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

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**Abstract:** Africa and the developing world have been the theatre of countless rules of law assistance projects since the end of World War II, with mixed results. While the reasons for the mixed results vary from project to project and from country to country, this paper seeks to address the limitations that arise right from project inception, reviews the cycle of project management from problem construction to monitoring and evaluation, taking into account the core and secondary aspects of project management such as scope, budget, quality, schedule, as well as stakeholder engagement, communication, risk management and performance management. With a focus on the attainment of the Sustainable Development Goals of Agenda 2030, the paper addresses the following aspects: identify challenges of past approaches of major development partners and interrogate the current shift in paradigm by the World Bank, United Nations and the United Kingdom's Department for International Development (DfID). It will consider lessons from complexity and other methodologies, theories of change, theoretical frameworks, and the Problem Driven Iterative Adaptation (PDIA) model as tools for doing development differently. The paper concludes with recommendations on improving the effectiveness of rule of law programmes, including a better approach to project design that makes allowance for results based programming, ease of adaptation, reflective learning through after action reviews and lessons learned from military science's doctrines and practices in the management of complex operations. The paper also recommends, back and forth iteration and better stakeholder engagement, including at the lowest level of governance (local contextualization), to increase effectiveness of rule of law and change in mind-sets especially donor and development partner ideology.

**Keywords:** Agenda 2030, rule of law programme development, PDIA, after action review, introspection

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# 1 Introduction

There is a growing consensus in the global community that the rule of law is a precondition for sustainable peace and development at both international and national level.<sup>1</sup> Since the adoption in September 2015, of Agenda 2030 for Sustainable Development, the successor to the Millennium Development Goals, rule of law was brought closer to the forefront of the quest for sustainable development. Africa and the rest of the developing world have been the theatre of countless rules of law assistance projects since the end of World War II, with mixed results. However, well-grounded knowledge about the factors that ensure successful outcomes from rule of law programmes, and why, remains scarce and far in between.<sup>2</sup> Additionally, scholars have not yet been able to develop a theory that systematically explains the interrelationship between law and development, which would establish law and development as a robust and coherent academic field.<sup>3</sup> How well rule of law projects respond to development challenges will depend on examining approaches and methodologies, with a view to addressing those that are not fit for purpose. This paper sets out to make recommendations on possible options and theoretical approaches to improve rule of law project interventions. It will take into account what law and development scholars have called for, inter alia, new approaches, including comparative ones, with references to the local context and conditions, as well as theoretical underpinnings that better explain the dynamics among law, institutions, and the existing political, social, and economic conditions.<sup>4</sup> At the onset, it is important to provide some background information that sets the stage for the discussion of the main issues that affect the success of rule of law programmes.

<sup>1</sup> United Nations Development Programme, *Strengthening the Rule of Law in Conflict- and Post-Conflict Situations: a Global UNDP Programme for Justice and Security 2008–2011*, available at: <[https://www.un.org/ruleoflaw/files/rol\\_final\\_apr09.pdf](https://www.un.org/ruleoflaw/files/rol_final_apr09.pdf)>, accessed March 1, 2019.

<sup>2</sup> I. Chukwuma and E. Ebai, *Promoting the Rule of Law through Evaluation and Performance Measurement in Nigeria: Challenges and Prospects*, available at: <<https://worldjusticeproject.org/news/promoting-rule-law-through-evaluation-and-performance-measurement-nigeria-challenges-prospects>>, accessed March 1, 2019.

<sup>3</sup> Yong-Shik Lee, *General Theory of Law and Development (December 28, 2017)*, 50 *Cornell International Law Journal*, no. 3 (2017), 415–472, 415, available at: <<https://ssrn.com/abstract=2951317>>, accessed March 1, 2019.

<sup>4</sup> *Ibid.*

## 2 Background

While the reasons for the mixed results vary from project to project and from country to country, this paper seeks to address the common limitations that arise right from project inception and run the full course of the project cycle. The mixed fortunes of rule of law programmes are aptly captured below;

The experiences in South Sudan are replicated in other post conflict and fragile states (*as well as in other developing countries*) where unprecedented international attention is being placed on state-building, with a primary focus on rule of law reform. Enormous amounts of money and effort are being dedicated to rebuilding and often changing entire justice systems, with modest success. This attention raises profound questions about the objective, approach, methodology, and consequences of these efforts. The evidence suggests that trying to change legal systems in these states is an unproductive endeavour. The causes of the movement's lack of success have remained constant—unrealistic objectives, misplaced doctrinal approaches, insufficient expertise, poor planning and execution, and a lack of deep contextual knowledge. Although the seminal works of Thomas Carothers, Erik G. Jensen, and Thomas C. Heller call for focus and modesty, the international rule of law movement remains undeterred from adopting “comprehensive,” whole-system approaches. This *chronic lack of success, the recycling of bad ideas and the bloated rhetoric regarding the centrality of rule of law to achieving “the good life”* led to the development of a series of papers that, in turn, became an edited volume exploring how the international movement could possibly extricate itself from the situation. (*emphasis mine*).<sup>5</sup>

D. Marshall further highlights the existence of a profound knowledge deficit regarding the justice “system,” its actors, and its processes and the apparent lack of interest in understanding, or learning from, years of international rule of law programming in the country – what worked, what did not, and why – or in applying lessons learned from similar contexts.<sup>6</sup> D. Marshall concludes that much of the assistance focused on “law and order” issues, with most support going to police and prisons, and the international community’s rule of law assistance seemed trapped in an “impoverished” view of the rule of law and appeared to have little, if any, impact in actually addressing injustices in the country.<sup>7</sup>

A discussion on the effectiveness of rule of law programmes would be incomplete without a review of the relationship between such programmes and sustainable development. Such discussion will provide the background necessary to put in context all observations and recommendations made here.

<sup>5</sup> D. Marshall, *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward*, available at: <<http://blogs.lse.ac.uk/jsrp/2014/06/23/the-international-rule-of-law-movement-a-crisis-of-legitimacy-and-the-way-forward/>>, accessed March 1, 2019.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

### 3 Rule of Law Programmes and Sustainable Development

Effective rule of law programmes that ensure best value for money and fit for purpose interventions are a necessity in the quest for sustainable development. In the programme management sphere, it is recognized that currently there is no widely defined standard for managing development projects and many development projects fail to deliver the expected outcomes or fail to produce the desired impact in the communities they serve.<sup>8</sup> The most common reasons for project failure include:

- a. that the objectives are not properly defined and agreed-upon due to a rush to obtain funding; beneficiaries are not included in the early decisions of the project;
- b. discrepancies in understanding the project's objectives due to the non-participation of stakeholders;
- c. outcomes and benefits are not properly defined in measurable terms;
- d. there is too much emphasis on measuring and tracking activities and tangible outputs and not enough on the intangible benefits that come as a result of achieving the project's final goals;
- e. insufficient planning and coordination of resources resulting in plans that do not meet the actual conditions in the field, and project staff having limited skills to modify and adapt the plan in time and under budget;
- f. poor estimation of duration and cost resulting in activities that take longer than planned and cost more than budgeted;
- g. incomplete, unrealistic and outdated project plans: the team blindly follows plans that, in many cases, have never been verified or modified to adapt to a changing environment;
- h. lack of communication and stakeholder management leads to high expectations about the project, increases distrust, and results in beneficiaries who are disconnected from the project;
- i. weak project leadership: vague lines of responsibility and authority produce an uncoordinated team that often duplicates efforts;
- j. inadequate definition and acceptance of roles results in project staff that cannot assume their responsibilities and increases the time a project manager needs to work with the team;
- k. poor commitment to the project by the team, the organization, and the beneficiaries, caused by inadequate leadership skills;

<sup>8</sup> PM4DEV, *Project Management in Development, Fundamentals of Project Management for Development*, Atlanta: PM4DEV (4th ed., 2014), pp. 16–18.

- l. weak control processes and feedback mechanisms that do not detect problems early enough;
- m. lack of analysis of major risk factors and inadequate risk-response strategies result in higher costs to recover from risk events; and
- n. lack of good quality controls that impact the ownership of the project by beneficiaries and other key stakeholders.<sup>9</sup>

The situation is even more precarious for rule of law projects where it has been found that more resources are being dedicated to rule of law and governance yet little is known about the actual impacts of programming. Research has shown that in many areas of rule of law, taking an evidence-based approach and drawing out areas where there is strong evidence on positive outcomes is not possible (the evidence base is quite thin in most areas of rule of law) as much of the literature does not review the impact of interventions but only presents results and internal project achievements.<sup>10</sup>

To gauge effectiveness of rule of law programmes, one needs to measure impact, but because of the broad scope of projects, reforms, and ideals of rule of law or governance, it is difficult to define and measure the success of complex interventions such as participatory governance, decentralization and institutional reforms.<sup>11</sup> Still, more is due to broader difficulties in evaluating true impacts of programmes, projects, and reforms – in moving beyond outputs and outcomes to measuring societal and attitudinal changes.<sup>12</sup> Another issue of relevance is the importance of impact evaluation timing as most evaluations are usually conducted shortly after the intervention yet meaningful rule of law reforms, most especially those dependent upon normative, behavioural and attitudinal change, take time to manifest. The long-term aspects of rule of law projects including sustainability are not evident in the interim since most projects are expected to be temporary in nature. To ensure effectiveness of rule of law projects, both implementers and evaluators must be in agreement throughout the project, despite possible differing priorities as to perceivable change and project success based on expenditure.<sup>13</sup>

<sup>9</sup> *Ibid.* p. 17

<sup>10</sup> E. Browne, *Evidence on 'Rule of Law' Aid Initiatives* (GSDRC Helpdesk Research Report 1008). (Birmingham, UK: GSDRC, University of Birmingham, 2013), available at: <<http://www.gsdrc.org/docs/open/hdq1008.pdf>>, accessed March 1, 2019.

<sup>11</sup> USAID, *Literature Review of Impact Evaluations on Rule of Law and Governance Programming, Report prepared for USAID's Center of Excellence on Democracy, Human Rights, and Governance*, available at: <[http://www.3ieimpact.org/media/filer\\_public/2016/03/22/alexander\\_et\\_al\\_2013\\_-\\_rule\\_of\\_law.pdf](http://www.3ieimpact.org/media/filer_public/2016/03/22/alexander_et_al_2013_-_rule_of_law.pdf)>, accessed March 1, 2019.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

Understanding rule of law as a concept makes interpretation of project objectives more cumbersome especially for beneficiaries and other stakeholders who are not conversant with technical aspects of rule of law. There are numerous definitions of rule of law and governance, from sources including the United Nations, bilateral organizations such as the United States Agency for International Development (USAID), DfID and non-governmental organizations such as the World Justice Project and this makes it difficult to appreciate the collective impact of rule of law technical assistance in a given political space.

The sources and nature of funding availed for rule of law projects determines the amount of pressure exerted on project managers. Financiers of rule of law programmes as well as the beneficiaries on ground will be looking for the best value out of the investment made but not necessarily in the same timeframe. Governments that receive funding from development partners and also raise money domestically have to meet the standards of accountability set by the tax payers and the electorate. As more nationalistic political agendas arise, demands for accountability for expenditure on foreign aid increase.

Attainment of the goals of sustainable development demands that rule of law programmes meet a number of criteria, including:

- a. That rule of law programmes address development needs in such a way that the needs of the present generation are met, without compromising the ability of future generations to meet their own needs.
- b. That rule of law programmes support initiatives that balance different, and often competing, needs against an awareness of the environmental, social and economic limitations that society faces, in itself a delicate balancing act.<sup>14</sup> Additionally, rule of law frameworks set out clear mandates and regulate behaviour, etc., rule of law provides a framework through which the competing needs can be met.<sup>15</sup>
- c. In practical terms, examples of how rule of law could avert or address global crises or challenges by handling large-scale financial crises caused by irresponsible banking, dealing with changes in global climate resulting from large dependence on fossil fuel-based energy sources, or mass displacements of population and migration as seen in the Mediterranean region,

<sup>14</sup> J. Ebbesson, *The Rule of Law in Governance of Complex Socio-Ecological Changes*, Global Environmental Change, available at: <<http://www.stockholmresilience.org/download/18.3eea013f128a65019c2800010450/1459560566497/Ebbesson%202010.pdf>>, accessed March 1, 2019.

<sup>15</sup> *Ibid.*

among others.<sup>16</sup> The nature of global crises and the interventions required to address or contain them explains the scale at which rule of law or its absence can impact development.

To assess the effectiveness of rule of law programmes, one has to examine the cycle of project management from problem construction to monitoring and evaluation, taking into account the core and secondary project constraints such as scope, budget, quality and schedule, as well as stakeholder engagement, communication, risk management and performance management, among others. It is anticipated that rule of law programmes in any scenario, including in times of conflict, are designed to have a beginning, middle and an end. These would include the following five stages:

- a. Start-up/Conception: opportunities and approaches for change are evaluated to decide whether or not to define a programme.
- b. Programme definition: the programme is defined, documented and evaluated to create a Programme Design Document and a programme business case and get it through the approval process.
- c. Programme establishment: this involves the acquisition of the resources, infrastructure and control processes required to achieve the programme's objectives and implementation commences. It also includes training and information sharing with programme team members and stakeholders concerning their roles and responsibilities.
- d. Programme management: where the projects comprising the programme are undertaken and outputs delivered to business users.
- e. Programme closure: once all the programme (and its projects) deliverables have been completed, responsibility for operational control of the improved capability has been handed over to line management, and sufficient benefits measures have been completed to judge success, the programme is terminated. If during the programme it becomes clear that it cannot be completed successfully, it may be terminated early.<sup>17</sup>

At each of the five stages identified above, rule of law programmes present unique challenges, some of which are delineated below.

<sup>16</sup> Sustainable Development Commission, *What is Sustainable Development*, available at: <<http://www.sd-commission.org.uk/pages/what-is-sustainable-development.html>>, accessed March 1, 2019.

<sup>17</sup> B. Payne and A. Watt, *The Project Life Cycle (Phases)*, available at: <<https://opentextbc.ca/projectmanagement/chapter/chapter-3-the-project-life-cycle-phases-project-management/>>, accessed March 1, 2019.

### 3.1 Characteristics of Rule of Law Programmes

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

- a. There are multiple definitions of rule of law and these filters into the conceptualization and design of projects. Different parameters are used for rule of law in different countries. It is critical to note that four Universal Principles of the Rule of Law have been established, namely that: (i) the government and its officials and agents as well as individuals and private entities are accountable under the law; (ii) the laws are clear, publicized, stable and just, are applied evenly, and protect fundamental rights, including the security of persons and property; (iii) the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and that (iv) justice is delivered timely by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve. In reality, development partners pick and choose the focus of rule of law programmes dependent upon how their respective parent organisations or governments define the ‘rule of law.’
- b. Rule of Law programmes deal with complex issues, for which at times, not all information may be available or obvious at the start-up phase and which are impacted upon by the demographic involved as well as cultural considerations and the geographic and economic peculiarities of each political space.
- c. Rule of law indicators are difficult to measure especially determining what to measure and when.
- d. Behavioural change and other factors that are critical to the success of rule of law programmes may not manifest during the project reporting cycles and financial years.

Having assessed the unique characteristics of rule of law programmes, it is timely to delve into what rule of law means to development partners and the impact the definition has on programme development and evaluation.

### 3.2 Rule of Law Definitions

The multiplicity of definitions of rule of law by development partners operating in the same political and geographical space is likely to impact on the design and delivery of rule of law interventions whether by the United Nations Agencies,



Funds and Programmes or other development partners. To promote uniformity in usage and understanding of the rule of law across the UN Secretariat, the UN Secretary General provided a detailed definition:

The “rule of law” refers to 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.<sup>18</sup>

This definition of the rule of law presents the concept as a collection of principles that can be used to inform the structure, operation, reform, and evaluation of law-related institutions across societies and it emphasises equity, accountability, human rights and avoidance of arbitrariness, as well as the more traditional concept of the supremacy of the law.<sup>19</sup>

While the UN has achieved uniformity of definition, other organisations such as DfID, USAID and the World Bank work with concepts of rule of law defined within the respective institutions.

In 2012, it was reported that within DfID, the focus of technical assistance and work was on security and justice and not on the rule of law.<sup>20</sup> This was most likely due to self-identified constraints for DfID to deliver a more coherent and scaled up approach such as split policy responsibilities, limited in-house expertise; insufficient UK government policy fora or instruments, and the need for innovation in fragile countries as well as in middle income countries.

The definition of rule of law for USAID is set out in its Guide to Rule of Law Country Analysis,<sup>21</sup> the rule of law contains five elements: order and security,<sup>22</sup>

**18** United Nations, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies: Report of the Secretary General*, August 23, 2004, pg. 4, para 6, available at: <<https://www.un.org/ruleoflaw/blog/document/the-rule-of-law-and-transitional-justice-in-conflict-and-post-conflict-societies-report-of-the-secretary-general/>>, accessed March 1, 2019.

**19** I. Chukwuma and E. Ebai, *supra* note 2.

**20** DFID does not focus much on law and development but on law and order. The possible contribution to the rule of law is not necessarily made explicit.

**21** USAID, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, p. 5, available at: <[https://pdf.usaid.gov/pdf\\_docs/Pnadm700.pdf](https://pdf.usaid.gov/pdf_docs/Pnadm700.pdf)>, accessed March 1, 2019.

**22** Rule of law cannot flourish in crime-ridden environments or where public order breaks down and citizens fear for their safety. The executive branch has immediate responsibility for

legitimacy,<sup>23</sup> checks and balances,<sup>24</sup> fairness,<sup>25</sup> and effective application.<sup>26</sup> A justice sector assessment would deepen the analysis contained in an overall democratic governance assessment and provide the basis for integrating rule of law programming into a mission's portfolio.<sup>27</sup> The purpose of USAID's Guide is helpful to rule of law officials required to conduct a rule of law assessment and design rule of law programmes that have a direct impact on democratic development, with particular attention to empowering poor and vulnerable groups. It aims to help rule of law officers maximize the impact of rule of law programmes on democracy and governance strategic objectives.

The guide reflects the understanding that the justice sector is part of the larger political context. Effective rule of law programming may need to look beyond traditional approaches that focus on operations of the courts and other components of the justice system. When the goal is democratic governance, the analysis that informs rule of law programme decisions must be broad and comprehensive, and programming must reflect a holistic appreciation of country dynamics. Additionally, the guide is organized to provide a conceptual framework for analysing the rule of law, by defining the rule of law and highlighting the links between rule of law and democracy, and focusing on five essential

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order and security, but the judiciary has an important role as well in protecting rights and providing for the peaceful resolution of disputes.

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

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

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

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

**27** USAID, *Conducting a Democracy and Governance Assessment: A Framework for Strategy Development*, available at: <[https://www.usaid.gov/sites/default/files/documents/1866/Master\\_SAF\\_FINAL%20Fully%20Edited%209-28-15.pdf](https://www.usaid.gov/sites/default/files/documents/1866/Master_SAF_FINAL%20Fully%20Edited%209-28-15.pdf)>, accessed March 1, 2019. Also see USAID, *Democracy, Human Rights, And Governance Strategic Assessment Framework*, available at: <[https://www.usaid.gov/sites/default/files/documents/1866/Master\\_SAF\\_FINAL%20Fully%20Edited%209-28-15.pdf](https://www.usaid.gov/sites/default/files/documents/1866/Master_SAF_FINAL%20Fully%20Edited%209-28-15.pdf)>.

elements of the rule of law and the legal framework, institutions and actors that make up the justice system.

According to the World Bank's World Governance Indicators, rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.<sup>28</sup> It is anticipated that too broad a conceptualization of the rule of law or democratic governance might weaken the ability to establish significant causal links between formal aspects of the law and development/growth impacts.<sup>29</sup>

In addition to the question of definition is the issue of focus of rule of law programmes. There is a tendency to focus on the justice, law and order aspects of the rule of law. Rule of law projects of a number of international, regional and bilateral agencies often focus on the criminal justice side of the legal system, where many initiatives deal with transitional justice issues, criminal procedure reform, reforming the police, inter alia. Lately, there has been a move to confirm that the rule of law is also of great relevance outside the justice sector, particularly in the public administration, and that the international community needs to expend more effort on integrating rule of law dimensions and perspectives into public administration reform. In short, public administration reform encompasses not only efficiency and effectiveness, but also extends to qualitative rule of law concepts and dimensions such as human rights, fairness, and objectivity.<sup>30</sup>

The discussion on what the rule of law entails for different stakeholders brings forth elements of complexity and their relevance to how the rule of law contributes to attainment of sustainable development.

### 3.3 Rule of Law and Complexity

Sustainable development is a complex concept and under goal 17 of Agenda 2030, it is envisaged that multi-stakeholder and cross-cutting partnerships will

<sup>28</sup> D. Kaufmann and A. Kraay, *Worldwide Governance Indicators*, available at: <<http://info.worldbank.org/governance/wgi/index.aspx#home>>, accessed March 1, 2019.

<sup>29</sup> G. Barron, *The World Bank and Rule of Law reforms*, available at: <<http://www.lse.ac.uk/internationalDevelopment/pdf/WP/WP70.pdf>>, accessed March 1, 2019.

<sup>30</sup> P. Bergling, L. Bejstam, J. Ederlöv, E. Wennerstrom and R.Z. Sannerholm, *Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development*, p. xvii, Folke Bernadotte Academy Publications, available at: <[https://fba.se/globalassets/rule\\_of\\_law\\_in\\_public\\_administration.pdf](https://fba.se/globalassets/rule_of_law_in_public_administration.pdf)>, accessed March 1, 2019.

be required to ensure the success of a whole-system approach. This arises from the complex nature of societies, systems of governance, institutions and rules. The rule of law system behaves as a complex system which features a large number of interacting components (agents, processes, etc.) whose aggregate activity is nonlinear (not derivable from the summations of the activity of individual components) and typically exhibits hierarchical self-organization under selective pressures. Rule of law is extremely complex and it is difficult to identify causal relationships, but even so, there is a surprising lack of empirical and comparative evidence.<sup>31</sup>

A country's rule of law framework is a complex system which needs to be navigated as such, in order to meet the objectives of rule of law programmes. Understanding how complexity applies to society and rule of law frameworks is relevant to the conceptualization, design and implementation of rule of law programmes. The development of policy and legislation is a complex transaction in itself as there is no one-size fits all framework. Following a poor design of programmes in some cases, societies with collectivist ideology have been exposed to legislative and policy reforms better suited for individualistic societies.

The question of the relevance of rule of law programme interventions to a society puts into focus a debate on the characteristics of the society, whether homogenous or heterogeneous, inter alia, which characteristics may help programme developers. Unravelling the identity of a society will help in answering questions as for whom the rule of law is intended so as to make more legitimate interventions.

### 3.4 A Crisis of Legitimacy- Whose Rule of Law and Whose Law Is It?

In the course of designing and implementing rule of law programmes, at times conflict arises, most especially concerning the beneficiaries and their interests. While the rule of law is often seen as a panacea for ensuring a successful, fair and modern democracy which enables sustainable development, however, this is not the case in reality.<sup>32</sup> According to M. Mutua, no African country has truly thrown

<sup>31</sup> K. Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt*. Paper No. 37. (2006). Social Development Papers. Conflict Prevention and Reconstruction, available at: <[http://siteresources.worldbank.org/INTCPR/Resources/WP37\\_web.pdf](http://siteresources.worldbank.org/INTCPR/Resources/WP37_web.pdf)>, accessed March 1, 2019.

<sup>32</sup> M. Mutua, *Africa and the rule of law*, available at: <<http://sur.conectas.org/en/africa-rule-law/>>, accessed March 1, 2019.

off the shackles of colonial rule and emerged as a truly just nation state – even though many have the rule of law at the heart of their constitutions.<sup>33</sup> In M. Mutua's view, the Western concept of the rule of law cannot be simply transplanted to Africa and the transition from colonial rule to a viable post-colonial state has proved more challenging than was expected.<sup>34</sup> Building and sustaining state institutions – including in the justice sector in post-colonial states was undermined by the lack of internal cohesion, ethnic rivalries, cultural dissonance, and external interventions.

More fundamental to the issue of legitimacy is the question concerning whose rule of law it is. The answer to which lies in the identity of the governed. Colonialism and the Trans-Saharan, Red Sea, Indian Ocean and Trans-Atlantic Slave Trades involved unprecedented mass movement of people and resulted in the creation of political spheres and new identities respectively, which to date still impact governance and the rule of law in those areas. Colonialism created legal pluralism, weakened national institutions as the foundation of the post-colonial state, and led to the development of binary political and legal conditions and focus on law and order. Slave trade introduced ethnic fractionalization, resulted in weakened states, corruption, warfare, banditry, to promote internal conflict and political instability,<sup>35</sup> a decline in the quality of domestic institutions, and the collapse of pre-existing forms of government.<sup>36</sup> Given the nature of political history described above, the answer to the question 'whose law is it?' becomes complicated and will always present challenges to rule of law programme developers.

### 3.5 Challenges Concerning Designing, Measuring and Evaluating Rule of Law Programmes

Evaluation of rule of law projects should provide feedback on efficiency of inputs and activities, effectiveness of outputs and outcomes and impact of the

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> See B. Barry, "Senegambia from the Sixteenth to the Eighteenth Century: Evolution of the Wolof, Sereer, and 'Tukuloor'," in B. A. Ogot (ed.), *General History of Africa: Volume 5, Africa from the Sixteenth to the Eighteenth Century* (Berkeley: University of California Press, 1992), pp. 262–299 and J. E. Inikori, "Africa and the Trans-Atlantic Slave Trade," in Toyin Falola (ed.), *Africa Volume I: African History Before 1885* (North Carolina: Carolina Academic Press, 2000), pp. 389–412.

<sup>36</sup> N. Nunn, *The Long-Term Effects of Africa's Slave Trades* (October 2006), available at: <<https://pdfs.semanticscholar.org/91b4/db8932ed7ee3b682ac54d4cdd3d7eb80cecb.pdf>>, accessed March 1, 2019.

goal. Results from the initial needs assessment, the baseline study, midterm evaluation and final evaluation are relevant to measuring or evaluating performance of rule of law programmes and ascertaining sustainability and relevance of projects. However, literature reviews of a number of studies reveal that no comprehensive measurement system exists for the rule of law and that vast knowledge is scattered around in various systems, organizations, and initiatives that often aggregate data under different indicators.<sup>37</sup> The wealth of indicators is not properly internalized by policy-makers or even those who manage programmes or interventions and existing studies are considered limited for not being all-inclusive to cover all aspects of rule of law. The most fundamental barrier appears to be a culture of discomfort with measurement and determining what to measure and how to measure remains the question in most jurisdictions. Many rule of law programme evaluations do not identify wider impacts on the status of rule of law or development in the country.<sup>38</sup> Most evaluations report back on whether the programme adhered to its own plans, and detail some outputs. Many evaluations identify blockages and lack of clear outcomes.

Governments often lack the capacity (the knowledge, facilitation and willingness to conduct monitoring and evaluation for rule of law projects and programmes), the skills, technology, vehicles and financial resources to inspect, audit, review and conduct monitoring effectively.<sup>39</sup> Even when skills and technology are available, bad policies or weak overall governance make it impossible to plan and budget for appropriate monitoring.<sup>40</sup> Countries and rule of law sectors that ignore or fail to collect and utilize vital statistics for planning and administration usually lack necessary capacity and political will to do so.<sup>41</sup>

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**37** Hiil Innovating Justice, *Concept Paper Monitoring and Evaluation of the Rule of Law and Justice in the EU: Status Quo and the Way Ahead?* (June 2012), available at: <[http://www.hiil.org/data/sitemanagement/media/Concept\\_Paper%20EU%20monitoring.pdf](http://www.hiil.org/data/sitemanagement/media/Concept_Paper%20EU%20monitoring.pdf)>, accessed March 1, 2019.

**38** E. Browne, *Evidence on 'Rule of Law' Aid Initiatives* (GSDRC Helpdesk Research Report 1008). (Birmingham, UK: GSDRC, University of Birmingham, 2013), available at: <<http://www.gsdrc.org/docs/open/hdq1008.pdf>>, accessed March 1, 2019.

**39** *Ibid.*

**40** Resource Governance, *Challenges Undermining Monitoring and Enforcement*, available at: <RWI Enforcing Rules Chapter Challenges Undermining Monitoring and Enforcement>, accessed March 1, 2019.

**41** E.E.O. Alemika and I.C. Chukwuma (eds.), *Crime and Policing in Nigeria: Challenges and Options, Network on Police Reform in Nigeria Lagos* (2005), available at: <<http://www.cleen.org/CRIME%20AND%20POLICING%20IN%20NIGERIA.pdf>>, accessed March 1, 2019.

Having identified some of the fundamental challenges related to rule of law programme design, it is time to address the way forward, commencing from a position of consideration of lessons from complexity and other methodologies, theories of change, theoretical frameworks, the General Theory of Law and Development and the PDIA model as tools for doing development differently. The recommendations range from the call for a better approach to project design that makes allowance for results based programming, ease of adaptation, reflective learning through after action reviews and lessons learned, back and forth iteration, and better stakeholder engagement, including at the lowest level of governance (local contextualization), to measures to increase the effectiveness of rule of law. Good practices that have been tried successfully elsewhere will be beneficial in informing the development of rule of law projects. Additionally, rule of law development planners have lessons to learn from military science's doctrines and practices in the management of complex operations and for a change in mind-sets especially donor ideology.

## 4 The Way Forward

Doing rule of law for development differently calls for efforts to boost existing good practices and introducing new practices to rule of law programming. By way of example, it is clear that policy approaches to rule of law programming are constantly evolving to meet the needs of different stakeholders. How well this is done remains a question. Examples drawn from the approach of the World Bank and DfID are very informative on what can be done right and what can go wrong in the circumstances. It is evident that the current shift in paradigm by the World Bank, United Nations and DfID, inter alia, is informed by lessons from experience. This will necessitate the refinement of old measures and for the introduction of new approaches based on good practices for promoting the effectiveness of rule of law programmes including AAR and introspection. It will also require application of the general theory of law and development which takes into account the disciplinary parameters of law and development by clarifying the constituent concepts of "law" and "development"; and the causal relationship between law and development through the regulatory impact mechanisms by which law impacts development, with references made to institutional frameworks and socioeconomic conditions.<sup>42</sup>

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<sup>42</sup> Lee (2017), *supra* note 3, p. 458.

## 4.1 Consolidating ‘Rule of Law’ Definitions

The DfID, World Bank, United Nations have taken the lead in consolidating approaches to the Rule of Law programmes which helps in providing guidance on what the rule of law entails in a specific context.

### 4.1.1 Lessons from DfID

It is worth noting that DfID’s new policy approach to help tie together different elements of open economies and open societies starts with clarity on the rule of law ends to be promoted. Interventions are most likely to strengthen the enabling conditions for the rule of law.<sup>43</sup> A renewed approach to the rule of law would result in approaching development planning at DfID through a rule of law lens which requires: (i) the adoption of an ends-based approach (being clear on the rule of law ends to be supported, and identifying specific objectives where external support is warranted); (ii) problem-solving (starting with a comprehensive understanding of the situation but being highly selective within this, identifying realistic and intermediate objectives around particular rule-of-law ends, based on a plausible theory of change); (iii) being people-centred, politically informed (rule of law programmes must be grounded in a sound understanding of the political economy of a specific country or community); and (iv) context-specific (obstacles and opportunities to advancing specific rule of law ends are located within specific political regimes, socio-economic environment and the presence, strengths and weakness of actors, organizations and institutions). Practical steps would include: analysis (e.g. political economy analysis); identification of rule of law ends the UK and partners would like to promote together; identification of main problem or obstacle to realizing those ends; prioritization of changes needed to address (e.g. changes in enabling conditions); and identification of entry points (taking into account the broader approach and linkages). Such a comprehensive approach would be relevant to rule of law project designers for identifying rule of law ends at the earliest stage of project conceptualization.

<sup>43</sup> DfID, *Policy Approach to Rule of Law*, available at: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/306396/policy-approach-rule-of-law.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/306396/policy-approach-rule-of-law.pdf)>, accessed March 1, 2019.



#### 4.1.2 Lessons from the UN

The UN's system approach to rule of law technical assistance takes into account the political context and the unique country context; advances human rights and gender justice and ensures national ownership. UN-supported rule of law projects also seek to support national reform constituencies; ensure a coherent and comprehensive strategic approach; and engage effective coordination and partnerships. At country level, the operational work on rule of law is based on technical assistance and capacity building carried out for the benefit of member states as mandated by the Security Council and/or at their request and in accordance with their national policies, priorities and plans. The response is within the local context, based on national assessments, local needs and aspirations and broad participation.

#### 4.1.3 Lessons from the World Bank

Justice and the rule of law are central to the World Bank's core agenda of ending extreme poverty and promoting shared prosperity, and since the early 1990s, the Bank has supported a variety of justice-related activities through lending and analytical and advisory work.<sup>44</sup> The literature review reveals that the World Bank's approach emphasizes justice and not rule of law. The World Bank's core work in justice focuses on:

- a. improving the performance of justice sector institutions;
- b. advising on criminal justice reform and citizen security by advising working with a wide range of criminal justice sector institutions;
- c. promoting justice in development sectors such as land, extractives, and urban development to support effective mediation of rights and entitlements, address grievances, and promote accountability;
- d. reforming the justice sector for better business and investment climate through review of legal and regulatory frameworks, as well as business court and court enforcement operations, to improve the business and investment climate of countries;
- e. leading global knowledge, learning and measurement initiatives on justice, human rights, and the rule of law;

<sup>44</sup> World Bank, *Justice and Rule of Law*, available at: <<http://www.worldbank.org/en/topic/governance/brief/justice-rights-and-public-safety>>, accessed March 1, 2019.

- f. designing interventions to promote access to justice and legal empowerment; and
- g. focusing on justice issues in contexts of fragility, conflict, and violence.<sup>45</sup>

## 4.2 Addressing Complexity in Rule of Law

Rule of law programme design for the attainment of the SDGs will require a different approach which includes approaches that seek to reverse the reductionist influence on legal institutions would require a complete overhaul of the approach to legislation, administration, and jurisprudence. This will require identification of the most relevant feedback loops in the rule of law ecosystem. The main challenge in social problem analysis many of which underlie the challenges that require rule of law interventions is to figure out the most important feedback loops driving a system's behaviour and then what they should be. Applying the principles of complexity to rule of law programming provides an opportunity to: see and think differently; permit personal initiative; encourage better stakeholder engagement and communication; support for whole-system approaches and taking note of the impact of external influences on the rule of law system. A whole-system approach helps in plugging all holes. To do this well requires increased collaboration between local and central government, all Ministries, Departments and Agencies, development partners, beneficiaries and other stakeholders to ensure the inclusion of all stakeholders.

### 4.2.1 The Problem Driven Iterative Adaptation

To further address complexity of rule of law programmes, the PDIA approach is recommended. The PDIA approach allows one to perform real-time experimental iterations once a problem has been identified and rests on four core principles: local solutions for local problems; pushing problem driven positive deviance; try, learn iterate, adapt; scale through diffusion.<sup>46</sup> PDIA helps one understand the

<sup>45</sup> World Bank, *New Directions in Justice Reform (2012)*, available at: <<http://documents.worldbank.org/curated/en/928641468338516754/pdf/706400REPLACEMOJustice0Reform0Final.pdf>>, accessed March 1, 2019.

<sup>46</sup> M. Andrews, L. Pritchett and M. Woolcock, *Doing Problem Driven Work*, CID Working Paper, no. 307, 2015, available at: <[https://bsc.cid.harvard.edu/files/bsc/files/doing\\_problem\\_driven\\_work\\_wp\\_307.pdf](https://bsc.cid.harvard.edu/files/bsc/files/doing_problem_driven_work_wp_307.pdf)>, accessed March 1, 2019.

problem space when addressing apparently intractable problems of rule of law and its contribution to sustainable development by regulating the necessary change and creating enabling environments for change, that is conditions that together create a sustainable environment that co-evolves with a changing social ecosystem.

PDIA encourages rule of law programme designers to construct and deconstruct the problem that warranted the designer's involvement in the community – first on their own and then, when one is able to state what the problem was, why it mattered, and why it was festering, to engage with the community for input and buy-in. This is critical to mobilising the involvement of the community at all stages of the process and allows the programme designer to manage the authorising environment. PDIA allows the team to design technically viable solutions to locally perceived problems and supports in real time iteration so that less lessons learned are quickly utilized in real time.<sup>47</sup> Applying the PDIA approach to rule of law problems will help in ensuring that interventions address problems in the context that applies to the beneficiary communities.

#### 4.2.2 Change Management

There is a tendency to focus on legal and technical changes and milestones attained in rule of law programmes and not the change in behaviour, attitudes and understanding of rule of law. In addition, many rule of law practitioners and organizations may not understand the stumbling blocks to change management such as embedded bureaucratic systems, organizational culture, and the structure of human interactions.<sup>48</sup> For rule of law projects to succeed, project managers will have to measure change holistically to be able to evaluate the effectiveness of their interventions. This implies developing and executing a change management plan for rule of law projects, a main stay in adaptive project management. It is crucial to the success of rule of law reform efforts that key stakeholders are grounded in a solid understanding of change, how it occurs and how it can be effectively facilitated by both domestic and international rule of law practitioners.<sup>49</sup> Well-executed change management plans would enable practitioners

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<sup>47</sup> *Ibid.*

<sup>48</sup> International Network to Promote the Rule of Law, Institutional Reform and Change Management, available at: <<https://www.inprol.org/rule-of-law-topics/institutional-reform-and-change-management>>, accessed March 1, 2019.

<sup>49</sup> V. O'Connor, A Guide to Change and Change Management for Rule of Law Practitioners, available at: <<https://zakon.co.uk/admin/resources/downloads/change-and-change-management-for-rule-of-law-practitioners-a-guide-to-2.pdf>>.

deeply examine problems, their evolution, solutions and the impact of implemented solutions, including behavioural changes. Further, this necessitates the development of a deliberate change management strategy which is rarely part of the planning for, or implementation of, rule of law projects.<sup>50</sup>

Rule of law project managers will be charged with managing change in stakeholders, who are at the centre of rule of law. They will have to apply adaptive measures, make adjustments as solutions emerge and attitudes change, learn to live with the experiments, manage resistance to change and chaos and also adopt a system-wide approach.

Since rule of law is cross-cutting, project managers will have to build relationships and build trust with stakeholders; find and support “change agents” (identifies a societal problem or unmet societal need and invents possible solutions) or “early adapters” are (people who are interested in new ideas and have a history of championing them); create change networks (collaborate and coordinate), gather and share new information freely and widely; develop a strategy to encourage broad-based and inclusive participation of the general public in any rule of law reform initiative; develop a strategy to address resistance to change; think and act politically; and build enthusiasm and have patience. The implementation of the change management strategy for rule of law activities has the advantage of promoting sustainability of interventions and securing buy-in of stakeholders.

### 4.3 Fostering Ownership of Rule of Law

There is no better way to address the question of legitimacy than promoting stakeholder engagement, transparency and communication. It also requires understanding the history of a society and addressing the underlying causes of rule of law challenges there is. Key stakeholders-include parliaments, local authorities, the Executive branch of government, judiciary, development partners, international financial institutions, Governments, International community (collective of states), development partners, ordinary man and women on the street, corporations, including investors, civil society and other non-governmental actors, media, community and traditional leaders. Members of the society and key stakeholders have to agree on what the rule of law means and the priorities should be. Activities that promote national consensus building may be factored into rule of law project activities to promote awareness and buy-in.

<sup>50</sup> *Ibid.*

#### 4.4 Better Rule of Law Programme Design

At the foundation of rule of law programmes is behavioural change for individuals and institutions which, as evidence shows, takes time beyond project timeframes, thereby affecting measures of impact of project activities and outputs. Concerning project finances, allowance will have to be made for overlaps across financial years and project reporting cycles. The institutionalization of the project logical framework or “log-frame” was a significant advance in the development sector but having a log-frame does not ensure the success of a project.<sup>51</sup> Many project managers using the log-frame fail to understand the critical managerial components of the project, focusing excessively on the technical components while ignoring the processes to manage the constraints of a project.<sup>52</sup> Organizations that use a formalized project management framework have a better clarification and agreement on project goals; a correct identification of the resources required ensuring accountability for results and performance, and fostering a culture that focuses on results.<sup>53</sup>

By developing indicators that track indicators and milestones for key inputs, activities, outputs, outcomes and impacts, the evaluator will be able to assess whether an initiative is being implemented as planned, if it is leading to improvements in safety, security and access to justice, and whether it is necessary to adjust project activities to maximize benefit and overcome unanticipated obstacles.<sup>54</sup> Without data on inputs, activities, outputs, outcomes and impacts it may be impossible to distinguish between security and justice projects that are yielding their intended benefits and those that need to be modified or shut down.<sup>55</sup>

The linear programme model can no longer be applied to the design and execution of effective rule of law programmes. This derives from the reason that cause and effect dynamic of law and development is circular and not linear.<sup>56</sup> Rule of law programmes have to be designed to be adaptive so as to accommodate deviance, positive chaos, and focus on qualitative methodology. This

<sup>51</sup> See G. Coleman, *Logical Framework Approach to the Monitoring and Evaluation of Agricultural and Rural Development Projects*, Project Appraisal (1987), available at: <<https://www.tandfonline.com/doi/pdf/10.1080/02688867.1987.9726638>>, accessed March 1, 2019.

<sup>52</sup> PM4DEV, *supra* note 8, pp. 16–17.

<sup>53</sup> *Ibid.* p. 17.

<sup>54</sup> Department for International Development, *Indicators of Inputs, Activities, Outputs, Outcomes and Impacts in Security and Justice Programming*, available at: <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/304626/Indicators.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/304626/Indicators.pdf)>, accessed March 1, 2019.

<sup>55</sup> *Ibid.*

<sup>56</sup> See Lee (2017), *supra* note 3. p. 438.

will necessitate managing the expectations of stakeholders. The practicalities and realities of meeting goals need to be made clear from the on-set to avoid misunderstandings about deliverables and the time involved. The impact of rule of law programmes takes time to manifest and this needs to be emphasized at all times. Rule of law logical frameworks should be designed with indicators and outputs that accept iteration and reports that go beyond project reporting timelines. Such a framework should position the rule of law, justice and fundamental rights into a logical structure that takes into account the peculiarities of rule of law projects.<sup>57</sup>

The design will have to take into account the relevance of the organization of law, legal frameworks and institutions, giving due consideration to applicable legal frameworks and institutional arrangements in the design and implementation of these projects as well as the “Analytical Law and Development Model” which is an analytical legislative reference to be developed in several key areas to facilitate economic development.<sup>58</sup>

From 2017, a new approach at the World Bank is evident as illustrated in the *World Development Report 2017: Governance and the Law*. The report addresses fundamental questions; Why are carefully designed, sensible policies too often not adopted or implemented? When they are, why do they often fail to generate development outcomes such as security, growth, and equity? And why do some bad policies endure? These questions are at the heart of development.<sup>59</sup> Cognizance is made of the fact that policy making and policy implementation do not occur in a vacuum but in complex political and social settings, in which individuals and groups with unequal power interact within changing rules as they pursue conflicting interests.<sup>60</sup> The report concludes that the capacity of actors to commit and their willingness to cooperate and coordinate to achieve socially desirable goals are what matter for effectiveness and this will most likely have an impact on rule of law programme design.<sup>61</sup>

The World Bank’s theory of change on governance and law has evolved to embrace the policy effectiveness chain through which policy effectiveness is understood not only from the technical perspective, but takes into account the

<sup>57</sup> HIIL Innovating Justice, EU Concept paper- Measuring the rule of law, justice and fundamental rights, developed in consultation with the European Union Agency for Fundamental Rights, available at: <fra.europa.eu/sites/default/files/concept-paper-on-the-rule-of-law-hiil-fra.pdf>, accessed March 1, 2019.

<sup>58</sup> See Lee (2017), *supra* note 3. p. 442.

<sup>59</sup> World Bank, *World Development Report 2017: Governance and the Law*, available at: <http://www.worldbank.org/en/publication/wdr2017>, accessed March 1, 2019.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*

process through which stakeholders bargain over the design and implementation of policies, within a specific institutional setting. The consistency and continuity of policies over time (commitment), the alignment of beliefs and preferences (coordination), as well as the voluntary compliance and absence of free riding (cooperation) are key institutional functions that influence the effectiveness of policies. The five steps in the new approach include definition of the development objective; identification of the underlying functional problem (commitment, coordination, cooperation); identification of the relevant entry point(s) for reform (incentives, preferences/beliefs, contestability); identification of the best mechanism for intervention (menu of policies and laws); and identification of key stakeholders needed to build a coalition for implementation (elites, citizens and international partners). Rule of law programme designers would benefit from the policy effectiveness chain approach which allows for more iteration.

The UNDP Guide provides a wide range of suggestions for conducting measurement in data-poor and politically challenging environments. Complementing the UN Rule of Law Indicators, it makes a compelling case for the benefits of measurement, and also provides a realistic overview of the requirements for effective programme measurement. It provides valuable advice and numerous examples of how UNDP programme results can be obtained even when operating under budget, time and data constraints — all with the intent of encouraging greater attention to data collection by governments, UNDP, the UN Global Focal Point mechanism and other development partners.<sup>62</sup>

The UN has developed a Guide that promotes empirical measurement of the strengths and effectiveness of law enforcement, judicial and correctional institutions in a conflict or post-conflict setting.<sup>63</sup> The instrument, in contrast to some other measurement tools, is designed to highlight apparent successes and shortcomings within institutions and to monitor changes over time within countries. The UN Guide provides step-by-step instructions on how to implement the instrument, with United Nations' support.<sup>64</sup> The first edition of the indicators has a more limited scope, focusing solely on criminal justice institutions, including the police and other law enforcement agencies, the courts, the prosecution

<sup>62</sup> UNDP, *Why, What and How to Measure? A User's Guide to Measuring Rule of Law, Justice and Security Programmes*, available at: <[http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP\\_CPR\\_ROLMGuide\\_August2014.pdf](http://www.undp.org/content/dam/undp/library/crisis%20prevention/UNDP_CPR_ROLMGuide_August2014.pdf)>, accessed March 1, 2019.

<sup>63</sup> United Nations, *The United Nations Rule of Law Indicators: Implementation Guide and Project Tools*, available at: <[http://www.un.org/en/events/peacekeepersday/2011/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf)>, accessed March 1, 2019.

<sup>64</sup> *Ibid.*

and the defence, and corrections. The indicators measure the most fundamental aspects of criminal justice institutions as they relate to the rule of law and focus on institutional capacity, performance, integrity, transparency and accountability. Indicators are used to also monitor how vulnerable social groups are treated by criminal justice institutions. National rule of law actors can use the guide and also develop tools to extend its application to other components of justice and rule of law.

#### 4.4.1 After Action Review

Rule of law programme designers can benefit from timely reflective learning by borrowing a leaf from military science, conducting an After Action Review (AAR) as an in-built structured review or de-brief (debriefing) process for analysing what happened, why it happened, and how it can be done better by the participants and those responsible for the project. The AAR is relevant as a knowledge management tool and a way to build a culture of accountability.<sup>65</sup> Information drawn from the AAR would contribute relevant input to evaluation of the programme activities. During the AAR, the facilitator (evaluator or controller) provides a mission and task overview and leads a discussion of events and activities that focuses on the objectives.<sup>66</sup> At the end of the review, the AAR leader summarizes comments from the observers, covering strengths and weaknesses discussed during the AAR and what is required to fix the weaknesses. An AAR occurs within a cycle of establishing the leader's intent, planning, preparation, action and review and begins with a clear comparison of intended versus actual results achieved. AARs can contribute to greater learning and introspection at a higher level.

#### 4.4.2 Introspection

Introspection is a valuable tool that allows users to consciously carry out self-examination, and the self-analysis involved can empower project team members learn, apply and improve from their past experiences and projects and create a

<sup>65</sup> Government of Australia, *A Leader's Guide to After-Action Reviews*, available at: <[http://www.au.af.mil/au/awc/awcgate/army/tc\\_25-20/tc25-20.pdf](http://www.au.af.mil/au/awc/awcgate/army/tc_25-20/tc25-20.pdf)>, accessed March 1, 2019.

<sup>66</sup> Also see DHS CE Handbook, available at: <[https://www.in.gov/dhs/files/CE\\_Handbook\\_Template\\_Apr-13.docx](https://www.in.gov/dhs/files/CE_Handbook_Template_Apr-13.docx)>.



better future for the beneficiaries.<sup>67</sup> Self-assessment can be defined as systematic, comprehensive, technical and periodic review that an organization undergoes to assess its operational functions and expected outcomes, supported by technical and quantitative models and tools.<sup>68</sup> Introspection takes less time to perform than a final project evaluation and allows for timely improvements on existing projects by enabling the project team to assess what is and is not working and make mid-course corrections.<sup>69</sup> The project introspective is an excellent vehicle to revisit and validate assumptions about features, resources, and schedule made earlier in the project.<sup>70</sup>

D. Marshall summarises the multitude of conceptual and operational questions relevant to detailed introspection and the experience of rule of law in South Sudan below:

What are the assumptions underlying the rule of law? In what way does the technocratic positioning of the rule of law blind us to the problematic aspects of creating law for others? In what ways does rule of law reform work clash with state sovereignty? What does it mean to seek to rebuild a justice system from the ground up? Is rule of law reform antidemocratic? Is the enterprise so flawed that it is impossible, or is it morally and ethically sound but hobbled by poor systems and flawed processes? Operationally, can identifying goals and defining success help us improve rule of law work? How can we better capture and manage our rule of law knowledge? What have been the successes of locally driven, “light footprint” interventions? And how can we best identify and support local priorities, initiatives, and solutions?<sup>71</sup>

In-depth analysis through introspection will help in informing the design of rule of law programmes.

<sup>67</sup> Abeer Al Nuaimi, *Balance between Introspection & Retrospection A Key Factor for Improved Project Performance*, VI PM World Journal, no. IX (September 2017), available at: <<https://pmworldjournal.net/article/balance-introspection-retrospection/>>.

<sup>68</sup> S. Kazmi and M. Naarananoja, *Significance of Management System for Effective Organizational Management*, 3 GSTF International Journal on Business Review (GBR), no. 2 (March 2014), 100.

<sup>69</sup> L. Nix, *Think Introspective, Not Retrospective— Why Wait Until the End* (November 13, 2003), available at: <<http://www.ksinc.com/articles/ProjectIntrospectives.pdf>>, accessed March 1, 2019.

<sup>70</sup> *Ibid.*

<sup>71</sup> D. Marshall, *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward*, available at: <<http://blogs.lse.ac.uk/jsrp/2014/06/23/the-international-rule-of-law-movement-a-crisis-of-legitimacy-and-the-way-forward/>>. Also see D. Marshall (ed), *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward* (Harvard Human Rights Program/distributed by Harvard University Press, 2014).

#### 4.4.3 Inculcating a Well-Developed PDCA Cycle

Proponents of rule of law programmes would benefit from developing and following a well-executed plan-do-check-act (PDCA) cycle. Also referred to as the Shewhart cycle or the Deming cycle, the PDCA is a well-known model for continual process improvement to all stages of the project cycle. This cycle allows rule of law practitioners and programme managers to recognize an opportunity and plan an action; do it by testing the change, check to see how the change conforms to the plan and act on what has been learned and if the change was successful, incorporate the learnings from the test into wider changes.

‘Planning’ involves establishment of the objectives based on the organization’s situation; set targets and develop strategic plans to achieve those objectives which are: project initiation, definition and scope, project resource allocation, management support, policy and management commitment, risk assessment and impact analysis, and developing management strategies.<sup>72</sup> ‘Do’ involves implementation of the strategic plans: develop and implement operational and control strategies, plans, procedures and programs, including; awareness, competence and training strategies, plans and programmes, definition of roles and responsibilities, communication strategies, plans and programs, and allocation of human, physical and financial resources.<sup>73</sup> ‘Check’ involves the measurement of results and performance assessment and evaluation in addition to the system maintenance. ‘Act’ involves correction and improvement of plans and how they are put into practice and review and improvement of the management system to incorporate required changes. The PDCA cycle’s four steps allow for timely improvement or change and can be included in the change management strategy.

#### 4.4.4 Glocalization of the Rule of Law Agenda

For the aspirations of rule of law proponents at global level to take root, glocalization, the simultaneous occurrence of both universalizing and particularizing tendencies in contemporary social, political, and economic systems<sup>74</sup> is relevant to localise the global agenda to suit circumstances on the ground. It

<sup>72</sup> S. Kazmi and M. Naarananoja, *supra* note 52.

<sup>73</sup> *Ibid.*

<sup>74</sup> J. Blatter, *Glocalization*, available at: <<https://www.britannica.com/topic/glocalization>>, accessed March 1, 2019.

calls for promoting the global agenda at local level, utilising the local governance structures and also taking into account the aspirations and needs of local communities. If well harnessed, glocalization can ensure that local contexts are developed when addressing the rule of law agenda laid out in the Sustainable Development Goals. This allows the development of home-grown solutions to problems that are prioritized at global level, comprised of smaller, local solutions rather than big, global solutions. National ownership, fostered through glocalization is critical as a means of achieving sustainability. It will also help in promoting, fitness for purpose-within the interventions and measures that are given context or the targeted community. The clarification of causal mechanisms between law and development in the context of local socioeconomic conditions will assist reformers in improving the effectiveness of law reform projects through better regulatory design and implementation.<sup>75</sup>

USAID has taken into account local contexts. The *Guide to Rule of Law Country Analysis* does not make any recommendations about how to sequence different programs, since country circumstances are too variable to make general prescriptions but provides guidance by suggesting an approach to prioritizing rule of law programming, depending on the country context.<sup>76</sup> It further suggests a range of potential programmatic approaches to addressing specific types of problems in the rule of law.<sup>77</sup>

Devolution and decentralization further disseminate the concerns and needs to the lower level. To ensure that programmes deliver results, the rule of law deficit identified in public administration reform should be addressed because administrative authorities, whether local government or special statutory bodies, are the principal interfaces between the individual and the state, and as such effectively determine the conditions for a peaceful life and economic recovery.<sup>78</sup> For example, it is in the processes of civil registration (issuing of birth, death, marriage, citizenship certificates, etc.) that it is determined whether people are to be regarded citizens, and thus should have the right to education, healthcare, vote, and members of weak and vulnerable groups such as refugees, women and children, tend to be particularly dependent on quality services provided by the administration, and are most seriously affected by problems in this respect.<sup>79</sup> Putting emphasis on the local context while planning rule of law programmes

<sup>75</sup> Lee (2017), *supra* note 3. pp. 418–419.

<sup>76</sup> USAID, *supra*.

<sup>77</sup> *Ibid.*

<sup>78</sup> P. Bergling, L. Bejstam, J. Ederlöv, E. Wennerstrom and R.Z. Sannerholm, *supra* note, 2.

<sup>79</sup> *Ibid.*

should make it easier to implement the SDGs in each country and community and contribute to the collective attainment of the goals.

Having made recommendations on suitable interventions to address the challenges posed by rule of law programme development in the Agenda 2030 era, one draws conclusions that there is hope for meeting targets at the local level if some, if not all of these measures are adopted.

## 5 Conclusion

It is anticipated that rule of law project proponents will be better placed to develop and maximise effectiveness of rule of law development programmes when they take into account recommendations made above. Effective programming on the rule of law requires balancing the different types of needs and timelines as well as paying close attention to what is to be delivered. This implies measuring rule of law changes and impact from ground up, it is about returns, cases completed, damages paid, financial restitution granted in cases, and other measures of trends. Without indicators, it will be difficult to establish that targets are met. Designers and implementers of rule of law technical assistance programmes will have to focus on the importance of local context, of designing projects with users/beneficiaries/partners, and of running small experiments and quickly iterating them based on experience on the ground. They will have to review technical assistance methodology to remove the reductionist approach to project design, move from linear programming to a more systemic approach that allows for iteration. The PDIA approach especially in the role of norms, customs and promotion of collective paradigm shifts to change norms, attitudes by addressing. The norm-setters and rule makers including cultural, traditional and religious leaders have to be brought on board. There are merits in applying the general theory of law and development and its analytical framework through which to examine the effectiveness of relevant laws in developed countries (as well as developing ones) in dealing with the cited economic issues facing developed countries today, with references to their legal frameworks, institutional arrangements, and socio-economic conditions.<sup>80</sup> Strengthening the rule of law is a development process, requires a sequenced approach and long-term investment. Lastly, it is important to remember that holistic and multisectoral approaches are more likely to have impact.

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<sup>80</sup> Lee (2017), *supra* note 3. p. 434.

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