The Rule of Law and Sustainable Development

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A Report of the CSIS Program on Prosperity and Development
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## Acronyms

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<th>Acronym</th>
<th>Description</th>
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<tr>
<td>CDCS</td>
<td>Country Development Cooperation Strategy</td>
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<tr>
<td>CGD</td>
<td>Center for Global Development</td>
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<tr>
<td>CLA</td>
<td>Collaborating, Learning, and Adapting</td>
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<td>CRS</td>
<td>Congressional Research Service</td>
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<td>DDI</td>
<td>Proposed USAID Bureau for Development, Democracy, and Innovation</td>
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<td>DDD</td>
<td>Doing Development Differently</td>
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<td>DFC</td>
<td>International Development Finance Corporation</td>
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<tr>
<td>DRG</td>
<td>Democracy, human rights, and governance</td>
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<td>IDS</td>
<td>Institute for Development Studies</td>
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<td>MCC</td>
<td>Millennium Challenge Corporation</td>
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<td>MFAN</td>
<td>Modernizing Foreign Assistance Network</td>
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<td>OECD</td>
<td>Organization for Economic Cooperation and Development</td>
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<td>OGP</td>
<td>Open Government Partnership</td>
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<td>RBA</td>
<td>Rights-based approach</td>
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<td>SDG</td>
<td>Sustainable Development Goal</td>
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<td>TWP</td>
<td>Thinking and working politically</td>
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<td>UNDP</td>
<td>United Nations Development Programme</td>
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<td>USAID</td>
<td>United States Agency for International Development</td>
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<td>V-Dem</td>
<td>Varieties of Democracy</td>
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<td>WGI</td>
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Executive Summary

The rule of law enhances the security of person and property, promotes equality of treatment, and provides for the impartial and peaceful resolution of disputes. Global declarations and persuasive research demonstrate that there is a connection between the rule of law and sustainable development. Some have questioned both the strength and the causal direction of this connection. But the correlation between a society’s adherence to the rule of law and its progress toward stability and development is beyond question.

The rule of law is a complex idea. Several organizations have sought to make it more understandable by identifying its constitutive principles. The World Justice Project’s Rule of Law Index ranks more than 120 countries each year on their performance with respect to principles of accountability, just laws, open governance, and accessible and impartial dispute resolution. There is a strong correlation between a country’s ranking on this index and its development progress. The lowest ranking countries largely correspond to countries identified as fragile situations.

General trends in international development policy and practice have influenced international support for the rule of law. The international community has long recognized the imperatives of local ownership and partnership for effective development cooperation. However, progress in fully incorporating those principles into practice has been unsteady.

The situation has improved as donors have embraced problem-driven, iterative, and adaptive approaches that are alert to local political, economic, and social dynamics. There is an increased reliance on political economy analysis to support thinking and working politically. Also, the search for politically smart development cooperation has led to increased attention to power relationships and behavioral causes of societal change. Tensions between the aspirations of local actors and those of their international partners are inevitable, however, and the framework of collaborative relations needs to accommodate diverging perspectives.

Another important trend in development cooperation is the growing diversity of participants and financing. The binary structure of donors and recipients is rapidly changing into a multipolar system in which private financing and domestic public resources have become far more prominent than official development assistance.
There are several reasons for dissatisfaction with the results of international support for the rule of law. In examining these, this paper reviews the inherent difficulty of the challenge of advancing the rule of law. It also describes the added difficulty caused by an increasingly hostile global environment for democratic governance. It then calls attention to valid criticisms that international efforts have tended to focus primarily on technical weaknesses in justice institutions and have not always given adequate attention to fostering a societal commitment to reform, especially in situations where proposed changes encounter strong resistance from powerful economic, social, and cultural forces that have benefited from the status quo.

Certainly, much can be done to adapt international support for the rule of law to adhere more closely to lessons learned about how to be more effective. In particular, it seems evident that an institution-centered approach that emphasizes capacity building should be broadened to focus more on people-centered approaches that emphasize needs, understanding, attitudes, preferences, and beliefs supportive of a societal commitment to reform.

It now seems evident that international support for the rule of law should be characterized by several important factors: an understanding of the political, economic, and social context; judgments about the extent to which local actors and their international partners agree on shared goals and mutual commitments; awareness of the sources and relative strengths of support and opposition; and clear but flexible strategies for overcoming impediments, meeting needs, and achieving desired objectives. The challenge remains of how to convert this knowledge into effective action.

The United States has a strong interest in fostering the rule of law as an integral part of its cooperation with developing countries. The National Security Strategy and the Joint Department of State/USAID Strategic Plan express that interest in terms of both development and security. In order to give effect to these authoritative policy directives, there should be more effective strategies for advancing the rule of law.

Specifically, there should be two mutually reinforcing strategies. First, there should be a concerted effort to strengthen the effectiveness of foreign assistance; and second, that assistance should be embedded into a broad framework of policies and actions that extend beyond the limitations of donor-recipient relationships.

An important aspect of improving the effectiveness of rule of law assistance should be a transition away from a principal concentration on the capacity of justice-sector institutions. Programming should extend beyond that historical focus to put greater emphasis on stimulating receptivity to an inclusive societal commitment to the rule of law, including a commitment to overcome resistance to reform, even when that reform will change long-standing allocations of power.

USAID’s 2019 Policy Framework has taken an important step in this direction. Its premise is that self-reliance depends upon the capacity to plan, finance, and implement solutions to local development challenges and, equally important, a commitment to see those actions through. To implement this guidance, USAID has published country roadmaps that measure local commitment as well as capacity and has instructed field
missions to make their Country Development Cooperation Strategies reflect a shared commitment to change.

One way to increase attention to the importance of commitment to the rule of law is to demonstrate connections between people’s legal needs and their economic and social well-being. These efforts need to look beyond USAID to include the other U.S. agencies that manage foreign assistance programs. Some of those agencies have roles in democracy promotion that are relevant to supporting the rule of law, and they need to be coordinated. Coordination with the programs of other donors is also important.

But a foreign assistance strategy is not enough. No matter how careful the preparation, how thoughtful the program design, or how skillful its execution, there are inherent limitations on the ability of foreign assistance, by itself, to foster a societal commitment to change. In order to support both needed capacity and needed commitment, additional instruments of influence and encouragement will be required in many cases.

Support for the rule of law, therefore, should be integrated into multiple relationships that engage participants in coordinated strategies to foster politically aware collaboration, including, where necessary, support for locally owned efforts toward a redistribution of power away from those whose interests are threatened by change. All concerned U.S. agencies should be involved in the planning, decisionmaking, and implementation of the elements of these strategies. Interagency collaboration should include consideration of the needed kinds of engagement, expected timeframe, amounts and sources of needed investments, channels for coordination with other local and international actors, and responsiveness to needs for adaptation and course correction.

The framework of the Global Fragility Act of 2019 could prove ideal for initial implementation and coordination arrangements. That legislation calls for a comprehensive and integrated 10-year global fragility strategy and 10-year plans for not less than five priority countries and regions, to be identified. Implementation of this statutory plan will be labor-intensive over an extended period of time.

An emphasis on the rule of law would be highly appropriate for inclusion in the integrated plans for some of the priority countries designated under the Global Fragility Act. In this regard, research has shown there is a strong causal relationship between increased respect for the rule of law and a reduced risk of violence.

With respect to countries not designated as priorities under that legislation, it would still be useful to consider several pilot efforts for integrated Department of State and USAID activities while seeking as much coordination from others as possible. The framework established by the Global Fragility Act and experience gained in the act’s implementation could inform these additional pilot efforts.

Thoughtful, coordinated international support can help to advance the rule of law and enhance its contribution to sustainable development, an environment of peace and stability, and the protection of human rights, well-being, and dignity. The United States should be a global leader in providing that support.
Introduction

As a philosophical concept, “the rule of law” evokes broad principles of widely accepted rules, fairly and equally applied, which provide an orderly and reliable framework for the exercise of economic, social, and political freedom. Within that framework, the rule of law enhances the security of person and property, inhibits the abuse of authority, promotes equality of treatment, and provides for the impartial and peaceful resolution of disputes.

The international community has identified the rule of law as a foundation and a safeguard of good governance and has associated good governance and the rule of law with sustainable development. World leaders have adopted declarations endorsing those relationships, including at the World Summit in 2005, the High-level Meeting of the General Assembly on the Rule of Law in 2012, and the Sustainable Development Summit in 2015. These global declarations are more than aspirational. They find support in persuasive research that demonstrates a connection between adherence to the rule of law and development progress that is economically, politically, socially, and environmentally sustainable.

Some analysts have questioned both the strength and the causal direction of the connection between the rule of law and development progress. Also, some studies have questioned whether rule of law reform is too complex to be prioritized among the many priority areas of needed focus in a developing country.


Despite these questions, there is no denying the correlation between a society’s adherence to the rule of law and its progress in achieving sustainable development. This correlation is demonstrated, for example, in the Pillars of Prosperity Index developed by Timothy Besley and Torsten Persson. Their index shows the relationship between a country’s per capita income and two other factors: (1) the country’s peacefulness, and (2) its capacity to enforce tax laws and contracts.4

Even more dramatic is the direct correlation between per capita income and a country’s score for rule of law in the World Bank’s Worldwide Governance Indicators (WGI), as shown in the following chart from a study by Daniel Kaufmann. The World Bank’s World Development Report 2017 contains a similar figure.5

**Figure 1: Correlation between Gross National Income Per Capita and the Rule of Law**

Data Source for calculations: WGI for X axis, Kaufmann, Kraay and Mastruzzi, 2009. Y-axis measures predicted GDP per capita on the basis of instrumental Variable (IV) results for each of the 3 categories. Estimations based on various authors’ studies, including Kaufmann and Kraay.

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Clearly, the international community is persuaded that support for the rule of law is a worthwhile investment for developing countries and their international partners. This is confirmed by the inclusion of Target 3 in Goal 16 of the Sustainable Development Goals (SDGs): “Promote the rule of law at the national and international levels and ensure access to justice for all.” A concrete expression of international support for this SDG target is the average annual commitment by international donors totaling more than $2 billion in official development assistance for legal and judicial assistance.\(^6\)

Two World Justice Project (WJP) reports published in 2019, Global Insights on Access to Justice and Measuring the Justice Gap: A People-Centered Assessment of Unmet Justice Needs Around the World, report on survey data from 101 countries showing the obstacles that people everywhere face to meeting their justice needs and how legal problems negatively impact lives in many ways. Together, these reports persuasively reveal the importance of access to justice for individual well-being.

WJP analysts estimate that 1.4 billion people have unmet civil and administrative justice needs. To this, they added estimates of other kinds of inadequate access to justice. These included people who: were victims of violence, were employed in the informal economy, lacked proof of housing or land tenure, were stateless, were living in modern slavery, or were living in countries with high levels of insecurity and no rule of law. Consideration of all these situations led the WJP to conclude that “5.1 billion people – or approximately two-thirds of the world’s population – face at least one of these justice issues, with many confronted by multiple injustices.”\(^7\)

The OECD regards people’s access to and satisfaction with justice services as “fundamental contributors to trust in government overall.” Both the OECD and the Open Government Partnership (OGP) have been giving increased prominence to access to justice as a development issue.\(^8\)

In addition, the multinational and multi-institutional Task Force on Justice of the Pathfinders for Peaceful, Just and Inclusive Societies has produced an impressive study of the importance of justice for all in the pursuit of the SDGs. The Pathfinders coalition is continuing its work to support the goal of access to justice for all by 2030. It is advocating for “more coherent [international] support for national implementation of the SDG targets for justice.”\(^9\)

\(^6\) “Creditor Reporting System, 2009-2018,” OECD Statistics, http://stats.oecd.org/index.aspx?datasetcode=CRS1#. For 2018 (the most recent year recorded), total commitments were $2.007 billion. The United States accounted for $1.269 billion of that total. A large part of the U.S. investment, which has been declining in recent years, is concentrated in a few large country programs, such as for Afghanistan and Iraq.


The Meaning of the Rule of Law

The rule of law is a complex idea. This is evident in the widely accepted definition formulated by United Nations Secretary-General Kofi Anan in 2004:

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.10

The process of undertaking rule of law reform is also very complex. Merilee Grindle examined this complexity in a widely read 2007 article. As she described it, such an effort needs to take into account: the social, political, economic, and institutional issues supportive of change or likely to constrain it; the incentives, power, and influence of different actors to support or oppose change; the roles, power, and influence of external actors; the expected payoffs; and how to operationalize the intervention.11

Many organizations and individual scholars have sought to make the rule of law more understandable by identifying elements that make up this complex idea, along with indicators to measure performance against those elements. An annex to this paper provides several illustrative statements of “general principles” or “essential elements” of the rule of law.

While lists of principles and indicators can be useful for building understanding and assessing trends, applying general criteria in specific cases requires some caution, in part because of differences among countries in how they select, collect, and interpret data.\(^{12}\)

Perhaps the most succinct and practical list is the one formulated by the WJP as the basis for its widely used and annually updated *Rule of Law Index*. According to this source, the rule of law is a durable system of laws, institutions, and community commitment that delivers four universal principles:

- **Accountability:** The government as well as private actors are accountable under the law.
- **Just Laws:** The laws are clear, publicized, and stable; they are applied evenly; and they protect fundamental rights, including the security of persons and contract, property, and human rights.
- **Open Government:** The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.
- **Accessible and Impartial Dispute Resolution:** Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve.\(^{13}\)

Based on these four principles, the *Rule of Law Index* ranks more than 120 countries—globally and within their respective regional and income groups—on their performance with respect to eight factors. These include constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice. For all three measurement groups (global, regional, and income), there is a strong correlation between a country’s ranking in these eight factors and its development progress. Sixteen of the 20 countries ranked lowest in 2020 on the *Rule of Law Index* also appeared among the 58 situations identified as fragile in the OECD’s most recent *States of Fragility* report.\(^{14}\)

In a 2019 article, the WJP’s Elizabeth Andersen and Ted Piccone provided a thorough explanation of the origins, methodology, and application of the highly respected WJP approach for defining and measuring the rule of law. The same article also offers additional evidence of the importance of the rule of law to “a series of other public goods, from health and education to economic development and opportunity.”\(^{15}\)

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The World Bank's Worldwide Governance Indicators (WGI) seek to measure and rank the performance of more than 200 countries with respect to six dimensions of governance: voice and accountability, political stability and absence of violence/terrorism, government effectiveness, regulatory quality, the rule of law, and control of corruption.

The WGI indicator for the rule of law, derived from 22 sources, seeks to capture “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.” As shown above in Figure 1, this indicator is strongly correlated with economic progress.16

Also relevant is the World Bank’s annual Doing Business report. It measures the ease of doing business in 190 countries by examining the cost and time required to obtain a variety of public services, including the enforcement of commercial contracts. Doing Business also evaluates the extent to which each examined economy has adopted a series of good practices to promote quality and efficiency in the court system. While there is substantial variation in country practices, the general proposition holds true that high scores on contract enforcement and court quality and efficiency tend to be consistent with overall development progress.17

The practice of measuring and comparing country performance regarding the rule of law is one manifestation of a broader effort to draw lessons from measuring and comparing the quality of governance and democratization. In 2011, the Hague Journal on the Rule of Law devoted an entire volume to the design of indices and indicators on justice, governance, and the rule of law. The volume’s overview article by Juan Carlos Botero, Robert L. Nelson, and Christine Pratt provides an informative examination of various indices and indicators, the purposes they intend to serve, and their comparability across countries.18

The large number of indices devoted to the task of measuring governance—beyond just those focused on the rule of law—demonstrates the breadth of thinking and the great variety of practices with respect to those inherently difficult efforts.19

The debate continues about the causation, sequencing, and relative importance of values, institutions, and resources. One widely shared view is that socioeconomic development triggers changes in values, beliefs, and culture that favor individual autonomy and democratic institutions.20 Other research suggests that democratization tends to be initiated by an influential and politically powerful elite with shared “emancipative” values and that the presence of democratic institutions is often then followed by socioeconomic development.21

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A recent publication by several respected economists concluded that a democracy achieves “about 20 percent higher GDP per capita in the next 25 years than a country that remains a nondemocracy,” irrespective of the initial level of economic development. This finding provoked an immediate counterargument by another respected economist “that it’s the degree of democracy that matters.” Other recent analysis reiterates the view that cultural values, including openness toward diversity, lead to rather than follow, the emergence of democracy. This long-standing debate is unlikely to produce a consensus view any time soon. Indeed, it seems unlikely that any single pattern is universally applicable.

Underlying all the research and analysis is the widely shared belief, supported by history, that human security, well-being, and dignity tend to advance along with progress in the spread of democratic values, competent and accountable institutions, and increased access to improved socioeconomic opportunities. USAID Administrator Mark Green reminded his audience of this tendency at a January 2020 conference:

History tells us that states with more democratic characteristics are usually more prosperous, stable, and reliable partners. They’re better economic partners, because they possess the characteristics and conditions that we believe are vital for economic vibrancy and sustainable growth. They’re better strategic partners because they’re citizen-centered, making them less likely to produce terrorists, proliferate weapons of mass destruction or engage in armed aggression. Conversely, authoritarian regimes are, at best, unreliable partners and, at worst, pose significant risks to peace and stability.

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Trends in International Development and Implications for Advancing the Rule of Law

General trends in development policy and practice have influenced international support for advancing the rule of law. Before proceeding to an examination of obstacles to progress and possible ways to respond to them more effectively, it is useful to consider how these trends are changing the global development context.

Over the past two decades, the international development community has repeatedly confirmed its recognition that local ownership of the development process is essential. The principle of respect for local ownership has been endorsed in the declarations of high-level meetings, from the Millennium Summit in 2000 to the Paris High Level Forum on Aid Effectiveness in 2005 to the Busan Partnership Declaration in 2011 to the Sustainable Development Summit in 2015.27

The recognized importance of local ownership has been reinforced by the widely shared characterization of development cooperation as a partnership between a developing country and one or more international actors as opposed to a relationship determined largely by the unilateral decisions of donors who set objectives, select programs, and impose conditions.28

The Busan Partnership Declaration’s enumeration of shared principles to achieve common goals expressed a global consensus on these related concepts of local ownership and partnership:

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Partnerships for development can only succeed if they are led by developing countries, implementing approaches that are tailored to country-specific situations and needs. . . . Openness, trust, and mutual respect and learning lie at the core of effective partnerships in supporting development goals, recognizing the different and complementary roles of all actors.29

At the time of the Busan Conference, it was apparent that the rhetoric of local ownership and partnership had advanced more quickly than changes in donor practices. A 2010 study of governance by the Institute for Development Studies (IDS) concluded that donors had responded to the limited impact of programs to strengthen institutions “by recognizing the need for more politically intelligent, context-specific approaches, and more local ‘ownership.’ But overall, there is still a big gap between donor rhetoric and actual behavior, and for the most part development practice remains donor-driven and aid-centric.”30

Since then, enthusiasm has grown in the development community for problem-driven, iterative, and adaptive approaches to international cooperation. The work of Matt Andrews, Lant Pritchett, and Michael Woolcock has been influential in the evolution of this trend.31

According to their recommended approach, international development actors should base their work, especially in politically sensitive areas, on problems defined by local actors rather than on solutions defined by outsiders. They should be alert to the political, economic, and social dynamics of the local context, oriented toward collective action, and supportive of local systems. Their actions should involve small steps, frequent review, and adaptation, with sensitivity to examples of positive deviance from the norm. The widely endorsed DDD (Doing Development Differently) Manifesto summarizes this approach.32

Increasingly, development agencies are placing greater emphasis on political economy analysis along with the need for thinking and working politically (TWP).33 USAID, for example, has published a practitioner’s guide and related resource materials to help institutionalize the use of political economy analysis in connection with a strong emphasis on collaborative learning and adaptive management.34

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Similarly, an advocacy note by members of an informal group of practitioners, the TWP Community of Practice, acknowledges the difficulty of changing ingrained practices but expresses optimism that progress is being made “incrementally, donor by donor, country by country, project by project.” The note attributes such progress through TWP and DDD agendas to “three core principles of strong political analysis, insight and understanding; detailed appreciation of, and response to, the local context; and, flexibility and adaptability in program design and implementation.”

However, despite the aspirations of donors and aid recipients alike to work as true partners, diverging perspectives in these inherently unequal relationships still sometimes impede the full realization of the ideal. As a result, development cooperation activities continue in some cases to focus more on measurable outputs than on the often-imprecise indications of progress toward long-term development outcomes. An IDS review in 2017 observed:

> With a few exceptions, most donors continue to distribute support on the basis of requests for proposals, expect adherence to static, linear theories of change, and encourage monitoring and evaluation that – for understandable reasons – emphasizes the strict delivery of outputs, for the purpose of making funding recipients accountable, rather than prioritizing the learning processes that are key to delivering results.

A subsequent study from the Center for Global Development concluded that “paying for outputs or outcomes is quite rare in foreign aid—despite several decades of discussion and promotion of the idea. This would be the outcome if recipients had the stronger negotiating position, but that seems unlikely. Instead, it seems that funders have other reasons to prefer paying for inputs over paying for results.”

One manifestation of the lingering tendency of donors to measure performance in terms of “paying for inputs” and “emphasizing strict delivery of outputs” has been an overreliance on an expectation that as local capacity grows, so will readiness to use that

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increased capacity to achieve desired results. Recent policy and practice are showing awareness of the need to avoid such assumptions and instead ensure that development partnerships address the need to build commitment as well as capacity.38

Tension persists between evolving thinking about how development cooperation can be made more effective and the rigid practices sometimes found in the management and evaluation of activities financed by donor organizations. On the one hand, shared commitments and partnerships that are flexible, context-appropriate, politically aware, and result-oriented can best contribute to development. On the other hand, donors are accountable to taxpayers and are therefore obliged to demonstrate how their activities produce results.

One observer describes the tension in terms of demands on development agencies to do two contradictory things at once. Firstly, they need to focus on measurable improvement in key indicators to be achieved during the life of a project. Secondly, and simultaneously, they need to focus on complex and long-term behavioral changes and structural shifts over which, during its life, the project is unlikely to have significant direct influence.39 That kind of tension is evident in the challenges to advancing the rule of law, discussed below.

The search for politically smart development cooperation has led to increased attention to the behavioral causes of societal change.40 This trend is evident in various initiatives to encourage institutional and societal behavior conducive to democratic governance and sustainable development. These include, for example, the extensive work of the OECD to foster public integrity and access to justice as well as the widely known human-centered design approach created by the development organization IDEO.41

A growing body of literature focuses on power relationships within complex social systems and the need in many cases to redistribute power in order to enable change.42 The World Bank’s World Development Report 2017 observed that power relationships within a society affect the contestability of issues in the policy arena, the availability of incentives, and the prospects for changing preferences and beliefs. The report reasoned that it was

sometimes necessary to overcome asymmetries of power in order to achieve desired goals. It identified elite bargains, citizen engagement, and international influence as potential drivers of change.\(^{43}\)

Thus, the clear trend in development thought is toward cooperation adapted to the realities of each situation, carried out through partnerships, and implemented in flexible ways that are responsive to locally identified needs and respectful of local actors, systems, and relationships.

Duncan Green condensed the elements of this approach in the guidance set out in his book *How Change Happens*: be flexible, seek fast and ongoing feedback, be aware that success is often accidental, undertake multiple parallel experiments, learn by doing (and failing), and convene and broker relationships.\(^{44}\) The crucial role of power relationships (and imbalances) is a major theme in Green’s analysis.

This way of thinking is evident in current deliberations specifically focused on strengthening the rule of law. For example, the action agenda adopted at the widely attended World Justice Forum at the Hague in 2019 called for broad international support for societal change, involving:

- people-centered justice systems that help people solve their justice problems and earn their trust in the rule of law,
- multi-disciplinary and cross-sectoral collaboration . . . involving national governments and parliaments, businesses, civil society, and international organizations,
- independent civil society organizations catalyzing reforms and expanding access to justice,
- data collection, research, and learning to better understand people’s legal needs and devise effective strategies to meet them,
- innovation, including through regulatory and procedural reforms that create a level playing field and facilitate the expanded use of new approaches,
- reforms of laws and justice sector institutions to protect human rights and meet people’s justice needs,
- mobilization of expanded public and private financial, pro bono, and in-kind resources to increase access to quality legal advice and support services, and
- commitment to accountable progress under the Sustainable Development Goals.\(^{45}\)

One more important trend in international development cooperation is the growing diversity of participants and financing. The binary structure made up of donors and recipients is rapidly changing into a complex, multipolar system in which private


foundations and the private sector have joined governments and international organizations. Middle-income countries that sometimes still receive assistance are managing their own programs of South-South and triangular cooperation. Commercial and other private financing and domestic public revenues have replaced foreign assistance as the principal sources of global development finance.\textsuperscript{46}

This diversity has given rise to consideration of how the erosion of the donor-recipient paradigm will influence the future of development cooperation. The transition away from the predominance of traditional foreign assistance models is an important aspect of the changing influence of international cooperation in the evolution of the rule of law in developing countries.\textsuperscript{47}


Challenges to Advancing the Rule of Law

Several causes contribute to dissatisfaction with the results of international support for the rule of law. First, the challenge of advancing the rule of law is inherently difficult. Second, an increasingly hostile global environment for democratic governance is impeding progress. Third, traditional models of development cooperation have shown an only limited capability to help overcome resistance to internationally supported efforts.

Advancing the rule of law is difficult.

According to Douglass North and his associates, adherence to the rule of law represents a fundamental societal change. Their view of development looks at two types of societies. First, there are “limited access orders” in which elites manipulate social, economic, and political systems based on limited entry and rent creation. Second, there are “open access orders” in which access to economic, political, and social organizations, including the freedom to form them, is open to all.

The transformation from a limited access order to an open access order, according to this view, involves a lengthy and difficult transition, beginning with three “doorstep conditions”: (1) rule of law for elites; (2) support for perpetually lived elite organizations; and (3) centralized and consolidated control of violence.48

As the authors explain the transition:

Historically, societies that develop sustainable property rights and rule of law began by making credible commitments to sustain those rights for elites. . . . In the transition, property rights and rule of law are transformed in two steps. First, rule of law for elites moves to define elite rights impersonally. That is, all elites possess the same rights, not a set of various rights that differ across individuals and groups depending on their power and their relationship to the ruling

coalition. Once elite rights are defined impersonally, then it may be possible to extend those rights to a wider circle of society.\textsuperscript{49}

One of the authors of the above-quoted report, Barry Weingast, sought in a separate analysis to explain the paradox that developing countries remain resistant to the rule of law even though “the institutional technologies for providing the rule of law – systems of property rights, civil rights, and personal liberties, general incorporation laws, corporate governance structures, contract law, and judicial systems – are relatively well-known.”\textsuperscript{50}

His explanation centered on the inability of limited access orders (also referred to as “natural states”) to make the credible commitments described by North et al. As Weingast put it:

\begin{quote}
Natural states possess many of the same institutions as open access orders, such as markets, elections, and judiciaries. But these institutions work very differently in natural states because they limit access, lack a perpetual state, and cannot deliver benefits to citizens on an impersonal basis.\textsuperscript{51}
\end{quote}

This explanation confirms, with specific regard to the rule of law, the warning that premature efforts to introduce policy and institutional reforms at variance with the logic of an existing limited access order are likely to be strongly resisted. This constraint brought Weingast to a very negative judgment about the value of international development cooperation:

\begin{quote}
Into this world come reformers with the best of intentions. . . . These reformers argue that their proposed reforms will make citizens better off. But they are wrong. The reason is that their reforms arise from the world of open access orders; they seek to transplant a subset of open access institutions into natural states without understanding why natural states systematically differ from open access orders.\textsuperscript{52}
\end{quote}

Weingast’s conclusion that the reformers are wrong and that proposed reforms will not make citizens better off seems unduly pessimistic. The distinction between limited access orders and open access orders helps us to remember that reforms always need to be appropriate for the political, economic, and social context. The reality, though, is that societies do not fall neatly into categories of “limited” or “open” access. As shown in the above-described indices, countries at various stages of development can make progress in strengthening the rule of law and advancing sustainable development, each in its own distinct, country-specific way. Of course, Weingast’s judgment would more likely be correct in a situation where the proposed reforms were imported and lacked local ownership.

\textsuperscript{52} Weingast, “Why developing countries prove so resistant to the rule of law.”
Weingast provides an important reminder that advancing the rule of law is essentially a political process. That is, it involves power relationships within complex, non-linear political and social systems and the incentives, preferences, and beliefs that shape those relationships. As Rachel Kleinfeld has cogently observed, “programs that get adopted are rarely technical best practices, but rather those that amass the most political support.”

Historical research confirms that crossing the threshold to state capability takes a long time. The World Bank’s World Development Report 2011 examined the time it took reforming countries in the twentieth century to achieve basic governance capabilities. The record showed that, with respect to the rule of law, the fastest progress by any country to that threshold was 17 years, and the time for the fastest 20 countries to reach the threshold was 41 years. That record of past experience is certainly an important note of caution for national and international actors that they should not expect their efforts to produce quick results.

**Widespread discontent with democratic governance is creating an increasingly hostile global environment for advancing the rule of law.**

According to the Center for the Future of Democracy at Cambridge University, 2019 experienced the highest level of democratic discontent on record, based on data from 1973 to the present.

*Freedom in the World* 2020, published by Freedom House, recorded the 14th consecutive year of decline in global freedom, a pattern that the report describes as making the world “increasingly hostile to fresh demands for better governance.” Globally, *Freedom in the World* found that more than half of the world’s established democracies deteriorated over the past 14 years, with functioning of government, freedom of expression and belief, and the rule of law the most common areas of decline. The report calls for support for democracy in both word and deed as a key pillar of foreign policy by:

- Emphasizing democracy-strengthening programs in foreign assistance,
- Focusing attention and funding on countries at critical junctures,
- Supporting civil society and grassroots movements calling for democracy,
- Investing in alliances with other democracies and multilateral institutions, and
- Addressing impunity by imposing targeted sanctions on individuals and entities involved in human rights abuses and acts of corruption.

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The concerns expressed in *Freedom in the World* are consistent with the finding of the *V-Dem Democracy Report 2020.* According to V-Dem, over the past 10 years, more countries have declined than have improved in the observance of the critical democracy aspects of freedom of association and expression, deliberation, clean elections, and the rule of law. At the same time, as a sign of hope, the report took note of an “unprecedented degree of mobilization for democracy in light of deepening authoritarianization.”

Studies focused specifically on the rule of law echo this general decline. The World Justice Program’s *Rule of Law Index 2020* recorded a third consecutive year in which the number of countries where overall performance declined exceeded the number where performance improved, a trend described as “continuing a negative slide toward weakening and stagnating rule of law around the world.” According to the WJP, the greatest decline over the past five years has been in three areas: fundamental rights, constraints on government powers, and absence of corruption.

The democratic decline has been the subject of intensive academic study and policy analysis. The Open Government Partnership has observed that the current wave of authoritarianism “is more gradual and less direct than in past eras. Today, challenges to democracy come less frequently from vote theft or military coups; they come from persistent threats to activists and journalists, the media, and the rule of law.”

The shrinking space for civil engagement has been an especially concerning characteristic of the current democratic decline. Amnesty International has cataloged many national examples and analyzed their implications.

Authoritarian leaders have used the pretext of the global coronavirus pandemic that has gripped the world in 2020 as justification for ever greater restrictions on the exercise of civil rights. This intensified pressure threatens to deepen and prolong the already disturbing hostility to democratic governance and the rule of law.

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In two related reports, a United Nations special rapporteur has highlighted how disturbing restrictions on the exercise of the rights to freedom of peaceful assembly and association are impeding progress toward the SDGs. In particular, he cited the following global trends:

- the use of legislation to suppress the legitimate exercise of freedom of peaceful assembly and association,
- the criminalization of and indiscriminate and excessive use of force to counter or repress peaceful protest,
- the repression of social movements,
- the stigmatization of and attacks against civil society actors,
- restrictions targeting particular groups,
- limitations on rights during electoral periods.
- the negative impact of rising populism and extremism, and
- obstructions encountered in the digital space.63

In many cases, restrictions consciously intend to impede international support for local actors, thus isolating them from knowledge and resources that might help them to engage effectively on the issues of contestability, incentives, and preferences and beliefs that the World Bank has identified as levers of change.64

Democratic decline is closely associated with diminishing trust in public institutions. The 2017 Edelman Trust Barometer highlighted this decline, referring to it as “a crisis in trust.”65

Similarly, according to the Pew Research Global Survey in 2019:

A median of six-in-ten think no matter who wins an election, things do not change very much . . . . A median of 44% share the opinion that the court system in their country treats everyone fairly, whereas a median of 53% say this does not describe their country well . . . . Across the 27 countries surveyed, 54% think most politicians in their country are corrupt. And only 35% agree that elected officials care what ordinary people think.66

66 Richard Wike, Laura Silver, and Alexandra Castillo, “Many Across the Globe Are Dissatisfied With How Democracy
In response to these negative trends, the OECD, among others, has instituted a substantial body of work to help restore trust, including an ambitious schedule of published reviews of “government efforts to make the public sector more efficient, effective, innovative and responsive to citizens’ needs and expectations.”

While the related declines in support for democratic governance and trust in public institutions continue, reforms to advance the rule of law obviously will be harder to attain. And if democratic governance and the rule of law are positive factors that contribute to economic and social progress and political stability, a more difficult environment for those factors will mean a more challenging environment for sustainable development generally.

**International cooperation to support the rule of law has not adequately adapted to lessons learned about societal change and sustainable development.**

Because it is widely believed that the rule of law is vital to economic, social, and political development, it is understandable that strengthening the rule of law has become a significant part of the development cooperation agenda. However, past efforts to support fair, effective, and accessible systems of justice through development cooperation have too often resulted in disappointment, as recorded in many studies.

In 2002, USAID commissioned a study of achievements in the rule of law in countries where USAID worked during the 1990s in Africa, Asia and the Near East, Latin America and the Caribbean, and Europe and Eurasia. The study recounted progress in strengthening institutional and human capacities for the administration of justice. It also acknowledged the continuation of many weaknesses and obstacles that often enabled the powerful to escape responsibility, permitted excessive delays and costs to deny effective access to justice, and failed to halt the corruption that undermined public confidence and contributed to dissatisfaction with reforms.

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A 2011 World Bank working paper examined the experience of international support for Latin American justice reform since the 1980s. Like the earlier USAID study, the World Bank paper described improvements in the structure and operations of the justice sector, the improved quantity and quality of resources available to justice institutions, and the strengthened management and administrative systems. However, it found that these improvements had not attained the initial expectations of local reformers and their international partners for a significant impact on higher-order issues of economic growth and citizen security. The paper highlighted the importance of identifying and addressing political impediments in the selection of reforms and the decisionmaking process.\(^70\)

A 2013 study for the United Nations Development Programme (UNDP) distinguished between the demonstrated linkage between the rule of law and development progress and the less certain impact of rule of law programming by international actors on development outcomes. The authors attributed the uncertainty to several factors, including the difficulty of attributing complex changes to specific interventions, donor impatience and reliance on untested assumptions, and the heavy focus of programming on formal institutions. They recommended that the post-2015 development agenda, among other things, should recognize that the “relationship between the rule of law and development arises not only in a particular set of institutions but also across social, economic and political development.”\(^71\)

In 2014, Linn Hammergren, an experienced practitioner and scholar, undertook an exhaustive review of donor-sponsored justice reforms and their shortcomings. Her study addressed the criticisms expressed in an extensive body of case studies and related literature concerning issues such as judicial independence and impartiality, the efficiency and integrity of justice system performance, and the availability of access to formal and informal dispute resolution mechanisms. The principal reasons she cited for disappointing results include:

- **Selection of objectives:** The proposed reforms were not based on a clear understanding of existing problems and their causes, were not specific to the local context, lacked country ownership, and did not adequately consider the interests of all stakeholders.

- **Structure and design:** The proposed reforms were not embedded in an overall sector development plan, were not adequately tested before being implemented broadly, and sought to do too much at once.

- **Implementation:** The reformers moved too fast to expand their proposed changes, failed to consider the additional costs of implementation—or the implications of those costs for sustainability, and were not sufficiently alert to risks of unanticipated consequences.


- **Learning and feedback:** The reformers were overly ambitious in estimating what they could accomplish and failed to learn lessons from past failures that might improve future efforts.72

Hammergren also examined the impacts beyond the justice sector of donor-sponsored reforms, that is, their relationship to higher-level development objectives such as economic growth, democracy enhancement, citizen security, reduced inequality, and empowerment of the poor. Her conclusion, consistent with the views of other studies, was that evidence of donor-supported justice reforms advancing those broader objectives was generally weak.73

The retrospective studies discussed above concentrated primarily on the experiences of countries that were undergoing transitions to democratic governance, as in Latin America and Eastern Europe in the 1980s and 1990s. Leaders in many of those countries and donor organizations (beginning with the United States) were attracted to the inclusion of justice system reform in national agendas.

As the studies reveal, early efforts tended mainly to focus on technical weaknesses in justice institutions and did not give as much attention to the powerful economic, political, social, and cultural forces that were threatened by the proposed changes. These efforts tended to be more successful in improving technical capacity than in fostering inclusive societal change concerning fundamental issues such as ensuring timely access to impartial justice and controlling corruption and impunity.

There are continuing criticisms that, in practice, donor-support for the rule of law too often still remains overly concerned with justice-sector institutions, based on weakly reasoned theories of change, inadequately grounded in local political systems, and lacking the agility they need to adapt to evolving circumstances.74 Rachel Kleinfeld has argued that an institutions-based focus in rule of law programming has limited “the conceptual space for treating rule-of-law reform as a cultural or political problem.” Kleinfeld writes that the problems are frequently located not in the courts, police, prisons, laws, and lawyers, “but in the broader relationships between the state and society.”75

Thus, in addition to Professor Weingast’s question of why developing countries are resistant to the rule of law, we also need to consider why donors and development organizations seem reluctant to look beyond the traditional, institution-focused approach to rule of law reform. Or, as recent studies have asked, why do donors prefer paying for “inputs” and “the strict delivery of outputs” instead of results?76

Certainly, much can be done to adapt international support for the rule of law so as to adhere more closely to what we have learned about local ownership, partnership,

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73 Ibid., 196. See notes 2, 3, and 25, supra, for references to other studies.
76 See the discussion above of Weingast in the text accompanying note 50 and of recent studies by IDS and CGD in the text accompanying notes 36 and 37.
problem-driven iterative adaptation, thinking and working politically, and attention to commitment as well as capacity. The challenge remains of how to convert this knowledge into effective action.
What Should Be Done

The United States has a strong interest in fostering the rule of law as an integral part of its cooperation with developing countries. The current National Security Strategy confirms that interest, stating with respect to developing countries: “The United States will use diplomacy and assistance to encourage states to make choices that improve governance, rule of law and sustainable development.”

The Joint Department of State/USAID Strategic Plan for 2018-2022 reinforces the National Security Strategy by specifying the objective of “strengthening citizen-responsive governance, security, democracy, human rights, and the rule of law.” The Strategic Plan also calls for efforts to “transition nations from assistance recipients to enduring diplomatic, economic and security partners.”

These authoritative policy statements recognize that the U.S. interest in advancing the rule of law has both a security and a development rationale. The U.S. policy directives treat democratic governance, the rule of law, and sustainable development as interlinked objectives engaging a broad range of issues, relationships, and instruments.

Because the rule of law is not only a development issue or only a security issue, international support for it should be undertaken through mutually reinforcing strategies that embrace both the development and the security dimensions of the challenge. First, there should be a concerted effort to increase the effectiveness of foreign assistance, and second, assistance should be embedded in a framework of policies and actions that extend beyond the limitations of donor-recipient relationships.

Increasing the Effectiveness of Foreign Assistance

In general, the effectiveness of foreign assistance can be increased by closer adherence to the proven approaches that have been widely endorsed in contemporary development thinking, discussed above. That means widely participatory identification of local needs and priorities; analysis of the forces that are supporting and that are opposing change;

programming that, while building local capacity, also influences attitudes, values, and beliefs; and collaborative learning and adapting through processes that respect the principles of partnership and local ownership.

This basic approach is likely to encounter unique challenges in the case of the rule of law because the intended changes are so transformative. Thomas Carothers has pointed out that, in this context, the transformation “changes how power is both exercised and distributed in a society and [is] inherently threatening to existing powerholders” and that “rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law.”

Part of the disappointment with the results of assistance to strengthen the rule of law can be attributed to the historical pattern, described above, of programming that overly focuses on the capacities of justice-sector institutions. Programming with that emphasis often includes support for civil society organizations and public information activities. But overall, the historic concentration on institution strengthening has had only limited success in fostering the inclusive societal receptivity and commitment that is needed to overcome inevitable resistance to carrying out sustainable reforms.

There is currently movement on this front. USAID published a new policy on private-sector engagement in 2019, and the Modernizing Foreign Assistance Network (MFAN) recommended in 2020 that USAID adopt a strategy on civil society engagement, asserting that “local civil society, with space to exercise its voice, is essential to meet the promise of sustainable, inclusive, and country-owned development.” Expanded engagement increases opportunities for USAID to be aware of and support broadly-based coalitions for reform.

USAID’s 2019 Policy Framework is a major step toward operationalizing the guidance in the National Security Strategy and the State/USAID Strategic Plan and addressing the key issue of readiness for change. The framework’s explicit premise is that self-reliance depends upon the capacity to plan, finance, and implement solutions to local development challenges and, equally important, the commitment to see these actions through—effectively, inclusively, and with accountability.

USAID now publishes country roadmaps that include the measurement of commitment as well as capacity. The metrics examined in the roadmaps include public access to laws and government data, the right to information, civic participation, and the adequacy of complaint mechanisms, using the indicators of the WJP’s Rule of Law Index. Updated guidance instructs USAID Missions to “collaborate meaningfully with local stakeholders” to make the Country Development Cooperation Strategy (CDCS) “a shared vision of self-reliance . . . that reflects a shared commitment to change.”

82 USAID, Policy Framework, 9.
Looking beyond USAID, numerous U.S. government agencies and nongovernmental organizations, as well as other donor countries and multilateral development organizations, manage foreign assistance programs. This fragmentation presents issues of programmatic coherence to support both commitment and capacity in developing countries, including with respect to the rule of law.

The Millennium Challenge Corporation (MCC) concentrates on countries that have demonstrated commitment to development by their positive performance in three areas—ruling justly, investing in people, and encouraging economic freedom. In particular, the MCC evaluates performance with respect to the rule of law by reference to the Worldwide Governance Indicators. However, even though the MCC monitors a partner country’s continuing performance, the content of MCC programming tends to be less focused on sustaining positive performance on the eligibility indicators once a country has qualified for an MCC compact.

The U.S. International Development Finance Corporation (DFC), established in 2019 to provide support for private-sector investment in developing countries, is directed by law to give preference to projects in countries that have demonstrated consistent support for conditions that enable private enterprise to make a full contribution to development. The specified conditions include market-based economic policies, protection of private property rights, respect for the rule of law, and systems to combat corruption and bribery. The DFC will need to establish policies and procedures to give effect to this statutory mandate.

The secretary of state chairs and the administrator of USAID serves on the boards of both the MCC and DFC. This structure facilitates coordination among those four agencies.

According to a recent Congressional Research Service report, in addition to the Department of State, USAID, and MCC, the U.S. agencies engaged in rule of law promotion include the Department of Justice, Department of Labor, and Department of Defense. The CRS report did not mention some additional U.S. rule of law programs, such as the Department of Commerce commercial law development program. Additional U.S. entities with rule of law programs include the U.S. Institute of Peace and the National Endowment for Democracy and its constituent institutions. Several other donor governments, UN organizations, the World Bank, and regional development banks also have significant rule of law programs.

The work of the WJP, the OECD, and the OGP to highlight the widespread problem of unmet justice needs and examine the implications of that problem for inclusive societies and sustainable development is addressing both capacity and commitment issues. For example, the OECD’s people-centered framework for analyzing justice needs asks four

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85 BUILD Act, Public Law 115–254 (2018), section 1451(g), 22 USC 9671(g).
questions at each of three stages of collaboration—identifying and measuring needs, designing services, and delivering and evaluating those services. The four questions are:

- Who experiences needs, and what needs do they have?
- Where and when are those needs experienced?
- What works to meet those needs most effectively?
- How should responsive services be delivered and evaluated?

Answers to those questions from a wide range of local stakeholders can help to identify incentives for change in preferences, beliefs, and behavior. This approach seeks to find the connections between meeting people’s legal needs and their ability to participate fully in the economy and the society—their healthcare, education, gender equality, employment, housing, and good governance, including trust in government.

Broader and deeper awareness, understanding, and demand can foster a popular response that combines the power of individuals to assert their rights, the commitment of groups to build solidarity, and the readiness of communities to organize and act effectively. By seeking to strengthen capacity while also building shared commitment, such an inclusive approach can help to diminish power asymmetries that are inhibiting reform and perpetuating the status quo.

Studies of successful capacity building in public institutions have identified common features designed to strengthen commitment as well as capacities. Like other lists of ingredients, they do not offer a formula for success, and they need to be adapted to many different socioeconomic and political contexts. Subject to that caveat, they provide useful suggestions on how to combine attention to both aspects of change. They include:

- policies and strategies arrived at through inclusive processes that identify clear goals and make them known to all stakeholders,
- flattened administrative structures and delegation of authority to implementers,
- an emphasis on staff recruitment and development (including rewards for good performance and negative consequences for inappropriate behavior),
- cultivation of a distinct organizational identity, values, and culture,
- a broad cadre of committed leaders,
- continuous learning through monitoring and self-evaluation,
- user-friendly services and durable relationships with service users and other stakeholders, and
- ability to marshal needed resources.

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One way to demonstrate connections between people’s legal needs and their economic and social well-being is to incorporate rule of law principles systematically throughout assistance programs. This kind of integrative strategy for addressing cross-cutting issues and values is well established in development cooperation.

The UN Millennium Declaration included an explicit commitment “to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.”

The World Bank and the OECD have compiled a substantial record of donor experience in integrating this commitment into development cooperation programs, with an emphasis on human rights.

USAID’s strategy on democracy, human rights, and governance (DRG) follows in this tradition. It includes as one of its objectives to “improve development outcomes through the integration of DRG principles and practices across USAID’s development portfolio.” That objective has three components: (1) to strengthen country-based mechanisms for participation, inclusion, and local ownership across all USAID development sectors; (2) to encourage host governments and civil society to employ legitimate and effective accountability mechanisms; and (3) to promote equality of opportunity and access to public goods and services, particularly with respect to poor and marginalized populations.

The rights-based approach (RBA) to development designed by USAID and Pact, an international development organization, is an example of an integration strategy. The premise of RBA is the belief that empowering individuals “to understand and use the law to their benefit has implications far beyond any one particular intervention.” It suggests that “a citizen who can effectively claim his/her rights to, for example, health services may be able to similarly mobilize for rights to education, clean water, or other domains.”

It has been difficult to utilize integrative approaches in implementing the DRG strategy across all sectors and throughout USAID’s decentralized operations, which extend to more than 100 countries. However, the agency’s proposed new bureau for development, democracy, and innovation (DDI) should facilitate the integration of the rule of law and other DRG themes in USAID assistance. The planned reorganization will place the DRG Center of Excellence within an organizational entity that also is the principal repository of technical expertise in other sectoral areas such as education; energy, environment,

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and infrastructure; and economics and market development. This should improve cross-sectoral coordination and encourage more integrated programming.

Efforts to improve the effectiveness of U.S. assistance obviously should include coordination among agency programs. Existing mechanisms, including the whole-of-government Integrated Country Strategies and the USAID Country Development Cooperation Strategies, are intended to serve this purpose. They can be used to foster a policy that approaches the rule of law less as an institution-building issue and more as a political issue centered on people’s needs.

In addition, there should be consideration of opportunities for coordination with rule of law programs of other donors and multilateral organizations, including some multilateral activities partially funded by U.S. contributions. Just as coordination among U.S. agencies is important for the success of national efforts, so too is coordination among international actors. Coordinated foreign assistance that emphasizes people’s unmet justice needs and broadly incorporates rule of law principles in a broad range of sectoral programs can contribute to a more favorable environment for elite bargains and citizen engagement, which are key enablers of commitment.

In such a coordinated approach, the allocation of resources among relevant programmatic objectives—strengthening justice-sector institutions, expanding awareness of rights, increasing demand for and access to justice, and integrating rule of law principles in other sectors—must be determined by the circumstances of each situation. For example, where there is weak commitment and strong resistance to reform, a program might initially prioritize activities to help increase awareness, understanding, and demand and to integrate rule of law principles in other sectors while deferring major investments in justice-sector institution strengthening.

Careful political economy analysis that engages local actors will be essential for informed judgments on those issues. In any context, though, international cooperation should emphasize, in appropriate ways: increasing local awareness, understanding, and demand for adherence to the values and principles of the rule of law in daily life; strengthening the societal commitment to respond to people’s needs; and fostering the evolution of a culture of lawfulness.


Embedding Assistance into a Broad Framework of Policies and Actions Beyond the Limitations of Donor-recipient Relationships

No matter how careful the preparation, how thoughtful the program design, or how skillful its execution, there are inherent limitations to the ability of foreign assistance, by itself, to foster a societal commitment that will be sufficiently strong and sustained to overcome entrenched resistance. This is especially true in situations where politically dominant forces have put in place restraints on local nongovernmental actors and international support for them. In these tough cases, assistance alone has often proved to have only limited, if any, influence on a society’s readiness for commitment.96

The limitations of a donor-recipient relationship are all the more evident at a time when we are experiencing an increasingly diverse array of participants in development cooperation activities and a multiplication of sources of development finance, which together are changing the paradigm for development cooperation. The current global hostility to democratic governance and the rule of law is a further reason why a more comprehensive approach is needed.

In order to foster both the capacity and the commitment that are needed, foreign assistance to strengthen the rule of law must work in harmony with additional instruments of influence, encouragement, and support. As appropriate in each case, those additional policy instruments might include diplomatic persuasion, public information, security cooperation, education and cultural ties, and trade and other economic relationships. This array of international instruments can promote adherence to the rule of law and the evolution of a culture of lawfulness. Local actors must decide whether and how to respond, possibly with reforms that include a redistribution of power “away from those who have too much and into the hands of those who do not have enough.”97 In any event, the response must be locally owned and locally led if it is to produce durable change.

The United States should always be clear and unambiguous in its advocacy for democratic governance, human rights, and the rule of law. However, U.S. support for strengthening the rule of law in any country also needs to be compatible with the local context and integrated into the broad scope of bilateral relations in appropriate ways. In each case, the appropriateness of a U.S. undertaking to promote the rule of law will depend upon some key judgments. Relevant factors will include: the nature of the relationships among key national and international actors; U.S. policy priorities in the country concerned; the relative importance of advancing the rule of law in addition or in preference to other issues; the potential for reform; the likely availability of needed resources and time; prospects for sustaining the effort; and the risks and consequences of failure.

Activities in each country will involve interaction among leaders, institutions, and citizens. Levels of commitment and capacity are likely to vary widely among these

97 O’Brien, “Left Behind or Pushed Behind?,” 318.
stakeholder groups and countries. The challenge is to make the best policy and program decisions in highly disparate and often less than ideal circumstances. This will require distinct arrangements with differing participants, goals, content, and expectations in each case, as determined by the circumstances.

In some cases, there will not be a sufficient community of shared interests in advancing the rule of law. In other cases, there may be strong differences between U.S. views and the views of the local government about priorities and approaches. The United States will sometimes prefer to maintain cooperation with a country in other areas despite differing views about the rule of law. For example, the United States may well defer to a friendly democratic government about how it chooses to address rule of law issues in its country.

A starting point for integrated and coordinated support for strengthening the rule of law could be to select a few countries in diverse circumstances that seem appropriate for concentrated efforts. New activities to advance the rule of law could begin with a joint participatory assessment by local stakeholders together with the United States and other major international actors. The assessment would necessarily examine the history of cooperation with the country. However, it would look more intensively into current attitudes and beliefs as well as political, social, and cultural opportunities, incentives, and impediments.

This would provide a factual basis for judgments on the kinds of critical factors suggested by Merilee Grindle and by the OECD, cited above. These might include, for example:

- the social, political, economic, and institutional issues supportive of change or likely to constrain it,
- the commitments and capacities of engaged local actors and their various roles, incentives, power, and influence to support or oppose change,
- the roles, incentives, power, and influence of external actors,
- local perceptions of priority needs,
- the expected payoffs for progress toward self-reliance and sustainable development, and
- how to operationalize international cooperation activities.\(^{98}\)

To the extent possible, all concerned U.S. agencies should be involved in planning and implementing the elements of coordinated strategies. Interagency collaboration should extend beyond foreign assistance programs to embrace the full range of U.S. programs and activities. It should address the kinds of engagement, expected timeframe, amounts and sources of needed investments, channels of coordination with other local and international actors, and needs for adaptation and course correction.

Continuous coordination will be needed to ensure that the promotion of shared values by outsiders remains consistent with local ownership of the reform process. Participants

\(^{98}\) See Grindle, “Good Enough Governance Revisited”; and OECD, Equal Access to Justice for Inclusive Growth.
will have to be patient, attentive to risks and opportunities, and ready to learn and adapt flexibly as experience grows and circumstances change.\footnote{99}

Initial efforts in a selected country would give prominence to strengthening the rule of law in U.S. planning and program coordination arrangements, such as the Integrated Country Strategy and the Country Development Cooperation Strategy. Beyond this framework, which traditionally has focused on foreign assistance, the Global Fragility Act of 2019 offers a unique opportunity to establish suitably broader and deeper collaborative arrangements.

The Global Fragility Act proclaims a U.S. policy “to seek to stabilize conflict-affected areas and prevent violence and fragility globally.” It calls for a comprehensive and integrated 10-year global fragility strategy together with 10-year plans for not fewer than five priority countries and regions, aligned with the national strategy. For not fewer than two of the selected entities, the priority must be to prevent violent conflict and fragility rather than to stabilize ongoing conflicts.

Under the act, country and regional plans must incorporate interagency coordination and implementation plans, baseline analysis of local conditions, and specified goals and objectives. Each country plan must describe how its goals and objectives will be incorporated into agency plans and strategies, measures to ensure local ownership, monitoring and evaluation frameworks for diplomatic and assistance activities, descriptions of how relevant policy tools will be used, and measures for coordination with local governments, the private sector, and international actors.\footnote{100}

An emphasis on the rule of law should be highly appropriate for inclusion in the integrated plans for some of the priority countries or regions selected under the Global Fragility Act. In this regard, important research by the Alliance for Peacebuilding on operationalizing implementation of the Global Fragility Act has found a strong causal relationship between the rule of law and the risk of violence. The alliance’s working paper explains this finding as follows:

Building on existing research on the predictors of violence escalation, we modeled the potential impact of influence on a number of different independent variables identified as the targets of previous U.S. stabilization efforts (including issues such as government transparency, rule of law, inclusion, the strength of civil society, and other variables).

Based on this assessment, conducted on a global sample, the clear result is that programs which focus on emphasizing or improving rule of law appear to be of significant value in reducing the risk of escalations in violence.\footnote{101}


The legislation emphasizes coordinated implementation. This is a mandate for thoughtful management of shared undertakings by multiple agencies with differing missions, cultures, staffing practices, and resources. Management approaches will need to accommodate sometimes diverging agency perspectives through shared understanding of roles, good communication, reliable monitoring, balance among participants of costs and benefits, consequences for departure from agreed commitments, and mechanisms for dispute resolution.102

Drawing on lessons learned about societal change, the collaborative selection, design, and implementation of the full range of agreed activities in each priority country and region should acknowledge the political nature of the issues to be addressed, the imperative of achieving local political, economic, and social commitment, and the inevitability of opposition. Each country and regional strategy should address the incentives, preferences, and beliefs that influence behavior, the competence and integrity required for effective institutions, and the interrelationships between strengthened commitment and increased capacity. In all of this, care must be taken to maintain the emphasis on local leadership and broad participation. Each country strategy and plan will need to preserve local ownership of the reform process, work in a spirit of partnership, and avoid any temptation to impose solutions.

Also, important will be the rigorous implementation of the act’s provisions on reporting to and consulting with the concerned congressional committees to ensure a shared understanding of and continuing support for the measures being taken. Overcoming fragility will be a lengthy process. While the act’s provision for 10-year strategies and plans recognizes this, sustained congressional support over that span of time will be essential. Keeping Congress currently informed and responding to congressional concerns will help to sustain the necessary interest and support for the long-term efforts.

With respect to countries not selected as priorities under the Global Fragility Act, it would still be worth considering a few pilot efforts for integrated Department of State and USAID activities, utilizing existing coordination mechanisms while seeking from other U.S. agencies and other international actors as much coordination as possible. An interagency headquarters mechanism could support the U.S. country teams in the field and help them to manage policy and programmatic coherence challenges. Experience under the Global Fragility Act could inform the design and implementation of these additional pilot initiatives.

Over time, as country experiments proceed under the Global Fragility Act, or perhaps under a separate Department of State-USAID initiative in some cases, there should

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be international dialogue about the value of the insights gained in promoting greater coherence and effectiveness more generally. Learning from this experience might enhance the effectiveness of international cooperation in areas beyond the focus on the rule of law discussed in this paper and beyond the fragile situations that are the priorities under the Global Fragility Act.
Conclusions

This report seeks to identify ways in which international support for strengthening the rule of law can respond more effectively to needs for both increased capacity for and societal commitment to transformative change. The report has urged that such international support should be characterized by several important factors: an understanding of the political, economic, and social context; judgments about the extent to which local actors and their international partners agree on needs, shared goals, and mutual commitments; awareness of the sources and relative strengths of both support and opposition; and clear but flexible, people-centered strategies for overcoming impediments, meeting needs, and achieving sustainable, locally-owned objectives. An important feature of the report is its insistence that international support for the rule of law should draw upon all appropriate instruments, not just foreign assistance.

The international community has long supported efforts by developing countries to advance the rule of law as an essential element of democratic governance, peace and stability, and sustainable development as well as a safeguard of human rights, well-being, and dignity.

International support for the rule of law has tended to concentrate on strengthening the capacity of organizations in national justice systems. This institution-centered approach has achieved progress in improving the performance of the assisted institutions. However, it has been less successful in enabling people to obtain reliable access to impartial justice, strengthening citizen security, controlling endemic corruption, and holding the powerful accountable under the law.

Donor initiatives to support justice institutions have frequently assumed that increased institutional capacity will translate into improved performance, which, in turn, will influence societal attitudes toward democratic values and practices and enable a societal commitment to strengthen the rule of law. But experience has cast doubt on the validity of this assumption.

Capacity strengthening remains important, but it does not necessarily lead to a societal commitment to reform. A transition from a primarily institution-centered approach to a broader strategy that focuses on the needs of the people and how their society responds to those needs can better serve to increase awareness, create incentives, and help to alter attitudes about the values of the rule of law, thereby fostering both commitment and capacity.
The effectiveness of international support for the rule of law can benefit from reflection on evolving thinking about development. Relevant considerations include recognition of the essentially political character of the development process, the influence of power relationships within complex political and social systems, and the attitudes, preferences, and beliefs that shape those relationships.

The clear trend is toward politically smart development cooperation that is context-specific, informed by behavioral science and political analysis, and directed at helping to enable societal commitments to embrace change. Where the change is transformational and threatens the interests of powerful forces, as in holding all equally accountable to the rule of law, broadly shared supportive attitudes, preferences, and beliefs are essential.

We have learned that development cooperation efforts should rely on flexible, people-centered, and results-oriented partnerships that respect local ownership. These partnerships should be problem-driven, iterative and adaptive, and continuously alert to the political, economic, and social dynamics of local context. Efforts should be implemented collaboratively through small steps, frequent reviews, and adaptation to evolving circumstances. That body of learning is certainly applicable to international support for the rule of law.

But reliance on the donor-recipient paradigm is not sufficient. The National Security Strategy and the Joint Department of State/USAID Strategic Plan provide authoritative confirmation that the interest of the United States in fostering adherence to the rule of law in developing countries has both a security and a development rationale. Experience has demonstrated the limitations of foreign assistance, by itself, to induce commitment to societal change, especially in situations where the change is transformational in nature and strongly opposed by powerful beneficiaries of the existing order.

Therefore, efforts to strengthen commitment as well as the capacity to advance the rule of law should involve a coordinated array of policy instruments in addition to foreign assistance. A coherent strategy should bring together the various agencies responsible for development cooperation and also bring into harmony their development efforts and the complementary work of the agencies that have lead responsibilities for diplomacy, public outreach, security cooperation, cultural ties, and trade and other economic relationships.

The United States should organize and launch a coordinated initiative to advance the rule of law as an integral aspect of its relations with developing countries, beginning in a few countries where there are significant U.S. interests, adequate resources, and reasonable prospects for success.

The Global Fragility Act provides an ideal structure for incorporating such an initiative within its required long-term global strategy and integrated country plans in selected priority countries. In addition to other advantages, including an emphasis on the rule of law in several country plans under the act will ensure continuing executive branch and congressional interest and attention, thereby providing incentives for coherent planning, coordinated program design, and sound execution.

With respect to countries not selected as priorities under the Global Fragility Act, the act’s framework still provides a valuable model for informing several freestanding initiatives.
with coordinated leadership from the Department of State and USAID and, as much as possible, participation from and coordination with other U.S. agencies and other international actors.

Thoughtful and coordinated international support can help to advance the rule of law and enhance its contribution to sustainable development, an environment of peace and stability, and the protection of human rights, well-being, and dignity. The United States should be a global leader in providing that support.
About the Author

James Michel is a senior adviser to the Center for Strategic and International Studies and an independent consultant in development cooperation. Ambassador Michel’s long career in public service has included service in the Department of State as deputy legal adviser and as principal deputy assistant secretary for Inter-American Affairs. He also served in the United States Agency for International Development as assistant administrator for Latin America and the Caribbean, acting deputy administrator, acting administrator, and counselor to the agency. In addition, his public service included appointments as U.S. ambassador to Guatemala and as chair of the Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD). In the private sector, he was senior counsel to Tetra Tech DPK, an international consulting firm. He received his JD, cum laude, from Saint Louis University.
## Annex – Illustrative of Statements of Rule of Law Principles

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<tr>
<th>USAID, Essential Elements of the Rule of Law</th>
<th>World Justice Project, Universal Principles of the Rule of Law</th>
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<tbody>
<tr>
<td><strong>Order and security</strong>: The law should protect the exercise of rights, including rights to personal security and property.</td>
<td><strong>Accountability</strong>: The government as well as private actors are accountable under the law.</td>
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<td><strong>Legitimacy</strong>: The law should represent the collective will of the people and approximate the common good and, therefore, merit respect</td>
<td><strong>Just laws</strong>: The laws are clear, publicized, and stable; are applied evenly; and protect fundamental rights, including the security of persons and contract, property, and human rights.</td>
</tr>
<tr>
<td><strong>Checks and balances</strong>: There should be a separation of governmental powers that prevents the concentration and abusive exercise of power.</td>
<td><strong>Open government</strong>: The processes by which the laws are enacted, administered, and enforced are accessible, fair, and efficient.</td>
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</table>
| **Fairness**:  
  - Equal application of the law: the laws are applied equally to all persons.  
  - Procedural fairness: procedures by which the law is applied conform to accepted standards of fairness.  
  - Protection of basic human rights and civil liberties: National legal systems meet minimum international human rights standards.  
  - Access to justice: citizens have reasonable opportunities to hold governments and others accountable under the law. | **Accessible and impartial dispute resolution**: Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve. |
| **Effective application**: the laws are consistently enforced and applied. | |

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The Rule of Law and Sustainable Development | 42
Tom Bingham, Ingredients of the General Principle of the Rule of Law*

<table>
<thead>
<tr>
<th>1. <strong>Accessibility of the law:</strong> The law must be accessible and so far as possible intelligible, clear, and predictable.</th>
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<tr>
<td>2. <strong>Law not discretion:</strong> Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.</td>
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<td>3. <strong>Equality before the law:</strong> The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.</td>
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<td>4. <strong>The exercise of power:</strong> Ministers and public officers at all levels must exercise the powers conferred on them for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably.</td>
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<td>5. <strong>Human rights:</strong> The law must afford adequate protection of fundamental human rights.</td>
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<td>6. <strong>Dispute resolution:</strong> Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties are unable to resolve.</td>
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<td>7. <strong>A fair trial:</strong> Adjudicative procedures provided by the state should be fair.</td>
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<td>8. <strong>The rule of law in the international legal order:</strong> The rule of law requires compliance by the state with its obligations in international law as in national law.</td>
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### EU Framework to Strengthen the Rule of Law

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<th>Principles which define the core meaning of the rule of law include:</th>
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<td>1. <strong>Legality</strong>, which includes a transparent, accountable, democratic, and pluralistic process for enacting laws,</td>
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<td>2. <strong>Legal certainty</strong>, which requires <em>inter alia</em> that rules are clear and predictable and cannot be retrospectively changed</td>
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<tr>
<td>3. <strong>Prohibition of arbitrariness of the executive powers</strong>, which requires that any intervention by the public authorities in the sphere of private activities of any person, whether natural or legal, must have a legal basis and be justified on the grounds laid down by law</td>
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<tr>
<td>4. <strong>Independent and effective judicial review, including respect for fundamental rights</strong>, which requires that the acts of EU institutions are subject to review of their compatibility with the general principles of law and fundamental rights, and</td>
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<tr>
<td>5. <strong>Equality before the law</strong>, including respect for human rights and non-discrimination.</td>
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<td>DFID, Constitutive Elements of the Rule of Law</td>
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<td>---------------------------------------------</td>
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<tr>
<td>1. Public authority is bound by and accountable before preexisting, clear, and known laws.</td>
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<td>2. Citizens are treated equally before the law.</td>
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<td>3. Human rights are protected.</td>
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<td>4. Citizens can access efficient and predictable dispute resolution mechanisms.</td>
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<td>5. Law and order are prevalent.</td>
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Bibliography


Global Fragility Act of 2019, Division J, Title V, of Public Law No: 116-94, December 20,


improve living standards—many are critical of institutions politicians.


