The Rule of Law and Informal Justice Systems

A Potential Conflict in Judicial Development

Joseph Ricken
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Preface

An ambitious young boy traveled far from his home to study under a great teacher. When he met the wise old man his first question was, “How long will it take me before I am as wise as you?” The old man swiftly replied, “Five years.” “This is a very long time,” the boy replied. “How about if I work twice as hard?” “Then it will take ten years,” said the master. “Ten! That’s far too long. How about if I studied all day and well into the night, every night?” “Fifteen years,” said the old man. “I don’t understand,” replied the boy. Every time I promise to devote more energy towards my goal, you tell me it will take longer. Why?” “The answer is simple. With one eye fixed on the destination, there is only one left to guide you along the journey.”

- Robin S. Sharma, The Monk Who Sold His Ferrari

I would like to thank all of the people who have encouraged and inspired me throughout my life. I cannot emphasize enough how important their support has been. All of my successes are in part thanks to them. I would like to especially thank my dad who has served as an invaluable sounding board and editor for this report and who has more importantly been a role model for me since childhood. I would like to thank my mom who has made me truly believe that I can accomplish anything I set my mind to and who has always helped me keep things in perspective. I would also like to thank my brother Ben and sisters Rebecca, Amanda and Jill for forming me into the person I am today. I would further like to thank Peter, Kaiyum and Frida for their dear friendships and generosity. Lastly I would like to thank Per Bergling for his guidance and support.
<table>
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<th>Abbreviations</th>
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<tr>
<td>CSGR</td>
<td>Centre for the Study of Globalization and Regionalization</td>
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<td>DANIDA</td>
<td>Ministry of Foreign Affairs Denmark</td>
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<td>IBA</td>
<td>International Bar Association</td>
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<td>IDLO</td>
<td>International Development Law Organization</td>
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<td>IJS</td>
<td>Informal Justice System</td>
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<td>OECDDAC</td>
<td>Organization for Economic Co-operation and Development, Development Assistance Committee</td>
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<td>PRI</td>
<td>Penal Reform International</td>
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<td>ROL</td>
<td>Rule of Law</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNDP</td>
<td>United Nations Development Program</td>
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<td>UNHCHR</td>
<td>United Nations High Commission for Human Rights</td>
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<td>USIP</td>
<td>United States Institute of Peace</td>
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Summary

Working to improve informal justice systems and promoting the rule of law are two judicial movements currently being advanced by various organizations to assist in judicial development worldwide.

Informal Justice Systems are dispute resolution mechanisms that are not a part of a state’s formal judiciary. Typically, informal justice systems do not apply written laws when resolving disputes, but instead apply common sense, consider community consensus and follow tradition. In recent years developmental organizations such as the United Nations and the International Development Law Organization have worked with informal justice systems to improve access to justice, the respect for human rights and strengthen the rule of law.

The rule of law, in its broadest sense, is the concept that people should obey the law and be ruled by it. It also requires adherence to the principles of judicial independence, legal equality and protection of human rights. Strengthening the rule of law throughout the world is a goal for most development organizations.

In this report I argue that universally implementing the rule of law is not the best way to engage with informal justice systems. Not because implementing the rule of law is a negative goal per se, but because informal justice systems rely on fundamentally different principles to resolve disputes than Western justice systems, and it must therefore be considered in each individual context whether implementing the rule of law will result in sustainable improvements. As an alternative to a rule of law approach, I suggest that developmental organizations should adopt a more flexible and context-based approach to programming.
1 Introduction

1.1 Background

For many people throughout the world their primary access to justice is through informal justice systems.\(^1\) Informal justice systems are dispute resolution mechanisms such as community mediators in Bangladesh, indigenous village courts in Ecuador and religious authorities in Niger, which are not members of their states’ formal judiciaries. For international development organizations\(^2\), working with informal justice systems has recently become a prioritized interest. In September 2012 the United Nations (UN) released a report, *Informal Justice Systems – Charting a Course for Human Rights Based Engagement*, that focuses on identifying how engagement with informal justice systems can build greater respect for human rights around the world. The International Development Law Organization (IDLO) released a report in 2011, *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, that focuses on how informal justice systems can be utilized to help improve access to justice. And other organizations, such as the United Kingdom’s Department for International Development (DFID), Ministry of Foreign Affairs Denmark (DANIDA), the Office of the High Commission for Human Rights (OHCHR) and the World Justice Project (WJP), have all made calls for engagement with informal justice systems in recent years.\(^3\)

Another current focus for international development organizations is strengthening the “Rule of Law”.\(^4\) The rule of law is a political ideal that every legal system can lack or possess to a greater or lesser extent.\(^5\) It can be understood, in its broadest sense, as the concept that people should obey the law and be ruled by it.\(^6\) The UN states on its website that the rule of law is at the very heart of its mission, and has adopted three resolutions in recent years renewing its...

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\(^2\) The phrases international development organizations, international actors in the field of judicial development, international actors, and development organizations, are used synonymously throughout this report.


\(^5\) See Chapter 3.1

interest in the rule of law.\textsuperscript{7} The International Bar Association has recently installed a “Rule of Law Action Group” to encourage speaking out in support of the rule of law.\textsuperscript{8} And the WJP, the IDLO, the United States Institute of Peace (USIP), Penal Reform International (PRI), and the DFID, among others, all endorse strengthening of the rule of law throughout the world, as will be subsequently presented.\textsuperscript{9}

Working with informal justice systems and promoting the rule of law are thus two judicial movements that are being advanced by various organizations to assist in judicial development worldwide.

1.2 Topic
During the fall of 2012 I conducted research on informal justice systems and the rule of law. My intention was to write a report about strengthening the rule of law through informal justice systems. But in the course of my research, I found that the concept of the rule of law and the realities of informal justice systems do not always align. Fundamental rule of law principles and fundamental structures of informal justice systems are, at times, incompatible.

In this incompatibility lies a conflict. Many actors in judicial development wish to ensure that every individual in the world lives in a society that obeys the rule of law (see chapter 3.2), but when this goal for universal implementation meets the reality of how informal justice systems function, either the nature of informal justice systems or the goal for universal implementation of the rule of law must compromise. In this report I address that conflict.

1.3 Purpose
This report has two purposes. The first is to challenge the goal for universal implementation of the rule of law. The second is to suggest what I believe to be a better approach to working with informal justice systems. What I hope to accomplish with this report is to emphasize the importance of being flexible and recognizing the unique nature of each individual context.


\textsuperscript{9} See Chapter 3.2
when engaging in judicial development. It is my belief that by doing so developmental organization can be more effective and provide appropriate remedies to actual problems at both national and local levels.

To fulfill my purpose, a number of intermediary questions are first asked and answered.

1. What are informal justice systems?
2. What characterizes informal justice system’s way of doing justice?
3. What is the rule of law?
4. What principles does the rule of law require in the context of judicial development?
5. Do development organizations support universal implementation of the rule of law?
6. What could result from universally applying the rule of law to informal justice systems?

1.4 Methodology, Material and Outline

To answer each question offered above a slightly different method was used which will be subsequently presented. In general though, a legal science method, primarily based on a traditional legal method but involving elements of sociology and political science, was used. The method involved the study of literature, resolutions, declarations, case studies and statements regarding informal justice systems and the rule of law. Though my approach, research methods, and argumentation were based on a traditional legal method, there was one significant deviation from such a method. Due to limited statutory regulation in the field of developmental law, traditional legislation was not a central source of information. Instead of focusing on what the law is, the method used focused on establishing best practices and good points of departure for international engagement. Legal principles, logical considerations and prior programming experiences were central to this method.

Following the introduction, the second chapter of this report focuses on the questions: What are informal justice systems and what characterizes their systems? Answering these questions required a comprehensive study of literature on informal justice systems and a review of several country specific case studies of informal justice systems functioning in the world today. Though there are many reports that touch on these topics, the “UN report” Informal Justice Systems – Charting a Course for Human Rights Based Engagement, is the most recent and the most comprehensive. It therefor served as the foundation for the information provided
in the second chapter of this report. Another report that provided important information on informal justice systems was *Doing Justice: How Informal Justice Systems Can Contribute* by Ewa Wojkowska. Though much of the information in Wojkowska’s report was similar to that in the UN report, Wojkowska better described certain topics, such as the strengths and weaknesses of informal justice systems. Therefore I have referenced Wojkowska’s report in some instances and the UN report in others, though similar information can often be found in both. A publication that provided interesting views on how to approach programming with informal justice systems was the IDLO-sponsored report *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, edited by Peter Albrecht, Helene Maria Kyed, Deborah Isser and Erica Harper. The report primarily focuses on learning from prior engagement with informal justice systems and provides insight into how informal justice systems function. In the second chapter of this report three case studies of informal justice systems are also presented. The reason why I picked the three case studies that I did was for their variation. My hope was to show the diversity of informal justice systems by choosing examples from three different continents, with three different ethnic and cultural backgrounds, and that fall into three different categories of informal justice systems (community-based, tribal justice, and religious).

The third chapter of this report focuses on what the rule of law is, what principles the rule of law requires in the context of judicial development, and if development organizations support universal implementation of the rule of law. To provide the reader with an understanding of the general notion of the rule of law, I largely relied on an article by one of the most renowned rule of law scholars, Joseph Raz. To provide an understanding of what the rule of law entails in the context of judicial development, specific definitions of the rule of law made by development organizations are presented. Those definitions were found in resolutions, declarations and reports by development organizations, in literature by rule of law scholars, and on the website of one international actor. The reasoning behind my choices of presented definitions was that I wanted to focus on definitions made by the most respected actors in judicial development and international law. To support my claim that international actors support universal implementation of the rule of law I have cited statements made by international actors in regard to the rule of law. These statements were found in resolutions, on organization websites, and in one case in a promotional video by the USIP.
Chapter four of this report focuses on what could potentially result from universally applying the rule of law to informal justice systems. This analytical chapter is primarily based on the information previously presented in the report but is also supplemented by reports of experiences working with informal justice systems.

In the concluding chapter I challenge whether the rule of law should be universally implemented and I make suggestions for how international actors can approach programming with informal justice systems in a better way. This chapter is also based on the information previously provided in the report and on logical considerations.

My opinions and analyses are interspersed throughout the entire report, as are sources beyond the ones already mentioned that strengthen the points being made and provide relevant information. I hope that this provides the reader with a balance of facts and discussions that keeps the report interesting and conversational.

1.5 Assessment of Material

It is my assessment that the three reports on informal justice systems that were relied upon for the information provided in this report are trustworthy sources. They were commissioned by prominent actors in judicial development and are comprehensive studies. Something I have considered is that Wojkowska’s report was published in 2006, while the UN-sponsored report and the IDLO report were published in 2012 and 2011 respectively. The latter reports are therefore likely to be more up to date. Besides the three reports on informal justice systems, I have included some information on informal justice systems from the UN Website. Though reports and literature have been preferred over electronic sources, the UN Website contained some interesting information on informal justice systems that was not included in the UN or the IDLO reports. It is my assessment that the information presented on the UN Website is trustworthy.

In presenting the rule of law, various definitions of the rule of law made by international actors are the primary sources. These definitions were found in resolutions, reports, declarations and on websites, each representing one organizations or scholars view of what the rule of law is. Here it was important to discern what the rule of law entails for specific organization that work with judicial development. I assess that the sources that I present serve that purpose. In choosing statements to support the claim that international organizations
support universal implementation of the rule of law I was careful in choosing statements that were a fair representation of each organization’s opinions. Statements made on official websites and in resolutions were the best means for this purpose.
2 Informal Justice Systems

2.1 What are Informal Justice Systems?

Informal justice systems, also known as traditional or non-state justice systems, are mechanisms for dispute resolution that are not a part of a states formal judiciary. Though not common in North America or Europe, such dispute resolution mechanisms are widespread in the global south. It has been estimated that over eighty percent of conflicts are resolved through informal justice systems in some countries.

Informal justice systems address important issues for individuals and communities, such as local crime, protection of land, resolution of family disputes and access to public services. These institutions thus play an important role in maintaining social harmony in many communities and are essential in providing access to justice for many individuals. The structure of informal justice systems varies from context to context, as does the acceptance and regulation of such mechanisms by the state. Some enjoy great legitimacy and acceptance, and others are outlawed.

Informal justice systems are popular because they are accessible, inexpensive and quick. But informal justice systems are also criticized, at times, for providing unequal treatment of women and disadvantaged groups, for not adhering to international norms and standards, and for supporting existing power structures in communities.

Many scholars and organizations have defined what constitutes an informal justice system. The UN report from 2012 defined informal justice systems as, "the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and whose substantive, procedural or structural foundation is not primarily based on statutory law." This definition includes any institution that acts as an adjudicator or a neutral third party assisting in the resolution of a dispute.

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is not a part of the formal judiciary as established by law. Eva Wojkowska describes informal justice systems in a UNDP report from 2006 as, “a dispute resolution mechanism falling outside the scope of the formal justice system”.\textsuperscript{16} For this report, either definition is satisfactory. What is more important is for reader to understand which type of institution is being considered when speaking of informal justice systems, and what characteristics are typical of those systems.

\textbf{2.1.1 The Shalish system in Bangladesh}

In Bangladesh disputes have been resolved through a process called Shalish for hundreds of years. A Shalish is initiated when two parties submit a dispute to a panel consisting of village leaders or persons of authority in the community. Upon submitting the dispute the parties must agree to respect the final judgment of the Shalish panel for the dispute to be arbitrated.\textsuperscript{17}

The Shalish proceeding takes place in public with onlookers forming a large group. This serves several functions. It gives members of the community the ability to affect the outcome of the dispute, it adds social pressure to the adherence of the outcome, and it provides some entertainment for the community. Both the parties and onlookers are given the opportunity to argue their perspective and produce any evidence they have in favor of their opinion. The procedures are lively and passionate, and opinions are often presented, “several persons at the same time”.\textsuperscript{18}

The ruling of a Shalish panel can be an order for one party to pay compensation to the other, a guilty party may be publically humiliated in some way (be forced to wear a necklace of shoes or have his or her face ground in dirt), or in rare cases a person may be temporarily imprisoned (though this practice is unlawful).\textsuperscript{19}

Shalish proceedings have no formal connection to the state of Bangladesh and therefore the decisions cannot be forcefully imposed, but they are still widely respected. This is because in the Bangladeshi context, community pressures are powerful means of enforcement.\textsuperscript{20}

\textsuperscript{17} Danish Institute for Human Rights (2012), pp. 203-204.
\textsuperscript{18} Ibid.
\textsuperscript{19} Ibid.
\textsuperscript{20} Ibid.
2.1.2 Indigenous Courts in Ecuador

Kichwa communities in Ecuador annually elect between seven and twenty village leaders to serve as judges and oversee the administration of justice throughout the year. When a dispute arises in the community, it is brought to the attention of the judges, who then address the issue. Depending on the nature of the dispute, the leaders may decide to resolve the conflict through private mediation, or they may decide to bring the case before the village assembly. A private mediation takes place between the parties and one or several of the village leaders. If a case is presented to the assembly, the parties are heard, along with any witnesses, and a verdict is publicly announced in front of a large group. The mission of the village judges, regardless if the dispute is resolved through private mediation or presented to the assembly, is to reconcile the parties and restore social harmony in the community.21

The outcome can be the return or reimbursement of goods, fines, public punishment (such as whipping and cold baths), placing in confinement, or in extreme cases exclusion from the community. But of all the potential outcomes, the most common is “joint reflection by the parties, dialogue and apologies.”22

2.1.3 Religious authorities in Niger

In Niger, many people rely on religious authorities to resolve disputes regarding family law and successional matters. This entails turning to the local Imam (worship leader of a mosque), Marabout (scholar of the Qur’an) or Qadi (Islamic judge of sharia law). When a question or dispute is brought to a religious authority in Niger, it is his job (most Imams, Marabouts and Qadis are men) to reach a decision based on the Qur’an or the Hadith (teachings of the prophet Mohammad). Because these texts are considered binding religious laws, the room for compromise in favor of reconciliation is somewhat restricted, though religious officials emphasize the importance that Islam places on reconciliation.23

2.2 Characteristics of Informal Justice Systems

The topics dealt with by informal justice systems depends upon the needs of the communities in which they serve, but they typically regard anything from relationships, to neighboring, to natural resources, to violence, to money and goods, and beyond. The procedures are typically

23 Ibid, p. 266.
oral, flexible and simple. Both mediation and arbitration are common forms of procedure, where parties are heard along with witnesses, and the leader of the informal justice systems makes a decision on an outcome or sanction. Standards of proof are often based on probability and integrity. It is rare that informal justice systems have means to enforce their decisions, so instead, compliance is based on consent from the parties that they will respect the decision of the informal justice systems, and social pressures. Many proceedings resolved by informal justice systems are public and involve the wider community. Disputes can end in a retributive outcome (punishment of some sort) but the more common result is a restorative one, involving compensation or conciliatory gestures, such as mutual apologies, criticism of both parties or airing of underlying hostility. It is rare that informal justice systems record their decisions.  

Aside from informal justice systems based on religion (which tend to base their decisions on religious texts), informal justice systems typically apply custom (sometimes referred to as customary law) as the source for their decisions. The content of customary law is different in each context but some generalizations can be made. Customary law tends to aim towards preserving peace and restoring social harmony in the community. These communal goals are often prioritized over individual legal claims and individual vindication. There is often no clear distinction between criminal and civil wrongs and fault can be placed on groups (families, groups of friends, etc.) as well as individuals. Substantive customary rules often originate from tradition, common sense and perception of the community consensus. But substantive rules are also ever changing through negotiation and discussion.

Typically, there is no separation between informal justice systems and local governance structures. The persons exercising judicial authority may often have executive authority over the same jurisdiction. Therefor it can be difficult to distinguish between political and legal governance.

### 2.2.1 Positive Attributes

In informal justice systems the proceedings are conducted according to local practices and in the local language. The processes also tends to be simple. This makes them understandable.

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25 Ibid.
26 Department for International Development (2004), p. 3.
and culturally comfortable. In criminal matters, contrary to many formal justice systems, the goal of informal systems is not to punish the perpetrator, but instead to compensate the victim for their grievances, prevent further criminal acts, and integrate both the perpetrator and the victim back into the community. This approach to justice is necessary in communities that rely heavily on social and economic cooperation within the community. Informal justice systems also resolve disputes quickly. Many citizens show a preference for the quick processes associated with informal justice systems opposed to the drawn out processes that characterize many formal systems. Further, informal justice systems have a good feel for local problems and are flexible, therefore they are able to find appropriate practical solutions that fit particular community contexts. Informal justice systems are widely viewed by communities and individuals as the most likely way of achieving an outcome that satisfies their sense of justice.27

2.2.2 Negative Attributes
Informal justice systems can also be criticized for a number of reasons. They tend to support existing power hierarchies in the communities in which they serve and equal rights for men and women may not be recognized. It is not uncommon that young people and disadvantaged groups are also marginalized. It is rare that decisions made by informal justice systems can be appealed and some outcomes and methods used to restore social harmony can be inconsistent with human rights and perpetuate the subordination of women and the exploitation of children (as is shown in chapter four).28 Such practices may further be imbedded in local tradition and culture, which can make them difficult to change.

2.3 Some Reflections
To me it is clear that informal justice systems have strengths that are often lacking among formal justice mechanisms such as quick and comfortable dispute resolution, and play an important role in providing access to justice that is timely and relevant for communities and individuals. But informal justice systems also have weaknesses. Working with informal justice systems is therefore important if development organizations wish to globally improve goals such as respect for human rights and gender equality.

But working with informal justice systems can be difficult. Because they vary so significantly from one another and from the western model of dispute resolution, engaging with such mechanisms requires a pragmatic and open approach to programming. Efforts that focus on predetermined models of justice are vulnerable to failure for a number of reasons. Instead, working to build upon the existing strengths while working to reform negative practices would seem to be a prerequisite for success.
3 The Rule of Law in Judicial Development

3.1 What is the Rule of Law?

For centuries the phrase “Rule of Law” has been used by philosophers, jurists and (in more recent years) development organizations in various contexts. Nevertheless, defining the rule of law is not easy. This is because the notion of the rule of law is inherently vague and there is no general consensus as to what the rule of law means.

The legal philosopher Joseph Raz has described the rule of law as a political ideal that justice systems can lack or possess to a greater or lesser extent. Beyond that general statement, universal consensus may be difficult to find. Raz further describes the rule of law, in its broadest sense, as the concept that people should obey the law and be ruled by it. This general notion can also be found in the Black's Law Dictionary, that defines the rule of law as, “a legal maxim whereby governmental decisions are made by applying known legal principles”, and Aristotle’s statement “Law should govern”. This concept, that also can be understood in terms of a “rule of law” as opposed to a “rule of man”, or that no man is above the law, can be seen as the essence of the rule of law, and is in some way a part of most rule of law definitions.

3.1.1 The Rule of Law in Judicial Development

But, as highlighted by the scholar Hiroshi Matusuo, definitions such as the ones offered above are neither sufficient nor accurate in defining the rule of law when used in more specific contexts, such as the context of judicial development. That is because in the context of judicial development, international actors place the rule of law in the dynamic context of state building. In judicial development, the rule of law does not simply mean that no man is above

29 The concept was familiar to Aristotle who wrote “Law should govern” (See Aristotle, “Politics”, Chapter 3.16) and to James I of England who wrote of “Rule of Law” (See Hallam, Henry (1827), “The Constitutional History of England”, Volume 1, p. 441.
32 Raz (1979), p. 3.
the law, instead it implies a range of principles of governance. Consider the following three examples.

The United Nations defines the Rule of Law as:

A principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.35

This definition is not contrary to the concept that law should govern, but it expands upon it. Not only does it require that no man is above the law (“all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated”), it also requires that the principles of equal application of the law, judicial independence, conformity to human rights, participation in decision-making and procedural transparency are respected.

Here an important distinction can be made. Rule of law principles can be said to fall into two groups.36 The first group of principles requires the law itself to conform to certain standards (such as public promulgation and conformity to human rights), and the second group of principles is designed to ensure that the legal machinery applying the law provides effective and fair application of the law (equal application, judicial independence, participation in decision-making, procedural transparency, etc.). This distinction is useful in understanding why rule of law definitions can vary so greatly. Often the principles falling into the first category are relatively similar in all rule of law definitions (they almost always require some form of publicized laws and conformity to human rights), whereas the second group of principles, those which ensure fair application mechanisms, can vary greatly.

Similar to the UN’s definition of the rule of law, but promoting a somewhat different set of principles, is the International Bar Association’s definition:

An independent, impartial judiciary; the presumption of innocence; the right to a fair and public trial without undue delay; a rational and proportionate approach to punishment; a strong and independent legal profession; strict protection of confidential communications between lawyer and client; [and] equality of all before the law; these are all fundamental principles of the Rule of Law.\(^{37}\)

In this definition, the essence of the rule of law (that the law should govern) is not mentioned. But this should not be understood to mean that publicly promulgated laws are not desired. In the IBA definition, it would appear that the concept of legal supremacy is implied. The principles which are presented in the IBA definition fall into the second category mentioned above (to ensure that the legal machinery applying the law provides effective and fair application), which would be superfluous without governing laws. In addition to some of the same principles highlighted by the UN, the IBA requires principles such as the presumption of innocence, the right to a public trial without undue delay, a rational approach to punishment, a strong legal profession and confidential communication between lawyer and client. This set of requirements is no small task, and it is unlikely that even the most prominent western justice systems live up to all of these standards. But despite such apparent difficulties, the IBA remains a strong supporter of the rule of law, proposing that it be followed by all civil societies of the world.\(^{38}\)

A third definition of the rule of law, that promotes yet another set of principles, is made by the World Justice Project:

The Government and officials must be accountable to the laws; the laws must be clear, publicized, stable, fair, and protect fundamental rights, including the security of persons and property; the process by which the laws are enacted, administered, and enforced [must be] accessible, fair, and efficient; and access to justice must be provided by competent, independent, and ethical adjudicators, attorneys or representatives, and judicial officers who


\(^{38}\) See chapter 3.2
are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.\textsuperscript{39}

In the WJP definition, key principles found in the UN and IBA definition reoccur (clear and publicized laws, conformity to fundamental rights, independent adjudicators, and fair enforcement of laws). But additional principles are also presented; the security of persons and property, sufficient resources in the judiciary, a requirement for adjudicators to reflect the makeup of the communities they serve and a requirement for competence in the legal profession.

As one can see, due to the different opinions concerning what the rule of law should include, it is difficult to provide a generally acceptable definition. When the phrase is used by the UN it amounts to one thing, when it is used by the IBA it means another, and when it is used by the WJP it means yet a third. To come to a universally acceptable definition of the rule of law is clearly problematic, so Raz’s description of the rule of law “as a set of principles that justice systems can lack or possess to a greater or lesser extent“, although imprecise, is probably as close to a functioning definition as we can get.

3.1.2 Central principles to the rule of law in judicial development

Despite the difficulty of finding a generally applicable definition of the rule of law, I believe certain central principles can be articulated. And though one must be careful not to assume too much, I believe it is possible, at least in part, to answer the question: What do organizations mean when they use the phrase the rule of law?

First one must consider the context in which the phrase “rule of law” is used. If the IDLO or the DFID (active in the field of judicial development) use the phrase “rule of law”, it can be assumed that they intend it to be understood in a similar manner that their compatriots in the UN, the IBA, and the WJP would be understood when using the term. But just because the UN is a prominent actor in the field of judicial development, and the UN’s rule of law definition has been described as “broad and widely accepted”,\textsuperscript{40} one should not assume that

\textsuperscript{40} Nielsen, Mette (2011), “From Practice to Policy and Back: Emerging Lessons from Working with Community-Based Justice Mechanisms in Helmand, Afghanistan”, in Perspectives on Involving Non-State
the UN’s definition of the rule of law is, in its entirety, what is intended by other development organizations. But by considering several rule of law definitions and highlighting common denominators among them, it is possible to discern what principles are central to rule of law in the wider context of judicial development.

In attempting to determine which are the central principles of the rule of law, I looked for common denominators amongst rule of law definitions in the context of judicial development. I came to the conclusion that there are four primary principals which deserve special attention, based upon definitions offered by the UN, the WJP, the IBA, the World Bank, Joseph Raz, and several other rule of law definitions.

3.1.2.1 Clear and Publicized Laws
The UN definition of the rule of law calls for publically promulgated laws. Similarly, the WJP definition demands that laws are “clear, publicized, stable and fair”. A prerequisite for the principles presented in the IBA definition of the rule of law is that there are laws that can be applied. The World Bank’s rule of law definition requires laws to be accessible and transparent, and Joseph Raz’s first rule of law principle requires the law to be prospective, open and clear. In order for “no man to be above the law” and for the “law to be obeyed” there must be a system of laws to follow. The concept of clear and publicized laws is thus at the very heart of the rule of law.

3.1.2.2 Legal Equality
Equality before the law (or legal equality) is the ideal that individuals are entitled to a relative position of equality in relation to the law, and its leading guideline is articulated as “like cases must be treated alike”.

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42 For the list of principles that Raz’s associates with the rule of law see Annex 2 from Raz (1979), pp. 5-8.
The UN definition of the rule of law calls for laws that are equally enforced and requires equality before the law. The WJP definition demands that the process by which the laws are enforced is fair. The IBA definitions require equality before the law. And the World Bank’s rule of law definition requires predictable laws “so that undue discretion is not left in the hands of public officials.” Clear and publicized laws and legal equality go hand in hand. If laws are enacted they must also be applied equally to all, otherwise the law loses its meaning and adjudicators lose their integrity. Legal equality is not only a fundamental rule of law principle, it is also required by article seven of the Universal Declaration of Human Rights. It is a second central principle to the rule of law in judicial development.

3.1.2.3 Judicial Independence
The UNHCHR basic requirements for judicial independence states, “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any [entity.] for any reason.” Judicial independence pertains to the ideal that the judiciary be free from external pressures in their decision-making and that there is a separation of powers between the judicial and executive branch of government. This protects citizens from unlawful acts of governance and ensures unbiased application of the law.

The UN definition of the rule of law calls for both independent adjudicators and separation of powers. The IBA rule of law definition requires an independent and impartial judiciary. The WJP definition calls for justice to be provided by independent adjudicators. And an independent judiciary is one of Joseph Raz’s central principles to ensure the rule of law.

3.1.2.4 Protection of Fundamental and Human Rights
Though many definitions of the rule of law are strictly procedural, most definitions in the

field of judicial development include requirements in regard to human or fundamental rights. The UN’s definition calls for the law to be “consistent with international human rights norms and standards” and the WJP’s rule of law definition calls for the “protection of fundamental rights”. Joseph Raz requires the principles of ”natural justice” to be observed, and the World Bank’s rule of law definition requires the protection of individual and human rights. Though it would not likely be considered a central principle in other contexts, the protection of fundamental or human rights is widely included in rule of law definitions by developmental organizations and can thus be seen as a fourth central concept to the rule of law in the context of judicial development.

3.1.3 A generally applicable definition?

Though there are several additional principles that can be found in multiple rule of law definitions (presumption of innocence, a strong legal profession, participation in decision-making, etc.) it is the four principals mentioned above which seem to enjoy universal agreement amongst rule of law definitions made by international organizations. And while it may be an overstatement to claim that these four principles constitute a definition of the rule of law in judicial development, I believe that these four concepts are so widely included by international organizations in their rule of law definitions that one can fairly assume that these principles are, in part, what is intended by developmental organizations when they refer to the rule of law.

3.2 A Rule of Law Paradigm

Throughout this report I have called attention to the fact that international actors in the field of judicial development are supporters of universal implementation of the rule of law. This position, that can be referred to as a rule of law paradigm, has been supported by many scholars over recent years (see for example Stephen Golub, Osato Chitou, Julio Faundez, and Per Bergling). This paradigm can be seen in observing the number of assistance projects

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being implemented today, aimed at reforming law and justice, and well as by studying statements made by international actors in regard to the rule of law. To get a true taste for the universal support for implementing the rule of law that developmental organizations assert, I offer the following examples of statements made by developmental organizations in regard to the rule of law.

“Despite advances, more needs to be done to ensure that rule of law activities are consistently integrated into all aspects of the UN engagement at the country level.”
- The United Nations

“Without the Rule of Law, you have a nation where its citizens fundamental rights and well-being are not protected.”
- Jason Gluck, Senior Program Officer at the United States Institute of Peace

“An effective, fair and accessible justice system is a strong mechanism of accountability. It is a key guarantor of the rule of law, an essential element of democratic politics.”
- United Kingdoms Department for International Development

“The rule of law is the underlying framework of rules and rights that make prosperous and fair societies possible.”
- World Justice Project

”We will spare no effort to promote democracy and strengthen the rule of law”
- United Nations

“The conference then concluded… with an open invitation for future national coalitions from other Arab countries to join in with the aim of reaching an Arab society free of the death penalty where the rule of law, sanctity of human life, human rights and tolerance prevail.”

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“The protection and promotion of the universal values of the rule of law, human rights and democracy are ends in themselves.”

– United Nations

“Our vision is of a world free of poverty where every human being lives in dignity and under the rule of law.”

– International Development Law Organization

“The Rule of Law is the foundation of a civilized society.”

– International Bar Association

Though these are only a few examples, they demonstrate the way in which the rule of law is regarded. The attitude held by international actors is that the rule of law should be “strengthened”, “developed” and “promoted”. And the belief is that the rule of law is “the underlying framework of rules and rights that make prosperous and fair societies possible” and “the foundation of a civilized society”.

While I believe that implementing the rule of law may be beneficial in many cases, and that strengthening the rule of law would likely lead to improvement in some justice systems, I challenge the position that the rule of law should be universally implemented and strengthened. The statement that “Rule of law activities… should be consistently integrated into all aspects of… engagement” is an overstatement and an oversimplification of a complex problem. Rule of law principles can be important to ensure the effective application of western models of justice, but their significance can also be lost when the context changes. The Rule of law is not an “end in itself”, but a means to provide individuals with a safe environment in which the pursuit of happiness is possible. Implementing the rule of law is not the only way to achieve such goals though, nor will it always have a positive effect on all systems of justice.

59 International Development Law Organization Website (2012), "Who we are", available at http://www.idlo.int/english/WhoWeAre/Pages/Home.aspx
4 Potential Effects of Rule of Law Programming with Informal Justice Systems

In discussions about programming with informal justice systems and promoting the rule of law, a question that should be asked is how these two movements will integrate with one another. The rule of law, as stated, is a political ideal with an emphasis on clear and publicized laws, legal equality, judicial independence, and the protection of human rights. Informal justice systems are dispute resolution mechanisms that emphasize reconciliation, social harmony, apply flexible standards of procedure, and use custom as the normative source for their decisions.

By juxtaposing the concept of the rule of law with the reality of informal justice systems, we can gain insight into how realistic and beneficial it might be to promote universal implementation of the rule of law, or if organizations should change their policies to be more open towards alternative approaches.

4.1 Clear and Publicized Laws – Transplantation or Codification
The first and perhaps most central principle to the rule of law is the existence of clear and publicized laws which can be predictably applied. But most informal justice systems don’t have clear and publicized laws, instead they often base their decisions on customary law that is a combination of traditions, common sense and perceived community consensus. In order to comply with the dictates of the rule of law, an informal justice system would have to transition from a system that does not apply clear and publicized laws to a system that does. There are two ways of doing this. The first is to codify the customary norms that are already applied by the informal systems, and the second is to adopt an existing legal framework, also known as a legal transplant.

The codification of customary law can be accomplished by either recording decisions, or through academic enquiry. Recording decisions entails the documentation, systematization and preservation of all decisions made by an informal system to be able to recall them as a source of law (the common law model). Academic inquiry entails documenting the customary norms of a society through a process of question and answer with local justice providers.
civil law model). Though codification of customary laws has been attempted in recent years, I question that this is a productive means of programming.

The codes that reign in the civil law countries of the world have been developed over hundreds of years. Most informal justice systems have no tradition of codification. To codify the governing rules of an informal justice systems would require a large investment of resources and time, both by local actors and by donor organizations. Personnel must be available to document decisions or jot down local customs. Those documents must be kept safe and easily accessible. The process would have to be a long term engagement to encompass the range of legal matters that are of relevance to the community. And language barriers could pose difficulties in communication between local actors and donor organization personnel. It is by no means an insurmountable task, but if such an investment is going to be made, an important question to consider is “to what avail?”. As the scholar M. Hinz points out, customary law does not become more “law” simply because it is codified.61 Though it would be more desirable from a rule of law perspective, this fundamental issue might cause difficulty to find support among local actors. Why would they make investment of time if they do not see the benefit of the efforts. This is highlighted by the UN report that points out, “it seems that prescriptive approaches will run the risk of lack of acceptance”.62

Also, because of the unwritten nature of customary law, attempting to codify it poses secondary problems. Even if local actors support codification, there is often a lack of consensus as to what the content of customary law is. If certain informants were favored over others in the process of documenting customary laws, their accounts of the law would be conserved and perpetuated. This might weaken the voices of women and youth, who may have a better chance of contesting customary law in a dispute resolution process than in a formal inquiry. Also, most decisions are the result of a negotiation between the parties and the principles that underlie the outcome are rather abstract. How would one codify common sense? Or the concepts of reaching a decision that restores social harmony in the community? Or the notion of reconciliation? Or perception of community consensus? Because codification of such abstract concepts are foreign to western jurists, codification attempts would prioritize

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the codification of tangible rules, inevitably tipping the scale in favor of such rules over time. As a USIP study highlights:

Attempts to reduce customary law to a written set of rules and sanctions runs the risks of undermining the essence and perceived fairness of customary justice by curtailing its flexible negotiation of laws and principles in the context of individual cases, which is a constitutive feature of the existing system and has kept customary law apace with [communities] rapidly changing social and economic environment.⁶³

Even if codification was successfully accomplished, the reduction of customary laws to a written set of rules would fail to appreciate the dynamic nature of informal dispute resolution. Their flexible nature, that leaves room for contesting and changing norms, is an important forum for disadvantaged groups such as women and children to advance their rights. Though it may improve predictability, codification is likely to reduce the options available for disadvantaged groups to redefine norms as their consciousness of rights grows. It would also reduce the flexibility of adjudicators to reach a decision that is mutually agreeable to both parties and that restores social harmony in the community. These are precisely the reasons why informal justice systems are a popular choice for many people in the first place. If informal justice systems loose their flexible and reconciliatory nature they no longer serve the people of their community in the best way. According to Wojkowska’s study, a reason that the poor favor informal systems over formal systems is sometimes specifically a mistrust and misunderstanding of laws.⁶⁴ Codification may be a satisfying rule of law ‘fix’, but I believe it would be ineffective at changing the social norms underlying a society. It is interesting, but not surprising, that both the Government of Zambia and the South African Law Reform Commission have abandoned attempts at codification of customary law in recent years.⁶⁵

The alternative to codification, legal transplant, can be criticized for a number of reasons. The first rule of good international engagement, according to the OECD DAC Principles of Good International Engagement in Fragile States is to “take context as the starting point”.⁶⁶ Laws taken out of the context in which they were developed are likely to be grossly misinterpreted,

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⁶⁵ Danish Institute for Human Rights (2012), p. 165
wrongly used and ineffective. They will also regulate matters which are not relevant and leave unregulated that which is important. Each community has their own rules, traditions and moral values, and laws are mirrors of those values. If laws are taken from one context and placed in another, they no longer mirror the values of the community, and therefore no longer serve their fundamental purpose. Of all the recent reports on programming with informal justice systems, none support the concept of legal transplant, and for good reason, I believe.

Though I wouldn’t go so far as to say that the codification of customary law or a legal transplant would have a negative effect on all informal justice systems, I strongly question the notion that all informal justice systems would benefit from such implementation. Mette Lindorf Nielsen puts it well in her report on community based justice mechanisms in Afghanistan, where she writes,

A fundamental aspect of the rule of law is the predictable application of publicly promulgated principles. Rather, justice processes in Afghanistan can be said to involve negotiation between different, and sometimes competing, principles to arrive at a decision. The complexities of these processes and their changing nature pose real challenges for how international donors interact with them. International engagement inevitably contributes to shaping power structures that determine justice outcomes, and when this impact is not well-understood, engagement can have negative, unintended effects… [At] a minimum, international actors need to understand how community-based justice mechanisms work and build flexibility into their approaches. Flexibility is key. If you get it wrong, adapt. If local circumstances require you to change your approach, do so. Sometimes it might be better not to become involved, and if engagement is pursued, the rationale for the engagement needs to be based on the realities on the ground, not a predetermined ideal about how things should work – ‘if it ain’t broke, don’t fix it’.  

But there is no flexibility in the statement, “We will spare no effort to promote democracy and strengthen the rule of law” or “The Rule of Law is the foundation of a civilized society”. These statements instead perpetuate a one-size-fits all approach based on western ideals of justice.

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4.2 Legal Equality - “like cases must be treated alike”

Legal equality is the principle that the law should be equally applicable to everyone and that cases with the same factual circumstances should be treated in the same way, “like cases must be treated alike”. As with publicized laws, this concept is not entirely compatible with informal justice systems.

Legal equality, or equal application of the law, implies that there is a set of laws to follow. Without laws to follow, equal application loses its meaning, as in “Equal application of what laws?” Again, the first step to ensuring equal application of the law would be to establish some kind of legal structure, which would lead us back to the problems discussed in the section above.

What about the statement ”like cases must be treated alike?” This may be feasible even without a statutory structure. However, many of the same arguments made in opposition to codification can be made in opposition to “like cases must be treated alike”. Informal justice systems are flexible, and the goal of adjudication is to reconcile the parties and restore social harmony in the community. For a system with these attributes, treating cases with the same factual circumstances in the same manner is not necessarily a prioritized interest and would not necessarily lead to more desirable outcomes.

To conform to the concept that like cases must be treated alike, adjudicators would have to give up some of their flexibility and openness in resolving disputes in favor of conformity. As has already been argued, this primarily has negative effects on disadvantaged groups and can contribute to stagnancy in judicial development. It also has other undesired consequences. In all societies, the same outcome will affect different individuals differently. A speeding ticket fine of 500€ takes more of a toll on a young student than on an established professional. Moreover, the discrepancy of the effect of an outcome can be even greater in societies where informal justice systems function, due to lack of social safeguards and widespread poverty. Though it is not possible for judges in most western communities to be aware of how outcomes would affect different individuals based on their personal circumstances, in the community context where informal justice systems function, it is possible for adjudicators to be aware of such differences and adjust decisions accordingly. Reaching an outcome that is
suitable for the individuals, rather than matching the outcome of a similar previous dispute, is probably more valuable in such contexts.

As is the case with codification, before incorporating the concept of equal application we must consider the context and apply only when needed to further a just determination. Though it may be an improvement in some contexts, it could also be inhibiting in others.

4.3 Judicial Independence – The Separation of Powers
Judicial independence embraces the concept that adjudicators be free from external pressures while exercising their judicial functions and that there is a separation of powers between the judicial and executive branches of governance. In the context of informal justice systems there is rarely a separation of these powers and external pressures from the community are a natural aspect of dispute resolution and customary law.

How a community would react to the transition from a traditional combined judicial and executive function, to a separation into two specialized branches, is a difficult question to answer. This question is sensitive to the context of each individual informal justice system. I can imagine a gradual transition towards the separation of powers being successful in certain contexts if the leading actors were willing and enthusiastic about making such a transition. But I could also predict confusion, power struggles and possible division as a result of such a transition. Let me offer a hypothetical example.

Imagine a community that has always had one institution to determine the outcome of disputes and to answer questions of policy for the community (this is the case in most communities with informal justice systems). Let us assume that this is how it has been for as long as anyone can remember. Then there comes a change. Based on advise from a developmental worker coming from outside of the community, it is decided that a second group of individuals will come into power for the specific purpose of resolving disputes, while the old institution is left to focus exclusively on policy making. Subsequently a question arises. It regards who has the right to a patch of land that has become vacant due to the passing of a member in the community. 68 One individual in the community is of the belief

68 This particular question was inspired by a biography about an American living in a Mayan village in Guatemala: Prechtel, Martin (1999), “Secrets of a Talking Jaguar – Memoirs from the loving heart of a Mayan village”, New York, Penguin Putnam Inc.
that it should belong to her because it belonged to her father. The adjoining neighbor of the property believes it should belong to him because it is connected to his property and it would be appropriate for him to gain access to this land because of his growing family and thereby growing need for space. There are no hard feelings, but the individuals want a resolution of the dispute.

Where should the individuals turn? This could be a question of policy (what is the custom in this situation?) which would entail consulting the “executive branch” of governance. But it could also be seen as a dispute to be resolved by the newly established “judicial branch” of governance. In our hypothetical example, one of the individuals wants to turn to the executive branch, the other to the judicial branch. When asked, both institutions believe that they are the ones who should resolve the question. This leads to a power struggle between the two institutions in terms of jurisdiction. When the question is discussed at a community meeting, a divide occurs within the community as individuals choose which institution they believe should handle the dispute. And in the midst of everything someone asks, “why did we make this change in the first place?” Is an independent judiciary necessary or beneficial in this hypothetical context?

The goal of judicial independence is to ensure that the judiciary is free to make independent rulings on the law without political pressures, and to protect citizens from unlawful acts of governance. But informal justice systems rarely operate in communities with laws, separate judicial and executive branches, and strong coercive powers of government. Instead they function in a context where policy and dispute resolution are a continuum and social pressures (such as community consensus) are an important part of that process. Because of this difference in context, the beneficial effects of an independent judiciary diminishes, or is completely lost.

Using Afghanistan as an example, Nielsen writes:

The concepts of judicial independence and the separation of powers are not well-developed in Afghanistan. Not only is actual judicial independence weak, the need for it is also not widely appreciated.\footnote{Nielsen (2011), p. 166.}
Some informal justice systems might benefit from the strengthening or implementation of an independent judiciary, while others would not. Once more, the context must be the starting point for engagement, and a predetermined idea of how things should be could potentially have more adverse effects than positive ones.

### 4.4 Protection of Fundamental and Human Rights

I support the principal that the protection of fundamental and human rights is a goal to be pursued. But there are situations where international actors might have to modify their approach in working with informal systems, to ensure protection of human rights. Development organizations might have to accept that a failure to live up to international norms and standards of fundamental and human rights might be an inescapable reality, at least for the time being, and take the realities on the ground as their point of departure.

Informal justice systems do not always respect human rights and in past years this was often cited as a reason to avoid engagement with informal justice systems. On the contrary, many scholar today perceive this as precisely the reason to work with informal justice systems. Once the decision is made to engage with an informal justice system, a first step should be to come to terms with realities on the ground and adjust levels of ambition accordingly. To change the practices of informal justice systems to be more compliant with international human rights standards, a different approach must be used than that which might work with state governments. It is not possible to merely sign into law a human rights framework, which is often the first step when working with state governments. Instead, a “bottom-up” process of changing the moral values and cultural practices is needed. This is a slow process because it requires that fundamental notions of justice be altered. In Nielsen’s study of community based mechanisms in Afghanistan she described that individuals who criticized the dispute resolution practices of the Taliban did not criticize them on the basis of their inhumane forms of punishment, but rather on their inability to restore social harmony after a dispute. This implies that for people receiving justice in some parts of the world, the restoration of harmony can rank higher than adherence to basic human rights principles. Another interesting example was the Afghan attitude towards the practice of “baad”. Baad provides that the perpetrator of

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71 Ibid.
72 Ibid.
a murder or other serious crime must give the victim’s family a woman or young girl as compensation for their misdeeds. This is intended to create a blood bond between the families concerned, in order to restore harmony in the community. Though this practice is of course a gross violation of human rights, it is also a pragmatic approach to dispute resolution that is forward-looking. If the baad transaction proves to be fruitful, social harmony is restored without further death or violence. The study went on to say,

Not all women took issue with baad as an act in itself, and some acknowledged its restorative potential. Rather, they took issue with the negative effects of baad. For example, they complained that baad girls were often treated badly by other wives, which in turn had an impact on whether baad was effective in restoring harmony or not. In other words, it is when baad does not work (in the sense of restoring harmony) that the community does not support it. ⁷³

My point is not to say that actors in the field of judicial development should accept practices such as baad just because they are a reality on the ground. Rather that it is important to understand the underlying concepts and reasons for practices, especially for those that violate human rights. It is important to find pragmatic solutions that are successful at sustainably changing attitudes over time. An approach that blindly pushes human rights concepts based on preconceived notions, without looking closely at the context in which the practice is offered, and the underlying principles for it, risks being ineffective and potentially doing more harm than good.

⁷³ Ibid.
5 Concluding Discussion

Integrating and balancing two major forces influencing judicial development in the world today (promotion of the rule of law and engagement with informal justice systems) is not an easy task. Implementing the rule of law is an admirable goal with what I believe to be the best of intentions. Programming with informal justice systems to improve access to justice and respect for human rights is likewise a commendable effort.

The attitude held by development organizations is that the rule of law should be strengthened, developed and promoted universally. But as we have seen in the preceding chapter of this report, the effectiveness and positive effects of rule of law principles are sensitive to the context in which they are applied. In the context of some informal justice systems, we have found that implementing central rule of law principles such as codified laws, legal equality and judicial independence could have adverse effects. What this shows is that the rule of law, though many times an admirable ideal to strive for, is not always the right path to improving justice. Instead of striving for implementation of the rule of law at all levels of engagement, I suggest that development organizations should attempt to implement rule of law principles only when a context justifies such action. Though this may seem obvious to some, it is not currently what is being practiced in judicial development today.

Recently, many scholars have challenged the “one-size-fits-all” approach that the rule of law paradigm requires. Harsh critique was made by the international scholar Stephen Golub, who began his report Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative, stating:

> The international aid field of law and development focuses too much on law, lawyers, and state institutions, and too little on development, the poor, and civil society. In fact, it is doubtful whether “rule of law orthodoxy,” the dominant paradigm pursued by many international agencies, should be the central means for integrating law and development.\(^74\)

Though this may be an overstatement, Golub makes a good point. Being caught by political ideals such as the rule of law, many developmental organizations seem to have lost track of the bigger picture. The end goal of development efforts is not to build legal institutions, but to help people. If legal institutions are what is needed, fine, but just because a system does not

\(^{74}\) Golub (2003).
adhere to a western political ideal such as the rule of law does not necessarily mean it needs fixing. And just because problems are prevalent in some justice systems, strengthening the rule of law is not necessarily the best path to improvement. As two scholars argue in their report *Women’s Access to Justice, Legal Pluralism and Fragile States*:

[An] approach seek[ing] to engage with informal systems with the aim of transforming them to comply with international standards… assume[s] that these systems can be ‘fixed’ into desired and known end states through legal and capacity-building support. What this fails to take into account is that no system exists in isolation from the underlying socio-economic, cultural and political context that determines the very real gender inequality and power asymmetries. Justice institutions and processes are a reflection of the fundamental inequalities in society. While in some cases, focusing on formal legal mechanisms can help correct social inequalities, in others — particularly where the reforms are superficial impositions, and where the legal institutions themselves are not seen as legitimate — it can have the opposite effect.75

What works in some cases, might not work in others. Therefor the context of each programming situation must be taken into consideration. It seems that the rule of law is held too preciously by international development organizations today. The rule of law is not an end in itself, nor does increased adherence to the rule of law always lead to improvement. When too much focus is on the rule of law, the underlying socio-economic, cultural and political realities may be overlooked and it is in that context that the root of many problems can be found.

I wholeheartedly support strengthening and implementing rule of law principles when appropriate, realistic and beneficial, but not universally and regardless of context. If we wish to improve the quality of justice administered throughout the world, then finding pragmatic solutions to actual problems is the way to succeed. Interventions should be based on realistic prospects of sustainable improvement over time, which requires openness, rationality and flexibility. Focusing on general legal models as a quick fix can instead divert attention from actual deficits. Short-term solutions that risk the creation of dependency and inflicting damage to functioning systems must be avoided unless there is assurance that something

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better will replace them. General models also assume resources that some countries and communities cannot afford. Fundamental questions about what is economically sustainable in each particular context are important to ask.

As we have seen, promoting a general model, even one as widely supported as the rule of law, without paying close attention to the context in which it is implemented, can in some cases do more harm than good. Just because dispute resolution mechanisms do not fit "western" ideals of justice does not mean that they are inherently broken. All systems have strengths and weaknesses that must be considered.

I commend the scholars who support and promote flexible and pragmatic approaches to programming such as Ewa Wojkowska and Mette Lindorf Nielsen that promote a “what works, what doesn’t, and how can we help”, approach to programming. I admire Wojkowska’s encouragement for development organizations to build upon existing strengths and solutions and Nielsen’s encouragement for international actors who want to improve access to justice for Afghan’s, to first understand Afghanistan’s existing approaches to resolving disputes “not because they are right or wrong, but simply because they exist and are widely used”.

It could be argued that a flexible and pragmatic approach would require more work and take longer than one that applies a finished method. Though that might be true, the worth of reaching solutions that are appropriate and supported within the aided community is invaluable.

Based on the information provided in this report, I believe it is time for development organizations to rethink their approach to judicial development at their highest levels of agenda setting. Instead of promoting general western models such as the rule of law I believe international organizations need to adopt more open, flexible and pragmatic policies in regard to programming. In the future, instead of resolutions declaring “We will spare no effort to promote democracy and strengthen the rule of law throughout the world”, I hope to read resolutions stating “Each individual context requires tailored efforts, and it is important that

we consider the strengths and weaknesses of all models of justice before they are judiciously applied”.

In their efforts to improve justice, developmental organizations must be mindful of why they engage in judicial development efforts in the first place; to provide individuals with a safe environment in which the pursuit of happiness is possible. With this genuine wish as the only true paradigm, preconceptions of right and wrong can be left at the door and organizations can be open to all models of justice and notions of how help can be provided. Not only because this is the right thing to do, but also because I strongly believe that this is the way to get the most out of development efforts.
6 References

6.1 Conventions, Resolutions and Declarations


Penal Reform International Conference Declaration (2007), ”Arab regional conference on the abolition of the death penalty”.


International Bar Association Resolution (2005), ”Rule of Law Resolution”.


International Bar Association Resolution (1982), ”IBA Minimum Standards of Judicial Independence”.

United Nations (1948), ”Universal Declaration of Human Rights”.

6.2 Bibliography

Aristotle (ca 250 b.c.), ”Politics”.

Bergling, Per, Ederlöf, Jenny and Taylor, Veronica L. (2009), ”Rule of Law Promotion: Global Perspective, Local Application”, Uppsala, Iustus Förlag AB.


Leonardi, Cherry et alia (2010), "Local Justice in Southern Sudan”, United States Institute of Peace.


6.3 Reports, Studies, Manuals and Working Papers

Department for International Development Briefing (2008), “Justice and Accountability”.


6.4 Online Resources


International Development Law Organization Website (2012), ”Who we are”, available at http://www.idlo.int/english/WhoWeAre/Pages/Home.aspx

7 Annexes

7.1 World Bank’s Rule of Law Definition\textsuperscript{77}

Legal reform seeks to supplant this autocratic and state-centered system with a rule of law that:

* \textit{Operates objectively.} The law is interpreted and enforced by lawyers, judges, prosecutors, and other officials in an ethical and fair manner, without special preferences and privileges.

* \textit{Is administered based on knowledge of the law.} Those charged with interpreting and enforcing the legislative framework know what the law is, and understand its underlying principles.

* \textit{Is accessible.} Individuals have meaningful access to the legal system. This means that they know what their rights are, can obtain representation, and filing fees are affordable.

* \textit{Is reasonably efficient.}

* \textit{Is transparent.} Citizens affected by legislation have an opportunity to comment on it as it is drafted. Likewise, judicial decisions are justified and explained and subject to press and academic scrutiny.

* \textit{Is predictable.} Legislation is drafted in a reasonably clear manner, so that outcomes are predictable and undue discretion is not left in the hands of public officials.

* \textit{Is enforceable.} Judicial and administrative decisions, rendered fairly, are enforced.

* \textit{Protects private property rights.}

* \textit{Protects individual and human rights.}

* \textit{Protects legitimate state interests,} e.g., by prosecuting those charged with clearly defined criminal acts.

7.2 Joseph Raz’s Rule of Law Definition\textsuperscript{78}

Many of the principles which can be derived from the basic idea of the rule of law depend for their validity or importance on the particular circumstances of different societies. There is little point in trying to enumerate them all, but some of the more important ones might be mentioned:

(1) \textit{All laws should be prospective, open, and clear.} One cannot be guided by a retroactive law. It does not exist at the time of action. Sometimes it is then known for certain that a


\textsuperscript{78} Raz, Joseph (1979), "The Rule of Law and its Virtue", in Raz, Joseph \textit{The authority of law: Essays on law and morality"}, Oxford, Claredon Press, pp. 5-8.
retroactive law will be enacted. When this happens retroactivity does not conflict with the rule of law (though it may be objected to on other grounds). The law must be open and adequately publicized. If it is to guide people they must be able to find out what it is. For the same reason its meaning must be clear. An ambiguous, vague, obscure, or imprecise law is likely to mislead or confuse at least some of those who desire to be guided by it.

(2) Laws should be relatively stable. They should not be changed too often. If they are frequently changed people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was. But more important still is the fact that people need to know the law not only for short-term decisions (p. 215) (where to park one’s car, how much alcohol is allowed duty free, etc.) but also for long-term planning. Knowledge of at least the general outlines and sometimes even of details of tax law and company law are often important for business plans which will bear fruit only years later. Stability is essential if people are to be guided by law in their long-term decisions.5

Three important points are illustrated by this principle. First, conformity to the rule of law is often a matter of degree, not only when the conformity of the legal system as a whole is at stake, but also with respect to single laws. A law is either retroactive or not, but it can be more or less clear, more or less stable, etc. It should be remembered, however, that by asserting that conformity to the principles is a matter of degree, it is not meant that the degree of conformity can be quantitatively measured by counting the number of infringements, or some such method. Some infringements are worse than others. Some violate the principles in a formal way only, which does not offend against the spirit of the doctrine. Secondly, the principles of the rule of law affect primarily the content and form of the law (it should be prospective, clear, etc.) but not only them. They also affect the manner of government beyond what is or can usefully be prescribed by law. The requirement of stability cannot be usefully subject to complete legal regulation. It is largely a matter for wise governmental policy. Thirdly, though the rule of law concerns primarily private citizens as subject to duties and governmental agencies in the exercise of their powers (on which more below), it is also concerned with the exercise of private powers. Power-conferring rules are designed to guide behaviour and should conform to the doctrine of rule of law if they are to be capable of doing so effectively.

(3) The making of particular laws (particular legal orders) should be guided by open, stable, clear, and general rules. It is sometimes assumed that the requirement of generality is of the essence of the rule of law. This notion derives (as noted above) from the literal interpretation
of ‘the rule of law’ when ‘law’ is read in its lay connotations as being restricted to general, stable, and open law. It is also reinforced by a belief that the rule of law (p. 216) is particularly relevant to the protection of equality and that equality is related to the generality of law. The last belief is, as has often been noted before, mistaken. Racial, religious, and all manner of discrimination are not only compatible but often institutionalized by general rules.

The formal conception of the rule of law which I am defending does not object to particular legal orders as long as they are stable, clear, etc. But of course particular legal orders are mostly used by government agencies to introduce flexibility into the law. A police constable regulating traffic, a licensing authority granting a licence under certain conditions, all these and their like are among the more ephemeral parts of the law. As such they run counter to the basic idea of the rule of law. They make it difficult for people to plan ahead on the basis of their knowledge of the law. This difficulty is overcome to a large extent if particular laws of an ephemeral status are enacted only within a framework set by general laws which are more durable and which impose limits on the unpredictability introduced by the particular orders.

Two kinds of general rules create the framework for the enactment of particular laws: those which confer the necessary powers for making valid orders and those which impose duties instructing the power-holders how to exercise their powers. Both have equal importance in creating a stable framework for the creation of particular legal orders.

Clearly, similar considerations apply to general legal regulations which do not meet the requirement of stability. They too should be circumscribed to conform to a stable framework. Hence the requirement that much of the subordinate administrative law-making should be made to conform to detailed ground rules laid down in framework laws. It is essential, however, not to confuse this argument with democratic arguments for the close supervision of popularly elected bodies over lawmaking by non-elected ones. These further arguments may be valid but have nothing to do with the rule of law, and though sometimes they reinforce rule of law type arguments, on other occasions they support different and even conflicting conclusions.

(4) The independence of the judiciary must be guaranteed. It is of the essence of municipal legal systems that they institute judicial (p. 217) bodies charged, among other things, with the duty of applying the law to cases brought before them and whose judgments and conclusions as to the legal merits of those cases are final. Since just about any matter arising
under any law can be subject to a conclusive court judgment, it is obvious that it is futile to
guide one’s action on the basis of the law if when the matter comes to adjudication the courts
will not apply the law and will act for some other reasons. The point can be put even more
strongly. Since the court’s judgment establishes conclusively what is the law in the case
before it, the litigants can be guided by law only if the judges apply the law correctly.6
Otherwise people will only be able to be guided by their guesses as to what the courts are
likely to do—but these guesses will not be based on the law but on other considerations.
The rules concerning the independence of the judiciary—the method of appointing judges,
their security of tenure, the way of fixing their salaries, and other conditions of service—are
designed to guarantee that they will be free from extraneous pressures and independent of all
authority save that of the law. They are, therefore, essential for the preservation of the rule of
law.

(5) The principles of natural justice must be observed. Open and fair hearing, absence of
bias, and the like are obviously essential for the correct application of the law and thus,
through the very same considerations mentioned above, to its ability to guide action.

(6) The courts should have review powers over the implementation of the other principles.
This includes review of both subordinate and parliamentary legislation and of administrative
action, but in itself it is a very limited review—merely to ensure conformity to the rule of law.

(7) The courts should be easily accessible. Given the central position of the courts in
ensuring the rule of law (see principles 4 and 6) it is obvious that their accessibility is of
paramount importance. Long delays, excessive costs, etc., may effectively turn the most
enlightened law to a dead letter and frustrate one’s ability effectively to guide oneself by the
law. (p. 218)

(8) The discretion of the crime-preventing agencies should not be allowed to pervert the law.
Not only the courts but also the actions of the police and the prosecuting authorities can
subvert the law. The prosecution should not be allowed, for example, to decide not to
prosecute for commission of certain crimes, or for crimes committed by certain classes of
offenders. The police should not be allowed to allocate its resources so as to avoid all effort to
prevent and detect certain crimes or prosecute certain classes of criminals.