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The prioritisation of rule of law support from a peacebuilding perspective

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Executive summary

Armed conflicts are increasingly interpreted as products of the breakdown of the rule of law. In turn, weak rule of law institutions are understood as a major challenge to early post-conflict reconstruction and long-term conflict prevention. Considered essential for the maintenance of peaceful social relations, rule of law reform has thus become a priority in peacebuilding activities in the periphery. Yet enforcing a liberal legal framework in war-torn countries has had mixed success at best, with reforms encountering severe difficulties in gaining the necessary legitimacy within disrupted communities to function authoritatively. This report explores the process of the prioritisation of the rule of law, presenting the assumptions that favour its application and the typical reforms implemented in the context of peacebuilding initiatives. In addition to discussing the current challenges to the modus operandi of external interventions, it makes concrete proposals for potential improvements.

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Introduction

Peacebuilding became an essential guiding principle of the United Nations (UN) framework of action in the 1990s, following its inclusion in Secretary-General Boutros-Ghali's 1992 report, *An Agenda for Peace.* The new conceptual structure crafted a peace strategy to confront the nature of post-cold war armed conflicts that granted the UN a wider and more innovative role in countries in which it was actively engaged, taking on unprecedented prerogatives ranging from conflict prevention to negotiating peace agreements and reconstructing the war-torn country and society. Along with three other strategies – preventive diplomacy, peacemaking and peacekeeping – post-conflict peacebuilding in particular was presented as the organisation's new priority, intended, in Boutros-Ghali's words, to "identify and support structures which will tend to strengthen and solidify peace in order to avoid a relapse into conflict".[1] The goal was no longer merely the absence of war, but the construction of a different social order that is conducive to non-violent relations.

Renewed attention to the root causes of armed conflict has increasingly led to their interpretation as products, in part, of the breakdown of the rule of law. In turn, weak rule of law institutions are understood as a major challenge to early post-conflict reconstruction and long-term conflict prevention. Rule of law reform has thus become a priority in external interventions aimed at the re-establishment of order and the promotion of peace in war-torn countries and societies. Considered essential for the maintenance of peaceful social relations, the transplantation of a liberal legal framework into post-war scenarios has become a staple of peacebuilding activities in the periphery. Moreover, it has served the project of spreading Western liberal values and has contributed to the restructuring of post-cold war international relations. Rule of law activities have, in short, reinforced international peacebuilding's distinctly Western modus operandi.

Nevertheless, the concept and practice of peacebuilding have continued to evolve in response to experiences in the field and criticism of actual projects. Accused of proposing a one-size-fits-all model, the UN has more recently hinted at the need to focus on the specificities of each post-conflict context and to be more open to the input of local actors, as the May 2007 decision of the UN Secretary-General's Policy Committee illustrates: "Peacebuilding strategies must be coherent and tailored to specific needs of the country concerned, based on national ownership, and should comprise a carefully prioritized, sequenced, and therefore relatively narrow set of activities aimed at achieving the above objectives."[2] Nonetheless, despite this warning, many rule of law interventions lack such coherence and conceptual clarity. Even as rule of law reforms increase in scope and pace, great conceptual confusion exists about what specifically such activities should entail, how they can be adapted to fit specific local needs, and even the exact nexus between the rule of law and peacebuilding's ends of post-conflict peace and stability.

This report seeks to clarify (and problematise) many assumptions underlying rule of law reforms and the concomitant discourse that is currently hegemonic in international peacebuilding initiatives. It also presents an overview of the current challenges facing the enforcement of the rule of law in post-conflict societies and suggests potential improvements.

What is the rule of law?

If the rule of law is central to contemporary peacebuilding initiatives, of what specifically does it consist? Reference is made to the rule of law in the preamble to the Universal Declaration of Human Rights and various other international treaties without ever being defined. Indeed, few concepts in political discourse garner so much attention and yet remain so plastic in definition. The rule of law has taken on different meanings for different individuals or ideological groupings at various historical junctures. Even today,

1 UN (United Nations), *An Agenda for Peace: Preventive Diplomacy, Peacemaking and Peace-keeping: Report of the Secretary-general Pursuant to the Statement Adopted by the Summit Meeting of the Security Council on 31 January 1992,* A/47/277, S/24111 of June 17th 1992, http://www.unrol.org/files/A_47_277.pdf.

2 Cited in UNPSO (United Nations Peacebuilding Support Office), *Peacebuilding: An Orientation,* 2010, p 5, http://www.un.org/en/peacebuilding/pbso/pdf/peacebuilding_orientation.pdf.

behind the apparent consensus shared by the rule of law's proponents – donors, host country actors, academics – in fact lie multiple and even contradictory visions.

Historically, the rule of law has stood for procedural justice with a focus on those features that any legal system must possess to function effectively as a check on arbitrary state power. In this formalist or "thin" view, governmental action must be based on rules that are clear, consistent, publicly declared and prospective. Moreover, the law must bind all individuals equally, including those in power. Under such requirements, government officials have little discretion or ability to act arbitrarily, hence the "rule of law" as opposed to the "rule of man".

Criticisms of this narrow view, which makes no judgement about the content or justness of the law, so long as it follows procedural prescriptions, have led many to advocate a substantive or "thick" conception. Concerned with the substantive content of the law and the creation of a just society, a "thick" rule of law is increasingly invoked to stand not simply for judicial equality and a government bound by law, but for a longer list of substantive rights and institutions, including political democracy or even a complete juridico-political system encompassing a supreme constitution, a bill of rights, the separation of powers, constitutional judicial review, judicial independence, etc.

International donors, including the UN, have tended to favour a substantive conceptualisation, albeit with little agreement on its exact institutional content. In determining the parameters of this content (and what, specifically, to prioritise), it is useful to consider how the rule of law contributes to the larger project of peacebuilding.

Rule of law as a tool for peacebuilding

Rule of law assistance is understood to contribute to the ends of peacebuilding by helping to establish stability and security in post-war or unstable societies, and prevent the emergence or re-emergence of violent conflict. Specifically, it can do so by providing mechanisms for settling conflicts peacefully and addressing the inequalities and grievances underlying these conflicts. As Daniel Levin writes, "when institutional power is distributed in such a way that each potentially violent faction can see their interests being better protected by legal institutions", then "violent conflict becomes less attractive".[3]

It is often the case that in post-war societies various institutions constituting the rule of law are absent, dysfunctional or considered illegitimate. By building mechanisms and procedures that provide for the peaceful resolution of disputes while also constraining individuals' or groups' ability to resort to violent action, rule of law reform can not only decrease the likelihood of an escalation of violent conflict, but also form a legitimate institutional structure for instilling peaceful habits and patterns of behaviour.

While the activities and policies pursued under the heading of rule of law reform are varied, they can be grouped under two broad pillars:

(1) reforms aimed at creating a system of laws that provide the "rules of society" and offer reliability, predictability and justice, while also providing norms that define appropriate societal behaviour and protect individual rights; and
(2) reforms aimed at creating a set of institutions that provide for the peaceful resolution of disputes, enforce laws, and regulate the political and judicial system.

Laws and rights

A central focus of rule of law assistance is law reform. Laws and legal codes may require revision to remove outdated provisions or provide for the protection of, say, basic rights in criminal procedures or minority rights. The latter may require, as in post-Soviet Georgia, the removal of openly discriminatory legislation. Commercial laws, banking legislation, property rights regimes, and civil and political rights are also common areas of reform, with many laws transplanted from Western systems. Increasingly, international donors also seek the recognition and enforcement

3 Daniel H. Levin, "Rule of law, power distribution, and the problem of faction", Mortimer Sellers & Tadeusz Tomaszewski, eds, *The Rule of Law in Comparative Perspective,* Dordrecht, Springer, 2010, p 151.

in national law of various international human rights standards and agreements. In Liberia, for instance, UN assistance has focused on the ratification of and accession to various international treaties and protocols.

While the content of laws has been an important focus for donors, many have also focused on improving legal certainty in post-conflict societies. Such certainty allows individuals and businesses to plan their activities by knowing what conduct is permissible and can be undertaken without fear of government sanction. Citizens may also interact with one another knowing in advance how disputes will be resolved and what rules will be applied to a dispute. Reforms thus also aim to ensure that laws are crafted through public processes and made public, decisions of courts made binding, limitations introduced on the retroactivity of laws, and laws (as well as court decisions) drafted in clear, accessible language.

Institutions

Reform focused solely on legislative changes overlooks a common gap between the so-called law on the books and law in practice. For laws to function as intended, institutions also need to be set up and empowered. The increased competency, efficiency and accountability of legal institutions has therefore been a second important focus of rule of law reform efforts. Basic steps include providing improved training and salaries for judges and court staff to ensure judicial independence, as well as establishing an efficient system for the authoring and easy dissemination of judicial decisions. Police, prosecutors, public defenders and prisons are all central to the rule of law and benefit from reform to improve skills levels and root out corruption. Similarly, improved legal education and new or redrafted ethics codes and professional standards for lawyers and other judicial actors improve the quality of legal representation and decision-making. Finally, in some jurisdictions entirely new court structures may be required. In post-war Bosnia, for example, a new Constitutional Court and Human Rights Chamber were established with jurisdiction to hear claims of human rights violations. Both have proved to be important institutions in securing a vision of a multicultural state and rejecting often-institutionalised.

Problems and challenges of rule of law reform

Notwithstanding the prioritisation for the past two decades of the reform of laws and legal institutions in war-torn societies as an indispensable tool for post-conflict reconstruction, international institutions have been criticised for their technocratic approach and poor results. A number of problems and challenges can be identified.

Unco-ordinated activities and legal transplants

Peacebuilding is a daunting task in many post-conflict countries that encompasses numerous activities in various areas such as the military and security, the political and constitutional, the social and economic, and the psychosocial. Interventions in all of these areas often contain implicit or even explicit legal dimensions. Rule of law assistance programmes are thus implicated in an expanding number of programmatic areas. Such activities as drafting national justice strategies; assisting constitution-making processes; engaging in legislative reform; strengthening police and law enforcement institutions; strengthening justice and correctional institutions; improving gender justice; and addressing housing, land and property issues all now fall under the banner of rule of law reform. In this context, delineating a co-ordinated approach that prioritises those specific legal reforms most needed in a given post-conflict society has been a major challenge.

Conceptually expansive, externally imposed notions of the rule of law risk becoming little more than a banner under which peacebuilding and developmental activities in general can be grouped. As more and more institutions or specific legal norms are added to a substantive definition, the rule of law increasingly comes to resemble the legal systems and institutions of donors themselves. Rule of law promotion can thus quickly become simply an attempt to transplant Western legal institutions and cultural societal models, with little appreciation for local contexts or the goals that such reforms are intended to advance. Past experience, such as that of the Law and Development movement in the 1960s and early 1970s, suggests that many

societies and institutions are resistant to formal legal transplantation, while transplants often have unpredictable or even counterproductive effects.[4]

Narrow focus

If rule of law programmes are overly sweeping and broad in conception, in practice specific donors often adopt a myopic focus on narrow areas of reform at the expense of other areas. For example, in both Cambodia in the early 1990s and East Timor a decade later, a focus on military reform and electoral assistance was accompanied by a failure to address institutional weaknesses and the development of a sustainable judicial system.[5] In Liberia, UN assistance has focused on the ratification of and accession to various international treaties and protocols, while the Liberian government struggles to enforce its already existing laws; thus new obligations without accompanying improvements in enforcement capabilities will likely prove ineffectual.

One area of rule of law reform stands out as a particular concern. Many international donors increasingly adopt a business-oriented approach to rule of law reform activities, following the lead of international financial institutions such as the World Bank. Prescribed reforms focus on securing the private property rights of international investors and entrenching contractarian market relations; thus the security of private property, the facilitation of business activity and the removal of "inefficiencies" such as labour protection regimes are the privileged areas of concern. This business-oriented focus overlooks the legal concerns of subaltern citizens and, insofar as such reforms advance neoliberal policies of wholesale liberalisation and deregulation (which have historically led to the growth of socioeconomic inequality, insecurity and human misery), may actually exacerbate the grievances precipitating violent conflict.[6]

Maintenance of illiberal regimes

In numerous cases the establishment of rule of law programmes has not prevented the persistence of authoritarian regimes in recipient countries. In fact, conceived in its thin, procedural form, the rule of law is not necessarily incompatible with illiberal or even repressive regimes. Where reform is focused narrowly, it may even become a coercive instrument to suppress dissident political activities. For instance, in Nigeria, anti-corruption laws have been manipulated to target political opponents. Moreover, a narrow focus on the formal legal equality of individuals before the law may actually obscure (or even legitimate) a markedly unequal social order and the grievances that give rise to social conflict. For example, in labour disputes the law is applied neutrally, with workers and owners of capital treated as equals. However, this process makes the very division of people into labourers and capital owners seem natural and inevitable. In celebrating the juridical equality of all citizens and the neutrality of the law, power relations and broader questions regarding the distribution of and access to material and cultural resources in society that constrain the enjoyment of formal freedoms are eclipsed.

Recommendations

A comprehensive approach to rule of law reform

The problems discussed above suggest, in the first place, that individual reforms alone are unlikely to achieve desired ends without a comprehensive approach that recognises the interrelationship between various reforms and their results. For instance, in any attempts to improve law and order, focusing solely on criminal law and police reform will likely be ineffective if corrupt judges release criminals and prisons allow criminal networks to continue operating across prison walls. Reform and co-operation is required across institutions

4 David M. Trubek & Marc Galanter, "Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States", *Wisconsin Law Review,* vol 4, 1974, pp 1062-1102.

5 Kuong Teilee, "Transitional justice in Cambodia: a new challenge to the development of rule of law?", Per Bergling, Jenny Ederlöf & Veronica L. Taylor, eds, *Rule of Law Promotion: Global Perspectives, Local Applications,* Uppsala, Iustus Förlag, 2009, pp 151-173; Susanne Alldén & Ramses Amer, "The United Nations and peacekeeping: lessons learned from Cambodia and East Timor", Per Bergling, Jenny Ederlöf & Veronica L. Taylor, eds, *Rule of Law Promotion: Global Perspectives, Local Applications,* Uppsala, Iustus Förlag, 2009, pp 111-127.

6 See Tor Krever, "The legal turn in late development theory: the rule of law and the World Bank's development model", *Harvard International Law Journal,* vol 52, 2011, pp 287-319.

and would, in this example, include training judges; ensuring judicial independence; improving prison services; and improving judicial institutions, court structures, prosecutorial services and so on.[7]

A comprehensive approach can also guard against the risk that rule of law improvements in one area may actually decrease success or undermine those in others. For instance, strengthening the judicial independence needed to protect against government abuse of power may be in tension with efforts to eliminate corruption in the judiciary. Similarly, as already noted, a myopic concern with the protection of foreign investors' private property rights and the enforcement of their contracts ignores the needs of others, such as poor citizens and civil society actors, with which these principles may conflict.

What is required is a tailored assessment of needs that allows for particular programmes to prioritise what is essential for a given context, while co-ordinating reform efforts between various local and international actors. Such an approach has had a positive impact in Kenya. There, the Governance, Justice, Law and Order Sector Reform Programme has co-ordinated activities among 32 government agencies, NGOs and international donors, and devised a broad approach to tackling problems of corruption and low levels of access to justice.

Rights awareness and legal empowerment

A comprehensive approach must also address those extra-legal elements indispensable to the rule of law. A checklist of formal rules and institutions, no matter how extensive, will be insufficient. For example, even though they are recognised in law, citizens' rights can be dramatically limited simply by difficulties in accessing courts and legal services. Individuals, but especially the poor, need skills and knowledge to access the legal protections that may be theoretically available, but otherwise difficult to obtain. An important aspect of rule of law reform is thus necessarily legal empowerment. Reforms should focus on broadening access to courts and alternative dispute resolution mechanisms. No less important is increased awareness, both of officials' obligations and individuals' rights. People will only use legal protections and avenues for dispute resolution if they know about them.

Legitimacy through local ownership

The rule of law, as should now be clear, is not simply the sum of legislation, courts, legislatures, police and other legal institutions. "Law is also a normative system that resides in the minds of the citizens of a society" and, as such, reforms should look not only to build institutions, but also "to intervene in ways that would affect how citizens understand, use, and value law."[8] Any number of legal and institutional reforms will be insufficient for the rule of law to operate in a society unless they are accompanied by a culture of respect. The rule of law requires widespread acceptance across society: individuals and organs of state power – such as the executive, legislature, police, armed forces, etc. – must accept that they are subject to the law and may operate only according to those powers consistent with the rule of law.[9] So, for example, if one wants to address issues of law and order, improving the operation and reliability of a country's police and courts may be an important step, but individuals' compliance with the law will be equally a product of the perceived legitimacy of the law and, in turn, the legitimacy of political law-making processes. Of course, such respect will develop over time as the law is shown to address and respond to the needs of individuals and groups.

In the short term, legitimacy can be enhanced through the local ownership of rule of law reform projects. All too often international donors have interfered directly in the political, economic and judicial systems of recipient countries. Instead, rule of law reform should be pursued through consultative processes, not only with political

7 Rachel Kleinfeld, "Competing definitions of the rule of law", Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge,* Washington, DC, Carnegie Endowment for International Peace, 2006, p 41.

8 Thomas Carothers, "The problem of knowledge", Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge,* Washington, DC, Carnegie Endowment for International Peace, 2006, pp 20-21.

9 Erik O. Wennerström, "Measuring the rule of law", Per Bergling, Jenny Ederlöf & Veronica L. Taylor, eds, *Rule of Law Promotion: Global Perspectives, Local Applications,* Uppsala, Iustus Förlag, 2009, p 65.

or economic elites, but also those broader segments of the population directly affected by reform. Where international actors, impatient with drawn-out processes of local consultation and local ownership, delineate reforms unilaterally, countries may end up with constitutions or laws written by foreign experts that, "while often of high quality, are never accepted or implemented by the national stakeholders".[10]

Often the most pressing concerns are not those immediately presupposed by outside observers. For instance, when the International Development Law Organisation arrived in post-tsunami Aceh it was certain that land rights reform was the most urgent issue, with a weak formal judicial system likely to struggle with a predicted increase in land disputes. Only when they were actually in the country did representatives understand that land rights were not a major hurdle in post-tsunami rebuilding, and they were forced to refocus their efforts.[11] The World Bank's assessments of many countries' rule of law needs are largely drawn from consultation with and surveys of business elites. It is no surprise that the attendant prescriptions for reform often lack legitimacy among large parts of the population.

Exploring the plural legal landscape

In engaging in local consultation and encouraging local ownership, international actors should also be sensitive to the plurality of legal systems that may exist and operate in post-conflict countries. The rule of law advocated by such actors, in its thin or thick incarnations, is, with its focus on individual rights and state-centred institutions, a distinctly liberal Western conception. In Aceh, for example, attempts to institute a formal land titling system clashed with traditional community-based land systems. Similarly, in Somalia, efforts to strengthen individual rights conflicted with customary systems of communal and shared rights and duties over land, water and crops. Dispute resolution systems are also often community based, operating through informal institutions rather than a formal, state-organised system of courts and judicial bodies. Excluding and dismissing these alternate legal orders undermine the legitimacy of reforms and may ultimately undermine citizens' access to law and justice.[12]

Experiences of legal pluralism, such as in Mozambique, East Timor or Afghanistan, point to a more productive way of assisting in the implementation of a rule of law that strengthens non-violent relations as the norm and simultaneously secures accessibility to and legitimacy among local actors of both formal and traditional justice systems. Some international donors have started to recognise the advantages of traditional community justice mechanisms: they are more culturally and linguistically familiar to parties, have lower costs, and are often based on conciliation and mediation rather than the adversarial model of European and American justice systems.

This is not to say that all forms of community justice are democratic; indeed, some reproduce social inequalities and there is a risk of creating an "ethnic law" for second-class citizens.[13] Yet, acknowledging the normative heterogeneity present in most societies and the porosity between different legal norms presents an opportunity to strengthen more democratic forms of justice and the means to better induce compliance. Exploring the complex and hybrid legal landscape instead of revising the legal framework of war-torn states to model that of Western states accounts better for local social and cultural understandings and practices of justice, ultimately facilitating enforcement and the promotion of peace.

10 Shelby Quast, "Rule of law in post-conflict societies: what is the role of the international community?", *New England Law Review,* vol 39, 2004, p 47.

11 Yuzuru Shimada, "The role of law in the reconstruction process of the Aceh tsunami disaster", Per Bergling, Jenny Ederlöf & Veronica L. Taylor, eds, *Rule of Law Promotion: Global Perspectives, Local Applications,* Uppsala, Iustus Förlag, 2009, pp 175-188.

12 See, for example, Boaventura de Sousa Santos, João Carlos Trindade & Maria Paula Meneses, eds, *Law and Justice in a Multicultural Society: The Case of Mozambique,* Dakar, CODESRIA, 2006.

13 Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism,* Princeton, NJ, Princeton University Press, 1996.