Report

Rule of law, politics and development

The politics of rule of law reform

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Introduction

Rule of law remains a constant theme in development policy and practice, and in recent policy discourse and international commitments it has gained new levels of prominence. Of course, rule of law and justice are concepts that have been bandied around for many decades, gaining ground at different times, for different reasons, and following (more or less) shifting normative orientations and goals across a range of development policy agendas. Despite this recognition, the history of international support to the sector's reform is peppered with a sad trail of failures and chronic underachievement.

This failure has been widely documented in terms of how and why international actors have tended to perform so badly and have continued to get it wrong.[1] At the same time, more so than ever it seems, the international community is committed to advancing an agenda on rule of law support. This is evidenced in, for instance, the UN Declaration in 2012 at the High Level Meeting of the General Assembly on the Rule of Law (A/RES/67/1) and the inclusion of justice for all in the Sustainable Development Goals. Member states at the High Level Meeting committed to:

> *[…] the rule of law and its fundamental importance for political dialogue and cooperation among all States and for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development. We agree that our collective response to the challenges and opportunities arising from the many complex political, social and economic transformations before us must be guided by the rule of law, as it is the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.*

How to square the recognition that rule of law really matters with the poor track record in reforming it? This short note draws on different analytical and empirical bodies of work on the international rule of law agenda, its (evolving) assumptions about the relationship between (rule of) law and development and its practice[2] to help find some better answers to this question.

International support to rule of law has featured across a very broad array of interventions, though it has focused mostly on legal change and justice sector reforms. This note briefly reviews key trends over time and makes the case for drawing on two current propositions for changing policy and practice, namely:

1. The link between rule of law and political settlements: We need to understand rule of law as both a political outcome and a constitutive element of institutional and organisational constraints on the exercise of power. It thus involves those features of the political system and reigning normative framework by means of which the exercise of power and rules of engagement on political, social and economic activities are agreed and managed. This is the stuff of political contestation, and institutional change, bound up in the processes of normative stabilisation that characterise the evolution and cycles of stabilisation of 'political settlements' (Bell, 2015; Kelsall, 2016; Laws, 2012; Laws and Leftwich, 2014; DiJohn and Putzel, 2012). Theory and empirical observations about the relationship between rule of law and political settlements are underdeveloped, despite consensus that the nature of the 'rules' that govern and the degree to which they are binding, predictable and certain are relevant for shaping development outcomes.
2. Being politically smart and adaptive in approaching rule of law reform: Given the deeply political nature of rule of law as both a process and an end in itself, it seems especially relevant and timely that international support efforts take on recent thinking on modes of engagement that take politics and context seriously. Recent work on politically smart forms of engagement has contributed to shifting the policy debate (although practice is in many respects still untested) to cover ways of working that involve a greater appetite for experimentation and sophisticated navigation of the political economy environment (Andrews et al., 2015; Booth et al., 2016; Carothers and Gramont, 2013). This includes more systematic (self-)reflection of the role of international actors in reform efforts. This is true of international efforts to support the rule of law and justice sector reform agendas too, where there has been a move to focus more not only on the political economy of context but also on the specific legal development or justice problems in question (Denney, 2016; Denney and Domingo, 2015; Desai and Woolcock, 2016).

In developing some reflections on these recent trends, this note is thus a call to new research, analytical reflection and empirical observation on their implications for policy and praxis of rule of law support.

1 Chapters in Carothers (2006a); Berg and Desai (2013); chapters in Domingo and Sieder (2001); Kleinfeld (2012); chapters in Marshall (2014); Trebilcock and Daniels (2008); chapters in Trubek and Santos (2006a).

2 Doing justice to the breadth of scholarship on law, politics and development is not possible in such a short note, which diminishes our scope for nuance and more complex treatment of the issues.

The problem of definition: rule of law as an essentially contested concept

We first need to remind current generations of rule of law practitioners as well as the wider development community of the definitional complexity and essentially contested nature of the concept of rule of law. By rule of law practitioners we mean the broad range of policy and practice constituencies ranging from multilateral and bilateral donors, to development economists and lawyers of various normative bents, to human rights advocates and non-governmental organisations (NGOs) working at community levels, among others.[3]

This reminder is perhaps especially important for the wider development community, as the concept often gets whittled down in the fast-pace world of policy discourse to bite-sized meanings: 'rule of law is about property rights'; 'rule of law is about access to justice'; 'rule of law is about state-centric justice and security provision'. It is often something vaguely about the law, about justice, occasionally also about rights (and some rights more than others), and somehow it is about law being important for development. International community involvement is often assumed to entail the provision of technical support (often through cookie-cutter approaches) to what are assumed to be the relevant governance building blocks of rule of law, mostly relating to courts and policing. Thus, in development discourse, outside the much narrower world of rule of law practitioners and scholars (across different disciplines), the understanding of rule of law is extraordinarily patchy.

Rule of law is, of course, a concept that is inevitably contested over time, across legal traditions and disciplinary boundaries and in terms of the (varied) normative goals and ideals it invokes. The imaginary of what we understand by rule of law is conditioned by the socio-political and legal-institutional histories that characterise different societies (Krygier, 2015).

Disagreement is often summarised with reference to binary concepts, such as by contrasting 'thick' and 'thin' definitions or emphasising the 'form' or 'function' (means and ends) components of rule of law. Importantly, common underlying components of rule of law definitions includes that they refer to those processes and agreed rules by means of which the exercise of power is regulated and constrained, according to an agreed set of rules whereby conflict and disputes are mostly resolved through non-violent means. Beyond this, definitions on content, on process and on whose agreement counts vary considerably.[4]

Thin definitions focus on the law-binding and power-constraining features of a rule of law regime, allowing minimum capacity for predictable and stable application of a knowable set of rules (the law) and appropriate regulatory order. In reality, thin definitions are never quite that thin; they are inevitably premised on some normative assumption about how the law is produced and its role in society (Krygier, 2011, 2015; Trebilcock and Daniels, 2008). Thick definitions are those explicitly imbued with normative content – that is, the substantive element of law – where it matters what the law says. And here we enter the more complicated world of competing normative and ideological preferences about what a good and just society looks like, how power should be exercised, how competition over the use and distribution of resources should be regulated, how disputes should be resolved. Thick definitions are also concerned with defining what a legitimate form of norm production is – who has legitimate authority to decide what the law is and how.

Definitions also vary in terms of form (what should rule of law institutions and organisational components look like?) and function (what purpose should they serve?) Typically, in the tradition of western liberal states, form elements on the supply side include different forms of separation of powers, judicial and constitutional review, dispute resolution and law-enforcing bodies (courts, prosecution services, police) and the criminal justice administration, as well as an assortment of other rights protections and accountability and regulatory bodies, including human rights ombudsman, land commissions, electoral commissions and tribunals and arbitration mechanisms of various kinds. On the demand side, rule of law includes the capacity (of 'end-users') to access the law, through the provision of different forms of support for access (legal aid, paralegals, etc.) and channelling of information on rights and justice and holding rulers to account (access to information, awareness-raising and knowledge on how power and rights are defined, distributed and regulated). Important features here might include how law is produced – such as through existing mechanisms of representation and legislative deliberation.

The *function* aspect of rule of law in fact amounts to a list of varying intended ends. At its leanest, rule of law is about the political and institutional capacity of a polity to put (agreed) limits on the exercise of power and to resolve disputes over the allocation of power and resources through non-violent means. But a longer list of attributes variably includes the capacity to put in place effective checks and balances and oversight mechanisms related to how power is exercised (accountability), to resolve disputes, to administer criminal justice and to protect and facilitate the realisation of rights and entitlements as these are defined in the reigning normative framework

3 Taylor and Simeon (2014) provide a synthetic review of this constituency.

4 See Tamanaha (2004) for a comprehensive history of rule of law. See also Kleinfeld (2012); Krygier (2015); Tamanaha (2011); Trebilcock and Daniels (2008) among others.

(Krygier, 2011, Tamanaha, 2011 and 2008; Trebilcock and Daniels, 2008). Moreover, for these functions to be feasible, it is assumed a number of professional capacities and institutional principles are in place. These include such attributes as the independence of judges, different forms of the separation of powers, etc.

Of course, such binaries are useful only to a point. In practice, rule of law takes very different forms, not least that reflect particular and necessarily complex political and institutional histories of contestation and negotiated norm production as societies find their ways to managing and regulating political, social and economic interaction. We start with the following definition of rule of law: *where there is sufficient consensual agreement among elite actors and governing authorities, and most of society, to be bound by an agreed body of norms (that is, the 'law') to manage social, political and economic interactions through non-violent means; and there is sufficient oversight, dispute resolution, regulatory and coercive capacity by the accepted public authority to enforce this normative framework,* through agreed combinations of bureaucratic, adjudicatory, oversight and enforcement mechanisms as befits a society's sociocultural, political and institutional history.

The degree of inclusion, legitimacy, participation and consensual agreement in relation to this is a political outcome and will of course vary, both between and within countries. In this definition, law not only is about formal state law but also includes other 'reigning' norm systems, reflecting the different realities of legal pluralism in many countries. We return to this point below, as it is an especially contested view of what can count as 'law' as opposed to other norm sets.

Rule of law is thus a political feature of how societies are organised: it is both a political outcome (namely, the result of political contestation and negotiation between both elite and non-elite actors) and a constitutive element of how power is exercised and constrained and how societies aim to manage their social, political and economic interaction and distributional battles by non-violent means (Desai and Woolcock 2012; Desai and Woolcock, 2015; Faundez, 2012; Tamanaha, 2011). The rule of law can itself become an instrument of contestation and transformation of state–society relations and wider power structures more generally. It can be used to preserve the status quo and protect the interests of ruling elites – or to change them. This breadth of definition underlines the importance of understanding the political economy of rule of law first and foremost.

Rule of law and development: competing normative assumptions, technical approaches and unsubstantiated theories of change?

So what have been the trends in international rule of law support? This has taken on different narratives as to how it relates to development. There are at least three key moments in rule of law support (Carothers, 2006c; chapters in Trubek and Santos, 2006a; Trebilcock and Daniels, 2008).

1. The first 'law and development' moment in the 1950s saw a convergence in legal and economic thought around the notion that the law and regulatory capacity of the state is important to facilitate and underpin state-led economic modernisation. This mostly took the form of small interventions in Africa and Latin America, oriented towards building up the legal capacity of state bureaucracies and of the legal profession more generally. Resources were targeted at legal and regulatory reform, often in the form of legal transplants from the donor country, and investing in university training, frequently by importing law school curricula regardless of their relevance to national legal traditions and histories of political and state development.
2. The second rule of law moment in the 1980s coincided with the surge of neoliberal thought and structural adjustment recipes. Here, in brief, the purpose of law and justice mechanisms was to limit the role of the state, to 'free' the market and to advance and protect individual property rights. This would require independent judiciaries and law enforcement bodies free of political capture and capable of ensuring a stable and predictable environment of legal security and law-enforcement to advance economic development. The focus was again on legal change, as well as on formal judicial capabilities and infrastructure, drawing on top-down and technical approaches that hoped to emulate institutional, organisational and legal trajectories in consolidated market-based democracies.
3. The third rule of law moment (in the wake of the fall of the Berlin Wall) included recognising the limits of the market and, with new enthusiasm invested in the possibilities of democratisation, greater focus on more equitable and inclusionary forms of development. As the notion of 'human development' gathered pace, this move coincided with a 'thickening' of human rights norms (Sikkink, 2004). The market needed to be constrained in pursuit of social justice, and state–society relations needed to be re-imagined through a

5 Of course, much 'rule of law' analysis focuses on legal systems where the source of law is the state. In liberal conceptions of rule of law, it matters that law is at a minimum the product of democratic deliberation or legislative processes as opposed to being produced in an authoritarian manner. But work on legal pluralism reminds us of both contemporary realities and more historical processes through which legitimate forms of norm production are more diverse and reflect existing mechanisms of governance at different subnational and national levels. It is now also acknowledged that legal pluralism needs to also encompass the complex world of global trajectories and mechanisms of norm production (see for instance chapters in Tamanaha et al., (2013).

more expansive view of rights-based citizenship. Rule of law was seen as a means of building and channelling the oversight capacity to hold states to account against human rights violations. This involved investing in the adjudicatory, law enforcement and security provision capacity to proactively advance newly recognised rights. This was seen in efforts to expand legal and constitutional reform in transition and post-conflict peace agreements. These reforms have tended to include expansive bills of rights, and often a strengthening – on paper at least – of oversight, accountability and judicial review processes and mechanisms. Donors have, moreover, paid increasing attention to notions of 'justice for the poor' and human rights-based approaches, and to support to legal mobilisation and legal empowerment, including a greater focus on the 'end-user' perspective. More recently, the call to arms on engaging with community, customary and non-state forms of dispute resolution is pushing donors in new directions as they struggle to find their way through the forest of what it means to grapple with the complexities of legal pluralism (Albrecht et al; Tamanaha et al ., 2013).

We are potentially witnessing a fourth moment in law and development, associated with different challenges and ambitions relating to rule of law support in post-conflict settings. Of course, there are continuities with the above, but the call to embed rule of law ambitions in peacebuilding operations and statebuilding agendas is a particular feature of the 2000's onwards. What this has meant for the rule of law agenda is often a securitisation of rule of law support, in contexts of ongoing conflict.[4]

In practice, international support of rule of law has been less than clear on the normative and ideological components of this agenda, reflecting the fact that there is far less agreement on the substantive purpose of rule of law than policy discourse often assumes. It is clear that among international rule of law practitioners, *where* the normative emphasis lies in their understanding of rule of law varies over time and ideational and normative preference.

It is also true that international support to rule of law is made up of a much more confused, truncated and disparate set of activities. This in itself would not be problematic were it not for the fact that international interventions are still mostly directed at supporting form-related aspects of judiciaries, criminal justice reform, legal reform and access to justice. The form of rule of law is not unimportant, but support continues to struggle with the challenge of what it takes to engage with the political economy and context-appropriate functional features of rule of law in ways that are more fit for purpose. Thus, the litany of critiques that has echoed through the decades continues to be relevant. These critiques are well documented elsewhere[7]; we draw attention to three:

1. The 'stickiness' of the focus on form over function: This in part reflects the pervasive belief that what works in one country will automatically work in another. While support to legal reform now pays more lip service to 'locally owned' and 'locally driven' agendas, there remains an assumption that law production is a technical endeavour best left to the 'technicians'. This also reflects the belief that the problem of rule of law is located in the justice system, and an overreliance by rule of law practitioners on lawyers to address this. In the past, these lawyers often had been educated in the global North and had limited experience in developing or transitional societies; they had been trained in taking at face value the idea that legal frameworks were replicable elsewhere because of the autonomous character of the law (Golub, 2006; Taylor and Simion, 2014; Tamanaha, 2011).
2. Associated with this is the presence of poorly articulated objectives and weakly reasoned (or extraordinarily implausible) 'theories of change' (Denney and Domingo, 2015; ICAI, 2015; Pasara, 2013.
3. The weak analysis that frequently underpins programming reflects poor attempts at translating the idea that rule of law is a necessary condition for, first, economic modernisation and, second, democratic development. On the one hand, these presumed links need to be unpacked and critiqued.[8] This requires a more granular problematisation of this reasoning in itself. That rule of law is a necessary feature of economic modernisation and democratisation remains a huge oversimplification of complex histories of the political and institutional underpinnings of these processes.

6 See for instance, Porter et al (2014); Sannerholm et al (2012); Sriram et al (2011).

7 Carothers (2006 c); Davis and Trebilcock (2008); chapters Domingo and Sieder (2001); Faundez (2011); Pasara (2013); Trebilcock and Daniels (2008), Upham (2002), among many others.

8 This has been underlined, both by the critics of the new manifestations of modernisation theory and the role of law in development and by those who urge for much more complex and nuanced reading of historical processes of political-institutional and economic change. Sustained economic growth has happened in the absence of rule of law and stable individual property rights regimes. And then, while established liberal democracies appear to correlate with predictable legal orders, we need to be wary of over-claiming the quality or regulatory reach of the rule of law, even in contexts in the global North. These too are fraught with inequalities in terms of how the law is experienced and whose rights are most protected. Moreover, the substantive elements of rule of law within the category of accepted 'consolidated' democracies vary significantly in terms of form (e.g. types of checks and balances, separation of powers, judicial review) but especially in terms of normative content (e.g. how rights and entitlements have been defined and experienced and with what consequences in terms of social justice and equity varies significantly). Tamanaha (2009) further notes that, while the 'revived' rule of law agenda is now more sophisticated in discourse, it essentially is not that far removed from the teleological underpinnings of earlier modernisation tenets. See also Kennedy (2006) and Trubek and Santos Trubek (2006b).

On the other hand, much could be gained from more modest ambitions, based on addressing specific, more tractable 'problems' of justice and rule of law that international support might plausibly address. Here, it is important to underline the need to reflect critically on who defines the problem and how.

Gaps in the knowledge: is there a 'rule of law field' to speak of?

For all that has been written about the rule of law, how much do we know about the political processes by which rule of law like features take shape in different societies? A multidisciplinary research community has in large measure documented the history of rule of law support and its problems. Each study has brought its own particular disciplinary and analytical lens. Yet, as many observers have noted, there is far less coherence than this history suggests (Brinks and Botero, 2014; Carothers, 2006b and c; Perry Kessaris, 2011, 2014; Tamanaha, 2011):

> *The multitude of countries that have been targeted for law and development projects differ radically from one another. No uniquely unifying basis exists upon which to construct a 'field'; there is no way to draw conceptual boundaries to delimit it. Law and development work is more aptly described as an agglomeration of projects advanced by motivated actors and supported by external funding. Law and development activities are driven and shaped by the flow of money that supports it and by the agendas of the people who secure this funding. This is offered as an accurate description, not a cynical characterization (Tamanaha, 2011: 220).*

The rule of law enterprise, then, itself does not constitute a coherent field either of practice or of policy objectives. Moreover, there is no commonly shared analytical language in the scholarship on the role of law in politics and development. This is not to diminish the wealth of analysis and work within concrete disciplines. But as Brinks and Botero (2012), Perry Kessaris (2014) and others underline, the inter-disciplinarity across the social and legal sciences is poor, and there continues to be insufficient cross-fertilisation in the knowledge base to understand the role of law (and rule of law) both in shaping political, economic and social conduct and, in turn, as an outcome of political contestation and negotiation.[9]

Rule of law as a political process: towards more politically smart, adaptive support

Moving the focus away from form to thinking in more politically relevant ways about intended functions of rule of law should help us liberate the agenda of rule of law support from the habit of drawing on the standard menu of activities. It may still be the case that supporting investment on capabilities gap is relevant, desirable and politically plausible. For instance, in Indonesia, investing in a locally advanced project to track pre-trial detention cases was seen as a relevant component in addressing excessive pre-trial detention, as it contributed to better access to information on cases, including for detainees. But this sort of support needs to be linked to in-depth understanding of the underlying problems – including of how rule of law really functions – rather than there being an assumption that one size fits all. Recent thinking on working in politically informed ways reinforces this, as does the adoption of 'problem-driven iterative and adaptive approaches' that is moreover locally grounded (Andrews et al, 2015; Booth and Unsworth, 2014; Booth et al 2016, among others).

Rethinking ways of working, and efforts to be more 'problem-driven' rather than assuming a particular solution from elsewhere will work, helps underline the fact that support to rule of law in all cases involves getting into the messy reality of politics, and being quite clear about the political and normative underpinnings of a particular rule of law project. This also raises questions as to who decides what the 'problem' is and how to ensure this does not result in opting for the simpler problems (Denney, 2016; Denney and Domingo, 2015). There is also the issue of what constitutes relevant evidence. Such a turn also requires more experimental approaches that deliberately seek to discover what will work in particular contexts

These approaches need to draw on what we are learning from the emerging evidence base – and to recognise what gaps remain. The wider knowledge base regarding the political processes by means of which rule of law is negotiated and advanced and with what effect is still quite thin (Brinks and Botero, 2014). In part, this also reflects the relative youth of the field of law and politics is in many respects. But clearly we are also not starting from scratch.

At the empirical end, much of the focus on law and politics has been on the study of specific organisational components – mostly with an emphasis on courts, their rulings and the conduct of judges (Shapiro, 2009). This is important, but there has been much less on the political economy of law production or the distributional impact of law and how it is implemented. In terms of theory, there has been the more parsimonious if highly valuable analysis from political theory and new institutionalism on what it takes for societies to develop what might look like

9 See also Desai and Woolcock (2015) and (2016).

rule of law as defined above.[10] This includes investigating incentives and motivations, given particular combinations of power relations and politics of disruption and change that can explain strategic choices by governing elites and other powerful actors to accept constraints on the exercise of power, and the decision by different political and social actors to be law-bound.

But close political ethnographic studies of what these piecemeal processes look like remain thin on the ground. Detailed analysis of what results in the strategic calculations by different actors to become law-abiding or of experiences of bottom-up contestation through law, with what consequences for distributional struggles and development outcomes, remains both underdeveloped and analytically disperse.

This is urgently needed, to build the broader knowledge base regarding, first, trajectories of political and institutional change that result in and sustain rule of law functions, and second, the features of these change processes that are more likely to contribute to or correlate with more politically inclusive, accountable and socially equitable outcomes. Different rule of law trajectories correlate with different combinations of power relations, resource distribution and ideational underpinnings of the reigning political settlement. In addition, better understanding of these trajectories can generate ideas on areas for experimentation in rule of law support. Here, we present examples of recent scholarship on different aspects of the relationship between law and politics that engages with some granularity on these processes.

Different qualities and experiences of the rule of law

O'Donnell's (1999) graphic colour mapping approach to visualising different qualities and textures of rule of law in Latin America has helped frame some key questions about how rule of law, justice and law enforcement mechanisms are produced and experienced, to take account of the hugely diverse and differentiated experiences of legality.[11] Rule of law is never absolute. It is best imagined as a layered and differential process in which uneven qualities and practices tend to coexist. It is also experienced differentially by different groups in society, mirroring the nature of power relations and structural inequalities. This is true in consolidated democracies with stable legal, judicial and law enforcement orders, in places where resistance among elites to being law-bound is never far from the surface and where competing interests in practice result in some people's rights trumping those of others. Some types of rights are also considered as more important than others.

Game-changing effect of legal change: law as a site of political contestation

Another important area covers the ambitious constitutionalism under the third wave of democratisation, reflected through expanded bills of rights and empowered accountability mechanisms, such as constitutional courts. This has produced new scholarship on the politics of legal change, the role of courts, judicial review and legal mobilisation. It has also developed insights on the possibilities and limits of law and judicial review on distributional and accountability outcomes, (Gargarella et al. 2006; Gauri and Brinks, 2008; Gloppen, 2008; Yamin and Gloppen, 2011, among others).

Research has also looked at the politically instrumental way formal law is invoked, manipulated and undermined to serve particular constellations of power with different distributional consequences, as well as the potential for legal reform to have 'game-changing' effects. It highlights the important legitimating capital these reforms can provide, even if elites have weak commitment to them, and how legal change can create unexpected opportunities for new accountability practices, including through islands of success that create new constraints on the exercise of power.

Constitutional reforms are often considered critical junctures that may enable such game-changing processes. How significantly they mirror or shape new orientations in the exercise of power and in the terms of state–society relations varies enormously, as does the degree to which contending actors perceive them as meaningful sites of political contestation. Law as a site of contestation is powerfully illustrated in the examples of women activists and feminist lawyers engaging strategically with constitutional reform and transitional justice legislation, as demonstrated in the cases of Colombia and Kenya in Box 1.

The formal process of legal change may not in itself be the determining factor for change. Rather, there is a need to look more closely at what motivates the 'game-changing' features of legal change that alter conduct in the exercise of power and thus shift in (some components of) the underlying political settlement. Importantly, the law and the technical expertise required for norm production is a politically valuable skill. The technical, in legal reform, is first and foremost political.

10 For instance, Holmes (2003), Maravall (2003) and other chapters in Przweworski and Maravall (2003). New institutionalism has contributed to the field but often in the form of fairly brushstroke if important analytical contributions, such as in North et al (2009) on progress from closed access, to limited access to open access orders.

11 Brinks and Botero (2014) recently propose mapping the prospects for (and types of) rule of law against patterns of structural inequality.

Box 1: Law and legal change as a site of contestation

In Colombia, women's movements were not motivated to invest in the constitutional reform process of 1991 because of entrenched distrust of exclusionary elite pacts, given the country's political history, and the expectation that the exercise was business as usual. But the opportunities for accountability of state action that the new Constitution of 1991 opened up, not least through the unexpected evolution of a socially progressive constitutional court, have shifted their calculations. In recent decades, feminist action in Colombia has included legal mobilisation before the court, as well as strategic involvement in legislative processes, including in negotiating concrete gender-sensitive wording in new law on transitional justice (Domingo et al., 2015).

The Kenyan Federation of Women's Lawyers (a group of feminist lawyers) was active from the start of the constitutional reform process, resulting in the 2010 text. It engaged not only in drafting text on women's rights but also in proactively supporting the strengthening of oversight and accountability mechanisms (Domingo et al., 2016; Maingi, 2011).

In both cases, the production of law was itself a site of political contestation and change; in both cases, 'technical' legal expertise was a key skill that combined with politically strategic ways of engaging in the political complexities of legal change.

Box 2: Electoral reform in Mexico

In Mexico, the electoral reforms of 1996 brought an unexpected and momentous end to decades of entrenched practices of electoral fraud, and represented a game-changing agreement among powerful actors within the dominant party as well as with other political forces. The emerging new political settlement was to invest in autonomous electoral architecture that would fundamentally alter electoral contest – constituting in many respects an 'island of excellence' in relation to rule of law. For the first time, competing parties were accepting to abide by real electoral results in determining political outcomes and agreeing to the possibility of alternation in power. The motivating set of conditions included among other factors, escalating levels of violence during elections; the emergence of an armed rebellion group in Chiapas; the consolidation of the North Atlantic Free Trade Agreement; and a longer-standing historical memory of the levels of violence that accompanied the Mexican revolution of the 1930s, (Garrido de Sierra, 2012 and others). At the same time, the quality of rule of law in Mexico remains deplorable. The stabilisation of the post-revolutionary political settlement (including through predictable patterns of patrimonialism and state capture at national and sub-national levels by political and economic elites) has been disrupted by the escalation of organised crime, and escalating levels of criminal violence.

Institutional change in practice resulting from legal change can result in creating 'islands of excellence', where some features of rule of law can be meaningfully activated, including in ways that were unexpected by key actors. See Box 2.

Notwithstanding the potentially power constraining elements of some experiences of formal legal change, the politics underlying the frequent gap between constitutional and legal text and implementation is a matter for empirical observation. We also need to be wary of incrementalist readings of rule of law construction that assume a cumulative and linear process (Desai and Woolcock, 2015). These processes are neither necessarily linear nor cumulative, and thus demand very detailed understandings of the political conditions that enable or constrain how law and legal change interrelates with wider process of realignment of interests, power relations and conduct regarding constraints on the exercise of power that might have been seen to be once taken for granted.

Legal pluralism and hybrid political orders

As the complexities of political and institutional change have become increasingly evident for the international rule of law enterprise, an especially challenging feature of contemporary transition or post-conflict settings is that of hybrid political orders and legal pluralism. An important shift in the policy discourse is the recognition that we cannot continue to ignore this. The challenges for international practitioners in engaging with legal pluralism seem especially significant, and necessarily requires deep understanding of the specific features of institutional variation at the national and subnational levels. It is also true that engaging with legal pluralism is no more complex than understanding the particular ways in which state law and justice mechanisms reflect, and in turn shape the direction of, elite bargains and distributional battles – not least as all societies have plural normative orders that co-exist with varying levels of complementarity and tension

Importantly there is now a rich if in many respects young scholarship emerging on the politics of legal pluralism – much of which draws on legal anthropology. Recent contributions about the nature of legal pluralism bring together important analytical insights using different disciplinary lenses about the fact that hybridity exists in all societies (Tamanaha et al 2013 and others). What varies is analysis of the political economy of how the real hierarchies of normative orders that co-exist reflect the nature of underlying political settlement(s) and the consequences for social, political and economic development.

These research findings all have implications for international engagement with rule of law support. First, we need to accept that state law is not the only source of law or institutional arrangement that shapes and regulates social conduct. Norm production takes place in multiple sites – an axiom that is well established in legal anthropology but has only quite recently gained ground in the community of rule of law practitioners.[12]

Second, there is a need for further research on the political economy of the hierarchies between different normative regimes, how these are politically negotiated and what this tells us about the power dynamics that define these hierarchies – who gains and who loses from these arrangements and how they interact. Changes in formal law, for instance in relation to property titling, intended to empower women's access to land or generate opportunities for access to credit can activate different patterns of adjustment to the incentives that this creates. This includes further entrenching the social practice of denying women's access to property and ensuring titling goes to the male members of the community or family (Chopra and Isser, 2011; Isser, 2013; Manji, 1999; McAuslan, 2006).

Third, legal pluralism also presents different windows of opportunity for contesting norms. Chopra and Isser (2011), for example, note the merits of finding opportunity in institutional fluidity:

> *While those in power use forum shopping for their own advantage, it can also be strategically employed by women or those supporting women's access to rights. Where multiple legal orders exist, they can be used to contest each other. By supporting good contests, international actors can support women to become more active in shaping and defining legal norms and processes to advance the implementation of their rights.*

Finally, as the international community struggles to find its way to engage with legal pluralism in supporting rule of law, Faundez (2014) duly warns us of the perils of engaging with it lightly. It is no less risky in terms of 'doing harm' than the experiences of legal transplants that have characterised much rule of law support in the past 50 years.

There is then much we do not know about the political economy of the rule of law – as a political outcome of strategic calculations by elite actors consenting to be bound by an agreed set of binding rules; and how in turn this becomes a process by means of which power is constrained and disputes are resolved using non-violent means. But we do know that, first and foremost, how rule of law-like features in society evolve – whatever the normative and ideational direction – is first and foremost a political process, interconnected with the nature of the underlying political settlement (Desai and Woolcock, 2015; Sannerholm et al., forthcoming; Tamanaha 2011).

The politics of rule of law in practice: a research agenda

Donor support to rule of law needs to engage much more thoughtfully with the function aspects of rule of law and the deeply political processes that shape these. For this, rule of law needs to be taken out of the narrower sector focus to be recognised as a core feature of governance. Here the connection to the emerging analysis of political settlements seems especially relevant – and the role of law in this. Some important features to take note include the following.

Thus, looking first at rule of law as an outcome of political processes of contestation and negotiation to agree a common position on managing and regulation social and political interaction involves assessing the levels of consent by powerful groups to be bound by the terms of the political settlement and the weight of the incentives drawing elite interests under a common purpose. The thick empirical analysis of what these processes look like remains underdeveloped – namely, the political economy of legal development. This includes observing the connections between law production and how this both shapes and reflects distributional struggles over power, rights and resources.

Second, the law itself is a site of contestation, including for non-elite groups, in terms of both its redefinition (e.g. through social mobilisation) and its appropriation by non-elite actors to keep elite actors and abuse by power-holders in check (e.g. through the accountability function of the law, manifested through different strategies of legal mobilisation by non-elite groups). What does it look like when this occurs? How can we explain compliance and law-abiding conduct by the powerful?

Third, neither law itself nor its application, for instance through adjudication, are politically neutral. These are political and discursive spaces within which distributional battles about resource allocation are contested and resolved. Thus, such features as their credibility and legitimacy depend on the degree to which state law (or the reigning normative system) is perceived as authoritative and the security and justice functions are meaningfully embedded in society – at national or community level. This includes also looking closely at trajectories of greater or lesser inclusivity and participation in contesting and

12 Such works as the volume by Helmke and Levitsky (2006) have been hugely influential in bringing into the mainstream of political science and thinking informal institutions. More recently, research in feminist institutionalism is developing very interesting insights on the politics of navigating different institutional and normative orders, including to subvert the reigning political settlement. This is highly relevant to informing a more political understanding of the development of rule of law, including in recognition of the complexities of multiple normative orders that co-exist. See for instance Waylen (2014).

shaping law, and in invoking law to resolve disputes about how power is exercised or resources allocated.

Fourth, the real world of exercising constraints on power, providing safety, regulating conflict and protecting from violent and non-violent means of resolving disputes is much messier. This is complicated by the fact of legal pluralism and normative hybridity. This is especially true of fragile and conflict-affected contexts, where often the social, political and economic rules intersect in complex ways across plural legal spheres that coexist with varying degrees of tension, compatibility or complementarity.

Much of the above is the stuff of political settlements analysis – although analytically the connections between political settlements literature and rule of law scholarship remain underdeveloped, with some exceptions. This note is a call to develop research on the politics of rule of law, underlining the need to take as a starting point context-specific histories of institutional change and legal development. From the perspective of international support to rule of law, understanding how rule of law is enmeshed in trajectories of political settlements (and their evolution) might considerably enhance such efforts, not least by putting the politics back into the law – and recognising the relevance of law in shaping, and reflecting the nature of reigning political settlements.

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