

## Helpdesk Research Report: Rule of Law Approaches

Date: 25.06.2010

**Query:** What different approaches to Rule of Law exist and what are the consequences of applying different definitions of the Rule of Law? What sources of measurement (indicators) exist internationally and how might these be applied?

**Enquirers:** DFID, Stabilisation Unit

### Contents

1. Overview
2. Rule of law conceptions and approaches
3. Rule of law programming
4. Rule of law measurements and indicators
5. Additional resources – key books on rule of law
6. Additional information

## 1. Overview

There is no universal definition for the term “rule of law” or a common approach toward rule of law. There are, however, some universal key distinctions and principles.

A key distinction that is generally accepted is between ‘rule by law’ and ‘rule of law’:

- Under rule by law, law is an instrument of government and government is considered above the law. In some authoritarian contexts, formal state laws and judicial institutions were and are seen by elites as instruments by which to impose and legitimise their power (Schlaeppli and McCabe, 2008).
- Under rule of law, everyone in society is bound by the law, including the government. The constitution and the laws constrain the actions of the state and make them function for the ‘general’ interest (Schlaeppli and McCabe, 2008)..

Another distinction is that between the notion ‘Rechtsstaat’, which focuses on the vertical relationship between the government and the citizens; and the ‘rule of law’, which also includes the horizontal relations amongst citizens. (Albers, n.d.)

Common principles of the rule of law include (see HiiL, 2007; Vélez, 2009, Skaaning, 2008):

- Predictability, certainty, publicity and clarity of laws
- Open, clear and stable rules for making such laws
- Prevention of arbitrary exercise of power
- Promotion of formal equality
- Order

### Conceptions of the Rule of Law

There are two conceptions of the rule of law commonly found in the literature: ‘thin’ and ‘thick’.

#### 'Thin'/ Narrow/ Formal/ Procedural

- This definition focuses on structural features and procedures common in most legal systems and on the need for predictable systems to guide people's behaviours.
- It does not prescribe moral content, in terms of particular social outcomes or systems of law that are considered positive. Rather, it presumes that formal, procedural rule of law will result in fair and efficient outcomes (Ringer, 2007).
- The advantages of such a conception is that it provides a clear approach and it is less likely to be considered as an imposition of values or 'ethnocentric' (Barron, 2006).
- The disadvantages are that it does not pay sufficient attention to law in action; and could lead to perverse results, such as the justification of repressive rule, so long as there is a structured, predictable system in place (Ringer, 2007).
- The World Bank has often been cited as adopting thin conceptions of the rule of law, focusing on procedures through which rules are formulated and applied; and distinguishing rule of law from human rights and democracy (HiiL, 2007; Barron, 2006).

#### 'Thick'/ Broad/ Substantive

- This definition associates rule of law with substantive outcomes – justice, democracy, liberty and individual rights and freedoms.
- The advantage is that it aims to protect rights and contribute to human development; and it gives the 'rule of law' a positive connotation.
- The disadvantages are that it is subjective in terms of what is considered a 'just' society; can be vague; and has the ability to encapsulate everything, which can render the concept meaningless (Ringer, 2007).
- The UN adopts a thick conception of the rule of law, defining it as incorporating a strong constitution, a strong electoral system, laws for the protection of minorities and other vulnerable groups, and a strong civil society. USAID also falls under this approach, including in its definition of rule of law compliance with human rights norms and standards (Ringer, 2007; HiiL, 2007).

Some scholars argue against this 'thin'/'thick' dichotomy and advocate for a middle ground: a 'Thinner conception'. This incorporates both a formal, institutional framework and a set of ideals, without prescribing a blueprint for a 'just' society. The ideals may include some minimum social welfare, basic human rights and aspects of a market economy (Ringer, 2007; Trebilcock and Daniels in Vélez, 2009). Tamanaha adopts a model of rule of law that shows a progression along which both formal and substantive aspects of the rule of law can be 'thinner' or 'thicker' (Tamanaha, 2004 in HiiL, 2007). At the 'thinner' end, formal law may resemble 'rule by law', then move toward 'formal legality' and then to 'democracy and legality' at the 'thicker' end. Substantive justice may move from 'individual rights' (e.g. property and contract) at the 'thin' end, to 'rights to dignity', to 'social welfare' at the thick end.

Others hold the view that in practice, 'thick' and 'thin' conceptions are difficult to distinguish. The need for an independent judiciary which is supported under a thin approach, for example, requires respect for due process and fair trial – both considered important human rights. In addition, preventing arbitrary exercise of power likely requires a degree of free speech and free press in order to make known violations of law by government officials (HiiL, 2007).

### **Trends and Implications of the Differing Conceptions of Rule of Law**

'Thick' conceptions of the rule of law has gained ground in international development circles and has resulted in a merging of the rule of law agenda and the democratization agenda (Carothers, 2009). The World Bank, as well, has moved from a procedural definition of rule of law to one that includes more substantive criteria and leans toward the promotion of positive rights (Barron, 2006). The need to develop alternative 'thick' conceptions other than Western-oriented liberal democratic rule of law is advocated by some in order to avoid charges of 'imperialism' and to recognize the diverse conditions of countries (Peerenboom, 2009; Bassu, 2008)

The debate over narrow or broad conceptions can affect sequencing of rule of law interventions. The adoption of a 'thin' conception and the separation of rule of law and democratization processes has translated into the view that rule of law and some level of economic development should be established first, prior to democratization. Carothers argues instead that democratization should not be delayed until full-fledged rule of law and a well-functioning state is in place. He states that certain aspects of democracy can help to foster rule of law. Alternation of power, for example, can increase accountability; and freedom of the press can bring attention to abuses of power (2009). Bassu stresses though that in post-conflict states, it is beneficial to begin with a thin version of rule of law. The long-term development of 'thick' rule of law must be embedded in local political discourse, involving both legal and political elites, and civil society, which takes time (2008).

Another distinction that affects the design of rule of law interventions is whether an institutional approach is adopted or an ends-based approach.

- Under an institutional approach, the focus is on rule of law institutions – the laws themselves, the judiciary, police force etc.
- Under an ends-based approach, the focus is on societal goals/ social goods (Samuels, 2006; HiiL, 2007).

The literature generally advocates for an ends-based approach, as an institutional approach that does not say anything about actual outcomes. Such an approach can also translate into a technocratic exercise and the automatic adoption of a blueprint of Western institutions. Instead, a focus on societal goals entails examining what is already available and desirable at the local level (e.g. local formal or informal dispute resolution mechanisms, norms etc.) (HiiL, 2007).

### **Measurements of Rule of Law**

One of the challenges with varying definitions and approaches to the rule of law is trying to create a measurement system for the rule of law. The adoption of a 'thinner' conception can make rule of law more measurable; however further debate on the conception is necessary (Albers, n.d.).

There are various rule of law indices and studies that exist. The World Justice Project's Rule of Law Index seeks to adopt culturally universal principles, and draws from both 'thin' and 'thick' conceptions (Agrast, Botero and Ponce, 2009). Its four principles against which a country's adherence to rule of law is assessed are:

- The government and its officials and agents are accountable under the law.
- The laws are clear, publicized, stable and fair, 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.
- Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

The Vera Institute of Justice (and members of the Altus Global Alliance) has developed sixty rule of law indicators connected to these principles that aim to gauge how people experience the law.

Rule of law measures tend to involve at least two distinct dimensions. Some look at the level of order in society (e.g. absence of violence and crime); whereas others focus on the quality of the legal system (e.g. equality before the law and independent courts) (Skanning, 2008). Studies are also approached from different angles. Some survey the demand side (the general public) while others survey the supply side (those working in legal institutions). Studies may be based on perceptions or rely on objective data.

## 2. Rule of law conceptions and approaches

Ringer, T., 2007, 'Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the "Rule of Law" and its Place in Development Theory and Practice', *Yale Human Rights and Development Law Journal*, vol. 10, pp. 178-208

<http://islandia.law.yale.edu/yhrdlj/PDF/Vol%2010/ringer.pdf>

This paper stresses that there is no consensus on how to define rule of law, whether in the field of development or in normative theory. It advocates for an approach that views rule of law as a means of development, rather than as one of its ends. It also stresses the need to recognize that rule of law is a dynamic process that is impacted by other aspects of development. The paper outlines the following definitions of the rule of law:

### Thick conception

- Rule of law is associated with democracy, liberty and individual rights and freedoms.
- The United Nations adopts such an approach; it defines rule of law as incorporating a strong constitution, a strong electoral system, laws for the protection of minorities and other vulnerable groups, and a strong civil society.
- This conception has been critiqued for its moralistic approach and for equating rule of law with the creation and maintenance of a *just* society. By encapsulating *everything*, the concept can be rendered meaningless.

### Thin conception

- This is a formalistic definition of the rule of law which focuses on structural features common in most legal systems and on the need for predictable systems to guide people's behaviours.
- It does not prescribe moral content, in terms of particular social outcomes or systems of law that are considered positive. Rather, it presumes that formal, procedural rule of law will result in fair and efficient outcomes.
- The World Bank is considered to follow this approach; it adopts a technocratic approach to rule of law since their charter formally does not allow political and legal interference. The assumption is that reforming laws and legal institutions that affect the economy will lead to broader, social and political acceptance of the principles of the rule of law.
- This conception has been critiqued as merely setting up institutions does not necessarily lead to a culture of rule of law. Further, some argue that a thin conception can lead to perverse results, such as the justification of repressive rule, so long as there is a structured, predictable system.

### Thinner conception

- This approach lies between 'thick' and 'thin' conceptions. It avoids prescribing a blueprint for a *just* society as in the case of the 'thick' conception, but goes beyond a 'thin' conception by recognizing that the quality of institutions is important for development outcomes. It incorporates both formal, institutional components and substantive elements to the extent that rules that secure some minimum social welfare, basic human rights and some variety of a market economy are preferred.
- The capability-approach to development, championed by Amartya Sen and the New Institutional Economist (NIE) framework could fall under this conception. Although neither prescribe a particular model of a just society, they emphasise the importance of a few justiciable rights and a structure of economic facilities. In the case of the capability-based approach to rule of law, respect for basic instrumental freedoms is essential. In the case of an NIE-based approach, normative priority is given to a conception of justice as property rights.

Vélez, M. G., 2009, 'Literature Review on the Rule of Law', International Development Research Centre, Ottawa

<http://idl-bnc.idrc.ca/dspace/bitstream/10625/40794/1/128975.pdf>

This paper discusses definitions, theories, evidence and researchable questions in relation to rule of law. It outlines several definitions of rule of law, drawn from a review of key literature.

These include:

- Minimalist, 'thin' or formalistic definition: focuses on the establishment and enforcement of laws and the need for a predictable system to guide behaviour. It does not make reference to rights, democracy, equality or justice.
- 'Thick' definition: tends to link rule of law to the concept of freedom or egalitarianism.
- 'Thinner' conception (as proposed by Trebilcock and Daniels): incorporates both a set of ideals and an institutional framework. The focus is on rules and key legal institutions but evaluates them based on normative benchmarks – in particular, the contribution they make to human development.
- Power and accountability definition (as proposed by Finn and Tamanaha): the focus here is to prevent the arbitrary exercise of power by government and to ensure that it follows rules and is accountable to citizens.
- Confidence definition (as adopted by the World Bank): focuses on perceptions and the extent to which agents have confidence in and abide by the rules of society.

Although various definitions of the rule of law exist, the paper highlights some generally common accepted principles. These include:

- Laws should be prospective, open, clear and relatively stable;
- There must be open, clear and stable rules to the making of such laws;
- The judiciary must be independent and the courts should have the power to review political powers.

Carothers, T., 2009, 'Rule of Law Temptations', The Fletcher Forum of World Affairs, vol. 33, no.1, pp. 49-61

[http://www.carnegieendowment.org/files/Rule\\_of\\_Law\\_Temptations.pdf](http://www.carnegieendowment.org/files/Rule_of_Law_Temptations.pdf)

This paper outlines various conceptions of the rule of law and some of the implications of these differences on development activities. Concepts of rule of law can differ based on varied professional perspectives. Different organisations tend to push for their own areas of specialisation. Moreover, while rule of law is generally considered desirable, the reasoning can vary based on ideological interpretations. These ideological differences exist among donor actors and those in target countries. As such, rule of law reform can be an intensely politicized activity.

- Those on the right of the spectrum interpret rule of law as supporting property rights, fair treatment of foreign investors, strong police, and a general emphasis on law and order
- Those on the left of the spectrum see in it a focus on rights and fair and equal treatment for all, a way to empower the marginalised and citizens generally
- Centrists consider rule of law a technocratic ideal that encompasses key elements contributing to good governance such as governmental accountability, transparency and anticorruption

The paper also discusses the two more common definitions of rule of law:

- Formalist, proceduralist or narrow conception: stresses procedural fairness and institutional inefficiency – and incorporates notions of rule *by* law in addition to rule of law
- Substantive or broader conception: stresses the importance of substantive outcomes and not solely procedural norms – and views basic political and civil rights as an integral part of rule of law.

The latter definition has gained ground in international development circles and has resulted in a merging of the rule of law agenda and the democratization agenda. As such, even though the World Bank maintains an official neutrality regarding political development, the

broadening of its rule of law activities has brought its work closer to that expressly include a democratization rationale. In contrast, in recent years, authoritarian and semi-authoritarian governments, in particular Russia and China, have adopted the rule of law agenda – but based on a narrow, proceduralist conception. They guarantee fairness and efficiency, while excluding the rights element.

The debate over narrow or broad conceptions can also affect sequencing. The adoption of a narrow conception and the separation of rule of law and democratization processes has translated into the view that rule of law and some level of economic development should be established first, prior to democratization. The belief is that the rule of law will provide traditionally authoritarian societies with the mechanisms to mediate potentially chaotic or unpredictable processes of mass political participation. The paper critiques this line of thinking, arguing that societies should not be required to live with authoritarianism until full-fledged rule of law and a well-functioning state is in place. Moreover, it notes that certain aspects of democracy can help to foster rule of law. Alternation of power, for example, can increase accountability; and freedom of the press can bring attention to abuses of power.

**Hiil, 2007, ‘Rule of Law Inventory Report’, Academic Part, Discussion Paper for the High Level Expert Meeting on the Rule of Law, 20 April, Hague Institute for the Internationalisation of Law**

[http://www.hiil.org/uploads/File/1-947-Rule\\_of\\_Law\\_Inventory\\_Report\\_2007.pdf](http://www.hiil.org/uploads/File/1-947-Rule_of_Law_Inventory_Report_2007.pdf)

This report reviews academic writing on the rule of law and profiles differing views of scholars, donors and practitioners. It outlines the broad/thick/substantive and narrow/thin/formal conceptions of the rule of law. It argues that the narrow conception offers a good base-line. By not prescribing a particular form of governance or substantive vision of human rights (as is the case under a broad conception), it provides a better basis on which to start a consensus building conversation. Four key aims or values that are prevalent in all conceptions of rule of law are:

- Predictability or certainty
- Prevention of arbitrary exercise of power
- Promotion of formal equality
- Order

Some scholars, notably Tamanaha, have critiqued the treatment of thin and thick as a dichotomy and present instead a model of rule of law, which shows a progression along which both formal and substantive aspects of the rule of law can be ‘thinner’ or ‘thicker’. (See chart below: Tamanaha, 2004, p. 91 in Hiil, p. 12).

<b>ALTERNATIVE RULE OF LAW FORMULATIONS</b>			
Thinner -----> to -----> Thicker			
FORMAL VERSIONS:	<b>1. Rule-by-Law</b>  – law as instrument of government action	<b>2. Formal Legality</b>  – general, prospective, clear, certain	<b>3. Democracy+ Legality</b>  – consent determines content of law
SUBSTANTIVE VERSIONS:	<b>4. Individual Rights</b>  – property, contract, privacy, autonomy	<b>5. Right of Dignity and /or Justice</b>	<b>6. Social Welfare</b>  – substantive equality, welfare, preservation of community

Various organisations adopt different approaches to rule of law promotion. The UN and USAID both adopt thick conceptions of the rule of law that includes compliance with human

rights norms and standards. In contrast, the Open Society Institute and the World Bank adopt thin conceptions of the rule of law, distinguishing it from human rights and democracy (see pp. 27-28 for the precise definitions). These different conceptions are often driven by organizational mandates.

The report cautions that in practice thick/broad and thin/narrow conceptions may be difficult to distinguish. The development of an impartial and independent judiciary as dispute resolution mechanism, for example, is supported under a narrow approach. This entails respect for principles of due process and fair trial though, which are protected international human rights treaties and in many constitutions. A fair trial also entails access to justice or legal aid. In addition, preventing arbitrary exercise of power and holding government accountable likely requires a degree of free speech and free press in order to make known violations of law by government officials.

The report also emphasizes the preference for an ends-based understanding of the rule of law instead of an institutionalist approach. This would entail examining what is already available and desirable at the local level (e.g. local formal or informal dispute resolution mechanisms, norms etc.) rather than automatically adopting a blueprint of Western institutions and pushing for example for the construction of court houses. The report advocates for greater research into how rule of law can be promoted by mechanisms other than those familiar to actors in the West.

This would also address one of the conditions for the rule of law: legal culture. Setting up legal institutions and rules is insufficient and will have little effect if they are established in an environment in which the values and beliefs underlying them are not shared.

**Schlaeppli, E. and McCabe, C., 2008, 'Rule of Law, Justice Sector Reforms and Development Cooperation: SDC Concept Paper', Swiss Agency for Development and Cooperation**

[http://www.deza.ch/ressources/resource\\_en\\_170419.pdf](http://www.deza.ch/ressources/resource_en_170419.pdf)

The concept paper discusses definitions of rule of law and linkages with other concepts in development cooperation.

It stresses the due to different national histories and functions, rule of law can differ in meaning:

- Ruling by law: in authoritarian contexts, formal state laws and judicial institutions were and are often seen by elites as instruments by which to impose and legitimise their power and economic interests.
- Rule of law: in more pluralistic political contexts, the constitution and the laws constrain the actions of the state and make them function for the 'general' interest.

Despite the variations in definitions of the rule of law, the paper identifies common key elements (see p. 5):

- Non-discrimination and equality before the law
- The primacy of the constitution and a hierarchy of laws
- Government is bound by law
- Separation of powers and checks and balances
- Independent and impartial judiciary
- Respect for human rights

The paper also outlines the relationship between the rule of law and other concepts used in international development cooperation (see p. 10):

- Rule of law and human rights: rule of law is a means by which to realise human rights and a key element for good governance and democracy since it protects the human rights and fundamental freedoms that are needed for meaningful political participation and ensures accountability of those in power
- Rule of law and gender equality: rule of law is relevant for realising gender equality -if legal and judicial systems are not gender-sensitive, they often privilege men over women and reinforce discrimination

- Rule of law and decentralisation: rule of law is needed for the success of decentralisation strategies and the performance of local governance, particularly by distributing tasks and responsibilities and ensuring legal accountability
- Rule of law and poverty reduction: rule of law is essential for fighting poverty, since it empowers poor people to claim their rights and access justice on the basis of equality, and it reduces their risk to be exploited and abused by the more powerful and rich
- Rule of law and economic development: rule of law is important for economic development because it makes State decisions predictable and private contracts enforceable for all competitors
- Rule of law and peacebuilding: rule of law is required for peace building because it provides the basis for a non-violent means of dealing with conflicts based on rules that are applicable to all, and can build trust by making decisions predictable

**Peerenboom, R., 2009, 'The Future of Rule of Law: Challenges and Prospects for the Field', Hague Journal on the Rule of Law, vol. 1, pp. 5–14**

<http://journals.cambridge.org/action/displayFulltext?type=1&fid=4614080&jid=ROL&volumeld=1&issueId=01&aid=4614076>

This paper suggests ways in which to advance thinking in the rule of law, based on four key areas:

#### Conceptual or theoretical

- Adopt a pragmatic perspective that accepts multiple definitions of the rule of law, instead of trying to generate a consensus definition.
- Develop alternative 'thick' conceptions other than Western-oriented liberal democratic rule of law, in particular conceptions of Islamic rule of law that reflect the diversity within Islam and the diverse conditions of the countries in which Islam plays a role.
- Avoid circular definitions or measurements that build into rule of law the ends which it is meant to achieve (e.g. considering that rule of law means or is measured by protection of property rights; or that rule of law means or is measure by low crime rates).

#### Methodological

- Move away from international best practice and adopt a more process oriented approach that recognizes a greater role and responsibility for target countries and allows for differences in norms, practices and outcomes. This would require increased participation of various domestic stakeholders during all stages of the reform process, from planning, to legislation, implementation, monitoring and assessment.

#### Empirical

- Move beyond broad, general studies on the links between rule of law and economic growth or democracy, and test specific claims and hypotheses of which particular rules, institutions, cultural practices and contexts contribute to various desired outcomes.

#### Disciplinary

- Adopt a more inter-disciplinary approach that recognizes the linkages between legal reforms and other reforms.
- Increase cooperation between academics and rule of law practitioners.



### 3. Rule of law programming

**Barron, G., 2006, 'The World Bank and Rule of Law Reforms', Working Paper, no. 70, Development Studies Institute, London School of Economics and Political Science**  
<http://www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf>

This paper reviews the World Bank's approach to and work on rule of law reforms. The key premise underlying the paper is that the rule of law is a social and political ideal. The Bank's approach to rule of law reform has been informed by its reliance on New Institutional Economics (NIE). In practice, it focuses on legal and judicial reform as a means of promoting rule of law. Property rights are of particular importance as they are considered essential to economic growth.

Definitions of rule of law by the World Bank have evolved over time. Initially, it referred solely to the procedures through which rules are formulated and applied (a stable, predictable legal environment for economic activities, free from arbitrary interference of government). In contrast, the subsequent definition includes more substantive criteria and leans toward the promotion of positive rights (making reference to issues of equality; human dignity; and 'accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy). While the latter definition prevents the view that systems in which human rights are denied and persecution is prevalent can still meet requirements of rule of law, its substantive conception is very political and subject to charges of 'ethnocentricity'.

Disappointment with legal reform by the World Bank and other donors and the limited take up of 'legal transplants' have resulted in the prominence of the term 'legal culture'. This is used to explain why some laws 'take' and others do not. The paper critiques reliance on 'legal culture' to explain failures of legal transplants, as it obscures any analysis of whether the laws attempted to be transplanted are themselves 'good' laws. Moreover, it argues that it is unclear from World Bank documentation how issues of 'legal culture' are to be addressed. There has been limited attempts to understand local contexts before introducing new laws.

Judicial reform has also been challenging. The Bank's strategy on reforming judicial institutions is based on the promotion of four goals: judicial independence; efficiency; access to justice; and accountability. The paper argues that the independence of the judiciary, along with other rule of law reforms, is a highly political issue. The Bank acknowledges that judicial reform requires 'political will'. Similar to the critique of 'legal culture', the paper argues that lack of 'political will' has been relied upon by the Bank to absolve itself for the failure of rule of law to emerge from its various activities.

**UNDP, 2009, 'The Rule of Law in Fragile and Post-Conflict Situations', Bureau for Crisis Prevention and Recovery (BCPR), UNDP**  
[http://www.undp.org/cpr/documents/jssr/rol\\_concept\\_note\\_july09.pdf](http://www.undp.org/cpr/documents/jssr/rol_concept_note_july09.pdf)

This concept note outlines the BCPR's approach to rule of law programming:

- Programming must be placed within the broader context of justice, peace, security and development and be complementary to protection strategies, security sector reform policies, recovery and development programming, governance and domestic reforms. In addition, programming must be comprehensive in bringing together the inter-dependant institutions that contribute to justice, peace and security.
- Programming must be rooted in national needs, capacities, assessments and stakeholders. It should be based on principles of inclusion, participation and empowerment, and should be centred on institution building and the creation of civilian oversight mechanisms.
- National level support and programming must be accompanied by sufficient focus on justice and security at the community level.

The note stresses that strengthening rule of law can be a critical tool for conflict prevention:

- 'Functioning courts, and alternative means to dispute resolution, can address conflicts over land and resources before they lead to violent tensions;

- Equal treatment before law, and equitable access to justice, can help reduce collective perceptions of marginalization of discrimination, and hence incentives towards violence;
- Timely redress for grievances can help ease emerging tensions, especially if they involve sectarian conflicts;
- Effective institutions for the rule of law can curb precipitants of instability, such as illicit flows of drugs and weapons' (p. 2).

**OHCHR, 2006, 'Rule-of-Law Tools for Post-Conflict States: Monitoring Legal Systems', Office of the United Nations High Commissioner for Human Rights, New York and Geneva**

<http://www.ohchr.org/Documents/Publications/RuleoflawMonitoringen.pdf>

(Summary below from GSDRC document library:

<http://www.gsdrc.org/go/display&type=Document&id=3096>)

Post-conflict environments suffer from devastated and often completely dysfunctional or discriminatory legal frameworks and institutions of justice. This Office of the United Nations High Commissioner for Human Rights (OHCHR) report argues that monitoring legal systems can form a vital part of peacekeeping operations by promoting the rule of law. It provides a framework for developing a monitoring programme to analyse institutions and the justice system as a whole from which good practices can be reinforced and bad practices addressed.

The objective of monitoring is to improve the legal system's compliance with the law, including applicable international and regional standards, and to support the rule of law. Without an accurate, in-depth and coherent picture of the actual functioning of the justice system, it is difficult to formulate reform strategies that are targeted and effective while maximising limited resources. The underlying principle of monitoring the justice system is to reinforce the proper role and response of the system by encouraging those in it and those in authority to fulfil their obligations. The role of monitors is not to try to solve individual problems, as this may simply reinforce systemic failure.

Developing a justice system that protects human rights and promotes the rule of law is a critical aspect of securing peace and preventing future conflict. The report also finds that:

- Transforming dysfunctional justice systems requires comprehensive institution-building and reform. Monitoring legal systems implies a holistic approach that looks at the overall functioning of the system and its institutions.
- Monitoring of the legal system is aimed at identifying widespread patterns or trends in violations of international standards and the systemic issues that hinder compliance in order to support effective reform initiatives.
- High levels of insecurity in post-conflict or transitioning environments can hamper a whole reconstruction and peacebuilding effort. Establishing a base for the rule of law, beginning with public safety and accountability, is a foremost concern.
- Publicising well-documented human rights concerns and systemic problems within the justice system and informal justice mechanisms, can be essential not only for targeting reform and resources but also for generating the political will to do so.

Ultimately, those responsible for legal system monitoring programmes in post-conflict settings should set their priorities and goals based on the situation and implement these with professionalism, integrity and respect for the national context. A peacekeeping operation's primary objective regarding legal reform is to reinforce the justice system in its functioning, not to attempt to replace it with the operation's own actions. Suggested guidelines include:

- A monitoring programme should have representatives at the headquarters and each regional or field office. The headquarters should have a programme chief and at least one reporting and analysis officer.
- The monitoring team, after gaining an overview of the system, should select priority types of cases, issues or implementation of legislation for all monitors to follow systemically.

- The chief of the monitoring programme should have regular meetings with the chief of the judiciary, the minister of justice and other officials in the government to discuss issues raised by the legal system monitors.
- Periodic reports on the justice system should reflect the operation's assessment of the needs of the legal system, personnel and the impact that assistance efforts are having, positive or negative.
- Reports should combine a diagnosis based on a comparison of a number of similar cases or issues, with a proactive, problem-solving approach, and include practical and appropriate recommendations to address the problems identified.

**Samuels, K., 2006, 'Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt', Social Development Papers, no. 37, Conflict Prevention and Reconstruction Unit, World Bank, Washington**

[http://siteresources.worldbank.org/INTCPR/Resources/WP37\\_web.pdf](http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf)

This paper explores lessons learned in the area of rule of law reform. It discusses policy approaches, operational initiatives and challenges faced in fragile and post-conflict states. It concludes that, despite two decades of experimenting, the field lacks a common agreement on - the goals of rule of law reform, how different aspects should be sequenced to avoid them working against each other and what sorts of strategies are effective.

The paper stresses several important distinctions in defining rule of law reform:

- The distinction between end-goals, programmatic strategies and institutional goals: end-goals (usually social goods) of rule of law reform are complex and intangible, whereas programmatic strategies are designed in order to achieve these end-goals. Institutional goals are often conflated with social end-goals but the latter can be fulfilled without achieving the desired social goods.
- The distinction between different end-goals: there are various ways of conceptualising end-goals. The UN Secretary General's report on the rule of law formulates the rule of law in terms of ambitious end-goals. This paper advocates for five categories of end goals: a government bound by law; equality before the law; law and order; predictable and efficient rulings; and human rights.
- The distinction between rule by law and rule of law: in some Asian countries, the focus is on predictable and enforceable law, but the government does not consider itself subject to the law.

The paper also identifies four key rationales that different agencies have put forward as justifications for rule of law reform in fragile, post-conflict or underdeveloped states. They are: economic development; democratisation; poverty reduction; and peacebuilding. It is difficult to demonstrate causality, however.

**Bassu, G., 2008, 'Law Overruled: Strengthening the Rule of Law in Post-Conflict States', Global Governance: A Review of Multilateralism, vol. 14, no.1, pp. 21-38**

<http://www.atypon-link.com/LRP/doi/abs/10.5555/ggov.2008.14.1.21>

(Summary below from GSDRC document library:

<http://www.gsdrc.org/go/display&type=Document&id=3615>)

What is meant by 'the rule of law', and how can it most effectively be promoted in post-conflict states? This article considers definitions, and outlines lessons from Kosovo and Haiti. Donors need to recognise rule of law reform as a political activity, and to harmonise as much as possible potentially contradictory elements: (a) local narratives and resources; and (b) the historical connection of the traditional 'thick' version of the rule of law with a liberal democratic state.

The rule of law is a key ideal in Western political thought, bound up with the concept of natural (human) rights and of government controlled by the people and subject to checks and balances. It is associated with certain institutional arrangements, including separation of powers between executive, legislature and judiciary. This has been called a 'thick' version of

the rule of law, which may be seen as too tightly bound with a particular cultural context. A 'thin' definition focuses instead on defining who can make laws and the rules used to do so. It could thus be compatible with a variety of political arrangements.

The rule of law does not take root quickly or easily; efforts to strengthen it must be patient and modest. International efforts should initially focus on establishing a 'thin' version of the rule of law, kick-starting both supply and demand sides of the justice sector. The long-term development of 'thick' rule of law must be embedded in local political discourse, involving both legal and political elites, and civil society. This will take time.

In post-conflict situations, the rule of law is often weak or absent, and criminality can quickly fill the void. Re-establishing basic criminal justice is essential. The official legal system may be seen by the population as distant, untrustworthy and/or ineffective. International support for reform is often required. Lessons from case studies regarding such support include the following:

- *Applicable law:* A conflict can polarise the legal system if one side uses it as a means of repression. In such cases, a law other than that in place prior to the conflict might be applied, once agreed through extensive consultations. This could be the local law modified and updated in line with international standards.
- *Mapping studies:* Lack of understanding of the pre-conflict state of the legal system hampers efforts to rebuild it. High quality mapping studies are essential, and must accurately represent local reality.
- *Local systems:* Local dispute resolution mechanisms and customary law must be integrated into the legal system.
- *Public involvement:* A wide section of civil society must be involved in rule of law programmes, so that the population has a stake in their success.
- *Sector-wide approach:* Rule of law reform must integrate all components (eg police, courts, prisons) in one coherent system.
- *Coordination:* Multiple donors with conflicting priorities and processes are unhelpful. Donors should speak with one voice and pay from one purse.
- *Timescale:* Establishing the rule of law is complex; support for 10-12 years is required. Appropriate long-term targets should be used to measure progress.
- *Sequencing:* While some steps must be taken first (eg establishing basic security), the interconnectedness of all elements requires simultaneous effort on many fronts.
- *Bigger picture:* Strengthening the rule of law is a political not a technical exercise; donors must be willing to engage at the political level.

**Sannerholm, R., 2007, 'Legal, Judicial and Administrative Reforms in Post-Conflict Societies: Beyond the Rule of Law Template', *Journal of Conflict Security Law*, vol. 12, pp. 65-94**

<http://jcsf.oxfordjournals.org/content/vol12/issue1/index.dtl>

A common position adopted by the international community is that establishing the rule of law after violent internal conflict is an essential prerequisite in the transition from war to peace. In practical terms, this often translates into projects and programmes directed at the criminal justice sector. Rarely is rule of law acknowledged in relation to administrative law, public governance and economic management. This has several negative effects, particularly in societies where public mismanagement, bad economic governance and corruption run high, and especially if one considers these issues as constituting a large part of the reason for state failure. But, a new trend is now vaguely discernible in the practice of the international actors involved in rebuilding war-shattered societies that gives priority to the rule of law in relation to public sector reform. Liberia provides, in this regard, an illustrative example through the agreement between the Transitional National Government of Liberia and donor agencies, where international experts will have co-signing authority over a number of budgetary issues, and where national judicial institutions will be strengthened in order to combat arbitrary governance and corruption.

#### 4. Rule of law measurement and indicators

**Agrast, M. D., Botero, J. C. and Ponce, A., 2009, 'The Rule of Law Index Measuring Adherence to the Rule of Law around the World: Design and Implementation of the Index - Country Profiles for 2009', Presented at the World Justice Forum II, 12 November, Vienna**

<http://www.worldjusticeproject.org/sites/default/files/World%20Justice%20Forum%20II%20-%20Rule%20of%20Law%20Index%20Report.pdf>

This document outlines the World Justice Project's Rule of Law Index, designed to assess countries' adherence to the rule of law. It also discusses the process it went through in formulating a set of principles that would constitute an accepted working definition of the rule of law. Key points include:

- Adopting culturally universal principles and avoiding Western, Anglo-American or other biases;
- Drawing on aspects from both 'thin', formal or procedural conceptions of rule of law and 'thick', substantive conceptions. It was understood that for the Index to gain wide acceptance, the definition would have to be applicable to many kinds of social and political systems; yet it was also recognised that the rule of law should be more than merely a system of rules.

The four principles adopted attempt to strike a balance between thinner and thicker conceptions. Each of these principles is treated as a band in the index, with various factors falling under it. Countries' adherence to the rule of law is assessed based on these principles and factors. The principles are:

- The government and its officials and agents are accountable under the law.
- The laws are clear, publicized, stable and fair, 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.
- Access to justice is provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

**Parsons, J., 2008, 'Developing Indicators to Measure the Rule of Law: A Global Approach', A Report to the World Justice Project, Vera Institute of Justice and Members of the Altus Global Alliance**

<http://www.vera.org/download?file=1807/Developing%2BIndicators%2Bto%2BMeasure%2Bthe%2BRule%2Bof%2BLaw%2B%2528Online%2Bversion%25292.pdf>

This project by the Vera Institute of Justice (and members of the Altus Global Alliance) aims to complement the World Justice Project's Rule of Law Index by adapting the detailed and comprehensive statement of legal standards the Index offers to measures that gauge how people *experience* the rule of law. Sixty rule of law indicators have been developed and tested in four cities: Chandigarh, India; Lagos, Nigeria; Santiago, Chile; and New York City, U.S. The project finds that this single set of indicators can be flexible enough to be used in very diverse jurisdictions, yet still be meaningful to policy makers and practitioners.

The report stresses the importance of documenting the experiences of poor and marginalised groups as an important litmus test for problems with the rule of law. This can be done by developing indicators that have an implicitly pro-poor or pro-gender focus; or collecting information that allows for disaggregation along important lines of inequality. It is also important to assess non-state justice mechanisms as these play a crucial role in many parts of the world.

**USAID, 2008, 'Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework – A Guide for USAID Democracy and Governance Officers, USAID, Washington, DC**

[http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/ROL\\_Strategic\\_Framework\\_Sept\\_08.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ROL_Strategic_Framework_Sept_08.pdf)

This guide presents a strategic framework for conceptualizing the rule of law, assessing a country's strengths and weaknesses with regard to rule of law and designing strategic programmes to address rule of law challenges.

The guide acknowledges that there are various definitions of the rule of law and that it is not necessarily a universal principle. It links rule of law with democracy and highlights five essential elements of the rule of law: order and security; legitimacy; checks and balances; fairness; and effective application. Assessments of rule of law and reviews of sectors are to be based on these five elements. Assessments should comprise the following steps:

- Take into account the political and historical context
- Understand the roles of major players and political will
- Examine program options beyond the justice sector
- Assess the justice sector

**Albers, P., n. d., 'How to Measure the Rule of Law: A Comparison of Three Studies'**

<http://www.coe.int/t/dghl/cooperation/cepej/events/onenparle/Albers251007.pdf>

This paper discusses three studies that partly measure the rule of law in an attempt to begin developing rule of law indicators. One of the difficulties with varying definitions and approaches to the rule of law is the absence of a comprehensive measurement system for the rule of law. The paper states that adopting a 'thinner' conception of the rule of law is a step towards making the 'rule of law' measurable; however further debate on the conception is necessary. Existing studies tend to look at certain aspects of the rule of law or view the topic from a specific angle. The three studies discussed are:

- **'Governance Matters' (World Bank):** the rule of law is measured here by the extent to which agents have confidence in and abide by the rules of society, in particular the quality of contract enforcement, the police and the courts, as well as the likelihood of crime and violence. It results in a perceived level of governance (based on the subjective opinion of citizens, experts etc.) rather than a real (objective) level of governance.
- **'Doing Business' (World Bank):** this study measures business regulation and the protection of property rights, including their effect on businesses, especially small and medium sized business firms. The study on enforcement of contracts is a good example of how this element of the rule of law can be measured.
- **Study on Judicial Systems (European Commission for the Efficiency of Justice):** this study adopts a supply side, institutional-based approach. It entails questionnaires to judicial institutions and governmental agencies concerning issues such as the independence of the judiciary, fair trial, and reasonable length of proceedings, access to justice and courts, legal aid and the role of the public prosecutor.

The paper suggests that the combination of the World Bank and European Commission studies can add value regarding the measurement of the independence and the functioning of the judiciary as together they provide an overview of 'perceived' and 'real'; and supply and demand based information. Greater effort should be made to establish indicators that would incorporate these differing viewpoints.

**Davis K.E., 2004, 'What Does the Rule of Law Variable Measure?', Paper presented at the Globalization, Law and Development Conference, 16-18 April, Ann Arbor, Michigan**  
[http://64.9.213.241/files/old/global\\_conf/papers/revise/Davis\\_Kevin.pdf](http://64.9.213.241/files/old/global_conf/papers/revise/Davis_Kevin.pdf)

This paper questions cross-country empirical analyses that claim to establish the existence of a causal relationship between legal reforms and development. It focuses on the International Country Risk Guide (ICRG), the most commonly used source of data on respect for the rule of law. The ICRG provides quantitative assessments by unidentified experts of the strength of the law and order tradition in various countries. It argues that the ICRG rule of law variable is flawed for various reasons:

- It includes information on both the behaviour of legal personnel and the behaviour of members of the general public; and thus cannot be considered a purely legal variable. As such, it cannot provide any clear links between the design of a legal system and development outcomes. Rather, development outcomes could be attributable to crime rates, for example.
- Behaviour of legal personnel and the general public seems likely to depend heavily on the media. The willingness of the media to investigate and report on political corruption will impact on perceptions of the integrity of state officials; and the willingness of media to report on various other crimes will impact perceptions of the frequency of such crimes.
- Even if the rule of law variable could be properly characterized as a legal variable, it does not refer to specific features of the legal system that can be modified to promote development.

**Skanning, S-E., 2008, 'Measuring the Rule of Law', Paper prepared for the ECPR Joint Sessions of Workshops, 12-16 April, Rennes**  
<http://www.democracy-assessment.dk/papers/uploaded/1015200812009PM.doc>

This paper offers a critical review of seven indices of rule of law:

- Bertelsmann Foundation: Transformation Index – Rule of law
- Freedom House: Freedom of the World – Rule of law
- Freedom House: Countries at the Crossroads – Rule of law
- Freedom House: Nations in Transit – Judicial framework and independence
- Global Integrity: Global Integrity Index – Rule of law and access to justice
- The PRS Group: International Country Risk Guide – Law and order
- World Bank: Worldwide Governance Indicators – Rule of law

It seeks to address key aspects of measures: focus and scope, conceptualisation, measurement and aggregation. It finds that rule of law measures tend to involve at least two distinct dimensions: one tends to reflect the quality of the legal system (e.g. equality before the law and independent courts) and the other mirrors the level of order in society (e.g. absence of violence and crime). In terms of conceptualization, the paper suggests based on a survey of literature an analytical distinction between three dimensions of the rule of law:

- Functioning of the legal system: e.g. an independent and impartial judicial system, respect for the decisions of the courts, due process, and equality before the law.
- Personal integrity rights: e.g. freedom from arbitrary arrests, police violence, and inhuman/degrading treatment, are violated by the government.
- Preservation of order: e.g. whether order or open conflict, violence, upheavals, and crime characterizes a country.

A conceptual overview of all the indices demonstrate convergence and divergence among the various indices. The paper also finds differences among the indices in terms of focus and scope, measurement and aggregation.

## 5. Additional resources – key books on rule of law

**Bergling, P., Ederlöf, J., Taylor, V. L., 2009, Rule of Law Promotion: Global Perspectives, Local Applications, Iustus Frilag, Uppsala**

[http://www.iustus.se/page/index.php?page=shop.product\\_details&product\\_id=556&flypage=flypage.tpl&pop=0&option=com\\_virtuemart&Itemid=9&vmcchk=1&Itemid=9](http://www.iustus.se/page/index.php?page=shop.product_details&product_id=556&flypage=flypage.tpl&pop=0&option=com_virtuemart&Itemid=9&vmcchk=1&Itemid=9)

**Trebilcock, M. J. and Daniels, R. J., 2008, Rule of Law and Development: Charting the Fragile Path of Progress, Edward Elgar Publishing Ltd., Cheltenham (UK) and Northampton (US)**

[http://books.google.co.uk/books?id=NTWq-CHZgZYC&printsec=frontcover&dq=trebilcock+daniels+rule+of+law&source=bl&ots=0iuUbSr\\_xH&sig=\\_KJyeqMfDtyTndxLsGQAODPSCVc&hl=en&ei=aJkfTMj1EKL40wSwy4CuDQ&sa=X&oi=book\\_result&ct=result&resnum=1&ved=0CBcQ6AEwAA#v=onepage&q&f=false](http://books.google.co.uk/books?id=NTWq-CHZgZYC&printsec=frontcover&dq=trebilcock+daniels+rule+of+law&source=bl&ots=0iuUbSr_xH&sig=_KJyeqMfDtyTndxLsGQAODPSCVc&hl=en&ei=aJkfTMj1EKL40wSwy4CuDQ&sa=X&oi=book_result&ct=result&resnum=1&ved=0CBcQ6AEwAA#v=onepage&q&f=false)

**Hurwitz, A. and Huang, R., 2008, Civil War and the Rule of Law: Toward Security, Development, and Human Rights, Lynne Rienner, Boulder and London**

[http://www.rienner.com/title/Civil\\_War\\_and\\_the\\_Rule\\_of\\_Law\\_Security\\_Development\\_Human\\_Rights](http://www.rienner.com/title/Civil_War_and_the_Rule_of_Law_Security_Development_Human_Rights)

**Carothers, T, ed., 2006, Promoting the Rule of Law Abroad: In Search of Knowledge, Carnegie Endowment for International Peace, Washington, DC**

<http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=17714&prog=zgp&proj=zdr1>

**Jensen, E. and Heller, T. C. eds., 2005, Beyond Common Knowledge: Empirical Approaches to the Rule of Law, Stanford University Press, Stanford**

[http://cddrl.stanford.edu/publications/beyond\\_common\\_knowledge\\_empirical\\_approaches\\_to\\_the\\_rule\\_of\\_law/](http://cddrl.stanford.edu/publications/beyond_common_knowledge_empirical_approaches_to_the_rule_of_law/)

**Tamanaha, B. Z., 2004, On the Rule of Law: History, Politics, Theory, Cambridge University Press, Cambridge, UK**

<http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=0521843626>

## 5. Additional information

### Author

This query response was prepared by **Huma Haider**: [huma@gsdrc.org](mailto:huma@gsdrc.org)

### Contributors

Ronald Janse (Hague Institute for the Internationalisation of Law)

Tilman J. Röder (Max Planck Institute for Comparative Public Law and International Law)

### Selected websites visited

Arab Center for the Development of Rule of Law and Integrity, Center on Democracy, Commonwealth Secretariat, Development and the Rule of Law (Stanford University), Centre for Public Law (University of Cambridge), Eldis, European Commission, Global Development Network, Google, Google Scholar, Governance Assessment Portal, GSDRC, Hague Institute for the Internationalisation of Law, Ingenta journals, Managing for Development Results, Max Planck Institute for Comparative Public Law and International Law, Overseas Development Institute, Peacebuilding Initiative, UNDP, United States Institute of Peace, Vera Institute of Justice, World Bank, World Justice Project



**About Helpdesk research reports:** Helpdesk reports are usually based on 2 days of desk-based research. They are designed to provide a brief overview of the key issues; and a summary of some of the best literature available. Experts are contacted during the course of the research, and those able to provide input within the short time-frame are acknowledged.

**Need help finding consultants?**

If you need to commission more in-depth research, or need help finding and contracting consultants for additional work, please contact [consultants@gsdrc.org](mailto:consultants@gsdrc.org) (further details at [www.gsdrc.org/go.cfm?path=/go/helpdesk/find-a-consultant&](http://www.gsdrc.org/go.cfm?path=/go/helpdesk/find-a-consultant&))