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Promoting the Rule of Law Abroad: A Conversation on its Evolution, Setbacks, and Future Challenges

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I. Introduction*

The past four decades have seen the emergence and constant evolution of international efforts to promote rule of law. Even though, historically, rule of law assistance began with a regional focus on Latin America, during the last two decades it quickly expanded to other regions of the world. Today, it is part of both bilateral and multilateral assistance strategies designed to support democratic reform, encourage better governance, further economic development and prosperity through different strategies and interventions to secure legal empowerment and justice for the poor and traditionally disenfranchised groups, foster security and lead interventions in conflict, combat terrorism and drug trafficking, and support post-conflict reconstruction efforts in troubled societies among other objectives.

The list of definitions and elements developed to explain what the rule of law is and what the process and mechanisms behind its objectives are tends to be quite broad. In many cases, they tend to be linked to the set of interventions and strategies a particular organization has developed to respond to a particular societal challenge to the rule of law as part of its own mandate.

At the same time, the field included an army of multi-lateral and international agencies, lawyers, private foundations, legal and development consulting firms, human rights and civil society activists, governments, armed forces, and aid providers. To do what? A rapid answer says to foster and enforce a wide array of agendas while responding to some of the most compelling challenges to democratic values, human rights, governance, stability, peace, and economic development many societies and their citizens face. In other words, to equip societies and their institutions with the necessary tools to make the rule of law a reality.

If that is the end goal, what has the field—as engaged in the business of promoting the rule of law abroad—learned over the course of four decades? While the task of answering this question can seem quite daunting, for those engaged in this process, it remains a compelling exercise. A growing number of practitioners working on rule of law reform initiatives are beginning to acknowledge that while most of the challenges faced emerge as programs and initiatives are implemented elsewhere,¹ they must foster these conversations in their own countries if they are to respond to the challenges ahead. In other words, more of the same does not work and practitioners need to understand what has happened so far in order to be able to project new strategies and interventions that are responsive to what lies ahead. With one more caveat: these conversations should also keep in mind the folks on the ground, the citizens of the host countries where these interventions take place and the different societal, cultural, political, and legal traditions that they are aimed at targeting and reforming.

This is a powerful argument that challenges both practitioners themselves and the rule of law community of practice as a whole to think in different terms. It implies that they need to step back from merely engaging in designing and implementing projects in a reactionary mood and begin engaging in a different conversation among those engaged in this process.

* Lelia Mooney authored this section.

1. See James A. Goldston, *The Rule of Law at Home and Abroad*, 1 H_AGUE J. ON THE RULE OF L. 38 (2009).

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Over the course of these past four decades, they have been able to learn and understand that technical approaches to rule of law reform are that merely focus on strengthening institutions, training justice sector professionals, lawyers and bar associations, reforming laws and legal frameworks among others, while effective, do not deliver by themselves long lasting and sustainable changes.

Even more, any outside intervention, particularly one aiming at fostering the rule of law in any particular setting, cannot avoid exploring what the political arrangements of a particular society are and how different political, civil, society, and human rights stakeholders can have and should have a stake in this discussion. Furthermore, this exploration also demands a careful look at how a society has contributed to perpetuating discriminatory notions of justice, while at the same time understanding the potential that same society has (and the opportunity it has) in becoming a strong defender and re-builder of a more democratic, socially inclusive, just, and prosperous future for its own citizens.

As the scope of the rule of law agenda keeps expanding, so does the need to put these experiences and lessons learned into perspective and it is compelling to start with that exercise here, among those of us engaged in the field to better frame an integrated conversation instead of one that responds to only specific arguments or approaches in total disconnect with the challenges, dreams, and aspirations citizens face on the ground.

This entails beginning by conducting a critical exploration on the lessons learned from the evolution of the rule of law field, its setbacks and some of the challenges ahead. That is the precise objective of this paper that grew out of a live dialogue that was organized as part of a series that focused on promoting development, governance, and the rule of law abroad. It will try to do so by focusing the participants of this dialogue on three fundamental themes.

First, Martin Schönteich from the Open Society Justice Initiative will explore how the rule of law movement became what it is today and how its evolution contributed to shaping its current focus. Second, Jennifer Windsor from Freedom House will draw on *Freedom in the World* survey data to assess trends and challenges in the evolution of rule of law and will outline the critical role that human rights defenders can play in ensuring that rule of law systems actually deliver justice and equality to all citizens while securing those systems respect and enforce human rights. Third, Colette Rausch from the United States Institute of Peace (USIP) will walk through the most compelling themes that the rule of law field needs to consider as it evolves in a future that provides a secure and safe framework for all people, where everybody has equal access to justice and protected human rights.

Lastly, this paper will elaborate on some of the lessons that emerged out of this collective exploration as a way of responding to the current challenges and envisioning a different kind of action to the challenges both practitioners and the rule of law community of practice are facing here and elsewhere.

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II. How Rule Of Law Assistance is Evolving*

A. THE BEGINNINGS

The growth in rule of law assistance can be divided into a number of stages, beginning with the law and development movement. While there is some debate about when it began, a number of scholars identify its beginnings in the years immediately after World War II.² Shortly after the end of the war, modernization theory became prominent through the work of U.S. economists, political scientists, and sociologists. It informed the political development movement, which grew out of the spirit of optimism and confidence that followed the triumph of the western Allies in World War II.³

This new way of thinking stressed that the less-developed world needed to emulate the Western model of modernity, and pattern their society along Western lines in order to progress.⁴ Moreover, with the same economic, political, and social institutions in place as in the developed West—free markets, liberal political institutions, and the rule of law—Third-World development was deemed an inevitable, evolutionary process.⁵ Consequently, the primary focus of foreign aid was to improve the effectiveness and capacity of public institutions and centralized bureaucracies. Not much attention was given to judiciaries other than “another public institution in need of technocratic enhancement.”⁶

For many, the law and development movement only commenced in the mid-1960s, when the movement was motivated by ideas centered on both economic and democratic development.⁷ In the 1960s, the law and development movement focused on a few countries in Africa, Asia, and Latin America. Projects tended to be small with a limited time horizon, and funds were generally modest. Most of the funding came from U.S. private foundations and the United States Agency for International Development (USAID).

The law and development movement sought to reform the judicial systems and substantive laws of developing countries. Engaging legal scholars from prestigious American universities, the movement helped develop law faculties and legal education curricula in developing countries. The objective was to provide law schools in less developed jurisdictions with the capacity to train lawyers in the concepts and practices of Western—prima-

* Martin Schönteich authored this section.

2. See Thomas C. Heller, *An Immodest Postscript*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 383 (Eric G. Jensen & Thomas C. Heller eds., 2003); Erik G. Jensen, *The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses*, in BEYOND COMMON KNOWLEDGE: EMPIRICAL APPROACHES TO THE RULE OF LAW 345 (Eric G. Jensen & Thomas C. Heller eds., 2003).

3. See RICHARD A. HIGGOTT, *POLITICAL DEVELOPMENT THEORY: THE CONTEMPORARY DEBATE* (1983).

4. See, e.g., DAVID ERNEST APTER, *THE POLITICS OF MODERNIZATION* (1965); DANIEL LERNER, *THE PASSING OF TRADITIONAL SOCIETY: MODERNIZING THE MIDDLE EAST* (1958); WALT WHITMAN ROSTOW, *THE STAGES OF ECONOMIC GROWTH, A NON-COMMUNIST MANIFESTO* (3d ed. 1990).

5. Brian Z. Tamanaha, *The Lessons of Law-And-Development Studies*, 89 AM. J. INT'L L. 470, 470-86 (1995).

6. Jensen, *supra* note 2, at 346.

7. Tamanaha, *supra* note 5, at 472; see also HARRY BLAIR & GARY HANSEN, *WEIGHING IN ON THE SCALES OF JUSTICE: STRATEGIC APPROACHES FOR DONOR-SUPPORTED RULE OF LAW PROGRAMS, USAID PROGRAM & OPERATIONS ASSESSMENT REPORT NO. 7, 7* (1994), available at http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnaax280.pdf.

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rily U.S.—law to lead the economic and political modernization process in their countries.⁸

The movement was largely based on the assumption that law is central to the development process. Moreover, the law was understood as an “instrument that could be used to reform society and that lawyers and judges could serve as social engineers.”⁹ In other words, law reform leads to social change, and a key driver of change is the law itself.

Emboldened by the civil rights movement in the United States, numerous U.S. lawyers travelled to Africa and Latin America to promote a model whereby lawyers are activist agents of change. A related assumption was that educating the legal profession in developing countries would advance reform efforts. In other words, to overcome the barrier between the law as it appeared in the statutes and its actual application, it was necessary to educate lawyers and judges to become legal activists. The law and development movement paid less attention to legislatures, judiciaries, and practicing lawyers. This was not “because they were thought to be less important, but because it was assumed that change in the education system was the most effective way to bring about change in all other legal institutions.”¹⁰

The focus of the movement—both in respect of legal education and the development of modern law—was on the development of commercial law and the training of commercial lawyers in both the private and public sectors. This was not motivated by an indifference to democracy promotion but rather based on a belief that democratic values were best served through economic growth. Moreover, there was a basic understanding that, by focusing on the promotion of both the private sector and the development of a market economy, there was going to be a “spillover from an effective and instrumental orientation in economic law to ‘democracy values’ like access to justice and the protection of civil rights.”¹¹

B. SHIFTING THE FOCUS AND PRIORITIES

In the mid-1970s, the focus shifted to the importance of alleviating poverty by meeting basic needs and giving the poor a larger voice in the development process. One central understanding of this new process was the importance of making legal services accessible to the poor through legal aid projects. For example, USAID supported legal aid projects in a number of countries, and the Ford and Asia Foundations pursued “legal aid as an important objective and continued to refine their strategies in this sector throughout the 1970s and 1980s.”¹² Both Foundations “supported legal aid, mediation boards, law education, and legal advocacy organizations.”¹³

By the late 1970s a growing chorus of critics began to undermine the law and development movement. “U.S. legal advisers working abroad were criticized for being ethnocen-

8. BLAIR & HANSEN, *supra* note 7, at 7-8.

9. World Bank, Law and Development Movement, <http://siteresources.worldbank.org/INTLAWJUS-TINST/Resources/LawandDevelopmentMovement.pdf> (last visited Aug. 29, 2009).

10. David M. Trubek, *The “Rule of Law” in Development Assistance: Past, Present, and Future*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 77 (David M. Trubek & Alvaro Santos eds., 2006).

11. *Id.*

12. BLAIR & HANSEN, *supra* note 7, at 8.

13. *Id.*

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tric, naïve, and imperialistic.”¹⁴ Modernization theorists despaired as developing countries that had benefited from the movement failed to progress economically, experienced the weakening of their political institutions and, in the case of some, slid from democratic to authoritarian rule. Questions arose about the practical and moral challenges involved in transplanting Western legal institutions. “In some cases, the transplants did not ‘take’ place at all: some of the new laws promoted by the reformers remained on the [statute] books but were ignored in action. In others, laws were captured by local elites and put to uses different from those the reformers intended.”¹⁵

The impact of the educational reforms was modest at best as law schools proved resistant to significant change. Crucially, the law and development movement’s interventions failed to bring about systemic change. Moreover, change in the economic sphere—limited as it was—did not result in the anticipated democratization gains and the protection of individual rights. Theorists considered this to be “a real shock to Western liberal legalists who had assumed that the legal system was a seamless whole and that reform in one sphere would necessarily lead to progressive change in other areas.”¹⁶

The law and development movement failed to recover from its setbacks and growing levels of self-doubt by its erstwhile champions. The academics and policymakers that drove the movement in the 1960s lost interest and the study of law and development declined.¹⁷ While development aid for law reform did not cease altogether, foundations also lost interest in the field. Nevertheless French and English scholars, together with a number of African, Latin American, and Indian scholars, continued to research and write on the subject, developing a rich body of material. Moreover, some lawyers in developing countries continued—albeit in a somewhat ad hoc manner—to emulate the laws and the development of legal institutions based on Western models.¹⁸

During the 1980s a new phase in the rule of law movement developed, this time under the rubric of the administration of justice. Much of the activity in this period to promote democracy through legal development was funded by U.S. agencies and foundations and focused geographically on Latin America and Asia. The first round of reforms in Latin America in the early 1980s concentrated primarily on criminal justice from the perspective of limiting human rights abuses and ending the impunity of abusers.

The thrust of reforms in Latin America was the drafting and promulgation of new criminal procedure codes.¹⁹ As it became apparent that new laws would not facilitate change on their own, the scope of the reform was broadened to turn legal theory into practice. New elements added to the reform typically included the creation of new criminal justice institutions such as the prosecution and public defense, the restructuring and professionalization of existing criminal justice institutions such as the police, and the provision of new equipment and infrastructure more compatible with the new procedural requirements.

14. Carol V. Rose, *The “New” Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 *LAW & SOC’Y REV.* 93, 93-94 (1998).

15. Trubek, *supra* note 10, at 78-79.

16. *Id.* at 79.

17. *Id.* at 81.

18. Tamanaha, *supra* note 5, at 474.

19. LINN A. HAMMERGREN, *ENVISIONING REFORM: IMPROVING JUDICIAL PERFORMANCE IN LATIN AMERICA* 11 (2007).

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By the end of the 1980s, increasing emphasis was placed on issues of judicial independence, constitutionalism, the promotion of civil and political liberties, criminal law, and an overall systemic approach to the development of formal legal systems.

USAID invested heavily in court reform efforts in Central America during this period. In the mid-to-late 1980s, USAID initiated judicial projects to support the emergence of more democratic regimes in South America, and “judicial improvement programmes” began to constitute a major component of USAID-sponsored democracy programmes in the region.²⁰ The focus of this effort was to enhance the stature of the judiciary and thereby strengthen democratizing efforts in Latin America.²¹ Such initiatives included: increasing courts’ efficiency and effectiveness through court modernization efforts; “training judges; hiring more judges, public defenders, and prosecutors . . . reforming penal codes; and introducing career and merit appointments for judges and other judicial personnel.”²²

After the end of the Cold War a vibrant rule of law movement developed. The end of communism saw many countries in Eastern Europe and the former Soviet Union undergo a dual transition to market economies and democratic rule. Rule of law supporters saw these two issues linked; rule of law reform was necessary to buttress both. Beginning in the early 1990s, “[t]he rule of law became the big tent for social, economic, and political change generally.”²³ The earlier—mainly U.S. based—supporters of the law and development movement were now joined by a number of European bilateral and multilateral donors and the multi-lateral development banks in support of rule of law reform efforts in Africa, Asia, Eastern Europe, and Latin America.

During this period, “USAID broadened the geographic and analytic perspectives of its law programs.”²⁴ Because support for democracy was emerging as a major objective of USAID, its missions around the world began “including law projects in the design and implementation of country democracy programs.”²⁵ Moreover, “the programmatic focus and content of these efforts” began to encompass “a wider array of objectives, strategies, and activities,” including focusing on “issues of access, legal aid, and the mobilization of public demand for legal reform.”²⁶

More recently, large donors have begun supporting more comprehensive and integrated programming; although, as experts point out, in practice this often means little more than the pursuit of multiple objectives by combining a multitude of project components. The result is that any strategic linkages among goals and project components and activities are weak.²⁷

Poverty reduction has also taken on new prominence in the rule of law programming of a number of large bilateral donors. “Poverty-focused judicial reform programs have as a goal expansion of the human rights agenda to include social and economic rights—for example, poverty alleviation and health care.”²⁸

20. BLAIR & HANSEN, *supra* note 7, at 8-9.

21. *Id.* at 9.

22. *Id.*

23. Jensen, *supra* note 2, at 347.

24. BLAIR & HANSEN, *supra* note 7, at 9.

25. *Id.*

26. *Id.* at 9-10.

27. See HAMMERGREN, *supra* note 19.

28. Jensen, *supra* note 2, at 348.

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C. WHAT HAS THE MOVEMENT LEARNED?

There are three levels of intensity when it comes to the different rule of law reform efforts that have been supported by donors in the post-Cold War era.²⁹ At the first level, the focus is on laws themselves—revising laws and frequently changing whole codes, as in the case of Latin America, where criminal procedure codes based on the inquisitorial system have been replaced with those based on adversarial criminal proceedings.³⁰ In addition to criminal laws, changes have been made to constitutional law, commercial law, and administrative law.³¹

The second level of reform concentrates on changing and reforming law-related institutions. That is to make courts, prosecution services, policing agencies, public defender institutions, and, at times, prison administrations and law schools “more competent, efficient, and accountable.”³² In practical terms, this includes the development of training programmes for criminal justice actors, better salaries and working conditions for judges, prosecutors, and police, and the development of ethic codes and professional standards.³³

The third level concerns increasing governments’ compliance with the law, particularly with respect to judicial independence.³⁴ Success for this type of reform depends significantly on an enlightened political leadership and the ability to bring about substantial “changes in the values and attitudes of those [who hold political] power.”³⁵ Very often the impetus for such reforms must come from the domestic political, economic, and social elite.³⁶ Unlike the law and development theorists who thought that modern institutions and bureaucracies would facilitate change, the modern rule of law movement is based on the belief that change does not come naturally from key institutions but, rather, is dependent on key individuals.

In the recent past, most rule of law aid has focused on the first two levels of reform, partly because these types of reforms are relatively easy to achieve. But the most important—even crucial—element of successful reform that is both sustainable and has the potential to have real impact on the ground are the reforms falling under the third level.

III. The Current Rule of Law Challenge*

Exploring how rule of law assistance emerged and evolved over the course of more than four decades provides insight into understanding what specific objectives these efforts tried to achieve and the theories and the legacies left behind.

As this discussion moves into examining how well rule of law strategies have worked, it is useful to set the stage by taking a broad look at how societies have progressed in terms of instituting rule of law. In doing so, an analysis of findings through the lens provided by

29. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFFAIRS 95, 99 (1998).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

* Jennifer Windsor authored this section. Lisa Davis, Deputy Director of Programs at Freedom House, contributed to its development.

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Freedom House's *Freedom in the World* survey, Freedom House's annual assessment of political rights and civil liberties, which has been underway for over three decades, is useful to set the stage.³⁷

The *Freedom in the World* methodology gives significant weight to rule of law. Rule of law is one of the four main components of the civil liberties rating, along with "freedoms of expression and belief, associational and organizational rights . . . and personal autonomy" and individual rights.³⁸ Under the rule of law component, Freedom House evaluates four areas: the independence of the judiciary, civilian control of the security forces, the population's level of protection from unjustified imprisonment and torture or other abuse, including war and insurgencies, and equal treatment of all people.³⁹ The Freedom House approach therefore tries to assess the quality of rule of law—whether and how justice is actually delivered and experienced—by citizens within countries.

If one analyzes trends from the last ten years, it is clear that progress in rule of law components lags behind other indicators, even in some countries in the world that are generally considered to be on the right track in other areas, including political rights. For example, in the Latin America region, over seventy percent of the countries are in the "Free" category.⁴⁰ Most of the countries have received relatively good ratings for electoral processes, political pluralism, and freedom of association.⁴¹ Scores remain very low, however, in the area of rule of law and other areas in the overall civil liberties area.⁴²

The reasons behind the lack of progress vary from country to country and region to region, but a few general observations are worth remembering. First, the lack of progress in the area of rule of law is typically not simply a result of too few trained lawyers or courthouses, but is due to the fact that the most important political actors within the country have not adequately backed reform. In the end, a rule of law system is a reflection of the underlying socio-political contract that exists within a society. Rule of law reforms can and do alter the balance of economic and political power within the country. Second, the state is not the only source of constraints on improvements in rule of law. The persistence of violence has negatively affected rule of law and human rights within many societies, and non-state actors, such as criminal gangs and armed extremist forces, can be major perpetrators of such violence.

37. FREEDOM HOUSE, *FREEDOM IN THE WORLD 2009: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES* (2009), http://www.freedomhouse.org/template.cfm?page=351&ana_page=352&year=2009.

38. *Id.* at Methodology, http://www.freedomhouse.org/template.cfm?page=351&ana_page=354&year=2009.

39. Under the four main areas of the rule of law component, there are additional detailed questions. *See id.* at Checklist Questions and Guidelines, http://www.freedomhouse.org/template.cfm?page=351&ana_page=355&year=2009.

40. *Id.* at Map of Freedom in the World, <http://www.freedomhouse.org/template.cfm?page=363&year=2009>.

41. Arch Puddington, *Findings of Freedom in the World 2008—Freedom in Retreat: Is the Tide Turning?*, in *FREEDOM IN THE WORLD* (Freedom House 2008), <http://www.freedomhouse.org/template.cfm?page=130&year=2008>.

42. *Id.*

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A. IMPLICATIONS FOR RULE OF LAW STRATEGIES

What are the implications then for programmatic strategies? First, rule of law strategies should not be seen only through an institutional capacity-building lens but must also take into account the political context and how such programs are affecting different stakeholders within that society. Obviously, the international community has a limited ability to impact internal politics within a country, but it can be aware of power imbalances and seek to create incentives for positive reform in the design and implementation of programs. The process of assessing political contexts and balances should consider the different and changing power dynamics.

Second, there is a need to integrate human rights more explicitly into the design of rule of law programs. Strengthening rule of law should be focused on producing a system that delivers fundamental human rights to all the citizens within a society. Therefore, a greater emphasis on working with and in support of indigenous human rights defenders should be part of rule of law strategies.

Frontline human rights defenders are a key factor in pushing for rule of law reform, evaluating the performance of the justice system to render justice, seeking redress for victims, educating the public and government, and demanding accountability on the part of government and, increasingly so, non-state actors to both respect and protect human rights. A recent example of the crucial role that human rights defenders can play is the process leading up to the conviction of former Peruvian President Alberto Fujimori in April 2009.⁴³ The efforts of Peruvian human rights defenders⁴⁴ to investigate and document human rights abuses, to successfully advocate for the creation of a National Commission for Truth Reconciliation Commission and thereafter turn over information to it, and to represent victims' families during the prosecution ultimately succeeded in holding a former head of state accountable to the rule of law.⁴⁵ The leadership and tenacity of the talented individuals in the Peruvian human rights community should be applauded. They worked for more than a decade to gain redress and to change the Peruvian legal system from within.⁴⁶ Their efforts were partly supported by key members of the international community.⁴⁷

Human rights defenders can play an important role even in repressive environments. For example, local human rights Non-Governmental Organizations (NGOs) now sit on policy and law drafting groups alongside Kazakhstani government drafters.⁴⁸ While few of their recommendations make it into law, the human rights community receives early information, formulates sound analysis, and has effectively used these to block restrictive

43. Adriana Leon & Chris Kraul, *Ex-Peru President Fujimori Convicted of Mass Murder, Kidnapping*, L.A. TIMES, Apr. 8, 2009, at A17, available at <http://articles.latimes.com/2009/apr/08/world/fg-fujimori8>.

44. The Peruvian National Coordinator for Human Rights is an umbrella organization coordinating the work of sixty-seven human rights groups in Peru. It is dedicated to reporting human rights violations, representing victims, and advocating for respect to human rights and international humanitarian law.

45. Posting of Ricardob to Blog de la Coordinadora Nacional de Derechos Humanos, <http://blog.dhperu.org/?p=6033> (Jan. 5, 2010, 10:18 UTC-5).

46. *Id.*

47. *Id.*

48. Marston-Nicholson, *Civil Society: Kazakhstan to encourage NGO-Activities*, KAZAKHSTAN LIVE, Oct. 19, 2009, <http://www.kazakhstanlive.com/2.aspx?ProdID=88627a56-4bff-476c-898e-9305abd3c211&CatID=9f9f8034-6dd6-4f7e-adcf-0f6a7c0406d9&sr=100&page=1>.

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laws from passing and gain commitments to further reform. A new generation of human rights activists using the blogosphere has also had an impact in Egypt. The now well-known blogger Wael Abbas⁴⁹ released a video of an instance of torture by authorities on YouTube.⁵⁰ This video and others shared by him led to investigations and prosecutions of police responsible for the abuses and also encouraged the public to stand up against abusive practices and demand redress.⁵¹

The work of human rights defenders to monitor, report, and demand a system based on rule of law comes with great risk to themselves, their families, and their livelihoods. What helps defenders survive and continue their work is international recognition as legitimate actors in society through the United Nations Declaration on Human Rights Defenders, adopted in December 1998,⁵² and subsequent regional and country guidelines, international and domestic protection through precautionary measures,⁵³ diplomatic intervention, and sound self-protection strategies.

Rule of law program support helps human rights defenders in similar circumstances share best-use practices with regional exchanges and regional or global human rights defenders networks.⁵⁴ The provision of emergency funds for legal defense, medical expenses, or temporary relocation also provides a lifeline when defenders are under the most duress. International funding for their institutional support and training and tools to enhance their professional capability and credibility has also made an impact. Examples include training in human rights investigations, analysis, comparative and international law reform, sharing of innovative documentation software tools (*e.g.*, HURIDOCS and Martus) and secure information technology sharing strategies, and travel funds and inclusion in delegations of like-minded organizations at regional and international human rights forums.

Because of political imbalances in more repressive societies, political opposition to real rule of law reform and fundamental human rights protection hinders this type of rule of law program support. There is now a direct backlash by autocratic regimes against domestic efforts to strengthen democracy and foreign democracy assistance. Since 2004,

49. Mr. Abbas is the recipient of the 2007 Knight Journalism Excellence Award. Dawn Arteaga, *Egyptian Blogger, Burmese Reporter Named 2007 Knight Int'l Journalism Award Winners*, KNIGHT FOUND., Aug. 24, 2007, http://www.knightfoundation.org/news/press_room/knight_press_releases/detail.dot?id=137205.

50. Jeffrey Fleishman, *A Blog as National Conscience*, L.A. TIMES, Feb. 8, 2008, at A3, *available at* <http://articles.latimes.com/2008/feb/08/world/fg-blogger8>; Riz Khan, *Blogs in Egypt*, YOUTUBE, Sept. 5, 2007, <http://www.youtube.com/watch?v=xK-h3fQkmGY&NR=1>.

51. Fleishman, *supra* note 50.

52. Declaration on the Right and Responsibility of Individuals, Groups, & Organs of Society to Promote & Protect Universally Recognized Human Rights & Fundamental Freedoms, G.A. Res. 53/144, U.N. Doc. A/RES/53/144 (Mar. 8, 1999), *available at* <http://www2.ohchr.org/english/issues/defenders/docs/declaration/declaration.pdf>.

53. One organization that offers such protection is the Inter-American Commission on Human Rights. See Inter-American Comm'n on Human Rights, What is the IACHR?, <http://www.cidh.org/what.htm> (last visited Sept. 1, 2009), such as The Inter-American Comm'n on Human Rights, <http://www.cidh.org/DefaultE.htm>.

54. Press Release, Freedom House, Regional Democracy Conference Welcomed (Nov. 12, 2003), *available at* <http://www.freedomhouse.org/template.cfm?page=70&release=139>.

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over twenty countries worldwide have introduced restrictive regulations undermining civil society actors, particularly those working in the field of human rights and rule of law.⁵⁵

Taking on a superficially legalistic character, regimes attack irregularities in an organization's registration, stifle work through unwieldy tax or labor inspections, close organizations with missions deemed "hostile to the national interest," and restrict direct international funding and technical assistance for human rights defenders.⁵⁶ One of the most recent and egregious examples is the new Charities and Societies Law enacted in January 2009 in Ethiopia, which restricts organizations receiving more than ten percent of their funding from foreign sources from conducting any activity advancing human rights or the promotion of the efficiency of the justice and law enforcement services, among other restricted activities.⁵⁷ Bloggers reporting on corruption and human rights violations in China, Egypt, Iran, and other similarly repressive environments find themselves under arrest for uncovering human rights or other rule of law abuses.⁵⁸

B. WHERE DOES THE MOVEMENT GO FROM HERE?

The international community must redouble its efforts in spite of the backlash to continue to recognize human rights defenders, include them in the rule of law reform processes, and protect them from the backlash. With properly leveraged influence from foreign human rights groups, rule of law implementers, international organizations, and the diplomatic community, local human right defenders can get, and remain, seated at policy and law reform tables, ensure that they keep their legal registration, and maintain access while in prisons and jails and to international forums. The pressure leading up to and surrounding the decision of Kazakhstan to take over the chairmanship of the Organization for Security and Cooperation in Europe has created the space for human rights defenders in their policy reform debate.⁵⁹

Human rights defenders need to be credible and qualified in their work, and thus rule of law programming should include human rights defenders as training participants on substantive and comparative law content. Efforts by the UN Office of High Commission for Human Rights to not only train governments, but also human rights groups, in report preparation for the Universal Peer Review process within the Human Rights Council are a valuable initiative. Defenders arrested or otherwise harmed in their work continue to need lifelines of emergency funding support and diplomatic support.

Because one of the most effective ways that autocratic governments suppress human rights activism is to isolate activists from their peers and support networks in the international community, new initiatives and support for regional and global networks is important. While resources available to civil society will never match those of the governments they confront, they can be strengthened both by diminishing their relative isolation and

55. David Moore, *Safeguarding Civil Society in Politically Complex Environments*, THE INT'L J. NOT-FOR-PROFIT L., June 2007, at 3, available at http://www.icnl.org/Knowledge/ijnl/vol9iss3/special_1.htm.

56. Jennifer Windsor, *Stand up to Global Bullies Who Beat Back Democratic Progress*, CHRISTIAN SCIENCE MONITOR, Oct. 25, 2006, available at <http://www.freedomhouse.org/template.cfm?page=72&release=431>.

57. Charities and Societies Proclamation No. 621/2009 (15th Year, No. 25, 2009) (Eth.).

58. *Blogger Arrests Hit Record High*, BBC NEWS, June 16, 2008, <http://news.bbc.co.uk/2/hi/7456357.stm>.

59. Press Release, Freedom House, Kazakhstan Pledges to Improve Democratic Performance in Compromise Decision to Assume OSCE Chairmanship in 2010; Freedom House Urges Monitoring of Implementation (Dec. 3, 2007), available at <http://www.freedomhouse.org/template.cfm?page=70&release=594>.

by coming together in joint or concurrent engagement on critical human rights issues in regional or global venues.

IV. What Needs Revisiting?*

For those who have worked in the rule of law field over the years, the one thing they have learned is how little they really know. Before, it appeared so easy. When asked to construct a rule of law reform strategy, practitioners would readily propose passing a few laws, train some judges and prosecutors, maybe a few defense attorneys for good measure, stand up a few courts, and introduce a case management system and all would be well. But as time went on, and the anticipated changes in society did not come about, rule of law reformers began to realize that strengthening rule of law is a much more complex and nuanced endeavor. The reality hit us that it is not just about fixing a set of static systems in a technical and mechanical way. The fact is, humans are involved in the equation, and that very dimension changes the game.

Further, complex systems of historical, social, political, and economic factors directly impact all rule of law reform efforts. As Freedom House's survey and methodology demonstrate,⁶⁰ examining how poorly rule of law indicators perform, as compared to other indicators, signals that rule of law efforts cannot be conceived, implemented, and evaluated in isolation. They are the result of many elements and factors such as how the justice system responds to human rights violations, how different forces contribute to fostering conflict, and how any given society contributes with its practices to upholding it or not.

This section will give an overview of three themes for consideration while pondering "what needs revisiting" as the rule of law field evolves into the future and works to find ways to create a system where all people have equal access to justice, all persons are held accountable, everyone's human rights are protected, and their safety and security ensured. The three themes that capture what needs revisiting are: 1) rule of law is about people, not widgets; 2) whose reform agenda is this anyway; and 3) everyone is connected and reform efforts affect one another.

A. RULE OF LAW REFORM IS ABOUT PEOPLE, NOT WIDGETS

Historically, the focus has been on taking a "top down" approach whereby the attention was on institutional reform. The thought was that reform from the top would then trickle down through the institution and society; thus, rule of law would be established. The focus was on the technical aspect of reform such as getting the parliament to pass laws, institutions to train personnel, and the institutions themselves to function. Not that these aspects should be ignored, but they are only a small part of a larger rule of law system. Reformers have learned that the "formal" system of justice, such as courts and institutions, is not always the only game in town. In fact, legal plurality is often the norm.

* Colette Rausch authored this section. It is based on her personal work experiences in different countries.

60. See FREEDOM HOUSE, *supra* note 37.

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This means that many different systems of justice may be in operation. For example, in Afghanistan, the formal justice system does not operate in most of the country.⁶¹ Instead, various non-state or traditional systems are in existence and serve to resolve conflicts.⁶² In some countries, tribal leaders or elders may mete out justice rather than judges in a courthouse.⁶³ Practitioners have learned in rule of law reform that their definition of a justice system must be expanded and they must be willing to work to understand how various societies seek resolution of conflict in search of justice. Practitioners have also learned that some systems may not encapsulate their notions of “justice,” especially as it relates to women, minority groups, or people without financial means. But oftentimes practitioners need to work outside their comfort zone and work with what exists.

For example, United States Institute of Peace (USIP) works in a number of countries to understand how the various justice systems operate and then tries to work with national actors to find ways developing functioning systems that meet the demands of justice and are fair to those they serve.⁶⁴

Additionally, USIP realizes that both the process and the people who are part of rule of law reform, both from the international assistance side and the national actor side, are critical. Specifically, oftentimes “how” USIP proceeds is more important than “what” USIP reforms and those who are involved in the process can make the difference between reform happening or not. For example, simply having an external actor determine what laws are needed, drafting the law for a country, pushing the country to adopt it, and then getting it adopted does not guarantee that law will be enforced by the institutions or even accepted by society at large.

On the contrary, chances may be better for acceptance and enforcement if a process included national consultation on what laws are needed, prioritization, and how best to approach the reform process.⁶⁵ Further, resources will not be wasted and duplicative laws will not be passed. For example, much effort was made to draft a traffic law for Kosovo in the early days of the UN mission in that country. Not long after the law was finally drafted, it was discovered that a traffic law already existed and could have been amended, if needed, in a fraction of the time spent drafting a new one.

Something else of note is that rule of law reform is not a linear process. It is more organic, meaning it evolves over time and does not follow a predictable pattern of starting with A and then always following with B and then C. Rather, one is more likely to find that you start with B, followed by C and D and then back to A before moving on to E. One donor (donor #1) spent large amounts of money and time to conduct a very in-depth assessment of what could be done in the security and justice sectors of a country coming out of conflict. After the assessment, a multi-dimensional strategy was developed to address all sectors. Now, this is a good thing. It is always good to have a strategy and to scope out the entire justice and security universe.

61. THOMAS BARFIELD, ET AL., U.S. INST. OF PEACE, *THE CLASH OF TWO GOODS: STATE & NON-STATE DISPUTE RESOLUTION IN AFGHANISTAN 2* (2006), available at http://www.usip.org/files/file/clash_two_goods.pdf.

62. *Id.*

63. *Id.*

64. U.S. Inst. of Peace, *Our Work*, <http://www.usip.org/about-us/our-work> (last visited Mar. 30, 2010).

65. The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ X, delivered to the Security Council, U.N. Doc. S/2004/616 (Aug. 24, 2004).

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But, it is what one does next that is the key. In this particular case, the donor could not figure out the “entry point” because donor #1 wanted to be able to work on all the sectors in a coordinated fashion given the inter-linkages between them. Now, yes, in an ideal world, this is how reform would progress. But the world is not ideal. So donor #1 struggled and kept meeting with the country officials and trying to determine where to begin. After two years, the country officials grew tired of the frequent visits of donor #1’s high-priced consultants who flew in again and again to meet with the country officials and ponder what to do. The country officials grew frustrated, wanted donor #1 to just start somewhere and explained to donor #1 that rule of law reform as a process is sometimes organic and not as organized as everyone would all wish.

They further explained that it would be more productive to create an entry point that could be the foundation that could be built upon to develop the bridge to the other shore. Waiting at the shore of the river and not crossing at any point means you are not getting anywhere in the reform process. By contrast, another donor (donor #2) took a different approach and what started out as a small entry point blossomed into outreach into a few sectors just two years later. Donor #2 operated with the belief that with each step taken, other opportunities will be presented along the way. Further, donor #2 gained the trust and built a relationship with the country officials that were grateful for donor #2’s willingness to work with them and start small on something that was meaningful for the country. This trust and relationship building created the foundation necessary for success. Meanwhile, donor #1 continued to stand on the shore, paralyzed by the desire to find the perfect timing and a perfect whole sector strategy.

As for the people involved, time and again, practitioners have seen that there are actors (national and international) who are more interested in enhancing their own financial or career interests and are not focused on service to the broader goal of enhancing rule of law toward establishing a peaceful society. Experience has demonstrated that without a critical core of change agents in the mix and supportive leadership at the top, reform will be stifled. These factors, together with grassroots support, can pave the way for positive change. At the same time, experience has shown that you often only need a few change agents and one or two openings at the top, and that can be the start of significant reform opportunities. With all the daunting challenges in rule of law reform in countries emerging from conflict, one should never underestimate the power of a few committed people who work together toward a common service-oriented end.

In addition to a greater focus on process, another area that needs revisiting is the importance of what are often called “soft skills” in engaging in rule of law reform. These skills include understanding culture, treating people fairly and with respect, and understanding the role of outsiders. One example of this is what happened in Liberia.

According to a Liberian government official, they were experiencing an increase in escapes while transferring prisoners from the court to the detention facility. The international actors present in the country tried to grapple, without success, with this problem. None of these international actors considered asking the country’s nationals how this might be resolved. So, the country’s justice sector actors watched as the problem escalated. Finally, out of exasperation, an international actor asked one of the country’s justice sector actors, what to do. In seconds, the country’s official came up with a solution. She suggested that rather than transporting detainees to and from the court and detention facility, the court proceedings be brought to the detention facility. But what stuck in the

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mind of the country's official was how foreigners were in her country, who failed to work to view things in the country's experiences and culture, dismissed the competence of the "locals," and assumed they could solve everything themselves. So, as she explained, she and her colleagues figured that when the internationals were good and ready, they would come to their senses and ask for help where they should have asked in the first place.

B. WHOSE REFORM AGENDA IS THIS ANYWAY?

Many come to the field of rule of law reform with the vision that the country is a blank slate just waiting for an outsider to come in and set things straight. Over time, many who have this view realize that this is not the case and begin to reflect on a number of questions. These questions include: What is the role of the outsider? What can practitioners actually do in a country and what is even possible to do?

Further, even for those who hold tight to the view that change must always be forced, the questions are: Change the environment in their own image? If so, which image, country, system? Due to the nature of rule of law reform, there are multiple agencies, donors, and countries, operating—sometimes competing—within the borders of one country emerging from conflict. Chaos is often caused by many dueling and conflicting reform efforts. Many reformers are pushing for immediate results in what takes a stable and well-resourced country many, many years to develop. The reality is that rule of law reform is more organic than international reformers want to accept and less in their control than they want to admit. Sometimes, no combination of carrots (incentives) and sticks (imposed consequences) will get local officials to what reformers are promoting. This is not to say that incentives and consequences are irrelevant, but they should be carefully measured to fit the situation and should not be seen as the solution in all cases.

So, many reformers have come back to a less-is-more approach. They promote an ethos of working with what exists and going from there. Sometimes what exists may not be perfect, but it is what is known, and it generally works at some level. Taking this approach can help promote stability and a strong foundation upon which to develop. The alternative is constant reform efforts resulting in instability and uncertainty. For example, in Kosovo following the arrival of an international assistance mission, the first year was spent in what seemed like an endless process of law reform including passing many regulations and totally overhauling the existing criminal code and criminal procedure code. Countless hours and attention were diverted to what evolved into a futile process.

Perhaps a better approach would have been to use the laws that existed (with a few minor changes to deal with international standards related to arrest and detention) and deal with the problems at hand rather than launch immediately into an intensive law reform and law promulgation process that resulted in a legal chaos of sorts, with layers of laws on top of other laws and lack of clarity as to how to apply it all together.

Another question relates to the role of the foreigner. One often hears about "experts" being sent to a country to help. Just that very term denotes a superior being imbued with knowledge greater and more important than those with whom he or she will be engaging. In a South Asian country emerging from conflict, this term is not appreciated by the "experts" national counterparts. If asked, one will often hear that the national justice sector actors prefer having "resource persons" come and, on equal footing, share ideas, thoughts, and case studies. The national counterparts can then consider and determine

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how these ideas could be adapted or used in the country's context. The operative word here is "share" and not tell. A natural consequence to this sharing is that international reformers then cannot control the outcome. They can facilitate the process, but then need to let go of the notion of a predetermined outcome. Further, things may not move as quickly as international reformers would hope. But it is okay that a step or two is taken because it is movement. Then later, maybe another step will be taken, and another. This is how most things change. Finally, the process and end state may not look exactly how international reformers had planned. But it may work for that country, and that is more important than it looking like the foreigner's country.

Another example is in the context of Afghanistan's law reform efforts. A workshop was held for the country's lawyers and officials engaged in reforming their criminal procedure code. The goal was for the country's participants to have a dialogue with their foreign counterparts who had experience in comparative law and criminal procedure reform. Unfortunately, things turned around and the first half of the workshop ended up being a number of the foreign counterparts arguing why the draft prepared by the national actors was insufficient and how they should fix it. These foreign counterparts were operating on one channel.

The Afghans were attempting to ask questions and explain where they were coming from, including all the challenges facing any law reform effort in the country. But they were not getting the helpful responses they were asking for and were operating on a different channel than the foreign actors. Instead, the Afghans were being talked "at" and "down to" by some of the foreign actors. After about a day and a half of escalating tensions and communications breakdowns, the facilitators decided to break the groups into two. This allowed the national actors to work on their own, using the input they did get from the members of the foreign group who took the more constructive route of sharing and dialoguing rather than dictating. In the end, much to the surprise of the more vocal foreign group, the national actors succeeded in making major revisions and the entire process was moved forward further than the more vocal group thought possible. The national actors simply needed constructive dialogue, not dictation, and time on their own to sort it through.

C. EVERYONE IS CONNECTED AND REFORM EFFORTS AFFECT ONE ANOTHER

If one were to look at rule of law reform as if looking at it from standing on the moon, one would get a much better perspective of how it works. In fact, one would see the vast networks of connections that comprise rule of law reform. It is these connections that everyone needs to ever be reminded of, and everyone needs to operate with the knowledge that rule of law reform cannot be approached in a vacuum.

Let's first just look at the rule of law reform sphere alone. Just this sphere includes (this is illustrative not conclusive) the formal system of courts, prosecutors, lawyers, judges, etc. Then there are other systems such as tribal courts or religious leaders as arbiters. Then there are the oversight mechanisms such as human rights commissions, ombudspersons, and parliamentarian oversight bodies.

It then includes a dizzying array of assistance providers and donors. Some donors are taking a top down approach; some are taking a bottom up approach. Some are acting out of their national security or other national interests. Some act out of humanitarian inter-

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est. The point is, not everyone (or anyone) is always on the same page and has a meeting of the minds, yet all are operating in the same sphere and all affect each other. Then there are other spheres that directly impact the rule of law sphere. These include the governance and economic sphere, for example. Rule of law reform is affected by history and unresolved aspirations and abuses on a war-torn population.

These issues can result in continued violence and insecurity as groups fight it out for access to power or justice. Some countries' reform efforts are stuck due to a political situation where political interference in the justice sector is caused by unresolved conflicts, angry and marginalized groups, economic disparity, or a rigid social structure.

In many countries, there are power structures that are often entrenched and those who have it don't want to give it up. The result is that rule of law reform efforts that threaten these power bases are quashed or stymied. But it is not always the national power interests at play alone. There are international actor power interests as well. For example, country A was engaged in a security and rule of law reform effort and had been engaged for almost three years. It was a well-established program that was driven by change agents and had been embraced by national actors who were engaged in the program because it was locally developed and owned and met the needs of the country. Countries B and C, however, did not want country A to be engaged because both countries felt that this was their "territory." So countries B and C put pressure on the officials to not work with country A. Furthermore, country B duplicated country A's program and worked to initiate it.

In summary, there are many factors outside the rule of law sphere that directly affect rule of law reform. These factors run through the core of rule of law reform. It is like a thread that when you pull on one piece, depending upon how hard you pull, it can either all come together, or all unravel. Because it is, after all, all connected.

V. Conclusion*

Discussing the state and aftermath of rule of law promotion efforts through critical lens can be a daunting task but, as seen so far, not an impossible one. It demands an intellectual exercise based on a process that is open to understanding the evolution of rule of law promotion efforts, the challenges and conflicts confronted today, and a willingness to revisit what is left in order to envision its future. That was the original intention of this collective discussion.

But the participants of this dialogue went beyond their scope of work. They revisited original assumptions and challenged the status quo in order to generate more than another discussion on the rule of law. As a result, one could affirm that a meeting of the minds has occurred.

This dialogue generated a new common understanding that accents critical and extremely helpful insights, in an integrated manner, to some of the most compelling issues rule of law promotion efforts abroad confront and that the rule of law community of practitioners needs to act upon once and for all. This dialogue did so in an integrated manner and approach that looks at the complexity of the field, the problems and its challenges, and the richness and diversity of the societies in which it operates as illustrated by

* Lelia Mooney authored this section.

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Jennifer Windsor's discussion in light of the Freedom in the World 2009 rule of law indicators analysis.

The discussion on rule of law promotion efforts abroad is not a lineal exercise and can neither be conducted in isolation from the context nor disconnected from the people's lives, hopes, and aspirations as they seek to improve their quality of life free from conflict, as Colette Rausch implores.

Moreover, this discussion involves several narratives and experiences while imparting some lessons (or tasks) learned that urge some attention and demand a different kind of action as no rule of law reform or effort is sustainable without key individuals, and average citizens, engaging in this process as well and taking ownership, as Martin Schönteich notes.

A. WHAT ARE SOME OF THESE LESSONS AND TASKS?

While embarking on the reform of legal frameworks to enable indigenous legal environments is a necessary element of any rule of law promotion effort, legal reform will not achieve some or any of these goals by itself. At the same time, merely strengthening the institutional infrastructure of a justice sector (without looking at whether human rights abuses are punished and civil and political liberties are respected and upheld) should not be the central focus or unique end result of the development of any capacity building effort.

Designing rule of law reform and programming without taking into consideration the different political arrangements of any particular society, how state and non-state actors contribute to stabilize or de-stabilize conflict or post-conflict societies, may not generate the expected results and would probably lead to failure. Designing and implementing rule of law programming without a deep understanding of the society's traditional dispute resolution practices and their interaction with formal systems of justice, cultural patterns, legal traditions, and ways of dealing with conflict, and without involving the most critical stakeholders and actors may lead to the indigenous rejection of these initiatives without fostering any change and achieving any sustainability.

Measuring success and monitoring progress are critical components of any rule of law effort. It is still an exercise and a pending task for the field and community of practitioners. While looking at analytical frameworks that focus on both process and impact evaluations are a very important element of these initiatives, lessons learned should focus on what works and what does not, instead of only producing end project reports and assessments that highlight success stories and best practices that do not provide critical insights that could help avoid making the same mistakes in any host country over and over again.

This critical exploration on what works and what does not demands from both the rule of law field and community of practitioners that they get out of their own expertise and programmatic comfort zone. As challenges to the rule of law evolve in complexity and stubbornness, so must practitioners evolve and develop more creative, holistic, multi-disciplinary, cross-sector, demand driven, and coordinated interventions (where sometimes working with the courts, the legislature or the rest of justice sector institutions may not be the only response to the problems confronted and there may be a need to look at what the community is offering). This requires creative, strategic, and tactical thinking and acting that needs technical expertise combined with multi-disciplinary framework that explores

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what is the role of rule of law promotion efforts within a particular context and when should it be more appropriate (prevention, stabilization, reconstruction, conflict, post-conflict and humanitarian scenarios).

The rule of law community of practitioners needs to have a candid and direct conversation on its lessons learned, setbacks, and future challenges. It owes it to the growing rule of law community of practitioners. It also owes it to the ultimate recipients: the citizens and their societies. As a result, rule of law promotion efforts will emerge as a more legitimate process where strategies and programming, instead of focusing on merely highly technical capacity building and reform approaches, could contribute to making long lasting impact.

Finally, the ultimate measure of success lies somewhere else. It is very personal and it has a human face. It is based on whether the average citizen, the folk on the ground, has the certainty he or she can trust justice sector institutions while at the same time feels confident his or her human rights, civil liberties, and political freedoms are respected and enforced in an inclusive, fair, secure, stable, and peaceful environment promoted and defended by the government⁶⁶ and that there are effective, responsive, and accountable systems of governance.

⁶⁶ Lelia Mooney, *Introductory Note to Inter-American Juridical Committee: Resolution on the Essential and Fundamental Elements of Representative Democracy and their Relation to Collective Action within the Framework of the Inter-American Democratic Charter*, 48 I.L.M. 1233 (2009).

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