

## Background Paper: Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post-2015 Development Agenda

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### Executive Summary

This paper lays out a framework for discussions on the role of the rule of law in the post-2015 agenda. It summarizes the evidence base for the relationship between the rule of law and development, highlights lessons from rule of law development programming and the experience of the MDGs, and points to options for how the rule of law might be incorporated into the post-2015 development agenda.

The paper emphasizes three themes. First, it recognizes the general commitment among policymakers to the importance of the rule of law to development. The deliberations to flesh out the post-2015 agenda provide a unique opportunity to translate this commitment to the rule of law into action. Second, it highlights the importance of context and specificity. The rule of law is a concept that resonates across borders and boundaries while reflecting a diverse set of perspectives rooted in societies' culture, history, politics, institutions and conceptions of justice. Third, it describes the multi-faceted, cross-disciplinary, and sometimes contested nature of the evidence base, and emphasizes the importance of understanding the particular pathways between the rule of law and development. Efforts to define commitments, targets and indicators should clarify the particular pathways they are trying to promote while building on and strengthening the existing evidence base.

The starting point for incorporating the rule of law into the post-2015 agenda should be an understanding of the nature of the rule of law and its relationship to development. We take an inclusive view of the rule of law, which incorporates a diversity of perspectives while recognizing international norms. The rule of law is a system of rules and norms, a set of institutions, and an outcome of development, and a feature of the processes that cut across sectors to enable development to advance. At the same time, specific functions of the rule of law and its relationship to development are increasingly recognized. Drawing on a wide range of empirical literature and practical experience, the paper lays out core development functions of the rule of law, including:

- Enabling economic development,
- Citizenship and social and economic justice.
- Preventing, mitigating and deterring conflict, crime and violence
- Strengthening accountability and checks on power, and reducing corruption
- Enhancing the fair allocation of services

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- Protecting the environment and natural resources

Understanding these relationships, the specific pathways between the rule of law and development that each implies, and the evidence base for each, is essential to crafting effective goals and targets. Development policy should also consider the trade-offs and tensions among these various functions.

The post-2015 agenda should also take into consideration the history of rule of law development efforts as well as the experience of the MDGs. While development actors have sought to promote the rule of law for at least five decades, evidence of impact has been mixed. Several critiques have arisen to point out specific limitations and suggest alternative approaches. First, programs have tended to presume linear trajectories of change. Second, they have not incorporated sufficiently long time horizons. Third, they have tended to transplant models or goals from elsewhere without considering the contextual basis of change. Fourth, they have not sufficiently supported in-country political coalitions to underpin the development of the rule of law.

In response to these concerns, development actors have moved toward evidence-based “problem-solving approaches”. These approaches focus on the problems experienced by “end-users” of rule of law systems, and examine rule of law challenges that cut across development sectors and outcomes. Building on these advances in the rule of law field, we suggest that retaining some flexibility in defining goals, targets and indicators to reflect the unique challenges of particular societies within broadly understood conceptions of the rule of law.

As a basis for goals and indicators for the rule of law in the post-2015 agenda, the paper reviews prior and ongoing efforts to measure the rule of law. A crucial step in setting targets is defining clear and measurable concepts, rooted in the evidence for particular pathways between the rule of law and development. The range of measurement approaches have emphasized varying conceptions and methodologies, ranging from measures of institutional performance and compliance with international norms, to surveys of user experience and perception, to broad indices and “baskets” of indicators that aim to aggregate various concepts. Given the multi-dimensional nature of the rule of law, each of these approaches carries particular trade-offs, including between specificity and breadth of context; universal application and context specificity; sensitivity of measurement and comprehensiveness; as well as in regards to considerations like cost, reliability, and measurement. The design of targets and indicators should also consider the particular incentives they create and the risk of unintended consequences of focusing on a particular concept or indicator.

With these lessons in mind, the post-2015 agenda provides a unique opportunity to build upon global political commitments to the rule of law. The wide range of commitments - reflected in international policy documents, conventions and resolutions of multilateral and regional organizations around the world - displays both the broad resonance across countries of the importance of the rule of law to development and the varied conceptions of and approaches to measuring countries’ adherence to the rule of law. The experience of the MDG process also highlighted the importance of the rule of law, as several country reports emphasized the importance of elements of the rule of law to achieving objectives. During the post-2015 process, civil society actors have advocated for rule of law goals and indicators, and recent consultations have emphasized its importance on issues ranging from personal security to governance.

Three general approaches to incorporating the rule of law into the post-2015 development agenda could be considered. These approaches are not mutually exclusive and could be adopted in concert:

- ***Define a common rule of law goal with a flexible basket of indicators that can be tailored to country contexts.*** A rule of law goal would signal the importance of the rule of law as an outcome of development on par with other outcomes such as poverty reduction and health, though it would require consensus on a particular function of the rule of law for development.
- ***Adopt the rule of law as a high level “enabling” goal,*** which would commit countries to make national-level policy changes that enable progress on other development goals. This approach recognizes that the rule of law is not just an end in itself, but that it also enables a broader range of development outcomes.
- ***Incorporate the rule of law across development goals,*** through rule of law specific targets and indicators in support of other goals. This approach highlights the importance of the rule of law across development, without defining it as a desirable end in itself.

## Introduction

This paper lays out a framework for discussions about the rule of law in the post-2015 agenda. It is structured around three themes. The first is the increasing recognition among policymakers of the importance of the rule of law to development. This is particularly true in the context of the post-2015 world. The rule of law has shaped development processes through the operation of laws, regulation and enforcement; enabled conditions and capacities necessary to development outcomes; and remained a core development end in itself. Although it was not addressed explicitly as part of the Millennium Development Goals (MDGs), the importance of the rule of law to achieving the Goals is mentioned across several MDG country reports. UN Member States have recently renewed their commitment to the strengthening the rule of law as a basis for development, notably in the 2012 UN General Assembly High Level Meeting on the Rule of Law and the Rio +20 Conference. Commitments to the rule of law and protection of rights also emerged from the recent Panama and Johannesburg consultations on personal security and democratic governance in the post-2015 agenda;<sup>2</sup> and global civil society actors have called for rule of law goals and/or indicators.<sup>3</sup> The forthcoming deliberations to flesh out the post-2015 agenda provide a unique opportunity to translate this commitment to the rule of law into action.

The second theme is the importance of context and specificity. The concept of the rule of law resonates across borders and boundaries, and societies have developed shared understandings of the value of the rule of law to development. At the same time, developing and developed countries have adopted a diverse set of perspectives and approaches to the rule of law that reflect their culture, history, politics, institutions and conceptions of justice. It is understood both as an outcome and a feature of development processes, a broad principle as well as a set of institutions, and it is laden with varying social and political values. The balance between universality of goals and specificity to context should be reflected in approaches to promoting the rule of law through the post-2015 agenda.

The third theme is the multi-faceted nature of the evidence base. The evidence base cuts across disciplines – from law to economics to anthropology – revealing the cross-cutting importance of the rule of law to a wide range of development outcomes. The rule of law has been linked to broad economic growth, to social justice, to enhancing safety and security, to public and private accountability, and to enhancing the fair allocation of services by governments. Each of these linkages is based on a particular set of causal pathways that point to varying policy options for promoting the rule of law as a basis for development. The evidence base for some of these relationships is also contested, in part due to the multi-faceted nature of the evidence, the varied disciplines in which it is rooted, and paucity of reliable data on core elements of the rule of law. Emphasizing the lessons from practical experiences alongside empirical research, we aim to present the most robust evidence available, pointing out areas in which the evidence is strong, and others where further analysis and better data are needed.

As a basis for discussions about how the rule of law might be incorporated into the post-2015 development framework, this overview scans the literature on law and development; justice reform and rule of law promotion; as well as economic, political science and anthropology literature on the linkages between the rule of law and development, drawing out themes and possible directions. While we refer to relevant

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<sup>2</sup> <http://www.worldwewant2015.org/conflict> and <http://www.worldwewant2015.org/governance>

<sup>3</sup> [http://www.transparency.org/whatwedo/pub/policy\\_brief\\_looking\\_beyond\\_2015\\_a\\_role\\_for\\_governance](http://www.transparency.org/whatwedo/pub/policy_brief_looking_beyond_2015_a_role_for_governance) and <http://www.opensocietyfoundations.org/projects/justice-and-development>

allied fields, such as security sector reform, transitional justice, human rights, and sustainable development, we do not claim to treat them comprehensively. Furthermore, we focus on national, rather than international “rule of law” (such as the operation of treaty bodies), although we engage with links where appropriate.<sup>4</sup>

Based on this literature, we find an emerging body of evidence that points to specific linkages between the rule of law and development that can provide a foundation for incorporating the rule of law into the post-2015 development framework. We highlight the range of principles, concepts and commitments that comprise the rule of law, along with the variety of pathways that link the rule of law to development. Efforts to define commitments, targets and indicators should sort through this range of pathways while building on and strengthening the existing evidence base. We do not recommend any particular concept or target in this overview, nor do we develop one single narrative. Rather, we aim to clarify the range of different options and approaches. We also emphasize the importance of embedding targets and indicators deeply in local contexts, and prioritizing national and local perspectives through a problem-solving approach.

We are mindful in drafting this overview of the need for humility and care, and we do so based on lessons learned from the MDG process. As the UN Task Team on the post-2015 agenda states: “Several of the goals and targets related to the global partnership for development were defined rather imprecisely, thereby weakening accountability for the promised international support for the implementation of the MDG framework. Many of the commitments made by the international community have remained unfulfilled.”<sup>5</sup> Our approach is to avoid prescriptivism and rather to try and frame current discussions and offer some guidance on potential ways forward after 2015.

This overview thus aims to help structure discussions by (1) clarifying the relationship between the rule of law and development; (2) summarizing the lessons of rule of law development efforts and the experience of the MDGs; and (3) pointing to options for how the rule of law might be incorporated into the post-2015 development agenda.

### What is the Rule of Law?

*At its core, the rule of law is a means of ordering society* – including the state-citizen relationship. It includes systems of rules and regulations, the norms that infuse them, and the means of adjudicating and enforcing them. While older policy conceptions of the rule of law in development emphasized security and property rights, a broader understanding opens up space for new thinking about the rule of law in the context of the post-2015 agenda.

*The substance of values, rules and their application vary deeply across cultures and contexts*, and evolve in response to political and social forces including development and globalization. Some of the elements that infuse the concept include:

- *Concepts from political philosophy* with a multiplicity of definitions including: a system of rules (sometimes “rule by law”); norms such as equality before the law; just process, just outcomes; and equal access.
- *International human rights norms*. The rule of law can be infused with human rights norms; for the U.N. and many development agencies, the rule of law is inherently consistent with international human rights standards.

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<sup>4</sup> As indicated in the Secretary General’s recent report on the rule of law: A/66/749 at para 35 *et seq*

<sup>5</sup> UN System Task Team on the Post-2015 UN Development Agenda, 2012. “Realizing the Future We Want for All: Report to the Secretary-General”, at 7.

- *Complex relationship with “justice”*: “justice” is often used in relation to the rule of law. Within the same philosophical tradition of the “rule of law” as discussed in this overview (i.e. one dominated by philosophy from the Global North), it has been taken – from all sides of the political spectrum - to mean the norms that infuse a rule of law system;<sup>6</sup> the outcome of the way in which society, economy and/or a political system is ordered;<sup>7</sup> and/or a series of institutions that maintain the “rule of law”.<sup>8</sup> At the same time, in enforcing particular norms of justice in a given society, the rule of law determines varying forms of recognition among groups and individuals, public participation, individual and group agency, human and physical security, and the distribution of resources and public services.<sup>9</sup>
- *Geographical and cultural variance* in definitions. A variety of institutions and normative commitments are relevant. For example, while *kastom* or customary law are important in parts of Melanesia; in Saudi Arabia, “[t]he legal system rejects *qanun* [‘code’ or ‘statute’] entirely, refusing to codify even its basic civil laws. It uses the term ‘*nizam*’, or regulation, for the limited number of man-made laws it does have.”<sup>10</sup>

*The rule of law varies deeply across cultures and contexts*

“So actually looking at the [state] court, they only focus on the nature of your complaint and care less to know what transpired in the past. So in short, the court does not satisfy the both parties when cases are resolved by them. But for our traditional people they look at the nature of the case and also dig out the past to know what happened, and based upon that they peacefully resolved the matter. And at the climax the both parties leave with smile.” - **Male adult in Nimba, Liberia.**  
*Source: Deborah Isser, Steven Lubkemann and Saah N’Tow (2009), “Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options,” Peaceworks No. 63, United States Institute of Peace.*

*Deductively, the rule of law is of fundamental importance to development outcomes*: the rule of law expresses and enables a society’s conception of social and economic justice, and more specifically attitudes to extreme poverty and deprivation. It frames wealth, resource and power (re)distribution.

*Yet no rule is without substance*. Many writers on the rule of law distinguish between “thin” (i.e. concerned with the form of law and equal application), and “thick” (i.e. fair or just substantive content) rule of law.<sup>11</sup> However, all conceptions express some form of

<sup>6</sup> Aristotle (2012), *Nicomachean Ethics* (trans. Bartlett, R. and Collins, S.). Chicago: University of Chicago Press ; Rawls, J. (1999), *A Theory of Justice* (revised edn.). Cambridge, MA: Harvard University Press

<sup>7</sup> Rousseau, J.-J. (ed. Gourevitch, V.) (1997), *The Social Contract and other later political writings*. Cambridge: Cambridge University Press; Posner, E. (2002), *Law and Social Norms*. Cambridge, MA: Harvard University Press; Posner, R. (1983), *The Economics of Justice*. Cambridge, MA: Harvard University Press; Sen, A. 2009. *The Idea of Justice*. Cambridge, MA: Harvard University Press; Sandel, M (1998), *Liberalism and the Limits of Justice*. Cambridge, Cambridge University Press; Dworkin, R. (1986), *Law’s Empire*. Cambridge, MA: Harvard University Press; Nozick, R. (1974), *Anarchy, State, and Utopia*. New York: Basic Books.

<sup>8</sup> Montesquieu, C. (2011), *The Spirit of Laws* (trans. Nugent, T.). New York: Cosimo

<sup>9</sup> See, for example, Fraser, N. (1995), “From Redistribution to Recognition? Dilemmas of Justice in a ‘Post-Socialist’ Age”, 212 (July-August) *New Left Review* 1 68.

<sup>10</sup> Vogel, F.E., 2000. “The Rule of Law in Saudi Arabia,” in Cotran, E., and Yamani, M. (eds.) *The Rule of Law in the Middle East and the Islamic World: Human Rights and the Judicial Process*. London and New York: I.B. Tauris and Co., at 129.

<sup>11</sup> See, for a summary, Trebilcock, M.J. and Daniels, R.J., 2008. *Rule of law reform and development: charting the fragile path of progress*. Northampton: Edward Elgar.

allocation of goods or social values.<sup>12</sup> Principles of legal certainty, for example, might prioritize the existing distribution of land over redistribution efforts, or might impact community usufruct rights.<sup>13</sup>

*As a result, how ROL is defined is a highly political choice, as the different values and norms it espouses result in different interpretations of what is and is not the legitimate exercise of power by public and private actors. Thus, unlike a facet of development defined by a series of individual-level outcomes, like maternal or child health, the rule of law is a multi-dimensional social and political reality that varies significantly by context.*

*The complexity of ROL means policy understandings of the rule of law are also varied. Depending on the actor or institution, the rule of law has been viewed as:*

- *An outcome of development.* For instance, the World Bank writes that “a lack of access to justice is itself a central dimension of poverty.”<sup>14</sup> In this sense, it is a normatively described legal and political order, a state of human security, and an outcome of justice.<sup>15</sup> It is also an *enabling condition* for development, for instance in establishing the basic social order and security required for other development activities to proceed. It is also a *process* through which other development outcomes are achieved, that determines which decisions are made, rules are adopted and enforced, and grievances and disputes are resolved.<sup>16</sup>
- *Principle of governance,* or political order, regulating and framing the use of public and private power. The UN Secretary General (UNSG) defines it as 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.”<sup>17</sup> UNDP incorporates a similar view of rule of law and access to justice in its Democratic Governance pillar. In this context, the rule of law contributes to sustainable human development as a system of regulation and justice. It governs the use of power through the fair and equal upholding of rules and laws; it also focuses on the ability of the poor and marginalized to seek redress of grievances and vindication of rights and claims through a system of legal and social institutions.<sup>18</sup>

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<sup>12</sup> Kennedy, D. 1991. “The Stakes of Law, or Hale and Foucault!” 15 *Legal Studies Forum* 327.

<sup>13</sup> World Bank (2010), Wan Lis, Fulap Stori: Leasing on Epi Island, Vanuatu. Washington, D.C.: World Bank

<sup>14</sup> World Bank (2012), *New Directions in Justice Reform*, [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194\\_20120906024506/Rendered/PDF/706400REPLACEMENT0Justice0Reform0Final.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194_20120906024506/Rendered/PDF/706400REPLACEMENT0Justice0Reform0Final.pdf), at 1.

<sup>15</sup> Sen, A., 2000. ‘What is the Role of Legal and Judicial Reform in the Development Process?’ In: *World Bank Legal Review Vol 2*. Washington, D.C.: World Bank

<sup>16</sup> Santos, A., 2006. ‘The World Bank’s use of the ‘Rule of Law’ promise in economic development’. In: D.M. Trubek and A. Santos, eds., 2006. *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press.

<sup>17</sup> S/2004/616 at para 6.

<sup>18</sup> See, e.g.,

[http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus\\_areas/focus\\_justice\\_law.html](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/focus_areas/focus_justice_law.html), [http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice\\_PN\\_En.pdf](http://www.undp.org/content/dam/aplaws/publication/en/publications/democratic-governance/dg-publications-for-website/access-to-justice-practice-note/Justice_PN_En.pdf) and [http://www.undp.org/content/dam/undp/library/corporate/results/english/Results-RuleOfLaw\\_9-25-12\\_E.pdf](http://www.undp.org/content/dam/undp/library/corporate/results/english/Results-RuleOfLaw_9-25-12_E.pdf)

- *A set of institutions.* While the UNSG articulates a definition of ROL as a principle, Arbour<sup>19</sup> mentions a prevailing institutional view of the rule of law and development: it concerns state bodies that deal with security, law and order and the resolution of disputes - the police, ministries of justice, prisons, courts, prosecutors, etc. Others<sup>20</sup> take a somewhat broader institutional view: the task of development is to get right the state and non-state institutions and rules that regulate economic and social activity. Clark<sup>21</sup> adopts a principled institutionalist view, beginning with the principles underpinning UNDP's approach then shifting focus down to the national institutions which express or impede these principles, discussing the judiciary, the police, security forces, and parliaments
- *International norms and standards:* states have committed to international norms and standards, including to the principles of the rule of law itself (see section on international commitments below). During the 2012 UN General Assembly High Level Meeting on the Rule of Law, Member States recognized that "there are common features founded on international norms and standards which are reflected in a broad diversity of national experiences in the area of the rule of law."<sup>22</sup>

*International commitments to the rule of law as a basis for development*

"The advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law" - *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels, 2012*

"Democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger." - *The Rio +20 Conference on Sustainable Development Outcome Document, 2012*

"The rule of law is not a mere adornment to development; it is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish, and prosperity can be built." - *UN Commission on Legal Empowerment of the Poor Final Report, 2008.*

<sup>19</sup> Louise Arbour, "The Rule of Law", *New York Times*, September 26, 2012,

<http://www.nytimes.com/2012/09/27/opinion/UN-general-assembly-on-the-rule-of-law.html>; Louise Arbour, Statement to the High-level meeting of the 67<sup>th</sup> Session of the General Assembly on the Rule of Law, 24 September 2012, at [http://unrol.org/files/Statement\\_President\\_CEO-and-ICG.pdf](http://unrol.org/files/Statement_President_CEO-and-ICG.pdf)

<sup>20</sup> North, D., (1990) *Institutions, Institutional Change and Performance*. Cambridge University Press; North, D., Wallis, J. and Weingast, B. (2009) *Violence and Social Orders: A Conceptual Framework for Interpreting Recorded Human History*. Cambridge University Press.

<sup>21</sup> Helen Clark, 'Rule of Law and Development: Times of Challenge and Opportunity', Inaugural Distinguished Visitor Programme Speech, College of Law, Qatar University, 6 December 2012, at <http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/12/06/helen-clark-rule-of-law-and-development-times-of-challenge-and-opportunity-/>; Helen Clark, Speech at the High-level meeting of the 67<sup>th</sup> Session of the General Assembly on the Rule of Law, 24 September 2012, at <http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/09/24/helen-clark-67th-session-of-the-un-general-assembly/>; Helen Clark, "Development in Practice: Rule of Law, Transitional Justice, and Human Rights", 2013 Hands Lecture, 1 May 2013, at <http://www.undp.org/content/undp/en/home/presscenter/speeches/2013/05/01/helen-clark-2013-hands-lecture/>.

<sup>22</sup> A/RES/67/1 at para 9 *et seq*

*The rule of law remains a multi-faceted concept.* Drawing from all of the above, we can say that in the context of the post-2015 agenda, the rule of law is (1) a system of rules and norms that is a feature of social and political life; (2) a social and political reality that exists according to different values; and (3) a process and outcome that operates at multiple levels and cuts across sectors of development. Many have highlighted the plethora of definitions.<sup>23</sup> We treat it as an “essentially-contested concept”: that is, incapable of being pinned down in the abstract.<sup>24</sup>

*As a result, we suggest that our understanding of the rule of law with respect to the post-2015 agenda be rooted in the functions and roles it plays in relation to development, as well as the lessons learned from the history and evolution of rule of law reform.* We address each of these in the following sections.

### **The Relationship between the Rule of Law and Development**

The literature presents varying views and evidence of the *development functions* performed by the rule of law, or the pathways through which the rule of law contributes to development. As UNDP Administrator Helen Clarke has stated, the focus of development actors has been “less on sources of the law” and “more on why the rule of law is essential for achieving inclusive and sustainable development.”<sup>25</sup> In this section we draw on policy understandings of these pathways – from UNDP and elsewhere – and outline the varying strands of theory, empirical evidence and lessons from experience that underpin them. We discuss what rule of law is in relation to economic and social development and growth, rather than as an independent principle. We note that ideas about this relationship have evolved and changed over time; several are still contested while evidence for others is increasingly robust.

*Enabling economic development*, through a range of factors such as the protection of individual property rights; guaranteeing fair and credible contract enforcement;<sup>26</sup> setting and enforcing labour laws; facilitating market creation and access, including for the poor and marginalized<sup>27</sup> (for example, protecting women’s inheritance rights or their legal capability to enter into contracts).<sup>28</sup>

- In general, policy on the rule of law affects the rules of the game that allow people to transact.<sup>29</sup> There is strong evidence of a correlation between robust property rights protection and long-run economic growth.<sup>30</sup> On the other hand, it is not clear if property rights protection is an outcome of growth rather than

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<sup>23</sup> Notably Tamanaha, B.Z., 2004. *On the rule of law: history, politics, theory*. Cambridge: Cambridge University Press.

<sup>24</sup> Gallie W. B., 1956. ‘Essentially contested concepts’. *Proceedings of the Aristotelian Society*, 56, pp. 167-98.; Waldron, J., 2008. ‘The concept and the rule of law’. *Georgia Law Review*, 43(1), pp.1-61.

<sup>25</sup> Helen Clark, ‘Rule of Law and Development: Times of Challenge and Opportunity’, Inaugural Distinguished Visitor Programme Speech, College of Law, Qatar University, 6 December 2012, at <http://www.undp.org/content/undp/en/home/presscenter/speeches/2012/12/06/helen-clark-rule-of-law-and-development-times-of-challenge-and-opportunity-/>;

<sup>26</sup> See Haggard, S. and Tiede, L. (2011), “The Rule of Law and Economic Growth: Where are We?”, 39 *World Development* 673 for an overview of the literature.

<sup>27</sup> See, for example, “business rights” in Commission on Legal Empowerment of the Poor (2008). *Making the Law Work For Everyone: Volume 1*. New York: UNDP.

<sup>28</sup> Mary Hallward-Driemeyer and Tazeen Hasan (2012). *Empowering Women: Legal Rights and Economic Opportunities in Africa*. Washington, D.C.: World Bank.

<sup>29</sup> North 1990; World Bank Justice Annex to Governance and Anti-Corruption Update (2012)

<sup>30</sup> See for example, Knack and Keefer 1995, Scully 1988, Acemoglu et al 2001, Acemogly

its cause.<sup>31</sup> Moreover, while property rights are important, enforcement is a critical variable that is often overlooked.<sup>32</sup> Debates also cluster around the content of the regulation, the level of enforcement and its effects on pro-poor growth.<sup>33</sup> As regards labor laws, their frame the relationship between labor and economic development. Finally, the impact of the role of market creation and access has convincingly been asserted, but the evidence base is limited.<sup>34</sup>

- There is considerable evidence for the relationship between rule of law and economic development. But elements of this relationship need to be further researched. It is not clear, for instance, exactly why and how much the rule of law influences economic growth. For example, some countries and sectors have grown as a result of an industrial policy of favorable treatment for certain companies, while others have benefited from equal treatment under the law.<sup>35</sup> In addition, while liberal understandings of property rights, contract enforcement and so on have tended to be associated with growth, they have significant distributional effects. In some cases, efforts to strengthen the rule of law can be inequitable if they focus on lowering transaction costs for elites rather than facilitating redistributive action or broader access to opportunities.<sup>36</sup>

*Citizenship and social and economic justice.* The elements of the rule of law related to identity, legal recognition, enabling participation and agency, and the allocation and enforcement of claims and rights – including economic and social claims and rights – have been linked to equitable growth, equitable delivery of public services, and the possibility of more effective redistribution.

- Sen sees the rule of law as beginning with the capabilities of individuals and communities to participate in defining what is just. Development interventions have sought to build these capabilities – or a citizen’s *agency and voice* – across sectors. This cuts across all levels of a legal system, for example from high-level

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<sup>31</sup> Haggard, S., MacIntyre, A. and Tiede, L. (2008), “The Rule of Law and Economic Development”, 11 *Annual Review of Political Science* 205; Haggard, S. and Tiede, L. (2011), “The Rule of Law and Economic Growth: Where are We?”, 39 *World Development* 673

<sup>32</sup> Dam, K.W., 2006. *The law-growth nexus: the rule of law and economic development*. Washington, DC: Brookings Institute Press.

<sup>33</sup> See for example Botero, Juan, Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 2004. “The Regulation of Labor”, *Quarterly Journal of Economics* 119 (4): 1339-82; Alvaro Santos, *Labor Flexibility, Legal Reform, and Economic Development*, 50 *Virginia Journal of International Law* 43-106 (2009); Kennedy, David, 2006. ‘The ‘Rule of Law’, political choices and development common sense’. In: D.M. Trubek and A. Santos, eds., 2006. *The new law and economic development: a critical appraisal*. Cambridge: Cambridge University Press; Faundez, Julio (2009). “Empowering Workers in the Informal Economy”, *Hague Journal on the Rule of Law*, 1: 156–172; Maiti, D., 2009. ‘Institutions, networks and industrialisation: field level evidence of fragmentation and flexibility from India’, IPPG Discussion Paper, No. 26. Manchester: IPPG.

<sup>34</sup> Stephens, M. (2009). “The Commission on Legal Empowerment of the Poor: An Opportunity Missed”, *Hague Journal on the Rule of Law*, 1, 132-157; Mahdi, S., 2010. “The impact of regulatory and institutional arrangements on agricultural markets and poverty: a case study of Tanzania’s coffee market”, IPPG Discussion Paper, No. 40. Manchester: IPPG

<sup>35</sup> Amsden, A.H., 2001. *The rise of the rest: challenges to the West from late-industrializing economies*. Oxford: Oxford University Press; Pistor, K. and Wellons, P. (1999), *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995*. New York: Oxford University Press; Trubek, D.M., 2008. ‘Developmental states and the legal order: towards a new political economy of development and law’, University of Wisconsin Legal Studies Research Paper, No. 1075; Trubek, D.M., 2009. ‘The political economy of the rule of law: the challenge of the new developmental state’. *Hague Journal on the Rule of Law*, 1(1), pp.28-32.

<sup>36</sup> Son, Hyun and Kakwani, Nanak (2007) ‘Global estimates of pro-poor growth’ *World Development* 36 (6): 1048-1066; Holston, J., 1991. ‘The misrule of law: land and usurpation in Brazil.’ *Comparative Studies in Society and History*, 33(4), pp.695-725; Scott, J.C., 2009. *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia*. New Haven: Yale University Press.

rules (such as constitutions) that can facilitate recognition and participation, to national and local administrative law regulating the delivery of basic services, to customary law governing the allocation of natural resource rights.

*The rule of law, equity and inclusion*

Legal institutions such as courts can play an important role in defining identity and thereby guaranteeing equitable access to economic and social opportunities. In *Karanja v. Karanja* (1976), the High Court of Kenya set a precedent by rejecting the argument that under Kikuyu customary law, married women do not own property because they have no independent legal identity. The court awarded the woman a third of the couple's property in divorce proceedings. Source: Mary Hallward-Driemeyer and Tazeen Hasan (2012). *Empowering Women: Legal Rights and Economic Opportunities in Africa*. Washington, D.C.: World Bank.

- Access to justice and legal empowerment initiatives have proven to be valuable ways to do this. Legal empowerment blends community empowerment and mobilization with legal capacity building and advocacy to build the voice and political impact of the poor and marginalized. Access to legal information and to institutions of the rule of law (loosely defined) may enable the poor to take advantage of economic opportunities and resist exploitation, particularly by making local institutions (such as customary courts or local magistrates courts) accessible.<sup>37</sup>
- The evidence that exists between specific legal empowerment initiatives and broader social and economic outcomes – predominantly a series of detailed case studies but little comparative work - is mixed. Where legal empowerment approaches have been correlated with more equitable development outcomes, it is clear that social mobilization is an important factor if this approach is to work.<sup>38</sup> A controlled study in Bangladesh found that the incidence of illegal dowry payments dropped in comparison to the control group following NGO-led legal education and mobilization interventions.<sup>39</sup> Yet a study of primary education in India found that informing the community of their rights to push for change spurred little community activity and no improvement in education outcomes.<sup>40</sup> By contrast, the preliminary results from a land titling randomized control trial indicate that an empowerment approach was more effective than the provision of court advocacy services at promoting effective conversations among communities about land rights, spurring peaceful intra-community conflict resolution over land and increasing community ownership of land reforms.<sup>41</sup>
- Studies emphasize the long, historical sociopolitical processes that have come to define citizenship and identity; their impact on distribution of rights, resources

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<sup>37</sup> Golub, S., 2010. 'What is legal empowerment?: an introduction', in Golub, S. (ed.), *Legal empowerment: practitioners' perspectives*. Rome: International Development Law Organisation.

<sup>38</sup> Gauri, V. and Brinks, D. eds., 2008. *Courting social justice: judicial enforcement of social and economic rights in the developing world*. New York: Cambridge University Press;

<sup>39</sup> Asian Development Bank, (2001), "Legal Empowerment: Advancing Good Governance and Poverty Reduction", Appendix 2, at 135-49.

<sup>40</sup> Banerjee, A., R. Banerji, E. Duflo, R. Glennerster and S. Khemani (2010) "Pitfalls of Participatory Programs: Evidence from a Randomized Evaluation in Education in India." *American Economic Journal: Economic Policy*, 2(1): 1-30

<sup>41</sup> Knight, R. et al (2012), *Protecting Community Lands and Resources: Evidence from Liberia, Mozambique and Uganda*. Rome and Washington, D.C.: IDLO and Namati.

and services; and the significant variation in the possibilities of mobilization and collective action that are so important to this approach.<sup>42</sup>

*Preventing, mitigating and punishing conflict, crime and violence* (including law and order). The link between security, stability and development has been clearly established, as has the negative impact of the absence of rule of law on growth.<sup>43</sup> Civil wars are particularly devastating to development, and other forms of widespread crime and violence divert the provision of public goods, destroy private property and infrastructure, and lead to extortion, monopoly and other harmful practices.<sup>44</sup>

- In addition to preventing economic development, violence and crime have a direct impact on social development and wellbeing of citizens.<sup>45</sup> This is often contrasted in the literature with the aspects of the rule of law widely associated with the ability of states to ensure the human security of their citizens, including both physical safety and fulfillment of basic needs. Recent analysis suggests that of the various dimensions of the rule of law, the basic control of violence has the strongest correlation to economic growth in developing countries.<sup>46</sup>
- Strengthening criminal justice institutions tends to be seen as an important step toward improving security and enabling various forms of development, especially in the aftermath of violence conflict. Nevertheless, studies have cautioned against an overemphasis on security (“securitization”) to the detriment of other dimensions of the rule of law.<sup>47</sup>

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<sup>42</sup> See, for a summary, Marc, A. et al (2012) *Societal Dynamics and Fragility: Engaging Societies in Responding to Fragile Situations*. Washington, D.C.: World Bank; Gauri, V., Woolcock, M. and Desai, D. (2013) ‘Intersubjective Meaning and Collective Action in Developing Societies: Theory, Evidence and Policy Implications’, 48 *Journal of Development Studies* (forthcoming).

<sup>43</sup> For a summary of the evidence, see The World Bank (2011) *World Development Report: Conflict, Security and Development*. Washington, DC: The World Bank.

<sup>44</sup> Collier P. (1999). ‘On the economic consequences of civil war’, *Oxford Economic Papers* 51:168–83; Buvinic, M., & Morrison, A. (1999). *Violence as an obstacle in development*. Washington, DC: Inter American Development Bank; Ayres, R. (1998). *Crime and violence as development issues in Latin America and the Caribbean*. Washington, DC: World Bank.

<sup>45</sup> Narayan D, Patel R, Schafft K, Rademacher A, Koch-Schulte S. 2000. *Voices of the Poor*. New York: Oxford University Press

<sup>46</sup> Haggard, S. and Tiede, L. (2011), “The Rule of Law and Economic Growth: Where are We?”, 39 *World Development* 673

<sup>47</sup> See, for a summary, Harborne, B. and Sage, C., (2010), “Security and Justice Overview”, Background Paper prepared for the World Development Report 2011, at [http://siteresources.worldbank.org/INTIUSFORPOOR/Resources/WDR\\_Background\\_Paper\\_Harborne\\_Sage.pdf](http://siteresources.worldbank.org/INTIUSFORPOOR/Resources/WDR_Background_Paper_Harborne_Sage.pdf). See, for a trenchant example of this critique, Duffield, M. (2002) “Social reconstruction and the radicalization of development: aid as a relation of global liberal governance”, 33 *Development and Change* 1049

*The rule of law and conflict, crime and violence*

In perception surveys of six conflict-affected countries and territories, injustice, inequality and corruption were cited as the leading drivers of violence. In Central America, crime and violence were consistently cited as the top five constraints to productivity and growth. According to local business owners, the high cost of crime acts as a drag on competitiveness, reduces profit margins, and can make the difference in whether a company survives or fails. In a 2008 survey of all Central American countries, 71% of the adult population said they view crime as a major threat to future well-being, and more than 50% believed high crime rates would justify a military coup. *Source: World Bank (2011), World Development Report 2011: Conflict, Security and Development. Washington, DC: World Bank*

- In the context of civil conflict, Transitional Justice mechanisms – which deal with the legacy of war crimes and abuses of authority by the prior regime – can affect the transition to greater stability and development.<sup>48</sup> Some development-relevant functions of transitional justice are (1) recognizing the rights of victims, (2) building confidence that authorities intend to break with the past, and (3) re-establishing state-society relationships.<sup>49</sup> However the evidence for the impact of transitional justice and other efforts to strengthen criminal justice institutions in the aftermath of war is highly limited and very mixed.<sup>50</sup> Some efforts have been criticized for focusing too much on high-level perpetrators and ignoring the needs of victims or of the majority of citizens (such as socio-economic grievances).<sup>51</sup> Others have focused on re-building community level trust, and addressing the social and economic needs of citizens whose lives have been disrupted by conflict.

*Strengthening accountability and checks on power, and reducing corruption.* The rule of law entails public and private accountability in the exercise of power, and consistent and fair regulation and dispute resolution, in national and local contexts.<sup>52</sup>

- Depending on a country's constitutional and institutional setting, institutions that enforce and adjudicate the law, such as judiciaries and regulatory agencies, may be in a position to check the arbitrary action of government to varying degrees. This function of the rule of law shapes the meaning of and possibilities for corruption, nepotism and rent-seeking, affecting costs for economic actors<sup>53</sup> and the nature of long run growth. The presence of institutional checks also affects the distribution of rents and shapes the provision of public services and

<sup>48</sup> Vinjamuri L, Snyder J. 2004. 'Advocacy and scholarship in the study of international war crimes tribunals and transitional justice.' *Annual Review of Political Science* 7:345–62;

<sup>49</sup> Teitel, Ruti. 2002. *Transitional Justice*. Oxford University Press; Mani, Rama. 2002. *Beyond Retribution: Seeking Justice in the Shadow of War*. Cambridge: Polity Press; World Bank (2011), *World Development Report 2011: Conflict, Security and Development*. Washington, DC: World Bank; UNDP (2011), *Strengthening the Rule of Law in Crisis-affected and Fragile Situations*. New York: UNDP, at 18

<sup>50</sup> Tiede, Lydia and Stephen Haggard. 2012. "The Revival of the Rule of Law in the Wake of Civil War," 4 *Hague Journal on the Rule of Law* 120. Call, C (2007), "Conclusion" in Call, C. (ed.) *Constructing Justice and Security After War*. Washington, DC: United States Institute of Peace Press.

<sup>51</sup> Miller, Z. (2008), "Effects of Invisibility: In Search of the 'Economic' in Transitional Justice", 2 *International Journal of Transitional Justice* 266.

<sup>52</sup> O'Donnell, Guillermo A. 2004. "Why the Rule of Law Matters," *Journal of Democracy* 15(4); Weingast B. 1997. ;The political foundations of democracy and the rule of law'. *Am. Polit. Sci. Rev.* 91(2):245–63; UNDP (2011), *Strengthening the Rule of Law in Crisis-affected and Fragile Situations*. New York: UNDP, at 8, 11.

<sup>53</sup> Hallward-Driemeier, M., Khun-Jush, G. and Pritchett, L., 2010. "Deals versus Rules: Policy Implementation Uncertainty and Why Firms Hate It", *NBER Working Paper* No. 16001

the quality of public infrastructure.<sup>54</sup> The presence of such institutions has been correlated with investment and economic growth,<sup>55</sup> and more generally with more robust economic activity and higher tax revenues.<sup>56</sup>

- However some studies have distinguished between *de facto* and *de jure* checks on executive power.<sup>57</sup> Moreover, the direction of causation is contested: while rules and institutions matter, where they come from and the reasons for which people follow them may be rooted in other factors that need to be better understood, such as the nature of political coalitions and sources of authority. In other words, legal institutions may be the result, rather than the cause, of agreed checks on power.<sup>58</sup>

*Enhancing the fair allocation of services* by providing credible mechanisms for holding public and private actors accountable and redressing grievances.

- As such, the rule of law cuts across development endeavours: road building or the provision of primary health care raises issues of the reallocation of rights, privileges, duties and powers. A legal system frames these reallocations, adjudges their legitimacy, enforces them, and deals with the grievances of those who lose out.<sup>59</sup> It seems clear from the evidence that ROL is important to service delivery.

*The rule of law and equitable service delivery*

In Brazil there have been over 100,000 court cases in the last decade that have enforced the rights of individuals and groups to receive medical treatment.

Source: Varun Gauri (2011), "Redressing Grievances and Complaints Regarding Basic Service Delivery", World Bank Policy Research Working Paper Series 5699

- Furthermore, a range of actors beyond the courts support service delivery through legal or quasi-legal means. In India, a World Bank health project developed a complaints handling mechanism sensitive to the needs of a

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<sup>54</sup> Bhagwati, J. (1982). 'Directly unproductive profit-seeking (DUP) activities'. *Journal of Political Economy*, 90(51), 988; Poli Mauro P. 1998. 'Corruption and the composition of government'. *J. Public Econ.* 68(88):263; Tanzi V, and Davoodi H. 1997. 'Corruption, public investment and growth'. *IMF Working Paper Series* WP/97/139.

<sup>55</sup> Henisz, W. J. (2000). 'The institutional environment for economic growth'. *Economic Politics*, 12(1), 1; Helmke, G., & Rosenbluth, R. (2009). "Regimes and the rule of law: Judicial independence in comparative perspective". *Annual Review of Political Science*, 12, 345

<sup>56</sup> Olson, M. (1993). 'Dictatorship, democracy and development', *American Political Science Review*, 87, 567; McGuire, M., & Olson, M. (1996). 'The economics of autocracy and majority rule: The invisible hand and the use of force'. *Journal of Economic Literature*, 34, 72; Weingast, B. (1997), 'The political foundations of democracy and the rule of law', *American Political Science Review*, 91(2), 245.

<sup>57</sup> Feld, L., & Voigt, S. (2003). 'Economic growth and judicial independence: Cross-country evidence using a new set of indicators', *European Journal of Political Economy*, 19(3), 497

<sup>58</sup> Upham, F. (2006). 'Mythmaking in the rule-of-law orthodoxy', in Carothers, T. (ed.), *Promoting the rule of law abroad: in search of knowledge*. Washington, DC.: Carnegie Endowment for International Peace;

Stasavage, D. (2002). Private investment and political institutions. *Economics and Politics*, 14, 41

<sup>59</sup> Sage, C., Menzies, N. and Woolcock, M., 2009. 'Taking the rule of the game seriously: mainstreaming justice in development The World Bank's Justice for the Poor Program'. In: IDLO Legal Empowerment working papers, No. 5. Rome: International Development Law Organization; Sandel, M., 2007. *Justice: A Reader*. Oxford: Oxford University Press.

disadvantaged tribal community by placing staff members from a local tribal NGO in health centers to assist in registering complaints and suggestions.<sup>60</sup>

*Protecting the environment and natural resources.* The rule of law is important to any notion of sustainable development:<sup>61</sup> it enables the sustainable use of the environment by protecting environmental rights in constitutions and legislation; enforcing regulations; requiring administrative protections such as environmental impact assessments; and defining rules for natural resource exploitation and governance.

- The rights of indigenous peoples to manage and share in the benefits of their land and natural resources are a feature of the international legal regime and in some countries are incorporated into national laws and policies with the establishment of protected areas.<sup>62</sup>
- The literature and evidence on natural resources and rule of law institutions is not very extensive<sup>63</sup>: resource sustainability has mainly been understood in terms of economic policy.<sup>64</sup>
- While the evidence base is limited, significant theoretical work and several case studies assert the importance of this relationship in legal terms<sup>65</sup>: for example, since 1962 more than 90 countries have included a right to a healthy environment in their national constitution.<sup>66</sup> Some countries have developed this further, moving from constitutional provisions to subsidiary legislation and regulatory or local government action. In this view, the rule of law becomes central to protecting natural resources, to curbing illegal extraction, and to enforcing the fair allocation and distribution of resources for sustainable development.

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<sup>60</sup> Dena Ringold, Alaka Holla, Margaret Koziol, Santhosh Srinivasan. 2011. *Citizens and Service Delivery: Assessing the Use of Social Accountability Approaches in Human Development*. Washington, D.C.: World Bank

<sup>61</sup> International IDEA and IDLO (2012), "Informal discussion on linkages between the rule of law, democracy and sustainable development", Concept Note, at <http://www.idea.int/un/upload/Concept-Note-IDEA-IDLO-Italy-rev-5-0-Final.pdf>

<sup>62</sup> Anaya, S. and Williams Jr., R. 2001. "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under The Inter-American Human Rights System." 14 *Harvard Human Rights Journal* 33; Xanthaki, A. 2003. "Land Rights of Indigenous Peoples in South-East Asia." 4 *Melbourne Journal of International Law* 467.

<sup>63</sup> Norman, C., 2009. "Rule of Law and the Resource Curse: Abundance Versus Intensity", *Environmental and Resource Economics*, 43(2), pp. 183-207.

<sup>64</sup> Collier P (2008), *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*. New York: Oxford University Press; World Bank (2010), *The Changing Wealth of Nations: Measuring Sustainable Development in the New Millennium*. Washington, D.C.: World Bank. Desai, D. and Jarvis, M. (2012), 'Governance and Accountability in Extractive Industries: Theory and Practice at the World Bank', 30 *Journal of Energy and Natural Resources Law*, 101 attempts to tell a rule of law and governance story.

<sup>65</sup> Boyle, A. and Freestone, D (eds.) (2001), *International Law and Sustainable Development*. Oxford: Oxford University Press; Dasgupta, S., Mody, A., Roy, S. and Wheeler, D. (2001) "Environmental Regulation and Development: A Cross-country Empirical Analysis", 29 *Oxford Development Studies* 173; Lehtonen, M. 2004. "The environmental-social interface of sustainable development: capabilities, social capital, institutions", 49 *Ecological Economics*, 199.

<sup>66</sup> Law, D and Versteeg M (2012), "The Declining Influence of the United States Constitution", 87 *New York University Law Review* 762, 773-5

*The rule of law and environmental protection*

In the Philippines, the legislature –with UNDP support - produced specific rules of procedure for environmental cases “with a view to protecting and advancing the constitutional right of the people to health and to a balanced and healthful ecology, and providing a simplified, speedy, and inexpensive procedure for the enforcement of environmental rights under Philippines law.” *Source: UNDP, at [http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/projects\\_and\\_initiatives/environmental-justice-philippines/](http://www.undp.org/content/undp/en/home/ourwork/democraticgovernance/projects_and_initiatives/environmental-justice-philippines/)*

*The relationships between ROL and development are more complex and multi-dimensional than any of these functions alone suggest.* ROL sits in complex terrain of political and social change allied to governance reform,<sup>67</sup> requiring some rethinking of what the rule of law is and what it is supposed to do for development.

- The relationship between rule of law and development is complex, comprises multiple dimensions and functions, and likely goes through multiple pathways over long periods of time. As a result, context matters immensely.
- Traditional ways of building the rule of law (i.e. a focus on strengthening certain state institutions with explicitly judicial or legal functions) are of varying effectiveness when it comes to affecting ROL’s development functions. Efforts that focus solely on these institutions may only have a limited impact on equity and pro-poor growth. Although several studies have found strong correlation between ROL and overall growth, one analysis found no association between ROL (based on the World Bank governance indicators) and more equitable income distribution.<sup>68</sup> This suggests more emphasis needs to be paid to citizenship, social and economic justice, and the delivery of basic services when promoting the rule of law.
- ROL may have broader effects on development than are currently understood, as ROL-related reforms have significant *political and social consequences*. For example, transforming land rights protections to formalize individual title might involve a change in social understandings of “community” property, which could either exclude or expand women’s existing usufruct rights.<sup>69</sup> In general, “buy-in” to reforms will in part rest on the rule of law as a framework for the exercise of power, politics and thus collective action and coalition-building.<sup>70</sup>
- ROL reforms must engage with the whole range of *political and social rules* and norms that constitute a society, including informal legal systems that are relevant to billions of citizens. A state-centric mindset often prompts donors to focus on formal

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<sup>67</sup> Pistor, K. and Wellons, P. (1999), *The Role of Law and Legal Institutions in Asian Economic Development, 1960-1995*. New York: Oxford University Press; Jayasuriya, K. (ed.) (1999), *Law, Capitalism, and Power in Asia: The Rule of Law and Legal Institutions*. New York: Routledge; Khan, M. (2008) ‘Governance and Development: The Perspective of Growth-Enhancing Governance’, in ODI, *Diversity and Complementarity in Development Aid: East Asian Lessons for African Growth*. Tokyo: GRIPS Development Forum/National Graduate Institute for Policy Studies, pp. 107-152.

<sup>68</sup> Son, Hyun and Kakwani, Nanak (2007) ‘Global estimates of pro-poor growth’ *World Development* 36 (6): 1048-1066.

<sup>69</sup> World Bank (2010), Wan Lis, Fulap Stori: *Leasing on Epi Island, Vanuatu*. Washington, D.C.: World Bank

<sup>70</sup> McGee, R. and J. Gaventa (2011) *Shifting Power? Assessing the Impact of Transparency and Accountability*, IDS Working Paper 383. Brighton: Institute of Development Studies; Wild, L. and Bergh, G. (2012) “The relationship between democratic governance and MDG achievement”, Overseas Development Institute (on file with authors).

systems.<sup>71</sup> However, it is unhelpful to think of legal systems as either “state” or “non-state”. Different systems operate with the backing of a range of actors: commercial arbitration may be state-enforced, while customary or religious leaders may also be local government officials.<sup>72</sup> These systems are not inherently deficient: they do not always need to be remedied or put under direct state control. Indeed, formal court supervision of customary decisions may undermine the legitimacy of customary courts.<sup>73</sup> Some may raise human rights or political legitimacy concerns, but they may also provide a form of ‘good enough’ governance and a safe space for dispute resolution,<sup>74</sup> especially when bolstered by the mobilization of existing social groups to apply social pressure for the desired results.<sup>75</sup>

*As a result of this complexity, the rule of law entails numerous trade-offs, tensions and choices for policy makers:* In order for a policy maker to take a comprehensive view on ROL in the context of sustainable development, he or she must think about the specific aspects of development to be achieved in the light of several key *choices, trade-offs and tensions*. In the context of land titling, for example, there may be compromises between *generalized or context-specific* rules and understandings of property, ownership and inheritance, such as individual or community title; between *actors*, such as whether to focus on problems as understood by the state, local communities, or individuals; and between *institutions*, such as how to engage with non-state or informal institutions like customary title to land. No one policy option is *ex ante* the best: for example, the entire universe of state and non-state institutions can be relevant to or distant from people’s needs, trusted or illegitimate, costly or cheap.

*Rule of law trade-offs*

“This land ownership is the worst possible thing for livestock husbandry. Cropland can be privatized and protected, OK. Livestock husbandry must certainly not be settled. The climactic conditions are extremely difficult and changeable here. Therefore, pasture must be shared among herders and used in common... it must be left as it is and has been for hundreds of years.” - **Mongolian pastoralist**

Source: Maria Fernandez-Gimenez and Batjav Batbuyan (2004), “Law and Disorder: Local Implementation of Mongolia’s Land Law”, 35 *Development and Change* 141.

<sup>71</sup> Desai, D., Isser, D. and Woolcock, M. (2012), ‘Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies’, 4 *Hague Journal on the Rule of Law* 54; Baker, B. (2010). “Linking state and non-state security and justice.” *Development Policy Review*, 28(5), 597; Baker, B. & Scheye, E. (2009). “Access to Justice in a Post-conflict State: Donor supported Multidimensional Peacekeeping in Southern Sudan.” *International Peacekeeping* 16 (2), 171.

<sup>72</sup> Humphreys, S., 2011. *Theatre of the rule of law: transnational legal intervention in theory and practice*. Cambridge: Cambridge University Press; Tamanaha, B.Z., 2000. ‘A non-essentialist version of legal pluralism’. *Journal of Law and Society*, 27(2), pp.296-321; Tamanaha, B.Z., 2008. ‘Understanding legal pluralism: past to present, local to global’. *Sydney Law Review*, 30, pp.375-411.

<sup>73</sup> Isser, D., 2012. “The problem with problematizing legal pluralism: lessons from the field”, in Tamanaha, B., Sage, C. and Woolcock, M. (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge: Cambridge University Press; Sage, C. and Woolcock, M., 2012. “Introduction: Legal Pluralism and Development Policy - Scholars and Practitioners in Dialogue”, in Tamanaha, B., Sage, C. and Woolcock, M. (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge: Cambridge University Press.

<sup>74</sup> Adler, D. and Woolcock, M., 2010. ‘Justice without the rule of law? The challenge of rights- based industrial relations in contemporary Cambodia’. In: C. Fenwick and T. Novitz, *Human rights at work: perspectives on law and regulation*. Oxford: Hart Publishing

<sup>75</sup> Khan, M (2009) ‘Is “Good Governance” an Appropriate Model for Governance Reforms? The Relevance of East Asia for Developing Muslim Countries’, in: Springborg, Robert, (ed.), *Development Models in Muslim Contexts: Chinese, “Islamic” and Neo-Liberal Alternatives*. Edinburgh: Edinburgh University Press; Khan, M. (2008) ‘Governance and Development: The Perspective of Growth-Enhancing Governance’, in ODI, *Diversity and Complementarity in Development Aid: East Asian Lessons for African Growth*. Tokyo: GRIPS Development Forum/National Graduate Institute for Policy Studies, pp. 107-152.

*Understanding the various pathways through which the rule of law affects development can enable more effective rule of law programming.* It can broaden consensus around the functions where the evidence is stronger; highlight those where more exploration and research are needed; and ultimately help to clarify trade-offs and inform policy choices that can improve development outcomes.

### The Evolution of Rule of Law Reform

We look to the evolution of policy and the lessons learned over several decades of development assistance to understand how efforts to promote the rule of law as a basis for development have fared in practice. The meaning of the rule of law, its relationship to development, and what rule of law reform looks like have all been questions debated by policymakers and academics at least since the 1960s. This quick historical sketch situates the discussions above in the context of rule of law and development policy. Some ideas from each of the periods below remain relevant today.

- *Early development co-operation (1960s to 1974)*: driven by foreign aid agencies and American legal academics. Attempted to recreate American legal education (and some institutional reform) in developing countries to transmit liberal values to a new generation of legal elites, who would then go on to make law and social policy. Criticised as being decontextualized and unaware of the political and institutional reality of the recipient countries.<sup>76</sup>
- *Scepticism (1974 – 1990)*: Retreat from much law and legal institutional reform work with the exception of the UN agencies. As deregulation and structural adjustment became primary development tools, institutions and governance were not prioritized (although former colonial powers continued to engage with the legal systems of former colonies, for example by building law schools and strengthening legal education<sup>77</sup>).
- *Revival (1990-1999)*:
  - Emergence of institutions as objects of reform and the idea that the “rules of the game” by which people led their economic and social lives mattered to development. Incorporation of legal reform into market-enabling policy prescriptions (for example, regulation and property rights protection): law was no longer simply a tool to constrain state power but was a policy tool to support economic exchange. Eventually this type of rule of law reform distilled into strengthening criminal justice, judicial predictability, enforceability of contracts, and security of property as enablers of economic development. It tended toward a focus on transplanting particular best practices regarding law and organizations as part of reform packages.
  - Simultaneously, the emergence of former communist states resulted in a political conception of the rule of law, closely linked to democratization. The rule of law was a framework for the exercise of state power and represented a political culture; however, it was generally judged against

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<sup>76</sup> Trubek, David M. and Marc Galanter. 1974. “Scholars in Self-Estrangements: Some Reflections on the Crisis in Law and Development Studies in the United States,” 4 *Wisconsin Law Review* 1062; Gardner, J. (1980), *Legal Imperialism: American Lawyers and Foreign Aid in Latin America*. Madison, WI: University of Wisconsin Press.

<sup>77</sup> McAuslan, Patrick (2004), “In the Beginning was the Law... an Intellectual Odyssey”, *Cornell Law School East Asian Law and Culture Series*.

a Western liberal ideal-type.<sup>78</sup> Donors supported constitutional reform; law reform; judicial capacity-building; court administration and case management reform; and the use of law to support transition (for example privatization and market liberalization).

- The expansion of peacekeeping and peacebuilding missions led to a distinct approach in conflict-affected countries, with an emphasis on establishing order and security, rebuilding and restructuring justice system institutions, mitigating the sources of conflict through improved dispute resolution, and promoting accountability for past atrocities through transitional justice.<sup>79</sup> Work in conflict-affected countries focused primarily on criminal justice, including police, prosecutors, courts and corrections as a basis for security and peacebuilding, and “rule of law” work became synonymous with rebuilding and restructuring these institutions. Closely related to “rule of law” work was the emergence of security sector reform, which aimed to infuse assistance to military, police and other security forces with attention to principles of good governance and human rights.
- *Governance and institutions, rights and justice (1999 - )*: Law has become understood not just instrumental to market functioning or transition, but as an end of development itself. “Institutions rule”<sup>80</sup> – or the idea that if you get the institutions right and everything else will follow – means that getting the rule of law “right” (per an undefined external standard) has become a donor goal. Simultaneously, Sen’s idea of “development as freedom”<sup>81</sup> provided this external standard – of human rights norms and claims – against which to get the institutions right.
- *Context, complexity and pluralism (2002 - )*: at the same time, work on institutions (which from the start emphasised their historical and social contingency), plus experience from previous phases of rule of law reform, has highlighted the importance of context and complexity. Legal anthropologists and others who had engaged for decades with new or non-Western states used lessons about the importance of context,<sup>82</sup> the nature of political and cultural path-dependencies<sup>83</sup> and the complexities of non-state systems of justice to criticize one-size-fits-all approaches. Civil society groups and other non-state actors have emerged as governance providers in certain areas.<sup>84</sup> As a result,

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<sup>78</sup> Carothers, T. 2006. “The Rule of Law Revival”, in Carothers, T. ed., *Promoting the rule of law abroad: In search of knowledge*. Washington, DC.: Carnegie Endowment for International Peace.

<sup>79</sup> Mani, Rama. 2002. *Beyond Retribution: Seeking Justice in the Shadow of War*, Cambridge: Polity Press; Stromseth, Jane, David Wippman and Rosa Brooks. 2006. *Can Might Make Rights: Building the Rule of Law After Military Interventions*. Cambridge University Press; Call, Charles T. (ed.) 2007. *Constructing Justice and Security After War*. Washington, DC: United States Institute of Peace Press; Samuels, Kirsti. 2006. “Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt.” *Social Development Papers: Conflict Prevention and Reconstruction* 37. Washington, DC: The World Bank.

<sup>80</sup> Rodrik, Dani, Arvind Subramanian, and Francesco Trebbi. 2004. “Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development.” *Journal of Economic Growth* 9 (2): 131–65.

<sup>81</sup> Sen, Amartya (1999) *Development as Freedom*, New York: Knopf

<sup>82</sup> Hatchard, John, and Amanda Perry-Kessaris (eds.) 2003. *Law and Development: Facing Complexity in the 21st Century*. London: Cavendish Publishing; McAuslan, Patrick (2004), “In the Beginning was the Law... an Intellectual Odyssey”, *Cornell Law School East Asian Law and Culture Series*.

<sup>83</sup> Teitel, Ruti. 2005. “Transitional Rule of Law”, in Czarnota, Adam, Martin Krygier, and Wojciech Sadurski, (eds.) *Rethinking rule of law after communism*. Budapest and New York: Central European University Share.

<sup>84</sup> Sikkink, K., 2002. “Transnational Advocacy Networks and the Social Construction of Legal Rules”, in Dezalay, Y. and Garth, B., eds. *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy*. Arbor: University of Michigan Press.

donors are turning to targeted interventions – including “legal empowerment” initiatives focused on the poor - to confront specific problems in their context.<sup>85</sup> They have also turned increasingly to “non-state” systems, and examined the plurality of legal and dispute resolution systems in countries. This sits in contrast with governance and rights approaches, which have a stronger normative commitment and operate at a greater level of generality.

- *Security (2001- )*: The first decade of the 2000s also included a trend toward “securitization” of rule of law initiatives, especially in the aftermath of 9/11 and in countries affected by violent crime or conflict. In parallel to focus on local initiatives, some donors have prioritized assistance for strengthening the capacity of states to confront transnational crime and terrorism, and on enhancing criminal justice cooperation across borders.

#### Rule of Law Programming and Evidence for Development Effectiveness

*While the evidence in any one particular area is insufficient, it is becoming increasingly clear that the rule of law matters across the board.* Policy makers are starting to pay more attention to types of evidence beyond quantitative data, such as anthropological work or political economy studies. Taken together, these sources of information are beginning to do a much better job of describing ROL as a complex and cross-cutting phenomenon. As a result, the evidence base remains insufficient, but clear gaps and potential solutions are emerging.

*While there is increasing evidence linking ROL to development, the evidence linking ROL programming to rule of law and development outcomes is complex and in some cases uncertain.* This uncertainty plays out at three levels: the macro causal relationships between the rule of law and development; the micro causal relationships between rule of law programming and its impact on immediate development program goals; and the intermediate relationships between the achievement of program goals or outputs and broader rule of law and development outcomes. While evidence has accumulated for the macro relationship between rule of law and development, as summarized above (albeit with questions around causation), evidence for the impact of development programs on immediate program goals or on broader goals related to the rule of law and development is uncertain and contested.

- *Macro: causation between rule of law and development.* As detailed in the section above, there’s a general consensus that institutions matter to governance and to development. One study finds a correlation in the World Bank Governance Indicators between a 1-point increase (out of 6) on the rule of law scale and a 2.5-to-4-fold improvement in per capita incomes and infant mortality, and a 15-25 per cent increase in literacy rates.<sup>86</sup> Another finds a significant and strong correlation between institutional quality and per capita incomes.<sup>87</sup> However, these studies provide no clear evidence as to whether the rule of law causes development or the other way round.<sup>88</sup> Examples such as China had growth with a limited role for the

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<sup>85</sup> Golub Stephen. 2006. “The Legal Empowerment Alternative” in Carothers, ed. *Promoting the Rule of Law Abroad*. Washington, DC: Carnegie Endowment for International Peace.

<sup>86</sup> Kaufmann, D., Kraay, A. and Zoido-Lobaton, P. (1999). “Governance Matters.” *World Bank Policy Research Working Paper Series* 2196.

<sup>87</sup> Rodrik, Subramanian & Trebbi. (2004). “Institutions Rule: the primacy of institutions over geography and integration in economic development.” *9 Journal of Economic Growth* 131.

<sup>88</sup> Glaeser, E., et al, 2004. “Do Institutions Cause Growth”, *9 Journal of Economic Growth*, 271.

legal system, and there are few studies of specific reform efforts that question, rather than assert, causation.<sup>89</sup>

- *Micro: Program effectiveness.* There is less evidence for whether institutions can be influenced by aid-based development programs, or whether rule of law systems are instead the result of complex historical, economic, political, social and cultural dynamics beyond the reach of development interventions.<sup>90</sup> Change in rule of law systems might be so complex that it is hard to attribute to development interventions, especially given donor time horizons, shifting goals,<sup>91</sup> high expectations, untested assumptions and normative commitments not sufficiently borne out by evidence.<sup>92</sup> Furthermore, the measures used focus heavily on formal institutions such as courts, which only represent a slice of the relevant institutions making up a rule of law system.<sup>93</sup> They also take limited account of *citizen and community voice*, including perception survey data on the rule of law and detailed qualitative assessments (such as ethnographies). Emerging approaches, from randomized control trials to mixed methods studies, are increasing the sophistication of our understanding of how program effectiveness. However, these approaches have yet to become mainstream.
- *Intermediate: the impact of ROL programs on broader development outcomes.* Even where donors find evidence that they are achieving their immediate goals in strengthening elements of the rule of law, the impacts on the broader rule of law and on development outcomes is rarely established. The proposed causal links between program outputs and broader outcomes are often poorly theorized, and measures of outputs are confused for measures of rule of law.<sup>94</sup> For example, U.S.-funded rule of law programs in Haiti have focused on reducing the percentage of detainees in prolonged pre-trial detention. While these programs address a dire human rights issue that merits attention, the results may have little impact on the perceptions and experience of the majority of citizens who never come into contact with the criminal justice system. Meanwhile, broader elements of program effectiveness are often left out of measurement frameworks. For example, a World Bank-supported reform project in Venezuela led to between 20% and 70% reductions in case processing

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<sup>89</sup> Davis, K. and Trebilcock, M. (2008), "The Relationship Between Law and Development: Optimists versus Skeptics", 56 *American Journal of Comparative Law* 895; Jensen, E.G. and Heller, T.C. (eds.) (2003). *Beyond common knowledge: empirical approaches to the rule of law*. Stanford: Stanford University Press; Samuels, Kirsti. 2006. "Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt." *Social Development Papers: Conflict Prevention and Reconstruction* 37. Washington, DC: The World Bank; Bergling, P., Ederlof, J., and Taylor, V. (2009), *Rule of Law Promotion: Global Perspectives, Local Applications*. Iustus Forlag: Uppsala; Trebilcock, M. and Prado, M. (2012), *What Makes Poor Countries Poor?: Institutional Determinants of Development*. Cheltenham: Edward Elgar; Messick, R. (1999), "The International Bank for Reconstruction and Development Judicial Reform and Economic Development: A Survey of the Issues", *The World Bank Research Observer*, 14 (1), 117-36.

<sup>90</sup> Davis, K. and Trebilcock, M. (2008), "The Relationship Between Law and Development: Optimists versus Skeptics", 56 *American Journal of Comparative Law* 895

<sup>91</sup> Cohen, Elin, Kevin J Fandl, Amanda Perry-Kessaris, and Veronica Taylor. 2011. "Truth and Consequences in Rule of Law: Inferences, Attribution and Evaluation", 3 *Hague Journal on the Rule of Law* 106

<sup>92</sup> Wild, L. and Bergh, G. (2012) "The relationship between democratic governance and MDG achievement", Overseas Development Institute (on file with authors).

<sup>93</sup> Davis, Kevin. 2004. "What can the Rule of Law variable tell us about Rule of Law reforms?" *Michigan Journal of International Law* 26:141-161.

<sup>94</sup> See, for example, Jensen, E.G. and Heller, T.C. (eds.) (2003). *Beyond common knowledge: empirical approaches to the rule of law*. Stanford: Stanford University Press; Carothers, T. (ed.) (2006), *Promoting the Rule of Law Abroad: In Search of Knowledge*. Washington, DC: Carnegie Endowment for International Peace; Hammergren, L. (2007) *Envisioning Reform: Improving Judicial Performance in Latin America*. State College, PA: Penn State University Press; Trebilcock, M. and Daniels, R. (2006) *Rule of Law Reform and Development: Charting the Fragile Path of Progress*. Cheltenham: Edward Elgar.

times,<sup>95</sup> yet the systemic impact on user experience – or on broader governance – was not studied. This again points to the need for a long-term and robust engagement with *citizen and community voice* to understand impact. There is also limited data on the effectiveness of scaling up of targeted rule of law efforts such as empowerment programs (although an attempt is taking place in Sierra Leone to evaluate the scale up of paralegal provision).<sup>96</sup>

*More can be done to measure development effectiveness through improved data collection and better monitoring and evaluation (M&E) frameworks.* Much M&E has counted outputs (such as case processing time) and not impact over time. Especially when looking beyond formal institutions, outcomes become even harder to measure. For example, the impact of non-state systems is often poorly captured.<sup>97</sup> Two approaches have emerged recently: first, randomized control trials designate treatment and control communities to receive different levels of legal assistance (for example, to undertake land titling) and then measure the impact.<sup>98</sup> These are robust, rare and expensive. The other approach is to conduct a thorough baseline study using a “cluster” of indicators from a variety of sources, and then measure what changed over time after a specific project.<sup>99</sup> Accumulating these studies from several projects is a cheaper “informed process of monitored trial and error.”<sup>100</sup> Yet such approaches require more attention to M&E from the start of projects. Toward this end, UNTP is developing a new guide on measuring effectiveness of ROL programming.

*A key cause of the evidence gap is the lack of emphasis placed by donors on building domestic data collection capacity.* This capacity is important for donors to evaluate programs, and also for countries to conduct sustained evaluation of their institutions.<sup>101</sup> This is one area that the MDG experience clearly stimulated and which had spillover effects: increased capacity to gather data and pursue a range of data-gathering methodologies.

### Current Trends in Rule of Law Programming

*In response to a growing body of evidence, policymakers have adopted new and promising efforts to pursue the rule of law that reflect a pragmatic problem-solving approach and that cut across development.* While the evidence for traditional rule of law programming is mixed, it has also pointed towards new avenues for strengthening the various pathways between the rule of law and development. More work is needed to evaluate these new approaches.

*On the one hand, the critiques of traditional approaches to rule of law programming are increasingly clear.* A broad consensus has emerged around certain criticisms of recent

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<sup>95</sup> Pérez Perdomo, R. (2006) “Una Evaluación de la Reforma Judicial en Venezuela,” in *Judicial Reform in Latin America: An Assessment for Policymakers*, Center for Strategic and International Studies and Centro de Estudios de Justicia de las Américas.

<sup>96</sup> <http://www.soros.org/sites/default/files/pretrial-csae-research-overview-20120710.pdf>

<sup>97</sup> Haggard, S., MacIntyre, A. and Tiede, L., 2008. ‘The rule of law and economic development.’ *Annual Review of Political Science*, 11, pp.205-34.

<sup>98</sup> Knight, R. et al (2012), *Protecting Community Lands and Resources: Evidence from Liberia, Mozambique and Uganda*. Rome and Washington, D.C.: IDLO and Namati.

<sup>99</sup> Parson, Jim (2011), “Developing Clusters of Indicators: An Alternative Approach to Measuring the provision of Justice,” 3 *Hague Journal on the Rule of Law* 170

<sup>100</sup> Braithwaite, John (2011) ‘The Essence of Responsive Regulation’ *UBC Law Review* 44(3), 475-520

<sup>101</sup> UNDP (2011), *Strengthening the Rule of Law in Crisis-affected and Fragile Situations*. New York: UNDP at 48; Foglesong, T. and Christopher Stone, 2007. “Measuring the Contribution of Criminal Justice Systems to the Control of Crime and Violence: Lessons from Jamaica and the Dominican Republic”, *CID Working Paper* No. 144

rule of law efforts from a development perspective, and acknowledgement of what hasn't worked:

- *A presumption of linear trajectories of change*<sup>102</sup>: rule of law reforms and their impact are socially, economically and politically complex and often deal with values deeply embedded in society. As a result, change is complex and will not necessarily happen in a linear fashion. Things may get worse before they get better, and things may simultaneously get worse by some measures (e.g. property rights) and better by others (e.g. grievances in service delivery)
- *Time horizons*: rule of law reform is often a long-term, multi-generational endeavour requiring sustained commitment.<sup>103</sup> One study found that it took the fastest moving countries an average of 41 years to achieve significant transformations to the rule of law.<sup>104</sup>
- *The need for robust in-country political coalitions and will*: Given the complex and context-specific nature of rule of law reform, political demand for reforms is essential, as is grappling with vested interests that render reforms difficult to realize.<sup>105</sup> Policy makers should modulate expectations accordingly: "If the efficacy of legal institutions depends on complementary features of the broader political system, apparently simple reforms may be well beyond the capacity of outsiders to effect."<sup>106</sup>
- *Transplanting models from elsewhere*: Identifying "best practices" in rule of law reform from elsewhere (such as the ideal design of a prosecutor's office) and transplanting them is unlikely to work.<sup>107</sup> Emphasis should be placed on the function that they system is meant to perform, rather than what it looks like. That does not mean that learning lessons and sharing knowledge aren't important, but that they must be evaluated in each new context.

*In response to these critiques, policymakers have pursued new approaches to the rule of law that better reflects local contexts and varying perspectives on the rule of law.* The landscape of rule of law efforts has broadened beyond the narrow focus on a particular set of institutions. Policy makers have increasingly focused on the legal and institutional underpinnings of development policy. Viewing the rule of law both as an outcome and element of process, development agencies have incorporated attention to rule of law into a variety of development programmes, from employment, health and education to natural resource management, crisis prevention and mitigation, poverty reduction, and

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<sup>102</sup> Desai, D., Isser, D. and Woolcock, M. (2012), 'Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies', 4 *Hague Journal on the Rule of Law* 54

<sup>103</sup> World Bank (2012), *New Directions in Justice Reform*, [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194\\_20120906024506/Rendered/PDF/706400REPLACEM0Justice0Reform0Final.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194_20120906024506/Rendered/PDF/706400REPLACEM0Justice0Reform0Final.pdf), at 8. See also World Bank (2011), *World Development Report 2011: Conflict, Security and Development*. Washington, DC: World Bank; Desai, D.,

Isser, D. and Woolcock, M. (2012), 'Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies', 4 *Hague Journal on the Rule of Law* 54.

<sup>104</sup> Pritchett, Lant, and Frauke de Weijer. 2010. "Fragile States: Stuck in a Capability Trap?" Background paper for the World Development Report 2011, at <https://openknowledge.worldbank.org/handle/10986/9109>

<sup>105</sup> Trebilcock, M. and Daniels, R. (2006) *Rule of Law Reform and Development: Charting the Fragile Path of Progress*. Cheltenham: Edward Elgar;

<sup>106</sup> Haggard, S., MacIntyre, A. and Tiede, L., 2008. 'The rule of law and economic development.' *Annual Review of Political Science*, 11, pp.205-34, at 206

<sup>107</sup> Carothers, Thomas. 2006. "The Problem of Knowledge," in Carothers, ed. *Promoting the Rule of Law Abroad*. Washington, DC: Carnegie Endowment for International Peace.

economic growth. They have also engaged a broader range of state and non-state actors, legal systems and dispute resolution mechanisms.

*Many policy makers and scholars have turned to pragmatic problem-solving.* In this approach, they have worried less about capacity-building in or service delivery from specific institutions; rather, they have made choices, trade-offs and balances on a case-by-case basis with an emphasis on the perspective of the end-user. They have focused on working with the range of institutions and actors that affect the desired development outcome. Engaging with the norms, laws, regulations and mechanisms to enforce them and resolve disputes is critical to this approach. The recent World Bank strategic document on justice reform offers an important practical synthesis of how to understand ROL through the lens of this approach. From a development perspective, ROL becomes (1) *a set of laws, regulations and institutions spanning all three branches of government and multiple nonstate actors carrying out relevant functions*; (2) *access to and enforcement of these laws, regulations and institutions*; and (3) *the norms and values that infuse them*.<sup>108</sup> This approach has some key components:

- *End-User Perspective:* Sen articulates a “realization-focused understanding of justice”, or the “need to focus on actual realizations and accomplishments, rather than only on the establishment of what are identified as the right institutions and rules.”<sup>109</sup> The World Bank commits to doing so from the perspective of end-users and potential end-users<sup>110</sup>, and UNDP looks at the rule of law from a people-centred perspective.<sup>111</sup> In order to know these needs and problems, policy makers and donors need to commit to building, articulating and listening to the voices of the poor and of national-level policy makers. This is both a development end, and a means of improving other development processes through better monitoring and evaluation.
- *Starts with concrete problems facing people.* Rather than starting with broadly defined principles or international best practices, this approach seeks to identify the key challenges experienced by citizens. Local appropriateness (along with participation and buy-in) will affect the sustainability of reform.<sup>112</sup> For example, human rights realization in Malawi<sup>113</sup> and Angola<sup>114</sup> have been hampered not by constitutional issues but practical issues such as access to justice and the capacity of courts.
- *Evidence-Based:* A program on justice indicators and national-level data collection at Harvard sees rule of law reform as a process of gathering data and solving problems that they bring to light.<sup>115</sup> These approaches do not

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<sup>108</sup> World Bank (2012), *New Directions in Justice Reform*, [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194\\_20120906024506/Rendered/PDF/706400REPLACEM0Justice0Reform0Final.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/09/06/000386194_20120906024506/Rendered/PDF/706400REPLACEM0Justice0Reform0Final.pdf), at 3

<sup>109</sup> Sen, A. 2009. *The Idea of Justice*. Cambridge, MA: Harvard University Press, at 10

<sup>110</sup> World Bank, *New Directions in Justice Reform*, at 1.

<sup>111</sup> UNDP (2011), *Strengthening the Rule of Law in Crisis-affected and Fragile Situations*. New York: UNDP, at 11

<sup>112</sup> International IDEA and IDLO (2012), “Informal discussion on linkages between the rule of law, democracy and sustainable development”, Concept Note, at <http://www.idea.int/un/upload/Concept-Note-IDEA-IDLO-Italy-rev-5-0-Final.pdf>

<sup>113</sup> Gløppen, S. and Kanyongolo, F.E. (2007). “Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law.” *International Journal of Constitutional Law*, 5(2), 258-293.

<sup>114</sup> Skaar, E., Serra Van-Dúnem, J.O. (2006). “Courts under construction in Angola: What can they do for the poor?” *Working Paper - Chr. Michelsen Institute*, 20.

<sup>115</sup> The Harvard Kennedy School Program in Criminal Justice Policy and Management, see <http://www.hks.harvard.edu/programs/criminaljustice>

presuppose the principal rule of law challenges, but seek to address them as they are and however they are configured.<sup>116</sup> A recent review of the UN ROL support agenda found that “[r]ather than presupposing formal judicial and security institutions, as tends to be the practice, those seeking to provide assistance could look instead to the immediate self-defined needs of the citizenry as a guide...The precise sequence and prioritization of these efforts should not be generalized and developed into boilerplate responses and they certainly need to be accompanied by sound political economy and other forms of analysis.”<sup>117</sup>

- *Cuts across a range of institutions:* Policy makers have worried less about what constitutes “law” and what counts as an “institution” in a rule of law system: concerned with “a continuum which runs from the clearest form of state law through to the vaguest forms of informal social control”<sup>118</sup>, insofar as these mechanisms impact development outcomes.<sup>119</sup> Providers range from courts to customary leaders, to youth groups to conflict-resolution NGOs and so on.<sup>120</sup>
  - *No institution – formal or informal – is a panacea:* in an evaluation of *Lok Adalats* (community justice institutions) in India, Galanter & Krishnan found their judgements and effectiveness to be inconsistent.<sup>121</sup> A problem-solving approach is not wedded to particular institutions or institutional forms, but takes a pragmatic approach to realize desired functions.
- *Cuts across a range of sectors (“cross-cutting” or “mainstreaming”).* Rule of law, especially as experienced by citizens, is not limited to the courts, police and other elements of the justice system. The fair allocation and delivery of services, treatment of grievances and resolution of property disputes affect citizens’ perception and reality of the rule of law. Strengthening the rule of law therefore requires looking across sectors from health and education to economic development.

*The problem-solving approach has begun to reconfigure policy approaches to ROL’s various development functions, bringing into focus ROL’s social and political complexity; its cross-cutting nature; and the importance of innovative tools. We see the following areas as core dimensions of the ways in which ROL relates to the post-2015 agenda:*

- *Enabling economic development:* a focus on problems faced by end-users rather than specific institutions or preconceived notions of the rule of law – for example, property rights and enabling markets - has led to policy makers appreciating

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<sup>116</sup> Scheye, Eric (2009) ‘Rule of Law in Fragile and Conflict Affected Countries: Working within the Interstices and Interfaces’ Framing Paper Produced for the World Bank Headline Seminar on Rule of Law in Conflict-Affected and Fragile Situations, at <http://siteresources.worldbank.org/EXTLICUS/Resources/511777-1224016350914/5474500-1257528293370/Scheye.pdf>

<sup>117</sup> Kavanagh, Camino and Bruce Jones (2011) “Shaky Foundations: An Assessment of the United Nation’s Rule of Law Support Agenda”, NYU Center on International Cooperation, at [http://www.cic.nyu.edu/staff/docs/kavanagh/kavanagh\\_rol.pdf](http://www.cic.nyu.edu/staff/docs/kavanagh/kavanagh_rol.pdf)

<sup>118</sup> Woodman, G. (1998), “Ideological Combat and Social Observation: Recent Debate About Legal Pluralism.” *Journal of Legal Pluralism*, 42: 21-59, at p. 45.

<sup>119</sup> Tamanaha, B. (2007). “Understanding Legal Pluralism: Past to Present, Local to Global.” *Sydney Law Review*, 30: 375-411

<sup>120</sup> Baker, B. & Scheye, E. (2009). “Access to Justice in a Post-conflict State: Donor supported Multidimensional Peacekeeping in Southern Sudan.” *International Peacekeeping* 16 (2), 171-85.

<sup>121</sup> Galanter, M., Krishnan, J.K. (2004). “‘Bread for the poor’: Access to justice and the rights of the needy in India.” *Hastings Law Journal*, 55(4), 789-834.

grievances and conflicts across their development portfolios as rule of law issues. Thus resolving conflict over grazing rights is not just a question of land and agriculture policy, but a justice issue that may be resolved through support for locally-driven community groups or committees;<sup>122</sup> service delivery projects such as basic healthcare provision now include the design of grievance mechanisms and their linkages to existing courts and legal mechanisms in country.<sup>123</sup>

- *Citizenship and social and economic justice*: Legal empowerment approaches have emerged as useful problem-solving tools in this context as they are targeted, flexible and participatory. For example, paralegals help people navigate state and customary courts to have their grievances redressed, from sanitation issues to the provision of healthcare.<sup>124</sup> Empowerment approaches need to be considered in the political context and power dynamics of the communities in which they operate: there is a risk of capture by powerful interests<sup>125</sup> and a question of accountability of the facilitators (such as paralegals) to the target beneficiaries.<sup>126</sup>
- *Conflict, crime and violence*: the recent *World Development Report 2011* highlighted the importance of justice and the rule of law to avoiding conflict and facilitating transitions out of conflict. However, it also stressed the importance of a problem-solving approach driven by institutional functions, as well as the length of time donors needed to commit to reforms and the importance of realistic expectations.<sup>127</sup>
- *Accountability*: focusing on end-user perspectives, policy makers have turned to technology: for example, in the gathering and resolution of grievances (through SMS hotlines, for example), the gathering and dissemination of legal information (for example, broadcasting radio programs about rights-awareness)<sup>128</sup> and participation in decision processes.<sup>129</sup>
- *Service Delivery*. The legal frameworks for local public and judicial authorities are emerging as an important area for rule of law reform. Many decisions affecting daily lives happen at the local level, and local administration is a key link in the building of trust between the individual or community and the state.<sup>130</sup> A pilot reform effort in Quezon City in the Philippines identified specific problems with the rule of law

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<sup>122</sup> Tanja Chopra (2009), "Justice Versus Peace in Northern Kenya", 2 *World Bank Justice & Development Working Paper Series* 1; Knight, R. et al (2012), *Protecting Community Lands and Resources: Evidence from Liberia, Mozambique and Uganda*. Rome and Washington, D.C.: IDLO and Namati.

<sup>123</sup> Varun Gauri (2011), "Redressing Grievances and Complaints Regarding Basic Service Delivery", *World Bank Policy Research Working Paper Series* 5699.

<sup>124</sup> Vivek Maru (2010), "Allies Unknown: Social Accountability and Legal Empowerment", *Health and Human Rights* 12, pp 83-93.

<sup>125</sup> Hooria Hayat and Khola Ahmed (2008), "Legal Empowerment: An Impossible Dream", DfID and Women's Empowerment in Muslim Contexts Working Paper, at

[http://www.dfid.gov.uk/R4D/PDF/Outputs/WomenEmpMus/WEMC\\_WP\\_HayatandAhmed.pdf](http://www.dfid.gov.uk/R4D/PDF/Outputs/WomenEmpMus/WEMC_WP_HayatandAhmed.pdf)

<sup>126</sup> Marlese von Broembsen (2012), "Legal Empowerment of the Poor: The Re-emergence of a Lost Strand of Human Rights?", *Rapport Center Human Rights Working Paper Series*, 1/2012, at 15.

<sup>127</sup> World Bank (2011), *World Development Report 2011: Conflict, Security and Development*. Washington, DC: World Bank

<sup>128</sup> Varun Gauri (2011), "Redressing Grievances and Complaints Regarding Basic Service Delivery", *World Bank Policy Research Working Paper Series* 5699.

<sup>129</sup> UN System Task Team on the Post-2015 UN Development Agenda, "Governance and Development: Thematic Think Piece", May 2012, at 3.

<sup>130</sup> Per Bergling, Erik O Wennerström and Richard Zajac Sannerholm (2010), "Rule of Law in Public Administration: Problems and Ways Ahead in Post-Conflict Peace-building", *Hague Journal on the Rule of Law*, 2(2), pp. 171-202.

framework for implementation of a city housing program, in large part on the basis of end-user surveys.<sup>131</sup>

## International Policy Commitments to the Rule of Law

### *Commitments to the Principle of Rule of Law*

*The importance of the rule of law is broadly accepted across countries and regions, as reflected in international policy documents, conventions and resolutions of multilateral and regional organizations around the world. Several of these documents specifically affirm the importance of the rule of law to development.*

- The UN Member States have affirmed their commitment to the rule of law through several UN General Assembly Resolutions. Most recently the September 2012 *Declaration of the High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels* (following on previous UNGA Resolutions including the 2005 World Summit Outcomes and follow up resolutions), stated that “the advancement of the rule of law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms, including the right to development, all of which in turn reinforce the rule of law, and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.”<sup>132</sup>
- *The Rio +20 Conference on Sustainable Development* in June 2012 affirmed the essential role of the rule of law in development. In the Outcome Document, which was adopted by the UN General Assembly in September 2012, participating states “acknowledge that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger.” The participants also acknowledged the need for “strong and effective legal and regulatory frameworks,” especially to ensure sustainable development through extractive industries, and to expand development to the poor and vulnerable.<sup>133</sup>
- *The UN Secretary General* has produced several reports focused on the rule of law (for example: the Programme of Action; A/66/749 and October 2011, S/2011/643; *The Rule of Law and Transitional Justice in Post-Conflict societies* August 2004, S/2004/616; “Uniting our strengths: Enhancing United Nations Support for the Rule of Law,” S/2006/908, 14 December 2006)
- *The UN Commission on Legal Empowerment of the Poor*, which included broad representation from around the globe, stated in its 2008 final report, *Making the Law Work for Everyone*, that “the rule of law is not a mere adornment to

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<sup>131</sup> Edna Estifania A. Co, Maria Faina L. Diola, Dan A. Saguil, Eleanor E. Nicolas, and Crinezza Veil Mendoza (2011), *Rule of Law in Public Administration: The Philippine Local Government Urban Poor Resettlement and Housing Program*. UP NCPAG Policy Brief No. 2, at

<http://folkebernadotteacademy.se/Documents/Kunskapsomr%C3%A5den/Rule%20of%20Law/Rule%20of%20Law%20in%20PA%20Philippines.pdf>

<sup>132</sup> Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels, A/67/L.1\* (2012)

<sup>133</sup> UN General Assembly, “The Future We Want,” A/RES/66/288 (2012).

development; it is a vital source of progress. It creates an environment in which the full spectrum of human creativity can flourish, and prosperity can be built.” It called for more attention to “legal empowerment,” defined as “a process of systemic change through which the poor and excluded become able to use the law, the legal system, and legal services to protect and advance their rights and interests as citizens and economic actors.”<sup>134</sup>

- *The Millennium Declaration*, adopted by the UN General Assembly in 2000 as the basis for the MDGs, stated that “We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.”<sup>135</sup> The UN General Assembly has reaffirmed that “that good governance and the rule of law at the national and international levels are essential for sustained, inclusive and equitable economic growth, sustainable development and the eradication of poverty and hunger” in subsequent resolutions regarding the MDGs.<sup>136</sup>
- *The High Level Forum on Aid Effectiveness Busan Declaration* calls for combating corruption and illegal financial flows. The G-7+ New Deal for Engagement in Fragile States includes security and justice as two of its central Peacebuilding and Statebuilding Goals, with an underlying focus on the rule of law.
- *Regional and Multilateral Organizations* have affirmed commitments to the rule of law in their charters and founding documents, for example:
  - *The African Union*: “The Union shall function in accordance with the following principles: ... respect for democratic principles, human rights, the rule of law and good governance” (Constitutive Act of the African Union, Article 4)
  - *ASEAN*: “To strengthen democracy, enhance good governance and the rule of law” (ASEAN Charter, art. 17)
  - *Organization of American States*: “The effective exercise of representative democracy is the basis for the rule of law and of the constitutional regimes of the member states of the Organization of American States.” ( Inter-American Charter, art. 2)
  - *The European Union*: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities (Treaty of Lisbon, Art. 1a); “EU partnership and dialogue with third countries will promote common values of: respect for human rights, fundamental freedoms, peace, democracy, good governance, gender equality, the rule of law, solidarity and justice” (The European Consensus on Development, 2006/C46/01)<sup>137</sup>
  - *The Commonwealth of Nations*: “Those Principles have been further elaborated and strengthened over the years to underline that development rests on the foundations of democratic governance, the rule of law, respect for human rights, gender equality and peace and security.”

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<sup>134</sup> Commission on Legal Empowerment of the Poor, “Making the Law Work for Everyone” Vol. 1 (2008)

<sup>135</sup> Millennium Declaration (General Assembly Resolution) A/Res/55/2 (2000)

<sup>136</sup> Keeping the promise: united to achieve the Millennium Development Goals (General Assembly Resolution) A/RES/65/1 (2010)

<sup>137</sup> Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: ‘The European Consensus’

*At this level, the commitment to the rule of law is most often framed as a commitment to a general principle of governance. This principle is most clearly defined in UN documents, including the 2012 UNGA Resolution, in the definition cited above.<sup>138</sup>*

*Although there is broad recognition of the principle of the rule of law, the specific policy commitments are extremely varied* Agreement to the broad principle has translated into a variety of substantive commitments by member states, which span different conceptions and definitions of the rule of law. The breadth of this concept and the resulting commitments can be illustrated by the country pledges at the 2012 UNGA High Level Meeting on the Rule of Law. Some of the pledges are related to international relations, while others are related to the rule of law at the national level, and involve a range of issues from individual human rights to private sector growth. Some examples of these pledges include:

- Ratify and/or apply of international human rights and humanitarian law instruments, e.g. Geneva Conventions, Rome Statute, Convention Against Torture, Protocol Convention on Rights of the Child, etc.
- Strengthen domestic implementation of human rights norms, e.g. through development of strategies and action plans for reducing violence against women, address needs of women prisoners, etc.
- Support post-conflict rule of law development, e.g. through funding to UNDP, bilateral development cooperation, and deployment of civilian specialists to post-conflict countries;
- Strengthen international cooperation on combating transnational crime and corruption, including trafficking in persons, drug trafficking, terrorism and financial crimes
- Introduce domestic laws and policies to improve fair and efficient justice, e.g. expand legal aid, build corrections facilities, improve mediation
- Introduce domestic policies and procedures to increase legal certainty for business, e.g. administrative burdens and barriers to trade

#### *Specific Commitments relevant to the rule of law and development*

*The wide range of specific commitments reflects the varied conceptions of and approaches to measuring countries' adherence to the rule of law. Beyond broad statements of commitment to the principle of rule of law, countries have adopted numerous specific commitments, ranging from binding treaties to much looser principles and standards, in a variety of areas that are directly applicable to the rule of law. These commitments are far too numerous and varied to list. Nonetheless, some of the broad categories that are relevant to the rule of law are listed below.*

- *Human Rights Conventions.* These instruments are a central pillar for upholding the rule of law at the international and national levels. States' formal commitments to conform national law and practice to the principles contained in these documents are a vehicle through which national actors ensure that their governments uphold the law. Some of the more prominent examples include: *Universal Declaration of Human Rights (1948); International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights (1966); International Convention on the*

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<sup>138</sup> "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" (see S/2004/616).

*Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Convention on the Rights of the Child.*

- *Standards for Fair and Efficient Justice Systems.* A variety of standards have evolved to guide national law and policy on the treatment of individuals through the criminal and justice system, and on the structure of the system overall. Although some standards are contained in binding conventions, such as the Torture Convention, most are in the form of standards, principles and codes of conducts that are applied by national authorities in the development of their own law and policy regarding their justice systems. Although these standards generally reflect broad human rights and rule of law principles, they tend to focus on specific institutions or actions, such as the conduct of judges, prosecutors and police in the treatment of prisoners or the fulfilment of their actions. For example, the *Basic Principles on the Independence of the Judiciary* set out standards for the conditions of service, qualifications and professional ethics for judges. Other examples include: *the Standard Minimum Rules for the Treatment of Prisoners; United Nations Rules for the Protection of Juveniles Deprived of their Liberty; Code of Conduct for Law Enforcement Officials; Basic Principles on the Role of Lawyers.*
- *Governance and corruption.* Numerous international instruments have set standards aimed at increasing transparency and reducing corruption at the national level. The most robust and widely recognized instrument is the *United Nations Convention Against Corruption (UNCAC)*, which involves specific commitments to adopt domestic law and policy and cooperate internationally, and includes a review mechanisms to enforce compliance. Regional organizations, like the African Union and Organization of American States, have adopted their own conventions and standards on corruption. Other mechanisms consist of voluntary partnerships and commitments to adopt standards governing specific types of revenue or services, like the *Kimberly Process* which involves commitments regarding the mining and export of diamonds, and the *Extractive Industry Transparency Initiative (EITI)* which governs the extraction and sale of oil and mining resources. Other initiatives involve broader standards that are used as a reference point, with varying levels of review and enforceability. Examples include the Open Government Partnership.
- *Security and Law Enforcement, including preventing and mitigating conflict, and combating crime and terrorism.* A growing number of international instruments have focused on strengthening the tools at the national and international level to reduce violent crime that contribute to insecurity and conflict. Such instruments range from conventions that require national action against specific forms of crime, like the *UN Convention Against Transnational Organized Crime, International Convention for the Suppression of the Financing of Terrorism* and related conventions, to commitments to improve cooperation in preventing transnational crime and preventing criminal financing. States have also committed to building and strengthening international bodies, like the International Criminal Court, with jurisdiction over international crimes.
- *Economic activity.* Several international treaties and standards focused on economic activities include extensive provisions that affect the content of states' law and policy and their treatment at the domestic level. These commitments are directly related to development, and to the domestic policy instruments that affect development through trade, investment, intellectual property, and other areas of economic activity. The most prominent example is the World Trade Organization, and its system of trade requirements that must be enshrined in law.

## Targets and Indicators

*Just as the rule of law matters, so measuring it matters.* The design of targets and indicators for the rule of law has been a challenge for development policy and programs. The broad and multi-faceted nature of the rule of law has resulted in an incredibly varied set of indicators and tools, each with its own complexities and limitations. Yet recent advances have produced new tools for measuring various elements of the rule of law

*The first step in setting rule of law targets is defining one or more clear and measurable concepts.* Donors frequently deploy differing definitions of ROL in line with their respective conceptions, comparative advantages and institutional mandates. Low correlation among different measures of the rule of law reveal that the measures are highly sensitive to the specific concept measured, the methodology chosen, and the context in which they are deployed.<sup>139</sup> Yet it is important to bear in mind that definitions for the purpose of measurement are not necessarily the same as the principles of ROL that guide donor programming. Donors can choose to measure adherence to these broad principles or the effectiveness of rule of law programming through different indicators.

*Measuring the impact of development policies is particularly difficult,* due to confusion about causation between program outputs and intended outcomes (see evidence section above). Moreover, any measure is only an imperfect proxy for that concept. Trying to measure a more specific element of the concept inevitably omits other core elements of the concept. Composite indicators lose precision and sensitivity to change, and run into methodological problems.<sup>140</sup>

*Significant advances have nonetheless been made in measuring the rule of law from a variety of perspectives and methods.* Existing indicators for the rule of law focus on different concepts inherent to the rule of law and apply various methods. Some of the approaches include the following.

- *Broad indices of rule of law at the country level.* Attempts to capture the broad conception of rule of law generally rely on composite measures that combine several dimensions to produce a multi-faceted measure of rule of law at the country level. This is done either by combining several existing indicators that measure more specific aspects of the rule of law, (e.g. World Bank's *Governance Indicators*); or through expert and public surveys that ask a variety of questions regarding different elements of the rule of law (e.g. the World Justice Project's *Rule of Law Index*). The broader the concept, however, the less specific and sensitive to changes. Broad measures have also been critiqued for emphasizing certain elements of the rule of law over others, or for favouring Western conceptions of the rule of law. Combining multiple indicators can also lead to methodological problems in the aggregation of the data, and how to interpret such aggregation.
- *Indicators of elements of the rule of law.* Several indices measure more specific elements or components of the rule of law, such as security of property and individuals (e.g. World Economic Forum, Index of Economic Freedom, World Bank's CPIA); contract rights and enforcement (World Bank's CPIA and Doing Business);

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<sup>139</sup> Arndt, C., & Oman, C. (2006). *Uses and abuses of governance indicators*. Paris: Organization for Economic Cooperation and Development. Haggard, S., MacIntyre, A., & Tiede, L. (2008). The rule of law and economic development. *Annual Review of Political Science*, 11, 205–234.

<sup>140</sup> Botero, Juan Carlos, Robert L. Nelson and Christine Pratt. 2011. "Indices and Indicators of Justice Governance and the Rule of Law: An Overview," *The Hague Journal on the Rule of Law* 3(2).

compliance with human rights and civil liberties (e.g. Cingranelli-Richards CIRI Human Rights Dataset, Freedom House); judicial independence (e.g. Judicial Independence Index); constraints on the executive (e.g. Polity IV, Bertelsman Rule of Law index); or corruption (e.g. Global Corruption Barometer, Global Integrity Index). These indices often rely on perception as measured by expert surveys. As a result, they are sensitive to the sample of respondents and may be biased. Some of these indices, for example, have been critiqued for relying too much on elite lawyers or businesses.

- *Measures of institutional performance.* Several measures focus on the performance of specific government institutions, usually in the justice sector, although some also include other sectors of the government, or alternative and non-state dispute resolution. One advantage of such measures is that the ability to collect administrative statistics on elements of government performance, such as court efficiency, allows for direct and accurate measures. Yet the reliability and availability of such data varies widely. More fundamentally, focusing on institutional performance, such as the efficiency of court proceedings, often reveals little about the broader rule of law (in particular the constellation of institutions that citizens turn to) or how it is experienced by citizens. Moreover, institutions and standards may differ considerably across countries. Some examples include: the American Bar Association/ROLI Legal Education, Legal Profession and Judicial Reform Indices, the National Center for State Court's CourtTools focusing on court performance; the National Judicial Institute of Canada's framework for assessing judicial independence, transparency and accountability; the World Bank's Doing Business indicators and World Business Environment Survey of the credibility of the courts in enforcing contracts.
- *Compliance with international norms.* One straightforward way to measure states' compliance with international law is to examine their laws and procedures, and whether they conform to international laws and standards. Many international conventions include monitoring mechanisms, like the ICCPR's periodic review process, or UNCAC's peer review process. These processes generally review whether the country has adopted and implemented the legal and policy provisions required by the convention. However focusing on compliance often leaves out the crucial elements of implementation and the policy trade-offs that result from competing norms, which can be much harder to assess.
- *Measures of user experience and citizen perception.* Another way to measure the rule of law is to focus on the experience of users of institutions and the perceptions of citizens in general. A number of cross-country surveys ask specific questions about people's perception of state institutions, their compliance with the law, and their attitude toward various aspects of the rule of law. Surveys can also focus more narrowly on particular categories of citizens, such as those that have been in contact with courts or police to measure their performance. Some examples include Afrobarometer, Asian Barometer, Latinobarometer, TI's Corruption Barometer. Relying on perceptions can be highly imprecise and reveal contradictory findings. For instance, a government's efforts to combat corruption can result in greater exposure of cases, resulting in an increase in citizen perception of corruption. They also depend on the definition of the concept to be measured, and the framing of the problem. For example, surveys on the perception of crime rarely define what "crime" is and how serious it should be.
- *"Baskets" of indicators tailored to country needs.* Other indicators start from broad principles but break down the concept into various principles and sub-principles that are aggregated into "baskets" of measures from various sources. The measures

used in a particular country can be tailored to country needs. An example of this approach that seeks to compare across countries is the UN Rule of Law Index. Other “basket” approaches are more tailored, and develop indicators based on an analysis of country conditions and what is needed to achieve either higher level principles and standards, or specific improvements in the provision of justice.<sup>141</sup> For example, generating indicators based on a detailed analysis of a particular issue and the data available to craft a basket of indicators focused on the particular problem – e.g. a set of indicators focused on police searches, seizures and arrests to measure dimensions of police performance identified as a problem by policymakers.<sup>142</sup> Yet the more country specific the indicator, the less they are comparable across countries. Moreover, using multiple indicators and data source increases the cost of collecting the data.

*The foregoing discussion highlights several trade-offs in defining indicators and targets relative to the rule of law.* As a multi-dimensional social and political reality that varies by context, changes in the rule of law cannot easily be captured through a single, time-bound or specific indicator. Many measures of the rule of law have tended to privilege certain conceptions of the rule of law over others – such as security of property rather than equitable enforcement – and to focus on institutional performance – such as case processing time - rather than outcomes for citizens. Since data on each of these elements tends to be fragmented and unreliable, selecting a single indicator that can be measured across countries can be tricky. Other trade-offs that arise in selecting indicators include:

- Specificity vs. Breadth of concept
- Universal application/comparability vs. Context specificity
- Sensitivity of measurement vs. Comprehensiveness of measurement
- Achievable vs. Ambitious
- Norm-based vs. Performance-based
- Cost of Measurement
- Reliability and measurability of data
- Incentives created by different indicators

*Efforts to measure the rule of law can also produce unintended consequences.* Even where policymakers intend to address various elements of the rule of law, selecting indicators for measuring policy impact can empower certain actors over others, or distort institutional performance toward fulfilling targets while neglecting other crucial functions. Significant gaps in the availability of data, both on the performance of institutions and on outcomes for the public can exacerbate these consequences if policymakers choose to measure what is available rather than what matters. For example, the measure of homicide rates is often used as a proxy for the rule of law, since it is relatively reliable, sensitive to policy change, and can be compared across countries. Yet it can also lead to a focus on certain types of crime over others, which drives the allocation of resources and the lack of attention to important elements of insecurity and injustice.

*A multi-national indicator, driven by national voices, in its political context and with clear and limited aims, can be valuable.* Such an indicator could focus global attention on elements of the rule of law that are understood to be important across countries and contexts, and help spur improved approaches to measuring it. It could be based on a

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<sup>141</sup> Parsons, Jim. 2011. “Developing Clusters of Indicators: An Alternative Approach to Measuring the Provision of Justice” *The Hague Journal on the Rule of Law* 3(2). See also

<sup>142</sup> Stone, Christopher and Todd Foglesong, “Strengthening Rule of Law by Measuring Local Practice, One Rule at a Time,” *Program in Criminal Justice Policy and Management at the Harvard Kennedy School of Government*.

“basket” of indicators that are grounded in local challenges and context. For example, a measure of access to justice might include survey data showing the types of cases of most concern to citizens, capture user perception and experience, measure the performance of several institutions, and assess the availability and quality of a range of services – from courts and paralegals to community mediation and media access – that are relevant to a given context. Such an approach could measure global outcomes while remaining adaptable to local contexts. The most common criticism of universal indicators is that they lack relevance to particular country contexts and needs in order to achieve a common concept across countries. Underlying this is the notion that they have been built on limited input from different voices, especially from the south and at the local level.

*Countries have begun to define their own country-specific indicators.* Some processes are attempting to break the mould, using nationally-driven processes to develop targeted multi-national indicators while acknowledging their imprecision and stressing the links between the indicator, the behavioural change they are trying to stimulate, and a vision of the rule of law. In the context of the MDGs, Mongolia, Albania and Cambodia defined their own “ninth” MDG focused on human rights, good governance or human security. Each of these goals reflected varying levels of public consultation, but they were all tailored to their particular development needs. Other countries have sought to define their own commitments and targets more explicitly focused on the rule of law in the context of other fora. For example the G-7+ New Deal for Engagement in Fragile States has sought to define indicators, including for security and justice that reflect the needs and perspectives of the member countries. This effort attempts to define a set of targets and indicators that are more comparable across contexts but rooted in country needs.

*More attention could be devoted to national and local-level input in the definition of targets and indicators.* National voices are essential, but they have been “notably absent from the global discussion on rule of law assistance, which has been replete with international experts. Government and civil society stakeholders within recipient countries can provide substantive insight on the dynamics underlying key concepts such as national ownership. Moreover, they might question fundamental aspects of current approaches and suggest innovations to improve the likelihood of success.”<sup>143</sup> More focus should be devoted to defining targets and indicators that respond to the conditions in various countries, that are relevant to specific country contexts, and that incorporate a broader range of voices and perspectives. This contextualized approach should not be used to avoid challenging indicators, such as multi-dimensional ones or those that focus on end users. Rather, it should be used to explore whether the country context – including the nature and capacity of government authorities – suggests them to be useful.

*Setting rule of law targets will also require attention to developing local sources of data on the rule of law.* This includes building capacity to collect and analyze data that is relevant to local contexts, and helps to assess local realities, including by incorporating sub-national and local voices using a range of different methods.

- This requires *domestic data-collection*, investment by donors in building domestic capacity for such data collection, and rule of law staff in country who have a grasp of local context.<sup>144</sup> It also requires effective engagement at the

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<sup>143</sup> UNSG report A/63/226, at 17

<sup>144</sup> Deborah Isser (2011), “Understanding and Engaging Customary Justice Systems”, in Deborah Isser (ed.), *Customary Justice and the Rule of Law in War-Torn Societies*. Washington, DC: United States Institute of Peace, at 344-345.

international with academics and policy-makers from recipient countries,<sup>145</sup> and facilities to promote South-South exchange of lessons.

- It also requires *different types of data*. Legal analyses, household surveys and economic data do not seem to be sufficient in expressing the complexity of rule of law systems in order to support the design of problem-based interventions.<sup>146</sup> This is particularly true when we think of systems incorporating traditional, customary and other forms of justice. Understanding local conceptions of justice and capturing *voice and agency* through a broader range of data – for example the World Bank’s *Voices of the Poor* project - is essential
- This also requires a concerted effort by donors to *link local and national data and understanding of contexts*. Targeted local interventions will not be successful without an understanding of the national contexts of power and coalitions in which they play out. National or big interventions will not work unless they are made relevant to power and coalition dynamics at the local level.<sup>147</sup> Additional data and analytical techniques are required to measure these various elements of the rule of law.

### Lessons from the MDGs

*Experience suggests the value of the MDGs for increasing attention and resources to particular development challenges.* The most frequently cited benefit of the MDGs has been its impact on focusing attention of donors and recipient countries on achieving common objectives and targets. The MDGs are credited with having generated consensus around development priorities, raised international awareness of poverty, shifted the development discourse from a focus on economic growth to poverty reduction, and encouraged governments and their publics to devote resources to address these goals.<sup>148</sup> The MDGs also led to improved data collection and techniques for measuring development outcomes, to enable the definition of concrete and measurable goals.<sup>149</sup>

*The evidence for this impact is limited so far.* Few systematic studies have been carried out to measure these effects and more research is needed.<sup>150</sup> Those studies that have been conducted suggest that the impact of MDGs on achieving goals has either varied by the specific goal – with more progress on income, primary completion rates, child and

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<sup>145</sup> William Twining, “Legal Pluralism 101”, in in Tamanaha, B., Sage, C. and Woolcock, M. (eds.), *Legal Pluralism and Development: Scholars and Practitioners in Dialogue*. Cambridge: Cambridge University Press.

<sup>146</sup> Desai, D., Isser, D. and Woolcock, M. (2012), ‘Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies’, *4 Hague Journal on the Rule of Law* 54.

<sup>147</sup> Giles Mohan and Kristian Stokke, 2000. “Participatory development and empowerment: the dangers of localism”. *Third World Quarterly*, 21(2), pp. 247-268.

<sup>148</sup> Sakiko Fukuda-Parr, Should global goal setting continue, and how, in the post-2015 era?, DESA Working Paper 117 (2012, ST/ESA/2012/DWP/117), 2; Charles Kenny and Andy Sumner, More Money or More Development: What Have the MDGs Achieved? (Center for Global Development Working Paper 278, 2011), Alex Evans and David Steven, Beyond the Millennium Development Goals: Agreeing a Post-2015 Development Framework (Managing Global Order Working Paper, 2012),

[http://www.beyond2015.org/sites/default/files/evans\\_steven\\_millennium\\_2015.pdf](http://www.beyond2015.org/sites/default/files/evans_steven_millennium_2015.pdf), 6; and Claire Melamed and Andy Sumner, A Post-2015 Global Development Agreement: why, what, who? (Paper for ODI/UNDP Cairo workshop on a post-2015 Global Development Agreement, 2011) <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7369.pdf>, 2-4.

<sup>149</sup> Claire Melamed, After 2015: Context, politics and processes for a post-2015 global agreement on development (Overseas Development Institute, 2012), 7.

<sup>150</sup> See Richard Manning. 2009. “Using Indicators to Encourage Development: Lessons from the Millennium Development Goals” DIIS Report 1, Danish Institute for International Studies.

maternal mortality than other goals<sup>151</sup> – or has not led to any acceleration in achieving goals relative to the pre-2000 period.<sup>152</sup> Moreover, studies of certain sectors, in particular health, have noted the distortive impact of the MDGs on state systems, with an overemphasis of aid and policy on specific targets (such as HIV/AIDS and malaria prevention and treatment) to the detriment of other essential areas (such as deworming).<sup>153</sup> Thus while the MDGs appear to have had an impact on increasing aid flows to priority areas, the impact on effective government policy and resource allocation is less clear.<sup>154</sup> A clear lesson learned is to devote resources and attention to ensuring that the objectives and targets are resulting in greater resource allocation.

*The MDG experience highlighted the importance of the ROL for broader development outcomes.* A review of country reports reveals the importance of addressing the rule of law to achieve MDG targets across sectors.<sup>155</sup> In a broad range of countries, establishing transparent and legitimate legal frameworks, ensuring predictable enforcement of rules and procedures, and reducing corruption have enabled effective delivery of health, education and other social services. The absence of these elements has in many cases been cited as a factor in countries' failure to meet targets. For example, legitimate laws and credible enforcement mechanisms have particularly contributed to expanding opportunities for women and vulnerable groups to participate in economic and political life – as required by the third MDG on gender equality.

*In a few cases, the MDGs have encouraged countries to define context-specific approaches to promoting the rule of law.* In a handful of countries, including Mongolia, Albania, Cambodia and Iraq, the MDGs have resulted in specific attention to elements of the rule of law. As noted above, these countries adopted additional MDG objectives and targets related to the rule of law, anticorruption, governance or human security. The Mongolian MDG, which on respecting human rights, ensuring free access to information, mainstreaming democratic principles and practices, and reducing corruption, reflected broad public consultations as well as the input of international expertise to define targets, indicators and measurement techniques.<sup>156</sup> The Albanian MDG focused on improving governance, rule of law and inclusion of minorities in the context of its bid for EU accession. Cambodia's MDGs focused on the need to reduce the impact of landmines and improve assistance to victims. The impact of these MDGs on the resources devoted to these issues or the success of programs so far has not been systematically tested.

*Some of the lessons learned from the MDGs are particularly relevant to the rule of law, especially the need to better reflect varying national and sub-national contexts, and to*

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<sup>151</sup> Charles Kenny and Andy Sumner, *More Money or More Development: What Have the MDGs Achieved?* (Center for Global Development Working Paper 278, 2011), 18.

<sup>152</sup> Sakiko Fukuda-Parr and Joshua Greenstein, *How Should MDG Implementation Be Measured: Faster Progress or Meeting Targets?* (UNDP-IPC Working paper 63, 2010) <http://www.ipc-undp.org/pub/IPCWorkingPaper63.pdf>, 22.

<sup>153</sup> Molyneux, David H., "Combating the "other diseases" of MDG 6: changing the paradigm to achieve equity and poverty reduction?", *Transactions of the Royal Society of Tropical Medicine and Hygiene* (2008) 102, 509—519; Shiffman, J., 2008. Has donor prioritization of HIV/AIDS displaced aid for other health issues? *Health Policy Plan*. 23, 95—100.

<sup>154</sup> Sakiko Fukuda-Parr, Should global goal setting continue, and how, in the post-2015 era?, DESA Working Paper 117 (2012, ST/ESA/2012/DWP/117), 5.; Charles Kenny and Andy Sumner, *More Money or More Development: What Have the MDGs Achieved?* (Center for Global Development Working Paper 278, 2011), 4; see also Claire Melamed and Andy Sumner, A Post-2015 Global Development Agreement: why, what, who? (Paper for ODI/UNDP Cairo workshop on a post-2015 Global Development Agreement, 2011), at 14.

<sup>155</sup> References to adequate legal frameworks, effective enforcement and resolution of grievances are sprinkled throughout country reports, although rule of law is rarely an explicit theme.

<sup>156</sup> Dorjsuren, P., "Mongolia's Experience in Developing Democratic Governance Indicators," The Academy of Political Education, Mongolia, at [http://academy.org.mn/apem/index2.php?option=com\\_content&do\\_pdf=1&id=93](http://academy.org.mn/apem/index2.php?option=com_content&do_pdf=1&id=93)

*incorporate broader consultation.* One of the main critiques of the MDGs was their insufficient attention to varying local contexts and conditions. The selection of goals did not include broad consultations across countries, or among different groups within countries, leading to the exclusion of important aspects of development.<sup>157</sup> Although common objectives and targets were useful in facilitating measurement, they did not sufficiently address variations across contexts.<sup>158</sup> Globally, the targets did not address the disparities across countries that constrained the achievement of the rule of law. At the sub-national level, aggregate indicators did not reflect the challenge of reducing inequalities between different groups or give priority to the most disadvantaged.

*The importance of navigating the tension between universal benchmarks and context-specific objectives is also particularly relevant to the rule of law.* Given the variation in the substantive underpinnings, institutional forms and processes that affect the rule of law in different contexts, it is particularly important to engage with a range of thinkers, ideas and perspectives from societies in both the Global North and South. Goals and indicators should reflect a particular pathway or relationship between the rule of law and development. In defining objectives, targets and indicators, policymakers should explore the multiple ways of measuring the rule of law described above, that range from normative commitments to institutional performance to citizen perception and experience, along with efforts to construct flexible baskets or systems of indicators that respond to particular contexts. Development objectives related to the rule of law should also reflect consultations that include different groups within societies, and be flexible to local conditions, norms and institutions.

### Concluding Thoughts and Possible Approaches

*The rule of law is of enduring importance to development policy discourse.* The relationship between the rule of law and development is multi-faceted and runs through various pathways. Nonetheless, substantial evidence has accumulated showing its importance to development. Countries have expressed their commitment to the rule of law through several international fora, including the UN General Assembly as well as several regional and international bodies and international treaties establishing states' responsibility to protect human rights. Civil society actors have increased their calls for addressing the rule of law as part of the post-2015 development agenda.<sup>159</sup>

*Although the rule of law is highly complex, it is part of the deep structure of all societies.* As states outlined in the Rio +20 Outcome document, the post-2015 development goals should have universal appeal. Attention to the rule of law would reflect a shared sense that human dignity and justice matter, and thus have global political, social and economic resonance. Given the prevalence of poverty and inequality in both developed and developing countries, it is possible to say, for example, that all countries face

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<sup>157</sup> Sakiko Fukuda-Parr, *Should global goal setting continue, and how, in the post-2015 era?*, DESA Working Paper 117 (2012, ST/ESA/2012/DWP/117), 11, 12; William Easterly, "How the Millennium Development Goals are Unfair to Africa," *World Development* vol. 73, no. 1 (2008), 27; Claire Melamed, *After 2015: Context, politics and processes for a post-2015 global agreement on development* (Overseas Development Institute, 2012), 7.

<sup>158</sup> Sakiko Fukuda-Parr, *Should global goal setting continue, and how, in the post-2015 era?*, DESA Working Paper 117 (2012, ST/ESA/2012/DWP/117), 10-11.; Charles Kenny and Andy Sumner, *More Money or More Development: What Have the MDGs Achieved?* (Center for Global Development Working Paper 278, 2011), 11; Michael A. Clemens, Charles J. Kenny and Todd J. Moss, "The Trouble with the MDGs: Confronting Expectations of Aid and Development Success," *World Development* vol. 35, no.5 (2007).

<sup>159</sup> See

[http://www.transparency.org/whatwedo/pub/policy\\_brief\\_looking\\_beyond\\_2015\\_a\\_role\\_for\\_governance\\_and](http://www.transparency.org/whatwedo/pub/policy_brief_looking_beyond_2015_a_role_for_governance_and) <http://www.opensocietyfoundations.org/projects/justice-and-development>

challenges related to ensuring effective access to justice by the poorest and most marginalized sectors of their societies.

*A growing body of evidence and practice point to the importance of the rule of law across sectors of development.* The rule of law is an end in itself as well as an enabling factor and element of process that affects a wide range of development outcomes. The evidence for the relationship between certain elements of the rule of law and development is growing, although more research and improved measurement tools are needed. Development practice is also changing to reflect a nuanced and complex understanding of the rule of law that is rooted in local context and addresses particular development challenges in a variety of sectors.

*Incorporating the rule of law into the post-2015 development agenda could increase attention to its role as an enabler and outcome of development.* The experience of the Millennium Development Goals suggests the value of setting global targets to steer resources and attention toward translating commitments into practice. Additional global focus on the rule of law can channel resources toward deepening the evidence base, generating new data and measurement techniques, and designing effective solutions to challenges related to the rule of law and development.

*Efforts to incorporate the rule of law into the post-2015 development agenda should address the lessons learned from the MDGs and fifty years of rule of law and development programming:*

- *Incorporating the rule of law requires clarifying the concept of the rule of law, and its relationship to development.* The various conceptions of the rule of law, including differing substantive and cultural commitments and the variety of institutions involved, can complicate efforts to define a common objective. Nonetheless, the evidence described above suggests specific pathways through which the rule of law matters to development. It should be possible to focus on certain pathways and outcomes that are most relevant to the post-2015 agenda, while ensuring flexibility and adaptability to local contexts. A robust discussion could lead to the definition of core elements of the rule of law that can be adopted as a specific objective or incorporated into other objectives.
- *Efforts to measure the rule of law should take into account the potential for unintended consequences in adopting indicators for complex and multi-dimensional concepts like the rule of law.* Indicators can empower certain actors over others, or distort institutional performance. A very narrow conception of the rule of law focused on one aspect of physical safety, and may distort policy efforts, for example by directing resources toward certain forms of violent crime rather than other sources of insecurity, dispute or grievance that more commonly affect citizens.
- *In addressing the rule of law, any future global framework should remain sufficiently adaptable to reflect its context-specific and complex nature.* Given the rule of law's contested nature, it is particularly important to engage with a range of thinkers, ideas and perspectives from societies in both the Global North and South. Moreover, the experience of unintended consequences suggests the importance of broad input in defining rule of law elements of the development framework, including voices within and across countries with varying conceptions and priorities. The definition of targets and indicators should also reflect local, context-specific understanding of the rule of law and its relationship to development, without eschewing or undermining complexity.

- *The post-2015 agenda should recognize the importance of the rule of law across sectors of development.* It is increasingly understood that the rule of law shapes outcomes across sectors, from health and education to equitable growth, through institutions and processes that ensure legitimate legal frameworks, predictable and fair enforcement, and opportunities to equitably resolve grievances and claims. The relationship between the rule of law and development arises not only in a particular set of institutions, but also across social, economic and political development.
- *Goals, targets and indicators related to the rule of law should reflect its multiple dimensions and functions.* The multi-faceted nature of the rule of law requires a flexible and multi-dimensional approach to setting targets and indicators. Many measures of the rule of law have tended to privilege certain conceptions of the rule of law over others – such as security of property rather than equitable enforcement – and to focus on institutional performance – such as case processing time - rather than outcomes for citizens. Some of the recent innovations in measuring the rule of law, including defining baskets of indicators or indices that include multiple dimensions of the rule of law and that can be tailored to local contexts, might better reflect this complexity than a single indicator.

*Three general approaches to incorporating the rule of law into the post-2015 development agenda could be considered. These approaches, based on current deliberations regarding the future framework as reflected in intergovernmental discussions and outcomes, are not mutually exclusive and could be adopted in concert:*

1. ***Define a common rule of law goal with a flexible basket of indicators that can be tailored to country contexts.*** A rule of law goal would signal the importance of the rule of law as an outcome of development on par with other outcomes such as poverty reduction and health.
  - Selecting a rule of law goal would require achieving broad consensus on a particular aspect or function of the rule of law that resonates across borders. This might focus on safety and security, a form of governance, access to justice, or social and economic justice. Achieving such consensus would require consultations at the international and country levels that include a variety of voices. The goal would also need to be sufficiently broad to reflect variations across cultures and contexts. It would need to take into account the lessons learned from the MDG process – such as aid distortion and unintended consequences - and the history of rule of law policy making.
  - The goal should focus on an aspect of the rule of law that is related to other parts of the post-2015 agenda. For example, if the post-2015 framework focuses on poverty reduction, the goal might be oriented toward social or economic justice, perhaps aiming for equitable allocation of opportunities and services or access to credible processes for resolving grievances and disputes.
  - Developing such a goal and its targets is a complex endeavour. The goal would be specific, time-bound and universally applied. For example, a goal on equitable access to justice might focus on the percentage of people with access to certain types of services, or who feel fairly treated in the delivery of services. Yet at the same time, lessons from the MDGs

suggest that countries should retain flexibility by designing at least some of their own targets and indicators, drawing from “baskets” of indicators that can be tailored to specific contexts. For example, a goal related to public safety and security might involve a target of reducing violent crime by a certain percentage, but allow countries to define the type of crime that is most salient in its context, and complement indicators based on crime statistics with measures of citizen experience. Carefully-crafted consultations within each country would aim to develop indicators that resonate with each society’s priorities and experience.

2. ***Adopt the rule of law as a high level “enabling” goal.*** Operating at a level beyond the primary development goals, an enabling goal would commit countries to make national-level policy changes that enable progress on other development goals. This approach recognizes that the rule of law is not just an end in itself, but that it also enables a broader range of development outcomes.
  - The enabling goal would focus on a specific element or function of the rule of law that, according to empirical evidence, facilitates other aspects of the new development framework. On the basis of the brief summary of the evidence presented above, an enabling goal could focus on one or more specific functions, including enforcement of contracts; accountable and transparent application of executive authority; protection of physical safety; or access for vulnerable groups to knowledge about rights and means to enforce them. For example, a post-2015 emphasis on poverty reduction and inequality might lead to a rule of law enabling goal on participation, access to information and rights protection for vulnerable groups to ensure they benefit equally from poverty reduction efforts.
  - The enabling goal would entail concrete, measurable commitments to adopt national-level legal or policy changes. These commitments would focus on a national rule of law system as a distinct object of policy change. But they would also be designed to enable achievement of goals in other sectors. For example, to fulfil an enabling goal related to expanding access to information and protection of rights, countries might commit to such policy changes as adopting freedom of information laws, improving performance of law enforcement, or expanding access to paralegal services. These targets would be designed to enable progress on other goals such as healthcare delivery, but they would produce broader benefits as well.
  - The details of the benchmarks and indicators could vary by country. While adopting universal goals, countries would define at least some targets and indicators based on their own institutional needs, contexts and development challenges. For example, a goal focused on access to justice might include a universal target focused on expanding the percentage of people with access to fair and credible dispute resolution mechanisms, but allow local variation in defining the specific type of mechanism – from formal courts, to customary tribunals, to paralegal or administrative measures. The indicators for measuring the effectiveness and fairness of these mechanisms might similarly vary according to the context.
3. ***Incorporate the rule of law across development goals.*** Focusing on the rule of law as an element of process, this approach would ensure that other

development goals simultaneously contribute to the rule of law by incorporating targets and indicators related to the rule of law across these goals. This approach highlights the importance of the rule of law across development, without defining it as a desirable end in itself.

- This approach would require clarifying the elements of process that are important to achieving the post-2015 goals according to the empirical evidence. These elements might include legitimate and transparent legal frameworks; public participation and agency; the fair and equitable resolution of disputes and grievances; credible enforcement of the law; and/or rights protection. Each of these elements would contribute to the achievement of other goals by strengthening the rule of law around particular issues.
- These elements could be applied across goals by incorporating specific targets and indicators related to the rule of law for each goal. For example, a development goal on improving maternal health could include targets on equitable access to services, and include indicators on the adoption of a legal framework establishing rights to services, including mechanisms that enforce rights and handle grievances fairly and equitably.
- The targets and indicators would be carefully formulated to address a range of country contexts and institutional needs. They might also combine a range of data sources. For example, each goal might include indicators that combine user perspectives collected through surveys, output indicators showing numbers of individuals served, and input indicators revealing legal changes.