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“Something Old, Something New – Which Way to Go for Rule of Law Projects in the  
Agenda 2030 Era?”

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## Introduction

There is a growing consensus in the UN System and beyond that the rule of law is a precondition for sustainable peace and development at both international and national level.<sup>1</sup> Since September 2015, *Agenda 2030 for Sustainable Development* has brought rule of law to the forefront in the quest for sustainable development. Africa and the rest of the developing world have been the theatre of countless rule of law assistance projects since the end of World War II, with mixed results.

## Background

While the reasons for the mixed results vary from project to project and from country to country, this paper seeks to address the limitations that arise right from project inception.

One rule of law practitioner has aptly summed up the mixed fortunes of rule of law programmes as follows;

“The experiences in South Sudan are replicated in other post conflict and fragile states (**as well as in other developing countries** where unprecedented international attention is being placed on state-building, with a primary focus on rule of law reform. Enormous amounts of money and effort are being dedicated to rebuilding and often changing entire justice systems, with modest success. This attention raises profound questions about the objective, approach, methodology, and consequences of these efforts. The evidence suggests that trying to change legal systems in these states is an unproductive endeavour. The causes of the movement’s lack of success have remained constant—unrealistic objectives, misplaced doctrinal approaches, insufficient expertise, poor planning and execution, and a lack of deep contextual knowledge. Although the seminal works of Thomas Carothers, Erik G. Jensen, and Thomas C. Heller call for focus and modesty, the international rule of law movement remains undeterred from adopting “comprehensive,” whole-system approaches. This **chronic lack of success, the recycling of bad ideas and the bloated rhetoric regarding the centrality of rule of law to achieving “the good life”** led to the development of a series of papers that, in turn, became an edited volume exploring how the international movement could possibly extricate itself from the situation.” *-emphasis mine*),<sup>2</sup>

D. Marshall further highlights the existence of a profound knowledge deficit regarding the justice “system,” its actors, and its processes and the apparent lack of interest in understanding, or learning from, years of international rule of law programming in the country—what worked, what did not, and why—or in applying lessons learned from similar contexts.<sup>3</sup> Further, according to Marshall, much of the assistance focused on “law and order” issues, with most support going to police and prisons and the international community’s rule of law assistance seemed trapped in

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<sup>1</sup> Strengthening the Rule of Law in Conflict- and Post-Conflict Situations a Global UNDP Programme for Justice and Security 2008-2011, [https://www.un.org/ruleoflaw/files/rol\\_final\\_apr09.pdf](https://www.un.org/ruleoflaw/files/rol_final_apr09.pdf)

<sup>2</sup> D. Marshall, *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward*, <http://blogs.lse.ac.uk/jsrp/2014/06/23/the-international-rule-of-law-movement-a-crisis-of-legitimacy-and-the-way-forward/>

<sup>3</sup> *Ibid.*

an “impoverished” view of the rule of law and appeared to have little, if any, impact in actually addressing injustices in the country.

In the programme management sphere, it is recognised that currently, there is no a widely defined standard for managing development projects and many development projects fail to deliver the expected outcomes or fail to produce the desired impact in the communities they serve.<sup>4</sup> The situation is even more precarious for rule of law projects where it has been found that. More resources are being dedicated to Rule of law and governance, yet little is known about the actual impacts of programming.

To gauge effectiveness of rule of law programmes, one needs to measure impact yet due to the broad scope of projects, reforms, and ideals that can be considered as rule of law or governance, it is difficulty in defining and measuring the success of complex interventions, such as participatory governance, decentralization, and institutional reforms.<sup>5</sup> Still, more is due to broader difficulties in evaluating true impacts of programmes, projects, and reforms—in moving beyond outputs and outcomes to measuring societal and attitudinal changes.<sup>6</sup> Another issue discussed is the importance of impact evaluation timing as most evaluations were and are usually conducted shortly after the intervention yet meaningful rule of law changes takes time to manifest. effectively, both implementers and evaluators must be in agreement throughout the project, despite possible differing priorities.<sup>7</sup>

Understanding rule of law as a concept makes things cumbersome. There are a myriad definitions of rule of law and governance, from sources including the United Nations, bilateral organizations such as the U.S. Agency for International Development (USAID), and non-governmental organizations such as the World Justice Project and this makes it difficult to appreciate the collective impact of rule of law technical assistance in a given political space.

With this background, it is time to discuss what sustainable development requires in terms of effectiveness of rule of law programming, including whether there is best value for money or fitness of purpose of interventions, among others.

Financiers of rule of law programmes as well as the beneficiaries on ground will be looking for the best value out of the investment made in rule of law initiatives. Governments that receive funding from development partners and also raise money domestically have to meet the standards of accountability.

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<sup>4</sup> Project Management in Development, Fundamentals of Project Management for Development, Fourth Edition. Published by: PM4DEV, Project Management for Development  
4th Edition, 2014

<sup>5</sup> Literature Review of Impact Evaluations on Rule of Law and Governance Programming Report prepared for USAID’s Center of Excellence on Democracy, Human Rights, and Governance (DRG)  
[http://www.3ieimpact.org/media/filer\\_public/2016/03/22/alexander\\_et\\_al\\_2013\\_-\\_rule\\_of\\_law.pdf](http://www.3ieimpact.org/media/filer_public/2016/03/22/alexander_et_al_2013_-_rule_of_law.pdf)

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

Sustainable development in itself demands that rule of law programmes meet a number of criteria, including:

- That rule of law programmes address development needs in such a way that the needs of the present generation are met, without compromising the ability of future generations to meet their own needs.
- That rule of law programmes support initiatives that balance different, and often competing, needs against an awareness of the environmental, social and economic limitations that society faces, in itself a **delicate balancing act**. By setting out clear mandates and regulating behaviour, etc., rule of law provides a framework through which the balancing act can be achieved.
- In practical terms, examples of how rule of law could avert or address global crises or challenges include: from addressing large-scale financial crises caused by irresponsible banking, to dealing with changes in global climate resulting from large dependence on fossil fuel-based energy sources, mass displacements of population and migration as seen in the Mediterranean region, among others. This explains the scale at which rule of law or its absence can impact development.

Of necessity, interventions to promote rule of law are delivered through programmes that are designed to that end. To assess the effectiveness of rule of law programmes, one has to examine the cycle of project management from problem construction to monitoring and evaluation, taking into account the core and secondary aspects of project management such as scope, budget, quality, schedule, as well as stakeholder engagement, communication, risk management and performance management, among others.

Ideally, in programme management, the process is clear. It is anticipated that rule of law programmes in any scenario, including in times of conflict are designed so as to have a beginning, middle and an end. These would include the following five stages<sup>8</sup>:

- a. Start-up/Conception: where opportunities and approaches for change are evaluated to decide whether or not to define a programme.
- b. Programme definition: where the programme is defined, documented and evaluated to create a Programme Design Document and a programme business case and get it through the approval process.
- c. Programme establishment: this involves the acquisition of the resources, infrastructure and control processes required to achieve the programme’s objectives and implementation commences. It also includes training and information sharing with programme team members and stakeholders concerning their roles and responsibilities.
- d. Programme management: where the projects comprising the programme are undertaken and outputs delivered to business users.
- e. Programme closure: where, once all the programme (and its projects’) deliverables have been completed, responsibility for operational control of the

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<sup>8</sup> <https://opentextbc.ca/projectmanagement/chapter/chapter-3-the-project-life-cycle-phases-project-management/>

improved capability has been handed over to line management, and sufficient benefits measures have been completed to judge success, the programme is terminated. If during the programme it becomes clear that it cannot be completed successfully, it may be terminated early.

It is worth noting that at each of these stages, rule of law programmes present unique challenges that are discussed in detail below.

### ***Characteristics of Rule of Law programmes***

Rule of law programmes present a number of characteristics that have an impact on programme development:

- a. There are multiple definitions of rule of law and these filter into the design of projects.
- b. They deal with complex issues, for which at times, not all information may be available or obvious at the start-up phase and which are impacted upon by the demographic involved as well as cultural considerations and the geographic and economic peculiarities of each political space.
- c. Rule of law indicators are difficult to measure-what to measure and when.
- d. Behavioural change and other factors that are critical to the success of rule of law programmes do not adhere to project reporting cycles and financial years;
- e. Different parameters are used for rule of law in different countries- Four Universal Principles of the Rule of Law have been established, namely: The government and its officials and agents as well as individuals and private entities are accountable under the law; The laws are clear, publicized, stable and just, are applied evenly, and protect fundamental rights, including the security of persons and property; The process by which the laws are enacted, administered and enforced is accessible, fair and efficient; Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve. These universal principles are not in reality adhered to on the ground. Rule of law as a principle component good governance, which is critical to sustainable development to manifest.

### **Rule of Law definitions**

The multiplicity of definitions of rule of law by development partners operating in the same sphere is likely to impact on the design and delivery of rule of law interventions whether by the United Nations Agencies, Funds and Programmes or other development partners.

The United Nations defines the rule of law as a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. Accordingly, the rule of law also requires measures to

ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

For the United States Agency for International Development (USAID), the rule of law contains five elements: order and security,<sup>9</sup> legitimacy,<sup>10</sup> checks and balances,<sup>11</sup> fairness,<sup>12</sup> and effective application.<sup>13</sup> It is anticipated that too broad a conceptualization of the rule of law or democratic governance might weaken the ability to establish significant causal links between formal aspects of the law and development/growth impacts.<sup>14</sup>

### ***Rule of law and complexity***

As I have indicated elsewhere, the rule of law system behaves as a complex system which features a large number of interacting components (agents, processes, etc.) whose aggregate activity is nonlinear (not derivable from the summations of the activity of individual components) and typically exhibits hierarchical self-organization under selective pressures.<sup>15</sup> A country’s rule of law framework is a complex system which needs to be navigated as such to meet the objectives of rule of law programmes. Understanding how complexity applies to society and rule of law frameworks is relevant to the design and implementation of rule of law programmes. It is therefore not surprising that most Rule of law programme interventions are by nature multi-site, multi-stakeholder, multi-level, multi-component and cross-cutting thematic thus the need for the complexity theory approach. The development of legislation is a complex transaction in itself. Complex social relations in societies with collectivist ideology exposed to laws meant for individualistic societies.

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<sup>9</sup> Rule of law cannot flourish in crime-ridden environments or where public order breaks down and citizens fear for their safety. The executive branch has immediate responsibility for order and security, but the judiciary has an important role as well in protecting rights and providing for the peaceful resolution of disputes.

<sup>10</sup> Laws are legitimate when they represent societal consensus. Legitimacy addresses both the substance of the law and the process by which it is developed. This process must be open and democratic.

<sup>11</sup> Rule of law depends on a separation of governmental powers, among both branches and levels of government. An independent judiciary is seen as an important “check.” At the same time, checks and balances make the judiciary accountable to other branches of government. Like all branches, the judiciary is also accountable to the public

<sup>12</sup> Fairness consists of four sub-elements: (1) equal application of the law, (2) procedural fairness, (3) protection of human rights and civil liberties, and (4) access to justice. These sub-elements are key to empowering the poor and disadvantaged, including women. The justice sector bears primary responsibility for ensuring that these sub elements are in place and implemented.

<sup>13</sup> This element pertains to enforcing and applying laws. Without consistent enforcement and application for all citizens and other inhabitants, there can be no rule of law. The judiciary is an important element of the enforcement process.

<sup>14</sup> G. Barron; The World Bank and Rule of Law reforms, <http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP70.pdf>

<sup>15</sup> The complexity theory and rule of law programme management for sustainable development in Commonwealth Africa

Rule of law is complex, relationships between rule of law actors speak to complexity, legislation is complex, law making and law reform processes are complex, development is complex.

### ***A crisis of legitimacy- whose rule of law? Whose law is it?***

The rule of law is often seen as a panacea for ensuring a successful, fair and modern democracy which enables sustainable development, however, as Makau Mutua highlights, this is not the case.<sup>16</sup> Using the example of African states, Mutua describes how no African country has truly thrown off the shackles of colonial rule and emerged as a truly just nation state – even though many have the rule of law at the heart of their constitutions. This, he argues, is because the Western concept of the rule of law cannot be simply transplanted to Africa and the transition from colonial rule to a viable post-colonial state proved more challenging than was expected. Building and sustaining state institutions – including in the justice sector – was undermined by the lack of internal cohesion, ethnic rivalries, cultural dissonance, and external interventions.

More fundamental to this question of legitimacy, is the question-whose rule of law it is. Colonialism and the Trans-Atlantic Slave Trade created new identities and political spheres, which to date still impact governance and the rule of law. Colonialism created legal pluralism, weakened national institutions as the foundation of the post-colonial state, binary political and legal conditions, focus on law and order and laid the foundation for social and political elites to takeover, at independence, from where the colonial administrations left off. Accounts of colonialism all reveal the institutionalisation of violence; non-industrialization of colonies and Britain first policy, supported by the use of state machinery to exploit local resources to the advantage of the imperial power and the focus of law and order, not law and development. In the Caribbean the legacy of colonialism is worsened by the legacy of slavery resulting in states built on a foundation of racially informed political and social structures.

As a result, the law is perceived to serve a different purpose for each category of stakeholders. Role occupants (duty bearers and mandate holders) and beneficiaries (individuals, local communities, institutions, rights holders) who seek the guidance of the law use and benefit from the law in different ways.

The answer to the question ‘Whose law is it?’ can be found by addressing the following questions:

- a. Who makes the law;
- b. Who participated in the rule making;
- c. Who does the law apply to;

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<sup>16</sup> <http://sur.conectas.org/en/africa-rule-law/>

- d. Who applies the law;
- e. Who is affected by the law, including on the basis of the principle of ‘unintended consequences’;
- f. Who is the custodian of the law and;
- g. Who owns the law?

### ***Challenges concerning Measuring and Evaluating Rule of Law and Governance***

It has been agreed in a number of studies that no comprehensive measurement system exists for the rule of law and that vast knowledge is scattered around in various systems, organizations, and initiatives that often aggregate data under different indicators.<sup>17</sup> Existing studies are considered limited for not being all-inclusive to cover all aspects of rule of law. The wealth of indicators is not properly internalized by policy-makers or even those who manage programmes or interventions: The most fundamental barrier appears to be a culture of discomfort with measurement and determining what to measure and how to measure remains the question in most jurisdictions.

### **The way forward**

By way of example, it is clear that policy approaches to rule of law programming are constantly evolving to meet the needs of different stakeholders. How well this is done remains a question. Examples drawn from the approach of the World Bank and DFID are very educative on what can be done right and what can go wrong in the circumstances. It is evident that the current shift in paradigm by the World Bank, United Nations and the Department for International Development, inter alia, is informed by lessons from the experiences of development partners. It is also timely to make recommendations as to good practices for promoting the effectiveness of rule of law programmes.

### ***Lessons from the UN***

The UN’s system approach to rule of law technical assistance is based on international norms and standards; however, it also takes into account the political context and the unique country context; advances human rights and gender justice; ensures national ownership; supports national reform constituencies; ensures a coherent and comprehensive strategic approach; and engages effective coordination and partnerships. At the national level, the work of the UN on rule of law is based operationally on technical assistance and capacity building carried out for the benefit of member states, at their request and/or as mandated by the Security Council, and in accordance with their national policies, priorities and plans. This enables the UN to respond to the needs of countries in a flexible manner, eschewing “one size- fits-all” formulas and the importation of foreign models, instead, basing its support on national assessments, local needs and aspirations and broad participation.

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## ***Lessons from the World Bank***

Justice and the rule of law are central to the World Bank’s core agenda of ending extreme poverty and promoting shared prosperity and since the early 1990s, the Bank has supported a variety of justice-related activities through lending and analytical and advisory work.<sup>18</sup> The World Bank’s core work in justice rests with the Governance Global Practice which focuses on: improving the performance of justice sector institutions by applying public sector management expertise to agencies at all levels of the justice system in areas such as human resources, budgeting, IT, and supply chain management; advising on criminal justice reform and citizen security by advising working with a wide range of criminal justice sector institutions, including prosecutors, police, corrections, criminal courts, and public defenders; promoting justice in development sectors such as land, extractives, and urban development to support effective mediation of rights and entitlements, address grievances, and promote accountability; reforming the justice sector for better business and investment climate through review legal and regulatory frameworks, as well as business court and court enforcement operations, to improve the business and investment climate of countries; leading global knowledge, learning and measurement initiatives on justice, human rights (through the Nordic Trust Fund), and the rule of law; designing interventions to promote access to justice and legal empowerment; and focusing on justice issues in contexts of fragility, conflict, and violence.<sup>19</sup>

From 2017, a new approach at the World Bank is evident. The World Development Report 2017: Governance and the Law addresses fundamental questions (Why are carefully designed, sensible policies too often not adopted or implemented? When they are, why do they often fail to generate development outcomes such as security, growth, and equity? And why do some bad policies endure?) which are at the heart of development.<sup>20</sup> Cognizance is made of the fact that policy making and policy implementation do not occur in a vacuum and that they take place in complex political and social settings, in which individuals and groups with unequal power interact within changing rules as they pursue conflicting interests.<sup>21</sup> The report concludes that the capacity of actors to commit and their willingness to cooperate and coordinate to achieve socially desirable goals are what matter for effectiveness and this will most likely have an impact on rule of law programme design. The World Bank’s theory of change on governance and law has evolved to embrace the policy effectiveness chain through which policy effectiveness is understood not only from the technical perspective, but takes into account the process through which actors bargain over the design and implementation of policies, within a specific institutional setting.<sup>111</sup> The consistency and continuity of policies over time (commitment), the

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<sup>19</sup> New Directions in Justice Reform (2012):

<sup>20</sup> <http://www.worldbank.org/en/publication/wdr2017>

<sup>21</sup> Ibid.

alignment of beliefs and preferences(coordination), as well as the voluntary compliance and absence of free riding(cooperation) are key institutional functions that influence the effectiveness of policies. The five steps in the new approach include definition of the development objective; identification of the underlying functional problem (commitment, coordination, cooperation); identification of the relevant entry point(s) for reform (incentives, preferences/beliefs, contestability); identification of the best mechanism for intervention (menu of policies and laws); and identification of key stakeholders needed to build a coalition for implementation (elites, citizens and international partners).

### ***Lessons from DFID***

In 2012, it was reported that within DFID, the focus of assistance and work was on security and justice and not on the rule of law.<sup>22</sup> This was most likely due to self-identified constraints for DFID to deliver a more coherent and scaled up approach such as split policy responsibilities; limited in-house expertise; insufficient UK government policy fora or instruments; and the need for innovation in fragile countries as well as in middle income countries. However, it is worth noting that DFID’s new policy approach to help tie in together different elements of open economies and open societies starts with clarity on the rule of law ends to be promoted. Interventions are most likely to either strengthen the enabling conditions for the rule of law or target specific issues.

**A renewed approach to the rule of law would result in approaching** development planning at DFID through a rule of law lens at would speak to the adoption of **an ends-based approach** (being clear on the rule of law ends to be supported, and identifying specific objectives where external support is warranted), **problem-solving** (starting with a comprehensive understanding of the situation but being highly selective within this, identifying realistic and intermediate objectives around particular rule-of-law ends, based on a plausible theory of change), **people-centred, politically informed** (rule of law programmes must be grounded in a sound understanding of the political economy of a specific country or community) and **context-specific** (obstacles and opportunities to advancing specific rule of law ends are located within specific political regimes, socio-economic environment and the presence, strengths and weakness of actors, organisations and institutions). Steps would include: Analysis (e.g. political economy analysis); Identification of rule of law end or ends the UK and partners would like to promote

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<sup>22</sup> However, within DFID they are rarely developed with an explicit rule of law perspective, or linked to security and justice programmes. There is a disconnect between a bottom-up, people centred approach, and a relative lack of attention to elite capture of the rule of law through control over institutions (e.g. constitution, judiciaries, police, or economic governance rules). We rarely consider support to non-executive branches together, in their role as checks and balances (judiciaries, parliaments, accountability bodies). DFID does not focus much on law and development but on law and order. The possible contribution to the rule of law is not necessarily made explicit.

together; Identification of main problem or obstacle to realising those ends; prioritisation of changes needed to address (e.g. changes in enabling conditions); and identification of entry points (taking into account the broader approach and linkages).

Having identified challenges related to rule of law programme design, it is time to address the way forward, commencing from a position of consideration of lessons from complexity and other methodologies, theories of change, theoretical frameworks, and the Problem Driven Iterative Adaptation (PDIA) model as tools for doing development differently. The recommendations range from a better approach to project design that makes allowance for results based programming, ease of adaptation, reflective learning through after action reviews and lessons learned, back and forth iteration, and better stakeholder engagement, including at the lowest level of governance (local contextualisation), to increase effectiveness of rule of law. There will be need to apply the good practices that have been tried, tested and not found wanting as the way to go for the benefits to be accrued from projects designed to improve rule of law. Other recommendations include a call for a change in mind-sets especially donor ideology. Rule of law development planners have lessons to learn from military science’s doctrines and practices in the management of complex operations.

### ***Problem Driven Iterative Adaptation***

Many of the challenges in international development are complex in nature. They involve many actors in uncertain contexts and with unclear solutions. A recommendation is made to pursue the approach known as Problem Driven Iterative Adaptation (PDIA), which allows one to perform real-time experimental iterations once a problem has been identified.<sup>23</sup> PDIA helps one understand the problem space when addressing apparently intractable problems of rule of law and its contribution to sustainable development by regulating the necessary change and creating enabling environments for change- conditions that together create a sustainable environment that co-evolves with a changing social ecosystem.

PDIA encourages rule of law programme designers to start constructing and deconstructing the problem that warranted the designer’s involvement in the community—first on their own and then, when one is able to state what the problem was, why it mattered, and why it was festering, to engage with the community. This is critical to mobilising the involvement of the community at all stages of the process and allows the programme designer to manage the authorising environment. PDIA

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<sup>23</sup> Andrews et al. 2015, "Doing Problem Driven Work."

allows the team to design “technically viable solutions to locally perceived problems.”<sup>24</sup>

### **After Action Review**

Borrowing a leaf from military science, conducting an after action review (AAR) as a structured review or de-brief (debriefing) process for analysing what happened, why it happened, and how it can be done better by the participants and those responsible for the project would help promote reflective learning. The AAR is relevant as a knowledge management tool and a way to build a culture of accountability. These would contribute relevant input to evaluation of the programme activities. During the AAR, the facilitator (evaluator or controller) provides a mission and task overview and leads a discussion of events and activities that focuses on the objectives.<sup>25</sup> At the close, the AAR leader summarizes comments from the observers, covering strengths and weaknesses discussed during the AAR and what the unit needs to do to fix the weaknesses. An AAR occurs within a cycle of establishing the leader's intent, planning, preparation, action and review and begins with a clear comparison of intended versus actual results achieved. AARs can contribute to greater learning and introspection at a higher level.

### **Introspection**

One example of results of a detailed introspection are captured from a review of the experience of rule of law in South Sudan. The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward<sup>26</sup> addresses a multitude of conceptual and operational questions. What are the assumptions underlying the rule of law? In what way does the technocratic positioning of the rule of law blind us to the problematic aspects of creating law for others? In what ways does rule of law reform work clash with state sovereignty? What does it mean to seek to rebuild a justice system from the ground up? Is rule of law reform antidemocratic? Is the enterprise so flawed that it is impossible, or is it morally and ethically sound but hobbled by poor systems and flawed processes? Operationally, can identifying goals and defining success help us improve rule of law work? How can we better capture and manage our rule of law knowledge? What have been the successes of locally driven, “light footprint” interventions? And how can we best identify and support local priorities, initiatives, and solutions?

### **Inculcating a well-developed PDCA Cycle**

Proponents of rule of law programmes would benefit from developing and following a well-executed plan-do-check-act (PDCA) cycle [Shewhart cycle and the Deming

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<sup>24</sup> Greenwood et al. 2002, p.60

<sup>25</sup> Also see DHS CE Handbook, [https://www.in.gov/dhs/files/CE\\_Handbook\\_Template\\_Apr-13.docx](https://www.in.gov/dhs/files/CE_Handbook_Template_Apr-13.docx)

<sup>26</sup> (Harvard Human Rights Program/distributed by Harvard University Press, 2014)

cycle], a well-known model for continual process improvement (CPI). This cycle allows rule of law practitioners and programme managers to recognize an opportunity and plan an action; do it by testing the change, check to see how the change conforms to the plan and act on what has been learned and if the change was successful, incorporate the learnings from the test into wider changes. The PDCA cycle’s four steps allow for improvement or change and can be included in the change management strategy.

### **Glocalization of the rule of law agenda**

Glocalization, the "simultaneous occurrence of both universalizing and particularizing tendencies in contemporary social, political, and economic systems"<sup>27</sup> is relevant as a theoretical framework, relevant to localising the global agenda to suit circumstances on the ground. Well harnessed, glocalization can ensure that local contexts are developed when addressing the rule of law agenda laid out in the Sustainable Development Goals. This allows the development of home-grown solutions to problems that are prioritised at global level, comprised of smaller, local solutions rather than big, global solutions. National ownership that will be fostered through glocalisation is critical as a means of achieving sustainability.

### **Change management for the rule of law**

While there is a tendency to focus on legal and technical changes, rule of law programme managers will have to measure change and how it manifests. This implies developing and executing a change management plan for rule of law projects, a main stay in adaptive project management. It is crucial to the success of rule of law reform efforts that they are grounded in a solid understanding of change, how it occurs and how it can be effectively facilitated by both domestic and international rule of law practitioners.<sup>28</sup> Such change management plan would enable practitioners deeply examine problems, their evolution, solutions and the impact of implemented solutions, including behavioural changes.

Rule of law project designers will be charged with managing change in people, who are at the centre of rule of law. This will involve applying adaptive measures, making adjustments as solutions emerge and attitudes change, learning to live with the experiments, resistance to change and chaos and also taking on a system-wide approach.

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<sup>27</sup> <https://www.britannica.com/topic/glocalization>

<sup>28</sup> This Practitioners’ Guide A Guide to Change and Change Management for Rule of Law Practitioners; <https://zakon.co.uk/admin/resources/downloads/change-and-change-management-for-rule-of-law-practitioners-a-guide-to-2.pdf>

This will call for the development of a deliberate change management strategy is rarely part of the planning for, or implementation of, rule of law projects.<sup>29</sup> A number of actions are required to foster sustainable change in rule of law. These include the following: build relationships and build trust with stakeholders; find and support “change agents (identifies a societal problem or unmet societal need and invents possible solutions) (” or “early adapters are “(people who are interested in new ideas and have a history of championing them)”; create change networks (collaborate and coordinate), gather and share new information freely and widely; develop a strategy to encourage broad-based and inclusive participation of the general public in any rule of law reform initiative; develop a strategy to address resistance to change; think and act politically; and build enthusiasm and have patience.

### ***Addressing complexity in Rule of law programming***

Rule of law programme design for the attainment of the SDGs will require a different approach. This approach will include the following:

- a. Design rule of law programmes that seek to reverse the reductionist influence on legal institutions would require a complete overhaul of the approach to legislation, administration, and jurisprudence.<sup>30</sup> A system overhaul that applies Problem Driven Iterative Adaptation (PDIA) and similar approaches aimed at ‘Doing Development Differently’ is likely to yield better results.
- b. Identification of the most relevant feedback loops in the rule of law ecosystem. The main challenge in social problem analysis many of which underlie the challenges that require rule of law interventions is to figure out what the most important feedback loops driving a system’s behaviour are and then what they should be.
- c. Encouraging individual behaviours and choices and promoting initiatives by change agents within the rule of law framework which will impact on institutional behaviour.
- d. Rule of law officials and institutions will be and should be encouraged to step out of their comfort zones, into the arena of conflict, chaos and change necessary to bring about creative and innovative solutions to the challenges at the local level-this will involve crawling through the design space between the status quo and identified best practices relevant to their work. This positive defiance will shift the capability to deliver and also result in more relevant solutions to problems.

Concerning the design and execution of effective rule of law programmes, the linear programme model can no longer be applied. Rule of law programmes have to be designed to be adaptive so as to accommodate deviance, positive chaos, and focus on qualitative methodology. Adaptive programme management that takes into account power asymmetries, desists toeing the line of aid orthodoxy and the tendency to practice premature load bearing on nascent systems should be a better option. The

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<sup>29</sup> Ibid.

<sup>30</sup> Ruhl

message of iteration and also that the theory of change is flexible to change at the local level should be built into interventions, taken into account while allocating funding, developing delivery frameworks and inculcated in the principles underlying the respective theories of change.

Development and financial partners have to be given a clear and realistic picture of the time it takes for real change to manifest behaviour change and encouraged to shift away from the reductionist approach. They should be encouraged to find acceptable ways to support iteration within the project. It will be helpful to analyse a problem space to identify the multiple underlying and interacting causes; and measure performance through a portfolio system-wide approach to evaluation, with emphasis on promoting institutional learning and accountability, institutional credibility, informed governance and greater development effectiveness.

Rule of law logical frameworks should be designed with indicators and outputs that accept iteration. Such a framework should position the rule of law, justice and fundamental rights into a logical structure.<sup>31</sup> It should reflect an appropriate balance between what could be called ‘bottom-up’ and ‘top-down’ indicators. Various data sources should be used in the construction of a valid and reliable framework of indicators. At the same time the framework and its parts should not be overly complex. It has to be feasible and designed with a view to available data and what can reasonably be achieved in addition.

Applying the principles of complexity to rule of law programming provides an opportunity to do the following:

- a. see and think differently. It can no longer be business as usual as acknowledgment that rule of law is complex, supported by suitable methodologies such as PDIA, if applied well, reveals the underbelly of the whole system. It allows for problems to be seen as possibilities for improvement in the service, everyone participating and trying their best to contribute to making a difference.
- b. address issues of ethical and power relationships, especially when ill-facilitated rule of law officials have to make decisions between delivery of justice according to professional standards vis a vis cost-cutting and demands for better work conditions and benefits.
- c. people as the linchpins of the rule of law should be involved in process improvement therefore creating an environment that is supportive of individuals solving their problems locally. This will help meet the unpredictability in rule of law transactions and it is the well-managed ‘chaos’ that keeps the process running. Involvement of everybody in problem-solving and better stakeholder engagement (both top-down and bottom-up engagement, involving ‘us’ and not ‘I’) will provide increased flow of

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<sup>31</sup> HIIL EU Concept paper

information which enhances the feedback loops upon which the rule of law system is dependent.

- d. deliberate application of the system approach and the complexity theory to rule of law programmes helps everyone involved recognise interdependency and the fact that the strength of the whole rule of law framework chain depends on the weakest link therein. Instead of approaching rule of law technical assistance in piecemeal fashion, it is important to have a wholesome approach that is sector wide. The rule of law sector is by default, inter-linked whether by design or necessity, so it will be futile to address issues in one component without addressing others.
- e. reflective learning can lead to better programming as role occupants understand not the ‘how’ and ‘what’ of the intervention, but ‘why it worked.’ Reflective learning will in this case enhance the transferability of options and adaptation of the new ideas or lessons to their next project in the same local context. Aspects of flexible process management which allow individual rule of law officers to make small, simple and cost-effective changes at the local level should provide the raw material for the system to work with.
- f. appreciate sensitivity of the rule of law system to initial conditions that produce a long-term momentum or ‘path dependence’; manage the shocks and resistance that come with change management, acknowledging that norm-setting takes time. the trauma associated with law and order as a colonial legacy needs to be confronted and addressed so that rule of law can be seen as relevant to development.

### ***Addressing the question of legitimacy***

Work in development involves many stakeholders (anyone that has an interest in a project and can influence its success), both national and international, who have an interest in the outcome of a decision-making process or project (these stakeholders’ involvement in the process) to provide unique insight into issues and secure resources to assist with decision-making or projects. development is multidimensional and multi-faceted. Ideally, the people (the governed) should own the law as it regulates their behaviour, transactions, gives and takes rights, etc. In reality this may not be the case due to limited consultative processes that do not involve the local people or focus on problems and priorities that they have identified.

Developing legal frameworks for development involves many stakeholders- parliaments, local authorities, the Executive branch of government, judiciary, development partners, international financial institutions, Governments, International community (collective of states), Development partners, Ordinary man and women on the street, Corporations, including investors, Civil society and other non-governmental actors, Media, Community and traditional leaders. Limited or absence of state in providing socio-economic assistance draws more non-State actors into the development arena. Demands for delivery and accountability lead to more involvement of civil society organisations and media. Aside from the expectation that people are consulted in the law making process, the law assumes and expects much from the legal subject. The test and standard of the ordinary person in countries with



universal primary/elementary education vis a vis high levels of literacy, limited state presence (no back-up plans to support individuals in distress, including indigent persons, renders the test or standard questionable and suspect).

## **Conclusion**

It is anticipated that rule of law project proponents taking into account the points discussed above will be better placed to develop and maximise effectiveness of rule of law development programmes. Effective programming on the rule of law requires balancing the different types of needs and time-lines. It will have to address what is being delivered. This implies measuring rule of law changes and impact- from ground up, it is about returns, cases completed, damages paid, financial restitution granted in cases, and other measures of trends. Without indicators, it will be difficult to establish that targets are met. Designers and executors of rule of law technical assistance programmes will have to focus on the importance of local context, of designing projects with users/beneficiaries/partners, and of running small experiments and quickly iterating them based on experience on the ground. They will have to review of technical assistance methodology to remove reductionist approach to project design, move from linear programming to a more systemic approach that allows for iteration. PDIA especially in the role of norms, customs and promotion of collective paradigm shifts to change norms, attitudes by addressing the norm-setters and rule makers including cultural, traditional and religious leaders, is one option that is a necessity. Strengthening the rule of law is a development process, requiring a sequenced approach and long-term investment. Concerning project finances, allowance will have to be made for overlaps across financial years and project reporting cycles. Lastly, it is important to remember that holistic and multi-sectoral approaches are more likely to have impact.