

**“As the Resolution Clearly States...”:
Reflecting on 30 Years of Rhetoric, Rationalisations and Reality in
Promoting the Rule of Law**

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One Office, Two Worldviews

In the mid-1990s I had the opportunity to review the work of selected human rights monitoring missions across the globe, including in post-conflict Cambodia. As part of that consultancy, I met with a senior United Nations official who had been dispatched from his agency's headquarters to oversee its office in Phnom Penh. Much of our discussion consisted of his reading and highlighting in yellow for me key portions of UN General Assembly resolutions pertinent to his work. “As the resolution clearly states,” he repeatedly declared, the General Assembly had “in the strongest terms” affirmed, reaffirmed, acknowledged, emphasized, stressed and otherwise recognized various commitments, duties and principles relevant to both the Government of Cambodia and his office's role there.

Exiting the interview, and stepping across the hall, by chance I faced the door of his deputy, a former UN Border Relief Operation field officer whose background featured facilitating humanitarian relief and protection for Cambodian refugee camps along the strife-torn Thai-Cambodian border in the 1980s. I found a magazine cartoon tacked to the door, satirizing fictional UN entities along the lines of a “Department of Meaningless Resolutions,” “Agency for Empty Rhetoric,” and “Unit for Unrealistic Rationalizations.”

My point in painting these contrasting pictures is not to lambast UN resolutions and certainly not to blast the United Nations as a whole. As this anecdote illustrates, and as with most organizations engaged with international operations, the UN comprises a wide variety of personnel and perspectives. Over the course of 30 years of engagement with international development, human rights, post-conflict situations and political transitions, I have come to respect the fine work done by many dedicated UN employees in challenging, even dangerous circumstances.

But during that time I have also found that rhetoric and rationalisations too often trump reality in dictating the nature of international development institutions' rule of law (ROL) aid,

including but by no means limited to UN agencies. Having been honoured by UN Deputy Secretary-General Jan Eliasson's invitation to contribute a think piece aimed at "stimulating discussion and advancing current debates around the rule of law," I hope that this deliberately provocative paper can in some modest way contribute to such discussion and debates.

The main body of the paper presents a number of assumptions that reflect rhetoric and rationalizations in promoting the rule of law. I counter each assumption by sketching what I see as preferable perspectives and approaches.

Each topic and recommendation could in and of itself be the focus of many articles, debates, discussions and conferences. To some extent, that has already taken place for some topics in other forums. And some of the assumptions discussed here transcend promotion of the rule of law – they involve how the entire field of international development tends to operate. Regardless, these ongoing issues merit intensified attention from development agencies, human rights groups, governments, policy institutes and civil society organizations that are concerned with ROL and its interface with development, peace, security and human rights.

With that said, let the provocation begin...

Some Counterproductive Assumptions

Mistaking Legal Rhetoric and Reform for Reality. Though an admittedly extreme example, the above Cambodia anecdote illustrates a key assumption that plagues ROL promotion: that a resolution, law, court decision or international treaty necessarily translates into improvements in people's lives. Dispatched from his perch in his organization's headquarters, the UN official bought into this notion; his field-based deputy knew better. Legal reform is of course an important element in the process of strengthening the rule of law. But the most common comment I have heard about the rule of law in many countries across the globe is that "our laws are fine, but enforcing them is the problem." Moreover, many other development fields that could benefit from people knowing and acting on their rights (regarding housing, education, public health, local governance and irrigation, to name a few) pay scant attention to promoting such knowledge and action.

Though legal reform remains important for the many countries and fields in which laws are not fine, development agencies devote grossly inadequate resources to *legal implementation*, by which I mean ensuring that rights and decent laws that exist on paper are actually enforced in reality. From agrarian reform in the Philippines to battling apartheid in South Africa to facilitating community dispute resolution in Sierra Leone to obtaining release of unjustly detained prisoners in Malawi to protecting the communal land rights of cultural minorities in Ecuador, nongovernmental organizations (NGOs) have secured beneficial legal implementation even when working with flawed laws. In the process, they often convert their legal implementation impact into home-grown, well-informed, cost-effective legal reform efforts.

An Infatuation with Institutions. Advocates of dominant, orthodox approaches to promoting the rule of law could conceivably claim that legal implementation can mainly be achieved by

working with governments to reform state legal institutions. Along with other government-centric efforts, this focus constitutes what is sometimes called “rule of law orthodoxy.” As acknowledged at the World Bank and at many other development, policy and academic organizations, however, the track record of 30 years of such reforms of state legal institutions has been very weak.

Partly in view of this track record, the Bank’s Justice for the Poor Program, the Open Society Foundations and a host of other entities have been calling for a greater emphasis on *legal empowerment* – the use of law and rights specifically to help disadvantaged populations gain greater control over their lives. At its core, legal empowerment differs from ROL orthodoxy by not concentrating on state institutions *per se*, and by instead building the power of the poor, of women, of the marginalized and of their allies to pursue legal implementation and reform (including institutional reform).

Mistaking Organizations for Institutions. ROL orthodoxy also rationalizes its orientation by conflating two meanings of the term “institutions.” There is of course the everyday way in which we employ the term (including in this paper), as equating organizations. But ROL orthodoxy’s intellectual justification partly relies on the field of institutional economics, which actually distinguishes organizations from institutions. Institutional economics instead views institutions as the “rules of the game,” both formal and informal, that govern human behaviour and influence organizations. The problem is that ROL orthodoxy’s state institution-building draws on institutional economics’ emphasis on institutions, yet misinterprets that emphasis to feature state organizations rather than the rules of the game.

Effective ROL aid, then, would not feature technical assistance for institutions as state organizations to nearly the same degree as is currently the case. It would instead focus on institutions as rules of the game, on political economy analysis and on the power and political dimensions at play in a given issue. This in turn would translate into greater support for legal empowerment initiatives that reflect such analysis and that gradually aim to alter those power and political dimensions in ways that achieve concrete benefits by and for the disadvantaged.

The Rule of Lawyers. At first glance, it would seem natural that rule-of-law aid should be dominated by attorneys. But that first glance would be wrong. Many other actors and factors go into legal reform and legal implementation. These include paralegals, media, community organizing and integration with other development fields, to name a few. Unfortunately, as part of ROL orthodoxy, these tend to be ignored. In fact, the orthodox approach’s emphasis on attorneys can even be counterproductive: national bar associations are often the leading opponents of according formal status to paralegals (who, in the development context, are non-lawyers who help disadvantaged populations know and act on their rights).

A better perspective for ROL aid to take would be that of the public health field, which includes an array of health professionals and preventive strategies, such that it would not readily be accused of comprising the rule of doctors. As crucial as doctors and lawyers are to these respective fields, the former are far ahead of the latter in recognizing the important roles of other personnel and other expertise in rendering effective services and improving the lives of their partner populations.

Reinventing the Wheel. Part of the problem that ROL aid faces is that it has little institutional memory. With development agency personnel typically rotating out of country offices every few years – or even every year or two in “hardship posts” – country-specific programs are repeatedly swamped by new waves of interest influenced by ignorance of institutional reform efforts that have come and gone in the past. For example, in nearly 30 years of exposure to judicial reform efforts in the Philippines I have seen numerous aid agencies launch and eventually abandon programs, each usually ignorant of ineffective efforts they or other organizations previously undertook. The same can be said of my two decades of exposure to such programs in Cambodia, Bangladesh and other countries.

One simple, partial solution to this complex problem would simply be to station personnel in a country for more extended periods, as good organizations such as the Asia, Ford and Open Society Foundations tend to do. The first half of my six years in the Philippines in the late 1980s and early 1990s involved climbing a steep learning curve about the society and prospects for effective ROL aid and legal empowerment work there; I hope and think that in the second half of that period I knew much more and could operate more productively. As an inherently long-term field, international development requires more than short-term country commitments from its personnel.

Don't Just Stand There – Do Something. Much ROL aid rests on the assumption that every problem has a solution at a given point in time. Sometimes pressured by donor nation political leaders who want at least the appearance of action, development agencies rationalize that something must be done to bolster the rule of law even if the prospects are blatantly bleak. A better approach would be to ask whether any efforts are likely to prove effective where political repression, endemic corruption or other constraints are bound to stifle progress. Thus, while a colleague based in Suharto-era Indonesia in the 1990s dismissed ROL aid under that dictatorship as a “black hole” of wasted resources, the presence today of a more reformist administration committed to battling judicial corruption makes the prospects for such aid more promising.

An alternative, more realistic approach, then, would be “to just stand there” – to acknowledge the reality that sometimes there is nothing that can be done to effectively promote ROL institution-building at a given time. Better to invest scarce development resources in other aspects of governance, or (where possible) in grassroots legal empowerment efforts, or in socioeconomic development work that in some contexts could provide a basis for subsequent legal empowerment strategies. The upshot would be to gradually do what we can where we can to strengthen and benefit the disadvantaged, rather than chasing the chimera (in some societies) of the rule of law.

Development Agency Hubris. Complementing the assumption that something must always be done regarding the rule of law, a related rationalization is that development agencies should take charge of planning, directing and doing it. This development agency hubris views NGOs, state entities and other funding recipients as “implementing institutions” for projects all too typically designed for the agencies by international consulting firms, with a patina of local

consultation. The notion that, given sufficient support and flexibility, such recipients could initiate and evolve effective strategies of their own is often alien to this mindset.

Indeed, some of the most effective external support I have seen has been when flexible support has been provided to grantees. This has included but certainly not been limited to Open Society Institute funding to facilitate political transitions in Central and Eastern Europe; Ford Foundation support toward similar ends in South Africa and to undercut the legal underpinnings of apartheid there; and Asia Foundation grants to launch a Philippine Center for Investigative Journalism that, among many other accomplishments, helped force the ouster of a corrupt Supreme Court Justice and President. The common elements in these approaches included relying on grantees to formulate their own agendas. Bilateral and multilateral development agencies do have grant-making programs. But, as with a UN Development Programme legal empowerment project in Indonesia in the 2000s, they can be plagued by excessive bureaucracy and rigidity. Better to delegate such grant-making responsibility to international or national NGOs that can operate in a suitably flexible manner without sacrificing sound financial management.

The World as a Machine: the M&E Charade. Hand in hand with this hubris, one finds development agency assumptions that projects can be neatly planned and progress can mechanically proceed via such tools as logical frameworks, results frameworks and monitoring and evaluation (M&E) plans. Of course there is a need to plan and evaluate what is funded. But all too often the theory of change involved views legal and democratic development as proceeding in a neatly linear manner, akin to building a road or dam. (If only life and development were so simple when it comes to promoting human rights, peace, security and the rule of law.) The unfortunate resulting reality is that entire cottage industries of M&E experts have constructed elaborate, abstruse systems packed with complex terminology that both donor personnel and funding recipients have difficulty comprehending (to the very limited extent doing so is even worth the effort). Tremendous amounts of time go into feeding often useless data into these systems. My consultancies for three major development agencies that included employment of these tools revealed such systems to be charades – and indeed, counterproductive – in terms of understanding and facilitating project progress and impact.

A better approach would be to keep matters simple by virtue of dropping the elaborate, expensive frameworks and tailoring M&E approaches to individual organizations and projects, drawing on qualitative and quantitative methods to ascertain impact and learn lessons. The resulting research would be more selective in some respects and more in-depth in others, concentrating more on understanding carefully culled data rather than collecting reams of it.

Conclusion

I am tempted to close these reflections by claiming that the more things change, the more they stay the same in international development and rule of law promotion. But that would be unfair and inaccurate – thankfully, much has changed for the better over the past 30 years.

Nevertheless, to the extent that such positive changes have taken place, they have often flowed from the efforts and ideas of reformist organizations, movements and people within developing countries. Of course there are instances in which international actors must take the lead. But that should be the default mode, not the dominant approach. We would all be better served by a greater emphasis on financial and political support for those who need it most and are most dedicated to using it well, rather than buying into the hubristic rhetoric and unfounded assumptions that today dominate too much ROL aid.