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How to Stop the Backlash? Rule of Law and Development Cooperation: Roundtable Report

The Rule of Law is an important principle and objective in Swedish foreign policy and development cooperation. Against the backdrop of declining respect for rule of law globally and in most countries, what are the main challenges and opportunities in the context of development cooperation?

On the occasion of International Development Law Organization (IDLO) Director General Jan Beagle's visit to Stockholm, the Expert Group For Aid Studies (EBA) together with Sida and the Swedish Ministry for Foreign Affairs organised a roundtable discussion on Rule of Law: Challenges and Opportunities in the Context of Development Cooperation. Participants represented IDLO, Sida, Ministry for Foreign Affairs, Folke Bernadotte Academy (FBA), Raoul Wallenberg Institute (RWI), and the International Legal Assistance Consortium (ILAC). The discussion was held under the Chatham House Rule.

The backdrop to the discussion is a negative trend. As the 2023 World Justice Project index shows, rule of law has declined in most countries for the 6th year in a row. This decline especially concerns aspects related to a 'thick' conception of rule of law, incorporating such elements as human rights and democratic governance. At the same time, current challenges to the foundations of the international legal system call for an even stronger emphasis on upholding rule of law, including through development cooperation.

The discussion was framed around the following questions:

- How to promote rule of law internationally during this period of global backlash?
- How should rule of law be defined in order to include core elements and perspectives?
- How to ensure that support for rule of law within development cooperation also strengthens human rights and democracy?
- How to strengthen rule of law in practice? What good examples of interventions and approaches do we see?

Background: Rule of Law in development cooperation

Rule of law has been a key part of development cooperation for more than three decades. In the 1980s, law moved from the periphery of the development agenda to its core. The development community, previously devoted mainly to infrastructure and humanitarian aid, started to spend substantial amounts on projects promoting the rule of law. By the 1990s, there was a massive surge in development assistance for law reform projects.

The approach at the time was largely administrative, with rule of law seen as a tool to enable trade and as part of a good governance agenda, and less as an objective in its own right. A decade later the focus had increasingly turned towards the legal sector and rule of law. The human rights-based approach to development (HRBA) and issues around equal access to justice came to the fore, with rights-holders at the centre and interventions focused on strengthening institutions to deliver rights. The focus on access to justice also implied a move away from form to function – the actual access to justice is key regardless of whether the institutions or systems are formal or informal.

Defining rule of law

Much rule of law programming is (still) based on implicit and unproven assumptions about the meaning, purpose, and effects of rule of law, such as the assumption that rule of law in and of itself contributes to economic development and democracy. For example, as Thomas Carothers (2003) has pointed out, a central and faulty assumption underpinning development interventions in the area of commercial law, is that rule of law will augment justice in other parts of the legal and political system.

References to 'rule of law' can imply very different things to different stakeholders: particular institutional configurations, normative structures or even ideology. Most development agencies list rule of law as a primary objective of development cooperation, but the normative content and purpose of rule of law is seldom stated and made explicit. Reference to rule of law may imply a liberal democratic version of the concept, associated with civil and political rights and a separation of powers. A 'thin' conception of rule of law might define it merely as a system where laws provide meaningful constraints on state power, and where there are procedural rules for law-making. Or it may imply something more akin to 'rule by law', with law primarily seen as a tool to ensure stability and order.

Clearly, if the normative content of rule of law is not made explicit in development cooperation, there is little basis for the commonly assumed causal linkages between rule of law, democracy, and human rights.

The UN has defined rule of law as:

“...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.” (Report of the Secretary-General (S/2004/616, 23 August 2004)

IDLO believes that without the element of “justice”, laws and institutions risk becoming simple instruments in the exercise of power. The missing element of justice comes from human rights, including political, civil, economic, social, and cultural rights, which provide the law with its moral content. Accordingly, IDLO’s approach to rule of law also incorporates the *substantive* elements of justice, and includes a commitment to democratic principles, good governance, and international human rights standards.

Another strand of critique of rule of law in development aid is its traditionally top-down approach to development and justice, focusing on judiciaries and state legal organisations at the expense of poor and marginalised groups and individuals. Rule of law has at times been driven primarily at national and international levels, somewhat distant from local situations. Lately the concept of ‘people-centred justice’ has gained ground internationally, implying that justice must be accessible for all. However, ‘people-centred’ is a contested concept, and it was argued by some that the human rights-based approach is a better approach as it is inherently centred on people, on the rights of the individual, whereas ‘people-centred’ is vague and open for other interpretations.

Strengthening rule of law in practice

The lack of common definitions of the rule of law is problematic. The UN Charter, the foundation for human rights as we know them, consists of commonly accepted principles, agreed at a certain point in time, by a majority. But there are many occasions and places where such agreement is lacking, as well as situations where the rule of law is undermined in practice, such as when double standards are applied internationally, or when local informal norms overrule formal laws.

Promoting rule of law in different, complex settings and contexts requires both flexibility and consistency. In some situations, the lack of common definitions may even be an advantage: different approaches and tools may be used and promoted, depending on specific needs and situations. While it is necessary to work with the world as it is, we should also recognise that rule of law promotion is normative and underpinned by a certain set of values.

Approaches to reform need to take a system-wide perspective, and not focus only on specific institutions or specific partners, however important. Trust in institutions is a key prerequisite, and that trust needs to be built system wide. A combined top-down and bottom-up approach is essential, making institutions more accessible and responsive to people’s needs.

Rule of law can be used as a framework to address inequalities and build trust in society, but that requires fighting the corrosive force of corruption. Relaunching trust in public institutions undermined by corruption and impunity is key. Progress towards economic and social rights needs to accelerate, by creating more inclusive economic environments, and also through the use of foreign investments. Investors and traders that need rule of law for commercial dispute settlements can be champions also for ‘thick’ conceptions of rule of law, including human rights and democratic governance. Not least many European companies are nowadays both willing and forced to promote vital elements of the wider rule of law agenda.

Development actors need to be more risk-taking, and work with reform and change agents also in very complex and authoritarian contexts. To start with the world as it is, also implies realising that in many countries the reach and the competence of the state is very limited. Where informality prevail, it is necessary to understand how such informality functions. However, lack of formal systems and laws is not the same as

lack of systems or lack of prevailing norms. The first question to ask is what systems there are, whether these systems are legitimate, and whether legitimacy may be built for more inclusive and fair systems. In all this, a long-term perspective is necessary. Progress is, and will be, slow.

Successful interventions must take a systems view, guided by local context. It is necessary to identify champions that can help navigate political sensitivities and mobilise political will. The need to ensure sustainability after international support is phased out means that there is no alternative to identifying, developing, and transitioning to national capacities. Development initiatives with short funding cycles and unrealistic timeframes are self-defeating and rarely allow for the sustained engagement needed to build trust and incentivize change.

At the international level, analogous to the lack of state reach and competence at national level is the relative weakness of enforcement mechanisms to uphold international law. Perceptions of states applying double standards in relation to international law is further undermining the system established to provide accountability and enforcement.

Conclusions and next steps

The discussion moved along two distinct but interrelated tracks: a policy-oriented discussion with principles and their coherence and clarity as starting point, and on the other hand a more implementation-oriented discussion starting from practical realities on the ground and the challenges those imply for the promotion of rule of law. The former may call for stricter definitions and clearer principles, whereas the latter may benefit from more flexibility and probably use work on socio-economic issues as entry doors.

Several areas were identified where deeper knowledge and insights are needed, which may serve as input to EBA as areas for further study:

- How do interventions to promote rule of law, democracy, human rights, and anti-corruption relate to one another?
- How may rule of law be promoted most effectively in different political contexts and situations, including in the context of increasing authoritarianism? Are certain entry points more fruitful than others?
- In situations of weak state functionality and reach, the question of informal legal systems come to the fore. When and under what conditions may informal legal systems replace the functions of formal ones? How can the transfer from informal legal systems into formal be managed and supported?

References and further reading

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