quality issues related to the coverage and accuracy of government records and census data.

A number of the initiatives described here account for a lack of reliable data by basing measurement on a range of different data sources. For example, the Rule of Law Indicators combine information from public and expert surveys, administrative data sources, document reviews, and field observations to provide a system of measurement that can be used in post conflict countries that typically have very little existing data or data collection capacity. However, collecting data from multiple sources is often expensive and requires expertise in social science research methods. While there are examples of agencies within the UN system that have extensive experience collecting and analysing empirical data, such as the OGC, there is a general lack of expertise in this area. This is particularly true at the country level and indicator initiatives that are designed in New York, Vienna or Geneva may founder because of a lack of this data collection capacity within country offices.

According to the 2011 Secretary-General's report, the United Nations provides rule of law assistance in 150 countries.<sup>6</sup> In almost half of these settings there are three or more UN agencies engaged in providing rule of law support and in nearly a quarter, five or more entities are active. As the number of rule of law initiatives continues to expand, duplication of activities is an increasing challenge. Acknowledging the potential for duplication of efforts, coordinating bodies such as the Rule of Law Coordination and Resource Group (ROLCRG) have been developed to help streamline activities. However, while coordination efforts between representatives of agencies at UN headquarters may be effective, political obstacles and barriers to communication abound at the country level. A lack of cooperation between agencies can lead to duplication of data collection efforts, limiting the effective use of resources and causing frustration amongst national partners. Some common manifestations of this underlying problem include representatives from different UN agencies approaching heads of national justice institutions to request the same information within a short time frame without agreements to communicate priorities or share data.

Many of the existing data collection activities seek to describe the impact of a particular rule of law programme or UN agencies' work. However, in countries where there are several UN agencies, NGOs and other donors active in the development of rule of law programmes, attributing impact to a particular programme or intervention may be impossible. For example, in post-conflict settings, several organisations may be involved in police training or prison rebuilding programmes. Disentangling the "added value" of a particular intervention from the support offered by other donors may be difficult or impossible. In most cases, coordinated donor assistance and data collection activities will be far more effective than piecemeal, fragmented activities. Furthermore, from the perspective of residents in countries receiving rule of law support, the source of donor funds is mostly immaterial.

Finally, the "elephant in the room" is the fact that, in many countries receiving rule of law assistance from the UN, large sections of the population rely on customary justice systems to resolve disputes and access justice. There is a growing acknowledgment within donor organisations of the central role that these systems play. However, measurement initiatives have yet to catch up and there is currently no comprehensive system in place to describe the role of customary justice systems in empirical terms.

In conclusion, while the use of data as a tool for rule of law programming within the UN is still in its infancy, the last ten years has seen considerable progress towards a culture of empirical measurement. With the current proliferation of measurement activities, there is a need for improved coordination of data collection and consolidation of measures. This process will undoubtedly raise difficult questions and surface tensions between UN agencies and international partners. However, we firmly believe that enhancing the ability to use data to inform rule of law programming will ultimately deliver new opportunities, increased accountability, and greater impact.

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## **Section 2: The Nexus Between the National and International Rule of Law**

The Nexus Between the National and the International Rule of Law

André Nollkaemper

Strengthening National Capacity to Prosecute Genocide,  
Crimes Against Humanity and War Crimes within the International  
Criminal Court System

Emilie Hunter

Mobile Courts in the Democratic Republic of Congo:  
Complementarity in Action?

Michael Maya

# The Nexus Between the National and the International Rule of Law

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## Abstract

The rule of law at the national level and the rule of law at the international level are inextricably connected. While to some extent both levels raise their own questions, the UN so far has failed to recognise the connection, and should to a much greater extent aim its policies at the nexus between the two levels. The international rule of law depends on the national rule of law and vice versa. Moreover, it is increasingly difficult and pointless to identify what is national and international. A holistic approach is needed to move beyond the slow progress of the past decades.

**Keywords:** international rule of law – national rule of law – role of courts and other domestic actors – rule of law in international organisations

## Introduction

Rule of law promotion faces a number of key challenges, relating to the nexus between the national and the international level.

One challenge is that without a strong rule of law at the national level, attempts to strengthen the rule of law at the international level are significantly hampered. One of many examples is the problematic compliance with the UN Convention on the Elimination of Discrimination against Women. As a result, all of the familiar problems of promoting the rule of law domestically also hamper the rule of law internationally. In particular, attempts to promote the rule of law at the national level should deal with a variety of forms of lack of support or even resistance from the recipients of rule of law promotion. Rule of law promotion still can be criticised for reliance on one-size-fits-all solutions that fails to distinguish between post-conflict situations and different stages of development.

A second challenge is that as international law pervades more deeply into the domestic legal order, international law should conform to rule of law requirements that we tend to pose for domestic law. International organisations should meet the standards that they prescribe for others, if only because the failure to do so undermines the credibility of its external rule of law policies and the willingness of norm-addressees to accept the prescriptions and ambitions of the UN.

However, the question what this actually means, and what is required in terms of a rule of law at the international level that addresses the problems caused by the subsequent entry of international law in national legal orders remains an open one, and urgently requires more thought and discussion.

A third challenge is one of agency: both the promotion of the rule of law at the national level and at the international level, and at their interface, involves a wide variety of actors (states, institutions within states, regional organisations, international courts, the UN etc.). Despite the work done in the UN, mainstreaming and coordination remains a key challenge.<sup>1</sup>

## **Innovations, insights and/or positive trends in the past 5-10 years which (promise to) address these challenges**

In the past years, several international institutions have increasingly emphasised the need for a strong domestic rule of law that entails opening of national legal orders for the application of international law. Notable examples are the European Court of Human Rights and the Inter American Court of Human Rights. In this way, not only the international rule of law is strengthened, but the national rule of law as well.

The rule of law has increasingly become a part of the prescriptions of international law pertaining to the way in which states should organise themselves. In particular the justification of strong interventions into war-torn societies on grounds of the rule of law has highlighted the issue of the extent to which states are bound to implement rule of law domestically as a norm of international law. The support for rule of law as a form of governance, inextricably linked to human rights, has grown.

In particular as a result of the UN sanctions dispute and the invasion in Iraq, states and international institutions have increasingly recognised that international institutions, including the Security Council, should be subjected to rule of law requirements. The rule of law agenda has increasingly targeted international organisations, transnational actors and non-state parties that now play a more significant role in rulemaking and governance. The newly established Ombudsperson for the Sanctions Committee is a step in the right direction, but that it is still far removed from due process standards common in domestic legal systems.

## **Ways in which the international policy community, in particular the UN, can contribute to increase the impact of these innovations/insights/trends**

In support rule of law reform domestically, more attention should be given to specific approaches that strengthen reception of international law, not only by strengthening the courts, but by addressing all relevant actors. Policies to strengthen the domestic prosecution of international crimes, in conjunction with the ICC, are an example.

However, in so doing rule of law promoters should better recognise and address diversity and resistance on the receiving side. Any reform produces winners and losers. National and international donors are not well-positioned to address these types of local political contests. Mandates, but also information of local situations should be improved, and one-size fits all approaches prevented.

There is a need to recognise the potential impact of approaches that go beyond rule of law promotion in the narrow sense. There is a correlation between liberal states and support for the international rule of law, and ways to strengthen liberal states, for instance by conditionality and (non)recognition of governments, may be more influential than processes like constitutional assistance.

For the rule of law at the international level, traditional means require continuing support (such as compulsory jurisdiction of the International Court of Justice, reform of UN human rights bodies), but new ways need to be explored, including the role of internal checks and balances and controls over international institutions.

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# Strengthening National Capacity to Prosecute Genocide, Crimes Against Humanity and War Crimes within the International Criminal Court System

Emilie Hunter

Case Matrix Network

## Abstract

The capacity of national justice sector institutions to prosecute the perpetrators of genocide, crimes against humanity and war crimes is one of the greatest challenges to national rule of law initiatives within the context of peace and security. Approximately 60% of States Parties of the International Criminal Court (ICC) are yet to adapt their national legal framework to the cooperation requirements, crimes and modes of liability defined by the ICC Statute. Positive Complementarity is the most important conceptual insight to address this. Emerging from the Office of the Prosecutor, positive complementarity is a broad stakeholder enterprise. The ICC Assembly of States has invited States, international organisations and NGOs to participate in a national capacity development framework. Practical and innovative efforts to address national capacity have directly tackled three of the most prohibitive aspects of core international crime adjudication: complexity, quantity and cost. Two such examples include the Legal Tools Database (LTD) the largest online library of documents relevant to the practice of international criminal law, and the Case Matrix Network (CMN), which provides users with technology aided services to assist in the investigation, prosecution and adjudication of core international crimes. The international community has contributed steadfastly to the development of positive complementarity and can continue to further its impact by mainstreaming accountability measures for core international crime into its legal technical assistance and capacity developing programmes, ensuring that activities are driven by thorough analysis of the need of national justice sectors and reflective of cost effective methods of delivery.

**Keywords:** domestic prosecution of core international crimes – positive complementarity – capacity development – efficiency – cost effective adjudication

## Strengthening national capacity to prosecute genocide, crimes against humanity and war crimes

The capacity of national justice sector institutions to prosecute the perpetrators of genocide, crimes against humanity and war crimes has emerged as one of the greatest challenges to national rule of law initiatives within the context of peace and security.

On 1 July 2012, ten years after the International Criminal Court (ICC) became operational, Guatemala will become its 121<sup>st</sup> State Party. Despite the success in attracting members, substantial gaps remain in the formal legal frameworks of ICC States Parties: only 46 have incorporated the obligations to cooperate, while 49 members have incorporated the ICC crimes into domestic legislation, despite this not being a statutory requirement.<sup>1</sup> Whereas the limited incorporation of the obligation to cooperate slows down and limits the reach of the ICC to request evidence and the arrest and surrender of suspects from States, the absence of domestic legislation criminalising core international crime conduct and modes of liability, suggests that those States may not possess an adequate legal framework to prosecute perpetrators.<sup>2</sup>

This can also hinder the fair trial rights of the accused, and can cause delays in providing victims with meaningful access to justice. Even with this minimal legal framework in place, prosecutions are unlikely to fulfil broader international obligations without satisfactory protections that enable the independence and impartiality of national justice institutions and actors, guarantees fair trial standards, minimum international detention standards, provides adequate victim and witness protection, as well as mutual legal assistance agreements. The final precondition to legal capacity requires that investigators, prosecutors, defence counsel, judges and clerks be equipped with the skills, knowledge and resources that enable them to work according to the legal and institutional framework established therein.

It is perhaps no small surprise to note the small number of States pursuing prosecution at the national level. The UCDP/PRIO Armed Conflict Dataset reports 281 incidents of armed conflict in 38 countries between 2002 and 2010 and yet the ICC Legal Tools Database records only 10 States actively pursuing core international crime prosecution for acts conducted in the same period.<sup>3</sup>

This is important for two reasons: first, the unwillingness, inability or inaction of states to address conflict has been overwhelmingly linked to the onset of repeated episodes of violence, resulting in more deaths and victimisation, shifts in criminal activities, loss of stability and security and sharp reductions in economic growth.<sup>4</sup> Second, national capacity to respond to core international crimes has an overwhelming bearing on the international community as a whole, in its efforts to respect sovereign equality while ensuring the shared goal of establishing conditions for the maintenance of justice.

### **Addressing the needs of national criminal justice bodies: Complexity, quantity and cost of core international crime prosecution**

Positive Complementarity is perhaps the most important conceptual insight to address the needs of national criminal justice bodies in prosecuting core international crimes. First developed in the Office of the Prosecutor in 2003, to govern interaction with States that aimed to encourage national proceedings and support cooperation with ICC investigations, the adoption of a resolution by the Assembly of States Parties, at the first Review Conference in 2010, broadened its scope to that of a national capacity development framework, involving States, international organisations and NGOs, as well as the ICC.

Generic capacity development programmes, including thematic trainings, study visits and technical assistance continue to be organised, but the most practical and innovative efforts to address national capacity have done so by directly tackling three of the most prohibitive aspects of core international crime adjudication for less materially resourced States: complexity, quantity and cost.

The Legal Tools Database (LTD) is the largest online library of documents relevant to the practice of international criminal law. Designed by the Office of the Prosecutor between 2003 and 2005, the LTD contains over 57,000 documents, including national legislation, national cases of core international crimes, international cases and legislation, all preparatory works of the ICC, its Statute, rules, regulations, judgments, decisions and orders, and relevant international and regional human rights decisions. Documents can be accessed through a series of “folders” or through an efficient and easy to use search engine, and are provided free of charge to anyone with an Internet connection. In collating and verifying these materials, the LTD provides all national actors with the raw materials they need to inform themselves on core international crime adjudication, in a centralised, stable and trusted location.

The Case Matrix Network (CMN) compliments the Legal Tools Database by providing services to assist in the investigation, prosecution and adjudication of core international crimes. The Case Matrix application breaks down the substantive elements of core international crimes, showing investigators, prosecutors, defence counsel or judges the means of proof that is required for each crime, its contextual elements and specific elements, as well as the modes of individual liability that must be assigned to every individual for every crime that they are charged with committing.

The Case Matrix consists of two analytical digests of the elements of crime and modes of liability required to successfully prosecute core international crime conduct, running to over 7,500 pages. If a prosecutor needs to know the means of proof required to successfully prosecute rape as a crime against humanity, or the recruitment of child soldiers as a war crime, they can, at the click of a button, view concise analysis of these requirements, as well as the exact paragraphs of previous international and national judgments. The Case Matrix application also enables different users to organise case files where the conduct may amount to core international crimes, testing where evidence is weak or insufficient, in a secure environment. It is designed to strengthen the ability of national actors to conduct investigations and trials for conduct that may fall under the ICC's jurisdiction by empowering the national professionals involved. The Case Matrix is provided free of charge, following the signature of a user undertaking and it does not require Internet access. It is currently used by 125 institutions, including judiciary, prosecution services, defence counsel, government ministries, NGO's, international and hybrid tribunals.

Core international crime cases consist of a complex web of evidence and materials that link incidents to suspects, victims and witnesses. The Case Matrix helps to organise that evidence and material. But criminal justice systems also face challenges due to the quantity of cases, and failure to comprehend the scale and nature of prosecutions across a country can lead to a number of rule of law issues. Without an overview of open case files, prosecutorial strategies including the prioritisation or selection of cases (according to criteria such as gravity, seriousness etc.) can unwittingly incur selective bias. Due to the expected quantity of open cases, prisons can become over-crowded, suspects can get "lost" in remand and delays can mount up without a clear overview of where the bottlenecks occur. Districts may prosecute particular crimes or ethnic groups disproportionately according to the known facts, requiring a laborious and time-consuming effort to gather statistics that could demonstrate this. The Database of Open Case Files designed by the Case Matrix Network addresses these challenges and has been used in Bosnia and Herzegovina and the Democratic Republic of Congo.

The use of technology-aided tools, as well as the information provided therein, can help overcome the complexity of core international crime cases by providing knowledge directly to national practitioners, within their work environment, on a permanent basis. While empowering and informing criminal justice actors sustainably, this can improve the quality and effectiveness of their work and reduce unnecessary repetitions and mistakes, thereby contributing to the reduction of costs associated with criminal justice based on international human rights standards.

### **Developing sustainable national expertise in core international crime adjudication: Contributions of the international policy community**

The international community designed the ICC to have limited jurisdiction over States, and affirmed that effective prosecution must be ensured by domestic measures and enhanced by international cooperation. Where the ICC lacks capacity to investigate and prosecute more than 14 cases at any given time, the international community can fulfil its broader responsibilities by supporting national criminal justice efforts through methods that develop sustainable local expertise.

The international policy community has already made steadfast contributions, linking atrocity and accountability measures to economic recovery, development and rule of law (World Bank), shifting funding allocations in this direction (EU), and coordinating complementarity activities within the UN (UN Rule of Law Group).

To further the impact of positive complementarity, including technology-driven innovations, the international community, in particular the UN, can mainstream accountability measures for core international crimes into its technical assistance and capacity developing programmes in its subject matter areas including human rights, legislative reform, child soldiers, women and humanitarian issues. Coordination, cooperation and planning amongst agencies should be driven by thorough analysis of the need of national justice sectors and reflective of cost effective methods of delivery.

## Websites

ICC Assembly of States Parties Focal Point on Complementarity, Ms. Gaile A. Ramoutar, may be contacted at: [aspcomplementarity@icc-cpi.int](mailto:aspcomplementarity@icc-cpi.int).

Persons in New York wishing to make contact may do so via:  
Mr. René Holbach, Assistant to the President, at: [advisor4@nyc.llv.li](mailto:advisor4@nyc.llv.li).

Legal Tools Database: [www.legal-tools.org](http://www.legal-tools.org)

Case Matrix Network: [www.casematrixnetwork.org](http://www.casematrixnetwork.org)

ICRC Customary International Humanitarian Law Database: [www.icrc.org/customary-ihl/eng/docs/home](http://www.icrc.org/customary-ihl/eng/docs/home)

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<sup>1</sup> Taken from the National Implementation Legislation Database (NILD) of the ICC Legal Tools Database, last accessed 16 October 2011.

<sup>2</sup> The request of the ICTR Prosecutor to transfer Michael Bagaragaza to Norway was denied by the ICTR Transfer Panel on the grounds that the Norwegian Criminal Code did not prohibit genocide meaning that the accused would have to be prosecuted for the ordinary crime of murder. A second request for transfer to the Netherlands was also not possible as the Dutch Courts considered that it did not have jurisdiction over the acts committed. See Prosecutor v. Michel Bagaragaza, Case No. ICTR-2005-86-R11bis, Decision on the Prosecution Motion for Referral to the Kingdom of Norway, Rule 11 bis of the Rules of Procedure and Evidence, 19 May 2006 and LJN: BD6568, Hoge Raad, 08/00142.

<sup>3</sup> See UPCD/PRIOD Conflict Database, dataset of 29 July 2011, [http://www.pcr.uu.se/research/ucdp/datasets/ucdp\\_prio\\_armed\\_conflict\\_dataset/](http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset/) and National Cases Involving Core International Crimes folder of the ICC Legal Tools Database, [http://www.legal-tools.org/en/go-to-database/ltfolder/0\\_2373/#results](http://www.legal-tools.org/en/go-to-database/ltfolder/0_2373/#results), last accessed 16 October 2011.

<sup>4</sup> World Bank, Conflict, Security and Development, World Development Report 2011.

# Mobile Courts in the Democratic Republic of Congo: Complementarity in Action?

Michael Maya

American Bar Association Rule of Law Initiative

## Abstract

This paper will describe the impact of efforts to build the capacity of both “mobile” and traditional “bricks and mortar” courts in eastern Democratic Republic of Congo (DRC) to handle cases involving sexual and gender-based violence (SGBV), including those that rise to the level of war crimes and crimes against humanity under international and Congolese law. More broadly, this paper will advocate for greater commitment to building the capacity of local courts, including in conflict-ridden countries, to deliver locally-owned justice that as a practical matter can’t be - and in most cases, should not be - outsourced. Based on the track record of Congolese military and civilian courts since 2008, there is reason to believe that the justice sector in some of the least developed countries in the world<sup>1</sup> can, with relatively modest assistance, deliver justice to survivors of conflict-related violence and their communities while at the same time satisfying international standards for fair trials.

**Keywords:** DRC – mobile courts – positive complementarity ICC – sexual and gender-based violence – war crimes and crimes against humanity – Congo – rape

In DRC and elsewhere, the vast majority of transgressions committed during conflict are never addressed, serving ultimately to thwart reconciliation and the building of a durable peace. In fact, in remarks made in 2010, one of the architects of the International Criminal Court (ICC), Professor Cherif Bassiouni, lamented that, from 1945-2008, 866 people have been prosecuted for 92 million deaths in 313 conflicts. He also noted with considerable regret that, as of 2010, the ICC had pursued only four cases and seven defendants in its first seven years of operation. With a budget of roughly \$150 million per year, the cost of prosecuting an ICC case is obviously high. The ad hoc International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) are not appreciably different, with \$1.7 billion spent prosecuting the first 177 defendants. Admittedly, these are complex, time consuming and costly cases to prosecute under the best of circumstances.

This brief paper cites the above statistics not as a critique of these or other international tribunals, as they serve a distinct purpose and were never designed to supplant national courts; instead, they are cited to strengthen the case for greater investment in national trials, including in some of the world’s least developed countries. National trials will almost always be speedier and less costly; in many cases - arguably, most - they will deliver justice that is more satisfying for victims and their communities. By making this investment, the UN and other international actors could help re-imagine the concept of “complementarity,” which, at present, is treated as a jurisdictional restraint on the ICC and not as an opportunity or even obligation to help countries deliver the best possible justice within their own borders.<sup>2</sup>

Briefly, the doctrine of “complementarity” under the Rome Statute renders the ICC a court of last resort. The ICC is designed to intervene only where no national investigation or prosecution has been or is being conducted, or where the country in question effectively cannot or is unwilling to undertake such an investigation or prosecution. Because of capacity issues (including budgetary constraints), political considerations, or the restraints imposed by the doctrine of complementarity, the ICC can realistically address only a tiny fraction of the conflict-related transgressions committed each year. As the figures cited above demonstrate (92 million conflict-related deaths, 866 convictions), the international community and individual states have a very poor track record of delivering justice to the families and communities affected by the exploits of dictators, army commanders, rebel groups, militias, etc. Thus, an international community that is genuinely committed to justice and peace-building must explore promising, complementary approaches to the costly, lengthy, geographically remote and comparatively rare prosecutions that international tribunals carry out.

Imagine that a Congolese girl - one of over 60 survivors of a mass rape committed in South Kivu province, DRC - is given two options. Under Option I, her alleged assailant, an army commander, can be brought to trial within a few months of the rape, with the trial conducted less than a half-day's walk from her village. Her family and fellow villagers can accompany her at the trial. The military judges hearing her case are Congolese. While not as well trained as a typical western judge, they have a demonstrated mastery of laws pertaining to rape and other violent acts committed by army personnel or other combatants. They are also versed in international law pertaining to war crimes and crimes against humanity. Although there have been surprisingly few reprisals against survivors and witnesses participating in rape trials, the potential exists. That said, there are few practical precautions that can be taken short of relocating survivors and witnesses, a precaution many might refuse in any event. Finally, the conviction rate for rape in military court trials in eastern DRC is roughly 60%.<sup>3</sup>

Under Option II, a tribunal roughly 7,000 kilometres from the site of the mass rape in South Kivu, DRC can issue an indictment charging the young girl's alleged assailant of orchestrating a mass rape; it is hoped that a trial can be held within a few years of the rape, at which point the survivor would travel to The Hague to testify. Judges overseeing her case are luminaries in the field of international law, have ample time to weigh the evidence, and as a practical matter are impossible to influence through intimidation or promises of money and favours. The defendant's ability to intimidate or harm the survivor or her family is reduced significantly when compared to the scenario envisaged under Option I.

Which of the two options above best advances the rape survivor's interests? What is best for her village? Nearby villages? Which might have a greater deterrent effect on would-be rapists, especially if they were to learn of the commander's conviction before the conflict ends? Setting aside the costs of the two options, is the international criminal justice regime advanced more by a trial in DRC that receives comparatively little media attention, or at an international tribunal that receives significant worldwide media coverage? Finally, assuming that outside assistance is provided that helps the Congolese justice sector handle cases such as the one posited above in a professional, fair-handed manner, what is in DRC's best long term interests?

Since 2008, the American Bar Association Rule of Law Initiative (ABA ROLI) has been collaborating with MONUSCO, HEAL Africa and Panzi hospitals, Congolese NGOs, and international NGOs such as DanChurchAid, to conduct military and civilian rape trials in some of the most remote areas of South Kivu, North Kivu and Maniema provinces in eastern DRC. Many of these trials are conducted by mobile courts - temporary courts that are explicitly contemplated under Congolese law and which operate for a limited period of time in remote areas. A full team of justice sector professionals participate in these trials, including judges, prosecutors, defence lawyers, and bailiffs. Many of them receive training from ABA ROLI on relevant Congolese and international law governing rape, crimes against humanity, etc. Mobile court trials are often held under a tent, with scores of rapt villagers attending the trial for hours at a time without the comfort of shade, food or water. For most villagers, this is the first time they have seen a judge or lawyer. Few if any have ever observed a trial, with many unaware that a soldier, commander or other combatant can be held accountable for their misdeeds; in fact, the news that the accused do not enjoy impunity comes as a great surprise to many villagers, although public education campaigns and word of mouth are slowly dispelling this noxious myth.

During the period 2008-2012, ABA ROLI has helped facilitate nearly 900 rape trials in both mobile and "bricks and mortar" courts.<sup>4</sup> The conviction rate for alleged rapists has remained steady at roughly 60%, regardless of whether the case is heard by a military or civilian court. The cost of a typical, two-week mobile court is \$45,000-\$60,000, during which time the court can hear about 15 cases. This translates into \$3,000-4,000 per case, with cases heard in bricks and mortar courthouses costing significantly less to adjudicate. By design, roughly 75% of the cases heard by mobile courts are rape cases, with cases involving robbery and pillaging among the cases also commonly heard.

On January 1, 2011, a Lieutenant Colonel in the Congolese Army, Mutuare Daniel Kibibi, led his soldiers and officers into the village of Fizi in South Kivu province. Over the course of two days, he and over 100 soldiers and officers engaged in a rampage that included the rape of at least 62 girls and women. Kibibi himself was among the alleged rapists. Kibibi was apprehended and brought to trial at a mobile court in the village of Baraka, a few dozen kilometres from Fizi. The court was primarily facilitated by ABA ROLI, with significant assistance from MONUSCO, DanChurchAid and Avocat Sans Frontieres, among others.

Over the course of 12 days, the mobile court tried Kibibi, 10 high ranking officers, and one juvenile.<sup>5</sup> Scores of villagers from the surrounding area observed the trial, as did a number of international observers. Among them were noted war crimes scholar and commentator, Dr. Kelly Askin, of the Soros-funded Open Society Justice Initiative, an early backer of mobile courts as a complement to ICC prosecutions. Kibibi and nine officers were convicted of committing crimes against humanity under both international and Congolese law for raping and pillaging during the two-day rampage. The mobile court sentenced Kibibi to 20 years in prison, while his fellow officers received sentences ranging from 10-20 years. One defendant was acquitted. During the trial, it came to light that Kibibi boasted about his invincibility, joking that the ICC was ineffectual and would never touch him or anyone else involved in the rampage. He never imagined a Congolese mobile court would be his undoing. After the trial, Dr. Askin opined that the trial met international fair trial standards.<sup>6</sup>

Kibibi was the most notorious, high ranking defendant to be tried for rape by a court in eastern DRC since 2008. In fact, of the cases with which ABA ROLI has been directly involved, his was arguably the only one that might have attracted the attention of the ICC and resulted in a possible indictment. That an all-Congolese court could carry out a trial of this complexity and political sensitivity in a remote village in eastern DRC is above all a tribute to the professionalism and commitment of Congolese justice sector actors involved in this trial, including defence counsel who were appointed to protect the defendants' interests.

By Congolese standards, a mobile court such as the one assembled to prosecute the Fizi rampage is prohibitively expensive. For the international donor community, particularly when compared to the cost of conducting a similar trial at an international tribunal, this represents a very modest sum, even when factoring in the cost of training justice sector actors over the course of a year.

Finally, it is important to note that the Kibibi trial and several hundred other rape trials in eastern DRC would never have been conducted without outside assistance by ABA ROLI and its donors. In fact, without these resources, it might never have come to light that the Congolese justice sector had the potential and the will to address DRC's rape crisis, arguably one of the gravest and longest running human rights disasters of our time.<sup>7</sup> Finally, while it is easy to fall into the trap of writing off a conflict-ridden country's justice sector as unworthy of investment, the improbable example of DRC provides a needed check on our cynicism and lack of imagination.<sup>8</sup>

## Conclusion

The aim of this paper is to provoke a dialogue about the viability, advisability and even obligation to support locally delivered justice, even in countries in the midst of conflict. Ultimately, this paper supports the proposition that the donor community has the ability and obligation to collaborate with local justice sector actors to help deliver justice, even in regions enmeshed in conflict such as eastern DRC. By doing so, the donor community is helping host country actors to deliver justice that will in many cases be more immediate and satisfying to victims of conflict-related transgressions than a trial conducted by an international tribunal. Moreover, locally delivered justice will almost certainly have a greater deterrent effect on would-be transgressors than a geographically remote prosecution that is usually concluded long after the conflict is over. Finally, a modest investment in building the capacity of local justice sector actors to address conflict-related transgressions will not only increase their ability to deliver justice during the conflict, but also during the ensuing, shaky peace. For these reasons, it is submitted that it is incumbent upon the international community to explore whether the success achieved by DRC's justice sector since 2008 can be replicated in other regions affected by conflict. Looking ahead, the concept of complementarity could eventually be viewed as an affirmative mandate to assist countries deliver justice within their own borders rather than simply as a technical constraint upon the ICC.

## Endnotes

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<sup>1</sup> DRC is the *least* developed country in the world according to UNDP's Human Development Index (2011).

<sup>2</sup> This approach is in keeping with the evolving concept of "positive complementarity."

<sup>3</sup> This is based on statistics maintained by the American Bar Association Rule of Law Initiative for rape trials that it has facilitated since 2008.

<sup>4</sup> Funding to facilitate these trials and to conduct training of justice sector actors has been supplied by the Open Society Institute for Southern Africa, the Dutch and Norwegian governments, the State Department (DRL and INL), USAID and the MacArthur Foundation. Additionally, donor funds have been used to provide extensive psycho-social support to survivors and their families, to conduct public education campaigns on SGBV, and to fortify prisons to minimize or eliminate prison breaks by convicted rapists and other prisoners.

<sup>5</sup> The juvenile's case was remanded to a juvenile court in Kinshasa, DRC.

<sup>6</sup> Dr. Kelly Askin's writings on DRC mobile courts can be found at [blog.soros.org](http://blog.soros.org).

<sup>7</sup> DRC is the site of the deadliest conflict since World War II, with an estimated 5.4 million persons perishing since civil war erupted in the aftermath of the 1994 Rwandan genocide. Further, it is believed that no fewer than 500,000 girls and women have been raped during this period in eastern DRC alone. Recent estimates by the Harvard Humanitarian Initiative suggest the actual figure might be much higher.

<sup>8</sup> For an analysis of the potential of international development efforts, such as support for DRC's mobile courts, to achieve the objectives of international criminal justice, see Khan, Wormington, 'Mobile Courts in the DRC: Lessons from Development for International Criminal Justice' *Oxford Transitional Justice Research Working Paper Series* (2011).

<http://www.csls.ox.ac.uk/documents/OTJR-KhanandWormington-MOBILECOURTSINTHEDRC-LESSONSFROMDEVELOPMENTFORINTERNATIONALCRIMINALJU.pdf>

## **Section 3: Legal Empowerment and other Bottom Up Approaches to Rule of Law Promotion**

The Past, Present and Possible Future of Legal Empowerment:  
One Practitioner's Perspective

Stephen Golub

Land Rights and the Rule of Law

Roy Prosterman

Legal Empowerment of Rural Poor: A Pathway Out of Poverty

Dubravka Bojic, Christopher Tanner, and Margret Vidar

Timap for Justice and the Promise of Paralegal Initiatives

Simeon Koroma

Five Strategies Towards Basic Justice Care for Everyone

Maurits Barendrecht

Customary Justice: Challenges, Innovations and the Role of the UN

International Development Law Organization (IDLO)

Informal Justice Systems: Challenges and Perspectives

Tilman J. Röder

An overview on Legal Information Building and Sharing in the Arab World

Joyce Hakmeh

# The Past, Present and Possible Future of Legal Empowerment: One Practitioner's Perspective

Stephen Golub

## Abstract

This paper offers one practitioner's perspective on the origins, evolution and possible direction of legal empowerment (LE), which in some ways is a new field and in others is a continuation of many kinds of efforts linked by certain common elements. While receiving increasing international donor attention and support (though still relatively little compared to conventional law-and-development programmes), most legal empowerment work is primarily carried out by international and country-specific civil society groups because they tend to demonstrate more of the requisite initiative, dedication and flexibility than do government agencies. A limited but growing array of research findings indicates more legal empowerment progress and impact than that demonstrated by top-down, government-centred legal programmes, such as judicial reform.

For legal empowerment, the next two decades could bring increasing use of the term, launching of relevant initiatives and evidence of impact. Another conceivable outcome, however, could be that the term will thrive but the underlying concept, activities and strategies will barely survive – that legal empowerment terminology could mask many conservative, state-centric programmes. In a more constructive vein, the future of LE should include broader and deeper research, going beyond the initial efforts underway and generating evidence of various initiatives' impact (or lack thereof) and resulting lessons. Finally, and most hopefully, the most potentially powerful trend for legal empowerment could fall outside the justice sector. That is, ironically, the greatest potential for the field could involve its increased integration into socioeconomic and governance development initiatives, such as those pertaining to health service delivery or local government budget accountability.

**Keywords:** legal empowerment – law and development – rule of law – governance – accountability – civil society – justice for the poor – Commission on Legal Empowerment of the Poor – rule of law orthodoxy – Global Legal Empowerment Network – Haki – Namati

## By Any Other Name...

This paper offers one practitioner's perspective on the origins, evolution and possible direction of legal empowerment (LE), which in some ways is a new field and in others is a continuation of many kinds of efforts linked by certain common elements. I offer the perspective in the first person in order to address the matter in an informal manner.

While there are many viable definitions for this emerging field, I currently favour *the use of law and rights specifically to help increase disadvantaged populations' control over their lives*. Without delving into the definition's details, three key considerations for understanding the concept are:

- The word "specifically" is employed to distinguish LE from most rule-of-law (ROL) work supported by development agencies. LE directly engages and/or benefits the disadvantaged. In contrast, most ROL work - sometimes called ROL Orthodoxy for its conventional approach - mainly aims for benefits to only indirectly, eventually trickle down to the poor via reforming laws (e.g., regarding foreign investment) or government institutions (most notably judiciaries).
- Even more than being about law, legal empowerment is about increasing power/control for the relatively powerless.
- Such increased power can both flow from the use of law and/or result in law reform and, even more crucially, legal implementation – the actual enforcement on the ground of decent laws that all too typically exist only on paper in many countries.

In some ways, legal empowerment is just a catch-all term for an array of activities and strategies that sometimes go by other names: legal aid, developmental lawyering, structural legal aid and justice for the poor, for example. It also subsumes public interest litigation and social action litigation, and substantially overlaps with social accountability.

The importance lies not in the nomenclature, however, but in the concentration on specifically benefiting the disadvantaged, as opposed to ROL Orthodoxy. The value of weaving together diverse strands of strategies and activities that comprise legal empowerment is that it provides a focus for rethinking and invigorating how law and development should be integrated.

## The Past

Certain intellectual roots of the concepts underlying legal empowerment merit some brief illumination. In the 1970s a small, New York City-based international NGO, the International Center for Law in Development (ICLD), began promoting a “legal resources” approach by which the law was seen as a resource for helping the poor mobilise to assert their rights and improve their situations. The notion here was that in various ways law could be used by the disadvantaged for political and developmental ends.

Analogous trends were starting on a country-specific level across the globe in the 1970s and 1980s. For instance, when I first arrived in the Philippines in 1985 to work for the Asia Foundation, a San Francisco-based international NGO that funds and implements various development projects across Asia, a number of young Filipino NGO attorneys were starting to employ the legal resources approach. (Some came to call it alternative lawyering, as in an alternative to conventional legal practice and legal aid.) Moreover, many also were taken with the work and writings of Senator Jose Diokno, a human rights activist prominent in the opposition to the country’s dictator, Ferdinand Marcos. Diokno preached “developmental lawyering.” This aimed to cast lawyers as development actors partnering with the poor to seek change that promoted social change and that went beyond individual case work.

The actual origins of the term “legal empowerment” stem from a 2001 study that I co-authored for the Foundation, under a research contract that the organisation had received from the Asian Development Bank (ADB). The study focused on the creative ways in which (mainly) NGO attorneys and their partner populations and organisations were carrying out legal services in seven Asian nations. While it would be pleasing to claim that the term was a product of an intellectual effort to propound a new perspective on law and development, the reality of its origins are much more mundane. The original title that the ADB had used in commissioning the study featured legal literacy, which was misleading in that it suggested that the report was simply to be about legal knowledge. When I proposed to my co-author that legal empowerment better described the focus, it was simply to find a decent substitute for that title.

While the concept slowly gained increase traction in subsequent years, the trigger for garnering greater attention came with the 2008 report of the Commission on Legal Empowerment of the Poor (CLEP). The Commission has received criticism from many quarters for simultaneously adopting: grandiose claims (most notably, that four billion people are poor because they are excluded from the rule of law); a narrow conception of legal empowerment (*inter alia*, downplaying the roles of civil society, women and political economy analysis); and a top-down, government-centred approach to promoting a mainly bottom-up approach (reflected in part in its original name, the High Level Commission on Legal Empowerment of the Poor). More and more, then, individuals and organisations concerned with legal empowerment sidestep CLEP’s vision for the field. To its great credit, however, CLEP did focus on aspects of the law crucial to the poor and did spark greater interest in LE in certain international development circles.

This included interest by the philanthropist George Soros, who was influenced by both CLEP and the advocacy in favour of LE by the Open Society Justice Initiative (especially its programme on legal capacity development), a part of his sprawling Open Society Foundations (OSF) network. That in turn has translated into OSF supporting a number of new legal empowerment initiatives.

## The Present

OSF is by no means the only organisation taking an increased interest in legal empowerment. Bilateral aid organisations such as the Australian, Norwegian, United Kingdom and United States development agencies have been providing support for various legal empowerment initiatives. Multilaterals such as the UN Development Programme and the World Bank have become similarly engaged, the latter mainly through its growing Justice for the Poor Programme. Other institutions, such as the International Development Law Organization, also are playing a role.

International and domestic NGOs are increasingly employing the term – though, again, I should emphasise that what they are doing is far more important than what they call their work. Still, the growing role of the concept is reflected in the existence of new international NGOs and networks concerned with LE activities and strategies. These include the international NGO Namati, the Global Legal Empowerment Network (which it hosts) and another new legal empowerment network, Haki.

There are also new initiatives taking place on the academic and scholarly fronts. The University of Oslo has hosted an array of activities and publications. The Australian National University is becoming engaged with the field. A new law journal article argues for applying legal empowerment in the U.S. context. A number of university courses include the topic. And I am fortunate enough to start teaching courses solely on legal empowerment in the 2012-13 academic year, at the University of California at Berkeley Law School and at Central European University in Budapest.

Having said all this, the fact remains that if one walks into most development agency offices around the world and starts talking about legal empowerment to most of their personnel, the likely response will be blank stares. But this is to be expected in a relatively new field that comprises more an inchoate array of initiatives than a cohesive set of programmes.

Most legal empowerment work is carried out by international and country-specific civil society groups, be it NGOs or community-based organisations (CBOs) comprising the disadvantaged. This is not to preclude current or potential roles for governments in developing or transitional societies, particularly where they partner with NGOs and CBOs. But civil society tends to take more of the initiative, demonstrate more of the dedication and evince more of the flexibility requisite for effective LE operations.

Perhaps the most promising new trend regarding legal empowerment goes beyond what is being done, to what is being researched. To various extents and in various ways, funding agencies such as OSF, the World Bank (though its Justice for the Poor program) and the Australian and British aid agencies are supporting applied research on the impact of legal empowerment work. It may take years for the research to gather steam and produce results. But building on the scattered studies that already indicate progress and impact of LE initiatives, the new research could significantly document whether and how legal empowerment makes a difference and the various ways in which it can and should be pursued. In contrast, decades of heavy funding for ROL Orthodoxy has produced a paucity of proof that certain types of programmes falling under its rubric (notably judicial reform) have been effective.

## The Future

Speculating on the future of legal empowerment can take the forms of predicting what could happen or indicating what should happen. I will do a bit of both.

One very possible outcome is that, thanks to the efforts of various institutions, including those I have mentioned above, over the next two decades we will gradually see increasing: use of the term, launching of relevant initiatives and evidence of impact. We should not underestimate, however, the extent to which the political and bureaucratic forces that drive decision-making in international development will continue to hold sway. Even if growing evidence of LE impact emerges – and I am cautiously optimistic in this regard, but willing

to grant the possibility that findings could prove disappointing – this will not necessarily translate into expanded political and financial support for this work.

Another conceivable outcome, however, could be that the term will thrive but the underlying concept, activities and strategies will barely survive. That is to say, there is a tendency in international development circles for popular terminology to mask work that is irrelevant to or even runs counter to the previously plain meaning of the words being used. At one point, access to justice featured legal aid and related services that helped the poor gain access to the courts and other justice forums. In many quarters now, it has been broadened to include almost anything that is justice-related – it is only a slight stretch to claim that for certain agencies even changing a broken light bulb in a courthouse would fall under the rubric of increasing access.

Similarly, some views of human rights work have expanded to the point where in some circles it no longer features organisations such as Human Rights Watch, Amnesty International and their country-specific counterparts. Under the guise of human rights-based development (HRBA), even the most ineffective programmes with the most repressive regimes can be considered human rights work since they focus on “duty bearers” within the HRBA framework. It is possible that legal empowerment could go down a similar path.

In a more constructive vein, the future of LE should include broader and deeper research, going beyond the initial efforts underway and generating evidence of various initiatives’ impact (or lack thereof) and resulting lessons. It is worth the investment to ascertain whether and how this field should grow.

To end on a hopeful note, the most potentially powerful trend for legal empowerment could fall outside the justice sector. Ironically, the greatest potential for the field could involve its increased integration into socioeconomic and governance development initiatives. The scattered evidence of impact that I referenced above includes examples of this possible direction. A pilot project in Uganda has yielded improved health service delivery and bottom line impact, such as decreases in infant mortality where beneficiaries were enabled to understand and act on their relevant rights. Making use of a freedom of information law in India has allowed community groups to monitor and hold accountable local governments’ budget allocations. If such integration of legal empowerment becomes more the rule and less the isolated exception in development circles, it could greatly enhance the growth of the field. And much more to the point, it would greatly benefit the disadvantaged, who seek and deserve greater control over their lives.

# Land Rights and the Rule of Law

Roy L. Prosterman

Landesa

## Abstract

A major arena for successful pro-poor rule of law reform has been the provision of secure land rights for the rural poor. The bulk of the 70-75% of the extreme poor on our planet who make their livelihood in the rural sector fall into one of three great groups (altogether around 1.25 billion people) who lack secure land rights: tenants or agricultural labourers on lands of private owners; members of collective farms who have not yet received secure individual land rights in a break-up; and squatters on land claimed under public ownership.

Far more of the land-insecure would exist today, but for the successful carrying out of a number of land tenure reforms in the post-World War II era (including important reforms currently underway in such major developing countries as China and India). Yet much remains to be done.

In carrying out future rule of law reforms to provide secure land rights to the rural poor, a series of lessons can be distilled from the past and present work of Landesa and a number of others: that governments acquire needed private land rights voluntarily and at market price; preference for distribution of intensively used small house-and-garden plots; equal land rights for women; universal allocation of long-term individual land rights where collective farms are broken up; documentation protecting insecure holders of publicly claimed lands; and protection against new forms of insecurity, such as ill-compensated takings of agricultural land for non-agricultural purposes, and so-called "land grabs" by large agricultural users.

**Keywords:** land rights – land law – land tenure – land reform – land titles – land takings – women's land rights – property rights – farmland – revolution – collective farming – garden plots – household plots – conflict and land – land prices – just compensation

Among the most demanding challenges for application of the rule of law – not just in the past decade but persisting through the entire period since World War II – has been the crafting of land tenure reforms for the benefit of the world's rural poor. Still today, roughly half of our planet's population remains rural, including an estimated 70 to 75 percent of the very poorest; and of the latter, the great bulk depend for much or most of their scant livelihood on working agricultural land that belongs to someone else or as to which they have dubious and insecure rights. The land-insecure rural poor fall into three major groups:

1. Tenant farmers or agricultural labourers cultivating someone else's privately owned land;
2. Insecure holders (jointly or individually) on land that used to be, or sometimes still is, publicly owned and collectively farmed;
3. Squatters or claimants under customary tenure rules, on various lands also claimed by the state or whose formal ownership is unclear.

Altogether, roughly one-and-a-quarter billion people fall into one of these three groups. And where these widespread problems exist, of insecure rights or no rights at all to land which is the principal source of rural families' livelihood, status and security, a whole series of adverse consequences are likely to follow:

- Families whose land rights are insecure cannot risk making mid-to-long-term investments in land improvement and crop diversification, so production remains stagnant and yields remain low.
- Low yields mean limited nutrition for the family, especially for the children and, in many settings, particularly for the girls. An extensive study done a decade ago, concluded that poor nutrition was the primary cause of 53 percent of the ten million annual deaths on our planet of children under five (and those deaths are concentrated among the rural poor).
- Low yields also mean low incomes, with little money to support health, education and other basic consumption outlays.
- Land-based grievances continue to fuel major civil violence – the antithesis of the rule of law – in many parts of the world (here we see a long history of upheaval, from the Zapatistas of the Mexican Revolution to the Naxalites of contemporary India, with a cumulative death toll far into the millions).

By contrast, where basic land tenure reforms that give secure land rights to the rural poor – whether ownership of the land being farmed or something broadly equivalent- have been enacted, and carried out, a whole series of positive results have followed. Since World War II, a partial list of such reforms includes Japan, Taiwan, South Korea, Kerala and West Bengal states in India (and more recently underway in four additional states), Vietnam, Mexico, El Salvador, mainland China (first with ownership rights in 1949-56, then – after a disastrous collectivisation – with decollectivisation in 1980-84, and 30-year individual household land rights legislated in 1998 and 2002 and now implemented in about half of the Chinese villages), Lithuania, Latvia, and Estonia, Kyrgyzstan, and Russia (especially as to the small plots: household auxiliary plots on former collective farms, cottage (dacha) plots, and garden plots). Of all the foregoing, only the earliest stages of the tenure reforms in mainland China and pre-World War II antecedents of the tenure reforms in Mexico can be said to be immediately traceable to revolutionary overthrow of the previous regimes – and thus not to be instances of the reformist application of the “rule of law” – but the others stand as tangible, measurable instances where the rule of law has been effectuated.

Positive results of these reforms have included land investment followed by increased and diversified crop production and increased income. For Taiwan, for example, the ten years following land reform saw a 60 percent increase in grain production and a 150 percent increase in average farm income; in Russia the small plots have doubled in area, from three to over six percent of arable land, and now produce more than half the total value of agricultural production (up from 25-30 percent).

In settings where land tenure reforms have been legislated and effectively carried out, nutrition has greatly improved, infant and child mortality rates have been sharply reduced, land-based grievances (but see the caveat below) have greatly declined, and (where the new land rights are transactable), farm-family wealth has burgeoned. Moreover, the positive impact of greatly increased rural production, and income is felt over the whole economy.

These pro-poor land tenure reforms must be counted – certainly broadly, over the two-thirds of a century since 1945, and over the period of Landesa's own awareness and work on these issues from 1966 onward – as reflecting substantial successes for the application of the rule of law. But it is also of great importance to ask narrower questions as to the needs and opportunities for land tenure reform that have been more recently seen or identified. Certainly the scope for rule-of-law reforms in the land tenure area remains great in 2012, as reflected in the billion-and-a-quarter estimate we made above for the number of people who are still in one of the three groups lacking secure land rights.

Ten points stand out in looking at what has been learned, especially in the last decade or so, about the still very large needs for effective rule-of-law reform in the land tenure arena:

1. The approaches of the period from the end of World War II until the 1980s are less likely to provide the models for future land tenure reform – especially approaches in which privately owned land was compulsorily taken and redistributed to tenants. There is less political and ideological pressure for such reforms after the effective end of the Cold War, and the political pressures against them have further increased with sharp increases in the market prices of the private land involved. (A corollary will be that unimplementable laws on the books attempting to prohibit or limit tenant farming may need to be repealed, allowing more of the rural poor to become, or remain, small tenants – usually a better option than casual paid labour).
2. Experience has underlined that whatever tenure reform does involve taking and redistribution of private land should be fully compliant with the rule of law. In particular, it should not involve group-wide penalties levied without due process of law (confiscatory takings) against existing land owners, and beneficiaries should have free choice as to how they wish to farm.
3. Consistent with the last point (no forced collectivisation) countries that still have obviously unsuccessful imposed collectivised farming should be encouraged, with technical and financial assistance from the international community, to allow the voluntary break-up of such holdings, as happened in China and Vietnam.
4. Where collective farms have already been broken up, there is no plausible reason not to give the resulting individual farmers rights which are as long-term, secure, and “owner-like” as possible. Field evidence shows, for example, that China will benefit greatly if 30 year land rights are effectively extended to the roughly one-half of villages they have not yet reached.
5. With increasingly unaffordable land prices, a highly promising alternative to “full size” farms, is the distribution of small house-and-garden plots. These may be as small as 1/10th acre (1/25th hectare) or even less, requiring modest quantities of land that can be acquired voluntarily, at market price. Or existing public land may be available, not already used by the poor. Such programmes are now being successfully implemented in several Indian states, and a great deal of global evidence – see the small-plot sector in Russia, discussed above – demonstrates that benefits rise extremely rapidly with the first few thousand square feet of land allocated beyond the footprint of the house.
6. A further advantage of such micro-plot distributions is that it is often possible to reinforce women’s rights to primary control of the food and income produced, by titling such land jointly in the names of both wife and husband (or even in the wife’s name alone, where research confirms that this is feasible). A goal generally of land tenure reforms should be formalisation of equal rights for women.
7. Yet another opportunity for extending the rule of law with respect to land rights arises as to those with insecure rights to what the state regards as public land. A further successful tenure reform programme in India – now operating in four states and with extension likely – involves training and deploying local youths as paralegals to help customary and tribal holders or claimants of land that was supposed to be distributed in past land reform programmes (but where there is typically possession without documentation of rights or documentation without possession) to fully claim their rights, including the rights of women to joint recognition in the title document.

8. Another opportunity for legal protection of the land claims of traditional communities (found in various African settings, and also in Asia) is through the formal delineation and protection of the external boundaries of the territory claimed by the group, while leaving most internal land use allocations within these boundaries to traditional forms of settlement.
9. Also as to lands presently claimed by the state which are or may be subject of contention, there may be claims of “historical injustices,” some of which may be post-conflict or post-displacement claims. Kenya is in the process of establishing legal rules and procedures for consideration of such claims, and South Africa has done extensive adjudication of such claims.
10. Finally, there is our earlier caveat as to land-based grievances that may persist or arise out of new causes, and give rise to civil conflict, even where initial land tenure reform may have taken place. Two such categories of grievances have come especially to public awareness in the past five to ten years, both having to do with small farmers being deprived of their land under circumstances where due process and adequate compensation are lacking: government taking of agricultural land for non-agricultural purposes (with widely publicised cases, and civil disruptions, in both China and India, for example); and government dispositions of large tracts of land to companies or foreign governments for agricultural use. These have been commonly called “land grabs,” and a number have taken place in Africa, as well as others in Asia. Both of these categories of grievance may be ones where international help with fact-finding, access to dispute resolution, and technical assistance may have useful roles to play. And would-be investors in land, for ethical, financial, and reputational reasons, must become accustomed to doing their own independent “due diligence” wherever land rights are involved.

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# Legal Empowerment of Rural Poor: A Pathway Out of Poverty

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**Keywords:** legal empowerment – gender equality – land rights – paralegals

## Introduction

Recent years have witnessed growing attention on legal empowerment as a strategy for helping the poor get out of poverty; overcome economic inequalities; create economic opportunities; and improve their access to credit and financial services. As a process for reform, legal empowerment requires action not only at the levels of policymaking and legal institutional framework, but also at the level of the people. In other words, whatever protective and enabling legal and policy frameworks exist, the effectiveness of legal empowerment will depend on the knowledge and capacities of those responsible for their interpretation and implementation. Its effectiveness will also depend upon the capacity and confidence of men and women to legally assert their rights through the available legal procedures; and exercise the possibility to access the legal system and attain legal services.

Food and Agriculture Organization of the United Nations (FAO)'s work in land tenure, forestry, and fisheries management has long focused on enabling participatory and community-based approaches, and has more recently focused on legal literacy and empowerment of the rural poor. The FAO experience at the country level indicates that *paralegal training programmes* are a viable approach to improving respect for and ensuring protection of people's rights to land and other resources. These programmes increase capacity at the country level to influence institutional and legal reforms, and to implement reforms in practice. Furthermore, *paralegal training programmes* can also contribute to improving gender equality in agriculture by strengthening women's access and rights to land and other resources and services, and their participation in decision-making processes.

The next section of this paper highlights two examples of FAO's work on legal empowerment at the country level.

## Legal empowerment at local level in Mozambique: Exercising and defending land and other resource rights

FAO has been actively supporting the Government of Mozambique in the development and implementation of its progressive legislation on land and natural resources. The 1997 Land Law was developed with FAO technical support not long after the end of a protracted civil war in late 1992, when the country was at the early stages of a full transition to a market driven economy<sup>1</sup>. This legislation recognises customarily allocated and managed rights over land, according them full equivalence to the State 'Land Use and Benefit Right (DUAT, to use the Portuguese acronym)'. It also creates a legally defined "local community" within which local rights are administered according to local norms and practices; and the mandatory holding of consultations between communities and investors who want access to local land.

Since the adoption of this new legislation, the challenge has been to implement the 1997 Land Law in order to - in the words of the 1995 National Land Policy - '*secure the rights of the Mozambican people over land and other natural resources, as well as promote investment and the sustainable and equitable use of these resource*'.

Given the innovative nature of the rights-based and participatory approach espoused in the new legislation, it was recognised early on that the new law, and other new laws on forestry, wildlife, and the environment would require effective legal oversight. Thus, in 2001, FAO began the first of several Dutch government funded projects. FAO worked with a new but important government institution within Mozambique's Ministry of

Justice - the Centre for Juridical and Judicial Training (CFJJ). FAO's project with CFJJ focused on providing judges and public prosecutors with a grounding in what for most of them were new laws dealing with a relatively unknown area of work – land and resources management, and more specifically, elements of customary norms and practices which the 1997 law had successfully integrated into a single national legal framework for land.

During this first stage, several factors became salient: 1) community level legal support was needed; 2) that most local government officers had little real idea about the content of the new laws and/or how to use them in practice. This led on to a more decentralised form of legal empowerment and capacity building at local levels, with a twin-track programme of civic education and capacity building was developed at the CFJJ, with two main elements:

- Providing training selected NGO and public sector officers working as paralegals in rural development, land, environment and natural resources law and rights;
- Capacity development for local government and judicial teams in the fundamentals of the Constitution; the basic principles of the new laws; and how to use them to promote a participatory and equitable form of rural and local development.

The courses and seminars have adopted an open and participatory approach by bringing together various actors from different groups (for example, NGO workers and local government officers during paralegal trainings; key public sector figures from both the executive and judicial branches during the “District Officer Seminars”). The format of these courses and seminars promotes dialogue and favours sharing views, thus building confidence and breaking down barriers that can separate these different groups. Furthermore, these courses and seminars work to ensure that all sides receive the same information about legislation and rights from a reputable national legal training institution.

Since 2010, the CFJJ-FAO programme incorporates another project since 2010, funded by Norway, which focuses on the issue of gender and women's rights over land. Paralegal programmes specifically for women's NGOs are being run, with follow up provided for the paralegals when they go back to the communities where they work, and begin the challenging task of changing attitudes and, where possible, seeking to adjust local practices to bring them into line with over-arching constitutional principles on the equal treatment of women when it comes to land and resources access.

While it is difficult to assess impact at this early stage, also considering that many other factors influence the successful use of rights for development, anecdotal evidence indicates that the training model has kept alive the debate over how to recognise, defend and use acquired rights. The training does also provide communities with at least a minimal level of legal support at key points in the local development scenario. The challenges met along the way have been complex and at times difficult to overcome. In the first place, it was necessary to design a new paralegal training programme from scratch, and then turn this product into a sustainable training instrument with its own materials and guidelines<sup>2</sup>.

Finding a key national champion which also espouses a participatory approach to training and has a strong commitment to the rule of law has been a critical element of success in this innovative programme. With its core, officially mandated role to train the national judiciary, the CFJJ is also able to present a range of messages and guidance on how new and progressive laws should be applied, from a position of authority, which groups opposing certain aspects of the progressive laws find hard to challenge.

### **Tackling legal empowerment of men and women farmers in Kenya: Farmer field and life school approach**

More recently, FAO has focused on bottom-up empowering of men and women farmers through its Farmer Field and Life Schools (FFLS) approach. Based on the participatory agricultural extension approach of Farmer Field School (FFS), FFLS is a learning process aiming at empowering farmers to understand the larger socio-economic and cultural context and factors which influence their lives and livelihoods.

The first experience of using this approach for raising awareness of farmers on legal issues and strengthening their capacity to use law and legal services has been experimented in Kenya, at the Coastal Province. The Farmer Field School-Reproductive Health (FFS-RH) project implemented in four coastal districts, in collaboration with the Association of Women's Lawyers (FIDA Kenya), successfully integrated a number of legal issues in their participatory trainings. They include reproductive rights, gender-based violence, property rights and children's rights.

According to an FAO case study undertaken to document this experience<sup>3</sup>, the paralegal trainings generated several positive effects: *inter alia*, a number of trained persons started providing advice to neighbouring communities both in the field of agriculture and legal issues (e.g. widows' property rights); some facilitators provide assistance to village orphans by ensuring that they attend school and by protecting their property. In a few cases, the increased awareness on legal rights and available legal services has served as a protection against dispossession of widows. The impact was also felt on the side of rural populations' food security as food production in the area has increased despite the drought.

## Conclusion

FAO has found that legal empowerment can play a significant role in ensuring respect and protection of rural men and women rights, and enhance their food security and livelihood. It is most effective when bottom-up empowerment of people are combined with legal and institutional reforms, and when a two-track approach of training both rights holders and duty bearers is used.

Some of the challenges to effective implementation of these approaches include the following: the need for continued efforts, as new realities call for new legal and institutional reforms and then new capacity development efforts; the pressures on land and other natural resources contribute to pressure on existing, legally recognised rights; and the need to place legal empowerment efforts in the larger rural development context, requiring a holistic vision and attention to other development needs.

Legal empowerment makes people aware and gives them confidence to engage and act with what are still often more powerful social and economic forces. It is still only part of the solution however, and certainly does not mean that "empowered people" can then be left to fend for themselves. Follow up and the availability of accessible legal support are still needed, through specialised NGOs and access-to-justice mechanisms. And it is equally important to continue with other "attitude changing" exercises, which are especially important in the case of women, whose legal empowerment depends as much upon changing the attitudes of traditional, conservative male leaders, as it does upon women themselves being given knowledge about their rights under law and how to use and defend them.

## Endnotes

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<sup>1</sup> See Christopher Tanner, *Law Making in an African Context: the Mozambican Land Law*. FAO Legal Papers Online, No 26 (2002). [www.fao.org/legal](http://www.fao.org/legal)

<sup>2</sup> For example the *Manual para a Delimitação dos Direitos das Comunidades'* (Interministerial Land Commission and the CFJJ), and the *Manual para Paralegais na Area dos Recursos Naturais, Ambiente e Desenvolvimento* (CFJJ), both produced with FAO technical assistance and Netherlands funding. A video on paralegals and gender issues has also been made by the Norwegian funded project at the CFJJ on gender and women's land rights (available from the FAO Development Law Service, LEGN).

<sup>3</sup> See Dubravka Bojić-Bultrini, Carol Djeddah, Karine Garnier & Eliane Najros, *Tackling Legal Empowerment: the Farmer Field and Life School Approach*, Workshop Report (March 2009), [http://www.fao.org/fileadmin/templates/dimitra/pdf/fls\\_legal\\_empowerment.pdf](http://www.fao.org/fileadmin/templates/dimitra/pdf/fls_legal_empowerment.pdf).

# Timap for Justice and the Promise of Paralegal Initiatives

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Timap for Justice

**Keywords:** legal assistance – legal aid – legal services – access to justice law – legal dualism – paralegals – Africa – Sierra Leone

Timap for Justice employs a pioneering approach to expanding access to basic legal services in 19 offices throughout Sierra Leone. Several factors make access to justice particularly difficult in Sierra Leone: extreme poverty, a paucity of lawyers (mainly based in the capital), corruption, ongoing post-war reconstruction, and a dualist legal system, under which the customary system has primary relevance for the vast majority of people. Timap uses community-based paralegals as the frontline of its efforts. Paralegals employ a heterogeneous set of tools - mediation, negotiation, organising and advocacy - to assist citizens in addressing a wide range of justice problems, as well as engage both formal and customary legal institutions. Paralegals are trained, supported and supervised by a small group of lawyers who employ litigation and high-level advocacy in severe and intractable cases. In an effort to ensure paralegals are accountable to the host communities, Timap also works with Community Oversight Boards (COBs), whose members are drawn from traditional leadership and heads of the women and youth groups in the community. COBs support Timap when unavoidable conflicts arise with traditional leaders, as well as help direct the focus of Timap's work through community needs assessments. COBs also play an important role in ensuring continued, rigorous supervision of community-based paralegals. Timap has been recognised by independent institutions for providing justice services in the difficult context of rural Sierra Leone. Timap is currently working with the Government of Sierra Leone, the Open Society Justice Initiative, NAMATI, and other partners to expand and standardise a system of community-based paralegals to improve access to justice in Sierra Leone.

Securing the rule of law and improving accountability and fairness are crucial objectives in developing countries in general, and in post-conflict countries in particular. Injustice and exploitation were among the primary root causes of the Sierra Leonean civil war. Reforms to state institutions are necessary for improving the rule of law, though such reforms are mostly slow and difficult. It is equally important to advance the rule of law from the bottom up, by strengthening ordinary people's capacity to demand accountability from public institutions and at the same time address breaches of their rights. Conventional legal aid models, however, are often impractical and ineffective. They fail to address legal pluralism in a meaningful way; they are often concentrated in national capitals, as well as too costly to be viable nationally.<sup>1</sup>

Timap for Justice is a pioneering effort to provide basic legal services and to improve access to justice in Sierra Leone. Established in 2003,<sup>2</sup> **Timap for Justice** (Timap), a Sierra Leonean NGO, has developed a creative, flexible model to advance justice, one that combines education, mediation, organising, and advocacy to respond to the particularities of Sierra Leone's socio-legal context.

Sierra Leone is one of the poorest countries in the world, ranking among the lowest in terms of life expectancy, education and standards of living in the 2010 UN Human Development Index. Poverty is pervasive in Sierra Leone, with 2/3 of the population living on less than 2 dollars a day. The country's legal profession is severely undersized, with less than 300 practicing lawyers serving a population of 6.5 million. With most lawyers based in Freetown, the country's capital, legal services are unaffordable and inaccessible for the vast majority of Sierra Leoneans, including detainees, especially in rural areas. Approximately half of the prison population is behind bars awaiting trial,<sup>3</sup> and most have never been given any legal advice or assistance at any stage of their contact with the justice system. Furthermore, Sierra Leone has a dualist legal system, under which the customary system has primary relevance for the vast majority of people. Lawyers are also barred from practicing in these local (customary) courts.

Timap's frontline is made up of community-based paralegals rather than lawyers. Paralegals employ a heterogeneous set of tools to assist citizens in addressing a wide range of justice problems, including intra-community breaches of rights (e.g. a father refuses to pay maintenance, or a widow is wrongfully denied inheritance) as well as justice issues between people and their authorities (e.g. corruption, abuse of authority, failures in service delivery). Timap's paralegals, who work in 19 offices in the Eastern, Northern and Southern Provinces as well as in the Western Area, straddle the dualist legal system, engaging both customary and formal institutions.

The paralegals are trained, supported and supervised by a small group of lawyers. In severe and intractable cases, the lawyers employ litigation and high-level advocacy to address injustices that the paralegals cannot handle on their own. Because litigation or even the threat of litigation carries significant weight in Sierra Leone, our capacity to litigate adds strength to our paralegals' ongoing work as advocates and mediators.

In an effort to ensure the programme's accountability to its host communities, we work with Community Oversight Boards (COBs) in each of the chiefdoms where we operate. COB members are selected after consultations with paramount chiefs, other chiefs, local organisations, and community members. Each Board has four members, including a member of the traditional leadership (like Chiefdom Speaker, Adviser, or elder), as well as heads of the women and youths groups in the community. COBs play a bifurcated role: first, they act as a cushion between the community and Timap. In this regard, they both serve as a rallying point and support when unavoidable conflicts between certain traditional practices (and leaders) and Timap arise, as well as help direct the focus of our work through community needs assessments. Secondly, COBs play an important role in ensuring continued, rigorous supervision of community-based paralegals by thinking about questions like a) are the paralegals putting in the requisite time?; b) are they serving clients professionally, effectively, and ethically?; c) are they making sound efforts to address community-level problems? COBs meet regularly with the programme directors to provide feedback on paralegal performance.

Timap has been recognised by independent institutions including the World Bank,<sup>4</sup> the International Crisis Group,<sup>5</sup> and the UN Commission on Legal Empowerment<sup>6</sup> for developing a creative, effective methodology for providing justice services in the challenging and complex context of Sierra Leone. The Justice Sector Reform Strategy adopted by the Government in March 2008 also recognises Timap, and commits to exploring the possibility of scaling up the provision of Timap-style justice services.<sup>7</sup>

Since 2009, Timap for Justice has been working with the Government of Sierra Leone, Open Society Justice Initiative, and other partners to develop a nationwide network of low cost, basic justice service providers that uses the model developed by Timap (community-based paralegals backstopped by lawyers). Jointly, we are working to institutionalise paralegals, so that they are recognised by the government and subject to certain uniform standards,<sup>8</sup> including a standard training system for all community-based paralegals, a standard code of conduct for professional behaviour, a standard oversight mechanism, and a standard monitoring and evaluation framework.

The context that inspired Timap's model of community-based paralegals providing basic justice services in their communities and backstopped by lawyers - a paucity of lawyers, legal pluralism, poverty, post-war reconstruction, and corruption - is not unique to Sierra Leone. This model can be (and has already been) replicated in other countries. In 2007, the Carter Center initiated a paralegal programme in Liberia modelled after Timap.

Community-based paralegals pose an effective, affordable method of assisting people with problems of injustice. Timap strives to solve clients' justice problems - thereby demonstrating concretely that justice is possible - and at the same time to cultivate the agency of the communities with which it works. Timap adopts a synthetic orientation towards Sierra Leone's dualist legal structure, engaging and seeking to improve both formal and customary institutions.

## Endnotes

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<sup>1</sup> See, for example, Vivek Maru, *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide*, Yale Journal of International Law 31-32 (2006).

<sup>2</sup> Timap for Justice was co-founded by the Open Society Justice Initiative (OSJI) and the National Forum for Human Rights (NFHR), a coalition of Sierra Leonean NGOs.

<sup>3</sup> International Center for Prison Studies, World Prison Population List (Eighth edition, 2009). Last retrieved on May 27, 2012 from [http://www.prisonstudies.org/info/downloads/wppl-8th\\_41.pdf](http://www.prisonstudies.org/info/downloads/wppl-8th_41.pdf)

<sup>4</sup> In 2006, the World Bank recognized Timap as an innovative model for providing justice services, and awarded Timap an \$800,000 grant, which allowed Timap to double in scope. A World Bank qualitative evaluation of Timap finds feedback on Timap's work to be 'overwhelmingly positive, emphasizing the fairness of Timap's approaches its focus on the rights of the poor and/or marginalized, and the value of having a free forum in which to resolve disputes.' Further, 'those interviewed indicated that Timap filled an important gap and provided a chance to settle disputes that may otherwise have gone without resolution.'<sup>4</sup> Dale, P. *Delivering Justice to Sierra Leone's Poor: Progress and Predicaments; An Evaluation of the Work of Timap for Justice*, 1/2009.

<sup>5</sup> A 2006 ICG report on the justice sector in Liberia reported on Timap as a case study and recommended that Liberian civil society consider a similar intervention. 'By solving the everyday justice needs of ordinary citizens, [Timap] is proving town by town, case by case, that justice need not be a far-off ideal but can be an every-day reality.' *Liberia: Resurrecting the Justice System, International Crisis Group, 2006*. In 2007, the Carter Center initiated a paralegal programme in Liberia modeled after Timap.

<sup>6</sup> See United Nations Commission on Legal Empowerment of the Poor, *Access to Justice Thematic Paper, 2* (November 29-20, 2006).

<sup>7</sup> Section 3.13 of the strategy states: 'Demand side strengthening: Government will also consider how it can support the "demand side" – the users of the justice system - through the provision of widely available community based paralegals. This initiative will be undertaken in partnership with civil society, including the Timap for Justice project.' (Justice Sector Reform Strategy, Government of Sierra Leone, March 2008, Section 3.13, p. 18). The Costed Reform and Investment Plan states, 'The GoSL recognizes that the vast majority of the population do not have access to satisfactory legal services. It recognizes the valuable role that civil society is fulfilling in this respect, particularly through the provision of community based paralegal services (for example Timap for Justice <http://www.timapforjustice.org/work/>). Government wishes to recognize[d] that extended paralegal service provision has the potential to provide a step change in access to legal services in an extremely cost effective manner... The pioneering work of Timap will be studied in order to inform Government's plans to introduce community based paralegals into the nation's justice system.' (Justice Sector Reform Strategy, Government of Sierra Leone, March 2008, Ch. IV, p. 52-53).

<sup>8</sup> Early this month, the Sierra Leone Parliament enacted the Legal Aid Bill—already described as one of the most progressive legal aid laws in Africa. The new law provides inter alia for the establishment of a legal aid board, an independent statutory body to administer, coordinate, and monitor legal aid services in Sierra Leone. For more information: <http://www.namati.org/newsposts/sierra-leone-passes-legal-aid-law/>

# Five Strategies Towards Basic Justice Care for Everyone

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## Abstract

Ensuring the rule of law means people have access to justice. In a recent report, HiiL and its network of rule of law experts and innovators reviewed the state of the art. Legal needs research has shown that civil justice and administrative justice are delivered by a great many providers of services: public courts and private legal services; formal procedures and informal ones; traditional processes and innovative approaches. Together, these services provide access to justice, but providers of such services face some major challenges. Innovative approaches reveal five main strategies to overcome these challenges. The UN and other policy makers can play a major role in supporting these strategies.

**Keywords:** basic justice care – legal empowerment – bottom-up justice – access to justice – innovation in rule of law – courts – paralegals – legal information – IT and rule of law

## Many people do not get basic justice care...

When having serious problems at work or home, with neighbours, about land, housing, money, crime or with how their local community is governed, people need fair, workable solutions. With no trustworthy third party they can turn to, they are frequently left at the mercy of the powerful or stuck in conflicts. This causes stress, insecurity, health risks, damaged relationships, economic costs and an increased risk of violence.

The Innovating Justice Forum 2012 assessed how people's basic justice needs are protected and what are the trends in delivery of legal services to meet these needs across the world. A Trend Report surveyed research that shows how 10 problems are responsible for most of the injustice experienced by individuals. In many places, less than half of these problems are solved in a fair way. When best practices are used, solving over 70% is possible. Globally, the estimated "access to justice" gap consists of 200 million unsolved problems. Each year. That is a lot of injustice.<sup>1</sup>

The question is, if there is such a demand for justice, why it does not create sufficient supply. Across the world, lawyers, NGOs, project leaders, public administrators, judges and entrepreneurs are working hard to improve access to justice. But there are major challenges they face.

## Challenges to delivery of justice

Legal needs research has shown that civil justice and administrative justice are delivered by a great many providers of services: public courts and private legal services; formal procedures and informal ones; traditional processes and innovative approaches. In most countries, no single state institution or private service provider has an overall "market share" of more than 10%. People go to lawyers, paralegals, informal problem fixers, traditional leaders, religious leaders, informal tribunals, specialised committees, shop between different courts, or ask for help from the police, the mayor of their town, a social worker, a doctor, a journalist or the presenter of a television show.

Even in criminal justice, where the state is most heavily involved, the private sector is indispensable for prevention, and many crimes are solved by journalists. Enforcement and the use of force is ultimately the prerogative of the state, but compliance to norms and outcomes of dispute resolution processes is also a matter of people wanting to keep up a reputation in the community, in the media or on the internet.

There is a pattern in all these processes, though. Most problems are solved through interaction between the parties involved, in negotiation or similar processes. Only a small minority is actually decided by third party decisions (from courts or other persons whose authority is respected). Still the threat of involving a third party is indispensable: it guarantees fair, effective and speedy when people bargain about solutions.

According to the literature, the three main challenges to delivery of adequate services granting access to justice are the following:

- Courts (and other third parties) have insufficient incentives to deliver good quality interventions on time.
- Legal information, knowledge about best practices and neutral court interventions are difficult to sell for a price.
- Laws often prescribe in a detailed way who may deliver services, how they should organise themselves and which procedures they should follow. These rules are difficult to change, which is a barrier to innovation.

## Promising strategies

Innovation is changing the delivery of justice in fundamental ways. During the Innovating Justice Forum 2012, experts from all over the world prioritised five strategies for this innovation.

### 1. Legal Information Targeted on Needs of Disputants

Research clearly shows that about half of legal problems are solved by communication and negotiation between the parties. Settlement is the rule; a decision by a judge or another adjudicator is exceptional (typically around 5% of problems). Therefore, empowering people to negotiate fair solutions is key. Increasingly, legal information is distributed through websites, telephone lines, help desks at courts, community justice centres, leaflets and media. In many places, people see law as something threatening and complicated. Law should help them to communicate, negotiate and cope with problems. Legal information is most useful if it is understandable, tailored to the problem at hand and arrives in time. Ideally, it is sufficient to cope with the problem, offers limited options, and is easy to put into practice. When working with the information, people tend to need reassurance from a helpdesk or a support group.

A key element is learning about concrete solutions that worked for others. People need information about remedies that were accepted as fair by others empowers people (child support guidelines, schedules for calculating damages, guidelines for sanctions). This protects them from agreeing to unfair proposals. Their demands will become more realistic.

### 2. Facilitators and Paralegals Working Towards Fair Solutions

Many people rely on customary justice processes, informal interventions by local leaders, and similar arrangements in neighbourhoods. Because of their focus on conciliation and dialogue, such interventions now integrate modern mediation techniques and dispute resolution know-how. In developed economies, employees of legal expenses insurers and providers of legal aid are observed to work in a similar way.

Lawyers and judges increasingly use mediation skills, whereas mediators focus more on fair outcomes. Hybrids of the traditional professions – that is the future.

3. **Sharing Practices, Evidence Based Protocols**

As we have seen in health care, quality can be assured when information about the best treatments is made available to general practitioners working in a local context. Many disciplines provide knowledge on what works in negotiation and in bargaining about zero sum issues, on mediation techniques and on effectiveness of third party interventions. For domestic violence, global standards of practice are emerging. Within the next decade, this knowledge may develop into evidence based protocols for solving the most frequent justiciable problems.

4. **Choice of Third Party Adjudication Processes**

If the settlement process through negotiation stalls, people need the option of a third party to decide with them and for them, without the consent of the other party. *This is the only known way to guarantee the fairness of outcomes.*

When a court procedure takes three years and costs a fortune, the option of adjudication is not effective. Availability of legal aid, mediation or lawyers financing claims on a no-win no-pay basis does not really change this. A far more effective way to enhance access to justice is to create alternative adjudication mechanisms which the plaintiff can address. Throughout the world, courts and similar tribunals create easy-to-use procedures (designed for use without a lawyer). The most effective courts specialise: in family issues, land conflicts or other urgent problems.

Competition between third party adjudicators gives choice and increases incentives to be really helpful. Monitoring processes and outcomes can protect the legitimate interests of defendants.

5. **IT Platforms Supporting Negotiation and Litigation**

Resolving conflicts is basically a matter of exchanging information. The parties, the people assisting them and adjudicators learn about issues, facts, points of view, underlying needs, possible solutions, proposed norms and reach, eventually, decisions on these issues. This flow of information can be supported by forms and standard documents that ask the right questions.

Websites supporting online negotiation, mediation and adjudication are rapidly becoming available. Information submitted by the parties is organised issue by issue. Eventually, judges, arbiters or jury members can log in and get easy access to all information submitted. They can contact the parties, or ask them to come to a hearing, and even give their decision online.

## **What the UN and other policy makers can do**

These five strategies are tested and state-of-the-art. Taken together, they may not solve every justiciable problem. But they can bring basic justice care within everybody's reach.

The UN and other policy makers can play a major role in supporting these strategies. They can help to reinforce the underlying vision and reframe access to justice into access to fair solutions to urgent and frequent problems that people can encounter in their relationships to others. Policy makers can also make a difference by setting goals and terms of reference for procedures, by creating a level playing field, by stimulating choice and variety, and by monitoring quality of outcomes and processes.

### **Endnotes**

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<sup>1</sup> See Hiil Trend Report, *Towards Basic Justice Care for Everyone: Challenges and Promising Approaches* (2012), [www.hiil.org/publication/Basic-justice-care](http://www.hiil.org/publication/Basic-justice-care).

# Customary Justice: Challenges, Innovations and the Role of the UN International Development Law Organization (IDLO)

## Abstract

Interest in informal legal systems has grown in recent years with greater emphasis being placed on local ownership as an effective means of development. Non-state justice systems, including indigenous, customary, and religious legal orders; alternative dispute resolution mechanisms; and popular justice fora are often the only avenues through which the masses can access justice. Customary justice systems (CJS) provide access to justice for marginalised or impoverished communities that may otherwise have no other options for redress. The essential nature of CJS systems to many communities emphasises the need for their recognition for successful rule of law promotion. However, customary and religious systems are not without deep flaws. They often discriminate against women and minorities, and are inconsistent with established criminal justice standards and human rights norms. Furthermore, informal dispute resolution mechanisms are often captured by local elites or religious leaders, and women, the poor, and ethnic minorities are unlikely to get equal access or fair treatment. At the UN level, a great deal of attention has been given to the empowerment of people to use the law and legal processes, as well as to interventions aimed to strengthen the capacity of local communities, to guarantee access to justice on a fair and non-discriminatory basis. However, the current debate provides little practical guidance on how to strengthen customary legal systems without consolidating inequitable or rights-abrogating practices inherent in some of those systems, and what role the international community could play without undermining local ownership.

**Keywords:** non-state justice – informal legal systems – customary justice systems – traditional justice – access to justice – local ownership – dispute resolution – human rights

## Introduction

Interest in informal legal systems has grown in recent years, with greater emphasis being placed on local ownership as an effective means of development. Non-state justice systems, including indigenous, customary, and religious legal orders; alternative dispute resolution mechanisms; and popular justice fora are often the only avenues through which the masses can access justice. Customary justice systems (CJS) provide access to justice for marginalised or impoverished communities that may otherwise have no other options for redress. The essential nature of CJS, to many communities, emphasises the need to engage with such systems to ensure successful rule of law strategies. Engagement however, as discussed below, is not without challenges. Customary and religious systems are frequently characterised by deep flaws. They often discriminate against women and minorities, and are inconsistent with established criminal justice standards and human rights norms. Furthermore, informal dispute resolution mechanisms can be captured by local elites or religious leaders, and women, the poor and ethnic minorities are unlikely to get equal access or fair treatment.

However, criticism of traditional systems needs to be put into context. Neither gender discrimination nor lack of due process is peculiar to customary justice. In many of the countries where customary systems violate international human rights standards and principles, the state system itself is often no better.

For instance both customary and state systems in Somalia's Somaliland and Puntland consider as legitimate the reduction of penalties for homicide considered to be an "honour killing". In South Sudan the right of the family of a homicide victim to choose between execution of the perpetrator or the payment of blood money, is enshrined in law as well as customary norms.

## Key challenges surrounding the use of CJS

Interest in informal systems of justice as development tools has grown in recent years. However, a number of challenges remain unaddressed, including the following:

1. **Customary norms and justice processes often lead to discriminatory outcomes and tend to reinforce the power structure that controls and administers them.** The United Nations Development Programme (UNDP) finds that traditional and indigenous justice systems are susceptible to elite capture and may 'serve to reinforce existing hierarchies and social structures at the expense of disadvantaged groups'.<sup>1</sup> This includes traditional leaders who often rule arbitrarily, with few checks and balances on their administration, giving power considerations precedence over equity, fairness and overall justice. Flexible and uncertain rules and the lack of procedural safeguards pose particular risks for vulnerable groups, including women, the youth, people living with HIV/AIDS, and ethnic minorities.<sup>2</sup>
2. **Local judges and community members involved in alternative dispute resolution are often not aware of basic human rights standards.** As a result, customary law and customary dispute settlement and administration may violate human rights standards and constitutional provisions, such as the right to equality and non-discrimination and the right to fair trial, including the right to legal representation, the right to due process of law, the right to protection against self-incrimination or coerced confession, the right to a jury trial, the right to an appeal, and the right to protection against cruel and unusual punishment.

## Promoting Innovation in CJS

Both the international community and local actors have developed several approaches to tackle the challenges related to access to justice in customary settings, including the following:

1. **Community-based strategies, legal empowerment approaches and legal awareness programmes.** Such strategies seek to raise local awareness of state justice norms, for example by building the capacity of customary authorities to apply basic human rights standards, by empowering individuals and groups at the local level to realise their rights and access justice, or by providing legal and paralegal aid to pursue litigation of customary abuses in state courts. In this context, the use of community-based paralegals and "mobilisers" proved to be an especially effective way of bridging CJS with formal justice. Specially trained paralegals and community "mobilisers" can sit between the customary and formal systems, using the advantages of both and adapting to the situation. They can integrate reconciliation practices into dispute resolution and evoke the centrality of community harmony. Because they are community-based, paralegals are familiar with community power-holdings and dynamics, and may be more accessible and approachable, leading to a better understanding of the backgrounds of disputes. Working at the intersection between litigation and high-level advocacy, they may be able to overcome problems of elite capture common to many customary justice systems.
2. **The empowerment of women as equal partners,** through interventions aimed at equipping women with the information and skills necessary to assert themselves and speak up among men and chiefs, while promoting a community-wide appreciation of women's rights and contributions.<sup>3</sup> Gender-based programmatic interventions have proved effective in facilitating greater participation in decision-making, so that outcomes would represent the perspectives, needs, and expectations of the wider community, as opposed to only those of the chiefs and their followers.

## Engaging with CJS: The role of the international community

While the rule of law and justice administration traditionally lies at the core of state functions and responsibilities, the role of non-state actors in promoting and strengthening the rule of law and access to justice at both national and international levels should not be underestimated. At the UN level, a great deal of attention has been given to the empowerment of people to use law and legal processes, and to interventions aimed to strengthen the capacity of local communities to guarantee access to justice on a fair and non-discriminatory basis.

The Commission on Legal Empowerment of the Poor advocated a de-regulation of legal services including through customary justice systems, and the 2009 Report of the UN Secretary General called for 'low-cost justice delivery models, taking into account ... the efficacy of informal and alternative dispute resolution mechanisms'.<sup>4</sup> In March 2012, the Secretary-General<sup>5</sup> called on governments to clarify the relationship between traditional and formal legal systems, to bring them in line with international human rights standards and ensure access to justice of women and marginalised or vulnerable groups. However, the ensuing debate provided little practical guidance on how to strengthen customary legal systems without consolidating inequitable or rights-abrogating practices inherent in some of those systems, and what role the international community could play without undermining local ownership.

Engagement with customary legal systems to bring them into closer line with international norms and standards seems essential to strengthen the rule of law in development contexts. However, there are few comprehensive or empirically driven efforts to evaluate impact. Existing knowledge shows that interventions have tended to follow orthodox theories of reform, focusing on improving procedural or substantive aspects of customary laws, or modifying the state-customary interface to better harmonise or regulate the two frameworks, rather than empowerment-based approaches. Ultimately, understanding the political and social context as well as the relationship between formal and informal systems will be crucial to any reform effort, as is the importance of engaging with those most affected and implicated in these systems.

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<sup>1</sup> UNDP, *Access for All: A practitioner's guide to a human rights-based approach to access to justice* (2005).

<sup>2</sup> E. Harper, *Working with Customary Justice System: Post Conflict and Fragile States*, IDLO (2011).

<sup>3</sup> *Ibid* p. 20.

<sup>4</sup> UN General Assembly, *Report of the Secretary General on Legal Empowerment of the Poor and Eradication of Poverty*, 13 July 2009, A/64/133.

<sup>5</sup> UN General Assembly, *Report of the Secretary General on Delivering Justice: A Programme of Action to Strengthen the Rule of Law at the National and International Levels*, 16 March 2012, A/66/749.

# Informal Justice Systems: Challenges and Perspectives

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## Abstract

In large parts of the world, indigenous courts, councils of elders, and similar traditional authorities play a central role in the resolution of disputes. Despite all cultural differences, they share common features. Their relations with the state justice institutions are in many cases problematic, especially when they are not formally recognised. Nevertheless, they are perceived as legitimate institutions by local populations. Therefore, more recent strategies that aim at building the rule of law and improving access to justice include informal justice institutions as important stakeholders. In most cases, however, their positive potential can only be effectively used if they are reformed and linked to state institutions. This will be especially important in order to ensure that basic human rights standards are met. The inclusion of informal justice institutions will lead to a more comprehensive approach towards building the rule of law. Visible changes should however not be expected in the short term.

**Keywords:** informal justice systems – legal pluralism – human rights – access to justice – restorative justice

## Informal justice systems from a rule of law perspective

*Informal justice systems* have lately received much attention among rule of law theorists and practitioners. The notion refers to a variety of institutions that serve to resolve disputes and relate to social practices distinct from official state policy. Informal justice systems may be run by traditional or religious authorities, elders or other respected community members.<sup>1</sup> They are “informal” in the sense that they apply non-state methods of conflict resolution. Nonetheless they may be obliged to adhere to state law, and they can even be formally incorporated into the state court system, such as the Ethiopian *Kebele Social Courts* that are formal state organs that provide court-like decisions applying *shimglina*, a traditional mechanism of arbitration. But even if the law formally recognises and incorporates them, these institutions stand out of the official state and are perceived as “informal” by the people. Informal justice systems have existed in almost all societies and in all times. This paper focuses on the phenomenon in the development context of today.<sup>2</sup>

Informal justice institutions may be regarded as part of the overall governance system. The phenomenon is discussed mainly with regard to cases in Africa, Latin America, and South Asia. Many observers point to the practical needs of rural populations when explaining the popularity and functionality of informal justice institutions. Rural populations often have better access to informal justice systems than to the state judiciary and they prefer them for a number of significant reasons: typically, the procedure takes place on site, it is more or less free of cost and less prone to corruption, it is exercised by trusted people in the language everybody speaks, and decisions are taken according to rules known to all community members. Informal procedures typically aim at restoring social peace instead of enforcing abstract legislation. They are consent and justice oriented. In this sense, informal justice systems allow for better “access to justice”.

Apart from these common features, informal justice institutions are, in large geographical areas, the only choice due to the absence of the state. This is often the case in regions where colonial powers did not attempt to establish formal court systems, such as North Yemen or Afghanistan. In the situation of armed conflict, informal justice institutions often gain more importance due to the breakdown of the formal court systems. In post-conflict societies they can play a crucial role in the stabilisation and reconciliation process.

## Challenges for strengthening the rule of law

The growing attention given to informal justice systems is also due to the fact that the transfer of western-style judiciaries to post-conflict societies has more or less failed. After two decades of internationally funded institution building and rule of law promotion, and billions of dollars spent, the outcome still seems meagre. Recent studies have shown that newly established state courts and the laws they apply are not necessarily accepted by local populations. Especially in rural areas with more conservative, traditional communities, the gap between the formal and informal justice systems can be enormous. Even if state courts have been newly formed or re-established, disputes are still and foremost dealt with by the informal justice institutions.

Therefore, more recent efforts focus on *strengthening and reforming existing traditional institutions and linking them to state institutions* rather than trying to marginalise them. A purely state centred concept of the rule of law finds less and less support while informal justice institutions are more and more acknowledged as functional equivalents of state courts. In the latter sense Brian Tamanaha has stated that ‘although non-state justice systems do not meet the requirements of the rule of law, they can and do satisfy rule of law functions’, at least insofar as they can ‘play an important role in connection with establishing and maintaining rule governed behaviour between citizens’.<sup>3</sup> They complement – and often even substitute – the state infrastructure for conflict resolution, may enable the restoration of the social peace, and even provide better legal certainty.

This new strategy does however go along with substantial concessions. Gaining the benefits of informal justice institutions may require accepting their disadvantages as well:

1. Informal justice institutions function well within homogenous communities, but can create conflict in heterogeneous societies. They are effective in resolving conflicts on the community level, but not between individuals or groups and state institutions or other external actors.<sup>4</sup>
2. Informal justice institutions are often male dominated and their decisions tend to be gender-biased.
3. The most frequently raised concern is related to human rights. One example is the tradition of *swara*, i.e. the marrying of a girl or woman into another family as a compensation for the killing of a family member and as a symbol of reconciliation, which is practiced by the tribal councils called *jirgas* in parts of Afghanistan and Pakistan. To ensure a decent standard of human rights protection and fair trial in informal conflict resolution, some kind of monitoring and potentially also interference may be required. Informal institutions shall increase “access to justice”, but not create “poor justice for the poor”.<sup>5</sup>
4. Finally, it would be unrealistic to believe that informal justice systems were immune against corruption, nepotism, and other factors influencing the procedural fairness.

In view of the enormous importance of informal justice systems at the grass root level and their potential as effective means of conflict resolution but also the challenges they create, they have rightly been identified as one of the core issues for rule of law promotion in developing countries in the years to come.

## Most important trends in the past years

As the potential of informal justice systems to strengthen the rule of law finds more and more recognition, many states as well as non-state actors with the support of the international community are trying to strengthen them to the benefit of the concerned populations while diminishing their possible negative effects. It would be premature to report success stories as the change of legal cultures takes time and can only be assessed in the long-term perspective. The following examples are chosen in order to introduce the range of different approaches:

In accordance with Article 247 of the Constitution of Pakistan and the Frontier Crimes Regulation of 1901, an oppressive remainder from colonial times, Pukhtun *jirgas* in the Federally Administered Tribal Areas (FATA) may punish crimes on the basis of their own traditions and beliefs while the state assumes only a limited role. In response to calls for fairness in criminal procedures and equality before the law, tribesmen under trial were given a right to appeal and women and children under the age of 16 were excluded from a clause allowing for group punishment in 2011. These changes are certainly positive steps in the right direction but they are not going far enough, as basic human rights standards are still not fully guaranteed to the citizens of FATA.

The South Sudanese Local Government Act of 2009 goes further, being an elaborate regulation that provides a detailed prescription on customary court organisation and – like in South Africa – obliges the traditional authorities (*chiefs*) to give their rulings in accordance with the constitution. However, it still needs to be effectively implemented.

Meanwhile, the Constitution of Bolivia of 2009 established the “plurinational legal state” and gives official recognition to a variety of traditional non-state conflict resolution institutions like customary courts. Peasant communities like the Ayllus in the high plateau region who have always maintained their own customary law and courts may now officially exercise jurisdiction over their members in specific social affairs. Criminal cases are excluded but the competent state courts are often difficult to reach. The procedure applied by the customary courts is highly formal and every case is recorded. The aim is to reestablish harmony and reintegrate the accused into the community. The courts are bound to the constitution and shall consider human rights. It is especially noteworthy that they take final decisions. The only linkage with the state justice system leads to the Constitutional Tribunal. Bolivia’s decision to abolish the hierarchy of the formal over the informal justice system is part of the response of a new generation of political leaders to call for the recognition of indigenous forms of self-governance. Similar developments can be observed in other countries, both in the Latin American region and other regions. If Bolivia’s informal justice system can be formalised and access to justice improved without sacrificing internationally recognised human rights standards, its approach may be a model for other legal pluralist societies.

### **Possibilities for the international policy community to strengthen the rule of law through informal justice systems**

As mentioned before, the change of legal cultures needs time. Therefore, most of all, patience is needed. Sustainable improvements of the rule of law through the inclusion of informal justice systems into the respective strategies should not be expected within a span of a few years.

Approaches to reform informal justice institutions must be based on careful analysis of their functioning, as they may differ from village to village. In the search for ways to improve access to justice and the rule of law, experiences of other countries can be highly inspiring. There will be, however, no one-size-fits-all model, as the traditions and values on which informal justice systems are based are highly diverse.

Countries such as Pakistan, South Sudan, and Bolivia that take concrete steps towards legislative and even necessary constitutional reform should be actively supported. However, while it may be advisable to improve access to justice through informal institutions, formal justice sectors should not be neglected. For an effective protection of vulnerable individuals, especially children and women, it is necessary that state institutions remain competent to resolve certain cases. In many countries of the world, the judiciaries will need further assistance to fulfil this mandate. State capacity can be raised through the introduction of new forms of justice delivery such as mobile courts.

It is important to take into consideration that resolving disputes is an inherently political issue and that actors, formal as well as informal, will always have certain political motives. Efforts to reform and strengthen informal justice institutions are often faced with open or hidden opposition by high-ranking state officials who are concerned that they will lose political power. On the grass root level, in contrast, state officials are frequently willing to engage the informal system as they already live in communities and are in cases even involved in informal dispute resolution mechanisms.

In conflict and post-conflict situations, informal justice institutions may be perceived as competitors by stakeholders who are more interested in their own advantage than in effective conflict resolution and social peace, such as illegal armed groups, warlords and radical ideological or religious movements. If they are meant to play a vital and positive role in building the rule of law, informal justice institutions need to be protected from the influence of such actors.

Last but not least, the question of legitimacy must be taken very seriously. While state institutions mainly derive their legitimacy from national legislation - and to some extent – from international law, informal justice institutions are oftentimes met with much more acceptance from and within the local communities. The reform and strengthening of informal justice institutions and the creation of effective linkages with the state will fail if this has not been prepared together with the members of the respective communities in an inclusive process. Principles of traditional justice such as the seeking of consent may be useful in this way.

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<sup>1</sup> The wider notion of *legal pluralism* is avoided in this paper as it includes phenomena ranging from the self-governance of the Christian Churches to the *lex mercatoria* and hybrid forms of internet governance.

<sup>2</sup> One example of informal justice systems in Western countries are the councils of Native American tribes in Canada and the USA. See, Jacob T. Levy, *Three Modes of Incorporating Indigenous Law*, in Kymlicka and Norman: *Citizenship in Diverse Societies* (2000), 297-325.

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# An Overview on Legal Information Building and Sharing in the Arab World

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Arab Center for the of the Rule of Law and Integrity (ACRLI)

## Abstract

Legal information building and sharing maximises justice and the rule of law; citizens become knowledgeable about the law, while those working in the legal system are better able to enforce the rule of law. Many Arab governments have been “sharing” information by increasing access to legal information through increasing access to public laws, court documents, government forms, etc.; they have been also “building” information by digitalising and automating records and processes to increase internal efficiency; this is commonly referred to as “e-government”. However, the information building and sharing movement has not been without its challenges; illiteracy, public sector inefficiencies, a lagging IT industry, and other elements have hindered optimal success in the region, yet, they did not stand in the way of achieving several successes due to the cooperation of governments with the international community, NGOs, and the private sector. While there are success stories, the region as a whole has not reached its full potential regarding legal information building and sharing. It is critical that the international community maintains its support to countries that are willing but not able to reach their optimal provision of access to information. The international community needs to encourage a collaborative international environment and assist in both knowledge and finances. Effective information building and sharing cannot occur without the dedication of individual governments and the cooperation of the region, international community, NGOs, and the private sector.

**Keywords:** access to legal information – e-government – rule of law development – legal information building – legal information sharing

## The challenges of developing and implementing legal information sharing systems in the Arab region

Increased access to legal information will benefit lawyers, judges, elected members of government, public administration officials, scholars, researchers, and the overall general public. Establishing easy access to legal information and developing efficient information sharing programmes is necessary in implementing the rule of law because it creates a transparent government, allowing for the monitoring of enforcement of laws, and serves the right to knowledge, which encourages greater trust in the government and participation of its citizens. On the other hand, government information building creates a more efficient system that can better serve its citizens in delivering justice.

This movement is not without its challenges, as seen in the development of the Arab Countries, such as illiteracy, public sector inefficiencies, a lagging IT industry and maintenance of the system. However, the recent May 19 GCC e-Government Conference in Dubai is a testament to the region’s dedication to work internationally to overcome these domestic challenges of development.

### 1. Illiteracy and the “digital divide”<sup>1</sup>

A challenge to development in information sharing is illiteracy and lack of a digital infrastructure in some regions.<sup>2</sup> While literacy rates are on the rise and overall access to the internet in relatively widespread, there are still portions of the population that are not reached by online government and increased access to legal information, and thus do not benefit from it. Not until these gaps are filled will there truly be free access to legal information which benefits all citizens.

2. **Private vs. Public Sector Development**

The task of increasing access to legal sources and developing the government's legal building system has proven challenging for many governments because the public sector has not traditionally had a role in technology innovation and implementation. Therefore, governments must often engage the private sector for aid, especially if the information and technology sector is not fully developed in that nation.

3. **Lagging IT Industry**

A significant challenge to the development of legal information building and sharing is a historically low level of innovation in technology which has caused the Arab World to rely heavily upon support from outside the region in this respect.<sup>3</sup>

4. **Maintaining Success**

The challenges to information building and sharing do not end at a programme's implementation. Rather, governments need to continue to maintain the system in order to ensure that information is accurate and up to date. For example, a database containing court verdicts must be constantly updated with the latest court decisions. Maintaining information sharing and building systems takes dedication and continued support.

## Success stories: Arab implementation of legal information systems

Despite the challenges to development outlined above, various projects to increase information access in the Arab Countries have been successful due to the cooperation of Arab governments with the international community, NGOs, and the private sector. Below are some examples of these successes:

1. **United Nations Development Programme - Programme on Governance in the Arab Region (POGAR)**

UNDP-POGAR has developed and assisted countries in developing a set of legal databases to provide greater access to legal information in the Arab region. These databases include Arab Banking Laws, Arab Parliamentary, Arab Financial Oversight, Egypt Legal Database, Arab Associations Laws,<sup>4</sup> Arab Criminal Encyclopedia, and the Iraq Legal Database.<sup>5</sup> The challenge of compiling databases was met with the help of various NGOs. The Arab Center for the Rule of Law and Integrity's (ACRLI) experts specialising in legal informatics were behind the conception, development, and implementation of these databases.<sup>6</sup>

2. **Computerisation of Syrian Civil Records**

In an effort to modernise the government and encourage investment, the Syrian government developed an online access to civil and criminal records. All citizens are given a unique code to identify themselves and can use the code to access all civil and legal records associated with that code. This system allows citizens to access information without travelling to distant administrative offices. The programme's success can be attributed to establishing IT training institutes, setting up a separate government office for communication and technology (ICT), and modernising laws that formerly obstructed the development of the ICT.

3. **Iraqi Legal Database (ILD)**

In 2004, the United Nations Development Programme in Iraq, with the assistance of experts at ACRLI, launched the Iraqi Legal Database (ILD) which made available 27,543 updated and consolidated legal texts including laws, regulations, declaration, etc. which is to say every single Iraqi legal text that has been passed since 1917 until 2011 (including the region of Kurdistan). In addition six of the main Iraqi codes were documented, interpreted, and annotated with relative court decisions from all Iraqi and Kurdish courts. These codes include the criminal code, commercial code, civil code, Property code, Banking code, and Labour and Social Security Code, as each code groups together all the related laws, by-laws, regulations and other legal texts. The ILD was implemented to allow widespread access to legal documents to assist in a uniform implementation of the law. The database was the first of its

kind in Iraq and has been hailed a success; every month the site gets around 19,000 visits from 79 countries.<sup>7</sup>

4. **E-government in Morocco**

In Morocco, the government has not only developed an e-government programme including various government portals, but has also worked to increase internet access to make access to government information more effective.<sup>8</sup> The government is also hoping to encourage business development by codifying and publishing all administrative procedures. However, Morocco still has not been able to effectively use its government availability optimally due to a low literacy rate and “digital distrust.”<sup>9</sup> This is an example of an area where the international community can step in to fill a gap.

5. **E-government in the United Arab Emirates (UAE)**

The UAE’s goal of developing its access to legal information and government documents was fuelled by its desire to encourage economic development and investment.<sup>10</sup> The development of e-government in the UAE has been hailed a success story of the region and now ranks 28<sup>th</sup> on the UN’s E-Government Survey. The UAE’s success has, of course, been made easier by its wealth from natural resources; other Arab Countries are not as lucky.

6. **E-Justice in Kuwait**

In just one year, Kuwait has moved 21 places on the UN’s E-Government rankings.<sup>11</sup> Kuwait, with the help of Microsoft, has increased its access to government information via the internet.<sup>12</sup> The Ministry of Justice’s website is still under development but allows citizens to check if they currently have a travel ban and check the dates and times of trials. The website also provides links for information regarding specific laws, required documents, fees, and contact information.<sup>13</sup> Kuwait is an example of a successful private-public partnership in the area of information building.

## Continuing success stories: Engaging the international community

As previously mentioned, establishing access to legal information encourages the rule of law, aids in development and encourages investment in the economy. With this in mind, it is of critical importance that the international community comes together to continue to encourage progress in the field of access to legal and governmental information.

One way to assure success in access to legal and governmental information is to develop and invest in technology and communication training to ensure a sustainable future for the government’s provision of information. The international community can take an active role in training citizens in the IT field and assuring its sustainable future.

Another important way the international community can assist in development of this field is through aid. The development of a more digitalised and automated government system is an expensive investment. The international community should lessen this burden by giving financial and technical aid to nations that show initiative and commitment to maintaining continued success.

Finally, further access to legal and government information will never occur if there is not an awareness and demand by the citizens. Governments and the international community—especially after the Arab Spring that swept the region – need to promote and popularise the use of legal and government information through projects and campaigns. They also need to learn from past experiences and international best practices in order to fine tune their approaches and maximise their impact.

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<sup>3</sup> Ashraf Mishrif & Sandra Salmonvic, E-Government in the Middle East and North Africa: The Role of International Organization in the Experience of Egypt and Morocco at 911 (2010) available at <http://www.kcl.ac.uk/artshums/depts/mems/people/staff/academic/mishrif/E-governmentintheMiddleEastandNorthAfrica.pdf>.

<sup>4</sup> This database was developed by ACRLI and funded by Ford foundation and POGAR.

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<sup>6</sup> Arab Center for Development of the Rule of Law and Integrity, Building a Legal Database on the Right of Association in the Arab Countries,

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<sup>9</sup> Id. At 917.

<sup>10</sup> Rehab Lutah & Okan Geray, Dubai E-Government Case Study (2006) available at <http://www.oecd.org/dataoecd/4/40/36986277.pdf>.

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## **Section 4: Statebuilding and Rule of Law in Conflict-Affected and Fragile States**

The Heart of Developmental Change:  
Rule of Law Engagements in Situations of Fragility

Luc van de Goor and Erwin van Veen

Transitional Justice in Post-conflict and Fragile Settings:  
Progress and Challenges for Reparations, Truth-Telling, and Children  
International Center for Transitional Justice (ICTJ)

Extending Rule of Law Promotion beyond Criminal Justice:  
Rule of Law and Public Administration in Conflict, Post-conflict  
and Fragile States

Richard Zajac-Sannerholm

# The Heart of Developmental Change: Rule of Law Engagements in Situations of Fragility

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**Keywords:** situations of conflict and fragility – UN rule of law – designing security and justice interventions – engaging with non-state justice and security providers

## Introduction

The purpose of this paper is to articulate three “game changers” that can improve how the international community contributes to rule of law development in situations of fragility. Such change is long overdue. Many justice and security engagements fail to deliver their intended objectives because of the complexity of fragile environments, the political sensitivity of change in this area and current ways of working. In today's aid speak, transformative results are few and value for money is limited. Worse, the incentives and resources of many international actors are stacked against more realistic and political ways of providing support to rule of law development.

We define rule of law development simply as all efforts that contribute to a more accountable and more effective delivery of justice and security services to people.<sup>1</sup> This is a narrower view than e.g. articulated by the UN Secretary General in 2008, which holds the rule of law to be ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards’ (UN, 2008). It is precisely such a broad definition, in our view, that impedes clear operationalisation, gives too many actors a stake in the game and prevents effective management of UN efforts. It also does not explicitly recognise critical linkages between justice and security.

## Three game changers

Based on lessons learned over the last five years, three game changers can be identified. What unifies these game changers is that they are practical propositions aimed to increase the quality of rule of law support. They are based on sound analysis that is already available. The challenge is to translate translating available knowledge into practice.

### Game changer #1: Focus more on the political incentives and limitations of change

**Issue:** The organisations and means for providing justice and security represent tools of power that can be used for a wide range of political, economic and social purposes with an immediate effect on life, property and power relations. Change in access to, the organisation of, and authority over these tools is therefore a highly political issue that is bound to generate winners and losers. This creates extreme resistance and limitations to change. Historically, elite interests have dominated the organisation and use of justice and security mechanisms at most stages of development in most states. As a result, viewing or designing justice and security interventions – whether they take place at the local or the national level – as technical programmes is a recipe for failure.

**Game changer.** Justice and security interventions should be treated as political interventions with a technical component. They must be designed as political strategies and be backed up by adequate political capacity, analysis and engagement. Hence, the focus should be on having the ability to engage politically at all levels and on a daily basis to proactively build networks of political stakeholders in support of engagements and to react rapidly, with sufficient skill and muscle, to the inevitable setbacks and political challenges that will arise.

For example, Belgium, Germany and the Netherlands increasingly engage at high levels in a joint dialogue with the Burundian authorities on the politics of change on the back of the various justice and security programmes they support. This generates important signals, pressure and a better understanding of possibilities and limitations.

An obvious implication for the UN centres on the extent to which its Special Representatives and Resident Representatives can and should play a role as political change agents in support of UN rule of law efforts. It also points to the need for clear and political mission mandates, as well as to the need to be able to easily hire senior programme managers who combine political savvy with the required technical expertise where these are not available inside the UN.

### **Game changer #2: Build justice and security programmes in a more evolutionary manner**

**Issue.** The most common way to design security and justice engagements today is to follow a programme/project cycle approach of ca. 3-4 years. Most programmes are coherent sets of time-bound projects in pursuit of clear and detailed objectives with a defined financial and capacity envelope. Mounting evidence is suggesting that this programme cycle is not fit for purpose, in particular in conflict-affected and fragile situations. A concrete lesson is that the rigorous programme design, planning and implementation against detailed results suggest a level of predictability and plan-ability that belies the dynamics and characteristics of most fragile and conflict-affected situations.

**Game changer.** More realism and flexibility must be introduced in current programming methods. The clarity on objectives and theories of change – in particular to achieve “Western” look-alike end-states – suggest a kind of malleability of social and political processes that is not realistic. Instead, more room should be created for programmes to develop in a more evolutionary fashion that allows for gradual convergence of the opportunities and limitations of the local environment, a sound understanding of context, stakeholder incentives and the organisation of resources into a feasible programme with meaningful results. This requires introducing or strengthening three elements in programmes:

- **The ability to establish detailed overall programme results progressively.** Current operating realities are often such that results for programmes of 3-4 years are designed on the basis of scoping missions of only 3-4 weeks that mainly features a set of one-off interviews with key formal (usually government) stakeholders. This is insufficient to obtain an intimate and detailed understanding of the interests of a sufficiently broad range of political stakeholders, societal priorities and limitations in often-contested societies. It is more appropriate to start programmes on the basis of relatively open-ended results and a set of principles for working together. Of course, such results need to be made more specific over time. Dialogue, joint experiences and analysis can serve this purpose. This will typically require more time and human resources than currently allocated. Yet it is critical to better ground programmes in the realities and needs of countries characterised by a weak rule of law.
- **The ability to work iteratively at every stage of the project cycle** with an increasingly central role for local stakeholders. It is well known that the operating environment in fragile states is fluid with unexpected setbacks and windows of opportunity. It is also well known that “ownership” is not a matter of a one-off conversation, but a continuous process of critical dialogue with a widening set of stakeholders to ensure engagements reflect the priorities and possibilities of at least some of these stakeholders. Hence, a slower and more iterative way of designing and implementing the series of projects that typically make up a programme is appropriate. This, of course, is only possible when resources can also be allocated and mobilised flexibly. It can also inform the progressive establishment of more detailed results for the programme overall.

- **The ability to learn.** Monitoring is the Achilles heel of much programming. Even where monitoring is up to standard, examples of its results positively influencing programme development are rare. It still often is the case that monitoring is not seen as a means to learn and adjust, but rather as an instrument to focus on results and accountability. The *Zimbabwe Peace and Security Program* is a good example that recently received high praise for the manner in which its monitoring system informs a forward-looking conversation between key stakeholders.

Simply put, effective programme design does not only require longer inception phases (of up to 12 months) or longer programme horizons (of a minimum of 6-8 years), but also a different way of working that is more flexible and iterative. This goes against the current wisdom of value for money and rapid results but is critical for achieving long-term outcomes.

An obvious implication of the above for the UN is the need for peace support operations to develop, from the start, justice and security interventions hand in glove with other parts of the UN system that have longer time horizons so that short-term leverage can be combined with long staying power. Another implication is the need to reduce focus on short-term results. This requires a high-level dialogue with key UN funders, informed by good, independent analysis of what makes programmes effective, to ensure that funding conditions for e.g. UNDP work less as a “results straightjacket” and stimulate learning and process-oriented approaches more instead.

### **Game changer #3: Engage more with local/non-state justice and security providers**

**Issue.** In many conflict-affected and fragile states, local/non-state actors deliver a significant percentage (typically over 50%) of all justice and security services to the population. It is always possible to identify actors that merit support from both a normative and a practical point of view – such as neighbourhood watch groups, community development councils and trade associations. For example, in the urban areas of Bukavu (Eastern DRC), young men volunteered to patrol neighbourhoods in teams called “Forces Vives”. As a neighbourhood watch group, these teams contribute significantly to safety in areas where the police rarely responds (Derks, 2012). However, supporting such actors is resource intensive, small-scale and risky, for instance because of local power dynamics that are difficult to grasp. Moreover, it might run counter to a government’s centralisation agenda. Despite the latter’s intentions to set up structures and services that may be able to deliver adequately in the long run, they are often inadequate to deal with immediate and medium term needs. International actors often take long-term statebuilding priorities as the starting point for their interventions. As a consequence, much international justice and security support centres on the executive with little effect beyond major urban centres.

**Game changer.** International support to justice and security development should aim to strike a better balance between working with local/non-state and central justice and security providers. Two relatively simple steps can accomplish this and so significantly extend its reach:

- Building sustainable long-term partnerships with (international) civil society organisations (CSOs) that can help design, implement and monitor support for local/non-state justice and security providers. Such CSOs should be selected on the basis of their local legitimacy, detailed local knowledge and ability to influence. Although this requires a substantial upfront investment in time and resources, it provides a way to go with the grain and avoid direct confrontation with central stakeholders. Examples such as the *African Security Sector Network* and the *Asia Foundation* spring to mind.
- Adopting a problem-solving or service delivery orientation for justice and security support. Focusing on a particular problem or service offers a good entry point to engage local communities, actors, as well as central state services. The resulting dialogue and identification of priorities and needs can help to build confidence between citizens, local and central organisations and stimulate a more effective division of labour to provide key services, which is recognizant of the multiple layers, actors and sources of law that are typical in many fragile situations.

An implication of the above for the UN is the need to refocus some of its institution and capacity building justice and security interventions towards problem-solving and service delivery oriented activities. Another is the need for missions and country offices to build larger and better networks with national/ local and international civil society. This, however, will likely require funds and skilled staff. The CapMatch concept that is being developed by the UN's Civilian Capacity Team may offer a good starting point for mobilising additional resources.

## **An agenda for change**

Bold leadership and courageous decisions are required to operationalise and implement these three game changers. A first set of action could look as follows:

### **Here and now: easy, immediate actions**

- Ensure that every justice and security intervention has a high-level, in-country political champion in the UN system with time to engage, build political relations and “troubleshoot” as necessary.
- Identify and use lessons learned from the recent refocus of the UK's Stabilisation Unit on smaller rosters that include more senior experts on permanent call down contracts who combine developmental with political experience and receive more training.

### **For later: difficult, catalytic actions**

- Inventory which corrective measures in different sets of UN operating procedures (programming, risk management, procurement etc.) could bridge part of the tension between our knowledge and the current practice of supporting justice and security development.
- Ensure UN human resource policies on performance management, reward and leadership, provide incentives for staff to better cooperate and coordinate with colleagues across the UN system.
- Make it mandatory for peace support operations to conceive any justice and security programme type intervention with other relevant UN actors from the start to ensure adequate longevity of programmes. For instance, the UN's Integrated Mission Planning Process Guidelines of 2006 and 2008 could be used to operationalise the nuts and bolts of integrated programming. To ensure clarity of management and control, this must be done under clear mission leadership and with seconded staff authorised to commit their organisations. The UN's Interagency Security Sector Reform Task Force could be used as a resource and coordination centre for such joint justice and security programming.

## **Conclusions**

Change in the area of the rule of law is more difficult, higher-risk and features longer timelines for transformation than many other areas of development. These characteristics place high demands on the quality of international support. Sadly, much international support today is not fit-for-purpose. Such support neither delivers value for money, nor does it improve justice and security services for those who suffer their absence. We more or less know what must change. As the UN is a key global player in the area of rule of law development, the UN General Assembly's debate on the matter is a good place to start a discussion on how these lessons and implications can better inform the practice of UN engagement.

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<sup>1</sup> The term “accountable” covers aspects such as external and internal oversight over the manner in which justice and security services are provided (e.g. in line with human rights). See also: Bingham (2010) on the accountability dimension of the rule of law.

\* This paper does not reflect the official views of either the Clingendael Institute or the OECD. We have geared our paper to a UN audience because of the aim of this report. Yet, neither of us works for the UN. We hope that our UN colleagues will engage with the spirit of our arguments and pardon us for any manifest lack of insight into UN operating realities.

# Transitional Justice in Post-conflict and Fragile Settings: Progress and Challenges for Reparations, Truth-Telling, and Children

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## Abstract

Since the publication of the 2004 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, the field of transitional justice has continued to make progress in promoting the rule of law in countries that have experienced serious human rights violations. At the same time, the field continues to face new challenges, one of the broadest but most important of which is the need to adapt measures initially designed to confront abuses in post-authoritarian contexts to post-conflict and fragile state settings. This document reviews three areas in which, since 2004, progress can be seen but challenges - particularly related to postconflict and fragile settings—must be faced: reparations, truth-telling, and children. It also suggests ways in which the international community can contribute to meeting the emerging challenges.

**Keywords:** transitional justice – reparations – truth-telling – children and transitional justice – conflict and post-conflict states

## Reparations

Although a right to reparations was already contained by 2004 in a number of human rights treaties, the adoption by the UN General Assembly in 2005 of the Basic Principles and Guidelines on a Right to Reparation and to a Remedy for Gross Human Rights Violations and Serious Violations of International Humanitarian Law marked a turning point because it incorporated standards for the implementation of the right to reparations. Furthermore, while the Rome Statute was adopted prior to 2004, the increasing importance since then attached to the International Criminal Court's (ICC) reparations mandate, reflected in both the Court's pronouncements and in the growing support of donor states to its Trust Fund for Victims, suggests the recognition of victims' needs as an equal and indispensable element of international justice. At the national level, reparations programmes have been recommended by truth commissions and implemented by a number of states before and since 2004.

Despite international recognition of the right to reparations, however, many states have been unwilling or unable to establish reparations programmes or implement truth commission recommendations or court orders involving that right. In some cases, particularly in postconflict developing countries, this has been due to a lack of capacity and resources. In other cases, there continues to be a deliberate conflation of development programmes with reparations measures.

These challenges point to the need to encourage development actors and state and international institutions with a reparations mandate to identify not only shared goals but ways in which they can reinforce and complement their respective programmes. An emerging and related challenge is the extent to which reparations can contribute to guarantees of non-repetition, including by addressing the vulnerability of certain classes of victims who were already in pre-existing situations of marginalisation, including women, indigenous communities, and the poorest, often rural, communities in postconflict countries.

Through its various agencies, human rights monitoring mechanisms, and system of rapporteurs and Special Representatives of the Secretary General's (SRSGs), the UN has contributed immensely to elaborating on the content of reparations for those situations and victims within particular mandates, including women and children in armed conflict, and in relation to torture, genocide, and forced disappearances. It is important, however, for states and NGOs to encourage other UN agencies, rapporteurs, and SRSGs - including those involved in health, education, food, displacement, and indigenous communities - to examine the relevance of the right to reparations to their work. Some donor states have contributed significantly to the ICC's Trust Fund for Victims, but more support is required if it is to become effective and credible. With important exceptions,

many states have been reluctant to support national reparations programmes in postconflict countries or the efforts of post-dictatorship governments seeking to recover ill-gotten assets or reduce foreign debt burdens which, in some cases, have been or can be important sources of funding for reparations programmes.

## **Truth-telling**

The creation of truth commissions in postconflict and fragile settings has become a well-established practice, supported by a framework of legal principles and best practices that is ever more consolidated. Soon after the publication of the 2004 Secretary-General's report, the notion of a right to the truth was affirmed in the General Assembly (the Basic Principles and Guidelines on a Right to Reparation, and the Resolution on the Right to the Truth), as well as in resolutions and reports of the Human Rights Council. The right to the truth has since been elaborated in regional bodies' resolutions. The entry into force of the Convention on the Protection of All Persons Against Enforced Disappearances, in 2010, as well as recent country jurisprudence have further strengthened the concept. In addition, truth-seeking has found new and creative instruments, as truth commissions have gone beyond the classic model of national commissions examining large patterns of violations, to include smaller local commissions; commissions focused on violations against specific populations, such as indigenous peoples; and commissions emerging from civil society. Significant research has enriched the work of truth commissions regarding the treatment of victims and the special needs of women, indigenous peoples, and children.

At the same time, significant challenges remain. Many recent truth commissions have failed to conclude their mandates, or have done so in a substandard manner. Many commissions emerge from governmental decision without adequate consultation or civil society buy-in, and some commissions are created without sufficient political will to clarify facts, provoking strong resistance and even rejection from victims. Additionally, in spite of significant normative progress and even in the face of explicit truth commission recommendations, many states remain slow to respond to requests to declassify archives and to conduct effective searches for the missing and disappeared.

The international community, through the UN and regional bodies, has been instrumental in supporting truth-seeking initiatives in postconflict and fragile settings. The extensive compilation and systematisation of good practices for truth commissions has set strong standards for truth-seeking. However, more needs to be done: commissions often are created in situations of acute lack of local material and human resources, and the international community needs to find rapid instruments to cooperate. Instruments of truth-seeking other than truth commissions, such as the search for the missing and disappeared and the preservation and use of archives, receive scarce attention in immediate postconflict settings. It is important for the further strengthening of the practice of truth-seeking to see stronger cooperation and sharing of experience among different UN agencies, missions, and regional bodies.

## **Children**

The need to include children and youth in transitional justice efforts has been gaining recognition in recent years. A landmark development was Sierra Leone's Truth Commission, which included violations of children's rights in its mandate, conducted children's hearings, and produced a child friendly version of its report. Other commissions have included children in their focus in Peru, Timor-Leste, Liberia, and most recently Canada and Kenya. In criminal justice, while the victimisation of children is still insufficiently documented and proceedings are seldom child friendly, there have been some positive developments as well: two landmark sentences for the crime of forced recruitment have been recently issued, in 2011 in Colombia and in 2012 by the ICC. Normative developments in reparations have included the 2005 Guidelines on Justice in Matters Involving Child Victims and Witness of Crime, but national reparations programmes have inconsistently acknowledged or redressed violations against children.

Despite significant development, important challenges remain for effectively including children in transitional justice measures. Most importantly, there is a lack of awareness and understanding of the potential role for children and youth among practitioners, policymakers, and donors. There is also a need to conduct empirical research of the impact on children of their participation, and to produce informed best practices for this participation (such as guidelines on child witnesses in criminal justice proceedings, or crafting child-sensitive outreach programmes). Further challenges include the need to adopt child friendly mechanisms early in the process; budgeting the costs of such mechanisms; and the need for coordination among transitional justice actors, child protection agencies (CPAs), and other children advocates groups.

Children advocates worldwide, including the SRSG for Children and Armed Conflict, UNICEF, academics, NGOs, and CPAs, have in recent years promoted the normative framework regarding children and transitional justice, while UNICEF, together with NGOs, has taken a lead role in conducting research and creating knowledge. The Innocenti Research Centre's 2008 Expert Paper Series on Children and Transitional Justice was followed by important publications such as UNICEF-ICTJ's 2010 *Children and Truth Commissions* and UNICEF's 2010 *Children and Transitional Justice*, which includes Key Principles on Children and Transitional Justice. These principles seek to develop common minimum standards for children in transitional justice, and have been taken up at the policy level, as evidenced by their mention in the 2010 Report of the SRSG on Children and Armed Conflict, and by a section on the need for a child-sensitive approach to transitional justice in the 2010 Guidance Note of the Secretary General on the UN Approach to Transitional Justice. The 2011 Report of the Secretary General on the Rule of Law and Transitional Justice also refers to the need to include children in a significant manner, and calls for the development of common minimum standards.

# Extending Rule of Law Promotion beyond Criminal Justice: Rule of Law and Public Administration in Conflict, Post-conflict and Fragile States

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## Abstract

In countries struggling to overcome conflict, organised criminal violence and widespread poverty, administrative agencies have a critical part to play. Studies show that where administrative agencies are weak, subject to cronyism and corruption, and serving elite interests rather than the common good, states are vulnerable to fragility and conflict. Administrative agencies are the main interfaces between the state and the citizens and it is important to enhance the capacity of central state agencies while at the same time ensuring that their performance accord with human rights standards and rule of law principles. Thus far the international community has approached public administration reform and rule of law promotion as two separate projects. Reform of police forces, judiciaries, prosecutorial offices, and prisons are often undertaken on the basis of qualitative standards while public administration reform focuses on quantitative matters such as modernisation, organisational restructuring, and human resource matters.

There is today a growing interest and momentum in the area of rule of law and public administration and it is critical that emerging standard-setting and innovating approaches are supported by international the international community at the global level.

**Keywords:** rule of law – public administration – administrative agencies – self-assessment – analytical tool – measuring – monitoring – administrative justice – manuals – standard-setting

## Importance of rule of law in public administration

Public administration agencies are the principal interfaces between the state and the individual and deal with matters of relevance for fundamental human rights. A rule of law deficit in public administration is troubling because administrative authorities can effectively determine the conditions for justice, peace, and security. For instance, it is the processes of civil registration (issuing of birth, death, marriage, citizenship certificates, etc.) that determine whether people are to be regarded citizens, and thus should have the right to education, healthcare, vote, etc. Conversely, land administration agencies can have a direct impact on the successful return of refugees and internally displaced persons.

Several studies show that “quality” problems in public administration seriously challenge the ability of states to implement policies or programmes on economic development or support national and international investments. The fledgling state and public administration cannot play a constructive role in the coordination and implementation of international assistance and humanitarian relief if it acts arbitrarily, is corrupt, or systematically violates human rights standards. In addition, for post-conflict states that may relapse into conflict dissensions increase when the administration fails to meet legitimate demands, or when it enforces discriminatory policies.

In this sense, governments and international organisations have reason to regard enhancing the rule of law in public administration as a preventive aspect determining the ability of the system to defuse and deflect civil strife, unrest and conflict. Governments and administrative agencies need to know what are the rule of law challenges that confront the administration, and how to improve access and accountability. Citizens similarly need to know what they – in their capacity as rights-holders - can legally claim of the state and administrative agencies.

## Challenges

For the UN and the international community at large the rule of law has emerged as a central element in the maintenance of peace and security. Justice and the rule of law are together, with security and democracy, seen to be mutually reinforcing imperatives in fragile post-conflict, peace, and state-building processes. The UN Secretary-General has defined the rule of law in broad terms as ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws’. The definition also lays down that laws should be publicly promulgated, equally enforced and independently adjudicated, and be consistent with international human rights standards.<sup>1</sup> In the latest EU policy for justice missions under the Common Security and Defence Policy the UN’s definition is adopted as a guiding concept.<sup>2</sup> While rule of law policy from leading organisations is broad enough to include public administration there is in practice a “sectorisation” of rule of law assistance.

The international community’s rule of law assistance has varied over time but a dominant pattern is one where justice chain institutions receive a chief part of the attention (e.g. judiciary, law enforcement and detentions and corrections). For instance, the Folke Bernadotte Academy’s (FBA) mapping of UN rule of law efforts in Africa through peacekeeping and peace building missions between 1989 and 2010 shows that rule of law and public administration receives only marginal and scattered support over time.<sup>3</sup>

In many peacekeeping, peace-building and fragile state environments, public administration reform and rule of law reform are promoted as separate projects, underpinned by different paradigms: public administration reform is geared to making the administration more effective and efficient, while rule of law reform focuses on introducing and strengthening qualitative standards and human rights principles.

As a result, there is a rule of law deficit in the public administration and in the international efforts being made to reform it. The reasons for this division include lack of knowledge among international and national policy-makers concerning the relevance of the rule of law for public administration, vague and conflicting mandates and objectives involved and differences in topical orientation and “culture” among the international actors concerned. One of the most important observations in the FBA study, *‘Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development’*, is that many international and national policy-makers and implementers are not aware of the rule of law dimensions of public administration reform, and would need some kind of “yardstick” for what constitutes rule of law in public administration and how to effectively implement it.<sup>4</sup>

## Important developments

### I. Standard-setting and practical guidance

There is a growing awareness in the international community that the current situation is unsatisfactory and that the traditional concept of public administration reform needs to be broadened to include dimensions above and beyond efficiency and effectiveness. As early as in 1995, the UN General Assembly report *The Legal and Regulatory Framework of Public Administration* pointed out that efficiency in the administration is pointless and potentially dangerous without an appropriate rule of law framework. Recent statements by the UN Secretary General and others underline the centrality of the rule of law in UN peace operations and peace building.

The Council of Europe has developed several standard-setting recommendations on rule of law in public administration.<sup>5</sup> Among the standards in the Council of Europe’s recommendations are that public authorities shall act in accordance with the principles of legality, equality, impartiality, proportionality, legal certainty, and transparency. Public authorities shall also act and perform their duties within a reasonable time. Furthermore public authorities shall provide private persons with the opportunity to participate in the preparation and implementation of administrative decisions which affect their rights or interests, and respect the right to privacy,

particularly when processing personal data. On the issue of appeal, it is stated that private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests.

The Organization for Economic Co-operation and Development joint initiative Support for Improvement in Governance and Management (SIGMA) gives equal status to “effective administration” and “the respect for the rights and interests of citizens” in its programmes to support transition. The concept “effective administration” is understood to mean that each department, agency, local authority, or other public body exercises its powers in accordance with the purposes and standards defined by law in an economical and efficient manner. The “rights and interests of citizens” means that people who are affected by the actions and decisions of administrative institutions should be treated properly and fairly - that is, benefit from the protection normally associated with the rule of law. Outside a European context, legal qualitative aspects of public administration have also made their way into important frameworks, such as the African Peer Review Mechanism.

## II. Practical guidance and manuals

Beyond the emerging standard-setting there is also a need for practical manuals and guidance for rule of law and public administrative reformers. The field of rule of law reform today offers a multitude of “how-to” manuals on judicial reform, vetting of police forces, and criminal law reform but there is scarce guidance on how to approach rule of law problems in administrative agencies.

The FBA, together with international partners, have developed a set of tools for rule of law and public administration reform. One is a self-assessment tool for measuring rule of law at national and local government agencies, developed together with the UNDP. The second is a handbook on monitoring administrative justice, developed together with the ODHIR.

The self-assessment tool for measuring rule of law in public administration helps governments identify, better understand, and more effectively address rule of law problems in administrative agencies and processes in post-crisis, developing and transition countries. A novelty and important contribution of the tool to the range of existing assessment instruments is the emphasis on the “demand-side” of public administration – that is, the services that individuals themselves consider essential, and the aspects they consider problematic.

Furthermore, the assessment effort is nationally and locally owned, with the targeted agencies and their “users” in lead of the process. The tool examines rule of law according to six commonly accepted principles - *legality, accessibility, right to be heard, right to appeal, transparency and accountability* - and categorises the findings into structural, institutional and access-related problems. The tool provides concrete and actionable data on how a particular administrative agency performs in terms of rule of law, and how citizens (e.g. the “users”) perceive the agency. Furthermore, the tool is adaptable in focus, structure, and methodology to accommodate for various assessment needs and contexts.

The handbook on monitoring administrative justice focuses on administrative acts appealed to a court, tribunal or other judicial body established by law. The handbook serves as a resource for policy-makers and practitioners working on a range of issues relating to trial monitoring, human rights promotion, rule of law, good governance and public administrative reform. The handbook builds upon and complements established practices and methodologies in trial monitoring in other justice fields.

## Ways ahead

There is a need for concerted efforts at the global level to address the issue of what constitutes rule of law in public administration. The urgent need in conflict, post-conflict and fragile states to ensure that administrative agencies act in the interest of the individual, and not vice versa, makes it an important international task to develop and elucidate concepts or principles of rule of law in public administration.

An international concept enshrining commonly accepted rule of law concepts could be a “yardstick” against which to measure the quality of procedures and services, and thus help individuals demand high quality services and hold the administration accountable. This “yardstick” should be based upon the emerging standard-setting in the area of rule of law and public administration, for instance the Council of Europe, African Peer Review Mechanisms and other regional initiatives.

The codification of certain fundamental principles of administrative law in a specific UN instrument, for example a recommendation of the General Assembly or a supplementary human rights covenant, should be considered. Such an instrument may outline, inter alia: the right to a fair hearing before any decision is taken affecting the rights of the person; the right to participate in administrative procedure on the basis of widely defined *locus standi*; the rights to judicial review of administrative decisions; the right to access official documents subject to conditions and exceptions provided by the law; the obligation for the administration to provide relevant information to citizens; and the liability of public administration in case of harm caused by its activities.

While a strongly normative document may be difficult to promote within the UN system at present a first step could be to first build a broad-based consensus and political opinion among UN agencies and member states around something that is explanatory and functions as a guide that could eventually lead to norms and principles.

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## Endnotes

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<sup>1</sup> UN Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc. S/2004/616 (2004) p. 4.

<sup>2</sup> EU CSDP.

<sup>3</sup> Richard Zajac-Sannerholm, Frida Möller, Kristina Simion, Hanna Hallonsten, *UN Peace Operations and Rule of Law Assistance in Africa 1989-2010: Data, Patterns and Questions for the Future*, Folke Bernadotte Academy (forthcoming 2012).

<sup>4</sup> Per Bergling, Lars Bejstam, Jenny Ederlöv, Erik Wennerström, & Richard Zajac-Sannerholm, *Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development*, Folke Bernadotte Academy Publications (2008).

<sup>5</sup> See, for example, Council of Europe, Eur. Consult., *Recommendation of the Committee of Ministers to Member States on the Execution of Administrative and Judicial Decisions in the Field of Administrative Law*, CM/Rec(2003)16 (September 2003) and Eur. Consult., *Recommendation of the Committee of Ministers to Member States on Good Administration*, CM/Rec7 (June 2007).

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