Overseas Development Institute

Opinion

May 2009

131

Why Rule of Law matters for development

Pilar Domingo

'Constructing rule of law is a messy business. This is about how political power is exercised, and how resources are distributed. And it is also about human rights'

Rule of law anchors the relationship between state and society around an accepted set of political, social and economic rules. It is the foundation, and the result, of political settlement. For two decades the donor community has – quite rightly – supported rule of law reform, but this support has been based on a vast range of agendas and objectives ranging from rights protection to anti-corruption strategies to criminal justice reform. Donor support has been motivated sometimes by concerns on the legal security of property rights, sometimes by the drive for human rights protection and the principles of due process. It has also been driven by governance and accountability issues and the need for state-building, and, increasingly, by security concerns.

But the results on the ground have been disappointing. Why is this? A combination of unrealistic expectations and top-down, technical approaches may be to blame. In many cases, support for rule of law reform has failed to take into account local context, and has been driven by supply, rather than demand. Too often, the result is technical solutions that fail to match local needs. In addition, many initiatives try to address just one part of rule of law, such as reform of the police services, or improved caseload management in the courts. These 'silos' have also limited the impact of donor efforts to date – a fact that is, increasingly, recognised by donors themselves.

It is in fragile states that the need for rule of law is most urgent, and its absence felt most keenly. The donor community needs to move fast, therefore, to engage more effectively on this issue: on what rule of law involves, and why it matters for development, governance and state-building. Above all, if there is to be any chance of improving the quality and effectiveness of donor involvement in rule of law construction, there needs to be far greater acknowledgement of the deeply political nature of the exercise.

The framework I suggest develops a conceptual map around three overlapping but distinct components – or pillars – of rule of law (Figure 1), all of them critical to securing legitimacy for governance and effective state-building. It is important to stress that policy entry points must not develop in silos, but should be interconnected through an integrated approach to rule of law.

- First, rule of law is about the degree to which there is political will and institutional capacity to ensure accountable government. This relates to the extent to which those in power are constrained effectively by a pre-established and widely accepted set of rules of political engagement. This may take a constitutional form. Or it may be the result of tradition built up over time, such as some forms of common or community law. The key point is that these are rules to which power-holders agree to abide. When it comes to effective state-building, it is best if it is structured around democratic forms, arranged through various formats of separation of powers, such as the three that are most traditional: legislative, executive and judiciary.
- Second, rule of law is about the capacity of the state to protect and deliver the rights of citizens, however these are defined, but preferably in line with international human rights commitments and reflecting an inclusive social contract. State presence becomes embedded in society through the realisation of citizenship rights. And it is through those rights that citizens become empowered to shape political and development outcomes. Rule of law – understood as the legal protection of rights – is what gives citizens political and legal voice. This requires mechanisms of redress, so that citizens can claim their rights. And these mechanisms, in turn, depend on the quality of access to justice, due process and minimum levels of effective, equal and predictable application of the law.
- Third, rule of law is about the state's ability to enforce the law and protect its citizens through the provision of security against different forms of threat. The main issue

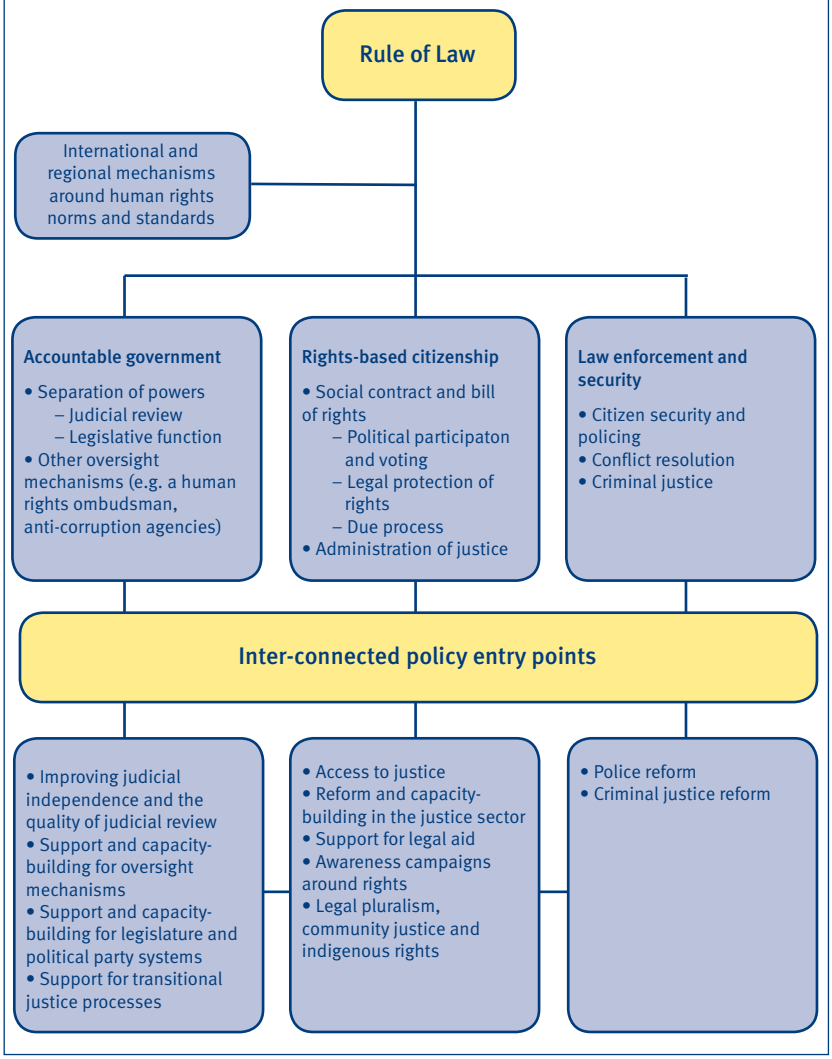
Overseas Development Institute

ODI is the UK's leading independent think tank on international development and humanitarian issues.

ODI Opinions are signed pieces by ODI researchers on current development and humanitarian topics.

This and other ODI Opinions are available from www.odi.org.uk

Figure 1: Towards an integrated rule of law framework



here is the policing and security capacity of the state, and the degree to which it is aligned with the principles of due process and 'do no harm'.

In this new millennium, rule of law construction is also supported by a growing web of regional and international conventions and instruments around human rights. These constitute 'soft' (in terms of their weak enforcement capacity) mechanisms of oversight on the behaviour of states and individuals in power. They include the International Criminal Court, and the Inter-American system of rights protection, among others, and are increasingly relevant in terms of supporting the rule of law agenda.

All three of these pillars are vital for the architecture of governance in rights-based democratic states, and positive synergies occur wherever the three meet. However, rule of law is, in essence, a political construct that is produced by internal processes at the country level. Moreover, its construction is, inevitably, an uneven, non-linear and messy process, as the stakes are high. This is about how political power is exercised and how resources are distributed. It is this complexity that needs greater acknowledgement from the donor community.

There are, in fact, diverse views within the donor community about what is really involved in the rule of law agenda. This reflects not so much conflicting definitions, but rather varying donor priorities on the different aspects of rule of law, ranging from a focus on justice administration reforms, criminal justice reform, the security sector, and anti-corruption campaigns, to approaches that are more centred on human rights. Interestingly, these priorities, coupled with the tendency for rule of law projects to be carried out in parallel and disconnected silos, tell us little about the broader objective of rule of law construction.

The development agenda has gone some way towards dispelling earlier myths about rule of law construction. Overall, at a discursive level, it has moved on from thinking of rule of law as a purely technical and institutional matter, to a greater political appreciation of how norms and rules are produced.

Second, there is greater recognition of the need for a more nuanced understanding of the complex interaction between the formal and informal rules that shape societies and political conduct. This is especially so in fragile states and regions, where state presence is problematic, and where parallel structures of rules and authority are likely to co-exist.

Third, there is the need to work with those on the ground and to support coalitions across different social and political arenas around building rule of law. In the hard cases of fragile states, supporting rule of law should, surely, be at the heart of any strategy that aims to facilitate such processes as peace-building and state-building, around which levels of trust and acceptance on the rules of political engagement can be negotiated.

Recent thinking on the need for a more sophisticated understanding of state-building processes is encouraging, as is the more open engagement by the donor community with political economy analyses of what drives change in specific contexts. To make a real difference on the ground, however, the challenge is how to translate this knowledge into more effective donor support for rule of law, rights-based citizenship and – above all – human rights.

Written by Pilar Domingo, ODI Research Fellow (p.domingo@odi.org.uk).

Overseas Development Institute

111 Westminster Bridge Road, London SE1 7JD

Tel +44 (0)20 7922 0300

Fax +44 (0)20 7922 0399

Email publications@odi.org.uk

ISSN 1756-7629