

International Rule of Law and Professional Ethics

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Chapter 4

Reflections on the Rule of Law:

Its Scope and Significance for Partners in Development

by John Barker

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John Barker¹

Introduction

In the past decade or so, multilateral and bilateral development agencies have sought to articulate and support the rule of law in host States as part of a wider strategy to promote stability, good governance and development.² While the rule of law may have been overestimated³ as a mechanism for resolving political conflict,⁴ corruption and poverty, there has been a tendency to oversimplify its meaning in a manner that unduly restricts its application and influence.

1 The author has served as a consultant to multilateral and bilateral development organisations in the design, implementation and evaluation of justice sector programmes in west and southern Africa over the course of some 20 years. He would like to acknowledge with gratitude the insights of many colleagues whose views and experiences have helped to shape these observations; however, responsibility remains solely with the author.

2 It is revealing to compare the evolving definitions and strategies employed by the World Bank, UNDP and the EU, as well as bilateral donors and NGOs such as the International Commission of Jurists and the International Crisis Group. See also Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press, 2011) and *Guide to Rule of Law Country Analysis*, USAID, 2010. For a history of the subject, see Brian Z. Tamanaha, *On the Rule of Law* (Cambridge University Press, 2004), 9. For observations about the importance of the security sector, see Mark Schneider, 'Placing Security and Rule of Law on the Development Agenda', Development Outreach, The World Bank Institute (Washington, 2009), accessible at: <http://siteresources.worldbank.org/WBI/Resources/213798-1253552326261/do-oct09-schneider.pdf> (accessed 16 December 2012).

3 The Commission on Legal Empowerment of the Poor correctly drew attention to the need for legal empowerment but is characterized as being overly optimistic about its impact and possibly harmful in excessive legal formalization. Humphreys, *Theatre of the Rule of Law*, 211ff.

4 Jeremy Farrall, 'Impossible Expectations? The UN Security Council's Promotion of the Rule of Law after Conflict', in *The Role of International Law in Rebuilding Societies after Conflict*, ed. Brett Bowden, Hilary Charlesworth and Jeremy Farrall (Cambridge University Press, 2009), 135.

Differences in institutional mandates, skill sets and agendas have shaped agencies' understanding of the rule of law. This in turn has had considerable bearing on their strategies and areas of focus. The result has been a rather limited understanding and inadequate approach to promoting the rule of law with consequences for public decision-making and the level of development achieved.⁵

This chapter seeks to explain some of the theoretical underpinnings of the rule of law concept as well as their implications. The practical observations contained here are based on field experience in the design and implementation of projects in support of the rule of law in the context of development.⁶ The purpose here is not to provide a comprehensive survey or a formulaic definition of the rule of law,⁷ but rather to offer some empirical lessons and draw attention to available opportunities to deepen and widen strategies for its effective promotion.

The first part of this chapter sets out a conceptual framework that seeks to illuminate important foundational concepts, before drawing attention in the second part to some salient lessons that flow from the way we think about the rule of law which in turn may help to facilitate more effective programming. It will be argued that, for the rule of law to be realized, law formation must be insulated by democratic processes from self-serving political forces that sacrifice the interests of citizens to enrich and/or entrench economic and political elites.

It will also be argued that an understanding of the rule of law that emphasizes enforcement cannot serve the complex legal, social, political and economic needs of society or permit law to play its full role as a transformational force in development. There has been a tendency in the past to confine justice sector programming efforts to the administration of justice (meaning courts and tribunals, Ministries of Justice, law reform and human rights bodies, the practising bar, police, prisons, and anti-corruption agencies) or to narrow it down further

5 See Kevin E. Davis and Michael J. Trebilcock, 'The Relationship between Law and Development: Optimists versus Skeptics', *American Journal of Comparative Law*, 56, no. 4 (2008); NYU Law School, Public Law Research Paper No. 08-14; NYU Law and Economics Research Paper No. 08-24, available at SSRN: <http://ssrn.com/abstract=1124045> (accessed 16 December 2012). See also Michael Trebilcock, 'The Rule of Law and Development: In Search of the Holy Grail', in *The World Bank Legal Review (vol. 3), International Financial Institutions and Global Legal Governance*, ed. Hassane Cissé, Daniel D. Bradlow and Benedict Kingsbury (World Bank 2012), 207–39. See also *The World Bank Legal Review (vol. 4) 'Legal Innovation and Empowerment for Development'*, ed. Hassane Cissé, Sam Muller, Chantal Thomas and Chenguang Wang (World Bank, 2013), at <http://issuu.com/world.bank.publications/docs/9780821395066> (accessed 7 February 2013).

6 The author was involved with the design of justice sector support programmes developed by the European Union, the UNDP, the Office of the High Commissioner for Human Rights, the UK Department for International Development, the Canadian International Development Agency, British Council and various NGOs.

7 For an invaluable repository of available literature on the rule of law and other governance materials, see Governance and Social Development Resource Centre www.gsdr.org (accessed 16 December 2012).

to the criminal/juvenile justice sector.⁸ Such interventions may be essential but are hardly sufficient, bearing in mind that there is no sphere or department of government, including the legislative branch, that lies beyond the reach of an extensive web of legal imperatives⁹ in which legal rules, information, advice and training play a fundamental role in optimizing decision-making outcomes, the holy grail of good governance.

Another fundamental aspect of the rule of law often overlooked is its implicit structuring of decision-making in all parts of government. One example is the strictures of administrative justice which confront capricious decisions tainted by bias or arbitrary considerations. Arguably, the citizens of all nations have a right to *responsible* decision-making in the sense that public decisions should be structured (bound by rules that promote reasonableness and procedural justice), accountable, evidence-based, strategic, ethical and directed to promoting the public interest. While the individual elements of responsible decision-making are reasonably well understood, the knowledge is specialist in nature and dispersed across many disciplines. More work is needed to integrate this knowledge into a unified discipline as a part of its practical realization.

A further aspect of the rule of law, frequently overlooked but closely bound to the most pressing interests of citizens, is economic justice. Ideological confrontation coupled with difficulties inherent in reconciling market forces with fairness have meant that economic justice has not been well served. Although regulatory mechanisms, competition laws and consumer law are meant to level the playing field and promote wider access to opportunities, goods and services, many economies are feeling the crippling effects of failure to regulate markets effectively. This is a rule of law problem because it is the rules and on whose behalf they are written that determine how the goods of society are allocated.

Finally, when societies are critically examined through the lens of rule of law and especially good governance, the distinction between ‘developed’ and ‘developing’ fades as the limitations and needs of more developed economies come more clearly into view. Accordingly, we need to work respectfully and innovatively together as partners to find solutions that address similar and increasingly urgent structural problems confronting both sides of the North–South divide.

⁸ See, for example, the narrow scope of The United Nations Rule of Law Indicators: Implementation Guide and Project Tools, 2011 at http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf (accessed 16 December 2012).

⁹ Legal requirements imposed upon officials throughout government include rules proscribing the receiving of benefits and other obligations arising from administrative law, for example, discussed below in ‘Practical Lessons’.

Conceptual Framework

Rule of Law as Principle

The rule of law¹⁰ occupies a key position in the firmament of interconnected concepts and principles that contribute to good governance, recognized in the Declaration of Millennium Goals¹¹ to be a precondition of development. Examples of other constitutive principles of good governance include legitimacy,¹² constitutionalism,¹³ legality,¹⁴ accountability,¹⁵

10 For an excellent discourse on the rule of law, see Tom Bingham, *The Rule of Law* (Allen Lane, 2010).

11 Some key documents on the UN and the rule of law are: United Nations Millennium Declaration (A/RES/55/2); 'The Brahimi Report': Comprehensive review of the whole question of peacekeeping operations in all their aspects (A/55/305); 2005 World Summit Outcome (A/RES/60/1); Secretary-General's Report 'In Larger Freedom: Towards Development, Security and Human Rights for All' (A/59/2005); Secretary-General's Report 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies' (S/2004/616); Secretary-General's Report 'Uniting Our Strengths: Enhancing United Nations Support for the Rule of Law' (A/61/636); Secretary-General's Report 'Strengthening and Coordinating United Nations Rule of Law Activities' (A/63/226); Secretary-General's Report 'Annual report on strengthening and coordinating United Nations Rule of Law Activities' (A/64/298).

12 Legitimacy is a complex and pervasive concept that is more far-reaching than legality, capturing the notion that authority claimed or exercised is duly constituted and maintained over time in both form and substance, reflecting a politically or socially acceptable level of support or consensus. See Michel Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy', *Southern California Law Review* 74 (2001), available at SSRN: <http://ssrn.com/abstract=262350> or <http://dx.doi.org/10.2139/ssrn.262350> (accessed 16 December 2012); Thomas M. Franck, 'Democracy, Legitimacy and the Rule of Law: Linkages', NYU Law School, Public Law and Legal Theory Working Paper No. 2 (1999), available at SSRN: <http://ssrn.com/abstract=201054> or <http://dx.doi.org/10.2139/ssrn.201054> (accessed 16 December 2012). See also Lukas Meyer, *Legitimacy, Justice and Public International Law* (Cambridge University Press, 2009).

13 Constitutionalism establishes, structures, legitimizes and limits the exercise of public authority through a stable, paramount framework of laws and conventions that configure key institutions and their respective mandates and powers, as well as the processes by which laws are made and amended.

14 Legality refers to the principle that actions must be duly authorized and in conformity with legal requirements. A more technical understanding includes notions of legal clarity and non-retrospectivity. See discussion under 'Legal Regularity' below. See also Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2009), 15–19, 23.

15 Accountability can take many forms including political accountability, legal accountability, financial accountability, functional accountability for employment and contractual services, professional accountability, collegial accountability to peers, moral accountability to faith communities and familial accountability to family and clan. These

effectiveness,¹⁶ separation of powers,¹⁷ participatory democratic processes, good faith, fairness,¹⁸ justice¹⁹ and respect for human rights.²⁰ A definition offered by the Office of the UN Secretary-General illustrates the aggregation of concepts and the difficulty of providing a standalone definition that is not influenced by context:

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²¹

This seeming jumble of concepts, aspirations and norms serves as important organizing principles for delivering justice. They manifest themselves through rules and institutional arrangements at every level, including customary

tend to have strong moral and ethical dimensions. Accountability is often in tension with independence of action. In many offices of State and independent bodies such as judicial officers, police chiefs, prosecution agencies, anti-corruption agencies, human rights commissions, ombudsman functions, complaints commissions, central banking functions, regulatory bodies, etc., the challenge is to balance mechanisms that maximize public accountability and minimize political interference, a significant indicator of the quality of the rule of law.

16 Effectiveness is particularly relevant to public service delivery and requires capability. It is the foundation upon which the State entities make a claim to public revenues and in respect of which the legitimacy of many States is now severely tested. This includes the provision of support and protection to citizens from security arrangements to health, social services, education, infrastructure and regulatory frameworks.

17 See Latimer House Guidelines, http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7BACC9270A-E929-4AE0-AEF9-4AAFEC68479C%7D_Latimer%20House%20Booklet%20130504.pdf (accessed 16 December 2012).

18 Thomas M. Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995), 7ff.

19 The distinction between fairness and justice is the subject of debate, but justice is taken here to be more closely anchored to the normative and institutional recognition of legal obligations and entitlements.

20 Brian Z. Tamanaha, 'A Concise Guide to the Rule of Law', in *Florence Workshop on the Rule of Law*, ed. Neil Walker and Gianluigi Palombella, St. John's Legal Studies Research Paper No. 07-0082 (Hart Publishing Company, 2007). Available at SSRN: <http://ssrn.com/abstract=1012051> (accessed 16 December 2012).

21 (S/2004/616) Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: www.un.org/en/ruleoflaw/ (accessed 16 December 2012).

international law, international conventions, bilateral treaties, constitutional instruments, statutes, regulations, decrees, policies, and decisions of courts and tribunals. They may be informal or formal, directive²² or mandatory, permeating professional codes and best practice and mediating a wide range of relationships at the interstate level, among the three branches of government and between State and citizen. They also inform the rules of engagement between the State, the private sector, the not-for-profit sector and at the interface between national institutions and the international community.²³

The principles that shape the rules and institutional arrangements referred to above are not themselves laws and therefore are not legally binding *per se*. This is not a weakness, for they are arguably more influential than formal laws by virtue of their import, stability and universality, informing and guiding the pursuit of justice in its more tangible forms. Occupying loftier realms of shared human aspiration, they are independent of particular legal and political systems and beyond the reach of trade-offs and compromised ideals that breed injustice in how they are applied in practice. While often ignored or overridden in the pursuit of self-interested goals, history and daily experience are full of evidence that a yearning for an inclusive, fair society still burns brightly in the collective consciousness of humanity and in articulated aspiration.

Constitutive Elements of the Rule of Law

Considerable resources have been invested in the promotion of the rule of law, based upon a quite rudimentary understanding of its meaning. These investments have not lived up to expectation,²⁴ raising the question of whether the traditional emphasis on supporting the supply side of legal service delivery is deficient as a strategy and, at a more basic level, whether the rule of law is more of an outcome than a tool. It is submitted that, although the rule of law is the resultant of many political, cultural and resource-driven forces often hidden from view, a failure to grasp its scope and potential has led to missed opportunities to use some of its elements to greater effect as levers.²⁵

22 Directive is meant here in the constitutional sense of not having direct binding legal effect but indirect influence as an aid to interpretation.

23 See discussion at p. 96, below, on the need for the international community to incorporate principles of good governance in the manner in which it engages with developing countries.

24 Thomas Carothers, 'Promoting the Rule of Law Abroad', Carnegie Endowment for International Peace, *Rule of Law Series*, no. 34 (January, 2003), 3. For a discussion of the promotion of the rule of law and the Law in Development movement, see Gordon Barron, 'World Bank and Rule of Law Reforms', in *LSE Working Paper Series* no. 05-70 (2005) accessible at: www2.lse.ac.uk/internationalDevelopment/pdf/WP70.pdf (accessed 17 December 2012).

25 See, for example, Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (Carnegie Endowment for International Peace, 2012).

In exploring this question, it is illuminating to consider constituent layers of the rule of law separately – although they are more blended in practice. These layers are considered below under the rubric of law and order, legal regularity, procedural justice, institutional capacity and substantive rights.

Law and Order

At its most basic, the rule of law is contrasted with a state of lawlessness where order breaks down and citizens take the law into their own hands. Conversely, where the rule of law prevails, laws are observed and enforced, people are safeguarded, contract and property rights are respected and offenders are punished. Keeping the peace is generally regarded as the first order of business of the State. The importance of maintaining order is starkly illustrated in stabilization and post-conflict situations, which allow little room for development while human security is under threat.²⁶

This understanding is far from complete, however. First, conflating enforcement and compliance tends to emphasize coercive measures. This can be highly counterproductive. Second, it does not distinguish between forms of illegality fatal to socioeconomic ordering and forms of law-breaking routinely managed by legal systems. Third, it does not address the problem of *who* determines the content of the law and in whose interest. In many nations, one of the greatest challenges of our time is preventing those entrusted with power from preying on their own populations and public goods. Fourth, it does not do justice to the rich spectrum of dispute resolution mechanisms that serve to prevent as well as to settle disputes and promote harmony, trust and productive relations.

The rule of law has a strategic role to play well beyond the application of coercive enforcement measures to keep order. A regime that imposes itself merely to restore or maintain law and order is difficult to distinguish from other rent-seeking protection rackets – and one that invites competition from others as local populations apprehend the extent to which their own development is being held back. It is in this context that undemocratic, weak and failed States are most prone to State capture by narrow interests.²⁷

26 See also World Bank survey Voices of the Poor, Deepa Narayan et al., *Can Anyone Hear Us? Voices from 47 Countries*, (1999) which highlighted security as a priority need articulated by the poor. <http://siteresources.worldbank.org/INTPOVERTY/Resources/335642-1124115102975/1555199-1124115187705/vol1.pdf> (accessed 16 December 2012).

27 http://www.foreignpolicy.com/articles/2011/06/17/2011_failed_states_index_interactive_map_and_rankings (accessed 19 January 2013).

Legal Regularity

A more technically rigorous understanding of the rule of law includes a grasp of qualities that distinguish law from other normative imperatives over and above the manner of their enforcement. These qualities emphasize legal regularity and predictability to guide the conduct of those subject to the law.²⁸ Such qualities include public promulgation, clarity, prospectivity, relative stability,²⁹ generality³⁰ and equality in their application. There is also an emphasis on law guiding and limiting the discretion of public officials.³¹ These elements introduce an indispensable manifestation of justice wherein citizens have due notice of their obligations and derive significant social and economic benefits from legal continuity and protection from arbitrary decision-making.

Procedural Justice

More ambitious formulations of the rule of law seek to ensure procedural fairness³² by reference to principles of natural justice and due process.³³ These are potent

28 This view is represented by writers such as Joseph Raz, in 'The Rule of Law and its Virtue', in *The Law Quarterly Review* 93 (1977), 195.

29 These four are among the eight characteristics of a viable legal system postulated by Fuller, including rules-based coherence, being free from contradiction, implementation being possible and congruence between law and the actions of those enforcing law are cited in Lon Fuller, *The Morality of Law* (Yale University Press, 1969).

30 This means directed at the community as a whole and not at particular persons. Sometimes referred to as 'laws of attainder', *ad hominem* statutes were also considered a breach of separation of powers and of due process requirements. Peter Gerangelos, 'The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases', *Federal Law Review* 30, no. 1 (2002).

31 'The rule of law does not require that official or judicial decisionmakers should be deprived of all discretion, but it does require that no discretion should be unconstrained so as to be potentially arbitrary. No discretion may be legally unfettered.' Bingham, *The Rule of Law*, 54.

32 Many civil and political rights are protected and realized through procedural requirements. In criminal cases these include the presumption of innocence, the right to be represented, the right of the accused to know the case to be answered, the right to be heard and the right to cross-examine witnesses.

33 Due process appeared in the 1326 version of the Magna Carta. The phrase 'natural justice' is used in the United Kingdom in preference to 'due process' which in American law involves additional procedural and substantive safeguards, or 'fundamental justice' which appears in Canadian law. Constitutional differences between the US and UK impeded the development in the UK of judicial review processes, particularly the sovereignty of Parliament doctrine which, until membership in the EU and accession to numerous human rights conventions, was treated as *carte blanche* for members of Parliament. It is still regularly employed by political elites in many countries to legislate as they see fit even in cases where there are major constitutional constraints. The fact that Members of Parliament

forces for good. There is a tendency to underrate the impact of procedural rules on substantive outcomes, yet procedural justice forms a central pillar of justice by virtue of its capacity to introduce structure, discipline and accountability to public decision-making that so often determines in practice the realization of rights. By providing a useful framework to guide State officials and traditional authorities such as chiefs through complex decision-making processes, procedural justice represents an important pathway to substantive fairness.³⁴

Institutional Capacity

Some definitions incorporate institutional requirements that the justice sector provide a basic level and quality of service delivery.³⁵ An independent judiciary³⁶ is seen by many as an integral part of the rule of law in order to assure impartiality in deciding cases and mediating disputes.³⁷ Some go further, requiring threshold levels of competence, access and resourcing throughout the sector in order to function effectively in enforcing or realizing rights. Problems of access include geographical, financial and linguistic barriers, rights awareness, rule complexity, standing and representation, abuse of process and delay. Rights that can be claimed through the courts have a different character from those which can only be realized

are elected is, by some logic that remains mysterious, treated by some parliamentarians as a modern day version of the divine right of kings, contrary to the rule of law. This is what the Magna Carta itself sought to address in relation to the sovereigns of the day.

34 See 'The Judge over your Shoulder' provided to the UK civil service at http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf (accessed 16 December 2012).

See also Bingham *The Rule of Law*, chapter 6. The Office of the President and Cabinet in Malawi has incorporated similar training into its programme for civil servants in all departments. See Christopher Forsyth and Steve D. Matenje, 'Some Reflections on Administrative Justice in Malawi: Practical Steps', *Acta Juridica: Comparing Administrative Justice across the Commonwealth* (2006): 389–404 (ISSN: 00651346). In addition, the EU funded a South African motivational training programme for judges and magistrates in Malawi that focused on the close relationship between ethical framework, motivation, morale and productivity.

35 The World Justice Project defines the rule of law by four principles: (a) the government and its officials and agents are accountable under the law; (b) the laws are clear, publicized, stable, and fair, and protect fundamental rights, including the security of persons and property; (c) the process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient; and (d) access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve. See <http://worldjusticeproject.org/what-rule-law> (accessed 16 December 2012).

36 Raz, *The Rule of Law and its Virtue*, 195.

37 Specialist tribunals and alternative dispute resolution (ADR) facilities including ombudsman functions are increasingly recognized as important tools supplementary to courts in addressing access to justice concerns.

through long-term investment of public resources to build service delivery, not only in the justice sector but in many non-justice subject areas as well. For this reason, a more holistic approach to the reach of law is required, explored further in the second part, below. Sadly, in many countries there is an inverse relationship between resources committed and level of greatest contact between the justice system and the citizen.

Substantive Rights

While more positivist definitions may include elements of procedural justice and institutional functionality, they stop short of positing justice or fairness as matters of substantive entitlement.³⁸ By contrast, there is a growing awareness that the rule of law cannot fully be realized if it cannot distinguish between laws that subjugate people and those that empower them. Without substantive norms such as human rights, law is too easily used as a tool of oppression, particularly of minorities and vulnerable groups.³⁹

Definitions aside, the fact is that national and international societies make complex demands on legal systems and their subjects. This demand comes from the commercial sector and through substantive human rights standards incorporated into legal instruments at every level, as illustrated by many socioeconomic rights. Few legal theorists, practitioners, politicians or citizens would suggest that goals such as the promotion of human rights, dignity and well-being are not compelling social and legal objectives, even if unjust laws happen to be on the books or are consistent with restricted academic definitions of the rule of law.⁴⁰ For many, injustice and rule

38 See Raz, *The Rule of Law and its Virtue*, 195. Note, however, that too much attention to a purely formal definition is somewhat artificial because in practice virtually every element exists in all legal systems and the presence of repugnant laws merely indicates that the rule of law is not a condition in a binary system. Moreover, imposing legal stability brings about a certain kind of empowerment of citizens through a reduction of risks normally associated with reliance on relative strangers.

39 According to the Universal Declaration of Human Rights, 'human rights should be protected by the rule of law', G.A. Res. 217A (III), U.N. Doc. A/810, Preamble (3) (1948). One of the most ambitious projects to articulate principles governing the rule of law was undertaken by the International Commission of Jurists in 1956. This initiative led to the Declaration of Delhi which includes socioeconomic rights as well as civil rights. The most recent survey-based project led to the Rule of Law Index of the World Justice Project based on nine qualities: limited government powers, absence of corruption, order and security, fundamental rights, open government, effective regulatory enforcement, access to civil justice, effective criminal justice and informal justice.

40 In fact there are many reasons why justice may be compromised, including juridical reasons. Law often serves two masters, namely the public as a whole and individuals in their unique circumstances. It is difficult to achieve in any given instance a result that does justice to all, whether in legislation or in court rulings.

of law involves a logical contradiction, especially if one takes as axiomatic that the intended beneficiaries⁴¹ of the political-legal-economic system are citizens.

Many deplorable practices, such as the mutilation and trafficking of children and women, cannot be justified by cultural relativity and often involve serious criminal offences that already form part of the penal laws of most countries. A further risk associated with naive deference to many traditional systems is a perpetuation of gender-bias and other injustices inherent in some traditional power structures. The challenge can also come, however, from limited institutional capacity and resources to confront entrenched positions and sensitize communities.

Importing, if not imposing, a growing array of substantive norms is not without cost, however. The more inclusive and prescriptive the rule of law is, the harder it is to reconcile such imperatives with the values of other cultures, also reflected in their formal and informal legal systems.⁴² These external values need a chance to root organically within a culture. The price of imposing norms can be active resistance or backlash, impaired long-term buy-in, and a weakening of any claim to universality and even legitimacy.⁴³ Moreover, other important rights can be eclipsed and undermined when the rights system is politicized and targeted. Nor is a cavalier attitude on the part of more developed countries conducive to self-examination and identification of notable deficiencies within their own political, legal and economic systems.

While not denying the global importance or constitutional nature of the principal global conventions and *jus cogens* norms, it is not easy to prescribe how far to press substantive human rights norms that are embodied in some regions but opposed in others.⁴⁴ This requires considerable care and a level of local knowledge that many international organizations and observers do not possess, seek or build into their programmes at an early formulation stage.

Arguably, a more effective approach would be to focus on the procedural aspects of decision-making, such as legal presumptions and principles of natural

41 By 'principal beneficiary' is meant the reference point for any measure of efficacy.

42 See John Reitz, 'Export of the Rule of Law', *Transnational Law and Contemporary Problems* 13 (2003): 429; Randall Peerenboom, 'Varieties of the Rule of Law: An Introduction and Provision Conclusion', in *Asian Discourses on Rule of Law*, ed. Randall Peerenboom (Routledge Curzon, 2004). Inclusionary definitions have to be more flexible in their interpretation of how relative, context or resource-dependent certain rights, especially the socioeconomic rights, are. See also Simon Chesterman, 'An International Rule of Law?' *American Journal of Comparative Law* 56 (2008): 331–61. The more prescriptive the normative content, the more one must determine how flexible and responsive it can be without being weakened or compromised in some fundamental way.

43 See Humphreys, *Theatre of the Rule of Law*, 224.

44 As gay rights campaigns in parts of Africa demonstrate, stark fault lines are reflected in confrontations over substantive rights. Unfortunately, for many in Africa the concept of minority rights has, as a result, become restricted and taken on a pejorative meaning. Moreover, sharp differences in cultural values have thrown a political lifeline to moribund dictatorships in several African States.

justice, since they can strongly influence substantive outcomes without undue external interference. This is especially useful when engaging with traditional leaders who are responsible for dispute resolution and resource management at community level. This approach may facilitate a more harmonious and authentic evolution of public perceptions and cultural practices, especially in countries such as in the Middle and Far East where the subject of human rights is perceived as excessively confrontational and threatening to traditional values.

The above is no more than a tentative conceptual framework that separates key aspects of the rule of law and presents them as progressive layers intended to underpin and frame the observations that follow.

Practical Lessons

Rule of Law and Democratic Lawmaking Processes

Aristotle's 'law should govern'⁴⁵ reflects an aspiration down the ages for limits to be placed on the predatory, arbitrary and irrational exercise of power that has caused immeasurable human suffering.⁴⁶ The assertion that 'no one is above the law'⁴⁷ has far-reaching implications for democratic processes and the pursuit of justice. It is in fact a highly *political* formula that reverses power and replaces the empty 'people's' rhetoric of aging dictatorships and faded revolutions with something rather more genuine. In this formulation, leaders are in every sense trustees,⁴⁸ bound to serve the citizen and to derive only such benefits as are prescribed by rules that ultimately should lie beyond their powers.⁴⁹

45 'Politics, Book 3', ed. Jonathan Barnes, *The Complete Works of Aristotle*, The Revised Oxford Translation (Princeton University Press, 1984).

46 See the first rule of law principle of the World Justice Project, p. 85, footnote 35, above.

47 Albert V. Dicey, *An Introduction to the Study of the Law of the Constitution*, 5th edn (Macmillan, 1897). First published in 1885, Dicey popularized the term 'rule of law', describing it as 'a trait common to every civilised and orderly state', p. 180. According to Dicey, not being above the law requires an equality of all persons in relation to enforcement mechanisms as well: 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals', p. 185. Being 'ruled by law' means that one can be 'punished for a breach of law, but he can be punished for nothing else', p. 194.

48 This is made explicit in s. 12(ii) of the 1994 Malawi Constitution 'All persons responsible for the exercise of powers of State do so on trust'.

49 This can be understood as a variation on the concept of a veil of ignorance. See John Harsanyi, 'Cardinal Welfare, Individualistic Ethics, and Interpersonal Comparisons of Utility', *The Journal of Political Economy* 63, no. 4 (August 1955): 309–21 at 316. See also John Rawls, *A Theory of Justice* (Belknap Press, 1971), 60.

Virtually all political leaders purport to rule on behalf of all citizens in accordance with the wishes of the people. However far apart theory and practice are, there is virtual unanimity in principle as to the identity of the intended beneficiaries of the political, legal and economic systems. This precept is essentially political in nature, presenting law as something other than a self-interested command.⁵⁰ Any 'insulating' process therefore must protect and take as its reference point the wishes and interests of citizens. There is no guarantee that their wishes and long-term best interests will coincide but consultative and open democratic processes provide the safest space for public and expert opinion to be shared and reconciled in an open and informed manner.⁵¹ Equally important is a vigilant and well-informed press and civil society as part of a wider matrix of accountability that includes the legitimate concerns of the wider international community.

Unfortunately, legal constraints upon those in power are often weak and easily circumvented. Where legislatures are overly compliant or where informed public scrutiny is lacking, laws are too malleable in the hands of ruling elites⁵² to conform in reality with the principle that 'no one is above the law'.⁵³ The rule of law must engage all aspects of lawmaking processes to ensure that its very essence is not to be undermined. Programmes that strengthen electoral and legislative processes have an important role to play,⁵⁴ but must be accompanied by strategies to promote access to information, a politically literate population, a vigilant media, procedural mechanisms such as ring-fenced constitutional provisions, and

50 See Austin's command backed by threats. John Austin, 'The Province of Jurisprudence Determined', ed. Wilfrid Rumble (Cambridge University Press, 1995, first published 1832); John Austin, *Lectures on Jurisprudence, or The Philosophy of Positive Law*, two vols (1879), ed. Robert Campbell, 4th edn, rev. (London: John Murray, Bristol: Thoemmes Press reprint, 2002).

51 The measure of risk (nuclear energy, genetically modified organisms, carbon emissions) may call for expertise but acceptance of exposure to significant risk requires legitimate public processes to provide the equivalent of informed consent. For a discussion of conditions for informed consent, see K.S. Shrader-Frechette, *Risk and Rationality: Philosophical Foundations for Populist Reforms* (University of California Press, 1991), 206–207.

52 Attempts by leaders or their supporters to remove presidential term limits illustrate the point – Russia, Colombia, Mexico, Sri Lanka, the Palestinian authority, Malawi, Zimbabwe, DRC and Somaliland are examples.

53 Essential qualities of law, such as predictability, stability and/or generality of application are also weakened. The effect of rule by decree creates a zone of impunity antithetical to the essence of the rule of law.

54 The crafting of standing orders and the strengthening of oversight responsibilities of Parliamentary committees are examples of important processes that are addressed by parliamentary support programmes. See, for example, *Strengthening Parliamentary Accountability, Citizen Engagement and Access to Information: A Global Survey of Parliamentary Monitoring Organizations*, World Bank Institute and NDI, 2011.

adequate consultative and deliberative processes.⁵⁵ All help to insulate the content of the law from the manipulations of ruling elites.⁵⁶

If too narrow a definition of law is used by those designing programmes in support of the rule of law, there is a risk of losing important opportunities to challenge illegitimate political processes and related problems that can circumvent and undermine the legal system itself. Confining efforts and resources to courts and the formal machinery of justice is not enough. Support must be provided to other key ministries such as those that are confronted by child trafficking, internally displaced persons, refugees, domestic violence and violations of international humanitarian law. Such design shortcomings can be found even in sector-wide programmes and are due to a combination of unfamiliarity with the subject, risk aversion,⁵⁷ and assumptions that the design features of other specialist programmes have the reach to deploy the wide range of specialist skills required.⁵⁸ Unfortunately, this assumption seldom proves correct. Unless those responsible for programme design in the justice sector ensure essential linkages with democratic process and wider socioeconomic rights, law will continue to be used as a tool to serve the narrow interests of ruling interests at the expense of citizens.

Structured, Accountable Decision-making: An Emerging Right?

As with good governance, the rule of law is generally understood and promoted by focusing on the normative framework (especially the legal framework), on institutional structures, including processes and accountability mechanisms, and on building specialist legal skills within the sector.⁵⁹ These are indispensable; however, there is an unspoken assumption that they are sufficient to bring decision-making up to a desired standard. The international development community's limited impact over many decades, even where substantial investments have been made, challenges this assumption. The measure of success must be more than contributing to an overall functional objective, as the overworked term 'strengthens' conveys in the context of capacity-building. This is not ambitious enough.

55 See, for example, Jurgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. William Rehg (Polity Press, 1996), ch. 7.

56 See Larry Diamond, *The Spirit of Democracy* (Times Books, 2008).

57 Institutional risk-aversion is not compatible with work in this subject area. It requires skill and experience for external agencies to avoid being caught in political crossfire.

58 Support for the Clerk of Parliament, provision of legal reference materials, joined up training across the sector and public interest advocacy are often weak and fall between categories of programmes.

59 Other factors sometimes considered are: institutional culture, motivation and incentive systems, clan-based loyalty demands, and accountability to taxpayers and voters.

Humanity has paid a heavy price for the disastrous choices of the past, many of them unrecorded and hidden from view.⁶⁰ How many more losses will be incurred and opportunities squandered in the decades ahead from chronic sub-optimal decision-making at virtually every level of every public institution in every town, city, state and capital of the world? In the ordering of human society, unless the target is considerably more ambitious and efforts more carefully directed to *optimize* public decision-making, humanity risks being undermined by social and other forces it can no longer control. Decision-making must not be left to chance but must develop into a more inclusive and integrated discipline in its own right – one that embraces norms (including professional codes of conduct as well as legal rights and duties), structures, processes, critical thinking methodology, policy formation, strategic planning, institutional culture, psychology, sociology and even brain physiology.⁶¹ This will lead to a more powerful understanding of the many forces that act upon a decision-maker from outside and from within. As the discipline becomes more developed and refined, more effective programming will become possible, both in terms of what is being promoted and how.

One of the most potent yet underutilized elements of the rule of law is the public law framework of administrative justice that provides a framework to challenge and correct capricious and arbitrary decision-making.⁶² This is achieved through a coherent body of rules and principles that place duties upon those exercising public authority, including in the exercise of seemingly wide discretionary powers. Examples include requirements of impartiality and non-discrimination, allowing affected parties to be heard, a prohibition on disproportionate harm, requirements to direct one's mind actively to the matter at hand taking relevant factors into account and excluding irrelevant factors, obligations of good faith and not to prejudge issues before they are heard, thresholds of fairness and reasonableness,⁶³ avoidance of conflict of interest and abuse of power, including not exceeding powers

60 See Norman Dixon, *On The Psychology of Military Incompetence* (Jonathan Cape, 1976).

61 Interesting medical research is pointing to significant changes in brain physiology among those who wield power. See *Proceedings of the Royal Society of Medicine, London*, 9 October 2012.

62 Malcolm Russell-Einhorn and Howard Fenton, *Administrative Law Tools and Concepts to Strengthen USAID Programming* (USAID, 2008). For a domestic law source widely cited in common law jurisdictions, see W. Wade and C. Forsyth, *Administrative Law* (OUP, 2009). For an example of a more eclectic regional approach, see The Administrative Law Training Guidelines, EJTN Working Group Programmes' Administrative Law Sub-Working Group, 2012 at http://www.ejtn.net/Documents/Resources/EJTN_Administrative_Law_Training_Guidelines_2012.pdf.

63 In the UK, these are embodied in the so-called Wednesbury rules under which the decision-maker 'must call his own attention to the matters which he is bound to consider', and 'exclude from his consideration matters which are irrelevant to what he has to consider'. A third requirement adds a more generalized reasonableness test excluding 'absurd' outcomes. See *Associated Provincial Picture Houses v. Wednesbury Corporation*

or exercising them for purposes not intended. These obligations are recognizable in a variety of legal systems although they may be expressed differently. Where decisions are taken that violate these fundamental requirements of decision-making in circumstances where there are no effective legal mechanisms to identify and correct errors, the rule of law is undermined.

It is instructive to understand decision-making not only as bounded by external rules but as the result of a multitude of forces acting upon a decision-maker from many directions to determine decision-making outcomes. External forces may be constructive – the formal rules, policies, guidelines, professional codes of conduct, inspiring leadership and effective accountability structures, or they can be negative in the form of overbearing clan loyalty demands, conflicts of interest, political interference, intimidation or offers of illicit benefits.

More difficult to programme but highly influential are *internal* positive forces. These include honesty and integrity, respect for the law, a sense of civic duty, internalization of professional identity, a desire to follow and set examples of good leadership, a strong skills base, and vigilance in recognizing and avoiding potential conflicts of interest at an early stage. Negative internal forces, quite apart from the inverse of those just listed, include a range of vulnerabilities, fears and even clinical disorders.

By mapping these positive forces and negative influences, it may be possible to develop strategies to change for the better their relative impact. Such strategies have enormous potential in many spheres of public decision-making, since even small changes in routine decision-making practices effected on a global scale could be transformative, unlocking resources and benefits that otherwise never materialize, better equipping mankind to face the challenges of the future.

It is submitted that optimized, responsible decision-making is emerging not only as a coalescing discipline but as a composite right shaped by distinctive correlative obligations on the part of duty bearers. This would have the benefit of sharpening the focus upon attainable elements of sound decision-making and integrating demand and supply side in a practical way that both sides can understand. Is it not appropriate for citizens of all nations to expect and demand of their leaders fully responsible decision-making in their interest? Shouldn't all national assets be managed optimally and sustainably for the benefit of present and future generations? Can mankind afford not to make decision-making itself the focus of future collective endeavour?

Drawing upon a wide range of disciplines would sharpen the focus on how human beings make choices, affording greater prominence to strategies that work best. The evidence to date suggests that there is a genuine thirst for practical decision-making tools and that these can be transformational in terms of morale,

[1947] EWCA Civ 1, [1948] 1 K.B. 223, CA (England and Wales). In the US, decisions are subject to similar challenge if they are 'arbitrary and capricious'.

efficiency, reduction of conflict and cost savings.⁶⁴ There are also encouraging signs that emerging technologies are now making it possible to crowdsource and map relevant information more accurately and comprehensively. This will not only strengthen the evidence-base but give greater voice to the demand side of the service delivery equation and promote accountability.⁶⁵

Economic Justice and Abuse of Power

Perhaps one of the greatest challenges to sustainable development and economic justice is the lack of alignment of political choices with the needs of populations, especially in the allocation of resources and ‘rules of the game’ that largely determine how wealth is distributed in society. Many practical obstacles stand in the way of this alignment, including the dissociation of actions and consequences inherent in market systems and a general lack of economic literacy on the part of citizens, legislators and the media. As a result, the negative impact of political and economic choices are often too remote to trace. However, few obstacles are as toxic to democratic processes and citizen well-being as the debts owed by politicians to those who deliver votes and provide access to office.⁶⁶ This structural conflict of interest on the part of political leaders combined with a lack of true accountability⁶⁷ is a direct challenge to the rule of law and democratic legitimacy.

64 The EU supported a pilot course in administrative law, which had such a positive impact that it was integrated into routine civil service training in Malawi. See footnote 34, above.

65 Knowledge-based requirements will be better served in future by new educational tools that will increase lifelong access, including remote access, to knowledge and skills certification. See, for example, Cathy N. Davidson and David T. Goldberg, *The Future of Thinking: Learning Institutions in a Digital Age* (MIT Press, 2010).

66 Whether influence derives from military backing, ‘king-making’ media moguls, wealthy business interests that fund political campaigns, or organized lobbies, dangerously distorted national and/or foreign policy is not an uncommon outcome. The elephant in the room is the conflict of interest that results from dependence on any group interposing itself between citizens and their leaders. While this problem goes well beyond economic justice, the problem has become especially acute in relation to how the economy is managed, and specifically for whose benefit. There are clear winners and losers. The pendulum has swung so far in favour of protected positions through deregulation, poor protection against cartel behaviour and abuse of intellectual property rights and monopoly positions that wealth creation is being superseded by cost externalization from government to citizens and wealth transfers from citizens to financial elites. For a cogent analysis of the impact of predatory practices in financial services on middle-class families, see Teresa Sullivan, Elizabeth Warren and Jay Westbrook, *The Fragile Middle Class: Americans in Debt* (New Haven: Yale University Press, 2001).

67 In the past, there has been little accounting for decisions beyond being voted out of office for unpopular policies, not unsound ones. True democracy takes place through continuous citizen engagement. Otherwise, elections are little more than a periodic squabble among elites over whose turn it is to govern and/or plunder the nation. Factors such as the

The distorting impact upon domestic and foreign policy and its consequences cannot be overstated.

The spawning of unhealthy interdependencies between business, the media and politics undermine the delicate but important balance between power, wealth, how votes are delivered and access to the goods of society. A lack of transparency and appropriate boundaries in these relationships has led to excessively protected positions in the marketplace, generating extreme rewards that have induced sociopathic corporate behaviour and commercial recklessness.⁶⁸ As with corruption, the inducements may be relatively small in relation to the size of the stakes but the behaviour induced is the truly costly element, often many orders of magnitude greater, costing impoverished governments millions of dollars.

Citizens have become easy prey as governments have permitted legal conditions and corporate cultures to prevail where there is considered nothing wrong about pricing based on monopoly or cartel driven value rather than true market value.⁶⁹ When economic gain is more directly linked to political and/or military power, it creates even higher stakes winner-take-all competition that leads to greater abuses of office and, in more extreme cases, forms of State capture. This is especially problematic because correction from within is unlikely.⁷⁰

These problems are evident in many countries including our own liberal democracies. A loss of confidence in the good faith and *bona fides* of political leadership is producing a profound and incendiary breakdown in public trust in many parts of the world. It is evidenced by widespread protests at what is perceived to be a betrayal of a social contract/consensus that has undermined significant elements of the population. This marginalized and disenchanting group includes an increasingly aware and networked generation that is just reaching working

war on corruption, war crimes trials and progressive empowerment and engagement of communities are progressively but slowly transforming the accountability of political leaders.

68 For the impact on gaps between rich and poor in society, see Richard Wilkinson and Kate Pickett, *The Spirit Level: Why More Equal Societies Almost Always Do Better* (Allen Lane, 2009).

See also www.equalitytrust.org.uk (accessed 16 December 2012) and the Oxfam Report on the effects of inequality: <http://oxfamlibrary.openrepository.com/oxfam/bitstream/10546/266321/1/mb-cost-of-inequality-180113-en.pdf> (accessed 21 January 2013).

69 Society benefits far more from environments where competition drives prices toward cost and innovation drives cost down. Mere wealth transfer or concentration is not wealth creation and to equate cost externalization with cost saving is also a dangerous illusion.

70 Legal authority and efficacy tend to shrink as political power increases. While politically driven abuses of authority by government officials may be challenged in the courts, they can lead to serious confrontations between legal and political institutions which can weaken the legal system. See Latimer House Guidelines: <http://www.thecommonwealth.org/Templates/Internal.asp?NodeID=37744> (accessed 16 December 2012). See also Wade and Forsyth, *Administrative Law*, 2009. For an interesting rebuttal by Sir Stephen Sedley on the separation of powers, see *London Review of Books*, 34, no. 4. 23 (February 2012), 15–16.

age when economies are shrinking and failing to accommodate them. As trust and social cohesion break down, the use of coercion to maintain order (and the political status quo) serves to raise suspicions, inflame public opinion and further erode public confidence. This opens up space for opportunistic forces in the form of fierce ethnic competition, criminality and attempts to seize political power, territory and natural resources.⁷¹

When there is a resort to fear as a means of ordering society, there are negative economic implications as well as more direct human consequences. Information is the lifeblood of the economy and of society as a whole. Fear and excessive centralization of knowledge suppresses the normal and essential flow of information and opinion at all levels. Information gaps and blind-spots heighten commercial and political risk, and stifle initiative and investment. Instead of meritorious appointments, patronage and politicized board-level decision-making exert economically irrational influences upon important decisions that businesses must take to be successful. Rule of law deficiencies can therefore have far-reaching economic implications, while economic turmoil and exclusion unleash forces that undermine the rule of law and reinforce a downward spiral.

The Rule of Law in the Context of North-South Partnerships

Promoting the rule of law is heavily knowledge-and-relationship-based, requiring consistency and credibility on the part of those organizations seeking to promote it. This means that they must be prepared to observe the principles that they are espousing in the manner in which development programming is carried out. Unfortunately, development agencies have often fallen short in relation to continuity and coherence of programming and procedures, stakeholder participation, mutual cooperation and sharing of information, professionalism and courtesy, accountability and remediation of errors. Such deficiencies have undermined development partnerships and reduced their impact. Here too, a better understanding of rules and how they work may lead to useful practical tools.

The traditional institutional response to problems in the field has been for headquarters to introduce more detailed rules and controls, rather than to structure simpler rules and introduce practices that promote deeper knowledge, better decision-making skills and trust. Rules that set standards and promote accountability have an important role to play but a multiplication of cumbersome rules and procedures impedes motion in all directions. Rules are a counterproductive substitute for local knowledge, judgement and flexibility in environments that are already beset by many forms of transactional friction. As a further consequence of excess rule complexity, there has been a tendency in some development agencies

⁷¹ The conflict in the Niger Delta provides an example. See Kingsley Kuku, *Remaking the Niger Delta: Challenges and Opportunities* (Mandingo Publishing, 2012) and Judith Burdin Asuni, *Understanding the Armed Groups of the Niger Delta, Council on Foreign Relations* (CFR 2010).

to recruit staff for a knowledge of their internal procedures in preference to a technical knowledge of the subject, region or culture.

Rules can only produce simplified models of real life circumstances. Displacing discretion and accountability on the part of staff with the straightjacket of more fixed rules represents a failure to understand and engage with rules systems properly. Associated with every rule are penumbral meta-rules to guide their application, such as those governing interpretation, exceptions, mitigation and the legal consequences of non-compliance. Staff who are forced to navigate these meta-rules without adequate training or objective reference points tend to make it up as they go along, sometimes weakening or discrediting the rule regime or the organization itself. In cases where there is micromanagement by rules and resulting gridlock, a more productive approach would include simplified rules, training in the legal requirements governing the exercise of discretion, improved real-time feedback and monitoring and evaluation focused on how effective donor rules systems are when applied in practice.

It may be that, in fragile governance environments, more pressing and easily identified capacity limitations of host countries – combined with donor bargaining power – have obscured or diverted dialogue on donor deficiencies in the past. As lessons are learned and a new interconnected and politically astute generation of development partners emerges, such shortcomings will be increasingly apparent and challenged. This will hopefully provide the impetus needed to (a) reduce rule complexity and bureaucratic barriers, (b) avoid sudden, unilateral changes of direction and priorities that cause delays and frustrate expectations and planning, (c) develop a deeper understanding of local culture, priorities and circumstances to enhance and understand the impact of programming, (d) improve institutional memory and lessons learned, (e) enhance transparency and accountability for decisions taken, (f) provide corrective mechanisms when mistakes are made and (g) develop certification systems, training programmes and reference materials, networks and rational career structures that promote professionalism and knowledge base of the experts used by donors. Unfortunately, present procurement rules work against many of these objectives.

Some of these deficiencies are addressed by Paris Declaration principles but institutional inertia is strong and implementation remains a challenge.⁷² The next frontier in the provision of foreign aid may be the development of rules of engagement, codes of conduct and systems that genuinely reflect the fundamental governance principles being espoused. Unless there is a greater appetite for constructive self-examination, effectiveness in promoting the rule of law will continue to be a receding target.

72 See the Paris Declaration on Aid Effectiveness (2005) and the Accra Agenda for Action (2008) <http://www.oecd.org/dataoecd/11/41/34428351.pdf> (accessed 16 December 2012). See also OECD, Assessing progress on implementing the Paris Declaration and the Accra Agenda for Action, http://www.oecd.org/document/21/0,3746,en_2649_3236398_43385196_1_1_1_1,00.html (accessed 16 December 2012).

Conclusion

Different meanings, technical and colloquial, can attach to widely used expressions such as the rule of law. Those that focus on enforcement, especially in relation to failing States, have their place. However, in the context of development and economic productivity, there are compelling reasons for understanding its wider meaning and the full implications of its fundamental precepts that reach well beyond formal qualities, technical enforcement and compliance. If the rule of law is to realize its potential as an organizing principle of productive and humane societies globally, the focus of development and economic management will have to shift to embrace crucial elements such as the political legitimacy of law formation, the refinement of substantive rights, economic justice, and a more extensive use of administrative justice to improve the manner in which decisions are made by public authorities. Justice sector strengthening efforts with an excessively narrow remit are missing important opportunities and leverage points to transform societies through more optimized decision-making outcomes, a more level playing field and more inclusive engagement by marginalized citizens. Such techniques have the potential to transform the political and economic landscape of emerging and developed countries alike. Moreover, there is no other discipline or field of endeavour positioned to create and fully employ these tools. Unfortunately, a stunted, lay understanding of the rule of law has obscured from view many tools in the rule of law toolkit and limited their deployment.

It is somewhat striking that if one looks at one's own society through the same lens employed to promote the rule of law and good governance in developing countries, one discovers that many of the structural problems identified in the field feature in our own societies. 'Development' is therefore a more interdependent, two-way pursuit than believed by those who assume that it is about replication. This transformation to interdependence greatly enhances the authenticity and effectiveness of the development relationship. If we were serious about applying to our own institutions the principles we espouse to others, we would not only become more credible, professional and effective, we would also be in a better position learn from our development partners valuable lessons about how to make our own societies more balanced, humane and productive. If we can envisage what the world would look if the rule of law truly prevailed, then we might take seriously the intriguing prospect that the rule of law already has within it the practical means of its own realization.

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