

# *FBA Brief 06/2016*

## *Responsive and Responsible:* **Making Politics Part of UNDP's Rule of Law Agenda**

Working politically smart is receiving growing recognition in development and peacebuilding. This brief, drawing on a review of literature 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 working politically smart can be included in rule of law practice. The brief focuses on UN and United Nations Development Programme in particular. The main message is that for agencies such as 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.

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### SUMMARY

- › *Thinking and working politically smart in rule of law reform means going beyond technical engagement to frame programmes and projects in relation to political processes.*
- › *UNDP (as well as many other implementing agencies in the field) often seek neutral entry points for their programmes, base theories of change in formal law, and lack an institutional structure for integrating political analysis in their engagements.*
- › *In the UN context, it is the responsibility of the UN leadership in the field to encourage linkages between political and technical engagements, and to ensure that programme staff participates in political analysis to better inform their programming.*
- › *The joint programme between UNDP and DPA on Peace and Development Advisers has the potential to bolster political analysis and thinking.*
- › *UNDP should also 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.*
- › *UNDP should not hide 'failures' – but learn from them. One important aspect is to turn individual competencies into institutional capacity by investing in knowledge management and systematic competence provision.*

## INTRODUCTION

Over the course of several years, 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 such as UNDP 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. This is not a new insight to UNDP (or other UN agencies) and there are many examples where interventions have been smart, taken calculated risks and been aligned 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. 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.

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## RULE OF LAW AND POLITICS

In the international context, the most authoritative definition of rule of law is the so-called 'UN definition'.<sup>1</sup> 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.<sup>2</sup> The environment in most transition countries where UNDP operates is only marginally conducive to basic rule of law principles. Many fragile and conflict settings are characterised by confrontations in terms of institutional capacity, unclear or contested political mandates for governments, social fragmentation, gender inequality and high levels of violence against women as well as widespread corruption. Unstable and conflict-ridden states are also sensitive to crisis and suffer protracted fragility and repeated cycles of violence.<sup>3</sup> 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.

By 'political' and 'politics', this brief refers to the broader meaning of the words to include decision-making processes, distribution of resources and power, the institutional environment (formal and informal) and political culture.<sup>4</sup> 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. Whether one defines rule of law as a 'thin' or 'thick' concept (for example, focusing only on the formal and procedural aspects or on substantive 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. Politics plays a key role for the rule of law with regard to political settlements on the allocation of resources to legal, judicial and administrative

1. United Nations, *The rule of law and transitional justice in conflict and post-conflict societies*, Report of the Secretary-General (2004) p. 4.

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

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

4. Leftwich, *Bringing Agency Back In: Politics and Human Agency in Building Institutions and States* (2009) p. 13.

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. While individual competences can be turned into organisational capacity through institutional reform, 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.<sup>5</sup> 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. Failure to properly acknowledge the importance of politics means that risks, resistance and expected results will be difficult to forecast in programming.

The literature reviewed for this brief, as well as the interviews and consultative meetings held with practitioners, makes it clear that rule of law programmes and the 'ecosystem' where they operate are generally not designed to properly identify the political dimensions of reform, or capable of constructively addressing them during the course of implementation.

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## THE LACK OF POLITICS ON THE RULE OF LAW AGENDA

There are three main patterns that explain the absence of politics in rule of law reform; in general and for UNDP in particular.

### *Neutral Entry Points*

First, donors seek neutral entry points in politically demanding environments, and therefore downplay the political aspects of rule of law. As one respondent framed the issue, "there is pressure to find entry-points and this is very difficult". Under pressure to find entry-points, there is a tendency to fall back on linear arguments in conversations with governments, "if there is rule of law, then there is less corruption and more economic blossoming." Or in more direct terms, and appealing to perceptions and appearances, UNDP can sometimes approach governments with the adage, "we can make you look good". It also seems that donors strategically choose to enhance a formal rule of law requirement over the politically-focused on the assumption that the formal reform objectives will spearhead political reform at a later stage. 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 Implementation Modality (DIM) the organisation is, as one interlocutor put it, "beholden to the government" because national institutions act as implementing agencies.

### *Technical Path Dependency*

Second, and 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 formed and sustained by the assessment tools that are available in the rule of law field. Because programming is only as good as the information it is based upon, how and where information is gathered, analysed and understood is of paramount importance. Rule of law assessment devices tend to zero in on institutions rather than on broader justice and security problems.<sup>6</sup> The tools often depart from global best practices – for example, on judicial independence, constitutional review or specific legal regimes such as procurement or criminal law.

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

6. 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).

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 factors that are only marginally considered in most assessment tools. 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 and what the experience of programme staff is within UNDP and other agencies to employ such tools for programming purposes.<sup>7</sup>

*'Rule of Law(yers)'*

Third, the rule of law field is dominated by legal professionals. 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. While a judge is best suited to advise on court and profession-specific issue areas 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. One respondent raised the critical point that rule of law assistance has become an industry with the result that "only lawyers have been working on rule of law, and that has not been positive".

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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 such a system in countries undergoing complex political transitions. 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.<sup>8</sup> 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".

## MAKING POLITICS PART OF UNDP'S RULE OF LAW AGENDA

The following sections look at six different areas where UNDP need to do more in order to overcome its technical path dependency and reliance on theories of change based on law. Programmes and projects should be tailored to country circumstances, and there must be more explicit responsibility for learning and knowledge management, including a leadership commitment to thinking and working politically.

### *1. Make Political Analysis an Integral Part of Programming*

UNDP 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. 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

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7. For example, UNDP's *Institutional and Context Analysis* (2012).

8. Taylor & Simion, *Professionalizing Rule of Law: Issues and Directions* (2015) p. 24.

resisted, circumvented, mitigated or undermined. As one interlocutor said, “you’re re-organising power and that will get resistance, even though that is something that needs to happen”.

#### *Assess Political Will on Different Levels*

An analysis of the will to reform must be undertaken at all levels of state and 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.<sup>9</sup> Thus it is necessary to look at leadership from a broad point of view and not construct a theory of change based on the assumption that judges, lawyers, law enforcement personnel etc., are reform-minded. Legal professional groups may be heavily invested in a status quo, or display a multitude of loyalties depending on the objectives of different reform programmes.<sup>10</sup> This informs a need to adopt a more nuanced and detailed view of reform spaces and how ‘pockets’ of resistance – and possibilities for reform – can exist in otherwise difficult environments.

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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 how it is then used to benefit the planned project selection, design, implementation and results. Moreover, there is sometimes a tendency to expect political analysis to point directly to alternative programming strategies, but this has proved to be unrealistic. Political economy analysis is no silver bullet. If conducted it should ideally include staff that will be implementing and managing programmes. It is also important that political economy analyses add gender as a critical component to questions on power and power relationships. The unequal relationship between genders and its influence on political and policy is important to specifically recognise in an overall analysis.<sup>11</sup>

#### *Don't Let Perfection Stand in the Way of 'Good Enough'*

The test for UNDP is in identifying ways in which to capitalise on the methods and approaches of political economy analysis, and adapt it to existing practices. An important message here is that there is no need to reinvent the wheel for rule of law practice and it is better to connect with what is already in place. 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 programmes. Some form of political analysis whereby programming design benefit from a rudimentary political analysis is better than none.

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. Specialisation has unfortunately also led to fragmentation. One institutional feature that can remedy some aspects towards better information sharing is the UN system of PDAs.<sup>12</sup> 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

9. Dasandi, Marquette & Robinson, *Thinking and Working Politically: From Theory Building to Building an Evidence Base* (2016) p. 16.

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

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

12. See, UNDP-DPA, *Joint UNDP-DPA Programme on Building National Capacities for Conflict Prevention: Programme Document for 2015-2018* (2015) and, *Independent Review of Peace and Development Advisors and the Joint UNDP/DPA Programme on Building National Capacities for Conflict Prevention* (2014) p. 19.

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, as it appears to come down to individuals and personalities.

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. One PDA interviewed for this report stated that while support was often given at 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”.

## *2. Work with Best Fit, Not Best Practices*

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 UNDP 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. UNDP must 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. There is no reason to avoid exogenous solutions as long as they respond to problems identified by domestic actors and have a comparative advantage over ‘home-grown’ solutions. In essence, “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”.<sup>13</sup> 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”. Another interlocutor expressed a similar view stating that, “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 the UNDP should invest more time and resources in order to learn practice and function of law, rather than the form that law takes. Law plays many different roles but a common minimum 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.

### *Work within the ‘Realm of the Possible’*

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

13. Andrews, Pritchett & Woolcock, *Escaping Capability Traps through Problem Driven-Iterative Adaptation (PDIA)* (2013) p. 7.

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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”. Essentially, this means being 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.<sup>14</sup> 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, is the project Rule of Law and Community Justice for Conflict-Affected Areas in Ukraine (also UNDP). 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.

### *3. Be More Explicit About the Risks*

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 and when the political economy is impossible to assess from the outside, some implementing agencies such as UNDP are made to come up with comprehensive activities for rule of law reform within astonishingly short time frames. 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. Putting this into perspective, one respondent rather drily noted, “you are either the quick or the dead one”.

A number of studies warn of the dangers of supporting rule of law without carefully considering the political surroundings and unintended effects.<sup>15</sup> It is 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, rule of law is not so much lacking as facing competition from an alternative political system where strong interests operate within a ‘managed’ rule

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

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

of law system. 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 within UNDP should be further developed and become more nuanced. In conversations and interviews with interlocutors, a significant number talked of a sense of 'institutional culture' 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 testified and one respondent observed, "UNDP needs to fundraise. It works for governments. Therefore it is difficult for them to handle politics."

#### 4. Adjust Funding and Expectations

Working politically requires of UNDP an enhanced level of readiness and flexibility when planning for or designing interventions. The political economy of the organisation seems to constrain certain ways of working politically smart and instead favours 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.

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 and counter reforms) this has to be coupled with a more realistic view on what can be achieved during complex transitions.<sup>16</sup> As one respondent put it, "we see the opportunity but don't get past the political dynamics". Another interlocutor raised the issue of political will and what you can realistically hope to achieve when it is weak or lacking by saying, "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. 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.<sup>17</sup>

#### 5. Turn Individual Experience into Institutional Knowledge

If UNDP's rule of law agenda is going to become more political in how it is delivered and requiring of its staff to work more politically, it means they will have to go

16. Denney, *Using Political Economy Analysis in Conflict, Security and Justice Programmes* (2016) p. 9.

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

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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, UNDP will not be able to implement reform that extend beyond the now dominant technical approach.

While UNDP, like many other organisations, 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. In conversations and interviews with interlocutors working for 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 rather than the organisation.

Political acumen is critical for informing programming but it 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. For UNDP (and for other organisations with high staff rotation and short time frames) 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. 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 forth very strongly. Many also suggested that this should be modular and adaptive in the sense that different disciplinary backgrounds come in at different stages.

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 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.

#### *6. Link Conflict Prevention with Rule of Law Programming*

A critical aspect of making politics part of UNDP’s rule of law agenda is forging closer links between conflict prevention and rule of law programming. 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 regarding ‘signals’ received on the programming side.

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 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 and one respondent stated rather directly that “there is no home in the system for a note of this sort”. For early action to be taken, it is important that donors allow for clear feedback loops between their different levels of engagement.

Here, PDAs have the potential to bridge programming and political levels within the Country Team.<sup>18</sup> One good example of this is the use of survey data and public opinion research conducted in Sri Lanka as part of the PDA presence that provides a national baseline and informs programming in a range of fields, including rule of law and security.<sup>19</sup> Interlocutors 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. 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.

## CONCLUDING REMARKS AND WAYS AHEAD

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. Politics is beginning to matter to UNDP's rule of law reform, but there is some way to go before it becomes an integral part of UNDP's practice. One key message from the 'working politically' community, though simple and straightforward, is to ask hard questions about why change happens. Many UNDP interventions have for some time acted on an assumed change process that puts law at front and centre, thereby reinforcing a tendency to overstate the technical, not the political, when selecting, planning, designing, implementing and eventually evaluating programmes and projects.

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.<sup>20</sup> There is a tendency for rule of law experts 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. Working politically smart is often about fine and sensitive margins and having the right expertise in the right place through informed coordination among like-minded actors and could reap dividends for moving beyond 'technical' entry points.

Even where the need 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 the risks 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.

18. 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).

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

20. Hickey et. al. "Exploring the Politics of Inclusive Development: Towards a New Consensual Approach" (2014).

An introspective political economy analysis might be useful in order to understand blockages, incentives and interests in the ecosystem of UNDP and the UN system. Working more politically might disrupt established ways of working and challenge hard won institutional experience.

It could shift power balances in relation to other UN agencies, funds and departments and access to funding, require more joint work within, and between, 'competing' agencies and more transparency regarding trial and error. 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 the UN.

### **Recommendations for Politically Smart Rule of Law Reform**

#### *Make Political Analysis an Integral Part of Programming*

1) Make explicit that it is the responsibility of the UN leadership in the field to encourage linkages between political and technical engagements.

2) 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) and 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.

3) Ensure a system of information-sharing on political analysis, including through leveraging existing expertise available within UN Country Teams and UNDP Country Offices, including PDAs, where deployed.

#### *Work with Best Fit, Not Best Practice*

4) Allow flexibility in planning and design. Focus on adapting to the context rather than fulfilling previously 'set in stone' objectives.

5) 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.

#### *Be More Explicit About Risks*

6) 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.

7) 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*

8) Ensure flexible funding and reassess requirements; do not be bound by narrow technical frameworks and encourage longer timeframes to reach results. Recognise and make clear the limits of external involvement.

9) 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.

*Turn Individual Experience into Institutional Knowledge*

10) 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.

11) 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.

*Link Conflict Prevention with Rule of Law Programming*

12) 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.

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13) 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.