

Responsive and Responsible

Politically Smart Rule of Law Reform in Conflict and Fragile States

By: Richard Sannerholm, Shane Quinn and Andrea Rabus

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Contents

FBA is a Swedish government agency with the overall objective to contribute to lasting peace and development. The agency functions as a platform for cooperation between Swedish agencies and organisations and their international partners. Its main areas of responsibility are:

- Recruitment of Swedish civilian personnel to international peace operations
- Multifunctional education, training and exercises
- Policy, research and development
- Bilateral development cooperation in the field of peace and security
- Funding of civil society peace projects.

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Foreword

There is a long-standing recognition that rule of law is an essential element in achieving sustainable peace and development. In recent years it has gained even more prominence in policy discourse and as a core ingredient of broad-based international commitments, with the Sustainable Development Goals and in particular Goal 16 as a clear indicator for where we are headed. Yet, what has been lacking in rule of law reform, or at least it has been only marginally represented, is a political approach to address the underlying causes of problems and obstacles to rule of law.

In response to this, the United Nations Development Programme (UNDP) and the Folke Bernadotte Academy (FBA) joined forces to put the role of politics at front and centre and examine how it can be included in rule of law practice. As a result, this report is the outcome of intensive work and close interaction during a one-year partnership between UNDP and FBA, reflecting a shared commitment to more effectively meet the demands and confrontations of complex transformational rule of law change in fragile and conflict-ridden settings.

Working politically smart requires a collective effort. It cannot be achieved by using a single tool nor can it be summarized into a specific framework. Instead, it needs to be approached from different angles and the responsibility lies not only with the practitioners in the field, but also with donors, implementing agencies and policy makers. This present report further stresses the need to utilize political analysis to inform rule of law engagements in order to align political approaches with technical methodologies used by actors in the field of peacekeeping, peacebuilding and development.

As part of FBA's mandate, we look forward to continuing to promote the importance of rule of law as an essential foundation for sustainable peace, security and development and are pleased to offer this contribution

for consideration for the advancement of current and future rule of law reform. The conclusions and recommendations drawn out in this report are intended to generate concrete results but also to simply spur on dialogue, and greater support for, politically smart rule of law reform. While this report focuses on United Nations and UNDP in particular, it may also serve other agencies in the field of rule of law such as multilateral organisations, academic institutions, think tanks and civil society organisations.

Before concluding, it is with great pleasure to extend appreciation to the authors of this report: Richard Sannerholm, Shane Quinn and Andrea Rabus from the Rule of Law Programme at FBA. It is hoped that this report – alongside the invaluable work being done by others in this field – marks the passage for rule of law to take on a more politically smart course of action.



Sven-Eric Söder, Director General,
Folke Bernadotte Academy

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The project involved a vast array of exceptional professionals with UNDP in New York to whom the authors are greatly indebted. Special thanks to Alejandro Alvarez, Katy Thompson, Ludvig Becking, Chris Mahony, Laura Nelson, Christi Sletten and Alex Shoebridge.

The authors would also like to acknowledge the excellent support provided by UNDP Regional Service Center in Addis Ababa and UNDP Regional Hub in Amman in carrying out two regional seminars, one in Addis Ababa in January and later in Amman in May 2016, and particular thanks to Jos De La Haye, Marta Vallejo, Ibrahim Abu-Shamalla, and Ozonnia Ojielo. The result of the seminars was invaluable to this project and we recognize the important contributions by the large number of dedicated individuals who attended and generously shared their intellectual knowledge and experience.

This report is also the result of a common effort by interlocutors working for the United Nations, the World Bank and other organisations who engaged in interviews providing critical information and insights. Their generosity and willingness to share their experience are deeply appreciated.

Lastly, this report has benefited immensely from helpful comments provided by William Bennett, Marisa Consolata Kemper, Lisa Denney, Filippo Di-Carpegna, Pilar Domingo, Tam O'Neil, Camilla Redner, Emma Skeppström, Willemijn van Lelyveld and Birgitta Weibahr. Any errors and omissions remain the responsibility of the authors.

Abbreviations

African Union (AU)
Civil Society Organisation (CSO)
Council of Europe (CoE)
Department for International Development (DFID)
Department for Peacekeeping Operations (DPKO)
Department of Political Affairs (DPA)
Direct Implementation Modality (DIM)
Director-General for International Co-operation (DGIS)
European Union (EU)
Folke Bernadotte Academy (FBA)
Global Focal Point for Police, Justice and Corrections (GFP)
High Level Panel on United Nations Peace Operations (HIPPO)
Independent Commission on Aid Impact (ICAI)
International Network for the Promotion of Rule of Law (INPROL)
National Implementation Modality (NIM)
Non-governmental Organisation (NGO)
Office of the United Nations High Commissioner for Human Rights (OHCHR)
Official Development Aid (ODA)
Organisation for Economic Cooperation and Development (OECD)
Organisation for Security and Cooperation in Europe (OSCE)
Organisation of American States (OAS)
Peace and Development Adviser (PDA)
Resident Coordinator (RC)
United Kingdom (UK)
United Nations (UN)
United Nations Children's Fund (UNICEF)
United Nations Country Team (UNCT)
United Nations Development Assistance Framework (UNDAF)
United Nations Development Program (UNDP)
United Nations Office on Drugs and Crime (UNODC)
United States Agency for International Development (USAID)

Executive Summary

Working politically smart is receiving growing recognition in development and peacebuilding. It seems that past practice of avoiding political approaches in favour of the technical is slowly beginning to change. The political aspects of rule of law are now regularly emphasised by the United Nations (UN) and highlighted in the outcomes of recent international reviews including the *Report of the High Level Panel on United Nations Peace Operations*, the *Report of the Advisory Group of Experts on the Review of the Peacebuilding Architecture* and the Global Study on the implementation of UN Security Council resolution 1325, *Preventing Conflict, Transforming Justice, Securing the Peace*. The importance of politics and the need to address the underlying causes of problems and obstacles are also emphasised in the Transforming our World: Agenda 2030 for Sustainable Development, and in particular Goal 16.

This study, drawing on a review of literature (academic and policy) and interviews with rule of law practitioners, examines why politics has been only marginally represented in rule of law reform. We look at why this matters, and then go on to consider how politics and working politically smart can be included in rule of law practice. The report focuses on UN and United Nations Development Program (UNDP) in particular (the latter because of its reach of activities through the Global Programme on Rule of Law) but also other agencies in the field of rule of law – such as donors and implementing organisations. The main message is that for agencies such as the UNDP more responsive and responsible policies and actions are required in order to effectively meet the demands and challenges of complex transformational rule of law change in fragile and conflict-ridden settings. Rule of law reform is the pursuit of a political goal and rule of law is a political outcome. The concept of rule of law is intrinsically political and is often confrontational to power.

For a long time rule of law reform has been hampered by a supply-sided perspective, making reforms too technical, superficial and formalistic. Implicit assumptions that technical neutrality can initiate more substantive changes later have prevailed for decades. This assumption is underpinned by a technical path dependency and a domination of technical experts in rule of law reform. Working politically smart is a way of better formulating strategic programming that ensures a best fit, identifies any unintended consequences of reforms and ensures adaptability to the changing circumstances of an intervention. Another important aspect is knowledge management and learning. While donors and implementing agencies have to adjust their programmes to changes in the circumstances they are operating in, they must also adapt to their evolving knowledge of that context (such as the latest information arising, fresh relationships forming, and new risks emerging). This is not a new insight to UNDP or other UN agencies and there are many examples where interventions have acted smart, taken calculated risks, aligned themselves with local needs and political dynamics. Rule of law practice, by UNDP and other implementing agencies, is also full of examples where programmes have been following template approaches of drafting new laws, training more police officers, and setting up new institutions without matching a changing political economy. They have ended up doing more harm than good. Examples where programme objectives have been met but where the country concerned has undergone a dramatic turn into a worsening political crisis are extreme. But unfortunately they are not rare.

This study identifies two interdependent levels where change must take place for the UN and UNDP specifically. One is the level of programming where rule of law reform must become more responsive to needs and problems, political processes and power relationships in complex transitions, and go beyond law in order to support rule of law. The other level is the organisation, meaning the policy, rules and procedures that shape UN bureaucracies in particular ways. The main message in the literature is that development and peacebuilding does not require a technical fix but a political course of action. Similarly, it

is well to bear in mind that changing policy and practice within the UN is not all about more resources, different result matrices, or more efficient organisation. While these issues are important, a move towards working more politically necessitates a political change of culture. This involves acceptance of calculated risks and results and making necessary long-term investments in the course of becoming a learning organisation. This is responsible rule of law reform.

RECOMMENDATIONS

Responsive Rule of Law Reform

‘Good enough’ politically informed

- Make explicit that it is the responsibility of the UN leadership in the field to encourage linkages between political and technical (programming) engagements.
- Include political and conflict analysis in engagements on rule of law from the start (but recognise that political economy analysis is not a silver bullet). Encourage programme staff to participate in the analysis to better inform their programming and continuous updates during implementation, ensuring conflict sensitive approaches at a minimum.
- Ensure a system of information-sharing on political and conflict analysis, including through leveraging existing expertise available within UN Country Teams and UNDP Country Offices, including Peace and Development Advisers (PDA), where deployed.

Go beyond law

- Go beyond the principal-agent template. Law is one of many policy tools for influencing change. Collective action theory and public sector motivation perspectives should inform strategies for intervention.

Ensure best fit

- Allow flexibility in planning and design. Focus on adapting to the

context rather than fulfilling previously ‘set in stone’ objectives.

- Develop a strategic networking approach tailored to a broad rule of law stakeholder group in each country and concentrate on politically acceptable and realistic reforms.
- Address rule of law issues and concerns at sub-national levels as well. Identify ways of aligning formal and informal authority and institutions – match what they should do with what they actually do and avoid applying other country examples in the hope that what worked elsewhere will work in the new setting.

Responsible Rule of Law

Assess risks of rule of law interventions

- Make responsible policies explicit in recognising that no intervention because of inopportune moments, lack of information, or over-stretch is a responsible and encouraged course of action.
- Assess and make explicit any unintended consequences of an intervention. Encourage UN field leadership to calculated risk-taking and flexibility in implementation, including halting or abandoning programmatic goals.

Adjust funding and expectations

- Ensure flexible funding and reassess requirements; do not be bound by narrow technical frameworks and encourage longer timeframes to reach results and recognise and make clear the limits of external involvement.
- In extremely volatile environments, consider ‘collapsing’ inception and design entirely and encourage constant testing and learning through pilot processes with a view to eventually scaling up when the moment is more ‘ripe’ for more politically smart rule of law work.

Invest in knowledge management

- Do not hide ‘failures’ – learn from them. Turn individual competencies into institutional capacity by investing in knowledge management and systematic competence provision through training

and other measures to better prepare and extract experiences from rule of law work.

- Review the recruitment policy for rule of law practice to ensure that the field is differently staffed and reflects the multidisciplinary challenges facing rule of law reform.
- Ensure more robust handover and focus on learning when there is staff rotation, specifically on explicit and implicit theories of change for engagements, networks and alliances and experiences from trial and error.

Maximise comparative advantages: connect the dots

- Ensure feedback loops and proper documentation from rule of law programming to political analysis and political channels that relate to ‘signals’ and early warning indicators.
- Explore options for leveraging the expertise of PDAs, particularly with regard to their role in undertaking political/conflict analysis and providing guidance on conflict sensitivity, to inform rule of law programming based on past practice and conduct a needs analysis for a review of the terms of reference for PDAs. Identify a limited number of countries to pilot and facilitate closer collaboration between PDAs and UNDP’s rule of law portfolio, considering first those countries that were examined in this study.

Introduction

This report examines rule of law assistance in complex political transitions. The central question is the role of politics in rule of law reform and to what extent interventions are ‘politically smart’ – that is, the degree to which politics inform the selection, planning, design and implementation of projects and programmes. Past practice shows a disappointing record of reform that is technical when the problems are political and where reform efforts are continuing in accordance with project outcomes despite a radically changed country context, and where good intentions turn bad when political events and processes upset carefully crafted plans set out in programme documents.

Aim of the Report

This report aims to identify core priorities for working more politically smart in rule of law reform. While the United Nations (UN) and United Nations Development Program (UNDP) is a specific focus in this report due to the global reach on rule of law reform, the target group is also policymakers and decision makers on the donor and funding side. The responsibility for attaining better and more informed political engagement does not rest with ‘rule of law actors’ alone, but more broadly with the leadership within the UN and UNDP to ensure that reforms are given the right conditions to affect change. There is already a rich discussion on working politically smart in development, but scarcely little on peacebuilding. Much of the learning coming out from the community of

1. Political transitions is here used as a broad category including transitions from authoritarian rule, civil war, or prolonged periods of violence and insecurity.

2. This report is based on extensive desk research, particularly on documents of the UN, but also those of the EU and bilateral agencies, in addition to a wealth of academic literature. The authors also conducted a set of interviews with interlocutors working for the United Nations, the World Bank and other organisations. In January 2016 the FBA and UNDP organised an expert meeting in Addis Ababa, drawing together rule of law practitioners, Peace and Development Advisers, researchers and civil society representatives to discuss politically smart ways of doing rule of law work. A similar event was organised in Amman in May 2016. The presentations and discussions during those meetings have greatly contributed to this report.

3. See, UNDP, *Strengthening the Rule of Law in Crisis-Affected and Fragile Situations* (2015).

4. Denney & Barron, *Beyond the Toolkit: Supporting Peace Processes in Asia*, The Asia Foundation (2015) p. 14.

thinking and working politically is from donor-funded programmes where the implementing agency is a national or international NGO. This report does not claim to provide new or original input to the general debate, but rather a synthesis analysis that provides specific recommendations on what ‘working politically’ means for rule of law assistance in conflict-affected and fragile situations.

Historically, rule of law is the fundamental notion that all power must be exercised in accordance with public and transparent rules. In the international context, the most authoritative definition is the so-called ‘UN definition’. This definition reflects how the concept has evolved in legal and political theory – that is, as a principle of governance for minimising arbitrary power by providing clear rules for how power should be exercised, changed and contested. Thus understood, a rule of law system is desirable in its own rights and on its own merits, which are associated with different human qualities. It can, among other things, help achieve a legal order adhering to the rule of law; for instance, in terms of economic development and respect for human rights.

Rule of law reform or rule of law assistance is employed interchangeably in this report. What this means is a collection of policies, programmes and projects in fragile and conflict-ridden settings that aim to support rule of law developments – that is, initiatives aimed at strengthening legal certainty, legal security, accountability and transparency in decision making or a systemic capacity to uphold fundamental rights and freedoms. On the policy side, rule of law is fairly well-documented in key instruments from the UN, European Union (EU), Organisation for Security

and Cooperation in Europe (OSCE), African Union (AU), Organisation of American States (OAS) and Council of Europe (CoE). In the Universal Declaration of Human Rights the rule of law is set down as essential for the protection of human rights and to prevent conflict. In later treaties and international instruments the rule of law is similarly made solid. International law and other instruments from global and regional organisations establish the rule of law as an end in, and of, itself. In more recent policy and research discussions rule of law is also intimately associated with the realisation of other ends, primarily democracy, human rights, and peace and security.¹⁰

On the practice side of things, it is not that easy to clearly define what constitutes rule of law reform. First, the ‘field’ has grown rapidly over the past two decades and covers a broad group of assistance providers and interventions dealing with a breadth of social dynamics in a number of settings. These range from post-Communist transitions to market economy; post-authoritarian transition to democratic governance; sustainable development and post-conflict and fragile states. Second, the programmes and projects undertaken within this broad canopy vary in terms of size, substance matter and the main stakeholders they engage with – from civil society organisations to the state’s capacity to prevent violent extremism. Examples include (but are not limited to) reforms in support of the independence of the judiciary, support to legislative drafting capacity, access to fair and impartial justice and dispute resolution mechanisms, police reform (for example, community policing), gender justice, anti-corruption, constitutional reform and efforts to strengthen human rights and accountability institutions.¹¹ This has also led to a burgeoning range of rule of law actors – mainly international – engaged at various levels of implementation in the cumulative steps of reform or post-conflict rebuilding processes. As with the canopy described above, the categories of actors are broad and include government agencies,

5. United Nations, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General (2004) p. 4. See, for example, O’Donnell, “Horizontal Accountability in New Democracies” (1999).

6. McCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (2005) p. 16.

7. See, for example, United Nations, Resolution adopted by the UN General Assembly, *Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels*, A/RES/67/1, 30 November 2012. See, also, UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1 (2015) p. 9.

8. The conceptualisation of rule of law reform in this report thus consists of the dialogue between policy and practice, in line with ethnographies of development assistance generally. See, Taylor & Simion, *Professionalizing Rule of Law: Issues and Directions* (2015) p. 15.

9. See, Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, Brussels (2014).

10. See, UN General Assembly, A/RES/67/1 (2012). On rule of law and economic development, see research by Acemoglu, Naidu, Restrepo & Robinson, *Democracy Does Cause Growth* (2014) and Rothstein & Tannenber, *Making Development Work: The Quality of Governance Approach* (2015).

11. See, for example, the many different activities carried out by UNDP through its Global Program, UNDP (2015).

donors, international and intergovernmental organisations, non-governmental organisations (NGO), consulting companies as well as political party foundations, with all having their own specific entry points in political processes and also raising questions of ownership and sustainability if not coordinated properly.

‘Typical’ Rule of Law Reform

A combining feature for ‘standard’ or ‘typical’ interventions is that they seek to establish clear ‘rules of the game’ for how power should be regulated, exercised and challenged – rules of the game that apply to public officials and individuals alike. Another combining feature of standard rule of law work is that most interventions deal with institutions and institutional change – that is, the main stakeholders in reform efforts are governments and their bureaucracies. In this way, rule of law reform is often state-centred and top-down focused. Lately, an additional set of interventions under the rule of law heading have concentrated more on individuals. Initiatives such as legal empowerment can include many of the institutional areas mentioned above, but with a specific aim of supporting access, use, understanding and trust from individuals, civil society actors and marginalised groups in what is sometimes called ‘bottom-up’ approaches.

Few rule of law initiatives today are systemic, encompassing all areas at once. Instead, interventions typically concentrate on a set of institutions, processes or chain of actors in relation to a problem (for example, police, prosecution, judiciary and corrections to address sexual and gender-based violence). This report recognises that interventions relating to a set of institutions or processes do not on their own and in isolation affect rule of law generally for a country (on a scale that can be assessed through the *Worldwide Governance Indicators* or the *Rule of Law Index*) but should be understood and examined in relation to their specific set of activities and objectives. Support to the formation of bar associations, or the training of police in forensic investigations, for example, are different from constitutional assistance to formulate clear rules of the game for the

executive, or support to accountability and oversight mechanisms in order to strengthen anti-corruption. Yet the whole is greater than the sum of its parts and the multitude of interventions, programmes and projects share the overarching objective, and challenge, of encouraging transformative change towards the rule of law.

Outline of the Report

In the next chapter, the primacy of politics in rule of law reform is described. This is followed by a review in Chapter 2 of why rule of law reform has primarily worked through technical rather than political means and looks at the tactic of downplaying politics and examines the path dependency and the role of the professional group from which practitioners are drawn. Chapter 3 reviews the experiences from thinking and working politically and relates this to specific rule of law challenges and suggests ways in which rule of law reform can become more politically smart in its approach. This is followed by the last section, Chapter 4, which concludes and outlines recommendations for responsive and responsible rule of law reform.

1. Primacy of Politics in Rule of Law Reform

The environment in most transition countries is only marginally conducive to basic rule of law principles. Many fragile and conflict settings are characterized by confrontations in terms of institutional capacity, unclear or contested political mandates for governments, social fragmentation, gender inequalities and high levels of violence against women, as well as widespread corruption. Influences from transnational threats (for instance, organised crime and violent extremism) may lead to the establishment of ‘ungoverned spaces’ within the country, effectively challenging state authority.¹² Unstable and conflict-ridden states are also sensitive to crisis and suffer protracted fragility and repeated cycles of violence.¹³ Further challenging in many of these vulnerable settings is the shrinking political space for reform in the rule of law and in democratic governance and human rights.¹⁴

The combined development and peacebuilding demands in such fragile and conflict-ridden settings require great attention to selection, planning, design, implementation, adaptation and evaluation of reform efforts.

12. Clunan & Trinkunas (eds.) *Ungoverned Spaces: Alternatives to State Authority in an Era of Softened Sovereignty* (2010).

13. World Bank, *World Development Report 2011: Conflict, Security and Development*, (2011) p. 2.

14. Burundi and Rwanda are cases in point, see Reyntjens, “Rwanda: Progress or Powder Keg” (2015). On the political space generally, see Carothers & Brechenmacher, *Closing Space: Democracy and Human Rights Support under Fire* (2014).

This means that opportunities are changing and shifting in relation to the political contestation for power, thus creating circumstances on a collision course with planned or ongoing rule of law programmes. The combined development and peacebuilding demands in such fragile and conflict-ridden settings require great attention to selection, planning, design, implementation, adaptation and evaluation of reform efforts. This applies specifically to rule of law interventions that have often advanced complex technical assistance beyond the absorptive capacity of such states, and at the same time have failed to meet for political challenges and resistance to reform efforts.¹⁵

There is broad agreement in the literature that a state rests on the three central pillars of authority, capacity and legitimacy. These dimensions are interdependent but donors have focused mostly on authority and capacity, particularly in the rule of law field – that is, on the formulation and implementation of policy. Legitimacy, “whether citizens feel the government has the right to govern – and whether they trust the government” has lagged behind in development and peacebuilding. Most legitimacy-oriented interventions have been short-focused on restoring confidence, but rarely on the long-term forging of links or a ‘social contract’ between state and society. Moreover, the emphasis on authority and capacity is state-centred, and the constituencies residing in fragile situations do not always share the views on state capacity and authority, preferring in many cases non-state actors and institutions.¹⁷

The UN now regularly stresses the ‘political’ aspects of rule of law change, recognising that reform generates winners and losers.¹⁸ The recent *Report of the High Level Panel on United Nations Peace Operations* (HIPPO) states that lasting peace is achieved through political solutions: “the primacy of politics should be the hallmark of the approach of the

15. Institute of Development Assistance, *An Upside-down View of Governance* (2010).

16. World Bank, *Strengthening Governance: Tackling Corruption. The World Bank Groups Updated Strategy and Implementation Plan* (2012) pp. 9-10.

17. Denney & Barron (2015) p. 9.

18. United Nations, *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance*, (2008).

19. United Nations, *Uniting Our Strengths for Peace – Politics, Partnership and People*, Report of the High Level Independent Panel on United Nations Peace Operations (2015) p. 11.

UN to the resolution of conflict...”.¹⁹ In the same vein the *Report of the Advisory Group of Experts on the Review of the Peacebuilding Architecture* emphasises “peacebuilding must be understood as an inherently political process.”²⁰ The Global Study on the implementation of UN Security Council resolution 1325, *Preventing Conflict, Transforming Justice, Securing the Peace*, also places politics at the front and centre.²¹ The Sustainable Development Goals, particularly Goal 16, *Promote just, peaceful and inclusive societies*, equally dwell on the importance of politics and institutional reform. Politics is thus now recognised as a critical component for assisting countries undergoing complex transitions and governance failures are now primarily seen as political rather than resource or capacity-related.²² The future test lies in acting upon this recognition and experience to select, plan, design and implement interventions in a politically responsive and politically responsible way. If the UN’s work on rule of law is to truly reflect and integrate the notion of the “primacy of politics”, then such interventions must also be aware of the impact of such a shift on the relationships with national stakeholders, and the space afforded to the UN to conduct such interventions. Clearly, not all national stakeholders will welcome the UN’s engagement in addressing the structural challenges pertaining to rule of law, not only because of the implications this has on one’s sovereignty (perceived or real), but fundamentally because these interventions may seek to redress the balance of power and status quo from which those same national stakeholders (often elites) currently benefit. Being able to understand, balance and navigate these political interests thus becomes critical.

UNPACKING POLITICS

By ‘political’ and ‘politics’, this study refers to the broader meaning of the words, in line with Leftwich:

20. United Nations, *Report of the Advisory Group of Experts on the Review of the Peacebuilding Architecture: Challenges of Sustaining Peace*, UN Doc. (A/69/968-S2015/490) p. 9.

21. Global Study on the implementation of UN Security Council resolution 1325, *Preventing Conflict, Transforming Justice, Securing the Peace* (2015) p. 40.

22. UNDP, *Restore or Reform: UN Support to Core Government Functions in the Aftermath of Conflict* (2013) p. 19.

*all the processes [...] in taking decisions about how resources are to be owned, used, produced and distributed. Inevitably, the contours of politics are framed by the inherited institutional environment (both formal and informal), by the political culture and by the differing degrees and forms of power, which participants bring to the process, and not their interests and ideologies.*²³

This definition includes formal institutional processes and outcomes, as well as informal ones.²⁴ Formal institutions are typically understood as codified rules (constitutions, laws, operational guidelines) “consciously designed and clearly specified”²⁵ to which there are specific methods for their enforcement and actions against rule breaking.²⁶ Informal institutions are more difficult to define, though they are considered to be significant for achieving institutional change.²⁷ They work informally, in contrast to the official rules that can be observed through police, courts and laws. They operate through “subtle, hidden, and even illegal channels”.²⁸ As with formal institutions, informal ones also have their own methods of enforcement - for example, through exclusion, social ostracism and even violence.²⁹

‘Rules of the Game’ and Politics

Politics, as understood in this broad sense, places rule of law reform as something clearly political because it concerns the ‘rules of the game’ that can empower or disempower groups and interests within society and can challenge both formal settings and informal understandings. Whether one defines rule of law as a ‘thin’ or ‘thick’ concept (for example, focusing only on the formal and procedural aspects or on sub-

23. Leftwich, *Bringing Agency Back In: Politics and Human Agency in Building Institutions and States* (2009) p. 13. See also, Dasandi, *The politics-bureaucracy interface: impact on development reform* (2014) p. 6.

24. World Bank, *World Development Report 2011* (2011) p. xvi.

25. Lovenduski, *Feminizing Politics* (2012) p. 292.

26. North, *Institutions, Institutional Change and Economic Performance* (1990) p. 47.

27. See, Andrews, *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions* (2013)

28. Helmke & Levitski, “Informal Institutions and Comparative Politics: A Research Agenda” (2004) p. 733.

29. Grzymala-Busse, “The Best Laid Plans: The Impact of Informal Rules on Formal Institutions in Transitional Regimes” (2010) p. 313. See also, North (1990); Stiglitz, “Formal and Informal Institutions”; and Helmke & Levitski (2004).

stantive rights issues) it cannot be separated from politics, or sustained over time, unless most people in a given society recognise its value and trust its efficacy.³⁰ In this way, rule of law “is as much culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes”³¹ and a “normative system residing in the minds of the citizens of a society”.³² Politics, and the ‘life’ of formal and informal institutions thus assumes a specific significance when planning and designing programmes that seek to affect rule of law changes.

Politics and Change Management

It is a recognised aspect of change management that preferences and cognition are shaped by “those surrounding us”³³ – that is, individuals take action formed by the environment where they are. A substantial part of rule of law work assumes that stakeholders (political leaders, lawyers, judges and other public officials) will behave according to a ‘rational actor model’ – with their preferences and cognition dictated by a transnational legal community where there is agreement on the importance of human rights law, on the law’s ability to influence social change, and on the legitimacy of law as an independent guarantor for the ‘rules of the game’. Past experience strongly puts the rational actor idea to question, suggesting instead that reformers should seek to understand different stakeholders in relation to the political economy of their particular environments. In such environments there are often not one but many ‘actor models’, and these can and do come in conflict with one another. Law, as with other systems, is not normatively closed for the chief reason that people have many different roles – for instance, one can be a legal professional, a community leader, and a business woman all at once so that “so much of the small and large stuff of organizational life makes a sociological nonsense of the notion that systems are normatively closed”.³⁴

30. Kavanagh & Jones, *Shaky Foundations: An Assessment of the UN's Rule of Law Support Agenda* (2011).

31. Stromseth, Wipman and Brooks, *Can Might Make Rights? Building the Rule of Law After Military Interventions* (2006) p. 310.

32. Carothers, “Promoting the Rule of Law Abroad” (2003) p. 8.

33. Hoff & Stieglitz, “Striking a Balance in Economics: Towards a Theory of the Social Determination of Behaviour” (2016) p. 7.

34. Braithwaite, “Responsive Regulation and Developing Economies” (2006) p. 885.

From a functional point of view politics also plays a key role for the rule of law with regard to political settlements on the allocation of resources to legal, judicial and administrative institutions and in respect of the responsiveness of state and non-state institutions to people’s justice grievances, and on the consistency of political practices – formal and informal – that signal a commitment to rule of law.³⁵ Similarly, from a functional point of view, rule of law reform often deals with pluralistic systems where supporting one of them can affect other parts of the system.³⁶ The different sectors of the state collectively responsible for maintaining a system of rule of law also include a great host of ministries and agencies, often with little internal coordination, but with frequent competition between them. So, while individual competences can be turned into organisational capacity through institutional reform,³⁷ a broader state capacity with the ability to resolve societal conflict is dependent on creating alliances and networks that agree on a political settlement and on the ‘rules of the game’ for the framework of the state.³⁸ Creating such alliances and networks takes time, and it is a fallacy to think that they can be sustained by installing the ‘right’ type of formal institutions without considering the compromises, negotiations and resistance that this would generate in any society even more so in fragile and conflict-ridden settings.

A minimum understanding of politics in rule of law reform thus entails a recognition that projects and programmes are influenced by – and influences in turn – factors outside law in the formal sense (that is, individual and collective behaviour, networks and alliances between institutions, public trust and legitimacy towards the state).³⁹ Failure to properly acknowledge the importance of politics means that risks,

35. On political settlements, see Parks & Cole, *Political Settlements: Implications for International Development Policy* (2010) p. viii.

36. See, Albrecht & Kyed, “Justice and Security – when the state isn’t the main provider” (2010). See, also, Isser, Lubkemann, & N’Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options* (2009).

37. Teskey, *Capacity Development and Statebuilding: Issues, Evidence and Implications for DfiD* (2005) p. 10.

38. Teskey, Schnell & Poole, “Beyond capacity – addressing authority and legitimacy in fragile states” (2012) p. 10.

39. See, Dasandi, Marguette & Robinson, *Thinking and Working Politically: From Theory Building to Building an Evidence Base* (2016) p. 3.

resistance and expected results will be difficult to forecast in programming. Reform efforts can spark competition over resources or upset deeply entrenched norms. This is frequently experienced in relation to initiatives on gender and the role of women in public life. A programme on judicial independence can tip the scales of power balances in a fragile political arrangement. It could give judges too much power or reinforce elitist interests if the courts continued to play a role of maintaining an unequal status quo. Police reforms, on the other hand, can be used and abused by regimes struggling with democratic governance.

Failure to properly acknowledge the importance of politics means that risks, resistance and expected results will be difficult to forecast in programming.

Anti-corruption projects can stigmatise political opponents during an election year. The literature reviewed for this report, as well as the interviews and consultative meetings held with practitioners, makes it clear that a minimum understanding is not sufficient for effectively working politically smart. It is also clear that rule of law programmes and the ‘ecosystem’ where they operate are generally not designed to identify properly the political dimensions of reform, or capable of constructively addressing them during the course of implementation.

PURSUING A POLITICAL GOAL

If rule of law reform is essentially the pursuit of a political goal, the link between ‘the political’ and rule of law remains unexplored and warrants further analysis. At times this link is not so much unexplored as ignored. The reasons vary from path dependency of donors (a sense of “we’ve always done this”) to a perception that there are no alternatives or that the risks involved of engaging with politics are too great and that policies would take too long to implement and would lead to uncertain results. Past practice is full of instances where donors have continued to train and equip law enforcement personnel, or capacity build judges and legal professionals, in the face of a shrinking political space or unconstitutional power changes and where reforms risk doing more

harm than good. In some cases this was because project plans took a long time to prepare and where different political circumstances informed the design. Other instances (such as UNDP’s engagement in Yemen before the recent conflict broke out) have involved a failure of the organisation to adjust ongoing programming to changing country circumstances. Instead of re-assessing its support in the area of rule of law ahead of the conflict and to see what the new political dynamics meant for UNDP’s engagement, a shift was too simply made from institutions to civil society organisations (CSO). The experience from Yemen shows the difficulty organisations such as UNDP have when it comes to reassessing and redirecting support in the face of changing circumstances. As one respondent described the lack of flexibility, “we work with supply, and not demand”. While everyone agrees that conflict-ridden and fragile settings in particular need tailored and context specific assistance it seems that the conditions of these environments often lead to replication of past practices.

It is not only in rule of law reform that a critical review of method and practice takes place but is part of a larger trend in development assistance. Thinking and working politically forces the external actor to consider the impact they have on the politics of recipient countries and to see themselves as ‘political actors’, not just providers of funding and technical assistance’.⁴⁰ Working more politically would require, for most of the organisations supporting reform efforts, a partially new perspective on rule of law and an adjustment of the ‘methods of doing business’. It is only new in part. The perspective has been debated in research and policy communities more than two decades. What is new, then, is identifying ways where current thinking on working politically (with existing tools and practices in the field) can be employed for an enhanced political understanding and where reforms address rule of law problems rather than ‘rule of law institutions’.⁴¹

40. Dasandi, Marguette & Robinson (2016) p. 3.

41. This has long been advocated by Krygier, “Rule of Law: An Abusers Guide” (2009) and “Re-thinking the Rule of Law After Communism” (2005) p. 272: “ask what the point is, why bother, what’s the fuss?”.

2. *The Lack of Politics in Rule of Law Reform*

The criticism that has emerged of rule of law reform takes it to the task for being too technical instead of supporting broader transformative changes.⁴² The rule of law field, despite its long history, is still exhibiting a strong focus on state agencies, ad hoc and short time frames for interventions, and linear theories of change.⁴³ There are three main patterns that explain the absence of politics in rule of law reform. First, donors seek neutral entry points in politically demanding environments, and therefore downplay the political aspects of rule of law. Second, there is a technical path dependency in rule of law assistance, most clearly seen through the assessment apparatus employed. Third, the rule of law field is dominated by legal professionals. There are, of course, overlaps between the different reasons, and some of them can actually reinforce one another; for example, the path dependency and the high proportion of legal professionals working on rule of law reform.

A combining feature of the three patterns is the centrality afforded to law in each of them, from the identification of problems to the formulation of responses based on law and in assuming trajectories of change through law. In the ecosystem of the rule of law field there is an instru-

42. Gillespie & Nicholson, "Taking Interpretations of Legal Transfers Seriously" (2012) p. 3.

43. Desai, Isser & Woolcock, "Rethinking Justice Reform in Fragile and Conflict-Affected States: The Capacity of Development Agencies and Lessons from Liberia and Afghanistan" (2012) p. 248.

mental appreciation of law that has created a narrative where law is the vehicle for 'getting to politics', not the other way around.

NEUTRAL ENTRY POINTS

Development assistance has generally avoided 'politics' in favour of 'technical' reform agendas. Rule of law assistance has in a similar way avoided politics.⁴⁴ The reliance on technical advice, and a perspective on law as a system that is neutral in relation to political values, has been at the centre core of rule of law reform over past decades.⁴⁵ There was very little in the early stages of rule of law reform that took into account types of political regime, or the part that law could play in providing a framework for legitimate governance, or on other factors besides laws and legal professionals that had an impact on institutional performance and development.⁴⁶

Since then, rule of law reform has increased in volume and the objectives have changed as well. Rule of law is now a key foreign policy objective for states, an integrated part of the *Sustainable Development Goals*, specifically through Goal 16, and an essential component of international peace and security.⁴⁷ The scope of reform has expanded beyond the initial focus on 'modernising' law for economic growth. It now concerns itself with constitutional reform, access to justice, measures to address impunity, anti-corruption, and legal reforms aimed specifically at women and poor and marginalised groups.⁴⁸

Despite the increased and changed complexity in the demand for rule of law, there remains a strong tendency to avoid politics and instead

44. See, Tamanaha, "Review: The Lessons of Law-and-Development Studies" (1995).

45. See, Carothers, "The Rule of Law Revival" (1998). See, also, Trubek, "The 'Rule of Law' in Development Assistance" (2006) p. 76.

46. See, Rittich, "The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social" (2006). See, also, Desai & Woolcock, *The Politics of Rule of Law in Development States: 'Political Settlements' as a Basis for Promoting Effective Justice Institutions for Marginalised Groups*, ESID Working Paper No 08 (2012) p. 7.

47. Zajac Sannerholm, Möller, Simion & Hallonsten, *UN Peace Operations and Rule of Law Assistance in Africa, 1989-2010* (2012).

48. See, United Nations, *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance* (2008) p. 1.

rely on technical, institutional and state-centred reform efforts for transformative change.⁴⁹ There does not seem to be any doubts among donors and implementing agencies that a linear approach to rule of law development – “modernise x and you’ll get y” – is a faulty one. Yet rule of law reform is often presented in such terms in the pursuit of entry points in countries undergoing complex transitions. As one respondent framed the issue, “there is pressure to find entry-points and this is very difficult”. Under pressure to find entry-points (as some respondents narrated) there is a tendency to fall back on linear arguments in conversations with governments, “if there is rule of law, then less corruption and more economic blossoming”. Or in more direct terms, appealing to perceptions and appearances, UNDP can sometimes approach governments with the adage, “we can make you look good”.

The ‘Temptation of the Technical’

Thus a chief reason explaining the absence of politics in rule of law reform is the tactical choice to downplay politics in order to gain entry to countries otherwise unwilling or hesitant with regard to reform.⁵⁰ Carothers calls this the “temptation of the technical”. This comes from a reductionist agenda where rule of law reform concerns itself with more formal aspects.⁵¹ In contrast with democracy and human rights promotion, rule of law is sometimes presented as a more neutral reform area. It also seems that donors strategically choose to enhance a formal rule of law requirement over the politically based on the assumption that the formal reform objectives will spearhead political reform at a later stage and help instil ideas by a kind of osmosis.⁵² The temptation of the technical varies in strength depending on the engagement. For actors such as UNDP the funding modalities may dictate how ‘technical’ the engagement might eventually become. In cases where there is a National Implementation Modality (NIM) as opposed to a Direct

49. See, Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* (2012) 59ff.

50. See Ottaway, *Democracy Challenged: The Rise of Semi authoritarianism* (2013).

51. Carothers, “The Rule of Law Temptations” (2009) p. 55.

52. See, Stephenson, “A Trojan Horse in China”. See, also, Y. Dezalay & B. Garth, *The Internationalisation of Palace Wars: Lawyers, Economists and the Contest to Transform Latin American States* (2002) pp. 3-4.

Implementation Modality (DIM) the organisation is, as one interlocutor put it, “beholden to the government” because national institutions act as implementing agencies. Under such conditions, minimising the importance of the political implications of some rule of law activities can be done by a technical focus on capacity and authority. Compared with other actors in the UN family, the contrast is stark in terms of political entry points. The Department of Peacekeeping Operations (DPKO) and also Department of Political Affairs (DPA) missions are inherently political, backed by a UN Security Council resolution and represented by a Special Representative of the Secretary-General, with mandate fulfilment discussed in the General Assembly and its committees. Thus judicial reform in non-mission and in mission settings could essentially mean the same thing but take on a different significance in relation to government stakeholders.

The notion that rule of law may operate free from the political regime has a core flaw, namely that political leaders often use law as an instrument of state control.⁵³ A focus on technical rule of law aspects may be more easily agreed upon between donors and national governments, in particular in countries where democratic practices are in decline. Rule of law reforms that concentrate on strengthening the criminal justice system to combat corruption, for example, deal mainly with threats to the state. In such cases, reform incentives of international and national actors are partially aligned, though they might diverge strongly on the long term effects of rule of law reform as a means of asserting limits on political power.

This view often comes from focusing on the ways that reform is promoted, but fails to account for the fact that in arriving at a particular decision to initiate a technical reform is as a course of action that frequently involves political negotiation. Assistance to draft a gender-sensitive criminal law might be a technical exercise involving drafting techniques

53. Addison, *The Political Economy of the Transition from Authoritarianism* (2009) p. 2.

and bureaucratic procedures. At the same time, the mere fact that government officials decide to draft a gender-sensitive law is a political act in itself a decision that could upset strong interest groups in society.⁵⁴ The process leading to the decision would most likely have been fraught with tense negotiations, trade-offs, reform champions and spoilers. Also, if the new law in question is not accompanied by efforts that involve public debate, communication of the law, and capacity-building for public officials on how to apply it, it will most likely remain a formal institutional change rather than a transformative development.

The Neutrality of ‘Newness’

Peacebuilding interventions, particularly straight after a conflict ends, often strive to support reforms that appear to break with the past. Thus a number of recent missions and interventions have supported the establishment of new institutions and laws specifically for the purpose of providing forward-looking alternatives where existing or past institutional practices were previously entangled in political competition, ineffectiveness or were the subject of repression. Similar to the emphasis on technically neutral entry points, the spotlight on newness is also misleading. New institutions are always influenced by legacies of the past and practices of power distribution, as well as “cognitive and normative legacies”.⁵⁵ While the institutions concerned may be new, they still exist within a larger ecosystem and are forced to relate to other remaining formal and informal institutions. The recognition that there are no neutral alternatives, however technical the reform efforts are perceived to be, is important since it informs policy and practice in order to carefully consider their engagement through a political perspective.

54. See Domingo, Menocal & Hinestroza, *Progress despite Adversity: Women’s Empowerment and Conflict in Colombia* (2015).

55. See, Mackay, “Nested Newness, Institutional Innovation, and the Gendered Limits of Change” (2014).

TECHNICAL PATH DEPENDENCY

Closely related to the neutral entry-points is a technical path dependency where theories of change are firmly anchored in formal law. This path dependency is in many ways formed and sustained by the assessment tools that are available in the rule of law field. Such tools and frameworks are critical for providing an informed evidence base for interventions. They chart the terrain, identify and describe problems, capacities, and stakeholders that later inform programming. Because programming is only as good as the information it is based upon, how and where information is gathered, analysed and understood in the rule of law field is of paramount importance.

Assessment Tools

Rule of law assessment devices tend to zero in on institutions rather than on broader justice and security problems.⁵⁶ The tools often depart from global best practices – for example, on judicial independence, constitutional review, access to justice or specific legal regimes such as procurement or criminal law.⁵⁷ Too great a focus on global best practice runs the risk of creating an excessively strong external influence in fragile and conflict-ridden countries. Because there is an urgent demand to quickly show peace dividends in such countries the global best practice model can influence institutions to conform to what appears to be legitimate (that is to say, what they think they should look like) instead of employing national practices and features of rule of law that are specific to the given circumstances.

Politics, in the sense of the political framework that institutions exist in and in the level of control and supervision that they exercise and are subject to, together with public trust in formal institutions, are all

56. See, for example, United Nations Office on Drugs and Crime’s resource documents on assessments: *Criminal Justice Assessment Toolkit* (2006) and United Nations Office of the High Commissioner for Human Rights, *Rule of Law Tools for Post-conflict States: Mapping the Justice Sector* (2006).

57. See, for example, European Commission for Democracy through Law, *Rule of Law Checklist* (2016).

factors that are only marginally considered in most assessment tools or in conversations with governments and their bureaucracies. One interlocutor interviewed for this report reflected on her experience in Somalia and UN programmes on rule of law and justice, saying “what struck me was not talking to the people of politics. The counterparts were police etc. The problem was the strategy. There was none”. The political dimension is typically covered in other tools than rule of law assessments but it is unclear how and to what extent they are used and, if they are, how they influence rule of law programming, what the experience is of programme staff within UNDP and other agencies to employ such tools for programming purposes.⁵⁸ Moreover, rule of law tools are often weak on the issue of informal institutions, and the interplay between formal and informal institutions.⁵⁹ The *UN Rule of Law Indicators*⁶⁰, the World Justice Project *Rule of Law Index*⁶¹ and the UNDP’s *Guidance Note on Assessing the Rule of Law using Institutional and Context Analysis* are all examples of assessment tools departing from legal best practice, while failing to include politics. Even though the importance of understanding the political context is acknowledged in the instruments, the indicators do not adequately address the political implications of interventions or look beyond the so-called justice chain.

Evaluations and Rule of Law Reform

The critique against assessment tools can also be levied against the evaluation methods used to capture transformative change in rule of law. Failing to include politics and failing to design politically smart and best fit programming can result in misleading assumptions of what has been achieved. As Cohen, Taylor, Fandl and Kessarar noted

58. For example, UNDP’s *Institutional and Context Analysis*, but there are limitations as to their use in countries where power is strongly contested or in transition. The current practice of country assessments has also been criticised for being too subjective, not evidence based enough to provide a sound political analysis that can inform decisions on whether to engage in rule of law reform at all, and if so, to inform on potential pitfalls and blockages. The World Bank’s good practice framework *Problem-Driven Governance and Political Economy Analysis* goes some way to addressing this issue, and focuses primarily on proposing viable and relevant solutions rather than constraints and obstacles for why rule of law assistance is not working.

59. Chappell & Waylen, “Gender and the Hidden Life of Institutions” (2013) pp. 599-600.

60. United Nations, *Rule of Law Indicators: Implementation Guide and Project Tools* (2011) p. 13.

61. Botero & Ponce, *Measuring the Rule of Law* (2011) p. 2.

in their review of evaluations in the rule of law field, stakeholders in the rule of law and other international development programming tended to suppose that project outcomes were collectively contributing to a larger goal (democratization, market strengthening, legal institutional reform) simply because the project activities in question had been implemented and when they observed progress on their program objectives they attributed it to their project activities. A second common assumption about what has been achieved is to think that more is better in terms of rule of law: “the more business licensing procedures abolished, for example, the more economic growth likely to flow from unburned small and medium sized businesses”.⁶² The problem with these assumptions is that they are rarely grounded in a basic understanding of the context. It is therefore rather ‘bad practice’ considering that it takes away the need to carefully examine whether and to what extent there is a link between a project’s activities and the fulfilment of larger programme objectives.

Donors and other organisations rarely make explicit the underlying assumptions of a programme and evaluations are often strictly based on performance indicators and seldom diverge from their technical straitjackets. Evaluators are mainly hired for their knowledge on evaluation methodologies and tend to overlook or even miss potential links and openings for the project to form a vehicle for a politically smart intervention. Mid-term reviews can also be more strategically used to change the course of a project to create complementary entry points in addressing entrenched rule of law challenges, rather than have an institution-centric approach. In this way the technical path dependency affects the whole chain of rule of law reform from the assessment and planning stage to implementation, and ultimately to how reform efforts are evaluated and understood. This impacts severely on the process of learning from past practice in rule of law programming. In conversa-

62. Cohen, Fandl, Perry-Kessarar, & L. Taylor, “Truth and Consequences in Rule of Law: Inference, Attribution and Evaluation” (2011) p. 108.

tions and interviews with UNDP staff a robust knowledge management process is found to be wanting (frequently identified by the interlocutors) and which is something needed for a more in-depth orientation when coming to a new country or region.

RULE OF LAW AS RULE OF LAWYERS

Closely related to the technical path dependency, the weak role of politics in rule of law reform can also be explained by the professional community involved in reform efforts. Since rule of law is often seen as requiring a certain professional understanding about law, and a specific set of technical skills (that is, expert advice on anti-corruption laws or modernising court management) the people recruited are usually drawn from a rather 'closed' professional group of lawyers, judges and law enforcement and correctional personnel. This professional group is characterised by high levels of education, practical experience, and familiarity of working in integrity-demanding industries with codes of ethics regulating their respective areas of practice.

That the field of rule of law reform is predominantly populated by such qualified professional groups is not unproblematic. While a judge is best suited to advise on court and profession-specific issue areas (that is, on sentencing or the role of a judge in adversarial trials) that same judge might not have sufficient knowledge on how to work on a programme of wholesale judicial re-organisation, or to advise on the advantages or disadvantages of hybrid court systems as a transitional justice strategy. Similarly, as police reforms in developed countries have shown, skills and experience in policing are not that easily transplantable into reform of policing practices.⁶³ They might also not have sufficient country knowledge to understand how the law operates or of social norms in a given society, again giving preference to technical knowledge over the political.⁶⁴ One respondent raised the critical point that rule of law as-

63. See, Murray, "Police Building in Afghanistan: A Case of Civil Security Reform" (2007).

64. See, Hunt, *UN Peace Operations and International Policing: Negotiating Complexity, Assessing Impact and Learning to Learn* (2015).

sistance has become an industry with the result that "only lawyers have been working on rule of law, and that has not been positive".

"...only lawyers have been working on rule of law, and that has not been positive."

In a recent FBA report on professionals in the rule of law field, Taylor and Simion shows that there is a divide between knowing how to work in a legal and administrative system based on experience from one's own country, and knowing how to support or reconstruct one in countries undergoing complex political transitions. In interviews with more than 100 rule of law practitioners the authors concluded that the respondents were fairly confident with regard to the legal concepts and methods in an advanced economy but had little knowledge of how those advanced economies came into being or of the specific part that justice institutions played in that process:

...they were fairly confident about the mechanisms of writing and passing new laws or methods for training the judiciary, prosecutors, the police, public defenders and the bar associations of any given jurisdiction, they were much less informed about the social dynamics that cause a particular country to fall into a governance crisis.⁶⁵

Apart from a dissonance between legal expert knowledge and knowledge of the political economy of legal systems, particularly in times of crisis, many rule of law professionals are also tasked with non-legal skills for which they are poorly prepared. This includes skills regarding project management, qualitative and quantitative methods of surveys and perception studies, how to establish monitoring and evaluation mechanisms, communication and training and pedagogical models for adult professional learning.⁶⁶ Similarly to the findings in the FBA report, a

65. Taylor & Simion (2015) pp. 23-24.

66. Taylor & Simion (2015) p. 24.

‘profile’ for security and justice staff developed for the Organisation for Economic Co-operation and Development (OECD) report *Improving Security and Justice Programming in Fragile Situations*, emphasised the need for change management, political acumen, political economy analysis and facilitation as critical skills.⁶⁷ This is also confirmed by many respondents interviewed for this report. As one interlocutor tersely put it, “someone that is only trained in law is not always the right person to work on these programmes”. Reports from the European Court of Auditor on EU’s rule of law mission in Kosovo echo some of the same concerns, particularly the difficulty of recruiting personnel and of the right type for the specific reform objectives.⁶⁸ Shortcomings in civilian capacity are also acknowledged by the UN in the report from the Senior Advisory Group of the Civilian Capacity Initiative. Capacity gaps, and the slow pace of recruitment, were described by senior UN leaders in the field as “the greatest internal challenges to mandate implementation” – identifying justice as one of the most critical areas of concern.⁶⁹

Technical Expertise v. Change Management Skills

Closely related to the problem of over-reliance on legal professionals is the fact that rule of law practitioners are in the business of change. O’Conner argues that in-depth understanding of change and how it occurs is crucial to the success of rule of law efforts.⁷⁰ The concept of theory of change however is often neglected by both rule of law scholars and practitioners, who tend to focus more on the legal and technical dimensions rather than identifying those factors that could lead to incremental change at political level. The current emphasis on formal institutions is one illustrative example that comes from the fact that

“most rule-of-law promotion specialists are lawyers and when lawyers think about what seems to be the nerve centre of the rule of law, they think about the core institutions of law enforcement”.⁷¹ While there are technical change factors to rule of law efforts, most components involve what is called ‘adaptive change’. The term involves changing people’s habits, beliefs, priorities and loyalties, which require decision makers to make significant internal shifts and to begin acting differently. This reflects what has long been considered as ‘responsive regulation’ and accumulated thinking on how best to encourage change through regulation where formal rules are but one part of the approach. Other approaches include providing space for dialogue, attempting to collaborate and engage those who resist reform and praising those who bring it about completely.⁷² Technical solutions do not sufficiently change the behaviour of relevant actors. It is rather personal and individual actions that manifests change. This is also the most common cause of failure in reform initiatives – that is, the application of technical solutions to adaptive challenges. This is something that has repeatedly been done by the rule of law community.

67. OECD, *Improving Security and Justice Programming in Fragile Situations: Better Political Engagement, More Change Management* (March 2016) Annex 5.

68. Derks & Price, *The EU and Rule of Law Reform in Kosovo* (2010). See, also, European Court of Auditors, *European Union Assistance to Kosovo Relating to the Rule of Law* (2012).

69. United Nations General Assembly, *Civilian Capacity in the Aftermath of Conflict*, Independent Report of the Senior Advisory Group (March 2011).

70. O’Connor, *A Guide to Change and Change Management for Rule of Law Practitioners* (2015).

71. Carothers (2003) p. 8.

72. See, Braithwaite, “The Essence of Responsive Regulation” (2011).

3. Making Politics Part of Rule of Law Reform

When looking at past practices, it seems that rule of law reform has fallen into the so-called capability trap, outlined by Andrews, Pritchett and Woolcock. This capability-trap is where interventions typically reproduce particular external solutions considered to be best practices in dominant agendas and act through pre-determined linear processes that inform the tight monitoring of inputs and compliance with ‘the plan’ and, are driven from the top down assuming that implementation largely happens by edict.⁷³

Theories of Change in Rule of Law Reform

The table below presents a general description of how transformative change is typically viewed in rule of law reform. In a stylised way, rule of law can be characterised as being one dimensional in its approach to problems and solutions together with a limited scope of stakeholders, which produces limited change.⁷⁴ The column on the right provides a broader perspective drawing on political economy. It is recognised that the field is broad and diverse in practice and that there are exceptions to the capability-trap. Far from all rule of law work operating in such an insulated way, most share the view that it is *with* law and *through* law that social, economic and political change can be achieved. In specific

73. Andrews, Pritchett & Woolcock, *Escaping Capability Traps through Problem Driven-Iterative Adaptation* (PDIA) (2012) p. 2.

74. See, for example, Andrews, Pritchett & Woolcock (2012) p. 7 and their example of competitive bidding rules instituted through laws.

sub-fields the need to have a better political understanding of interventions has emerged more strongly in discussions, but often in parallel rather than in unison.⁷⁵ Constitutional assistance is one example where the reform processes frequently link to broader peacebuilding efforts. As a result, constitutional assistance actors have been required to acknowledge and seek to address the particular challenges related to fostering democratic, participatory process in settings “in which both state capacity and trust between citizens may be at an all-time low”.

Where exceptions to linear and rigid theories of change take place, it is clear that they exist on the level of individuals rather than as part of an institutional policy that encourages more politically informed rule of law work.

Where exceptions to linear and rigid theories of change take place, it is clear that they exist on the level of individuals rather than as part of an institutional policy that encourages more politically informed rule of law work. This naturally varies from organisation to organisation, but for major agencies such as the UNDP, it is very much the case that where programmes and interventions challenge the conventional and template approach, it has more to do with a resourceful individual willing to take risks rather than an explicit institutional policy.

75. See, Gluck & Brandt, *Participatory and Inclusive Constitution-Making: Giving Voice to the Demands of Citizens in the Wake of the Arab Spring*, (2015) and Williams, *Constitutional Assistance and the Rule of Law in Post-conflict Transitions: An Overview of Key Trends and Actors* (2013) p. 32.

Rule of law reform perspective	Politically economy perspective
<p>Scope Laws, legal institutions, institutions with a monopoly on violence, and dispute resolution agencies.</p>	<p>Social norms, informal norms and rules, cultural values and political power overriding or undermining laws and legal institutions.</p> <p>Disputes solved by political means (e.g. settlements).</p>
<p>Stakeholders Legal and security professional groups (judges, police officers, prosecutors, corrections officers), parliamentarians and politicians.</p>	<p>Bureaucracy (particularly regional or local public bodies): political groups, economic interests, and general public and public interest groups.</p> <p>Political stakeholders can have many different roles.</p>
<p>Assumed change process Within and through law, assuming a shared set of values and methods, i.e. passing new laws requires technical skills within parliament; that legal professionals understand them and are capable of applying them; and that they are (fairly) known in society. New laws, with stronger professional groups, force a change in behaviour.</p>	<p>Through politics (i.e. elections or unconstitutional political change), informal political settlements or public-private interactions.</p> <p>Collective action: most actors are willing to ‘do the right thing’ if most other actors are so willing.</p> <p>Plurality of change processes and political pressure from within or outside the country; demands or rewards in external relationships, i.e. trade, public appearance, international criticism.</p>

While writings on thinking and working politically emphasise different aspects of rule of law work, what they have in common is that they place politics at front and centre of reform “whether through analysis, strategy, partnerships or design, or simply trying to avoid the unintended

consequences that arise from ignoring the local political context”.⁷⁶ It is clear that what is suggested is not a revolutionary change of practice. Some donors and implementing agencies like UNDP would even argue that is essentially about good programming. This might be the case but a growing number of observations and studies point to obstructions to working in a more politically informed way that are embedded in the bureaucratic practices of most organisations, and the UNDP is no exception. Few donors and implementing agencies have informed policies encouraging and guiding practitioners to work more politically. On the contrary and as several interlocutors from UNDP stated, incentive structures of their organisation act as a deterrent to several of the suggested practices from the thinking and working politically community. Again, many of the experiences encountered of good programming is done by people who get around obstacles and work (despite the rules) in clever ways.

Rule of law reform as the pursuit of a political goal is not only an innately political endeavour but also a confrontational one. The following two sections focus on some of the most salient recommendations for working politically smart based on literature, interviews and consultative meetings. Concentration on rule of law programming comes first in the section on responsive rule of law reform. This in turn also requires that donors and implementing agencies establish responsible policies for when to engage in rule of law reform, how to assess risks, and how to become more open about trial and error and not hide from ‘failure’ but learn from it, particularly in environments of fragility and conflict. This is covered in the following section. The typical institutions that rule of law reform seeks to support are (together with democracy input institutions) the most important ones for creating and sustaining support for the performance of democracy and public trust in the political system.⁷⁷ It is often in relation to these institutions that early warning signals

76. Dasandi, Marquette & Robinson (2016) p. 3.

77. Dahlberg & Holmberg, *The Importance of Institutional Trust for Regime Support*, 2014, p. 9.

can be detected, indicating a closing space or impeding crisis. Thus technical rule of law programmes are also significant from the point of view of conflict prevention and early response to a crisis. Moreover, a politically smart way of working would also require analysis on how this plays out in relation to fundamental challenges of pluralistic legal systems and in situations where norms differ not just between donors and national stakeholders, but also within and between stakeholder groups.

RESPONSIVE RULE OF LAW REFORM

Working politically smart in rule of law reform is about allowing responsive policies to guide every action from planning to implementation and evaluation.⁷⁸ The academic and policy literature tends to coalesce around a set of conditions and recommendations: focus on problem-driven solutions, identified by domestic actors at different levels of state and society; employ an iterative, problem-solving and incremental process where ‘solutions’ are developed gradually and as opportunities arise; ensure technically sound and politically possible reform objectives; work through coalitions and ‘networked governance’, i.e. multidisciplinary cooperation when and where needed; and, ensure flexible funding.⁷⁹

What is suggested from the literature for politically smart programming might not always be feasible in certain countries, or with certain types of organisations. The analysis of being close to what national partners do, being selective in reform efforts and tailoring programming and recruitment accordingly, reflects the observations and

78. Responsiveness employed here is influenced by the thinking around responsive regulation by Selznick, *The Moral Commonwealth: Social Theory and the Promise of Community* (1992) p. 336.

79. Manuel, *Delivering Institutional Reform at Scale: Problem-driven Approaches Supported by Adaptive Programming*, LASER (2016) p. 4.; Denney & Kirwen, *Politically Smart and Locally Led Justice Programming: Learning from Other Sectors* (2014) pp. 2–3; Faustino & Booth, *Development Entrepreneurship: How Donors and Leaders Can Foster Institutional Change*, Asia Foundation & Overseas Development Institute (2014); Booth & Unsworth, *Politically Smart and Locally Led Development*; and Andrews (2013). It is worth noting the similarities between politically smart development work and the basics of responsive regulation. Braithwaite (2011) pp. 476–477. For example: think in context, don’t impose preconceived theories, listen actively and support dialogue that give voice to stakeholders, build commitment by helping actors find their own motivation to improve, engage those who resist with fairness and praise those who show commitment.

criticism that has long existed in the rule of law field, from early studies of the law and development movement to more recent engagements in conflict-ridden and fragile states. The field of rule of law has also gone through a gradual learning process, and much more attention is now being paid to local ownership, context and the avoidance of the easy transplanting of legal rules. While this testifies to a maturing field, becoming both more responsive and more responsible, it is a development that has taken place within a framework where trajectories of change still rely dominantly on law as *the* transformative tool. The following sections deal with some of the issues that should be addressed in order to enhance the responsiveness of rule of law reform.

‘Good Enough’ Politically Informed

Rule of law reformers must become better at assessing and understanding the political will to reform. It is typical to talk about absence of political will or political blockages to reform, but political will is not monolithic. Actors may have different incentives and constraints even within the same sector.

Past practice consistently shows that reforms are more effective when there is a genuine demand and a will to reform from political leaders and from within civil society. Earlier studies (for instance, *Weighing in on the Scales of Justice*) noted that in many countries the preconditions for undertaking an effective rule of law programme will be marginally present at best and the authors recommended United States Agency for International Development (USAID) officers to think politically rather than bureaucratically.⁸⁰ Nearly 20 years later, the same analysis was repeated in the 2015 Independent Commission for Aid Impact (ICAI) report, which examined United Kingdom (UK) development assistance to security and justice reform. The report found there were few signs that institutional development work was leading to wider improvements

80. Blair & Hansen, *Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs* (1994) p. 51.

in security and justice outcomes. The reasons cited is the reliance on a standard set of interventions across different country contexts and that the Department for International Development (DFID) often moved straight into supporting ambitious reform programmes, despite an apparent lack of interest either from the political leadership or the institutions themselves.⁸¹

A Nuanced Understanding of Political Will

Understanding political motivations to reform should not be one-sided but also include political motivations not to reform. This includes an understanding of the ways that rule of law reform can be resisted, circumvented, mitigated or undermined as outlined by Kleinfeld: “changes that involve political decision-making do not move in a straight line. Reforms tend to be met with counter-reforms, and movement tends to swing back and forth”.⁸² It is also important to recognise that political obstacles put in the way by social groups, community leaders, economic interests, or legal professionals, is not an independent factor.

“You’re re-organising power and that will get resistance, even though that is something that needs to happen.”

As one interlocutor said, “you’re re-organising power and that will get resistance, even though that is something that needs to happen”. So-called spoilers and resistance exist in relation to *something* – for example, a political leadership might oppose what it appear to be attempts by another political faction to claim power, or law enforcement agencies might fight against attempts at creating civilian oversight mechanisms lest it de-legitimises their agency. Thus, aversions can be triggered by reforms and not always because there is disagreement over outcomes. Donors and implementing agencies should also be aware

81. ICAI, *Review of UK Development Assistance for Security and Justice*, Report 42 (2015) p. 33.

82. Kleinfeld, *Improving Development Aid Design and Evaluation: Plan for Sailboats, Not Trains* (2015) p. 12. See, also, Stabereck, “A Rule of Law Agenda for Central Asia” (2005).

that their interventions can simultaneously generate both a resistance to and a will to action. Initiatives to enhance judicial independence that include capacity building of the judiciary through training, and securing of professional indicators for judicial positions, can both strengthen the judiciary with regard to the political power, but also de-mystify its professional status in relation to the constituency. In societies where there really never has been a tradition of public service, but where working for the state has been a professional marker, the depth and complexity of the cultural change required should not be underestimated.

Political Will on Different Levels

Identifying and analysing the will to reform must be undertaken on all levels of state and society. It is perhaps most clearly manifested through political leaders’ expressed commitments to reform agendas (through compacts, agreements, or development frameworks). But both the literature and past experience consistently emphasise the significance of also seeking political will at all levels of state bureaucracy and civil society. Political leaders are often necessary, but not sufficient, for the success of reform programmes, and they are often more responsive to the forces in their societies than to the persuasiveness of international donors.⁸³ While governments publicly embrace the rule of law agenda, their commitments might concern a technical conception of it, in line with the path dependency of donors and implementing agencies (where it can also be a conscious move to downplay politics).

Thus it is necessary to look at leadership from a broad point of view when discussing political will, but many observers note a tendency in rule of law reform to employ a fairly black and white view regarding the assessment of will beyond political leaders. Judges, lawyers, law enforcement personnel and legal professionals are generally seen as reform-minded in the theories of change for rule of law programmes (in accordance with the rational actor model). At the same time, legal

83. Dasandi, Marquette & Robinson (2016) p. 16.

professional groups may be heavily invested in a *status quo*, or display a multitude of loyalties depending on the objectives of different reform programmes. The political economy takes different expressions in relation to dissimilar state functions.⁸⁴ For courts, and other criminal justice actors, the political economy might be constituted by a tug of war for independence from the executive branch while simultaneously enjoying a special constitutional and social status as closed professional groups. Judiciaries and other legal domains, for example, may serve as arenas where state power can be challenged, even in countries where political opposition is not tolerated.⁸⁵ Though courts are used as political tools they also, paradoxically function as “important sites of political resistance”.⁸⁶

This informs a need to adopt a more nuanced and detailed view of reform spaces and how ‘pockets’ of resistance, reform possibilities can exist in otherwise difficult environments. In relation to public administration agencies, the political economy is often influenced by its closeness to the executive and in being largely shielded from international scrutiny and often lack in strong and clear legal mandates. Both Grindle⁸⁷ and Andrews⁸⁸ show how bureaucracies can effectively water down reforms that politicians have decided on. So, it is crucial to understand their motivations, hesitations, and interests in a transformative process. A recent review of politics and bureaucracy examines successful relationships between political leaders and state institutions and identifies five conditional themes. These include whether the bureaucracy has had a greater influence than usual on defining policy; whether political leaders shared a set of values and goals with the bureaucracy; whether there were informal ties between top bureaucrats and political leaders; and whether there was strong and committed political leadership to take on reforms.⁸⁹

84. See, for example, Levy & Walton, *Institutional Incentives and Service Provisions: Bringing Politics Back In* (2013).

85. See, for example, reports from Kyrgyzstan, Human Rights Watch, *Distorted Justice: Kyrgyzstan's Flawed Investigations and Trials on the 2010 Violence* (2011).

86. Moustafa & Ginsburg, “Introduction: The Functions of Courts in Authoritarian Politics” (2007) p. 2.

87. See, Grindle, *Despite the Odds: The Contentious Politics of Educational Reform* (2004).

88. Andrews (2013).

89. Dasandi, *The politics-bureaucracy interface: impact on development reform* (2014) p. 28.

Assessing Political Will

Assessing political will in order to ensure politically informed programmes fundamentally depends on the availability of an apparatus and framework for the planning and design of rule of law reform. Conducting political economy analyses prior to starting country interventions has become common practice for a number of development actors, not least DFID and the Dutch agency, Directorate-General for International Cooperation (DGIS).⁹⁰ Assessing political economy has become a necessary ingredient to disaggregate the political implications of project interventions, but to identify what has not worked and acknowledge the deficiencies in project design.

While using political economy for designing rule of law assistance is by no means a new approach, in certain cases UNDP staff members have said they did not find it helpful. There is a gap between a political economy assessment and then how it is used to benefit the planned project selection, design, implementation and results. The lack of significant commitment to integrate it into rule of law programming was underscored by one interlocutor in that “the technical expert sees himself/herself as a technical expert” only. Moreover, there is sometimes a tendency to expect political analysis to point directly to alternative programming strategies, but this has proved to be unrealistic.⁹¹ Political economy analysis is no silver bullet. If conducted it should ideally include staff that will be implementing and managing programmes so that the analysis is “not merely an add-on that sits in silo separate from implementation and day-to-day management”.⁹² It is also important that political economy analyses, or similar such exercises, add gender as a critical component to questions on power and power relationships. It is well-documented by gender and political researchers that there

90. See Wild & Foresti *Politics into practice: a dialogue on governance strategies and action in international development* (May 2011).

91. Whites, Gonzales, Fyson & Tesley, *A Governance Practitioner's Notebook: Alternative Ideas and Approaches* (2015) p. 49.

92. Denney, *Using Political Economy Analysis in Conflict, Security and Justice Programmes* (2016) p. 8.

is a general pattern across all regions of the world where “entrenched gender stereotypes and control of political resources have worked to privilege (certain) men and disadvantage most women”.⁹³ The unequal relationship between genders and its influence on political and policy is important to specifically recognise in an overall political analysis. Equally significant is that there is much to suggest that incorporating gender dynamics in political analyses will help to further understand and inform on power in relation to institutional change, and why such change does not always bring the desired results.⁹⁴

Use Political Analysis as a Complement to Existing Tools and Practices

The test for the rule of law field is in identifying ways in which to capitalise on the methods and approaches – the questions asked, the scope of inquiry – of political economy analysis, and adapt it to existing practices. The existing ‘toolbox’ for analysing the rule of law in a country setting is so much focused on law that a complementary analysis of the political economy is required in order to provide an informed basis for programming. Conversely, while most implementing agencies like the UNDP regularly conduct conflict analysis, actor mapping and other such studies, they are sometimes undertaken separately from the rule of law planning process, or taken on more as a formality without consideration as to how the data generated will support information from rule of law assessments.⁹⁵ A common observation in interviews and conversations with UNDP staff, including PDAs deployed jointly with the DPA, is that utilising existing tools and practices to create politically informed programming often comes down to individuals and personalities and not because of an institutional structure that systematically encourages linkages between political analysis and technical programming. For UNDP, this is an institutional vulnerability. An important message here is that there is no need to reinvent the wheel for rule of law practice. Instead, one way is to make use of what’s already in place.

93. Chappell & Waylen (2013) p. 602.

94. Waylen, “Informal Institutions, Institutional Change and Gender Equality” (2013) p. 212.

95. Denney (2016) p. 6.

Emerging new initiatives can augment the rule of law apparatus to properly take into account political aspects of reform.⁹⁶

“We’re too busy fighting fires and don’t have the luxury of conducting political economy analyses.”

Instead of developing completely new frameworks for analysis it is better to connect with what is already there in order to reinforce planning and programming processes. Another key message is not to overdo it and not let perfection stand in the way of ‘good enough’. When presenting the challenges, one interlocutor rather neatly summed it up stating that, “we’re too busy fighting fires and don’t have the luxury of conducting political economy analyses”. Time constraints are frequently cited as a reason for why political analysis is lacking in many rule of law programmes. Some form of political analysis whereby interventions and programming design benefit from a rudimentary political analysis is better than none. There needs to be a more nuanced emphasis on confronting the challenges of operating in fragile contexts where resistance to political change can be a targeted spoiler strategy adopted by a particular government. Indicators need to be underpinned by thorough political economy analysis and to be part of a broader strategic approach to determine if, and how, rule of law interventions promote political stability, security, and development.⁹⁷

There is also the point of sharing information, and the ‘burden’ of collecting it better. The UN, for example, has as one of its main comparative advantages a number of specialised agencies, funds and programmes that regularly generate vast amounts of information. This ranges from United Nations Office on Drugs and Crime (UNODC) on criminal law and Office of the United Nations High Commissioner for

96. See, Wild & Foresti, *Working With the Politics: How to Improve Public Services for the Poor*. According to the OECD, political economy analysis is: “...concerned with the interactions of political and economic processes in a society; including the distribution of power and wealth between groups and individuals, and the processes that create, sustain and transform these relationships over time”. OECD, *Political Economy Analysis Guide: Policy Impact Toolkit* (2012).

97. For more information on limitations and challenges of using indicators, see Oman & Arndt, *Measuring Governance*, (2010) and Thomas, “What Do the Worldwide Governance Indicators Measure?” (2009).

Human Rights (OHCHR) on human rights and impunity to UN Women on women's justice and human rights, United Nations Children's Fund (UNICEF), UNDP – and so on and so forth. Specialisation has unfortunately led to fragmentation. There are silos of analysis where data and explanations that collectively would provide a more comprehensive analysis are not shared sufficiently within or between institutions.

In almost all conversations with UNDP 'technical' staff, PDAs were seen as an important resource to bolster the political dimension of programming, but they also raised criticism that in some UN Country Team settings PDAs were seen as “disjointed” from the operational level or “in the hands of the Resident Coordinator”.

One institutional feature that can remedy some aspects towards better information sharing is the UN system of PDAs.⁹⁸ In almost all conversations with UNDP 'technical' staff, PDAs were seen as an important resource to bolster the political dimension of programming, but they also raised criticism that in some UN Country Team settings PDAs were seen as “disjointed” from the operational level or “in the hands of the Resident Coordinator” (RC). There does not seem to be a uniform practice, however, on the part that PDAs can play in relation to the preparation for programming and assessments in particular, and again it seems to come down to individuals and personalities, both the leadership of the RC, but also the outreach undertaken by the PDA. This is also shown in a mapping of the work of PDAs in the Asia Pacific region undertaken by the UNDP Bangkok Regional Hub. The report, which will be updated on a yearly basis, was developed with the aim of providing practitioners (including PDAs) in the same region with information needed to link their

98. See, UNDP-DPA, *Joint UNDP-DPA Programme on Building National Capacities for Conflict Prevention: Programme Document for 2015–2018* (2015). The uncertainty regarding the roles of PDAs was noted earlier in the UNDP, *Independent Review of Peace and Development Advisors and the Joint UNDP/DPA Programme on Building National Capacities for Conflict Prevention* (2014) p. 19.

99. UNDP, *Conflict Prevention and Peacebuilding Work in Asia Pacific*, to be published in July 2016.

work with conflict prevention activities, but also to serve as a knowledge management tool and to share lessons-learned as well as good practices.⁹⁹ While initiatives such as 'One UN' and frameworks such as United Nations Development Assistant Framework (UNDAF) are noteworthy, there is still much that can be improved upon order to enhance information-sharing and allow for a more comprehensive collation of information. One apparent danger, particularly for organisations such as UNDP where learning processes and feedback loops are weak, is that political economy analysis is taken to mean compiling relevant statistics to detail 'the context' and demonstrate progress, rather than actually analysing and unpacking rule of law problems and what sustains them. Moreover, a political analysis is not a one off exercise undertaken in the beginning of programming but should accompany programming throughout. The reason is simple – the context is always shifting, so much so that, according to one respondent, “every time the government changes, they come with a new idea. It is important that we value the impact we have. Otherwise, it will be difficult”. One PDA interviewed for this report stated that while support was often given in the beginning of programming, and a leadership role assumed to make this happen, once it was handed over to programme staff they ran into obstacles because they did not continuously update the political dimension. Instead, programme staff fell back on “what they know best, core project management skills which UNDP has perfected over the past 50-60 years, but which fail to prioritise the ability to consider the political side”.

Go Beyond Law

One of the most significant contributions from the stream of thinking and working politically smart community is the explicit recognition that technical assistance has to be framed in a political process. For rule of law specifically this means that there are other forces at work besides law that programmes and projects must relate to, and make use of, as opportunities and challenges arise. For most practitioners this is validation of a reality they often encounter in the field: much of what they do may have very little to do with law alone, but rather more with law as part of society and culture and behavioural change.

One illustrative example that challenges a fundamental part of the trajectories of change concerning law is the theory on collective action in relation to corruption and other forms of governance failures. Collective action goes against the traditional incentives and principal-agents idea that has long influenced rule of law reform. This is the idea that governance failures happen because principals (such as political leaders) fail to control their agents (the bureaucracy) and thus require support to regulate them.¹⁰⁰ Instead of viewing governance failures as being motivated by incentives or risk of sanctions at individual level, collective action shows that the quality of governance is better described and understood as something in ‘everybody’s’ interests and that it has effect only when actors have confidence that ‘almost all’ other actors act honestly.

Transformative Change through Collective Action and Plurality of Approaches

Collective action theory also questions the common situation where the principals themselves as well as their agents, are corrupt and unaccountable. A traditional view that governance failures such as corruption should be targeted at individual level (and where it is all about a cost benefit analysis of gains, getting caught and getting sanctioned) is gradually being challenged in favour of one where a situational account seems more relevant and useful and some researchers also claim that the dominance of this approach is probably one reason why so many anti-corruption initiatives have failed.¹⁰¹

The principal-agent relationship has also been impugned by recent works on public sector reform which emphasise motivating and empowering staff as a means of instituting change.¹⁰² This contrasts with the template approach of strengthening formal institutions and legal oversight

100. See, research by Mungu-Pippid, *Contextual Choices in Fighting Corruption: Lessons Learned*, (2011) in that the standard approach in anti-corruption reform have had no statistical impact at all on the control of corruption.

101. Gannet & Rector, “The Rationalization of Political Corruption” (2015) p. 167 and Rothstein & Tannenber (2015) p. 72.

102. See, Perry, Hondeghem & Wise, “Revisiting the Motivational Bases for Public Sector Service: Twenty Years of Research and an Agenda for the Future” (2010).

mechanisms in order to change the behaviour of agents. Bureaucratic motivation includes instituting reforms on dedication to jobs and civic duty and recognising and rewarding good performance as well as recognising social accountability to local communities where clients or ‘end users’ are engaged as checks on power and service delivery.¹⁰³ These perspectives on institutional reform and aspects of change management naturally include law in many different ways. The rewarding of good performance or civic duty might have to take an institutional form and in a similar way social accountability mechanisms might have to be regulated through law. The difference is that law plays a role of supporting or facilitating change, not as the main vehicle through which change happens.

For rule of law practice this broadens the scope of the stakeholders involved and emphasises the need to engage in dialogues on values and interests and complements technical approaches. For effective change any institutional reforms launched must be of such a comprehensive nature that they “do not only change the individual stakeholders’ perceptions about ‘how to play the game’, but also (and foremost) her perceptions of whether ‘most other’ stakeholders in her situation are also willing to change their behaviour”.¹⁰⁴ Valters, Van Veen and Denney emphasise in much the same way that institutional support should move beyond the capacity enhancement of a few stakeholders and instead focus more on changes in cultural, attitudinal and leadership styles, greater iteration in design and implementation, flexibility in the mobilisation of funds and staff, and longer timelines.¹⁰⁵ UNDP’s support to transitional justice in Tunisia is a case in point, specifically on the issue of ensuring that the process of seeking justice also engages women in both formal and informal ways. Most transitional justice processes face the challenge of ensuring gender equality, and Tunisia provides no

103. See, Fox, *Social Accountability: What Does the Evidence Really Say* (2014) See, also, Tandler, *Good Governance in the Tropics* (1997).

104. Rothstein & Tannenber (2015) p. 10.

105. Valters, Van Veen & Denney, *Security Progress in Post-conflict Contexts: Between Liberal Peacebuilding and Elite Interests* (2015) p. 25.

exception. To counter this problem the UNDP team in Tunisia sought out a variety of approaches, from formal institutional changes to ensure a representation in agencies central to the transitional justice process to awareness raising and targeted outreach strategies, involving community and youth centres. Many of these actions were rolled out simultaneously with the transitional justice process and clearly show how programmes can resourcefully adapt and respond to challenges in a flexible way based on a continuous analysis of context and event.¹⁰⁶

Regulatory theory offers a similar perspective to collective action theory on how to understand processes in rule of law change. In regulatory theory, responsive regulation is one that works by going with the grain of already established institutions and practices (where possible) and functions through so-called networked governance, thus emphasising plurality in checks on the abuse of power. In a programme seeking to minimise arbitrary power and imposing effective checks on the executive – a judiciary might to some extent play a significant role but it is likely to be most effective as a strategy when coupled with numerous other forms of checks as well – going beyond law in the formal sense.¹⁰⁷ Checks (in a broad sense) that can network with a judiciary to enhance the overall goal of curbing arbitrary power include the following: a national CSO; an international NGO; professional groups such as international and national bar associations and judges’ associations; embassies of the main donor countries; national institutions such as an ombudsman, a human rights office, or an auditor general; and institutions that rank governance and rule of law and make findings public at a global level.¹⁰⁸ Working to support a “plurality of many separate powers”¹⁰⁹ in order to curb corruption and minimise arbitrary governance in relation to a specific policy area is something that the rule of law field has in the past dealt with very poorly.

106. UNDP, Project PNUD-HCDH d’appui à l’opérationnalisation du processus de justice transitionnelle.

107. Braithwaite, “On Speaking Softly and Carrying Sticks: Neglected Dimensions of Republican Separation of Powers” (1996) pp. 311-313.

108. See, Drahos (2004) *Towards an International Framework for the Protection of Traditional Group Knowledge and Practice* (2004).

109. Braithwaite (2006) p. 885.

Ensure Best Fit

Similar to the paramount importance of assessing political will and going beyond template approaches on how and why change happens, rule of law reformers must also ensure that what they in the end support is a ‘best fit’ to the specific political economy of a country. Ensuring a best fit for rule of law interventions should not be limited to ‘understanding the context’ so that global best practice can be more easily introduced. It should rather focus on relevant practice that has traction and support in specific circumstances.

Ensuring a best fit for rule of law interventions should not be limited to ‘understanding the context’ so that global best practice can be more easily introduced. It should rather focus on relevant practice that has traction and support in specific circumstances.

Politically Acceptable and Realistic Reforms

Discussions on best fit are sometimes simplified by talk on legal transplants; that is, whether it is possible to transfer legal rules and institutions from one country to another. While informative in many ways, the debate tends to focus on law, and not so much on politics. A great deal of attention is given to the compatibility of legal rules or different legal ‘families’, but this rarely goes beyond what makes reform efforts successful. Viewed from this perspective, discussions on the importance of context not only impose high demands on practice but might also serve to exclude ideas and transformations if they are external to the country in which they are being implemented. Governance and rule of law change is seldom binary in this way. A recent literature review on the relationship between bureaucracies and politics in different countries identified several instances of successful reforms where bureaucrats and political leaders had borrowed ideas and policies from other countries.¹¹⁰

110. Dasandi, *The political-bureaucracy interface: impact on development reform* (2014) p. 29.

Other studies found that regional and sub-regional networks could hold more legitimacy and influence rule of law reform in a more positive way than international (or more distant) networks and norms.¹¹¹

Adapting ‘Best Practices’ to Context, Not Context to ‘Best Practices’

Thus there is no reason to avoid exogenous solutions and avoid good practice from the outside so long as they respond to problems identified by domestic actors and have a comparative advantage over ‘home-grown’ solutions: “the basic message must be that interventions are successful if they empower constant process through which agents make organisations better perform regardless of the forms adopted to effect such change”.¹¹² For this to happen, programmes must depart from the technical platform and align with political processes. In one interview a respondent put it simply, “the technical level can never accomplish rule of law alone because the rule of law sector is highly politicised”. A similar view was expressed by another interlocutor in relation to UNDP specifically, “in today’s world, unless you get politics right you can’t get development right”.

“In today’s world, unless you get politics right you can’t get development right.”

Recognising the importance of understanding how laws and legal institutions actually work and function in transition countries, specifically where it involves a political transition, suggests that donors and implementing agencies should invest more time and resources in order to learn practice and function of law rather than the form that law takes.¹¹³ Law plays many different roles depending on cultural, historic, political and economic trajectories, but a common minimum

111. See, Crouch, “Asian Legal Transplants and Rule of Law Reform: National Human Rights Commissions in Myanmar and Indonesia” (2013).

112. Andrews, Pritchett & Woolcock (2013) p. 7.

113. There is a fairly large research field on authoritarian states and specific institutional features of rule of law, i.e. judiciaries, police etc. See, Pereira, *Political (In) Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (2005) Hilbink, *Judges beyond Politics in Democracy and Dictatorship* (2007) and Barros, *Constitutionalism and Dictatorship* (2002). Addison, *The Political Economy of the Transition from Authoritarianism* (2009).

denominator in most contexts is that ‘good’ or ‘bad’ law in itself hardly ever matters much. What does matter is how it is put to use and allowed to frame the relationship between state agencies, powerful interests and citizens. When best fit becomes synonymous with understanding context in order to pave the way for best practice or global standards, donors risk enhancing what Andrews, Pritchett and Woolcock calls “isomorphic mimicry” – that is, because they are under pressure to reform organisations they adopt formal change strategies so that they look like successful organisations and emphasise organisational survival rather than functionality in relation to real needs and problems.¹¹⁴

Anti-corruption strategies are one example of where past initiatives have shown disappointing results simply because too much stress was placed on global norms and standards but relatively little on why corruption existed in the first place, or on its type, or on the different change processes that could be employed in order to restrain it.¹¹⁵ The weak impact of anti-corruption programmes is the failure to properly understand political processes and pressure forces, favouring instead sanctioning as a regulatory policy. Rule of law programmes focusing on combating corruption would be better advised to address the underlying causes of institutional corruption, and to try to account for informal institutions predicting corrupt behaviour, rather than routinely recommending technical programmes on new laws, watchdog institutions or enhanced capacity of law enforcement.

The relationship between formal and informal institutions might not be directly obvious, but can have a significant impact on how reforms are received and supported. Many studies, including ethnographically-based work, have provided insights into how informal and formal rules and norms interact within public administration, but very few of these seem to inform programming in any practical sense.¹¹⁶ Instead, formal

114. Andrews, Pritchett & Woolcock (2013) p. 5.

115. Klitgaard, *Addressing Corruption Together* (2015).

116. See, for example, Rhodes, *Everyday life in British Government* (2011).

institutions that can be changed relatively quickly constitute the backbone of rule of law assistance. Kosovo and East Timor are cases in point where the UN quickly changed a great number of formal institutions when they were in the position of international administrators. Other situations where constitutions and comprehensive formal institutions have changed with the support of international actors after a political settlement are to be found in Bosnia and Herzegovina, Iraq, Afghanistan, Burundi and Liberia. At the same time, all of these countries struggle with a persistent gap between formal rules and practice due to rapid legal change and dominant informal institutions with contrary incentives.

The attraction of a quick change of formal institutions is not only about idealistic overstatements about the role of law, but also a result of the ecosystem where rule of law reform takes place where longer timeframes and iterative approaches are discouraged financially: “it is much cheaper to fund a few expatriate experts with a small local staff to draft a law than to fund wide ranging programme[s] of public education, institutional reform and association building, which form the foundation for implementation”.¹¹⁷ Moreover, informal institutions are challenging to address through interventions and programming since they evolve in ways that are still far from being completely understood. As North said, they are “not typically amenable to deliberate human manipulation”.¹¹⁸

Best fit to the Local Level

In a similar way, reforms might only be possible at certain levels of state and society in any meaningful sense and it is important that donors and implementing agencies take a realistic view on what can be achieved and where. As one respondent (working in an environment where state institutions were effectively contributing to the problems with rule of law instead of working towards solutions) concisely put it, “we have to work within the realm of the possible”. This means being

117. Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries* (2005) p. 6.

118. North, *Understanding the Process of Economic Change* (2010) p. 50.

pragmatic and flexible about the type of processes that can be supported. UNDP’s rule of law programme in Palestine is a good example of doing just that. Considering the complexities of working in the Palestinian context, including Gaza, the UNDP programme has helped set up a rule of law CSO Roster with over 90 Palestinian, Israeli and international CSOs in Gaza and the West Bank.¹¹⁹ The CSO roster allows for a flexibility to shift strategic focus based on changing political dynamics and in cases where reform efforts are meeting resistance. The CSO roster has, for example, enabled a more tailored response to political changes, slightly shifting its original focus from legal aid to a focus on advocacy and strategic litigation interventions on accountability for human rights violations. Another example, also from UNDP, is the project *Rule of Law and Community Justice for Conflict-Affected Areas in Ukraine*. The proposed project has had to balance political differences between several regions, particularly in the conflict-affected east and Kiev. The proposed outline includes an approach of accompaniment and close alignment with local needs and challenges without appearing to push for a specific reform programme. At the same time the strategy suggested is one that would offer local officials and communities technical advice and material assistance in ‘coping’ – first in understanding, then in actually restructuring and performing new mandates within reforms that are sometimes seen as being ‘imposed’ by the national government. This approach has been developed by the UNDP in order to address underlying obstacles to community justice, and is a good example of recognising the political dynamics and acting upon that recognition when designing interventions.

In the case of Somalia, where over 80 per cent of its territory is not covered by justice institutions, one of the most pressing demands (as one interlocutor put it) is the issue of compatibility with Sharia law. Informal laws do not relate to the constitution or jurisdiction, which is something that needs to be considered. It is important, from a best fit

119. UNDP, *Strengthening the Rule of Law in the oPt: Justice and Security for the Palestinian People: Guidance Note – Civil Society Initiative* (2017).

perspective, to look beyond the national level and include sub-national arenas of governance. In a number of countries, more progress can be made with rule of law reform at local level if politics at national level is too much contested and slow to react to proposed change. Ukraine is an illustrative example where the Odessa reform package on public administration show the political deadlock and lack of consensus in evidence at the parliamentary level necessitated an alternative approach of building momentum from the local level up.¹²¹ Yet while advances are made lower down the political scale comes a risk that they can lead to a disjointed reform process without the engagement at executive level.

RESPONSIBLE RULE OF LAW REFORM

In order to allow for responsive rule of law reform to take place, where projects and programmes are based on and make use of politics, donors must do more to institutionalise responsible policies for rule of law assistance that strongly encourage such initiatives. To assume a more responsible policy towards rule of law reform requires donors and implementing agencies to invest in knowledge management and to take learning seriously as part of their programming. This includes learning from other fields where experience can be tapped as well as a review of recruitment policies. If practitioners are facing challenges in increasingly complex transitions, and demands are made on them to work more politically and beyond technical skill sets and competencies, then more has to be done to invest in personnel competences and to actively seek expertise for projects and programmes that fall outside the typical professional group for rule of law reform.

Working politically with responsive rule of law strategies also requires donors to allow funding to be more supportive of incremental and iterative ways of working rather than demanding results according to formulaic templates. This is not a chicken-or-egg situation. A main reason projects and programmes have the designs they have is because of rigid funding

121. The Economist, "Mr Saakashvili goes to Odessa" (26 September 2015).

systems and unrealistic timelines coupled with excessively high expectations or demands on results. Finally, a responsible rule of law reform should become better at assessing risks of interventions and potential unintended side effects. Rule of law reform is the pursuit of a political objective and in some environments this can have a negative impact in the sense of enhancing the legitimacy of an unaccountable government. It can also expose society to increased repression.

Assess Risks of Rule of Law Interventions

Incentives for Saying No to Funding

A responsible policy for rule of law reform where the political economy of reforms is taken seriously comes with a simple and straightforward rule: when in doubt, don't intervene, particularly if there is risk of doing harm. Doing something is not always the preferred option over doing nothing, at least not in the field of rule of law involving complex institutions such as the police, judiciary or security forces. A fundamental problem with aid and assistance today is that there are few incentives for saying no to funding. For UN agencies, funds, and programmes the ability to generate outside support for their operations is paramount in an atmosphere of unhealthy competition over a decreasing amount of ODA. This creates a warped incentives structure. Even in extreme environments, where there is limited information, security does not permit travel to collect information. When the political economy is impossible to assess from the outside, some implementing agencies (such as UNDP) are at times made to come up with comprehensive activities for rule of law reform, and sometimes within astonishingly short time frames.

As one respondent rather drily noted, "you are either the quick or the dead one."

Conversations and interviews with UNDP personnel frequently confirm this practice and it is often identified as a factor undermining a politically adapted, iterative and 'best fit' approach, and reinforces doing what you think you know best. As one respondent rather drily noted, "you are either the quick or the dead one". A responsible policy

would be to pass down the offer of funding or, alternatively, suggest a much more incremental and longer process of intervention, while also making the risks clear. Naturally, some situations require quick action, but it is important that time and resources are later made available to backtrack on reform efforts to conduct necessary planning, assessment and programming design.

Unintended Consequences and Do No Harm

A number of studies warn of the dangers of supporting rule of law without carefully considering the political surroundings and unintended effects. Lewis, in his paper on the OSCE police programmes in Central Asia, is critical of the support provided to national police forces.¹²²

Though acknowledging that modest aspects can be highlighted, such as exposing national police to international policing norms, or allowing them to discuss alternative strategies, police programmes have in some cases done more harm than good “by providing legitimacy to authoritarian regimes and helping them to modernize repressive law enforcement agencies”.¹²³ The experience from Central Asia is not unique.

Where international assistance is directed at a state’s capacity to meet the challenge of transnational organised crime and violent extremism, experience from Kenya shows that changes in the security situation can create circumstances where security forces go beyond the law and engage in profiling and mass arrests, thereby alienating communities and becoming part of the problem rather than the solution.¹²⁴ So long as there is lack of interest, at best, or outright hostility at worst, to democratic policing, programmes lacking leverage, monitoring and proper follow-up stand little chance of making a larger impact “it is impossible to develop democratic policing in a nondemocratic political environment”.¹²⁵

122. Lewis, *Reassessing the Role of OSCE Police Assistance in Central Asia* (2011) p. 51.

123. Lewis (2011) p. 51.

124. See, Open Society Justice Initiative, *We’re Tired of Taking You to Court: Human Rights Abuses by Kenya’s Anti-Terrorist Police Unit* (2013). A number of donors and organisations have supported reforms involving Kenya’s police and anti-terrorist unit in recent years, for example the UNODC.

125. Lewis (2011) p. 52.

Essentially, technical assistance has a tendency to continue without much divergence from established practices and is brought about by a lack of innovative thinking and risk-taking. Rather than training cadres, there should be a focused approach and a long term commitment to confidence-building within the police leadership and the responsible line ministry through creating more incentives. Without the political will to begin with, then any attempts to later breach this wall through a technical assistance track will ultimately not be enough to open doors at political level. Moreover, where corruption is deeply embedded in social norms and practices, this tends to create a continuing pattern in political competition and corruption.¹²⁶ Without adopting a political perspective to rule of law reform, support can further entrench conflict sensitive drivers in countries where political leaders pick reforms that enhance their grip on power.¹²⁷

Another example where unintended consequences risk thwarting reform efforts is the growing trend to support digitisation and rule of law. Many of these initiatives are used to enable civil society organisations to track government performance and share information quickly and broadly, and create automated government services to increase access and transparency in service delivery. While digital development is advancing rapidly across the world, significantly in fragile and conflict states, there is a risk of overstating what technical solutions can do to address more deeply rooted problems. Political corruption (such as the manipulation of policies, institutions and rules of procedure in the allocation of resources) will not disappear with technological advancement even though it might provide a new means of exposure. Corrupt practices will most likely adapt and find other ways to avoid disclosure. Moreover, digitisation initiatives involving civil society actors may expose them to easier surveillance and data collection from security agencies.

126. Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (2014) p. 86.

127. Kavanagh & Jones (2011) p. 36.

Increasingly, governments are imposing censorship and making greater demands on private sector actors to impose restrictive policies.¹²⁸ Examples such as these illustrate clearly that there is nothing apolitical with technical engagement and that in some countries reforms can be seized upon by government and strong interest groups in society and produce backlash and counter reforms.

Implications of Working in 'Rule by Law' Settings

It is also worth considering engagement in more difficult circumstances and to remember to see rule of law challenges in a specific country not in terms of lack but in design. In some countries where transparency is weak, judicial independence is frequently undercut and where corruption and impunity are rarely addressed (or discussed openly in the media, for example) rule of law is not so much lacking as facing competition from an alternative political system where strong interests operate within a 'managed' rule of law system.¹²⁹ Under such circumstances reforms may do more harm than good by strengthening political leaders' control and legitimacy, or by exposing civil society groups to increased repression.

Encouraging calculated risks based on a sound analysis of politics and conditions for reform is important for mitigating the overarching risks of doing harm. How risks are understood today should be further developed and become more nuanced in relation to challenges presented in fragile and conflict-ridden states. Risk-taking is not always encouraged by development and peacebuilding actors, and in some of the more politicised organisations taking a chance can be an inopportune behaviour for career development. In conversations and interviews with interlocutors for this report, many talked of a sense of 'institutional culture' (in particular for UNDP) that is reactive rather than reflective as opportunities appear in a country (either because of donor funding

or a political opening and invitation from the government). While also described as a unique vantage point – UNDP being responsive to events – this also signals a vulnerability of the organisation considering the weak institutional role of political analysis to which interlocutors also testified and one respondent observed simply, “the UNDP needs to fundraise. It works for governments. Therefore it is difficult for them to handle politics.”

Adjust Funding and Expectations

The Bureaucracy of Aid

Working politically requires of donors a greater amount of readiness and flexibility when planning for or designing interventions. This also involves risk-taking and openness to testing new ways of working. This means investing in both personnel, competences and processes for assessments that go beyond law and include political economy analysis, and for programming that is incremental and problem-oriented and less rigid in terms of inceptions and phases of implementation. The political economy of agencies like UNDP seem to constrain certain ways of working politically smart and instead favour a toolkit approach with its neat log frames, replicable interventions, familiar results and predictable funding. In one interview, a respondent related shrinking ODA with the practice within UNDP of using templates, particularly in smaller country offices where there are limited resources to invest in pilots and iterative approaches. Under these conditions, staff may choose “a safe route to show donors what we can achieve”. The same respondent suggested easier access to seed funding for pilots, experimentalism and iterative approaches when designing programmes. This was echoed in conversations with many other interlocutors working for UNDP. A central test is what to do, and how to work in countries where there are no 'opportunities' to seize, or where available opportunities are fleeting and narrow. In many peacebuilding situations, strategies of accompaniment seem to be the best option by finding reform openings by selectively attaching to some interest groups or concentrating on national or local priorities. In order to encourage this, flexibility funding should to a greater extent be based on “the needs, priorities and timings that programme staff

128. See, Freedom House, *Freedom on the Net: Privatizing Censorship, Eroding Privacy* (2015).

129. Borrowing the idea of 'managed' from Holmes, “Putinims Under Siege: An Autopsy of Managed Democracy”, (2012).

require, rather than top-down spending targets being determined from the outside of a programme”.¹³⁰

A Realistic Assessment of Results

If funding is made more flexible to provide incentives for incremental and longer programme and project design and inceptions, this will require a shift in expectation of results from a temporal perspective. The template or best practice approach in rule of law that focuses on formal institutional change produces results relatively quickly and is often taken as evidence that change has been effected. A more incremental process means that results may take longer. It also means that results will not always be as expected and will be both less tangible and binary.

While this is more reflective of how change typically occurs (gradual or sectoral results, drawbacks, fits and starts, counter reforms) this has to be coupled with a more realistic view on what can be achieved during complex transitions.¹³¹ Early studies by Jensen¹³² and by Blair and Hansen for instance, argue that because reform is difficult to initiate and support from the outside, an adjustment of expectations and calibration of goals in rule of law programmes is needed. This is reflected in more recent studies as well.¹³³ With few exceptions, researchers and observers are overwhelmingly clear on the need not to overstate what external interventions can realistically achieve. Countries in transition are often seen to hold a ‘window of opportunity’ for reform but these opportunities should be carefully assessed.¹³⁴ Some authors described this as a chance for interveners “to demonstrate that a new sheriff is in town and that it is no longer ‘business as usual’ ”.¹³⁵ In countries undergoing political transition it is not always clear who the ‘sheriff’ is, but it almost never

130. Dasandi, Marquette & Robinson (2016) p. 11.

131. Denney (2016) p. 9.

132. See Jensen, “The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers’ Responses” (2003).

133. Denney & Barron (2015) p. 3.

134. United Nations, *Report of the Secretary-General on Peacebuilding in the Immediate Aftermath of Conflict*, S/2009/304 (11 June 2009) p. 3.

135. Stromseth, Wippman & Brooks (2006) p. 145.

seems to be the external actors. As one respondent (working for the UNDP) put it, “we see the opportunity but don’t get past the political dynamics”. Another interlocutor (also from UNDP) raised the issue of political will and what you can realistically hope to achieve when it is weak or lacking, “let’s not be naïve and believe that our projects can be a magic wand. Imposing or semi-imposing (requesting the government to request us) can be pragmatic solutions...however, their likelihood of success is reduced”. It is clear that the room for the external actor is always limited and this perspective should inform policy and practice to a greater extent than it currently seems to do. Research on transition economies with fairly stable state structures reveals that “even under conditions of the strongest forms of external intervention, processes of democratization are in reality an essentially domestic drama...”¹³⁶ This will undoubtedly vary from country to country. The key point is that transformations, particularly those involving high political issues such as rule of law, are intimately linked to domestic stakeholders’ interests, and the space to reform is important to recognise. This speaks strongly for adapting a more responsive and responsible policy on rule of law reform that is “politically acceptable and within the resources of the government”.¹³⁷ There is a risk that shifting responsive and politically smart rule of law will be perceived as being less rigorous in terms of consistency and commitment because of the emphasis on iterative, trial and error and experimental ways doing things. Donors should take care to formulate clear guidance, or add to existing guidance frameworks, for the benefit of senior managers and implementing staff on how adaptability and flexibility can be pursued in responsible ways.¹³⁸

136. Morlino & Magen, “Scope, depth and limits of external influence: conclusions” (2009) p. 225.

137. Rose, *What’s Wrong with Best Practice Polices and Why Relevant Practices Are Better on Target? Government by Measurement* (2003) p. 10.

138. See, Booth, *Politically Smart Support to Economic Development* (2016).

Invest in Knowledge Management

If rule of law reform is going to become more political in how it is delivered and requiring of its practitioners to work more politically, it means they will have to go beyond currently established skill sets and professional roles. Unless personnel are able to undertake methodologically sound analyses and use the information gathered to inform programming, donors will not be able to implement reform that extend beyond the now dominant technical approach. In short, this necessitates two changes at the organisational level of donors and other international agencies supporting rule of law reform. One is to review the recruitment policy for rule of law practice and ensure that the rule of law field is differently staffed. Another is the need to invest in staff competence (both national and international) through training and knowledge management to both better prepare and extract experiences from rule of law work.

Individual Experience and Institutional Knowledge

While organisations like UNDP frequently engage in ‘lessons learned’ and different knowledge management processes, it is unclear who learns and how they learn. For professionals in the field there is a generally disproportionate relationship between new and experienced practitioners – “an acute lack of knowledge among new rule of law practitioners and, simultaneously, a wealth of ‘unused’ knowledge among those experienced in the field”.¹³⁹ In conversations and interviews with interlocutors working for the UNDP it has become clear that accumulated knowledge resides at individual level, and is not institutionalised to the extent needed to inform future rule of law interventions. This applies specifically to knowledge concerning political analysis, understanding, and assessments of risks that depend more on the individual than the organisation. Political acumen is critical for informing programming but is rarely captured in formal documents and processes. Weak feedback loops expose rule of law programming to repeating

the mistakes of the past and, at worst, marks a field of practice more based on intuition and hope than systematic knowledge and empirical evidence.¹⁴⁰ For UNDP and other organisations with high staff rotation and short time frames in difficult environments it is important that political acumen becomes a more explicit part of selection, assessment, planning, design and implementation of rule of law programmes. While it is not possible to capture this in detail and depth, a good enough knowledge management that ensures a documentation and transfer of political acumen between staff and programmes would go a long way.

Multi-disciplinary Teams

The issue of recruitment and team composition reflecting different disciplines and backgrounds is central to working politically and has been identified in the research on rule of law practice by Taylor and Simion and by a number of observers such as Alkon¹⁴¹ and Bayliss¹⁴². Looking at how larger donors are organised, however, this would require both the crossing of fault lines between those working in development and peacebuilding and between different themes – governance, human rights, democratic practices, rule of law, or security sector reform.

In many of the conversations with UNDP field staff, the need to broaden the professional composition of those working on rule of law reform came out strong. Many also suggested that this should be modular and adaptive in the sense that different disciplinary backgrounds come in at different stages. One respondent framed it thus, “what is needed is a bit of a filter...all rule of law people should not be political scientists, but someone should make the call in the beginning to see why we are doing projects. It should not just simply be, we are lawyers and therefore we do these things”. An enhanced focus on more political aspects of rule of law work – change and change management, sociological and anthropological work, for example – does not devalue the technical expertise

139. Taylor & Simion (2015) p. 25.

140. See, Trubek (2001).

141. Alkon, “The Flawed U.S. Approach to Rule of Law Development” (2013).

142. Baylis, “Tribunal Hopping with the Post-conflict Justice Junkies” (2008).

that many rule of law practitioners have. While such changes imply the adoption of revised recruitment practices, there are immediate options available for achieving a similar result, including through the establishment of ‘development solutions teams’ at country level comprised of multi-disciplinary expertise. In countries where deployed, PDAs could provide valuable insight and strategic guidance pertaining to political and conflict analysis, thus complementing the technical expertise of rule of law counterparts. It should be seen as a natural complement to the field, where there is acknowledgement that rule of law developments are also political processes that allow for employing comparative advantages of different skill sets at different stages of reform.

Learn from Other Fields

It is important to recognise that many of the lessons suggested by the political smart community are not new or original with regard to the challenges donors and aid providers have faced and are currently facing in complex political transitions. Moreover, many of the lessons are not even new to reforms working with and through law to a large extent. They are perhaps better described as new experiences for policymakers and practitioners in the mainstream of rule of law work.

Working on gendered law reform (or within the stream of feminist institutionalism) dealing with political resistance, informal rules dictating power sharing and cultural and social opposition to reform agendas, has been the norm. This has prompted the development of politically smart programming, utilising a variety of strategies to effect transformative change. Looking at the experience of feminist institutionalism shows an impressive array of lessons and approaches adopted in an area almost always facing resistance. Arguably, advancing gender equality and gender justice might be one of the most challenging policy areas on the development and peacebuilding agenda. Yet despite the tests that gender equality and gender justice have faced, it has managed to advance both law, practice and transformative change in a number of settings. The reason is to be found in the smart ways of navigating complicated political systems where entrenched patriarchal norms and

practices often permeates every layer of state and society. Chappelle and Waylan assert that in order to understand “why and how gendered rules, norms and practice change or stay the same.....we need to look within political organizations, to the operation of formal and the often invisible informal rules”.¹⁴³ By doing so it is possible to explain why changes to formal rules do not always mean that institutions behave differently, since informal rules and norms are often powerful enough to undermine formal changes.

Adding an analysis of gender power dimension to political and institutional frameworks, for example, in order to reveal who has the power to change institutional processes and outcomes, or why unexpected outcomes occur, constitutes the backbone of the work carried out by development practitioners, researchers and policy-makers on gender justice.¹⁴⁴ The learning that has taken effect in the field of gender justice has strongly influenced strategies and approaches.¹⁴⁵ It seems fair to say that the more mainstream forums of development assistance and rule of law – where gendered approaches may form part, but not constitute the heart of reform efforts – have sometimes made the mistake of assuming a more direct route to reforms because of biased assumptions that shared norms and values between professional groups (based on the rational actor model) the neutrality of law, and a downplaying of politics, will gain a foothold for more comprehensive and in-depth changes later on.

Maximise Comparative Advantages: Connect the Dots

The literature on general development assistance, and for rule of law reform specifically, consistently advocates a combined approach between peacebuilding and development. There is an increased specialisation of agencies, institutions and think-tanks, particularly within peacebuilding, on single policy issues – security and justice, rule of law

143. Chappell & Waylan (2013) p. 603.

144. Chappell & Waylan (2013) p. 600.

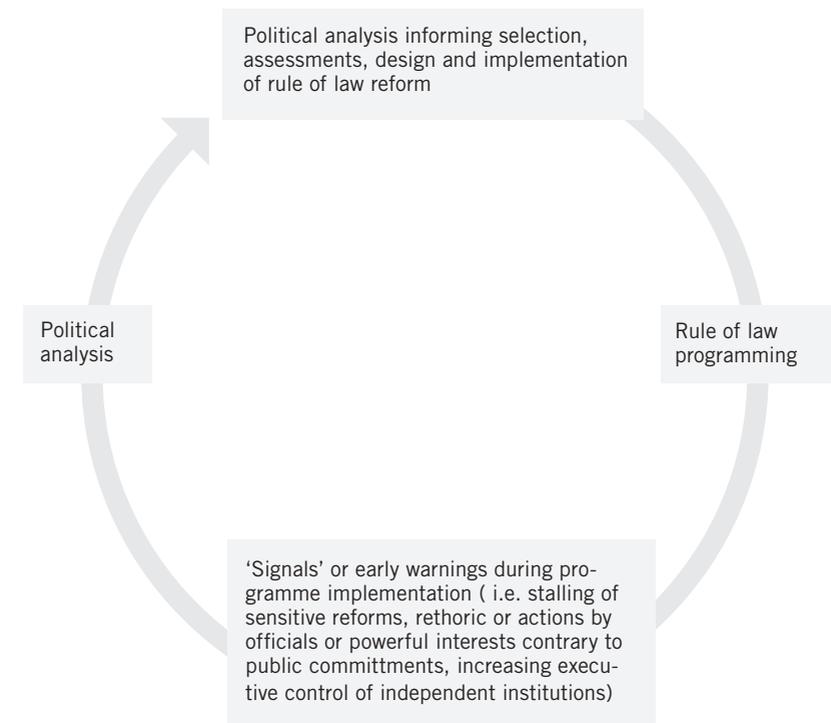
145. Domingo, Menocal & Hineostroza, *Progress Despite Adversity* (2015) p. 36.

or security sector governance. Many of these agencies and institutions operate in disconnected ways from longer-term development goals and apply their technical capacity in specific sectors with minimal interaction across disciplines and fields. This is not only a matter of ensuring a long-term perspective on peace and development but is also practical importance in the sense of utilising different ways of working to reinforce common objectives. Combining technical assistance with political leveraging is a valuable tool when addressing the political aspects of rule of law and could be used more frequently.¹⁴⁶

Rule of Law Programming and Conflict Prevention

A critical aspect of ‘connecting the dots’ is between rule of law programming and conflict prevention, in particular for UNDP. In conversations with UNDP in the field, it was stated that they struggle with ensuring links between peacebuilding and governance, and in particular between the technical programming side of rule of law and the more political level of engagement on dialogue, mediation and conflict prevention. This is not only about letting political analysis inform programming in order to be conflict sensitive, but more importantly to allow for feedback loops from programming at political level. The interlocutors interviewed for this report frequently cited a gap between programming and political levels. While this can make for poor programming, it also means that signals and movements identified while implementing rule of law programmes with relevance for conflict prevention are not systematically channelled to the appropriate political levels. Examples can include repeated practices from public officials that contradict their official message of support for reforms, an increase in policies and practices that violate core rule of law principles and human rights or particular actions of key official stakeholders that can upset political settlements.

Several interlocutors on the programming side also stated that when they write notes or documents on their observations regarding conflict



triggers and ‘signals’ of changing political climate, there is uncertainty on how to take that forward. On the one hand this is again a leadership issue (for the RC or other UN leadership in non-mission settings) yet there does not seem to be any institutional encouragement for doing so, with one respondent stating that “there is no home in the system for a note of this sort”. For early action it is important that donors allow for clear feedback loops between their different levels of engagement. PDAs have here the potential to bridge programming and political levels within the Country Team. One good example of this is the use of survey data and public opinion research done in Sri Lanka as part of the PDA presence that provide a national baseline that can also inform programming in many fields, including rule of law and security.¹⁴⁷ Interlocutors

146. Kleinfeld (2012) p. 128.

147. United Nations, *Report of the Secretary-General on the United Nations and conflict prevention: a collective commitment*, S/2015/730 (2015) p. 5.

often testified to the important part played by PDAs in their respective settings – for example, by providing political analysis and for regular updates of the situation as programmes were being implemented, adding the important conflict analysis and conflict prevention perspective.¹⁴⁸ At the same time and as stated above, both UNDP programme staff and PDAs interviewed for this study also reported on difficulties in connecting peacebuilding and conflict prevention with rule of law programming in the absence of more formal and institutional policies. Simply put, where there are successful examples of connecting the dots, it is due to a combination of RC leadership, proactive PDAs and programme staff. When the leadership is unsupportive or very risk averse, respondents report on difficulties of creating interactions between the political and programming level.

At the higher political level, the Special Representatives and Envoys of the Secretary-General, RCs and the diplomatic community all play key roles in convening and coordinating international actors and building and maintaining political consensus in order to assist in addressing political blockages that impede rule of law reform, and to collating information from programming on early warning signals. For example, the EU's membership incentive has often proved successful when used as a way to advance rule of law reform in candidate countries. At the same time, the EU's lack of a formal definition for the rule of law that it allows for the development for representative and transparent institutions that serve all citizens has largely entailed a dovetailing by member states in favour of a focus on a strong and independent judiciary as well as on the justice sector, and less on the internal workings of government institutions.¹⁴⁹

Within the UN system, a key obstacle in the past has been the rather watertight barriers between different agencies, funds and programmes.

148. See, also, UNDP, *Emerging Promising Practices in Conflict Prevention and Peacebuilding*, Practice Note (2013) and UNDP, *Delivering Programmatic Support in Conditions of Contested Sovereignty* (2013).

149. Ioannides, *Rule of Law in European Union External Action: Guiding Principles, Practices and Lessons Learned*, International (2014) p. 8

This is noted in the HIPPO report, where it comments that the UN should enable its relevant components to act in coherence with one another for greater effectiveness and to avoid facing major coordination challenges in the field. Essentially, the UN's diverse efforts must be better integrated and unified, something that the UN Secretary-General also echoed in his response to the HIPPO report.¹⁵⁰ Overcoming the challenge of UN divides should, however, not be underestimated. The UNDAF is one existing mechanism that has a mixed bag of results when it comes to assisting in the utilisation of multiple capacities within the UN system. There are new guidelines coming out on how to better use the authority of RCs and for mobilising resources for joint planning and programming. The Global Focal Point for Police, Justice and Corrections (GFP) is a fairly recent initiative that in several post-conflict settings has been able to bring out the comparative strength of the UN system.¹⁵¹ The GFP arrangement aims to ensure that the UN responds to requests for rule of law assistance in post-conflict situations through engaging all relevant UN entities in accordance with their comparative strengths, ensuring system-wide coherence.¹⁵² The most successful example is in Somalia where different UN agencies, funds and programmes work jointly on a broad set of policy issues. This means that resources and expertise are more readily available, but also that the interaction with Somali counterparts is coherent and carries stronger political weight than before. The GFP is an example of a platform for improving integration and coordination of the work of UN actors aimed at better delivery of assistance.¹⁵³ Though challenges of interoperability of integrating management and operational staff structures still exist it has enabled joint planning and joint work in 19 countries, including Somalia, the Central African Republic and Mali.¹⁵⁴

150. *Uniting Our Strengths for Peace* (2015) p. 50. And, United Nations, *The Future of United Nations peace operations: implementation of recommendations of the High-level Independent Panel on Peace Operations*, Report by the Secretary-General, A/70/357-S/2015/682, 2 (2015) p. 14.

151. Van de Goor et al., *Independent Progress Review on the UN Global Focal Point for Police, Justice and Corrections* (2014).

152. United Nations, Decisions of the Secretary-General – 11 September meeting of the Policy Committee, No.2012/13 (2012).

153. *The Future of United Nations peace operations: implementation of recommendations of the High-level Panel on Peace Operations*, Report by the Secretary-General, A/70/357-S/2015/682, (2015) p. 65.

154. Zajac Sannerholm & Ejelöv, *The UN Global Focal Point for Police, Justice and Corrections is at the Crossroads* (2015)

4. Conclusions and Recommendations

Rule of law development is a long-term and rarely linear process that is associated with political and economic developments and elite calculations about the merits and disadvantages of accepting constraints on their own conduct. Conversely, it needs to be able to engage in adaptive and flexible ways, given the volatility and instability of political conditions in fragile settings. While these constraints have been frequently noted in the literature over the years it is only recently that discussion on how to work under such constraints has become constructive and policy and practice oriented.

Politics is beginning to matter to rule of law reform, but there is some way to go before it becomes an integral part of rule of law reform. One example is that reformers must understand that taking politics seriously is not the same as taking context seriously. The two overlap, but understanding the context is something we should expect from rule of law practice. Knowing how rule of law affects and is in turn affected by politics is more difficult. Yet it is necessary for anticipating unintended consequences, properly identifying how reforms fit with social, economic, political and cultural demands, and for assessing the will to reform within the layers of state and non-state institutions and society.

One key message from the ‘working politically’ community, though simple and straightforward, is to ask hard questions about why change happens. The rule of law field has for some time acted on an assumed change process that puts law at the front and centre, thereby reinforcing a tendency to overstate the technical, not the political, when selecting, planning, designing, implementing and eventually evaluating

programmers and projects. Another example where the rule of law field needs to integrate politics seriously is the persistent one-sided focus on select rule of law institutions. Policy documents, tools and for that matter most of the research produced, all equate rule of law with courts, police, and correctional institutions. This is similar to the often used metaphor of a doctor only prescribing medicine based on symptoms, not causes. A narrow conception of rule of law is misleading since it implies that it has a certain set of institutions that are of more importance than others, and that these ‘core’ agencies can function well irrespective of how other government institutions (regional or local bodies) or non-state institutions perform according to rule of law principles.

In summary, and despite the recognised importance of the broader political context of the rule of law to sustainable peace, adopted approaches are often insufficient to address political challenges and drivers of conflict sensitivity.¹⁵⁵ First, rule of law experts have a tendency to see their roles as primarily ‘technical’, without taking into account the full breadth of the transitional context or the potential drivers of change that justice institutions and other public institutions can represent.¹⁵⁶ Thus, it potentially results in a programming which aims to only fill institutional capacity deficits even in contexts where the needs are inherently political. How the rule of law is defined also has a bearing on how funds are allocated and to what end. In a number of cases, implementing organisations that have pinpointed specific rule of law drawbacks and challenges not initially captured in a context analysis would benefit from a more flexible and informed donor approach to programming as well as provision of rule of law expertise through recruitment and secondment. Working politically smart is often about fine and sensitive margins and having the right expertise in the right place through informed coordination among likeminded actors and could reap dividends for moving beyond ‘technical’ entry points. Second, even where the need

155. Hickey et. al. “Exploring the Politics of Inclusive Development: Towards a New Consensual Approach” (2014).

156. Carothers, “The Problem of Knowledge” (2006) p. 21.

for a political approach is recognised, technically-oriented rule of law approaches may serve as the only common ground for cooperation with the host government that might be less willing to accept those that are more politically-oriented. In these situations, rule of law support may be formulated in technical terms to avoid criticism and conflict with the authorities or it could be withheld because of dangers of doing harm.

Because of these two established practices in rule of law reform, projects and programmes are often planned without parallel or phased engagement at the political level to ensure that authorities and institutions alike are capable of upholding the rule of law and addressing the root causes of societal grievance. This is especially the case in contexts of complex political transition or where the legacy of past violence looms.

Development literature and the ongoing debate on development aid politics is key to how and what rule of law assistance is trying to achieve, and whether it can become more adaptable and cognisant of the political dimensions of technical interventions. It is necessary not only to conduct political analysis, but to take into account the components of conflict sensitivity and to identify the drivers and spoilers of conflict in resisting rule of law reform in complex transitions.

An introspective political economy analysis might be useful in order to understand blockages, incentives and interests in the ecosystem of donors and implementing agencies as political agents. Working more politically on rule of law might, among implementing agencies, disrupt established ways of working and challenge hard won institutional experience. It could shift power balances and access to funding, require more joint work within and between ‘competing’ agencies and more transparency regarding trial and error. For donors, this could suggest a perception of diminished control in terms of fewer quantifiable results (numbers of laws supported, of judges trained, workshops organised) and more long-term funding. Thus, the challenge of moving towards more concerted, institutionally anchored and resource-backed political rule of law work lies not primarily in practice itself, but rather in the

sensitisation and frank conversations that must take place at donor and implementing agency level. Similar to the recommendations donors are receiving when engaging in transformative change in the field, transformative change at the above mentioned levels should not be seen as a technical fix, but as a political one.¹⁵⁷

157. See, for example, Mancini, *Managing Change at the United Nations: Lessons from Recent Initiatives* (2015).

Recommendations

RESPONSIVE AND RESPONSIBLE: POLITICALLY SMART RULE OF LAW REFORM IN CONFLICT AND FRAGILE STATES

Responsive rule of law	
Good enough politically informed	<p>Make explicit that it is the responsibility of UN leadership in the field to encourage linkages between political and technical (programming) engagements.</p> <p>Include political and conflict analysis in engagements on rule of law from the start (but recognise that political economy analysis is not a silver bullet). Encourage programme staff to participate in the analysis to better inform their programming and continuous updates during implementation, ensuring conflict sensitive approaches at a minimum.</p> <p>Ensure a system of information sharing on political and conflict analysis, including through leveraging existing expertise available within UN Country Teams and UNDP Country Offices, including PDAs, where deployed.</p>
Go beyond law	<p>Go beyond the principal-agent template. Law is one of many policy tools for influencing change. Collective action theory and public sector motivation perspectives should inform strategies for intervention.</p>
Ensure best fit	<p>Allow flexibility in planning and design. Focus on adapting to the context rather than fulfilling previously 'set in stone objectives'.</p> <p>Develop strategic networking approach tailored to a broad rule of law stakeholder group in each country and focus on politically acceptable and realistic reforms.</p> <p>Address rule of law issues and concerns also at sub-national level as well.</p> <p>Identify ways to align formal and informal authority and institutions – match what they should do with what they actually do.</p>

Responsible Rule of Law	
Assess risks of interventions	<p>Make responsible policies explicit. Recognise that no intervention because of inopportune moments, lack of information, or over-stretch is a responsible and encouraged course of action.</p> <p>Assess and make explicit any unintended consequences of an intervention. Encourage UN field leadership to calculated risk-taking and for flexibility in implementation, including halting or abandoning programmatic goals.</p>
Adjust funding and expectations	<p>Ensure flexible funding and reassess requirements; and not be bound by narrow technical frameworks and encourage longer timeframes to reach results and recognise and make clear the limits of external involvement.</p> <p>In extremely volatile situations, consider 'collapsing' inception and design entirely and encourage constant testing and learning.</p>
Invest in knowledge management	<p>Do not hide 'failures' – learn from them. Turn individual competencies into institutional capacity by investing in knowledge management and systematic competence provision through training and other measures to better prepare and extract experiences from rule of law work.</p> <p>Review the recruitment policy for rule of law practice, ensuring that the field is differently staffed and reflects the multidisciplinary challenges facing rule of law reform.</p> <p>Ensure more robust handover and focus on learning when there is staff rotation, specifically on explicit and implicit theories of change for engagements, networks and alliances and experiences from trial and error.</p>
Maximise comparative advantages: connect the dots	<p>Ensure feedback loops and proper documentation from rule of law programming to political analysis and political channels that relate to 'signals' and early warning indications.</p> <p>Explore options for leveraging the expertise of PDAs, particularly with regard to their role in undertaking political/conflict analysis and providing guidance on conflict sensitivity, to inform rule of law programming based on past practices and conduct a needs analysis for a review of the terms of reference for PDAs. Identify a limited number of countries to pilot and facilitate closer collaboration between PDAs and UNDP's rule of law portfolio, considering first those countries that were examined in this study.</p>

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