

The rule of law and international development¹

Author: Caroline Roseveare

Edited by: William Evans

Acknowledgements: Additional comments and proposals for revision provided by Naina Patel, Tam O’Neil.

This literature review of research evidence was produced by staff of the UK Department for International Development’s Policy & Research Division and based on additional research conducted by Coffey International Development and by the Governance, Conflict & Social Development PEAKS. The review does not necessarily represent the views of DFID as an institution. This is not a policy document, and is not intended to represent DFID's policy position.

¹ DFID’s Research & Evidence Division produces or commissions four types of evidence ‘product’. These are: Rapid Reviews, Literature Reviews, Evidence Papers and Systematic Reviews. The current paper is a Literature Review. This paper does not claim to have systematically searched the evidence base relating to the rule of law.

TABLE OF CONTENTS

List of commonly used acronyms, terms and abbreviations.....3

Executive Summary.....5

Section 1: Preliminary Matters.....9

 Background, purpose and scope 9

 Definitions and approaches to the rule of law in developmental processes 10

 Rule of law as set of principles 10

 Rule of law measurement 11

Section 2: International Rule of Law Frameworks.....12

 Summary..... 12

 International frameworks for the regulation of hostilities 13

 The international framework for the promotion of human rights..... 14

 The instrumental benefits of human rights..... 14

 The international framework for protection against crime 18

 The international frameworks for the promotion of commerce 19

Section 3: National Frameworks for Horizontal Accountability21

 Summary..... 21

 Separation of powers and horizontal accountability 22

 Legislative oversight and its effectiveness 23

 Judiciary oversight and its effectiveness 24

 The horizontal accountability function of ombudsmen 25

Section 4: The Rule of Law and State and Society relations25

 Summary..... 25

 Equal rights and equal treatment of citizens 26

 Citizenship & Gender 26

 Predictability and fairness in administration of the law 27

 Access to predictable and efficient dispute resolution for all citizens..... 27

 Legal Empowerment..... 28

 Extending access to justice through paralegals..... 30

Section 5: The Rule of Law and economic growth30

 Summary..... 30

 Three literature reviews on the rule of law and economic growth 31

 Box 1: The judicial system and economic growth 35

 The role of property rights in fostering investment and growth 36

 The impact of business regulation and ‘investment climate’ factors on economic growth 38

 Box 2: The legal environment and investment rates 39

LITERATURE REVIEW – NOT POLICY

Section 6: Legal pluralism, non-state institutions and actors39
 Definitions 39
 Forms of pluralism 39
 Preferences 40
 Legal pluralism in practice 41
Concluding comments: the nature of the evidence and evidence gaps42
ANNEX I: TERMS OF REFERENCE45
ANNEX II: SHORT DESCRIPTION OF METHOD49
ANNEX III: TITLES AND ABSTRACTS BIBLIOGRAPHY.....52

LITERATURE REVIEW – NOT POLICY

List of commonly used acronyms, terms and abbreviations

Asian Development Bank	ADB
Alternative Dispute Resolution	ADR
American Bar Association	ABA
Bi-lateral Investment Treaty	BIT
Community Legal Advisor	CLA
Commission on Legal Empowerment	CLEP
Convention for the Elimination of Discrimination against Women	CEDAW
Convention on the Rights of the Child	CRC
Convention on the Settlement of Investment Disputes between States and Nationals of Other States	ICSID Convention
Corporate Social responsibility	CSR
Foreign Direct Investment	FDI
Gender Based Violence	GBV
International Bar Association	IBA
Internally Displaced Persons	IDPs
International Centre for Transitional Justice	ICTJ
International Covenant on Civil and Political Rights	ICCPR
International Criminal Tribunal for Former Yugoslavia	ICTY
International Covenant on Social, Economic and Cultural Rights	IESCR
International Criminal Court	ICC
International Criminal Tribunal for the Former Yugoslavia	ICTR
International Criminal Tribunal for Rwanda	ICTR
International Development Law Organization	IDLO
International Human Rights Law	IHR
International Humanitarian Law	IHL
International Investment Agreement	IIA
International Labour Organization	ILO
Investing Across Borders	IAB
Multi-lateral Investment Agreement	MIA
New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards	New York Convention
International Centre for Settlement of Investment Disputes	ICSID
Non-governmental Organisations	NGO

LITERATURE REVIEW – NOT POLICY

Office of the High Commissioner for Human Rights	OHCHR
Organisation for Economic Co-operation and Development	OECD
Paralegal Advisory Service	PAS
Preferential Trade Agreement	PTA
Rule of Law	RoL
Sexual and Gender Based Violence	SGBV
Transnational Corporations	TNC
Transitional Justice	TJ
Transitional Justice Data Base	TJD
Truth and Reconciliation Commission	TRC
United Kingdom Department for International Development	DFID
United Nations Children’s Fund	UNICEF
United Nations Development Programme	UNDP
United Nations Entity for Gender Equality and the Empowerment of Women	UN Women
United Nations General Assembly	UNGA
United Nations Conference for Trade and Development	UNCTAD
United Nations Commission of International Trade Law	UNCITRAL
International Institute for the Unification of Private Law	UNIDROIT
United Nations Office on Drugs and Crime	UNODC
United Nations Security Council	UNSC
Violence against Women and Girls	VAWG
World Development Report	WDR
World Justice Programme	WJP

Executive Summary

1. The principal research question addressed in this report is as follows: “Why, and to what extent, do different dimensions of the rule of law impact upon developmental processes?”
2. Section 1 of this report provides some preliminary definitions relating to the rule of law.
3. Section 2 seeks to answer the following sub-questions:
 - a) Do international legal frameworks facilitate the realisation of human, humanitarian, criminal and commercial rights?
 - b) If so, how do such rights contribute to wider development outcomes?
4. Section 2 finds that:
 - (a) The ability of **international humanitarian law** to provide protection for both refugees and internally displaced persons is at best, questionable, and at worst, inadequate.
 - (b) Whether it is defined in terms of its intrinsic benefits or its instrumental returns, there is comparatively limited robust evidence to demonstrate the impact of greater **human rights** protection as a driver of development. Even so, there is a correlation between human rights abuses and violent conflict, which itself retards economic and human development. There is also some evidence that some human rights, such as basic rights and property rights, have a positive influence on productivity and growth. Evidence from such studies is countered by alternative research which finds that that human rights protection is an outcome of, rather than a precursor for higher national income levels.
 - (c) There is limited robust evidence to demonstrate that **international human rights treaties** are effective in improving human rights protection around the world. The ratification of a human rights treaty does not guarantee its implementation, as demonstrated by continued discrimination against numerous groups even where their host states are signatories of international human rights conventions. There is, however, a body of evidence considering how specific economic and social rights (with a foundation in international legal frameworks) which have subsequently been integrated into domestic law have been used in public interest litigation in order to realise developmental objectives.
 - (d) The empirical evidence for the success and benefits of **international criminal law** is piecemeal and inconsistent. Some studies conclude that transitional justice mechanisms can act as a deterrent, increase accountability for human rights violations and/or contribute to peace-building. Others observe that criminal prosecutions have not advanced reconciliation and, in some cases, actually perpetuate conflict.
 - (e) With regard to **international law and its effects on commerce**, there is long theoretical chain linking laws and regulatory environments (in general) with commercial productivity and economic growth. The theory has been substantiated by a large body of high-quality literature. The findings of this literature are inconsistent, with some analysts arguing that, as with many institutions, rule of law institutions improve in step with economic growth, but do not necessarily drive it. The current review nevertheless finds the evidence *for* the rule of law’s positive effects on commerce and economic growth persuasive. With specific regard to the efficacy of international commercial law’s effects on economic growth, the evidence (according to the current review) is much less extensive.

LITERATURE REVIEW – NOT POLICY

While it suggests that there is an important association between the legal environment, FDI and commerce and growth, there is much less conclusive evidence on the direction of causality and which aspects of commercial legal environments and institutions matter most for economic growth.

5. Section 3 of this report aims to answer the following sub-questions:
 - a) How effective are national institutions in providing checks and balances on the use or abuse of state power (i.e. in their ability to establish mechanisms of horizontal accountability)?
 - b) What are the developmental implications of improved horizontal accountability?
6. The findings of Section 3 are that:
 - a) The **separation of powers** between the state bodies that make, enforce and apply the law is a cornerstone of the rule of law. **Horizontal accountability** is the capacity of state organisations to check the abuse of power by other state organisations.
 - b) In theory, the **legislature** provides an important check on executive decision-making and its management of public finances and services. In practice, research shows that legislatures in developing countries find it difficult to fulfil their horizontal accountability functions, either because of constitutional design or *de facto* executive dominance.
 - c) In theory, the **judiciary** has two main roles in maintaining the rule of law: the impartial administration of the law, and independent review of the legality of new laws and executive decisions. In practice, research suggests that factors other than constitutional recognition of judicial powers influence whether the judiciary is able to exercise its horizontal accountability functions. These factors include the nature of the legal and broader culture, degree of budgetary autonomy and the scale of judicial capacity.
 - d) Beyond the legislature and judiciary, the current study finds that **other state bodies may also serve important oversight functions**. These bodies include ombudsmen, supreme audit institutions and anti-corruption and human rights commissions. The current review finds little evidence about the efficacy of these bodies, however.
 - e) The current review found no research showing a positive relationship between *de facto* increases in horizontal accountability in developing countries and improvements in the development outcomes of interest (state-building, peace-building, equitable service delivery and economic growth).
7. Section 4 of the report aims to answer the following sub-question:
 - a) How effective are national institutions and frameworks in guaranteeing citizen rights before the law and in providing for fair and predictable dispute resolution?
8. The findings of Section 4 are as follows:
 - a) There is a significant body of evidence showing that many countries do not have adequate statutory provision to protect and promote **equal rights for women**, either through omission or commission in the form of laws that discriminate against women and girls. There is some evidence that domestic legislation can help to reduce violence against women.

LITERATURE REVIEW – NOT POLICY

- b) Some researchers suggest that **fair and predictable application of the law**, particularly by front-line public administrators, may strengthen state legitimacy. However, research also suggests that perceptions that high-ranking officials are able to act with impunity are common worldwide.
 - c) Country case studies show that the formal justice often does not provide **predictable and efficient dispute resolution** for poor people. This is both because the state does not have sufficient capacity to provide justice services (e.g. shortage of prosecutors) and because poor and marginalised people face obstacles in accessing the formal justice system (e.g. location of courts, language, or lack of awareness).
 - d) There is evidence that **legal empowerment** programmes, including paralegal services, improve poor people's access to dispute resolution through both non-state mediation and legal assistance in the formal justice system.
9. Section 5 of this report seeks to answer the following sub-questions:
- a) Does the rule of law promote economic growth?
 - b) If the rule of law promotes economic growth, how does it do so?
10. Section 5 of this report finds that:
- a) There is a large body of evidence that considers the relationship between the rule of law and economic growth via mechanisms that protect property rights, facilitate incorporation and borrowing and the enforcement of contracts. In general, these studies concur on the existence of a **positive correlation between the rule of law** and growth but they also point to a lack of consensus as to which legal institutions are important in determining the shape and form of a feasible and effective rule of law reform process.
 - b) There is also a large body of evidence considering the specific links between the **protection of property rights and investment and growth**. At the macro-level, the evidence is contested in much the same way as the studies that look more generally at the rule of law and economic growth. At the micro-level, while there are studies that support claims that property rights incentivise investment and increased productivity, there are also studies that suggest such a link is dependent on the type of property and investment and the available markets for land, credit and other inputs.
 - c) A variety of studies show a correlation between **regulatory environments** that affect the ability to start a business, hire workers, protect investors, enforce contracts and exit business, investment levels and growth. However, there is less evidence available as to the specific interventions needed to create these environments and their success or otherwise.
11. Section 6 of this report seeks to answer the following sub-question:
- a) Do non-state actors and institutions promote the rule of law?
12. Section 6 of this report finds that:
- a) Several studies estimate that in developing countries **most justice services are provided by non-state mechanisms** (either partially administered by the state or entirely beyond state control), and claim that citizens often prefer these to state justice providers because they have greater confidence in their quality (e.g. fairness, honesty, competence and efficiency).

LITERATURE REVIEW – NOT POLICY

- b) The research suggests that there are widespread variations in the **quality and benefits of non-state justice mechanisms**. A growing body of literature suggests that legal pluralism – or the existence of multiple sources of law within a single geographical area – creates choice and that non-state justice mechanisms can support peace- and state-building processes. Other studies suggest that people may be coerced to use non-state providers. Commentators also contest the efficacy and predictability of these mechanisms and their consistency with constitutional and international human rights standards.
 - c) Informed opinions differ on the subject of how far formal state legal codes should accommodate traditional and customary law. Some commentators argue that legal pluralism undermines the rule of law because it generates uncertainty, while others suggest that **codification** of customary law enhances its predictability at the expense of flexibility and local relevance.
13. The concluding section of this report provides some general perspectives on **the state of the evidence** and identifies the principal gaps in the evidence base. It finds that:
- a) The literature relating to the rule of law surveyed here contains some high quality studies. However, the bulk of the research (with the notable exception of the study of the relationship between the rule of law, doing business and economic growth) is constituted of studies of an ‘*observational-descriptive*’ type and design. These are useful for identifying different *dimensions* of the rule of law, and for demonstrating the different *meanings and applications* of the law in different contexts. However, they are less well-suited to answering questions about the efficacy of particular rule of law *reforms or interventions* that may have been sponsored either by domestic actors or international donors. As such, this review concludes that the research community is asking the right questions, but is not yet able to provide findings of the type (and with the attached degree of confidence) that would most assist the donor community.

LITERATURE REVIEW: THE RULE OF LAW AND DEVELOPMENT

Section 1: Preliminary Matters

Background, purpose and scope²

14. The UK Department for International Development (DFID) is refining its approach to the rule of law. The current literature review seeks to strengthen the evidence base relating to the rule of law by providing a synthesis of the way in which the rule of law is likely to affect development.
15. The principal research question is as follows: “Why, and to what extent, do different dimensions of the rule of law impact upon developmental processes?”
16. The paper reviews the literature relating to the following dimensions of the rule of law:
 - a) The role of international frameworks in promoting human rights, humanitarian, commercial and criminal law;
 - b) The role of national frameworks in ensuring horizontal accountability and establishing checks and balances on the arms of the state;
 - c) The rule of law and the way it affects state and society relations;
 - d) The promotion of the rule of law through non-state security and justice mechanisms.
17. In addition, the review considers four outcomes of the above rule of law dimensions:
 - a) The rule of law as an intrinsic good (i.e. an end in itself rather than simply a means to an end);
 - b) The rule of law as an enabler for the respective developmental processes of state-building and peace-building;
 - c) The rule of law as an enabler of economic growth;
 - d) The rule of law as an enabler of equitable service delivery.

² See Terms of Reference in Annex I.

Definitions and approaches to the rule of law in developmental processes

18. Definitions of the rule of law typically distinguish between “rule by law” and “rule of law”: under the former, law is an instrument of government and government is above it. Under the latter, nobody is above the law: the constitution and law seek to ensure that the state functions in the public interest.³
19. Alternative definitions distinguish between ‘thick’ or ‘thin’ conceptions of the rule of law. A ‘thick’ definition views the rule of law as more or less inextricable from wider, liberal (and indeed moralistic and normative) concepts such as such as democracy, liberty and human rights.⁴ A ‘thin’ definition takes a much more parsimonious view, and considers the rule of law as being in place when a comparatively limited set of rules and laws are implemented effectively (regardless of their moral or liberal nature).⁵ The following additional definitions are positioned along this ‘thin’/‘thick’ spectrum.

Rule of law as set of principles

20. For the United Nations the rule of law is 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.” The UN posits that application of the rule of law requires “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.”⁶
21. The World Justice Program (WJP) uses a working definition of the rule of law based on four universal principles: i) the government and its officials and agents are accountable before the law; ii) laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property; iii) the process by which the laws are enacted, administered and enforced is accessible, fair and efficient; and iv) justice is delivered by competent, ethical, and independent representatives and

³ Schlaeppli, E., and McCabe, C. (2008), Rule of Law, Justice Sector Reforms and Development Cooperation: SDC Concept Paper, Swiss Agency for Development and Cooperation, online at: http://www.deza.ch/ressources/resource_en_170419.pdf (accessed Feb.13).

⁴ Dworkin, R. (1985), *A Matter of Principle*, Harvard University Press, pp.11-12; Barron, G. (2006), The World Bank and Rule of Law Reforms. Working Paper, no. 70, Development Studies Institute, London School of Economics and Political Science, online at <http://www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf> (accessed Feb.13);

Bassu, G. (2008), Law Overruled: Strengthening the Rule of Law in Post-Conflict States. *Global Governance: A Review of Multilateralism*, vol. 14, no.1, pp. 21-38, online at <http://www.atypon-link.com/LRP/doi/abs/10.5555/ggov.2008.14.1.21> (accessed Feb.13);

Carothers, T. (2009), Rule of Law Temptations, *The Fletcher Forum of World Affairs*, vol. 33, no.1, pp. 49-61, online at http://www.carnegieendowment.org/files/Rule_of_Law_Temptations.pdf (accessed Feb.13);

Peerenboom, R. (2009), The Future of Rule of Law: Challenges and Prospects for the Field, *Hague Journal on the Rule of Law*, vol. 1, pp. 5–14; and Peerenboom, R. (2005), Human Rights And Rule Of Law: What’s The Relationship? University of California, Los Angeles School of Law Public Law & Legal Theory Research Paper Series, Research Paper No. 05-31, online at <http://ssrn.com/abstract=816024> (accessed Feb.13) and

<http://journals.cambridge.org/action/displayFulltext?type=1&fid=4614080&jid=ROL&volumeld=1&issuelid=01&aid=4614076>.

⁵ Dicey, A.V. (1957), *An Introduction to the Study of the Law of the Constitution* (10th ed), London: Macmillan & Co., p.202;

Raz, J. (1977), The Rule of Law and Its Virtue. *Law Quarterly Review*, 93: 195-211 at 196 and 198;

inger, T. (2007), Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and its Place in Development Theory and Practice, *Yale Human Rights and Development Law Journal*, vol. 10, pp. 178-208, online at <http://tinyurl.com/a4grak4> (accessed Feb.13); and

Trebilcock, M. J., and Daniels, R. J. (2008), *Rule of Law and Development: Charting the Fragile Path of Progress*, Edward Elgar Publishing Ltd., Cheltenham (UK) and Northampton (US).

⁶ United Nations Office of the Secretary General (2004), The rule of law and transitional justice in conflict and post-conflict societies, online at <http://www.unrol.org/doc.aspx?n=2004%20report.pdf> (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.⁷

22. Both definitions, and most others, embrace at least some of the eight principles of rule of law elaborated in the European context by Lord Bingham in 2010. These include: accessibility of the law; law not discretion; equality before the law; limits on the discretionary use of public powers; legal protection of human rights; dispute resolution; fair trials; and compliance with international law.⁸ Most analysts agree that whatever the purpose of the rule of law, it must “be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms.”⁹

Rule of law measurement

23. Several datasets have been developed to ‘measure’ the rule of law. Among the most comprehensive is the World Justice Programme Rule of Law Index which takes the four previously mentioned WJP principles as its basis and disaggregates these into 48 sub-factors to inform nine dimensions of the rule of law: limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, access to civil justice, effective criminal justice and informal justice.¹⁰ Building on the WJP Index, the Vera Institute of Justice and Altus Global Alliance offer an alternative list of 60 rule of law indicators.¹¹ These have been used to inform the UN rule of law indicators.¹² The European Commission for the Efficiency of Justice (CEPEJ) uses a different list again, of some 170 quantitative and qualitative indicators, as part of its Evaluation of European Judicial Systems project.¹³

⁷ See: Agrast, M.D., Botero, J.C., Martinez, J., Ponce, A., and Pratt, C.S. (2013), Rule of Law Index 2012-2013, The World Justice Project, online at http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf (accessed Feb.13).

⁸ Bingham, T. (2011), *The Rule of Law*, Penguin Books, London. See also: International Bar Association (2008), *The Rule of Law: A commentary on the IBA Council’s Resolution of September 2005*, International Bar Association, online at www.ibanet.org (accessed Feb.13).

⁹ Tamanaha adopts a model of rule of law that shows a progression along which both formal and substantive aspects of the rule of law can be “thinner” or “thicker. See Tamanaha, B. (2007), *A Concise Guide to The Rule Of Law*, St. John’s University, Legal Studies Research Paper Series, Paper #07-0082; and earlier work, Tamanaha, B. Z. (2004), *On the Rule of Law: History, Politics, Theory*, Cambridge University Press, Cambridge, UK, online at <http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=0521843626> (accessed Feb.13).

¹⁰ Agrast, M.D., et al (2012) op,cit. The current Index is based on findings from interviews with 97,000 members of the general public and consultations with 2,500 experts in 97 countries and jurisdictions world-wide. It has adjusted a number of sub-factors from the Index 2011 report, see: See Box 3: “Updates to Conceptual Framework”, p:10. The methodology used is described at Box 4: “methodology in a nutshell”, p:12. Findings are presented through regional and country summaries. Part III comprises a separate statistical audit report by Saisana, M., and Saltelli, A., (European Commission Joint Research Centre, Ispra, Italy): “Statistical Audit Conceptual and Statistical Coherence in The WJP Rule of Law Framework”.

¹¹ These indicators were focused around four areas of accessible enactment and administration of laws, fair and efficient administration and enforcement of laws, unbiased and efficient delivery of justice by accountable institutions and accessibility of justice institutions to the people, applied in the context of criminal justice. The indicators were tested in a “pilot” of four cities: Chandigarh, India; Lagos, Nigeria; Santiago, Chile; and New York City, U.S. Findings are published in: Parsons, J., Thornton, M., Bang, H.E., Estep, B., Williams, K., and Weiner, N. (2008), *Developing Indicators to Measure the Rule of Law: A Global Approach, A Report to the World Justice Project, The Vera Institute of Peace*, online at http://www.altus.org/pdf/dimrol_en.pdf (accessed Feb.13).

¹² These indicators focus on the police, prisons and judiciary. See the United Nations (2011), *Rule of Law Indicators, Implementation Guide and Project Tools*, online at http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf.

¹³ The data is organised across the ten categories of budgetary data, access to justice, organisation of the court system, fair trial, career of judges and prosecutors, lawyers, alternative dispute resolution, enforcement of court decisions, notaries and functioning of justice, and it is collected biennially. See CEPEJ (2012), *European Judicial Systems: Efficiency and Quality of Justice*, online at http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf (accessed Mar. 22) for the most recent evaluation.

LITERATURE REVIEW – NOT POLICY

24. Other organisations collecting data on different dimensions of the rule of law include Freedom House annual's "Freedom in the World Survey" reports. This presents findings on a country by country basis on political rights and civil liberties in order to make a determination of status ('Free', 'Partly Free', or 'Not Free').¹⁴ The World Bank uses Worldwide Governance Indicators which consider six dimensions of governance (voice and accountability, political stability and absence of violence, government effectiveness, regulatory quality, rule of law and control of corruption), with data now available for the period 1996-2011 and analysed up to 2008.¹⁵ The Bank also uses Ease of Doing Business Indicators which consider nine dimensions of commercial activity (starting a business, dealing with construction permits, registering property, getting credit, protecting investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency) with data available from 2003 to the present.¹⁶ Global Integrity collects and analyses data on worldwide corruption and anti-corruption activities, and includes data pertaining to a number of legal provisions.¹⁷ There are a variety of other datasets available, however, a common problem is that they face validity and reliability issues given that indicators are open to interpretation, and data is collected differently in each country (see Haggard and Tiede's discussion of rule of law measurement and economic growth in section 5 below¹⁸).

Section 2: International Rule of Law Frameworks

Summary

25. This section of the report seeks to answer the following sub-questions:
- a) Do international legal frameworks facilitate the realisation of human, humanitarian, criminal and commercial rights?
 - b) If so, how do these frameworks contribute to wider development outcomes?
26. It finds that:
- (a) The ability of **international humanitarian law** to provide protection for both refugees and internally displaced persons is at best, questionable, and at worst, inadequate.
 - (b) Whether it is defined in terms of its intrinsic benefits or its instrumental returns, there is comparatively limited robust evidence to demonstrate the impact of greater **human rights** protection as a driver of development. Even so, there is a correlation between human rights abuses and violent conflict, which itself retards economic and human development. There is also some evidence that some human rights, such as basic rights and property rights, have a positive influence

¹⁴ The latest "Freedom in the World: 2013" is posted on the website at the time of writing but is not yet available Online at <http://www.freedomhouse.org/report/freedom-world/freedom-world-2013> (accessed Feb.13).

¹⁵ Kaufmann, D., Kraay, A., and Mastruzzi, M. (2009), Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996-2008., World Bank Policy Research Working Paper No. 4978, online at [Shttp://ssrn.com/abstract=1424591](http://ssrn.com/abstract=1424591).

¹⁶ World Bank (2013), Doing Business 2013: Smarter Regulation for Small and Medium-Size Enterprises, online at <http://www.doingbusiness.org/~media/GIAWB/Doing%20Business/Documents/Annual-Reports/English/DB13-full-report.pdf>.

¹⁷ Global Integrity, (2012), Global Integrity Report: 2011. Washington, D.C. Online at <http://www.globalintegrity.org/files/GIR2011.pdf> (accessed Feb.13).

¹⁸ Haggard, S., and Tiede, L. (2011).The rule of law and economic growth: Where are we? World Development, 39(5), 673-685.

LITERATURE REVIEW – NOT POLICY

on productivity and growth. These studies are countered by others that find that human rights protection is an outcome of, rather than a precursor for higher national income levels.

- (c) There is limited robust evidence to demonstrate that rights-based interventions (principally **international human rights treaties**) are effective in improving human rights protection around the world. The ratification of a human rights treaty does not guarantee its implementation, as demonstrated by continued discrimination against numerous groups even where their host states are signatories of international human rights conventions. There is, however, a body of evidence considering how specific economic and social rights (with a foundation in international legal frameworks) which have subsequently been integrated into domestic law have been used in public interest litigation in order to realise developmental objectives.
- (d) The empirical evidence for the success and benefits of **international criminal law** is piecemeal and inconsistent. Some studies conclude that transitional justice mechanisms can act as a deterrent, increase accountability for human rights violations and/or contribute to peace-building. Others observe that criminal prosecutions have not advanced reconciliation and, in some cases, actually perpetuate conflict.
- (e) With regards the effects of **international law and its effects on commerce**, there is long theoretical chain linking laws and regulatory environments (in general) with commercial productivity and economic growth. The theory has been substantiated by a large body of high-quality literature. The findings of this literature are inconsistent, with some analysts arguing that, as with many institutions, rule of law institutions improve in step with economic growth, but do not necessarily drive it. The current review nevertheless finds the evidence for the rule of law's positive effects on commerce and economic growth persuasive. With specific regard to the efficacy of international commercial law's effects on economic growth, the evidence (according to the current review) is much less extensive. While it suggests that there is an important association between the legal environment, FDI and commerce and growth, there is much less conclusive evidence on the direction of causality and which aspects of commercial legal environments and institutions matter most for economic growth.

International frameworks for the regulation of hostilities

- 27. Working on the assumption that humanitarian assistance features at one end of an extended continuum of development, the following section briefly considers the role of humanitarian law in development processes.
- 28. Some analysts suggest that the current set of international rules regulating internal armed conflict are in themselves sufficient to enable the promotion of humanitarian rule of law, provided they are also interpreted in terms of the broader framework of international law.¹⁹ However, a more reflective consensus of opinion is that there are major questions as to the fitness for purpose of international humanitarian law in its ability to provide protection for groups such as refugees (i.e. persons forced to migrate from one state to another) and internally displaced persons, and against the activities of non-state actors and new weapon technologies such as drones.
- 29. In recent years, international actors have been faced with an apparent proliferation of IDP-type crises. These have been concomitant with the increased frequency of so-called 'new wars' (emergent since the late twentieth century) featuring militias, paramilitaries, gangs and rebel groups rather than

¹⁹ Sivakumaran, S. (2011), Re-envisioning the International Law of Internal Armed Conflict, *European Journal of International Law*, vol. 22, iss. 1, pp. 219-264, online at <http://ejil.oxfordjournals.org/content/22/1/219.full.pdf> (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

organised militaries.²⁰ Frequently, states presiding over large populations of internally displaced peoples will be unprepared to consent to foreign intervention.²¹ In addition, the parties to armed conflict (particularly where they are *non*-state actors) will either be unfamiliar with the international legal framework that protects IDPs²² or will defy it, having not been party to its ratification.²³ This is particularly concerning given the rise of conflicts involving non-state actors as well as new weapon technologies such as drones which are contributing to internal displacement.²⁴

30. The current review does not offer any substantive analysis or evidence relating to the efficacy of international frameworks for the promotion of humanitarian law.

The international framework for the promotion of human rights

31. Further along the humanitarian/development spectrum, ambitions to engender greater respect for human rights underpin the main international law frameworks. As with a number of rule of law dimensions, there are two principal reasons why human rights receive particular developmental focus. First, they have intrinsic benefits: there is a moral justification for the promotion of human rights. Secondly, improved human rights are purported to provide concrete, instrumental development benefits.

Human rights as a moral principle

32. The principal literature relating to human rights as a moral principle stems from Sen's characterisation of development 'as freedom',²⁵ whilst Sfeir-Younis characterises human rights as an endowment integral to institutional and cultural capital.²⁶ However, even this family of rule of law conceptions recognise the instrumental benefits of improved human rights: Sfeir-Younis argues that human rights facilitate efficient resource allocation, whilst Sengupta argues that growth cannot be inclusive if human rights are denied.²⁷

The instrumental benefits of human rights

Human rights and violent conflict

²⁰ Lamp, N. (2011), Conceptions of war and paradigms of compliance: the 'new war' challenge to international humanitarian law, *Journal of Conflict and Security Law*, vol.16, iss. 2, pp. 225-262.

²¹ Luopajarvi, K. (2003), Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law? *International Journal of Refugee Law*, vol.15, iss. 4, pp. 678-714, online at <http://ijrl.oxfordjournals.org/content/15/4/678.abstract> (accessed Feb.13).

²² Schwendimann, F. (2011), The legal framework of humanitarian access in armed conflict', *International Review of the Red Cross*, vol. 93, iss. 884, pp. 993-1008, online at <http://www.icrc.org/eng/resources/documents/article/review-2011/irrc-884-schwendimann.htm> (accessed Feb.13).

²³ Ryngaert, C. and Van De Meulebroucke, A. (2011), Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: an Inquiry into some Mechanisms, *Journal of Conflict & Security Law*, vol. 16, iss. 3, pp. 443-472, online at <http://jcsf.oxfordjournals.org/content/16/3/443.abstract> (accessed Feb.13).

²⁴ Orr, A. (2011), Unmanned, Unprecedented and Unresolved: The Status of American Drone Strikes in Pakistan Under International Law, 44 *Cornell International Law Journal* 719 online at <http://www.lawschool.cornell.edu/research/ILJ/upload/Orr-final.pdf> (accessed Mar. 22).

²⁵ Sen, A. (1999), *Development as Freedom*. New York: Knopf. Analysis in the current paper is based on Pearce, N. (2001), Development as Freedom, A. Sen. Book review, *International Journal of Epidemiology*, 30(4), 907-908. Sen describes freedom itself as being composed of five "instrumental freedoms" (political freedom; economic facilities; social opportunities; transparency guarantees; and protective security) each of which play a key role in helping to realise 'human capabilities', themselves offering greater scope for individual and collective agency.

²⁶ Sfeir-Younis, A. (2004), The violation of human rights as a determinant of poverty, *International Social Science Journal*, 56(180), 321-325.

²⁷ Sengupta, A. (2010), Inclusive growth as rights-based development *Journal of Asian Public Policy*, 3(3), 215-222.

LITERATURE REVIEW – NOT POLICY

33. The Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948 states that “it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”²⁸ As such, it explicitly links the protection of human rights to reduced violent conflict.
34. Where human rights abuses are widespread, violent conflict is more prevalent.²⁹ Evidence cited in the World Development Report of 2011 claims that each step of deterioration on the Political Terror Scale results in a more than twofold increase in the risk of civil war in the subsequent year.³⁰ In addition, there is a significant statistical association between countries that keep large numbers of political prisoners and those that are likely to experience repeated rounds of civil war.³¹ Working on the basis that violent conflict is ‘bad’ for development, greater protection of human rights may therefore be a legitimate route for the reduction of poverty. However, notwithstanding the apparent link between human rights abuses and propensity to violent conflict, the current review offers no empirical evidence demonstrating that greater protection of human rights itself reduces violent conflict.

Other instrumental benefits: human development

35. A fuller discussion of the economic growth benefits of the full range of rule of law provisions follows in section 5. With specific regard to the instrumental benefits of human rights, Blume and Voigt (2007) apply statistical methods to explore the effects of four categories of human rights on growth rates.³² They find the following:
 - a) Basic human rights (absence of torture, absence of political killings, freedom from state interference) have a strong positive influence on the accumulation of physical capital;³³
 - b) Economic rights: Property rights have strong direct impacts on growth, as well as on the accumulation of physical capital and total factor productivity;³⁴
 - c) Civil and political rights (freedom to participate in political life, freedom of movement, freedom of information and freedom from censorship) and social and emancipatory rights (endowing the individual with positive rights in relation to the state [e.g. rights to food, paid jobs, housing, labour rights]) positively influence total factor productivity.³⁵
36. Overall, Blume & Voigt find that at the very least, none of the above categories of rights has any *negative* impacts on economic growth, and make a case that they do in fact have positive impacts.
37. There is also a growing literature addressing the use of public interest litigation, namely the reliance on constitutional protection for internationally recognised economic and social rights such as education,

²⁸ United Nations General Assembly, Universal Declaration of Human Rights.

²⁹ World Bank, World Development Report 2011, Conflict, Security and Development, World Bank, Washington, D.C, p. 82.

³⁰ The “Political Terror Scale” measures arbitrary detention for nonviolent political activity, torture, disappearances, and extrajudicial killings.

³¹ Fearon, J. (2010), Governance and Civil War Onset, World Development Report 2011 Background Paper.

³² Blume, L. & Voigt, S. (2007), The economic effects of human rights, *Kyklos* 60(4), 509-538.

³³ See also Farber, D. (2002), Rights as Signals, *Journal of Legal Studies*, 31, 83-98.

³⁴ See also Knack, S. and Keefer, P. (1995), Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Indicators, *Economics and Politics*, Vol. 7, No. 3 pp. 207-228.

³⁵ See also Burman, C. et al (2007), *Our Rights and Our Information: Empowering People to Demand Rights Through Knowledge*, Commonwealth Human Rights Initiative, 207; and Bivens, J. and Weller, C. (2003), *Rights Make Might: Ensuring Worker’s Rights as a Strategy for Economic Growth*, EPI Issue Brief 192, Economic Policy Institute.

LITERATURE REVIEW – NOT POLICY

healthcare or shelter to realise those rights through litigation brought in the public interest.³⁶ It is less clear from this body of work what the drivers of successful litigation are.

38. However, more generally, the evidence that human rights, and international human rights *treaties* in particular, positively affect the lives of the poor is quite limited.³⁷ There are several reasons for this.
39. First, there remain some absolute gaps in the international human rights framework. For example, Hamzić (2011) argues that international treaties provide insufficient protection for those experiencing discrimination on sexual orientation and gender identity grounds.³⁸
40. Secondly, even where the normative international human rights framework is complete, there may be problems with the enforcement mechanisms available internationally. So, abuses of children's rights are widespread internationally, notwithstanding the fact that all but three nations (Somalia, South Sudan and the United States of America) have ratified the UN Convention on the Rights of the Child (CRC), which at least signifies apparently widespread political will. Approximately half of all children in urban areas in Africa and South Asia are estimated not to have had their births registered, rendering them vulnerable to multiple forms of exploitation.³⁹ Since there is no Optional Protocol to the Convention enabling individuals to submit individual complaints, the enforcement machinery is lacking.
41. Third, human rights are merely one aspect of a robust rule of law framework. Indeed, the establishment of human rights may actually be contingent upon the pre-existence of a more general framework for the rule of law domestically, for example a strong judiciary and a robust framework for judicial review.⁴⁰ As such, a narrow focus on human rights as a mechanism for development may be ineffective.
42. Fourth, an empirical study of cross-national data covering the years 1976-1993 suggests that rather than being an outcome of improved human rights, higher national income levels are actually an important *determinant* of a government's respect for human rights.⁴¹ Again, focus on improving human rights may be ineffective if they are not, in fact, drivers of improved welfare. Such findings echo a much wider debate amongst the new institutional economics literature, in which a number of governance institutions are claimed by some, and rejected by others as causes of improved economic wealth.

³⁶ Gargarella, R. et al (2006), *Courts and Social Transformation in New Democracies: An Institutional Voice for the Poor?* Ashgate Publishing, UK; Banik, D. (2008), *Rights and Legal Empowerment in Eradicating Poverty*, Ashgate Publishing, UK; and Gauri, V. and Brinks, D. (2008), *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World*, Cambridge University Press.

³⁷ Tomasevski, K., 2005, Strengthening Pro-poor Law: Legal Enforcement of Economic and Social Rights', Human Rights and Poverty Reduction Background Paper, ODI, London, online at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4355.pdf> (accessed Feb.13).

³⁸ Hamzić, V. (2011). The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos. *Human Rights Law Review*, vol. 11, issue. 2, pp. 237-274, online at <http://hrlr.oxfordjournals.org/content/11/2/237.short> (accessed Feb.13). See also International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007, online at <http://www.unhcr.org/refworld/docid/48244e602.html> (accessed Feb.13).

³⁹ UNICEF, State of the World's Children 2012: Children in an Urban World, Executive Summary and Full Report, New York 2012

⁴⁰ Schlaeppli, E. and McCabe, C., 2008, Rule of Law, Justice Sector Reforms and Development Cooperation: SDC Concept Paper, Swiss Agency for Development and Cooperation, p. 10 online at http://www.deza.ch/ressources/resource_en_170419.pdf (accessed Feb.13) cited in GSDRC 212 p.7 and Goodliffe, J. and Hawkins, D.G. (2006), Explaining Commitment: States and the Convention Against Torture, *Journal of Politics*.

⁴¹ Poe, S. et al (1999), Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993, *International Studies Quarterly*, 43, 291–313. See also Peerenboom, R. (2005), Human Rights and Rule of Law: What's the Relationship? *Georgetown Journal of International Law*, vol. 36, 2005; UCLA School of Law Research Paper No. 05-31, online at <http://ssrn.com/abstract=816024> (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

43. Fifth, systems and frameworks of rights may not develop in the logical sequence expected. Kaufmann outlines a theory of change that suggests that first generation (political and civic) rights are likely to form a basis for the realisation of second generation (socio-economic rights). However, at present, the empirical evidence demonstrating the existence of this causal chain in practice is lacking.⁴² Indeed, it has been suggested that in some cases a focus on civil and political rights can hinder the achievement of economic and social rights.⁴³
44. Sixth, apparently uncontentious human rights provisions may not be universally accepted. Observing the tensions between international human rights and customary law in Southern Sudan, Leonardi finds that human rights provisions are seen locally as being responsible for the proliferation of urban, juvenile criminality, undermining the traditional rights of parents and elders to discipline family members and offenders according to historical custom.⁴⁴
45. Seventh, there has been comparatively little robust research on the impact of international human rights treaties themselves (as opposed to the rights they aim to establish and protect). Some of the research conducted on the success of 'rights-based' approaches to development in general reveal only modest successes. As is the case with many donor-sponsored efforts at institutional reform, such approaches tend to favour the establishment and protection of some rights as priorities, regardless of local context.⁴⁵ The research that is available seeks to infer conclusions on the basis of relatively superficial analysis, and the provision of fairly rudimentary examples/counter-examples.
46. So, for example, some research observes that 187 of 195 countries worldwide have ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) by 2011. But the World Development Report of 2012 offers a reminder that evidence of CEDAW's actual impact on discrimination against women is very limited. Discrimination against women is most pronounced in low income countries⁴⁶ and violence against women and girls (VAWG) remains pervasive.⁴⁷ Likewise, consider South East Asia, where domestic laws to combat VAWG and human-trafficking have been enacted (on the basis of CEDAW).⁴⁸ Judges, lawyers and court personnel have received training in gender-sensitivity in court processes.⁴⁹ But baseline data is lacking, preventing any robust analysis of the impact of these.

⁴² Kaufmann, D. (2004), Human Rights and Governance: The Empirical Challenge prepared for: 'Human Rights and Development: Towards Mutual Reinforcement' Conference, World Bank Institute, online at <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/humanrights.pdf> (accessed Feb.13).. Kaufmann explores the empirical linkages between first generation (political and civil rights) and second generation (socio-economic) human rights and other governance dimensions. His evidence suggests that second generation human rights gains depend on the achievement of first generation (political and civil rights) gains, but that second generation human rights gains have not developed as one might expect from this model. He emphasises, however, that his findings need corroboration.

⁴³ OECD and World Bank (2012), Integrating Human Rights into Development: Donor Approaches, Experiences and Challenges (2nd Ed), p.34.

⁴⁴ Leonardi, C. et al, Local Justice In Southern Sudan: A Joint Project of United States Institute of Peace and Rift Valley Institute", Peaceworks No.2, p.58.

⁴⁵ Grugel, J. and Piper, N.(2009), Do Rights Promote Development? Global Social Policy, vol. 9, no. 1, pp. 79-98.

⁴⁶ World Bank, World Development Report 2012: Gender Equality and Development, figure 7, p. 4.

⁴⁷ UN Women (2011), Progress of the World's Women: In Pursuit of Justice, UN Women, New York, pp.32-35, online at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf> (accessed Feb.13).

⁴⁸ All ten countries of the Association of Southeast Asian Nations (ASEAN)—Brunei, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam—have ratified or acceded to CEDAW. Timor-Leste, a non-ASEAN country, acceded to the Convention in April 2003.

⁴⁹ Pasqual, L. (2009), Time for Action: Implementing CEDAW in Southeast Asia, UNIFEM, Bangkok, pp.16-18 online at http://cedaw-seasia.org/resource_documents.html#time4action (accessed Feb.13); see also Sisters in Islam (2011), CEDAW and Muslim Family Laws: In Search of Common Ground, Musawah, Selangor, Malaysia online at <http://musawah.org/cedaw-and-muslim-family-laws-search-common-ground-0> (accessed Feb.13) and http://www.musawah.org/sites/default/files/CEDAW%20%26%20Muslim%20Family%20Laws_0.pdf (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

47. Finally, re-consider the ‘thick’ definition of rule of law, and the assertion that rule of law, human rights and liberal democracy go hand in hand. Peerenboom finds assumptions of an inevitable and reinforcing feedback loop connecting law, rights and democracy unconvincing on the basis that rule of law exists in non-democratic states, and indeed in democratic but non-liberal states. The reverse is also true: some nominally democratic states are apparently unable to adequately enforce the rule of law.⁵⁰
48. Overall, there is very limited robust research evidence demonstrating either the impact of human rights on development processes, or indeed the specific impacts of international human rights treaties. There is, however, a body of evidence considering the use of economic and social rights to realise developmental objectives.

The international framework for protection against crime

49. The following sections are specifically concerned with international criminal law, which is concerned with the identification and punishment of particularly severe transgressions including war crimes, crimes against humanity and genocide. Criminal law itself is distinguished from (i) civil law (the body of law concerned with dispute resolution between private individuals and the payment of compensation) and (ii) public law (the body of law concerned with the legality of government decisions).

Transitional justice

50. Over the last two decades there has been a proliferation of transitional justice processes in post-conflict and post-authoritarian societies.
51. ‘Transitional justice’ (as defined by the UN Security Council in 2004) covers “the full range of processes and mechanisms associated with a society’s attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”⁵¹ These mechanisms include the prosecution of those individuals alleged to have committed genocide, war crimes and gross violations of human rights; truth commissions set up to create a historical record of past wrongdoing; the payment of reparations or compensation to the victims of abuse; and the vetting of individuals to determine if their past activities or affiliations disqualify them from public office, law enforcement or other key roles.
52. Proponents of transitional justice argue that such mechanisms contribute positively to states’ emergence from war or authoritarianism. In particular, they argue that trials of war criminals or *genocidaires* increase the accountability of individuals before international law, and act as a necessary deterrent against future wrong-doing of the most heinous types.⁵² Sceptics argue that the pursuit of such justice undermines the prospects for peace or negotiated transitions. In particular, these sceptics question the validity of ‘large-N’ research studies as the basis for drawing useful conclusions relating to transitional justice programmes.⁵³

⁵⁰ Peerenboom, R. (2005), op. cit.

⁵¹ United Nations Security Council, 2004, The Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies, Report of the Secretary-General, UN Doc. S/2004/616, 3 August, p.4, online at <http://www.unhcr.org/refworld/category/REFERENCE/UNSC,,,45069c434,0.html> (accessed Feb.13).

⁵² Bassiouni, M.C. (ed.) (2002), *Post-Conflict Justice*, Brill Academic Publishers.

⁵³ Thoms, O. et al (2008), *The Effects of Transitional Justice Mechanisms: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, Centre for International Policy Studies, University of Ottawa, online at http://www.humansecuritygateway.com/documents/CIPS_Transitional_Justice_April2008.pdf (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

53. The empirical evidence available for the success and benefits of transitional justice mechanisms is piecemeal and inconsistent.
54. Surveying data from human rights prosecutions (domestic and international) expedited in 100 countries that experienced some form of political transition, Kim and Sikkink conclude that criminal trials *do* lead to improved human rights protection and act as a deterrent beyond national borders.⁵⁴ Exploiting data from the Transitional Justice Data Base (TJD), Olsen and others conclude that transitional justice has the greatest impact when particular mechanisms are carried out in parallel or in sequence, depending on the context (e.g. negotiated transition or regime collapse). As such, criminal trials may improve perceptions of accountability before the law, but partial amnesties may also be necessary for the maintenance of shorter-term stability.⁵⁵ Some analysis finds that the International Criminal Tribunal for Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) both contributed significantly to peace-building by helping to marginalise nationalist leaders and other forces allied to ethnic war and genocide. In addition, they may have discouraged vigilante attacks by victim groups, placated by the visibility of justice processes in practice. Findings from a survey of soldiers in five Bosnian cities support the argument that the ICTY contributed to democratisation and peace-building through creating space for dialogue and debate.⁵⁶
55. Conversely, one survey conducted in municipalities in Bosnia and Herzegovina found that both war crimes victims who *had* testified in criminal trials and those who *had not* were equally sceptical of the court's capacity to provide justice and deter future breaches of international law.⁵⁷ Moreover, Stover & Weinstein's comparative survey of Rwanda and the former Yugoslavia provides a more circumspect analysis of the success of transitional justice, suggesting that whilst criminal prosecutions have helped combat a culture of impunity, they have been of questionable value in achieving reconciliation.⁵⁸
56. Yet more analysis suggests that criminal prosecutions may actively perpetuate conflict or de-stabilise peace-building and state-building processes, a view expounded by Snyder & Vinjamuri based on their analysis of transitional justice processes in 32 post-conflict cases.⁵⁹

The international frameworks for the promotion of commerce

57. There is a significant body of literature that explores the relationship between domestic legal frameworks, commerce and economic growth. There is considerably less literature exploring the relationship between international legal frameworks and the same phenomena.

⁵⁴ Kim, H. and Sikkink, K. (2010), Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries, *International Studies Quarterly*, 54, pp. 939–963 online at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2478.2010.00621.x/full> (accessed Feb.13).

⁵⁵ Olsen, T. et al (2010), The Justice Balance: When Transitional Justice Improves Human Rights and Democracy, *Human Rights Quarterly*, Volume 32, Number 4, pp. 980-1007.

⁵⁶ Nettelfield, L. J., (2010), From the Battlefield to the Barracks: The ICTY and the Armed Forces of Bosnia and Herzegovina", *International Journal of Transitional Justice*, Vol. 4, Issue 1, pp. 87-109, 2010 online at <http://ssrn.com/abstract=1555558> or <http://dx.doi.org/ijp033> (accessed Feb.13).

⁵⁷ Hodžić, R. (2010) "Living the Legacy of Mass Atrocities: Victims' Perspectives on War Crimes Trials, *Journal of International Criminal Justice*, Vol. 8, Issue 1, pp. 113-136, 2010 online at <http://ssrn.com/abstract=1576352> or <http://dx.doi.org/mqq008> (accessed Feb.13).

⁵⁸ Stover, E. and Weinstein, H.M. (eds) (2004). *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, online at <http://www.cambridge.org/aus/catalogue/catalogue.asp?isbn=9780521834957> (accessed Feb.13).

⁵⁹ Jack L. Snyder, J.L., and Vinjamuri, L. (2003/04), "Trials and Errors: Principle and Pragmatism in Strategies of International Justice" *International Security*, Volume 28, Number 3, Winter 2003/04. pp. 5-44 suggests, for example, amnesties linked to a Truth Commission as in post-apartheid South Africa.

LITERATURE REVIEW – NOT POLICY

58. International frameworks that govern the cross-border contracts that drive commerce include private international law treaties and bilateral investment treaties. Private international law treaties govern which country's law should govern any dispute,⁶⁰ which country's courts should resolve it⁶¹ and what procedural steps are to be taken against companies which are not located in the country in which litigation proceedings are likely to take place.⁶² Meanwhile, bilateral investment treaties (BITs), typically agreed between only two states, establish reciprocal terms and conditions for investment by private companies from each state in the territory of the other.⁶³ BITs often include arbitration clauses which stipulate that any disputes arising out of the BIT or the contracts it regulates will be determined by arbitration rather than court-based litigation. There are a variety of frameworks that can govern these arbitrations, depending on whether they are ad-hoc (under the rules of UNCITRAL at an arbitration centre anywhere in the world) or institutional (under the rules of the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), the International Chamber of Commerce or the Permanent Court of Arbitration at the Hague), and affecting whether awards can be enforced against private entities or states.⁶⁴
59. There is some limited evidence to suggest that BITs encourage foreign direct investment (FDI) in countries by signalling the protection of property rights and/or adequate compensation to investors while the arbitration clauses within them may reassure investors that they will be able to resolve any disputes efficiently and fairly and enforce judgments reliably in spite of the shortcomings of the domestic legal system.⁶⁵ There is also some evidence to suggest that options for international dispute resolution (such as arbitration) maintain balance and fairness in international commercial relations while not adding prohibitively to the cost of dispute resolution,⁶⁶ and may also incentivise states to align domestic legal institutions with international norms.⁶⁷
60. However, there is also some limited evidence to suggest that investors are more influenced by market conditions such as labour and material costs, and indeed by the substantive protection provided by BITs (relating to establishment and access rights) rather than their dispute resolution provisions⁶⁸, and that

⁶⁰ For example, the Vienna Convention on Contracts for the International Sale of Goods, drafted by the United Nations Commission on International Trade Law (UNCITRAL) and the Ottawa Convention on International Financial Leasing, drafted by the International Institute for the Unification of Private Law (UNIDROIT).

⁶¹ For example, the Brussels and Lugano Conventions on Jurisdiction and the Rome Convention on the Law Applicable to Contractual Obligations, all creations of the EU.

⁶² For example, the Hague Conventions on Service Abroad and on the Taking of Evidence Abroad, both drafted by the Hague Conference on Private International Law.

⁶³ There are currently more than 2500 BITs in force, involving most countries in the world and all DFID priority countries save for, it seems, Montserrat, South Sudan, St Helena and St Kitts and Nevis.

⁶⁴ The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States 1965 (the Washington Convention) respectively.

⁶⁵ Acemoglu, Johnson and Robinson (2001), "The colonial origins of comparative development: an empirical investigation", *American Economic Review* Vol 91, 2001, pp.1369-1401; E. Neumayer and L. Spess (2005), "Do Bilateral Investment Treaties Increase Foreign Direct Investment", *World Development*, Vol. 33, No.10, pp. 1567-1585 and Ahlquist, John and Prakash, Aseem (2010), "FDI and the costs of contract enforcement in developing countries", *Policy Sciences* 43(2): 181-200. But compare Haggard and Tiede (2011), "The rule of law and economic growth: where are we?", *World Development*, 39(5), p.681.

⁶⁶ Asouzu (2001), *International Commercial Arbitration and African States*, General Introduction, p.5.

⁶⁷ OECD Report, paragraph 23; Stromberg, (2007), *Avoiding the Full Court Press: International Commercial Arbitration and Other Global Alternative Dispute Resolution Processes*, 40 *Loy. L.A. L. Rev.* 1337 (2007) and Fry (2011), *International Commercial Arbitration: Arbitration and the Promotion of Economic Growth and Investment*, Volume 13, 2011 issue 3-4, *African Conference on International Commercial Law Issue*, Pouget, S (2012), *The Role of Arbitration for a Trustworthy Mediterranean Area: Why an Effective Arbitration Regime Matters for Foreign Investors and Traders*, World Bank Group and Kee, C (2013), 'International Commercial Arbitration and Poverty, Not Obvious but Maybe Possible' in Schefer, K (2013), *Poverty and the International Economic Legal System: Duties to the World's Poor*, CUP.

⁶⁸ Perry (2002), "The Relationship Between Legal Systems and Economic Development: Integrating Economic and Cultural Approaches", *Journal of Law and Society*, 29(2): 282-307; Hallward-Driemeier (2003), "Do Bilateral Investment Treaties Attract Foreign Direct Investment? Only a Bit...And They Could Bite", World Bank Working Paper 3121; and Berger, Busse, Nunnenkamp and Roy (2012), *Attracting FDI through BITs and RTAs: Does treaty content matter*, *Columbia FDI Perspectives*, No. 75.

LITERATURE REVIEW – NOT POLICY

any rise in FDI from BITs reflects these factors and political stability rather than anything else.⁶⁹ There is also evidence to suggest that BITs can protect foreign investors at the expense of domestic investors, the environment, workers and other vulnerable individuals in the host state by stipulating little in the way of investor obligations. Indeed, sometimes they may actually undermine states' negotiating power by preventing them from regulating admission of investors to its territory⁷⁰ and prohibiting them from implementing measures designed to protect legitimate developmental or public welfare objectives.⁷¹ Finally, there is some evidence to suggest that in providing an alternative to domestic dispute resolution mechanisms, international dispute resolution mechanisms could undermine national judicial sovereignty, generate expense and reduce the incentives for both host countries and international investors to work to improve domestic dispute resolution and regulatory institutions.⁷²

61. There seems to be very little evidence as to the effects of harmonising domestic laws with international standards on FDI. Such harmonisation might take the form of ratifying key private international law treaties, harmonising domestic laws on a regional basis through organisations such as the EU or OHADA or adopting model laws into domestic legislation.. A report produced by the World Bank's Investing Across Borders (IAB)⁷³ initiative, based on research conducted in 87 developing economies, finds that restrictive and obsolete laws and regulations have particular retardant effects on Foreign Direct Investment (FDI) levels.⁷⁴ But equally, the implementation of 'pro-business' legal and regulatory reforms in developing countries is ineffective when not accompanied by more fundamental institutional change.⁷⁵
62. Overall, while there is evidence to suggest that there is an important association between the legal environment, FDI and commerce and growth, there is much less conclusive evidence on the direction of causality and which aspects of commercial legal environments and institutions matter most for economic growth.

Section 3: National Frameworks for Horizontal Accountability

Summary

63. The following section of this paper aims to answer the following sub-questions:

⁶⁹ E. Aisbett (2007), "Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation", UCLA Berkley. 70 Cotula (2007), Investment Treaties, Sustainable Markets Investment Briefing 2, albeit this is only where the BIT in question covers pre-establishment rights.

⁷¹ McCorquodale, R., (2010), Business, the International Rule of Law and Human Rights in *The Rule of Law in International and Comparative Context*, British Institute of Comparative and International Law, London 2012 and Peterson, "UK Bilateral Investment Treaty Programme and Sustainable Development: Implications of bilateral negotiations on investment regulation at a time when multilateral talks are failing", p.7, albeit again often modern BITs exempt regulation in the public interest.

⁷² OECD Report, paragraphs 23 and Ginsburg, T. (2005), 'International Substitutes for Domestic Institutions, 25 International Review of Law and Economics 107.

⁷³ The initiative compares the regulation of FDI globally using quantitative indicators to assess national laws, regulations and practices affecting FDI in different sectors.

⁷⁴ World Bank Group, Investing Across Borders 2010 (IAB), Washington, D.C, P:2.

Online at <http://iab.worldbank.org/~media/FPDKM/IAB/Documents/Overview-IAB.pdf> (accessed Feb.13).

⁷⁵ Kassahun, Y. (2006), An Overview of Law Reform in the Economic Development Context, Epilogue, in McInerney. T. (ed.) (2006), Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries, Legal and Governance Reform: Lessons Learned No. 1 International Development Law Organization (IDLO), pp. 175-185.

LITERATURE REVIEW – NOT POLICY

- a) How effective are national institutions in providing checks and balances on the use or abuse of state power (i.e. in their ability to establish mechanisms of horizontal accountability)?
- b) What are the developmental implications of improved horizontal accountability?

64. It finds that:

- a) The **separation of powers** between the state bodies that make, enforce and apply the law is a cornerstone of the rule of law. **Horizontal accountability** is the capacity of state organisations to check the use of power by other state organisations.
- b) In theory, the **legislature** provides an important check on the use of executive decision-making and its management of public finances and services. In practice, research shows that legislatures in developing countries find it difficult to fulfil their horizontal accountability functions, either because of constitutional design or *de facto* executive dominance.
- c) In theory, the **judiciary** has two main roles in maintaining the rule of law: the impartial administration of the law, and independent review of the legality of new laws and executive decisions. In practice, research suggests that factors other than constitutional recognition of judicial powers influence whether the judiciary is able to exercise its horizontal accountability functions. These factors include the nature of the legal and broader culture, degree of budgetary autonomy and the scale of judicial capacity.
- d) Beyond the legislature and judiciary, the current study finds that **other state bodies may also serve important oversight functions**. These bodies include ombudsmen, supreme audit institutions and anti-corruption and human rights commissions. The current review finds little evidence about the efficacy of these bodies, however.
- e) The current review found no research showing a positive relationship between *de facto* increases in horizontal accountability in developing countries and improvements in the development outcomes of interest (state-building, peace-building, equitable service delivery and economic growth).

Separation of powers and horizontal accountability

- 65. The separation of state powers is considered a cornerstone of the rule of law because it seeks to curtail the abuse of state power “by separating those who make the law (the Legislature), those who interpret and apply the law (the Judiciary) and those who have the power to enforce it (the Executive).”⁷⁶
- 66. Horizontal accountability (as distinguished from the separation of powers) is “the capacity of state institutions to check abuses by other public agencies and branches of government, or the requirement for agencies to report to those other agencies or branches”.⁷⁷ As such, the separation of powers may be viewed as the most important mechanism in establishing horizontal accountability.
- 67. While the judiciary and legislature are the main horizontal checks on executive power, other independent state organisations also exercise oversight functions. These include supreme audit institutions, anti-corruption or human rights commissions and ombudsmen.

⁷⁶ International Bar Association (2008) op.cit., p.5.

⁷⁷ O’Brien, M., Stapenhurst, R. & Johnston, N. (eds.) (2008), *Parliaments as Peacebuilders in Conflict-Affected Countries*, Washington, D.C.: The World Bank, p.78.

LITERATURE REVIEW – NOT POLICY

68. Like other forms of accountability, horizontal accountability has three main characteristics: i) transparency: availability of information about power-holders' commitments and actions; ii) answerability: the requirement for power-holders to justify their actions; and iii) enforceability: the ability of organs to impose and enforce sanctions when constitutional powers are over-stepped.⁷⁸

Legislative oversight and its effectiveness

69. Separating the branches of state authority may result in a variety of institutional and organisational formats. In 2012, of 190 parliaments surveyed by the Inter-Parliamentary Union and UNDP⁷⁹ 110 were unicameral, 75 were bicameral and 5 best described as 'transitional'.⁸⁰ Likewise, the functions that these legislatures perform vary significantly, with some serving a genuinely consultative and transformative purpose, and others merely operating as rubber-stamp organisations.⁸¹
70. In theory, legislatures have an important role in ensuring horizontal accountability by acting as a check or brake on the unconstrained use of executive powers, overseeing some of the main features of government decision-making and providing a bridge between the executive and civil society.⁸² Legislatures also play critical financial oversight roles in scrutinising taxation, expenditure and public services to ensure that the policy and governance that inform them conform with the law, that they are cost-effective, and that funds relating to them are not misappropriated. The establishment of parliamentary committees is one mechanism designed to strengthen such accountability functions.
71. However, in practice, legislatures are likely to face challenges in fulfilling their horizontal accountability functions. In a cross-country assessment of governance regimes in Africa, Van Cranenburgh observes that notwithstanding the constitutional separation of powers, many African democracies are 'hybrid regimes' assuming 'semi-presidential' forms. These fuse the power-concentrating features of presidential and parliamentary systems. Moreover, in countries tending to follow British traditions of government, government ministers serve dually as members of parliament, a system which may somewhat limit the accountability function of the legislature. In such systems, legislatures may be unable to restrain executive power because political leaders can count on overwhelming support from a dominant political party. Moreover, powers (such as censure against ministers; capacity to challenge spending plans; over-ruling the presidential veto; capacity to impeach the president; term of office limits) are rarely exercised, are easily circumvented or are subject to executive dominance.⁸³ With reference to Thailand, for example, Thongsawasdi demonstrates the extent to which parliamentary oversight was disabled through military interference in government.⁸⁴

⁷⁸ See for example Hudson, A. & GOVNET Secretariat (2009), *Aid and Domestic Accountability: Background Paper*, DAC Network on Governance, online at: www.oecd.org (accessed Feb.13).

⁷⁹ Inter-Parliamentary Union and United Nations Development Programme *The Global Parliamentary Report: The changing nature of parliamentary representation* (2012), online at http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Parliamentary%20Development/Global%20Parliamentary%20Report%20Executive%20Summary%20-%202012_English.pdf (accessed February 2013).

⁸⁰ Annex Basic Data on the World's Parliaments, *ibid.*, pp. 90-109, online at http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Global_Parliamentary_Report_English.pdf (accessed Feb.13).

⁸¹ O'Brien, M., Staphenurst, R. & Johnston, N. (eds.) (2008), *Parliaments as Peacebuilders in Conflict-Affected Countries*, Washington, D.C.: The World Bank, p.4.

⁸² Staphenurst, R., Pelizzo, R., Olson, D. & Von Trapp, L. (2008), *Legislative Oversight and Government Accountability*, World Bank Publications: Washington, D.C.

⁸³ Van Cranenburgh, O. (2009), *Restraining executive power in Africa: horizontal accountability in Africa's hybrid regimes*, *South African Journal of International Affairs*, 16(1), 49-68.

⁸⁴ Thongsawasdi, T. 'Military Intervention in Thai Parliamentary Democracy', in O'Brien, et al., *idem.*, pp.163-173.

Judiciary oversight and its effectiveness

72. The judiciary has two main roles in maintaining the rule of law. Judicial independence describes its impartiality in the administration of the law, whilst judicial or constitutional review describes the process by which new laws, executive actions and policy decisions are scrutinised to verify their consistency and compliance with existing legislation and the constitution itself.⁸⁵
73. In practice, the efficacy of the judiciary in contributing to horizontal accountability is generally determined by factors other than constitutional recognition of judicial independence and/or judicial review, which is already widespread. Extrapolating from a study of Tanzania and Zambia, Gloppen and others suggest that the following factors are important in shaping the degree to which judiciaries curtail the state abuse of power:
- i) Legal culture: judges' recognition of their right and responsibility to oppose the executive when it proposes legislation that contravenes the constitution;
 - ii) Judicial terms and conditions of appointment and security of tenure;
 - iii) Mechanisms for the appointment of chief justices, judges and magistrates;
 - iv) Budgetary autonomy;
 - v) Overall capacity in terms of size and skills;
 - vi) Social legitimacy: degree to which courts enjoy a secure or legitimate base in society.⁸⁶
74. Meanwhile, Stephenson has identified political factors such as competition, moderate judicial doctrine and a stable political order⁸⁷ and Rosenberg has highlighted the importance of political will on the part of elites to be bound by decisions of the courts.⁸⁸ Others have emphasised the importance of an educated citizenry, a well-developed civil society and access to justice to enable people to challenge government laws and decisions in the first place.⁸⁹
75. Publishing a report based on its Rule of Law Initiative, the American Bar Association notes a set of constraints hampering the ability of judiciaries to perform oversight functions, including: a) inadequate judicial education and professional training on judicial ethics hampers judicial and judge effectiveness; b) overwhelming caseloads; c) widespread corruption; and d) lack of professional guarantees and ill-defined judicial powers.⁹⁰ A number of these findings are confirmed in the case study literature.⁹¹
76. Conversely, some argue that too much judicial independence may be as damaging as it gives rise to an undue concentration of power in the executive. In a study of judicial independence in Brazil between 1985-2002, Santiso describes how the 1988 Brazilian constitution isolated the judiciary from political interference to enable it to perform its horizontal accountability functions through the judicial review of

⁸⁵ Hayek, F.A. (1960), *The Constitution of Liberty*, Chicago: University of Chicago Press.

⁸⁶ Gloppen, S., Gargarella, R. & Skaar, E. (2010), Introduction: the accountability function of the courts in new democracies. *Democratization*, 10(4), 1-6; Gloppen, S. (2003), The Accountability Function of the Courts in Tanzania and Zambia, *Democratization*, 10(4), 112-136.

⁸⁷ Stephenson, M. (2003), When the Devil Turns: The Political Foundations of Independent Judicial Review, *Journal of Legal Studies*, vol.32.

⁸⁸ Rosenberg, G. (1991), *The Hollow Hope: Can Courts Bring About Social Change?*

⁸⁹ Eppsten, C. (1998), *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective*.

⁹⁰ American Bar Association, (2012), ABA Rule of Law Initiative: Promoting the Rule of Law 2012, Washington D.C., online at http://www.americanbar.org/content/dam/aba/directories/roli/misc/aba_rol_i_2012_program_book_web_email.authcheckdam.pdf (accessed Feb.13).

⁹¹ See: Armytage, L. (2011), Judicial Reform in Asia Case Study of ADB's Experience: 1990-2007, *Hague Journal on the Rule of Law / Volume 3 / Issue 01 / March 2011*, pp. 70-105, Cambridge University Press, online at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8275223> (accessed Feb.13); Ahmad, R, and Porter, D. (2006), Justice Sector Reforms and Policy Conditionality: Symbiosis or Mutual Denial? In *Mclinery* (2006), op, cit., pp. 69-81.

LITERATURE REVIEW – NOT POLICY

executive decrees.⁹² However, in a number of cases of major importance, the independence of the judiciary amounted to counter-productive ‘judicial activism’. Moreover, the social legitimacy of the Brazilian courts is low and the sheer volume of cases renders the court system unresponsive to popular demand. Prado concludes that the Brazilian experience challenges the assumption that an independent judiciary is the single most important prerequisite for rule of law.⁹³ These reflect the views expressed elsewhere that judicial and constitutional review can, in the wrong circumstances, simply serve to reinforce the interests of political and social elites.⁹⁴ Tensions and trade-offs exist between independence and accountability and the primary challenge is to achieve the right balance.

The horizontal accountability function of ombudsmen

77. Beyond the judiciary and legislature, some countries establish the office of ‘the ombudsman’ in an attempt to manage popular grievances against the state bureaucracy, administration or civil service, and in so doing, checking the abuse of power by different state organs.⁹⁵ For example, Timor-Leste’s Ombudsman for Human Rights and Justice was established with a constitutional mandate to examine and settle citizens’ complaints against public bodies, certify conformity of administrative actions with the law, and initiate processes to remedy injustice. Around the world, offices have been established for ombudsmen with supervisory, investigative and educative powers in the domains of human rights, good governance, anti-corruption and anti-competition.⁹⁶
78. As for the efficacy of ombudsmen in promoting horizontal accountability, the current review has not identified many robust studies, although some findings of the 2011 Global Integrity Report are instructive. For example, in two of the three developing countries whose overall scores improved most dramatically between 2009 and 2011, effective oversight by a national ombudsman and improved regulatory enforcement are assessed as being important factors.

Section 4: The Rule of Law and State and Society relations

Summary

79. The rule of law requires that laws are free from bias and discrimination “equally enforced and independently adjudicated, and consistent with international human rights norms and standards”.⁹⁷
80. The following section of the report aims to answer the following sub-question:
- a) How effective are national institutions and frameworks in guaranteeing citizen rights before the law and in providing for fair and predictable dispute resolution?

⁹⁴ Galanter, M. (1973), Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change, *Law and Society Review*, 9(1).

⁹⁵ Abedin, N. (2006), The ombudsman institution and conflict resolution in the contemporary third world societies, *Journal of Third World Studies*, 23 (1), pp. 219-233.

⁹⁶ Bergling, P. et al (2010) op., cit., Box 7 p. 34; Walters, J. The protection and promotion of human rights in Namibia: The constitutional mandate of the Ombudsman, in Horn, N., and Bösl, A. (eds.), (2009), *Human Rights and the Rule of Law in Namibia* (2nd edited edition), Konrad Adenauer Foundation, Macmillan, Namibia, p.121-131.

⁹⁷ UN General Assembly (2004), *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General*, UN Doc S/2004/616 [6].

LITERATURE REVIEW – NOT POLICY

81. It finds:

- a) There is a significant body of evidence showing that many countries do not have adequate statutory provision to protect and promote **equal rights for women**, either through omission or commission in the form of laws that discriminate against women and girls. There is some evidence that domestic legislation can help to reduce violence against women.
- b) Some researchers suggest that **fair and predictable application of the law**, particularly by front-line public administrators, may strengthen state legitimacy. However, research also suggests that perceptions that high-ranking officials are able to act with impunity are common worldwide.
- c) Country case studies show that the formal justice often does not provide **predictable and efficient dispute resolution** for poor people. This is both because the state does not have sufficient capacity to provide justice services (e.g. shortage of prosecutors) and because poor and marginalised people face obstacles in accessing the formal justice system (e.g. location of courts, language, or lack of awareness).
- d) There is evidence that **legal empowerment** programmes, including paralegal services, improve poor people's access to dispute resolution through both non-state mediation and legal assistance in the formal justice system.

Equal rights and equal treatment of citizens

82. Citizenship has been defined as the 'right to have rights.'⁹⁸ Leydet argues that conferring upon the individual the legal status of citizenship makes possible a rules-based and non-arbitrary relationship between individuals and the state, giving each citizen the opportunity to enforce and contest the rules states make without recourse to violence.⁹⁹ Critical to many conceptions of citizenship is the preference for its universality: the idea that citizenship is a legal status through which an identical set of civil, political and social rights are accorded to all members of the polity.¹⁰⁰

Citizenship & Gender

83. For citizenship to have meaning, rights must not only be provisioned for constitutionally, but must also be protected by statutory law. A number of studies demonstrate clearly that many developing countries do not adequately protect and promote equal rights for women, despite constitutional provision. A study undertaken for the UN Secretary-General in 2006 found widespread and large scale variation in the degree to which states had established national laws to address domestic violence.¹⁰¹ This

⁹⁸ Arendt, H. (1958), *The Origins of Totalitarianism*, Orlando Harcourt Brace; Kesby, A. (2012). *The Right to Have Rights: Citizenship, Humanity, and International Law*, Oxford: Oxford University Press.

⁹⁹ Leydet, D. (2011), Citizenship in Zalta, E.N. (ed.), *The Stanford Encyclopedia of Philosophy* (Fall 2011 Edition) online at <http://plato.stanford.edu/archives/fall2011/entries/citizenship> (accessed Feb.13).

¹⁰⁰ Marshall, T. H. (1950), *Citizenship and Social Class and Other Essays*, Cambridge: Cambridge University Press; Giddens, A. (1982), *Profiles and Critiques in Social Theory*, London: Macmillan; Turner, B. (1992), *Outline of a Theory of Citizenship*, in C. Mouffe (ed.), *Dimensions of Radical Democracy: Pluralism, Citizenship, Community*, London, Verso; Lister, M. (2005), 'Marshall-ing' Social and Political Citizenship: Towards a Unified Conception of Citizenship. *Government and Opposition*, 40(4), 471–492.

¹⁰¹ Eighty-nine States have some specific legislative provisions; one hundred and two were not known to have any such legal provisions; twenty States had draft legislation at various stages of development; four additional States had expressed their intention to develop laws or make legal provision. 2012 figures indicate that in the Middle East and North Africa region only Iraq, Jordan, Kuwait and Tunisia have specific legislation in place. UN General Assembly (2006) 'In-depth Study of all Forms of Violence against Women: Report of the Secretary-General', UN Doc A/61/122/, data taken from footnote 16: IDLO (2013).

LITERATURE REVIEW – NOT POLICY

notwithstanding, the research suggests that where legislation is enacted to address gender inequality and/or violence against women and girls, the effects can be substantial. A study of the effectiveness of Namibia's 2003 Domestic Violence Act uses court documentation to demonstrate comparatively high 'uptake' or usage rates for the new legislation.¹⁰² A 2009 survey of the impact of Cambodia's 2005 domestic violence law provides some evidence to show that incidences of domestic violence were decreasing.¹⁰³

84. Other surveys of provision for gender equality further demonstrate that beyond the provisions of the constitution, women and children, especially girls, face discriminatory domestic laws relating to their personal legal status, their eligibility to own property and their fitness to stand as witnesses.¹⁰⁴ A range of discriminatory practices have also been identified in the criminal law and employment law jurisdictions.¹⁰⁵

Predictability and fairness in administration of the law

85. The principle that no individual is above the law is central to most rule of law definitions. And yet globally, perceptions of equality before the law are relatively modest. The most recent World Justice Project Rule of Law Index finds that worldwide, only 37% of respondents surveyed believe that high-ranking officials found to have misappropriated government funds would be prosecuted and punished.¹⁰⁶
86. Per Bergling and others stress the importance of basic and visible rule of law reforms as a mechanism for the strengthening of state legitimacy. They find that ensuring that the public administration takes a firm line in enforcing laws on apparently mundane issues such as vehicle registration, tax collection and rubbish removal may have a greater legitimacy pay-off for the state than reform of more sophisticated aspects of the legal system, such as the judiciary. They argue that "any continuing bad practices by government agencies can quickly deepen lawlessness and reinforce the reality/perception that the situation is out of control or has not changed."¹⁰⁷

Access to predictable and efficient dispute resolution for all citizens

87. Evidently, for the poor to realise their constitutional rights, they must first have access to justice.¹⁰⁸ Typically, however, the poor face severe challenges in accessing justice services. An absolute lack of

¹⁰² Gender Research and Advocacy Project (2012), *Seeking Safety: Domestic Violence in Namibia and the Combating of Domestic Violence Act 4 of 2003 – Summary Report*, Legal Assistance Centre, Namibia online at <http://www.lac.org.na/projects/grap/Pdf/seekingsummary.pdf> (accessed Feb.13).

¹⁰³ Cited in UN Women (2011), op., cit, p.34

¹⁰⁴ Banda, F. (2008), *Laws that Discriminate against Women*, Report commissioned by Office of the High Commissioner for Human Rights (OHCHR). See for example p. vii, p.115, online at http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf (accessed Feb.13).

¹⁰⁵ Ibid. See also Forster, C. and Jivan, V. (2009), *Gender Equality Laws: Global Good Practice and a Review of Five Southeast Asian Countries*, Bangkok: UNIFEM- source GSDRC Gender Topic Guide, online at http://cedaw-seasia.org/docs/Aw_GEL_incover050609Feb10.pdf (accessed Feb.13).

¹⁰⁶ Op.cit., Box 7, Significant variation was noted across countries and regions: Western European and North American countries score highest, followed by East Asia and Pacific, the Middle East and North Africa, Sub-Saharan Africa, and Eastern Europe and Central Asia. Latin America and South Asia ranked lowest and 12 of the 16 Latin American countries ranked in the 30% percentile or lower.

¹⁰⁷ Per Bergling et al (2010), p.177.

¹⁰⁸ Anderson, M.R. (2003), *Access to justice and legal process: making legal institutions responsive to poor people in LDCs*, IDS Working Paper 178.

LITERATURE REVIEW – NOT POLICY

state capacity is one major issue, with country case studies of Nigeria,¹⁰⁹ Malawi¹¹⁰ and Angola¹¹¹ (to take three examples) demonstrating these respective states' inability to offer high quality, formal /state-supported justice services for the poor. Dandurand notes the developing world's shortage of impartial, objective and suitably skilled prosecutors to ensure justice for the victims of crime.¹¹² Surveying the efficacy of the judiciary in Zambia (to take one example) through case-based data and field interviews, Kahn-Fogel also finds that there is a critical shortage of African lawyers at every level of the courts system, negatively affecting both criminal defendants and civil claimants.¹¹³ Capacity deficits are further exacerbated in conflict and post-conflict situations where prosecutors are often dealing with widespread crime, civil disorder and high incidences of rape.¹¹⁴

88. Compounding these issues relating to absolute shortages of state capacity are factors that render groups particularly unable to access justice services. For example, victims of forced migration are likely to suffer particularly from a lack of access to justice services.¹¹⁵ The geographical dispersion of courts prevent the rural poor from drawing upon their services, as do differences between the vernacular of specific poor communities and language of the courts. Low literacy rates, a lack of awareness of citizen rights or even just a basic lack of time to attend lengthy court proceedings act as further barriers. Women in particular face discrimination at the hands of the police, court staff, the judiciary and health care workers; and are left particularly exposed to the prohibitive costs of litigation.¹¹⁶
89. There are a number of potential responses to these shortages of state capacity. Those relating to non-state (informal, customary, traditional) forms of law are considered in section 5, below. Here, we consider the roles of legal empowerment programmes and paralegals in improving both the supply and demand-side challenges faced by the poor.

Legal Empowerment

90. Legal empowerment is “[t]he process of systemic change through which the poor are protected and enabled to use the law [so as] to advance their rights and their interests as citizens and economic actors.” Underpinned and inspired by international human rights standards, legal empowerment is perhaps the principal example of ‘demand-side’ responses to rule of law deficits.¹¹⁷ Rather than focussing on the establishment of new codes of statutory law, legal empowerment approaches consider mechanisms to extend existing legal provisions to the poor, and encourage the poor to be more pro-active in claiming their rights.

¹⁰⁹ Brems, E., Adekoya, C.O. (2010), Human rights enforcement by people living in poverty: Access to justice in Nigeria, *Journal of African Law*, 54(2), 258-282.

¹¹⁰ Gloppen, S., Kanyongolo, F.E. (2007), Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law, *International Journal of Constitutional Law*, 5(2), 258-293.

¹¹¹ Skaar, E., Serra Van-Dúnem, J.O. (2006), Courts under construction in Angola: What can they do for the poor? Working Paper - Chr. Michelsen Institute, 20.

¹¹² Dandurand, Y. (2007), “The role of prosecutors in promoting and strengthening the rule of law” *Crime, Law And Social Change*, 47 (4-5), pp.247-259.

¹¹³ Kahn-Vogel, N.A., (2012), The troubling shortage of African lawyers: Examination of a continental crisis using Zambia as a case study, *University of Pennsylvania Journal of International Economic Law*, 33 (3), pp.719-789.

¹¹⁴ United Nations Office of the High Commissioner for Human Rights (2006), Rule-Of-Law Tools For Post-Conflict States: Prosecution initiatives, United Nations, New York and Geneva, Online at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> (accessed Feb.13).

¹¹⁵ Harding, J., Scanlon, S., Lees, S., Beker, C., Lim, A.I. (2008), “Access to Justice and the Rule of Law”, *Forced Migration Review*, (30), pp. 28-30.

¹¹⁶ UN Women (2011), op cit. p.59; UNDP (2007), *Gender Equality and Justice Programming: Equitable Access to Justice for Women*, New York, p. 18.

¹¹⁷ United Nations General Assembly (2009), Legal empowerment of the poor and eradication of poverty, (A/64/133) online at <http://www.unrol.org/files/N0940207.pdf>, paragraph 3 (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

91. Maru identifies the five key principles of legal empowerment as: concrete solutions to injustice; litigation combined with grassroots tools (education, organisation, advocacy, mediation); pragmatic orientation towards plural legal systems; a commitment to empowerment; and a balance between rights and responsibilities.¹¹⁸ Case study evidence from Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda describes how legal empowerment can and has been used to secure land rights, negotiate disputes over natural resources, and address intra and inter-family conflicts.¹¹⁹

The Commission on the Legal Empowerment of the Poor (CLEP)

92. The UNDP's Commission on the Legal Empowerment of the Poor (CLEP), which ran from 2005-2008, has been the single most ambitious and large-scale attempt to implement legal empowerment approaches, and was based on the premise of extending the rule of law to those in developing countries who had hitherto been excluded from it.¹²⁰ The commission, organised around four pillars (access to justice and the rule of law; property rights, labour rights; business rights)¹²¹ aimed to ensure that "legal protection and economic opportunity are the right of all and not the privilege of few".¹²²
93. Two methodologically rigorous studies undertaken in the Southern Philippines and Bangladesh by the Asian Development Bank [ADB (2001)] offer evidence of the positive impact of the CLEP.¹²³ They find that it had beneficial impacts on agrarian reform; resident welfare;¹²⁴ and prioritisation of key issues for local communities.¹²⁵
94. Cousins' more conceptual paper, on the other hand, argues that whilst each aspect of the CLEP model is desirable, not all are likely to be poverty reducing. Specifically, he argues that labour rights rather than property rights deserve greater prominence, given that it is the adverse conditions under which the poor are currently integrated into the formal market (rather than their absolute exclusion from the market) which has the greatest bearing on their poverty.¹²⁶ Although the CLEP generated positive interest in the nexus between poverty, injustice and legal exclusion, Stephens, for his part suggests that its failure to adequately address the political economy of reform and to evidence its programme with empirical data represents a missed opportunity.¹²⁷

¹¹⁸ Maru, V. (2011), *Allies unknown: social accountability and legal empowerment*, Health and Human Rights, vol. 12, no.1, P.83.

¹¹⁹ Harper, H. (2011), *Customary Justice: from Program Design to Impact Evaluation*, International Development Law Organisation; Harper, H. (ed.) *Working with Customary Justice Systems: Post-conflict and Fragile States*, International Development Law Organisation; and Ubink, J. (ed.) *Customary Justice: Perspectives on Legal Empowerment*, International Development Law Organisation.

¹²⁰ Singh, N. (2009), *Fighting rural poverty, inequality and low productivity through legal empowerment of the poor*, *Journal of Peasant Studies*, 36(4), 871-892.

¹²¹ Commission on Legal Empowerment of the Poor and United Nations Development Programme (UNDP) (2008), *Making the Law Work for everyone: Vol 1 - Report of the Commission on Legal Empowerment of the Poor*, New York online at http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf (accessed Feb 13).

¹²² Commission on Legal Empowerment of the Poor and United Nations Development Programme (UNDP) (2008), *Making the Law Work for everyone: Vol 1 - Report of the Commission on Legal Empowerment of the Poor*, New York. online at http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf (accessed Feb.13).

¹²³ These were conducted under Asian Development Bank Regional Technical Assistance 5856 to supplement the seven-country Legal Empowerment Study.

¹²⁴ Asian Development Bank (ADB), Asia Foundation (2001), *Legal Empowerment: Advancing Good Governance and Poverty Reduction*, Appendix 1: *The Impact of Legal Empowerment Activities on Agrarian Reform Implementation in the Philippines*.

¹²⁵ Appendix 2: *The Impact of Legal Empowerment on Selected Aspects of Knowledge, Poverty, and Governance in Bangladesh: A Study of Three NGOS*.

¹²⁶ Cousins, B. (2009), *Capitalism obscured: the limits of law and rights-based approaches to poverty reduction and development*, *Journal of Peasant Studies*, 36(4), 893-908.

¹²⁷ Stephens, M. (2009), *Legal Empowerment of the Poor- The Commission on Legal Empowerment of the Poor: An Opportunity Missed*, *Hague Journal on the Rule of Law*, Volume 1, Issue 01 March 2009, pp.132-155, Cambridge University Press.

LITERATURE REVIEW – NOT POLICY

Legal empowerment and legal pluralism

95. In recent times, and based on the evident difficulties of boosting the capacity of the formal justice sector, legal empowerment programmes have developed stronger linkages with customary or informal, community based justice mechanisms (see Section 5).¹²⁸

Extending access to justice through paralegals

96. Paralegals, individuals trained in several aspects of the law, but not qualified to the same degree as lawyers, provide an alternative (or complementary) model for extending the rule of law to the poor.
97. Paralegal models differ in terms of the degree of state recognition or involvement. For example, as of 2012, Sierra Leone regulates paralegals as part of its legal aid system. Stapleton's study of the impact of the Paralegal Advisory Service (PAS) in Malawi finds that the system is a cost effective, and easily replicable way of providing legal assistance especially to those involved in criminal proceedings (those detained and awaiting trial). Stapleton's study finds that between 2002 and 2007, paralegal clinics conducted in prisons enabled an estimated 150,000 prisoners to represent themselves in court (in applications for bail, entering an informed plea to the charge, conducting their defence, entering a plea in mitigation or drafting an appeal to the High Court). As such, the paralegal system contributed to streamlining an otherwise sluggish judicial process and to reducing the overall remand population from 40–45% to 17.3%.¹²⁹
98. Similarly, Siddiqi's study of the Liberian Community Legal Advisors (CLA) programme demonstrates the apparent effectiveness of paralegals in extending access to the rule of law. CLAs were engaged in a wide range of cases (with a particular [42%] focus on family law). Siddiqi finds that an estimated 88% of all cases were resolved, and 41% of these through mediation. Crucially, 76% of community-level problems for which advice was sought from CLAs were resolved without recourse to the formal justice system.¹³⁰ Orvis also offers provisional evidence of the positive impact of civic education and paralegal programmes on extending the rule of law to rural areas.¹³¹

Section 5: The Rule of Law and economic growth

Summary

99. This section of the report seeks to answer the following sub-questions:
- a) Does the rule of law promote economic growth?
 - b) If the rule of law promotes economic growth, how does it do so?

¹²⁸ Harper, H. (2011), op. cit. p.6. Odinkalu, C. A., (2006), "Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa" pp.141-167 in Sage, C., and Woolcock, M. (eds), *The World Bank Legal Review: Law, Equity, and Development*, Volume 2, Washington, DC: World Bank.

¹²⁹ Stapleton, A. (2010), *Empowering the Poor to Access Criminal Justice: A grass Roots Perspective*, Legal Empowerment Working Papers, No. 2, International Development Law Organization, p.4.

¹³⁰ Siddiqi, B. (2012), *Law Without Lawyers: Assessing A Community-Based Mobile Paralegal Program In Liberia*, International Development Law Organization 2012, pp.26-27.

¹³¹ Orvis, S. (2003), *Kenyan civil society: Bridging the urban-rural divide?* *Journal of Modern African Studies*, 41 (2), pp. 247-268.

LITERATURE REVIEW – NOT POLICY

100. It finds that:

- a) There is a large body of evidence that considers the relationship between the rule of law and economic growth via mechanisms that protect property rights, facilitate incorporation and borrowing and the enforcement of contracts. . In general, these studies concur on the existence of a positive correlation between the rule of law and growth but they also point to a lack of consensus as to which legal institutions are important for what a feasible and effective rule of law reform process looks like.
- b) There is also a large body of evidence considering the specific links between the protection of property rights and investment and growth. At the macro-level, the evidence is contested in much the same way as the studies that look more generally at the rule of law and economic growth. At the micro-level, while there are studies that support claims that property rights incentivise investment and increased productivity, there are also studies that suggest such a link is dependent on the type of property and investment and the available markets for land, credit and other inputs.
- c) A variety of studies evidence a correlation between regulatory environments that affect the ability to start a business, hire workers, protect investors, enforce contracts and exit business, investment levels and growth. However, there is less evidence available as to the specific interventions needed to create these environments and their success or otherwise.
- d) Several studies estimate that in developing countries **most justice services are provided by non-state mechanisms** (either partially administered by the state or entirely beyond state control), and claim that citizens often prefer these to state justice providers because they have greater confidence in their quality (e.g. fairness, honesty, competence and efficiency).
- e) The research suggests that there are widespread variations in the **quality and benefits of non-state justice mechanisms**. A growing body of literature suggests that legal pluralism – or the existence of multiple sources of law within a single geographical area – creates choice and that non-state justice mechanisms can support peace- and state-building processes. Other studies suggest that people may be coerced to use non-state providers. Commentators also contest the efficacy and predictability of these mechanisms and their consistency with constitutional and international human rights standards.
- f) Informed opinions differ on the subject of how far formal state legal codes should accommodate traditional and customary law. Some commentators argue that legal pluralism undermines the rule of law because it generates uncertainty, while others suggest that **codification** of customary law enhances its predictability at the expense of flexibility and local relevance.

Three literature reviews on the rule of law and economic growth

101. A number of literature reviews synthesise the more specific research on the relationships between the rule of law and economic growth. Three of the most comprehensive are those by Davis and Trebilcock (2008),¹³² Haggard and Tiede (2011)¹³³ and Cox (2008).¹³⁴ This literature tends to focus on those aspects of the rule of law that facilitate activity between citizens, whether as individuals or firms, at the domestic level. These include systems that protect property rights, facilitate incorporation and

¹³² Davis, K. E., and Trebilcock, M. J. (2008), The relationship between law and development: Optimists versus skeptics, *American Journal of Comparative Law*, 56(4), 895-946.

¹³³ Haggard, S., and Tiede, L. (2011), The rule of law and economic growth: Where are we?. *World Development*, 39(5), 673-685.

¹³⁴ Cox, M. (2008), Security and justice: measuring the development returns – a review of knowledge, *Agulhas Applied Knowledge*, Prepared for DFID.

LITERATURE REVIEW – NOT POLICY

borrowing and the enforcement of contracts. However, the literature also considers aspects of horizontal accountability and checks on corruption within government.

Davis and Trebilcock (2008)

102. This literature survey explores the relationship between the rule of law and development.¹³⁵ Not only does the evidence suggest that strong institutions are associated with economic development, but there is some room for optimism concerning the positive impact of legal reforms. However, their overall conclusion is that there is a striking “lack of consensus” about the impact rule of law has on economic development between rule of law ‘optimists’ and ‘skeptics.’
103. Rule of law optimism is firmly rooted in the new institutional economics tradition which holds that economic growth follows the creation of an enabling institutional environment. De Soto’s (1989) claim, that “[d]evelopment is possible only if efficient legal institutions are available to all citizens”¹³⁶ is prominent in this school and a clear representation of the rule of law optimist view. Some specific institutional features conducive to economic growth include well-defined and alienable private property rights; formal systems of contract law facilitating impersonal contracting; corporate law facilitating capital investment; systems of secured lending enabling creditors to take a broad range of assets as collateral; bankruptcy regimes that induce the exit of inefficient firms and redeployment of their assets; and non-distortionary tax regimes.¹³⁷ Davis and Trebilcock also point to the ‘new constitutionalist’ school which proposes three particular constitutional attributes, namely democracy, separation of powers, and freedom of the press as being conducive to faster rates of development.¹³⁸
104. Rule of law ‘skepticism’ on the other hand, takes three main forms:
- a. Doubts as to whether or not the actors (be they international or domestic) seeking to promote the rule of law through reform programmes are technically capable of identifying and implementing the appropriate reforms.¹³⁹
 - b. Doubts that legal systems are ‘independently manipulable’ features of society: even if international and domestic actors are technically competent, inherent institutional frameworks, or indeed other societal dynamics (historical, economic, political, cultural) may simply be inherently beyond manipulation.¹⁴⁰ Influential in this field is a study by Acemoglu, Johnson and Robinson (2001) which suggests that the institutional and therefore development trajectories of states are overwhelmingly determined by the nature of their pre-independence colonial governance regimes.¹⁴¹
 - c. Enduring skepticism as to the existence of any causal relationship between legal reform and development.¹⁴² Development may not be associated with any particular type of legal system.

¹³⁵ Davis and Trebilcock focus on three books on law and development: Carothers (ed.) (2006), *Promoting the Rule of Law Abroad: In Search of Knowledge*; Trubek, D. and Santos, A. (eds.) (2006), *The New Law and Economic Development: A Critical Appraisal*; Dam, K. (2006), *The Law-Growth Nexus: The Rule of Law and Economic Development*.

¹³⁶ De Soto, H. (1989), *The Other Path: The Invisible Revolution in the Third World*, quoted in Davis and Trebilcock (2008), p. 903.

¹³⁷ Davis and Trebilcock (2008), p. 903.

¹³⁸ Davis and Trebilcock (2008), p. 905-914.

¹³⁹ Davis and Trebilcock (2008), p. 917-919.

¹⁴⁰ Davis and Trebilcock (2008), p. 919-932.

¹⁴¹ Acemoglu, D., Johnson, S. and Robinson, J. (2001), *The colonial origins of comparative development: an empirical investigation*, *American Economic Review*, 5, 1369-1401.

¹⁴² Davis and Trebilcock (2008), p. 932-938.

LITERATURE REVIEW – NOT POLICY

Ignoring existing forms of social control in favour of formal legal reform is likely to have no effect, or be actively counter-productive.¹⁴³

105. Davis and Trebilcock analyse some substantive, empirical studies to ascertain which of the above schools of thought is the more convincing. Cross-country statistical analyses have considered the effect of institutions on growth, some focus specifically on the rule of law.
106. Kaufmann et al (1999) draws on the World Bank's World Governance Indicators, and find that a 1-point increase on the 6-point rule of law scale is correlated with a 2.5-to-4-fold improvement in per capita incomes and infant mortality, and a 15-25 per cent increase in literacy rates.¹⁴⁴
107. In similar research, Rodrik et al (2004)¹⁴⁵ find a significant and strong correlation between institutional quality and per capita incomes, although the protection of property rights and strength of the rule of law feature heavily in their institutional measures.
108. From their assessment of these and other studies Davis and Trebilcock reject some principal concerns of rule of law sceptics, in particular, the idea that institutions in general, and rule of law in particular, are pre-determined by economic, political and cultural dynamics. They believe that institutions can be manipulated and that the "the empirical literature is consistent with the optimistic view that institutions are susceptible to deliberate efforts at reform and are not shaped exclusively by economic, cultural or political forces."¹⁴⁶ Moreover, "there appears to be an increasingly firm, empirically-grounded consensus that institutions are an important determinant of economic development."¹⁴⁷
109. Strikingly, however, Davis and Trebilcock do not support the specific claim of evidence showing that rule of law institutions are determinants of economic growth. They point to the lack of consensus about which legal institutions are important and the features of "an optimal set of legal institutions" for any given developing country. Nor is there any consensus about what a feasible and effective reform process looks like for developing countries without optimal legal institutions and the respective roles of "insiders" and "outsiders" in that process.¹⁴⁸ Pointing the way forward, Davis and Trebilcock recommend micro-economic studies of the institutions/growth nexus rather than further iterations of the cross-country econometrics.

Haggard and Tiede (2011)

110. Uncertainty about which specific aspects of the rule of law impact on development is also observed by Haggard and Tiede (2011)¹⁴⁹ who explore four constituent components of the rule of law namely: rule of law as the security of the person; rule of law as property and contracting rights; rule of law as checks on government; corruption and the rule of law.
111. They doubt that researchers know what they are measuring when they claim to be measuring the rule of law and illustrate the uncertainties through several enquiries. Data from 74 developing countries and the eleven rule of law measures explored suggest that the correlations across these measures are less strong than expected. High performance as measured by one rule of law indicator need not imply high

¹⁴³ This view takes aim at the 'legal determinists' within the rule of law optimists school.

¹⁴⁴ Kaufmann, D., Kraay, A. and Zoido-Lobaton, P. (1999), "Governance Matters." World Bank Policy Research Working Paper Series 2196.

¹⁴⁵ Rodrik, Subramanian and Trebbi. (2004), "Institutions Rule: the primacy of institutions over geography and integration in economic development" Journal of Economic Growth, 131.

¹⁴⁶ Davis and Trebilcock (2008), p. 940.

¹⁴⁷ Davis and Trebilcock (2008), p. 945.

¹⁴⁸ Davis and Trebilcock (2008), p. 932-938.

¹⁴⁹ Haggard, S., and Tiede, L. (2011), The rule of law and economic growth: Where are we? World Development, 39(5), 673-685.

LITERATURE REVIEW – NOT POLICY

performance in another. Hence, “findings with respect to the rule of law and economic growth are likely to be highly sensitive to the use of indicator.”¹⁵⁰

112. They also find that two of the aggregated rule of law measures (the World Bank’s Governance VII Rule of Law measure and the World Economic Forum Rule of Law measure) whilst being strongly correlated to corruption dimensions are not strongly correlated to other measures (including contract enforcement, judicial independence, political violence etc.). This means that analysis based on these aggregated indicators, which suggests that rule of law is important for growth, may in fact be pointing to initiatives to combat corruption as being particularly important for growth.¹⁵¹
113. Finally, Haggard and Tiede critique the influential body of work by Acemoglu and others¹⁵² referenced above which suggests a strong relationship between economic performance and the protection of property rights. Similarly, Haggard and Tiede dispute Barro’s (1997) findings¹⁵³ which claimed causation between property rights and economic growth, on the grounds that the indicators used are not internally valid. Lastly, they¹⁵⁴ find that two indicators of violence (homicides per capita, and civil war violence as a proportion of area) were significantly negatively correlated with economic performance.
114. They argue that states’ inability to provide law and order “in the most basic sense” is the biggest constraint on growth and suggest that “corruption, risk of expropriation, and... the extent of violence” are more compelling determinants. Although the methodology and analysis of Haggard and Tiede’s can be questioned, it underlines the fact that there is considerable, unresolved uncertainty about which aspects of rule of law are the most important for growth.

Cox (2008)

115. Cox (2008) reviewed literature relating to security, justice, the rule of law and economic growth. He shares the caution described above concerning the state of the evidence on the relationship between the rule of law and economic growth when considering the link between security and justice and development. He observes that the literature is characterised by theoretical disputes and methodological pitfalls¹⁵⁵ with “many controversies and few certainties.”¹⁵⁶ Cox is reluctant to make over-ambitious or generalisable claims concerning the rule of law’s potential to drive development outcomes. However, in terms of the relationship between justice and poverty alleviation, he concludes that strong evidence exists of the direct impact lack of security and justice have on the poor. Their vulnerability results from the loss of land and housing, itself a consequence of insecure property rights. When the poor are victims of crime, they suffer direct and indirect costs which affects their livelihoods. Moreover, the lack of access to reliable security and justice mechanisms makes the poor particularly prone to discrimination, persecution and human rights violations.¹⁵⁷
116. Cox stresses that it is unwise to make definitive statements about the direction of causation between legal and judicial systems and efficient markets. Moreover, the development of sophisticated legal systems should be driven by demand. He notes that evidence concerning the relationships between legal

¹⁵⁰ Ibid. p. 677.

¹⁵¹ Ibid. p. 677.

¹⁵² Acemoglu, D. and Johnson, S. (2005), Unbundling institutions. *Journal of Political Economy*, 113(5), 949-995; Acemoglu, D., Johnson, S. and Robinson, J. (2001), The colonial origins of comparative development: an empirical investigation, *American Economic Review*, 5, 1369-1401, Acemoglu, D., Johnson, S. and Robinson, J. (2005), Institutions as the fundamental cause of long-run growth in P. Aghion, and S. Durlauf (eds.), *Handbook of Economic Growth*. (Vol. 1A, pp. 385-472), Amsterdam: North Holland.

¹⁵³ Barro, R. (1997), *Determinants of economic growth: a cross-country empirical study*, Cambridge, MA: The MIT Press.

¹⁵⁴ Haggard, S., and Tiede, L. (2011), The rule of law and economic growth: Where are we? *World Development*, 39(5). See p. 681.

¹⁵⁵ Cox (2008), p. i.

¹⁵⁶ Cox (2008), p. 47.

¹⁵⁷ Cox (2008), p. 48.

LITERATURE REVIEW – NOT POLICY

institutions and foreign investment is equivocal. He also suggests that often perceptions of instability and crime rates are as important as signals for investment (international or domestic) as the strength of formal institutional frameworks. Looking at the relationship between justice and social change, Cox concludes that addressing legal inequality can be important for social development, but he also suggests that claims in the literature concerning the beneficial impacts of legal empowerment initiatives must be treated cautiously.

117. Lastly, with regards justice and government performance, Cox concludes that the literature has become too heavily focussed on mechanisms to disperse state power. This risks ignoring the role that the law may have as an instrument of state policy: it is paramount that states are able to establish rules and institutions which can function in situ. In short, the state must be able to shape the rule of law, as well as being subject to it.

Box 1: The judicial system and economic growth

- i) World Bank surveys in Brazil and Argentina reveal that firms operating in provinces with better performing judicial systems enjoy greater access to credit.¹⁵⁸
- ii) Hayo and Voigt (2007) find that *de facto* judicial independence (as opposed to technical or *de jure* independence) is robustly correlated with growth.¹⁵⁹
- iii) Others find that a country's legal tradition significantly affects different dimensions of economic development. Adopting an observational research design, La Porta *et al* (2004) claim to have identified a causal relationship between judicial independence and economic freedom. Their findings point consistently to the greater economic freedoms countries with common-law as opposed to civil-law legal traditions enjoy.¹⁶⁰
- iv) Fullerton Joireman (2006) examines the political development of common law in India and Kenya which in both cases was transplanted during colonial rule rather than organically grown. A comparison of the two countries' legal institutions and histories reveals significant differences in their institutional development and application of the law. These findings challenge the assumption that "*all common law systems share a similarity of structure and law which creates an environment facilitating investment and contract enforcement,*" and assertions by institutional theorists who argue that common law systems are superior to civil law systems in terms of economic growth.¹⁶¹
- v) However, Graff (2008) finds little evidence to support the assumption that "common law countries protect financial investors better than civil law countries," arguing that the evidence suggests financial investors are treated differently by actors across different legal systems.¹⁶²
- vi) Looking at the relationship between legal origin and the development of bond markets, Musacchio (2008) also finds little evidence to suggest that the adoption of a particular type of legal system constrains future financial development. In the civil law example of Brazil he found considerable "variation over time in bond market size, creditor protections, and court enforcement of bond contracts". Preliminary results for a small cross-section of countries reveal variations similar to those found in Brazil.¹⁶³

¹⁵⁸ World Bank, 2005, World Development Report 2005: A Better Investment Climate for Everyone, Washington DC: World Bank, p. 86.

¹⁵⁹ Hayo, B. & Voigt, S. (2007), Explaining *de facto* judicial independence, *International Review of Law and Economics*, 27(3), 269-290.

¹⁶⁰ The following research is cited: La Porta, R., Lopez-de-Silanes, F., Shleifer, A. & Vishny, R.W. (1997), Legal Determinants of External Finance, *Journal of Finance* 52 (July), 1131–50; La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. (1998), Law and Finance, *Journal of Political Economy*, 106 (December), 1113–55; La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. (1999), The Quality of Government, *Journal of Law, Economy and Organization* 15 (April), 222–79; La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. (2002), Government Ownership of Banks. *Journal of Finance* 57 (February), 265–301.

¹⁶¹ Fullerton Joireman, S. (2006), The evolution of the common law: Legal development in Kenya and India. *Commonwealth and Comparative Politics*, 44 (2), pp. 190-210.

¹⁶² Graff, M. (2008) Law and finance: Common law and civil law countries compared - An empirical critique *Economica*, 75 (297), pp. 60-83.

¹⁶³ Musacchio, A. (2008), Can civil law countries get good institutions? Lessons from the history of creditor rights and bond markets in Brazil, *Journal of Economic History*, 68 (1), pp. 80-108.

The role of property rights in fostering investment and growth¹⁶⁴

118. There is a broader body of literature that explores the links between the protection of property rights and investment and growth.
119. There are very strong theoretical grounds for assuming that more secure property rights should encourage investment, higher levels of innovation and productivity, and thereafter, growth (both at a local and national scale). There is also a strong theoretical argument for property rights being able to facilitate the use of property as collateral for credit.¹⁶⁵
120. At a macro-level, Acemoglu & Johnson identify a statistically significant correlation between property rights and long-run economic growth, investments and financial development.¹⁶⁶ However, as noted above, Haggard & Tiede question Acemoglu and others' ability to adequately isolate the effects of property rights from other elements of institutions.¹⁶⁷
121. At a micro- level, a significant body of evidence explores the effects of increased levels of tenure security on investment, innovation, productivity and growth. Country specific evidence drawn from impact evaluations (e.g. from Nicaragua¹⁶⁸ and Ethiopia¹⁶⁹) demonstrates that increased availability of registered land titles increases the propensity of households to undertake productivity-enhancing investments, and also boosts land values. Goldstein and Udry¹⁷⁰ show a significant and positive statistical correlation between agricultural productivity and tenure security. Using Chinese household level data, Jin & Deininger¹⁷¹ find that land markets play a critical role in promoting more effective use of potentially idle land, in turn leading to significant productivity gains. However, tenure security is likely to have different impacts on different types of investments. Fenske's systematic review finds that the correlation between tenure security and investment is more robust for some investments (for example, fallowing and tree planting) than it is for others (purchase of manure or chemical fertilisers, and indeed the hiring of labour).¹⁷²
122. The evidence of the effects of property rights as a means to use registered assets as collateral and gain increased access to credit is mixed. Evidence from an impact evaluation study conducted on a nationwide titling programme in Peru¹⁷³ shows that titling led to a limited reduction of credit rationing.¹⁷⁴ But the same analysis found that formal property ownership had no effect on approval rates

¹⁶⁴ Note that property rights are subject to further exploration in two DFID evidence products (a Rapid Review, forthcoming, November 2012, and a Literature Review, forthcoming April 2013).

¹⁶⁵ Besley, T. (1995), "Property Rights and Investment Incentives: Theory and Evidence from Ghana." *Journal of Political Economy*, 103(5), 903-947.

¹⁶⁶ Acemoglu, D. & Johnson, S. (2005), "Unbundling Institutions." *Journal of Political Economy*, 113(5), 949-995.

¹⁶⁷ Haggard, S. & Tiede, L. (2011), "The Rule of Law and Economic Growth: Where are We?" *World Development*, 39(5), 673-685.

¹⁶⁸ Deininger, K., E. Zegarra, and I. Lavadenz (2003), "Determinants and Impacts of Rural Land Market Activity: Evidence from Nicaragua." *World Development* 31(8), 1385-404; Deininger, K. & Chamorro, J.S. (2004), "Investment and Income Effects of Land Regularization: The Case of Nicaragua" *Agricultural Economics*, 30(2), 101-116.

¹⁶⁹ Holden, Deininger, Ghebru (2008), "The Impacts of Low-Cost Land Certification on Investment and Productivity," *American Journal of Agricultural Economics* 91(2), 359-373.

¹⁷⁰ Goldstein, M. & Udry, C. (2008), "The Profits of Power: Land Rights and Agricultural Investment in Ghana" *Journal of Political Economy*, 116(6), 981-1022.

¹⁷¹ Jin, S & Deininger, K. (2009), "Land rental markets in the process of rural structural transformation: productivity and equity impacts from China" *Journal of Comparative Economics*, 37(4), 629-646.

¹⁷² Fenske, J. (2011), "Land tenure and investment incentives: Evidence from West Africa," *Journal of Development Economics* 95(2), 137-156.

¹⁷³ Field, E. & Torero, M. (2006), "Do property titles increase credit access among the urban poor? Evidence from a nationwide Titling Programme," *Land Policy* 31(1993), 1-28.

¹⁷⁴ Credit rationing being where access to loans is restricted owing to lenders' reluctance to offer credit to borrowers, even at higher investment rates.

LITERATURE REVIEW – NOT POLICY

for private sector loans. Besley and others¹⁷⁵ explore the relationship through econometric modelling and empirical analysis (applied to quantitative data from Sri Lanka and Ghana). They find that the effects of property rights on access to capital will vary according to the wealth group (low, medium, high) to which the potential borrower belongs, with the most modest benefits accruing to the least wealthy. They also find that more robust property rights are more likely to serve as a lever for collateral where competition in the credit market (i.e. amongst lenders) is greater. Their analysis provides cautious support for the proposition that where property rights improve, interest rates on loans fall, and borrower profits rise. However, their analysis also suggests that the improvements in borrower productivity and profits owe more to increased effort (of the borrower) than to the effects of borrowed capital. In short, property rights may matter, but perhaps not through the 'property as collateral for capital' mechanism. Moreover, a recent IMF paper offers no evidence that stronger property rights will themselves affect levels of competition in credit markets.¹⁷⁶

123. A final critique which is relevant to both macro and micro level theories highlights the wide variations in the ability of developing countries to protect property rights consistently and universally, even where these have been set out formally. Property rights are important, but establishing and enforcing them is a state capability problem.¹⁷⁷ Others note that that the definition of *formal* property rights is less important than the existence and enforcement of *informal* property rights. Rodrik notes that formal property rights regimes (e.g. in Russia) do not necessarily deliver increased investor confidence, whilst in China, private investors have sufficient confidence in the security of their property even in the absence of formal property rights.¹⁷⁸ A very large proportion of land in Africa and other regions of the global south is held under complex and overlapping systems of formal, legal title and customary use rights.¹⁷⁹ For countries where data is available, an OECD Social Institutions and Gender Index (2012) study found that of the 112 countries scored, 86 have laws or practices relating to property and inheritance which discriminate against women.¹⁸⁰ Moreover, it shows that on average women hold only 15% of land titles.¹⁸¹ A study by Lankhorst and Feldman explores of the effect of customary law on land rights in Rwanda and illustrates the obstacles women confront in protecting and upholding their interests in land. Diminishing security of land tenure stemming from weak customary law rights remain major challenges, despite the reform of statutory laws in an attempt to make land rights more equitable and fair.¹⁸²

¹⁷⁵ Besley, T., Burchardi, K., & Ghatak, M. (2012), "Incentives and the De Soto Effect," *The Quarterly Journal of Economics* 127 (1): 237-282.

¹⁷⁶ Singh, R.J., and Huang, Y. (2011), "Financial deepening, property rights and poverty: Evidence from Sub-Saharan Africa," IMF working paper WP/11/196.

¹⁷⁷ Khan, M. (2006). *Governance and Development*, In 'Workshop on Governance and Development', organized by the World Bank and DFID, 11-12 November, Dhaka, Bangladesh (unpublished); see also Everest-Phillips, M. (2008), "The Myth of Secure Property Rights: Good Economics as Bad History and its Impact on International Development," SPIRU Working Paper 23, Overseas Development Institute; Wallace, J. & Williamson, I. (2006), "Building Land Markets," *Land Use Policy*, 23(2), 123-135.

¹⁷⁸ Rodrik, D. (2004), "Getting Institutions Right," Unpublished. Available at:

<http://riverbrugge.net/development/RodrikInstitutions.pdf> (accessed on 6 April 2012). See also: Keefer, P. (2006), 'Governance and economic growth in China and India,' Chapter 7, in Winters, L.A. & Shahid Yusuf (2006) (eds.) *Dancing with Giants: China, India and the Global Economy*, The World Bank and the Institute of Policy Studies: Washington, D.C.

¹⁷⁹ Deininger, K. and Ali, D. Ayalew, (2007), Do Overlapping Land Rights Reduce Agricultural Investment? Evidence from Uganda, The World Bank, Policy Research Working Paper 4310.

¹⁸⁰ OECD Development Centre, (2012), 2012 Social Institutions and Gender Index: Understanding the Drivers of Gender Inequality, p.4 cited in IDLO (2013) online at <http://www.genderindex.org/content/team> (accessed Feb.13).

¹⁸¹ OECD Development Centre, (2012), 2012 Social Institutions and Gender Index: Understanding the Drivers of Gender Inequality, p.4 cited in IDLO (2013).

online at <http://www.genderindex.org/content/team> (accessed February 2013).

¹⁸² Lankhorst, M., and Veldman, M. (2011), Engaging with Customary Law to Create Scope for Realizing Women's Formally Protected Land Rights in Rwanda, IDLO Customary Justice Working Paper Series, International Development Law Organization in conjunction with the Van Vollenhoven Institute, Leiden University.

The impact of business regulation and ‘investment climate’ factors on economic growth

124. There is also a body of literature which considers the role of institutions at firm level, and their effects on investment.
125. Eifert uses a 5-year panel of data (from the World Bank’s ‘Doing Business Project’) and finds that in countries which are relatively poor, and relatively well-governed, a reduction by 10 days in business registration procedures is associated with a 0.27 per cent increase in investment rates. In addition, in countries implementing regulatory reform in any given year, growth rates increase by 0.2 per cent (in relatively well-governed countries) and by 0.4 per cent (in relatively poor countries).¹⁸³ Evidence from studies of commercial enterprise in India¹⁸⁴ shows that local governance is correlated with investment and productivity growth, with net fixed investment being four times higher for firms in ‘good’ business governance environments as compared to firms trading in comparatively poor environments.
126. Surveying a wide set of investment climate variables, Djankov and others¹⁸⁵ find that improved business regulatory configurations across seven areas (starting a business, hiring and firing workers, registering property, getting bank credit, protecting equity investors, enforcing contracts in the courts and closing a business) are strongly correlated with growth. They find that improving from the worst to the best quartile of the business regulatory environment is correlated with a 2.3 per cent increase in average annual growth. Elsewhere, Djankov and others¹⁸⁶ reveal via an analysis of cross-national datasets that countries levying higher registration costs for businesses tend to suffer higher levels of corruption, and host larger informal economies.¹⁸⁷ Jalilian and others find that effective regulatory regimes are strongly correlated with economic growth on the basis of their analysis of World Governance Indicators.¹⁸⁸
127. A recent systematic review considers the effects of improved contract enforcement on levels of investment. It finds evidence that more effective contract enforcement generally promotes higher levels of investment. However, only one study surveyed as part of the systematic review provides evidence that specific contract enforcement *interventions* affect investment patterns.¹⁸⁹
128. In a similar vein, Klapper and others’ study of data from the World Bank Group Entrepreneurship Survey finds a very strong correlation between improved business environments and levels of entrepreneurship.¹⁹⁰

¹⁸³ Eifert, B. (2009), “Do Regulatory Reforms Stimulate Investment and Growth? – Evidence from Panel Data 2003-2007,” Center for Global Development, Working Paper No. 159.

¹⁸⁴ Dollar, D., Iarossi, G. and Mengistae, T. (2002), “Investment Climate and Economic Performance: Some Firm Level Evidence from India,” Working Paper 143, Stanford University Centre for Research on Economic Development and Policy Reform.

¹⁸⁵ Djankov, S. McLiesh, C. & Ramalho, R. M. (2006), “Regulation and growth.” *Economics Letters*, 92(3), 395-401.

¹⁸⁶ Djankov, S., La Porta, R., Lopez-de-Silanes, F., & Shleifer, A. (2002), “The Regulation of Entry.” *The Quarterly Journal of Economics* (2002) 117 (1): 1-37.

¹⁸⁷ See also: Djankov, S. (2009), “The Regulation of Entry,” *World Bank Research Observer*, 24 (2).

¹⁸⁸ Jalilian, H., Kirkpatrick, C. & Parker, D. “The Impact of Regulation on Economic Growth in Developing Countries: A Cross-Country Analysis,” Bradford Centre for International Development. They survey WGI ‘regulatory quality’ and ‘government effectiveness’ indicators across 117 countries.

¹⁸⁹ ‘The evidence of the impact on investment rates of changes in the enforcement of contracts: A systematic review,’ online at: <http://www.dfid.gov.uk/R4D/Output/191625/Default.aspx> (accessed February 2013).

¹⁹⁰ Klapper, L. F., Lewin, A. & Quesada Delgado, J. M. (2009), The Impact of the Business Environment on the Business Creation Process, World Bank Policy Research Working Paper No. 4937.

Box 2: The legal environment and investment rates

- i) Acemoglu, Johnson and Robinson (2001) find that variation in income levels across countries is closely associated with investor perceptions of the likelihood of expropriation of property. This study is widely cited for the twin proposition that the level of foreign direct investment (FDI) is an important component of growth in developing countries, and that a crucial factor in attracting FDI is a stable, consistent, fair and transparent legal system.¹⁹¹
- ii) A 2010 study analysing 98 developing economies suggests that FDI tends to be greater where the cost of contract enforcement in debt collection and property eviction cases is lower, particularly when the host economy is more indebted.¹⁹²
- iii) Beck (2010) demonstrates how differences in legal environments are correlated with several performance variations across countries, including investment decision-making.¹⁹³
- iv) Lindquist and Martinek (2010) set out how a stable legal environment provides a context in which economic agents may be more willing to engage in activities (including long-term investment) to foster economic growth.¹⁹⁴
- v) However, Woo-Cummings (2006) finds no support from the East Asian experience for the proposition that economic growth depends upon any specific set of legal rules or institutions.¹⁹⁵

Section 6: Legal pluralism, non-state institutions and actors

Definitions

129. Legal pluralism may be defined as the existence of multiple sources of law (both state and non-state) within the same geographical area.¹⁹⁶ Although the rule of law is often represented as law being made and administered exclusively by the state¹⁹⁷, a growing body of literature suggests that the provision of a range of different legal and quasi-legal security and justice mechanisms creates choices for individuals, communities, and even the state itself.¹⁹⁸

Forms of pluralism

130. Legal pluralism follows many forms. In some cases, customary or religious systems may operate autonomously from all state justice mechanisms. In other cases, the state may explicitly recognise (in the constitution or in statutory law) customary and traditional law codes, without administering them. In yet

¹⁹¹ Acemoglu, D., Johnson, S. and Robinson, J. (2001), The colonial origins of comparative development: an empirical investigation, *American Economic Review* Vol 91, 2001, pp. 1369-1401

¹⁹² Ahlquist, J. and Prakash, A. (2010), FDI and the Costs of Contract Enforcement in Developing Countries, *Policy Sciences* 43 (2): 181-200.

¹⁹³ See, for example: Beck, T. (2010), *Legal Institutions and Economic Development*, Centre Discussion Paper Series 2010-94; Beck, T. and Levine, R. (2005), *Legal Institutions and Financial Development* in C. Ménard and M. Shirley (eds.), *Handbook of New Institutional Economics* (pp. 251-278), Dordrecht: Springer.

¹⁹⁴ Lindquist, S. A. and Martinek, W. L., *Legal Stability and Economic Growth*, Western Political Science Association 2010 Annual Meeting Paper.

¹⁹⁵ Woo-Cummings, M., *The rule of law, legal traditions, and economic growth in East Asia*, UNU Research Paper No. 2006/53, May 2006.

¹⁹⁶ Merry, S. E. (1988), *Legal Pluralism*, *Law and Society Review*, 22(5), 869-896.

¹⁹⁷ Griffiths, J. (1986), *What is Legal Pluralism?* *Journal of Legal Pluralism*. 24 for example suggests that: "law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions".

¹⁹⁸ Tamanaha, B. (2007), *op. cit.*

LITERATURE REVIEW – NOT POLICY

other cases, states may establish quasi-state mechanisms to perform alternative dispute resolution (ADR) duties so as to ease the pressure on weak and / or overburdened formal court systems, or may decentralise government authority to non-state legal orders.¹⁹⁹ As such, legal pluralism often generates hybrid, or mixed legal environments.²⁰⁰ The Ethiopian Constitution, for example, permits the adjudication of personal and family matters by religious or customary laws.²⁰¹ Similarly, the Namibian constitution recognises the legitimacy of all those customary and common laws that were in force on the date of national independence (provided these are not unconstitutional or inconsistent with other statutory law),²⁰² and for its part, Liberian statutory law explicitly recognises the customary legal traditions under the so-called Hinterland Regulations.²⁰³

131. The degree to which legally pluralistic societies must formally accommodate traditional and customary law into formal state legal codes is a matter of contention. Some suggest that legal pluralism undermines the ideally predictable nature of the rule of law. Tamanaha argues that the multiple, uncoordinated, coexisting or overlapping bodies of law (statutory/formal and customary/traditional) make competing claims of authority and often impose conflicting norms. This potential conflict generates uncertainty or jeopardy for individuals, firms and social groups, who cannot be certain in advance about which legal regime might be applied to their case, be it a civil dispute or serious crime. It also creates, he suggests, opportunities for individuals and groups to “strategically invoke or pit one legal order against another”.²⁰⁴ On the other hand, a 2007 UN report suggests that “legislation aiming at codification [of customary and statutory law] across the board” has now lost its appeal in most contexts.²⁰⁵ Harper endorses this finding and suggests that whilst the codification of customary law may enhance predictability, it may actually curtail the very flexibility, negotiability and relevance to local context which act as customary law’s principal benefits.²⁰⁶

Preferences

132. A number of studies suggest that reliance on informal justice providers is the preferred choice of many citizens in developing countries, particularly in remote rural areas. It is estimated that informal or non-state mechanisms that are partially administered by the state or are beyond state control, account for anything between 70-90% of provision for the poor in the global south.²⁰⁷ The Global Barometer Survey of 2010 finds that in 14 of 16 low- to middle-income countries surveyed, women are significantly more likely to go to community leaders rather than a government official in order to express a grievance.²⁰⁸

¹⁹⁹ UN Women (2011), pp.67-68.

²⁰⁰ O’Connor, V. (2012), *Common Law and Civil Law Traditions: A Practitioners Guide*, INPROL - International Network to Promote the Rule of Law.

²⁰¹ IDLO (2013), Footnote 21.

²⁰² Article 66(1) provides that –[both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law cited in: Horn, N., and Bösl, A. (eds.), (2009), *Human Rights and the Rule of Law in Namibia* (2nd edited edition), Konrad Adenauer Foundation, Macmillan, Namibia.

²⁰³ Siddiqi, B. (2012), *Law Without Lawyers: Assessing A Community-Based Mobile Paralegal Program In Liberia*, International Development Law Organization 2012, p.14.

²⁰⁴ Tamanaha, B., Z. (2007), *Understanding Legal Pluralism: Past to Present, Local to Global*, 30(1) *Sydney Law Review* Vol. 29, St. John’s Legal Studies Research Paper No. 07-0080 online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010105 (accessed Feb.13).

²⁰⁵ UN Women, UNICEF and UNDP, (2007) “Informal justice systems: charting a course for human rights-based engagement”, New York, p.19 online at www.unicef.org/protection/INFORMAL_JUSTICE_SYSTEMS.pdf (accessed Feb.13).

²⁰⁶ Harper., E. (2011.), *Customary Justice: From Program Design to Impact Evaluation*, International Development Law Organization, Rome, pp.43-45.

²⁰⁷ Baker, B. (2010), *Linking state and non-state security and justice*, *Development Policy Review*, 28(5), 597-616. The estimate used here is 80-90%, but this figure is approximate.

²⁰⁸ Data presented at Figure 3.1, p.66.

LITERATURE REVIEW – NOT POLICY

133. There are a series of reasons why people in developing countries may seek access to justice outside the formal system.
134. Confidence in formal state justice is often low in developing countries. A study of perceptions in Timor-Leste found that 50% of the population surveyed believed that the formal system favoured the rich and powerful, whereas only 15% felt the same about the informal system.²⁰⁹ Leonardi's case study of Southern Sudan found that the justice system was undermined by widespread popular perceptions of bribery and favouritism, army and government interference, and incompetence and abuses of power within the police. Lengthy judicial processes and delays in the administration of justice further reinforce popular willingness to engage with formal justice mechanisms.²¹⁰ In Afghanistan, the IDLO finds that citizens prefer local forums (*jirgas* and district *shuras*) over state courts, with perceptions of fairness in local fora some 20% higher than they are for state courts.²¹¹
135. Conversely, there are a number of 'pull' factors that make non-state forms of justice attractive to poor communities in the global south. In some cases, these 'pull' factors take on a coercive character: individuals in Liberia face expulsion from their local community if they seek recourse to justice from formal state institutions: traditional authorities view the state justice system as a threat to local cultural norms and structures.²¹²
136. In other cases, informal justice systems are attractive owing to perceptions of their superior efficiency. A study of rape investigations in Namibia found that more than one third of female complainants in rape cases requested that their cases be dropped prior to conclusion of the court process because compensatory payments to the victim were arranged by families or traditional authorities.²¹³
137. Even so, a number of studies cast serious doubt upon the supposed superior efficacy of non-state justice. In an evaluation of 'people's courts' (Lok Adalats) in India, Galanter and Krishnan find that the quality of justice administered is variable, and that the effectiveness of the informal courts in resolving disputes is inconsistent.²¹⁴ Non-state justice mechanisms are at least as likely as state mechanisms to be beset by institutional discrimination in the form of family, customary and religious norms inimical to the rights of women, implicitly or explicitly.²¹⁵

Legal pluralism in practice

138. Leonardi explores the interaction between customary chiefs' courts and formal courts in Southern Sudan, finding that the two are barely distinguishable. Individuals pragmatically choose the best justice forum to meet their desired outcomes (reconciliation, dispute settlement, mediation, payment of compensation).²¹⁶ In a survey of Guinea, Baker explains how the formal courts may refer to customary justice providers those cases they have already ruled on in order to enforce any legal sanctions, and the

²⁰⁹ Asia Foundation, Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor (2004) cited in IDLO (2013), op., cit. footnote 51.

²¹⁰ Leonardi, C., Moro, L.N., Santschi, M., and Isser, D.H. (2010), Local Justice In Southern Sudan: A joint Project of United States Institute of Peace and Rift Valley Institute, Peaceworks No.2, p.39.

²¹¹ IDLO (2013), op.cit., p.16, findings from IDLO (forthcoming 2013), Report on Formal-Informal Justice Relations in Afghanistan.

²¹² Siddiqi, B. (2012), Law Without Lawyers: Assessing A Community-Based Mobile Paralegal Program In Liberia. International Development Law Organization 2012, p.12.

²¹³ Gender Research and Advocacy Project (2009), Withdrawn: Why Complainants withdraw rape cases in Namibia, Legal Assistance Centre, Windhoek, p.iii.

²¹⁴ Galanter, M., Krishnan, J.K. (2004), 'Bread for the poor': Access to justice and the rights of the needy in India, Hastings Law Journal, 55(4), 789-834.

²¹⁵ UN Women, (2011) p.69.

²¹⁶ Leonardi, C., Moro, L.N., Santschi, M., and Isser, D.H. (2010), Local Justice In Southern Sudan: A joint Project of United States Institute of Peace and Rift Valley Institute, Peaceworks No.2.

LITERATURE REVIEW – NOT POLICY

reverse may occur in cases where customary justice providers are unable to reach legal closure. Intelligence-sharing, sharing of equipment and training, and joint security patrols, and shared enrolment procedures are also standard practice for state and non-state security providers.²¹⁷ The apparent success of community-based restorative justice mechanisms in Sierra Leone (the *Fambul Tok* programme) and Rwanda (the *gacaca* courts) offer further examples of the potential choices and opportunities legal pluralism offers.²¹⁸

139. Analysing these cases further, Park notes that the comparative success of *Fambul Tok* and *gacaca* courts demonstrates that informal or non-state justice need not be a threat peacebuilding and state-building processes: instead, they may be integral to it.²¹⁹ Albrecht and others draw on case study evidence from Afghanistan, Pakistan, Nepal, Indonesia, Ghana, and the Marshall Islands as a basis for their recommendation that donors and states engage more actively with the diverse range of justice and security providers. They argue that these may be a more constructive alternative to narrowly state-centric approaches to institution-building, statebuilding and peacebuilding.²²⁰
140. Codified or not, customary law is by no means universally welcomed as a force for good. Tensions exist both with national, statutory law, and with international human rights provisions. Farran's study of Vanuatu and Tuvalu, finds that the co-existence customary law with formal, statutory law may actually undermine people's constitutional right to equality before the law, and efforts to promote human rights.²²¹ Siddiqi's study of Liberia finds that although the customary system is quick, proximate, relatively cheap and culturally acceptable, it also uses a range of practices that violate international standards. Trial 'by ordeal' and practices violating women's rights are the most obvious examples.²²² Serious criminal cases, such as rape, child sexual abuse, and murder raise complex questions for customary and informal justice. In Somalia, it is common practice for rape cases to be resolved by the marriage of the victim to the perpetrator, with victims under enormous societal pressure to acquiesce.²²³ In Afghanistan, so-called 'honour killings' and 'revenge killings' are considered extensions of customary or traditional justice.²²⁴

Concluding comments: the nature of the evidence and evidence gaps

141. This concluding section does not seek re-state the findings from each of the paper's main sections. The summary sections at the head of each section, and the executive summary itself perform this function. Instead, the following concluding remarks make some general comments on the nature of the evidence

²¹⁷ Baker, B. (2010), Linking state and non-state security and justice, *Development Policy Review*, 28(5), 597-616.

²¹⁸ Park, A.S.J. (2010), Community-based restorative transitional justice in Sierra Leone, *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 13(1), 95-119.

²¹⁹ Park, A. (2008), Consolidating peace: rule of law institutions and local justice practices in Sierra Leone, *South African Journal on Human Rights*, vol 24, iss. 3, pp. 536-564 online at http://www.sabinet.co.za/abstracts/ju_sajhr/ju_sajhr_v24_n3_a9.html (accessed Feb.13).

²²⁰ Albrecht, P., Kyed, H., Isser, D. and Harper, E. (2011), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, Rome: International Development Law Organisation (IDLO) and Danish Institute for International Studies (DIIS) online at <http://www.diiis.dk/sw111521.asp> (accessed Feb.13).

²²¹ Farran, S. (2006), Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific, *Journal of Legal Pluralism and Unofficial Law*, vol. 52, pp. 77-105 online at <http://www.jlp.bham.ac.uk/volumes/52/farran-art.pdf> (accessed Feb.13).

²²² Siddiqi, B. (2012), Law Without Lawyers: Assessing A Community-Based Mobile Paralegal Program In Liberia, *International Development Law Organization* 2012, p.12.

²²³ See also: Isser, D., and Chopra, T. (2012), Women's Access to Justice, *Legal Pluralism and Fragile States* Albrecht, P. et al (eds), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, IDLO and Danish Institute for International Studies.

²²⁴ Harper (2011a), op. cit, pp.23-24.

LITERATURE REVIEW – NOT POLICY

surveyed, and identify some evidence gaps that may be filled either by (a) a more specific and systematic search among academic and grey literature sources OR (b), the commissioning of new primary literature.

142. The current review is not systematic in its approach. It has sought to explore some of the key literature around very large topic. Each of the four substantive sections (sections 2-5) could merit a Systematic Review or extended literature review in and of themselves. As such, the following perspectives must be considered provisional.
143. The research surveyed contains a variety of conceptual/theoretical literature and primary & empirical literature. The primary & empirical literature appears to be of a generally moderate-to-high quality, given the purposes it aims to serve. It includes information and data drawn from surveys and detailed case studies carried out in a variety of countries. The search strategies adopted by the review's authors mean that many of the sources cited are drawn from peer reviewed journals.
144. However, the vast majority of the primary & empirical literature is 'observational' in type (rather than experimental). None of the studies cited in the current study compared the effects of implementing a rule of law reform in one location but not in another. Comparatively few of the studies surveyed here employed any sort of quantitative (or joint qualitative/quantitative) design (the principal exception being those studies relating to the rule of law and economic growth). Even where they did, quantitative analysis was carried out at the cross-national level, a study design which is not well-equipped for capturing the dramatic 'within country' variations.
145. Where the studies reviewed here conduct case study analysis, the case studies tend to be of single countries (as opposed to more robust 'comparative case study' designs). As such, the bulk of the research can best be described as 'Observational-*descriptive*.' In general, the research is not well suited to demonstrating causal relationships (e.g. "factor 'y' causes effect 'x'.") Moreover, regardless of the methods it employs, the literature surveyed here rarely explores the impacts of specific rule of law interventions, either at national or international levels.
146. Overall, then, and notwithstanding the presence of a number of studies (of a particular design) which are of a moderate-to-high quality, the body of evidence (at least the body surveyed here) relating *specifically* to the rule of law and development is surprisingly limited.
147. At a more nuanced level, it is fair to say that the evidence relating to the effects of law (and regulatory environments more generally) and economic growth is comparatively somewhat stronger. In this field, there are a growing number of studies looking at the effects of institutions, the rule of law and commercial efficiency and prosperity at a firm level (as opposed to the less useful national level).
148. Based on the current, provisional survey, the major, gaps in the evidence base appear to be **robust investigations or evaluations** (ideally rigorous impact evaluations) on the following subjects:
 - a) The effects of constitutional reforms on improved governance;
 - b) The effects of public sector reform and institutional reform programmes on improved governance, especially security and justice provision;
 - c) The impacts of international treaties and conventions on human rights, humanitarian rights, and businesses;

LITERATURE REVIEW – NOT POLICY

- d) A comparison of the effects on the poor of legal extension programmes (including the use of paralegals, legal empowerment, and the recognition of customary/informal law codes into formal state law).
149. In short, the questions identified in the current review have been the right ones. However, judging on the research cited here, there is currently insufficient evidence to provide good answers to any of these questions.

ANNEX I: TERMS OF REFERENCE

Literature Review on the role of the rule of law in development processes

Introduction

Background

1. As part of emerging research, policy and programming work focused on an “open economies, open societies” agenda for international development, the UK Department for International Development (DFID) is refining its approach to the rule of law.

2. This process of refinement is likely to involve the following steps:

- i. Strengthening the evidence base relating to the rule of law;
- ii. Updating DFID policy relating to the rule of law;
- iii. Consolidating existing DFID programmes relating to the rule of law;
- iv. Establishing new centrally-coordinated rule of law programmes;
- v. Making available the UK’s rule of law and legal expertise to partner countries.

3. The current terms of reference align directly with 2.i, above: “Strengthening the evidence base relating to the rule of law.”

Research specification (brief)

4. DFID is commissioning a literature review to consider the role of the rule of law in development processes. The review is to build on existing evidence scoping work written internally. It will broadly seek to answer the questions “Why, and to what extent, do different dimensions of the rule of law impact upon developmental processes?”

5. The literature review will explore the principal academic publications relating to the following aspects of the rule of law:

- i. International rule of law frameworks;
- ii. National rule of law frameworks establishing checks and balances on the state;
- iii. The rule of law as a regulator of state/society relations;
- iv. Societal (i.e. non-state) dimensions of the rule of law.

6. In addition, the literature review will explore the following potential outcomes of the rule of law:

- i. The rule of law as an intrinsic public good;
- ii. The rule of law as an enabler for statebuilding and peacebuilding;
- iii. The rule of law as an enabler of economic growth;
- iv. The rule of law as an enabler for the equitable delivery of services.

7. The literature review is to be completed by 15 February 2013.

Business objective: how the research will be used

8. The research forms a critical part of DFID’s commitment to refreshing its rule of law approach. The paper is being jointly commissioned by DFID Deputy Director & Head of Department (Governance, Open Societies and Anti-Corruption [GOSAC]), and by Deputy Head of Department (Conflict, Humanitarian and Security [CHASE]).

LITERATURE REVIEW – NOT POLICY

9. The paper will be used by a designated Rule of Law Working Group, comprised of members of DFID's GOSAC, Growth and Resilience (GRD) and CHASE departments, and the cross-Whitehall Stabilisation Unit. The designated Rule of Law Working Group is headed by HoD GOSAC and reports to the DFID Policy Director and DFID Director General for Policy & Global Programmes.

10. The research will be made available to all DFID staff, and to DFID's partners and the general public via the Research for Development (R4D) website.

Research objective and scope

11. The overarching objective of this research is to outline the principal debates surrounding the critical developmental implications of the rule of law. It will broadly seek to answer the questions "Why, and to what extent, do different dimensions of the rule of law impact upon developmental processes?" Specifically, the paper will explore the academic literature relating to:

- i. The role of international frameworks in promoting international human rights, humanitarian, commercial and criminal law;
- ii. The role of national frameworks in ensuring horizontal accountability and checks and balances on the arms of the state;*
- iii. The positioning of the rule of law as a component of state and society relations;*
- iv. Societal (i.e. non-state) frameworks for the promotion of the rule of law.

12. In addition, the literature review will explore the following potential outcomes of the rule of law:

- i. The rule of law as an intrinsic public good;
- ii. The rule of law as an enabler for statebuilding and peacebuilding;
- iii. The rule of law as an enabler of economic growth;*
- iv. The rule of law as an enabler for the equitable delivery of services.

13. The final product (see "outputs", below) is expected to directly adapt and build upon existing evidence synthesis work already completed by DFID's Research & Evidence Division. Those aspects of the rule of law marked with an asterisk, above, have already received significant attention in DFID's existing "Role of the Rule of Law in Development" rapid review. This resource is being made available to the consultant, and is expected to form the basis of the final literature review.

Methodology

14. The research and eventual outputs will employ mechanisms to ensure or enable the following:

- i. **Sourcing:** Impartial sourcing of literature;
- ii. **Screening & selection:** Appropriate selection of relevant literature;
- iii. **Description:** Proportionate description of the type (research design and, where possible, method) of specific studies cited in the review;
- iv. **Quality appraisal:** Proportionate assessment of the technical quality of specific studies cited in the review;
- v. **Synthesis:** clear, accessible, concise synthesis of the principal debates and literature relating to RoL;
- vi. **Evaluation of the overall strength of the literature surveyed:** Based on reference to:
 - a. The relative size of the body of literature covering each aspect of RoL;
 - b. The quality of the body of literature covering each aspect of RoL;
 - c. The context from which the RoL literature is drawn (by country, region, continent);
 - d. The consistency of the literature;
- vii. Inclusion of a **short "method" section** to demonstrate clearly which of the previous steps have been taken during the drafting of the paper.

LITERATURE REVIEW – NOT POLICY

Outputs

15. The outputs of the project will be a final written report including:

- i. A **1-page brief** of the evidence relating to key dimensions of the rule of law;
- ii. A **4-page** executive summary of the evidence;
- iii. A **full report** (not exceeding 20 pages in length);
- iv. **Technical annexes**, including a methods section, plus a full **“titles & abstracts” bibliography**;
- v. A presentation of the key findings to a DFID stakeholder panel (to be confirmed).

Information ownership

16. DFID is seeking to pilot an innovative approach to the production, ownership and endorsement of this paper. DFID would like its existing rapid review of the rule of law expanded and revised as an integral part of the production of this literature review commission. DFID is prepared to expend a proportionate internal resource to technically review (and, where appropriate, edit) the submitted draft paper, as part of its completion.

17. As such, DFID is ultimately seeking to be recognised as joint author of the final product, and, thereafter, to have the paper formally endorsed by senior DFID staff.

18. The contracted consultant is to demonstrate awareness of this production mechanism, should recognise that the findings will be jointly owned, and be prepared to work closely with DFID staff to take the paper through to its final completion.

Research Uptake

19. All written outputs will be made available to DFID staff and to the public via our open source repository (R4D).

20. The appointed consultant will be expected to make a presentation on the findings to DFID stakeholders. At this event, the awardee will also be expected to discuss the implications of findings for DFID policy and practice.

Assessment

21. Further to the final delivery of the report to DFID, a group of independent reviewers will be asked to assess the study according to the following criteria:

- i. Response to the objectives as established in the current ToR
- ii. Coverage of the scope as set out in the current ToR
- iii. Implementation of a methodology fulfilling the methodological requirements of the current ToR
- iv. Clarity of the final written product.

Funding terms and conditions

22. The project is to be funded according to the terms of the framework agreement between DFID and the GSDCH PEAKS.2

Costs

23. This ToR does not provide a guide price for the work. The proposed cost should be drawn up by the consultant on the basis of the specification, described above.

Timetable

24. The following timetable is to apply:

LITERATURE REVIEW – NOT POLICY

Component	Completion date
DFID & consultant agree project proposal	3 December 2012
Contract signed	4 December 2012
Report (version 1) delivered	18 January 2013
DFID issues detailed comments and proposed edits on version 1, returns it to consultant	30 January 2013
Final report issued	15 February 2013
Report endorsed by senior DFID staff	February 2013 (date to be confirmed)
Presentation delivered	February 2013 (date to be confirmed)

ANNEX II: SHORT DESCRIPTION OF METHOD

To meet the intent of an innovative approach to the production, ownership and endorsement of rule of law research, this Literature Review builds on, revises, and finalises a rapid internal review of literature drafted by the UK Department for International Development (DFID) in 2012.²²⁵

The current process and its outputs reflect the comments and suggestions the Rule of Law Working Group made on the above mentioned draft, including specific reference to additional literature requiring review. Also reflected in the Final Report are the action points made in discussions at the Rule of Law (RoL) Workshop convened by DFID on 16/01/2013; and consolidated and individual comments made by members of the group on preliminary working draft reports and work in progress.

The 2012 rapid internal review had paid significant attention to the following: (i) the role of national frameworks in ensuring horizontal accountability and checks and balances on the arms of the state; (ii) the positioning of the rule of law as a component of state and society positioning; and (iii) the RoL as an enabler of economic growth. This provides the basis of the final Literature Review.

Sourcing, selection and screening

The literature reviewed during the initial internal DFID process has been incorporated into the final Titles and Abstracts Bibliography which accompanies this report and can be found in Annex III. The additional literature recommended in the draft internal document is incorporated into the same. The introduction to Annex III summarises the types and quality of the literature surveyed and its overall strengths.

In order to explore those aspects of the RoL that had not been reviewed, additional literature was sourced, screened and selected by the Governance and Social Development Resource Centre (GSDRC) Helpdesk.²²⁶ This was screened for relevance²²⁷ and the selected literature was presented in Titles and Abstracts Bibliographies in two Helpdesk Research Reports.²²⁸ The resources listed in these bibliographies were further screened for their relevance and the literature selected has also been incorporated into the final Titles and Abstracts Bibliography.

Additional literature was supplied by members of the RoL Working Group following the workshop on 16/01/2013; and some targeted searches of specialist and expert web sites were undertaken, in order to source literature to fill gaps in coverage identified by members of the RoL Working Group and to ensure that the most recent, relevant literature was included in the Literature Review, as well as incorporated into the full Titles and Abstracts Bibliography in Annex III.

²²⁵ DFID Policy and Research Division, internal discussion paper: "The effect of the rule of law on development - a rapid review of the evidence".

²²⁶ Helpdesk reports are based on 3 days of desk-based research. They are designed to provide a brief overview of the key issues; and a summary of some of the best literature available. Experts are contacted during the course of the research, and those able to provide input within the short time-frame are acknowledged.

²²⁷ Depending on the keyword combinations used in the GSDRC searches: the first search undertaken produced between 6,000 and 10,000 results; and the second produced between 34 and 40,000 results. From the results from each search, a small number of references were selected by the researcher for inclusion.

²²⁸ Rao, S. (2012) Impact of Rule of Law frameworks on development processes (GSDRC Helpdesk Research Report). Birmingham, UK: Governance and Social Development Resource Centre, University of Birmingham. Rao, S. (2012) Impact of rule of law on state-building, peace-building and equitable service delivery (GSDRC Helpdesk Research Report). Birmingham, UK: Governance and Social Development Resource Centre, University of Birmingham.

Description of types of study cited in the review

Research design types are typically defined in terms of two categories: conceptual or theoretical studies which draw on previous research findings either to construct new theories or to influence policy development and programme design; and empirical studies which are primary (collecting, analysing and presenting new raw data) and secondary (interrogate and summarise primary findings generated by other studies or research). Wherever possible these distinctions have been drawn out in reference to specific studies cited in the main body of the report. Issues concerning the quality (examined below) of studies based on primary empirical data whose robustness has been questioned are also highlighted in the report itself. In overall terms, most of the studies cited can be categorised as secondary empirical studies which often include conceptual or analytical aspects.

There are also two broad categories of methods used in the studies cited in the report: quantitative and statistical methods; and qualitative methods, including perception surveys, interviews, and focus group discussions. Included in this second category are some empirical primary research studies. However, a number of studies straddle these two over-arching categories because they aim to influence policy development through the presentation of case study material (based on both primary and secondary) research findings. In addition, the studies cited are distinguished in terms of the level of focus: some are concerned with macro global analysis of trends, correlations or causation and others focus on national, community or micro/ local levels.

The studies cited in the report that can be most easily and neatly categorised are: those undertaken using a legal perspective- mainly conceptual or theoretical; and those using a “pure” economics perspective-primary empirical and/or secondary empirical. However, many studies defy easy categorisation because they do not adopt a single type of research design and/ or employ a range of different (quantitative and qualitative) research methods. For example, the compilation studies produced by the International Development Law Organisation are based on findings generated from primary empirical research (both qualitative and quantitative) in order to demonstrate “best practice examples” that will influence the shape and development of policy.

Quality Appraisal

Most of the literature that has been reviewed is published and peer reviewed. This was an active decision influencing the selection and screening of relevant literature. There is a vast “grey literature” which may warrant consideration in the future, but it would appear that much of this has been incorporated into or is referred to in the work that is published.

It was not within the scope of this review to systematically assess the technical quality of the evidence in each of the studies cited in the report, or to grade them each individually in terms of quality. That more detailed work is being undertaken separately through the commission by DFID’s Research and Evidence Division (RED) of more specific and detailed “systematic reviews” of the evidence base in particular areas, some of which are directly related to the role of the rule of law in developmental processes. However, whilst highlighted in the main body of the report, it is important to underline here some caveats concerning the quality and reliability of quantitative empirical data. ‘Measurement validity’ is a particular challenge for “large-N” studies (typically, studies based on large, cross-sectional samples of national indicators). Included in the definition of “large N” studies are those containing data, findings, and analysis generated from the various Global datasets relevant to the role of the rule of law in development. Questions concerning their reliability include: a) contextually specific factors may not be sufficiently considered in the measures; b) some scores providing comparable country level data over time may be based on incomplete data for years and/ or countries; c) limited scales may be used thereby concealing substantive gaps when grouping diverse

LITERATURE REVIEW – NOT POLICY

countries; d) sources of evidence used to measure different indicators may be questionable (e.g. too much reliance on expert opinion); e) indicators may be measured infrequently, which in fast changing contexts and countries, may limit their sensitivity; f) the poor quality of national-level data, particularly in fragile and conflict affected countries.

A major concern is the tendency to conflate correlation and causation. In some studies the counterfactual evidence may be insufficiently explored in order to identify competing explanations for specific outcomes. This is important since there may be a number of different variables simultaneously at play. For example, (as summarised in Technical Annex IV) Haggard and Tiede (2011) argue that “findings with respect to the rule of law and economic growth are likely to be highly sensitive to the use of indicator.”²²⁹ Not all researchers are using the same indicators nor are they aggregating and then correlating these in the same way which limits the reliability of findings derived from the cross comparison of different data sets and indicators.

In view of the above a health warning is attached to the evidence derived from “large N” studies and the relevant Global Databases that has been cited in the main report. However, over the past 2-3 years constraints relating to technical reliability and quality appear to have been taken on board. As mentioned in the opening section of the report the current World Justice Programme Rule of Law Index is now reported with an accompanying and independent statistical audit. Findings from the Vera Institute pilot study also appear to have been incorporated. Hence, concerns about the data generated warrant reappraisal. Further, possible development of major policy and programme interventions on the rule of law demands reliable base line and other data. Looking forward might, therefore, include consideration of how to ensure a robust statistical foundation.

Synthesis

Synthesis of the literature relating to the role of the rule of law in developmental processes and the principal debates has been undertaken in the body of the report under the appropriate sections. Where a topic or debate requires further exposition, then synthesis at some greater length is found in the Technical Annex IV. Lastly, in the Titles and Abstracts Bibliography the individual perspective of each study (bar those few where there was no abstract available and it was not possible to extract such easily from the executive summary or preface) are provided.

²²⁹ Haggard, S., and Tiede, L. (2011). The rule of law and economic growth: Where are we? *World Development*, 39(5), 673-685, P:677.

ANNEX III: TITLES AND ABSTRACTS BIBLIOGRAPHY

1. **Abedin, N. (2006). The Ombudsman institution and conflict resolution in the contemporary third world societies. *Journal of Third World Studies*, 23 (1), pp. 219-233.**

Abstract

In the post World War II period the ombudsman institution has increasingly emerged as an alternative tool for conflict resolution and grievance management. In the strictest sense, the primary responsibility of the ombudsman is to protect the members of society against bureaucratic wrongdoing and maladministration, and to redress grievances of citizens against the administration. To date, the ombudsman institution has operated with considerable success and has not run into serious operational problems in the developed world. However, doubts are often expressed about the usefulness, suitability and success of this institution in the Third World including developing democracies. Nevertheless, available data demonstrate that it could and does contribute towards conflict resolution at least to a limited extent and in varying degrees, and there is a fairly strong case for its adoption or use in that part of the world.

Source: Scopus

2. **Agrast, M.D., Botero, J.C., Martinez, J., Ponce, A., and Pratt, C.S. (2013). Rule of Law Index 2012-2013, The World Justice Project. Online at http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf (accessed Feb.13).**
No abstract available

3. **Albrecht, P., Kyed, H., Isser, D. and Harper, E. (2011). Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform. Rome: International Development Law Organisation (IDLO) and Danish Institute for International Studies (DIIS)**
Online at <http://www.diis.dk/sw111521.asp> (accessed Feb.13).

Introduction (extract)

Case studies on Afghanistan, Pakistan, Nepal, Indonesia, Ghana, Marshall Islands. Focusing on the role of non-state and customary actors in security and justice reform, this e-book engages with one of the most central debates in current international development intervention in fragile states. It does so by questioning the key pillar of such interventions: state-building. Written by both practitioners and academics, the contributions suggest that international development programming should focus on "what works" and what is seen as legitimate justice and security by ordinary citizens, rather than on "what ought to be", based on Western normative frameworks. This means engaging with the variety of justice and security actors that already exist and are used by local citizens, rather than trying to build something entirely new. In the majority of contexts this implies a move away from the dominant state-centric approach, which focuses on building formal state institutions or on 'fixing' those that have failed.

Source: website above.

4. **Armytage, L. (2011). Judicial Reform in Asia Case Study of ADB's Experience: 1990-2007, *Hague Journal on the Rule of Law / Volume 3 / Issue 01 / March 2011*, pp. 70-105, Cambridge University Press. Online at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8275223> (accessed Feb.13)**

Abstract

The central question to be addressed in this article is: what does this empirical evidence tell us about the nature and effectiveness of judicial reform in Asia?

LITERATURE REVIEW – NOT POLICY

This case study of the judicial reform program of the Asian Development Bank (ADB) experience 1990-2007 is framed within the global context of substantial growth, underwhelming results, and continuing evolution of approach in an ongoing search for success.

The case study marshals and evaluates a substantial body of new evidence from Asia which has been remarkably under-studied in the academic discourse. This body of experience contributes timely evidence of practice which is significant in supporting a number of key propositions. First, it reveals the still evolving nature of the judicial reform enterprise. Second, it demonstrates that ADB has created some 'results'. Third, it remains difficult to find any evidence of 'success' owing to the continuing conceptual fuzziness in the purpose and goals of endeavor, and the continuing lack of systematic monitoring and evaluation. Fourth, there are some tentative indications of an emerging capacity to demonstrate developmental effectiveness. While this evidence generally conforms to the global literature, the recency of endeavor in this region reveals a dynamic process of evolution, and highlights the incubation of a potentially paradigmatic shift in reform approach.

(Online publication May 17 2011)

5. **Anderson, M.R. (2003). Access to justice and legal process: making legal institutions responsive to poor people in LDCs. IDS Working Paper 178. Online at <http://www.ntd.co.uk/idsbookshop/details.asp?id=729> (accessed Feb.13).**

Abstract

This paper examines some of the principal factors that deny poor people access to justice and suggests a number of legal reform strategies. The legal system offers an arena in which people can hold political leaders and public officials to account, protect themselves from exploitation by those with more power, and resolve conflicts that are individual or collective. Access to justice is therefore not only central to the realisation of constitutionally guaranteed rights, but also to the broader goals of development and poverty reduction. Although the legal system is composed of numerous institutions, this paper focuses in particular on the judiciary. It begins with a comment on how different forms of illegality or lawlessness contribute to the creation and reproduction of poverty. After a review of the judiciary's accountability functions, it proceeds to examine the institutional obstacles to legal accountability by the poor and the anti-poor bias of many legal institutions. The paper's focus then turns to civil society and examines a number of economic and social factors that keep the poor from obtaining access to judicial systems. The next section explores how democratisation and the incorporation of human rights concepts into national law have (or have not) enhanced access to justice. The conclusion suggests a number of policy reforms and strategies that state and civil society groups can deploy to increase the responsiveness of judicial systems to the poor.

Source: website above.

6. **Asian Development Bank (ADB), Asia Foundation. (2001). "Legal Empowerment: Advancing Good Governance and Poverty Reduction".**

No Abstract available

Two studies undertaken to supplement to the seven-country Legal Empowerment Study conducted under Asian Development Bank Regional Technical Assistance 5856.

Appendix 1: "The Impact of Legal Empowerment Activities on Agrarian Reform Implementation in the Philippines".

Introduction to paper

This paper presents the results of a study on the impact of legal empowerment activities on the implementation of agrarian reform in two provinces in southern Philippines. The basic analytical strategy for this study was to compare areas in which nongovernmental organizations (NGOs) were

LITERATURE REVIEW – NOT POLICY

conducting legal empowerment strategies with comparable places where no such work was conducted. This paper reviews the law on land reform and the related legal empowerment work of NGOs, then analyzes three kinds of data collected in the study. These are: (i) judgmental data based on the independent observations and impressions of agrarian reform officials; (ii) quantitative data from a survey conducted in four communities (two with legal empowerment activities and two without); and (iii) the results of focus group discussions in those four communities.

Appendix 2: “The Impact of Legal Empowerment on Selected Aspects of Knowledge, Poverty, and Governance in Bangladesh: A Study of Three NGOs”.

Introduction to paper

This paper presents the results of survey research conducted in Bangladesh during the period November 2000 through January 2001. The research examined the impact of legal empowerment, which is the use of law to increase disadvantaged populations’ control over their lives, on selected aspects of sample groups’ legal knowledge, economic well being, gender equity, and participation in local governance. The survey involved a controlled comparison of three different approaches to legal empowerment to determine differences in impact on beneficiary populations, as well as demographically similar control samples. The three nongovernmental organizations (NGOs) selected for the survey were: (i) the Madaripur Legal Aid Association (MLAA), which specializes in educating citizens about the law and providing a variety of legal services, notably mediation; (ii) Samata, which concentrates on mobilizing communities to apply the law through mass based advocacy initiatives; and (iii) Banchte Shekha, which provides mediation and other legal services as part of an integrated development strategy for women.

Source: hardcopy supplied by DFID.

7. **Baker, B. & Scheye, E. (2009). Access to Justice in a Post-conflict State: Donor supported Multidimensional Peacekeeping in Southern Sudan. *International Peacekeeping* 16 (2), 171-85. <http://www.tandfonline.com/doi/abs/10.1080/13533310802685463> (accessed Feb.13).**

Abstract

Post-conflict governments and donors prioritize rebuilding the justice sector through state delivered rule of law and access to justice programmes. Misunderstanding the nature of the post-colonial state, such programmes make questionable assumptions. First, that a lack of access to state justice is the same as an overall absence of justice. Second, that the state system that is being built is what people want. Third, that the state system of justice that is being built could provide a sustainable nationwide network in the foreseeable future. Based on interviews conducted with policy designers, practitioners, local people and chiefs at three sites in southern Sudan 2007, this article calls for a rethinking of donor-supported justice and police development and advocates an approach that recognizes the importance of local justice.

Source: website above.

8. **Baker, B. (2010). Linking state and non-state security and justice. *Development Policy Review*, 28(5), 597-616. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1653014 (accessed Feb.13).**

Abstract

Until recently links between state and non-state security and justice have been given scant attention, despite being an important part of safety and security provision in the South. This article examines the circumstances in which such linkages occur; the benefits enjoyed by the partners; and the problems encountered. It considers how their success is to be measured, and how and when they can be facilitated and made sustainable. It comes to the conclusion that, for all their limitations,

LITERATURE REVIEW – NOT POLICY

states, donors and international agencies would be foolish to ignore links with non-state security and justice providers.

Source: website above.

9. **Banda, F. (2008). Laws that Discriminate against Women. Report commissioned by Office of the High Commissioner for Human Rights (OHCHR).**

Online at

http://www.ohchr.org/Documents/Publications/laws_that_discriminate_against_women.pdf (accessed Feb.13).

Executive Summary (extract)

The aim of the project was to examine the advisability of creating a new mechanism to address laws that discriminate against women. The terms of reference specified two key objectives. The first was to overview existing UN mechanisms to ascertain the extent to which they addressed the issue of discriminatory laws. This involved interviewing UN human rights and agency officials working in both Geneva and New York¹ and also reviewing the reports and jurisprudence of human rights committees and special procedure mechanisms. The second was to try to get national data on laws that discriminate against women. This was to be done by means of a questionnaire. On the basis of the data gathered, the consultant was required to advise on whether a special mechanism addressing discriminatory laws was needed.

Source: above website

10. **Barron, G. (2006). The World Bank and Rule of Law Reforms. Working Paper, no. 70, Development Studies Institute, London School of Economics and Political Science.**

Online at <http://www.lse.ac.uk/collections/DESTIN/pdf/WP70.pdf> (accessed Feb.13).

No abstract available

11. **Bassiouni, M.C., (ed.) (2002). Post-Conflict Justice, Brill Academic Publishers.**

<http://www.brill.com/post-conflict-justice-> (accessed Feb.13).

Abstract

Thirty scholars and experts discuss and provide wide-ranging views on a variety of accountability measures: the establishment of ad hoc criminal tribunals for the Former Yugoslavia and Rwanda; truth commissions in South Africa and El Salvador; and lustration laws for the former Czechoslovakia and Germany after its reunification.

Also discussed are amnesty for previous crimes and accountability, post-conflict justice involving issues pertaining to the restoration of law and order, and the rebuilding of failed national justice systems. In addition, the book also contains an important set of guidelines designed to achieve accountability and eliminate impunity. The guidelines with commentaries have been prepared by a distinguished group of experts, many of whom have also contributed articles to this volume.

Source: website above.

12. **Bassu, G. (2008). Law Overruled: Strengthening the Rule of Law in Post conflict States. Global Governance, vol.14, iss. 1, pp. 21-39.**

Online at <http://journals.riener.com/doi/abs/10.5555/ggov.2008.14.1.21?journalCode=ggov> (accessed Feb.13).

Abstract

There is a growing gap between what is meant by the rule of law in political discourse, its implementation by practitioners, and the development of the concept in academic analysis. Politically, it is often used interchangeably with democracy and good governance, which form part of

LITERATURE REVIEW – NOT POLICY

a reform “package.” Practitioners tend to reduce it to judicial reform programs, which have not had a high rate of success in strengthening the rule of law when measured against a broader “academic” notion of the concept. This article attempts to introduce some clarity to the plurality of meanings of the rule of law, look at ways in which it has recently been applied in international cooperation, and map out a new approach to promote it in post conflict states.

Source: website above.

13. **Beck, T. (2010). “Legal Institutions and Economic Development.” Centre Discussion Paper Series 2010-94**

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669100 (accessed Feb.13).

Abstract

Legal institutions are critical for the development of market-based economies. This paper defines legal institutions and discusses different indicators to measure their quality and efficiency. It surveys a large historical and empirical literature showing the importance of legal institutions in explaining cross-country variation in economic development. Finally, it presents and discusses three different views of why we can observe the large cross-country variation in legal institutions, the social conflict, the legal origin and the culture and religion hypotheses.

Source: website above.

14. **Beck, T. and Levine, R. (2005). ‘Legal Institutions and Financial Development.’ In C. Ménard and M. Shirley (eds.), Handbook of New Institutional Economics (pp. 251-278). Dordrecht: Springer.**

<http://www.springer.com/economics/law+%26+economics/book/978-3-540-77660-4> (accessed Feb.13).

Abstract/ Description

New Institutional Economics (NIE) has skyrocketed in scope and influence over the last three decades. This first Handbook of NIE provides a unique and timely overview of recent developments and broad orientations. Contributions analyse the domain and perspectives of NIE; sections on legal institutions, political institutions, transaction cost economics, governance, contracting, institutional change, and more capture NIE's interdisciplinary nature. This Handbook will be of interest to economists, political scientists, legal scholars, management specialists, sociologists, and others wishing to learn more about this important subject and gain insight into progress made by institutionalists from other disciplines. This compendium of analyses by some of the foremost NIE specialists, including Ronald Coase, Douglass North, Elinor Ostrom, and Oliver Williamson, gives students and new researchers an introduction to the topic and offers established scholars a reference book for their research.

Source: website above.

15. **Bergling, P, Wennerström, E.O, and Sannerholm, R.Z. (2010). Rule of Law in Public Administration: Problems and Ways Ahead in Post-Conflict Peace-Building. Hague Journal on the Rule of Law, 2, pp. 171–202. Online at**

<http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=7942001> (accessed Feb.13).

Abstract

This article demonstrates that in many peace-building environments, public administration reform and justice sector reform are promoted as separate projects and underpinned by different paradigms, namely making the administration more effective and efficient while introducing and strengthening rule of law and human rights principles in the justice sector. The reasons for this division include lack of knowledge among international and national policy-makers concerning the

LITERATURE REVIEW – NOT POLICY

relevance of the rule of law for public administration reform, vague and conflicting peace-building mandates and objectives, and differences in topical orientation and ‘culture’ among the international actors concerned. The resulting rule of law deficit in public administration reform has adverse effects on both states and individuals, not least for the protection of fundamental human rights. This deficit is also symptomatic of an even deeper dilemma: the distinction between ends and means in post-conflict efforts.

In order to more closely integrate rule of law dimensions in public administration reform, the article suggests an inventory of possible approaches, and relates these to current and future challenges and needs. The inventory comprises developing concepts of rule of law in public administration, promoting transformation of international rule of law principles to national law, facilitating institutional reforms to ensure the presence of institutions willing and able to adhere to the rule of law; the development of manuals, handbooks and other ‘aids’ for law-makers and administrators; developing tools for monitoring the ‘qualitative’ dimensions of public administration; transparency enhancement to enable individuals to enforce their rights; and improving inter-agency/sector co-operation in order to promote coordination and integrated approaches.

Source: website above.

16. **Bergling, P., Wennerström, E., & Sannerholm, P.Z. (2012). Rule of Law and Security Sector Reform: Casual Assumptions, Unintended Risks and the Need for Norms Hague Journal on the Rule of Law, 4: 98–119, 204. Online at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=8519813> (accessed Feb.13).**

Abstract

This article examines rule of law (ROL) and security sector reform (SSR) linkages in crisis management. In particular, the article looks into why international assistance providers chose to categorize a situation and ensuing response strategy as rule of law or SSR, how this categorization is motivated and explained to international and national partners and stakeholders, and how this categorization affects national laws, institutions and other arrangements in post-conflict and crisis societies. The article is borne out of an observation, based on events in the Arab Spring, that the character of international community responses to rule of law threats and challenges has as a strong focus on security. Rule of law promotion taking place in UN and EU missions has undergone a ‘securitization’ in how reforms are conceived and put into practice, compared with rule of law in development aid and past experiences of rule of law assistance in post-communist transitions.

Source: website above.

17. **Berglöf, E., and Claessens, S. (2006). “Enforcement and good corporate governance in developing countries and transition economies”, World Bank Research Observer, 21 (1), pp. 123-150.**

Abstract

More than regulations, laws on the books, or voluntary codes, enforcement is key to creating an effective business environment and good corporate governance, at least in developing countries and transition economies. A framework is presented to help explain enforcement, the impact on corporate governance when rules are not enforced, and what can be done to improve corporate governance in weak enforcement environments. The limited empirical evidence suggests that private enforcement tools are often more effective than public tools. However, some public enforcement is necessary, and private enforcement mechanisms often require public laws to function. Private initiatives are often also taken under the threat of legislation or regulation, although in some countries bottom-up, private-led initiatives preceded and even shaped public laws. Concentrated ownership aligns incentives and encourages monitoring, but it weakens other corporate governance mechanisms and can impose significant costs. Various steps can be taken to

LITERATURE REVIEW – NOT POLICY

reduce these costs and reinforce other corporate governance mechanisms. But political economy constraints, resulting from the intermingling of business and politics, often prevent improvements in the enforcement environment and the adoption and implementation of public laws. © 2006 Oxford University Press.

18. **Bianchi, A. (2002). Ad-hocism and the Rule of Law., European Journal of International Law, vol.13, iss. 1, pp. 263-272.**
Online at <http://www.ejil.org/article.php?article=467&issue=29> (accessed Feb.13).

Abstract

The frequent use of enforcement action of a unilateral or multilateral character to protect human rights as well as a growing concern over the detrimental effects of UN sanctions on civilian populations attest, albeit from different perspectives, to the importance of human rights values in the international community. In fact, a process of constitutionalization seems to be taking place in international law. The anomaly is that it materializes in bits and pieces, mainly through the emergence and subsequent consolidation of normative precepts perceived as fundamental. By providing ad hoc solutions, not grounded on any discernible principle of general application, the Security Council has failed to bring this process into an institutionalized framework. The prevailing 'ad-hocism' permeating its action prevents the development and subsequent enforcement of consistent patterns of normative standards and policies and makes it difficult to exercise scrutiny over the conduct of international actors. Eventually, the lack of consistency, predictability and fairness not only undermines its credibility, but also causes one to wonder whether the Security Council can be of any guidance in defining the contours of an international legal order based on respect for the rule of law and the consistent enforcement of shared values and common interests. Source: website above

19. **Bingham, T. (2011). The Rule of Law, Penguin Books, London.**
<http://www.penguin.co.uk/nf/Book/BookDisplay/0,,9780141034539,00.html#synopsis> (accessed Feb.13).

Synopsis

'The Rule of Law' is a phrase much used but little examined. The idea of the rule of law as the foundation of modern states and civilisations has recently become even more talismanic than that of democracy, but what does it actually consist of?

In this brilliant short book, Britain's former senior law lord, and one of the world's most acute legal minds, examines what the idea actually means. He makes clear that the rule of law is not an arid legal doctrine but is the foundation of a fair and just society, is a guarantee of responsible government, is an important contribution to economic growth and offers the best means yet devised for securing peace and co-operation. He briefly examines the historical origins of the rule, and then advances eight conditions which capture its essence as understood in western democracies today. He also discusses the strains imposed on the rule of law by the threat and experience of international terrorism.

Source: website above.

20. **Brems, E., Adekoya, C.O. (2010). Human rights enforcement by people living in poverty: Access to justice in Nigeria. Journal of African Law, 54(2), 258-282.**
<http://www.africabib.org/rec.php?RID=338677747&DB=p> (accessed Feb.13).

Abstract

This article analyses the challenges facing those living in poverty in Nigeria in accessing justice for the enforcement of their rights, despite those rights being constitutionally protected and despite the

LITERATURE REVIEW – NOT POLICY

existence of a specific procedure for their enforcement. People living in poverty are generally most likely to see their human rights violated, and least likely to enforce their rights. The article posits that the judiciary in developing countries has a crucial role to play in fighting human rights violations specifically affecting people living in poverty, and notes the great challenge for the Nigerian legislator and judiciary towards making justice accessible in practical terms to the needy in Nigeria. The example of public interest litigation in India can serve as a source of inspiration in this respect. Source: website above.

21. **Carothers, T. (2009). Rule of Law Temptations. The Fletcher Forum of World Affairs, vol. 33, no. 1, pp. 49-61. Online at http://www.carnegieendowment.org/files/Rule_of_Law_Temptations.pdf (accessed Feb.13).**
No abstract available
22. **Clark, J. (2011). Peace, Justice and the International Criminal Court. Journal of International Criminal Justice, vol. 9, iss. 3, pp. 521-545.**
Online at <http://jicj.oxfordjournals.org/content/9/3/521.abstract> (accessed Feb.13).
Permissions required so abstract not included
23. **Cousins, B. Capitalism obscured: The limits of law and rights-based approaches to poverty reduction and development (2009) *Journal of Peasant Studies*, 36 (4), pp. 893-908.**

Abstract

The Commission on the Legal Empowerment of the Poor (CLEP) was established by the United Nations in 2005 and concluded in 2008. Although inspired by Hernando de Soto's analysis of the role of property rights in economic development, the scope of the Commission was defined as 'legal empowerment' in general. This commentary offers a critique of the CLEP report, and argues that its underlying assumptions rest on an idealised version of liberal democratic capitalism in which a dynamic market economy assures 'win-win' solutions for all. This implies that there are no tensions between the four 'pillars' of legal empowerment identified by CLEP (the rule of law, property rights, labour rights, and business rights). However, in the real world of capitalism, in both democratic and authoritarian versions, there are structural tensions between classes of capital and classes of labour, which result in the economy and its underlying institutional order becoming a key site of contestation. The case of farm labour in rural South Africa is used to illustrate this argument. A focus on legal rights can, however, be 'empowering' to a degree, when it helps defend poor people from exploitation and abuse, or is located within broader strategies to eradicate systemic poverty. © 2009 Taylor & Francis.

24. **Cox, M. (2008). Security and justice: measuring the development returns – a review of knowledge. *Agulhas Applied Knowledge*. Prepared for DFID.**

Executive summary (extract)

This paper reviews the state of knowledge on the role of security and justice (S&J) in the development process. The purpose is to enable DFID and its partners to gain a better understanding of the returns available from investments in this area, in terms of economic growth, poverty reduction and achievement of the Millennium Development Goals (MDGs). As well as presenting the evidence available from the literature, we are asked to assess the state of knowledge, describing the methodological challenges and how they are being addressed, and proposing areas for further research.

Source: DFID

25. **Dandurand, Y. (2007). The role of prosecutors in promoting and strengthening the rule of law. *Crime Law And Social Change*, vol. 47, iss. 4-5, pp. 247-259.**
Online at <http://link.springer.com/article/10.1007%2Fs10611-007-9070-8?LI=true> (accessed Feb. 13).

Abstract

At the institutional core of governance systems based on the rule of law is not only a strong independent judiciary but also an effective prosecution service committed to upholding the rule of law and human rights in the administration of justice. There are many aspects in the responsibility of prosecutors to promote and strengthen the rule of law, including their duty to combat impunity and ensure the lawfulness of State actions. This paper reviews some of the challenges that prosecutors can anticipate in performing their responsibility to uphold the rule of law. It also touches upon some of the issues that have emerged in recent years in relation to the performance of that important function in the context of emergency situations (e.g. counter-terrorist activities), within the global regime of international cooperation in criminal matters and in the context of post-conflict reconstruction and peace-building initiatives.

Source: website above.

26. **Davis, K.E., and Trebilcock, M.J. (2008). The relationship between law and development: Optimists versus sceptics, *American Journal of Comparative Law*, 56 (4), pp. 895-946.**

Abstract

Over the past two decades there has been a resurgence of interest, on the part of both academics and practitioners, in using law to promote development in Latin America, sub-Saharan Africa, Central and Eastern Europe, and Asia. The level of academic interest in the topic is reflected in the publication of three recent books on law and development by prominent American scholars: Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, Kenneth Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development*, and David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*. In this essay we suggest that these books (or at least some contributions to them) reflect insensitivity to the ambiguities surrounding the relationship between legal reform and development. We show that there is ongoing debate about fundamental questions such as whether law is an important factor in determining social or economic outcomes in developing societies given the existence of informal methods of social control; whether there are insurmountable economic, political or cultural obstacles to effective legal reform; as well as, assuming effective legal reform is feasible, what types of reforms are conducive to development and what types of actors ought to implement them. We argue that although there are some reasons for optimism about the potential impact of legal reforms upon development, the relevant empirical literature is inconclusive on many important issues and counsels caution about the wisdom of continuing to invest substantial resources in promoting legal reform in developing countries without further research that clarifies these issues.

Source: Scopus

27. **Deininger, K. and Ali, D. Ayalew, (2007). Do Overlapping Land Rights Reduce Agricultural Investment? Evidence from Uganda. The World Bank, Policy Research Working Paper 4310.**
<http://ideas.repec.org/cgi-bin/htsearch?q=Deininger+and+Uganda&cmd=Search!&ul=%2Fwbk%2Fwbrwps> (accessed Feb.13).

Abstract

The need for land-related investment to ensure sustainable land management and increase productivity of land use is widely recognized. However, there is little rigorous evidence on the effects of property rights for increasing agricultural productivity and contributing toward poverty

LITERATURE REVIEW – NOT POLICY

reduction in Africa. Whether and by how much overlapping property rights reduce investment incentives, and the scope for policies to counter such disincentives, are thus important policy issues. Using information on parcels under ownership and usufruct by the same household from a nationally representative survey in Uganda, the authors find significant disincentives associated with overlapping property rights on short and long-term investments. The paper combines this result with information on crop productivity to obtain a rough estimate of the magnitudes involved. The authors make suggestions on ways to eliminate such inefficiencies.

Source: website above.

28. Deval, D., and Woolcock, M. (2012). **The Politics of Rule of Law Systems in Developmental States: 'Political Settlements' as a Basis for Promoting Effective Justice Institutions for Marginalized Groups.** *Effective States and Inclusive Development Research Centre Working Paper No. 08, July 2012.* Available at SSRN: <http://ssrn.com/abstract=2141876> or <http://dx.doi.org/10.2139/ssrn.2141876> (accessed Feb.13).

Abstract

The rule of law (ROL), although an “essentially contested concept”, can be understood pragmatically as a system that informs people of what to expect from others through durable and enforceable rules applying equally to all constituent members of a given juridical space. This literature review engages with “the politics of what works” with regard to ROL interventions in development, through an exploration of how these expectations and encompassing rules are shaped within and between groups, as political settlements broaden across political, economic and social dimensions. We understand the politics of ROL as deeply complex and inherently multi-directional: elites, for example, certainly use ROL, but legalization is powerful and can be used in unpredictable ways against elites by other elite groups or by non-elite actors. We review an extensive literature to explore how contests among and between elites and end users shape institutions through a contested, iterative and dynamic process that, in any given setting, is likely to yield an idiosyncratic outcome borne of a unique hybrid mix of local and external inputs. As such, “more research” as conventionally understood will only yield marginal improvements in conceptual clarity and to our cumulative empirical knowledge of the dynamic relationship between ROL, politics and development. The political salience, legitimacy and action-ability of such understandings much be negotiated anew in each setting, between different epistemic groups (professions, users, policymakers) and across divides of gender, ideology and class. We conclude with some specific suggestions for how to enhance the rigor and relevance of ROL interventions from both an analytical and practical standpoint.

Source: website above.

29. Dollar, D. and Kraay, A. (2002). **Trade, growth, and poverty.** *Economic Journal* 114 (493). <http://onlinelibrary.wiley.com/doi/10.1111/j.0013-0133.2004.00186.x/abstract> (accessed Feb.13).

Abstract

A key issue today is the effect of globalisation on inequality and poverty. Well over half the developing world lives in globalising economies that have seen large increases in trade and significant declines in tariffs. They are catching up the rich countries while the rest of the developing world is falling farther behind. Second, we examine the effects on the poor. The increase in growth rates leads on average to proportionate increases in incomes of the poor. The evidence from individual cases and cross-country analysis supports the view that globalisation leads to faster growth and poverty reduction in poor countries.

Source: website above.

LITERATURE REVIEW – NOT POLICY

30. **Farran, S. (2006). Is Legal Pluralism an Obstacle to Human Rights? Considerations from the South Pacific. *Journal of Legal Pluralism and Unofficial Law*, vol. 52, pp. 77-105.**
Online at <http://www.jlp.bham.ac.uk/volumes/52/farran-art.pdf> (accessed Feb.13).
31. **Introduction (extract)**
This article will proceed by looking first at the legal systems of these two countries and the sources of official and unofficial law which are relevant in each of them and how these interact. It will then consider the location of official statements pertaining to human rights within these and any express restrictions to or limitations on the exercise and enjoyment of such rights. Finally it will examine examples of disputes which have come before the courts and involved considerations of custom or customary law. These case examples, which locate the subject of the law within the larger system of law, illustrate that the plurality of laws in these countries can operate to undermine, constrain or defeat rights claims and that the operation of legal pluralism may in fact be fundamental to the problems faced by human rights advocacy in the region.
Source: website above.
32. **Fleck, D. (2006). International Accountability for Violations of the Jus in Bello: The Impact of the ICRC Study on Customary International Humanitarian Law. *Journal of Conflict and Security Law*, vol. 11, iss. 2, pp. 179-199.**
Online at <http://jcsf.oxfordjournals.org/content/11/2/179.abstract> (accessed Feb.13).
Permissions required for abstract
33. **Foresti, M., Higgins, K., and Sharma, B. (2010). Human rights and pro-poor Growth, Project Briefing 34, ODI 220.**

Extract

Since the mid-1990s, the understanding of the relationship between human rights and development has been growing. There is increasing recognition of the relationship between the failure to realise human rights and the continuation of poverty, exclusion, vulnerability and conflict. There is also increasing acknowledgement of the vital role human rights play in mobilising social change; transforming state-society relations; removing the barriers faced by the poor in accessing services; and providing the basis for the integrity of the information services and justice systems needed for the emergence of dynamic, market-based economies. The relationship between human rights and growth is key to advance these objectives. This Project Briefing provides an overview of an ODI study that analyses the relationship between human rights and pro-poor growth and identifies synergies, complementarities and points of connection, as well as latent tensions or contradictions. Crucially, it also provides some practical recommendations and entry points for taking forward a more integrated approach to human rights and pro-poor growth. The study was commissioned by the Governance Network (GOVNET), under the OECD Development Assistance Committee (OECD-DAC) with the aim of building the foundations for effective collaboration between different constituencies for sustainable development.

Source: hardcopy ODI

34. **Forster, C. and Jivan, V. (2009). Gender Equality Laws: Global Good Practice and a Review of Five Southeast Asian Countries. Bangkok: UNIFEM- source GSDRC Gender Topic Guide.**
Online at http://cedaw-seasia.org/docs/Aw_GEL_incover050609Feb10.pdf (accessed Feb.13).

Extract from Executive Summary:

This report presents the results of a desk review commissioned by UNIFEM East and Southeast Asia Subregional Office, conducted in 2007 and early 2008. The review aimed to analyse gender equality laws (GEL) from around the world, to identify those that represent good practice from a CEDAW-

LITERATURE REVIEW – NOT POLICY

informed perspective. Based on the good practice examples identified, the review aimed to analyse the strengths and weaknesses of enacted and draft GEL in five countries, namely Indonesia (Draft Act Concerning Gender Equality and Equity), Lao PDR (Law on the Protection and Development of Women and the Decree on the Implementation of the Law on the Development and Protection of Women 2006, which together constitute the Lao PDR GEL), Philippines (Draft Magna Carta for Women), Thailand (Promotion of Opportunity and Gender Equality Act) and Vietnam (Law on Gender Equality 2006).

Source: above website

35. **Galanter, M., Krishnan, J.K. (2004). 'Bread for the poor': Access to justice and the rights of the needy in India. *Hastings Law Journal*, 55(4), 789-834.**

Abstract

India's courts suffer from enormous backlogs. To remedy this, Indian politicians and judges have been promoting various reforms, including alternative forms that would dispose of cases more quickly. One forum in particular, the Lok Adalat or people's court, has been promoted with special fervor for nearly two decades. The Lok Adalat has been widely trumpeted as a success by its proponents, but very little information is available on the workings of this institution. This study is a preliminary empirical assessment of several sorts of Lok Adalats. These Lok Adalats exhibit great variation in how they function. We find that their performance is highly problematic, both in terms of effectiveness in resolving cases and in the quality of justice received by the parties. These findings have serious implications for the millions of Indians currently being encouraged or required to submit their grievances to Lok Adalats and for the prospects for efficacious reforms of the Indian legal system.

Source: Scopus

36. **Gender Research and Advocacy Project (2009). *Withdrawn: Why Complainants withdraw rape cases in Namibia*. Legal Assistance Centre, Windhoek.**

<http://www.lac.org.na/projects/grap/Pdf/rapesum.pdf> (accessed Feb.13).

No abstract

37. **Gender Research and Advocacy Project (2012). *Seeking Safety: Domestic Violence in Namibia and the Combating of Domestic Violence Act 4 of 2003 – Summary Report*, Legal Assistance Centre, Namibia.**

Online at <http://www.lac.org.na/projects/grap/Pdf/seekingsummary.pdf> (accessed Feb.13).

No abstract

38. **Gilligan, E. *The human rights ombudsman in Russia: The evolution of horizontal accountability* (2010) *Human Rights Quarterly*, 32 (3), pp. 575-600.**

Abstract

Establishing state mechanisms for the protection of human rights in post-Soviet Russia has been an uncertain endeavour. While the non-government sector quickly embraced the public space created by perestroika, the evolution of state-sponsored initiatives has taken a more problematic course. The judicial system has witnessed substantial reform, yet continues to face enormous challenges, which have been determined by a number of constituent factors: psychological, financial, and political. This study seeks to examine the performance of another agency of state accountability, the Russian human rights ombudsman, and to consider its contribution to democracy building in Russia. In discussing the historical context in which the office was established, the direction in which it has developed, and its performance and attendant political responses, this article contends that despite

LITERATURE REVIEW – NOT POLICY

the vicissitudes that shaped its beginnings, the office of the human rights ombudsman is making a valuable contribution to the expansion of administrative justice in contemporary Russia, as it begins to hold government agencies accountable for state human rights violations. © 2010 by The Johns Hopkins University Press.

39. **Global Integrity, (2012). Global Integrity Report: 2011. Washington, D.C. Online at <http://www.globalintegrity.org/files/GIR2011.pdf>** (accessed Feb.13).

No abstract available

40. **Gloppen, S., Kanyongolo, F.E. (2007). Courts and the poor in Malawi: Economic marginalization, vulnerability, and the law. International Journal of Constitutional Law, 5(2), 258-293. <http://icon.oxfordjournals.org/content/5/2/258.abstract>**

Abstract

Malawi's democratic Constitution of 1994 shifted the law in a pro-poor direction. With the judiciary emerging as a surprisingly strong institution in an otherwise weak political system, one might expect a body of pro-poor jurisprudence to develop. This has not been the case, and this article investigates why. After considering patterns of poverty and the role of law in the dynamics of economic marginalization in Malawi, we examine factors assumed to influence the use of courts by the economically marginalized, the strength of their legal voice, and the response of the courts to poor people's social rights claims. We find an interplay between factors impeding the demand for pro-poor justice as well as its supply: lack of litigation resources; high access barriers; the pull of alternative institutions; and the nature of Malawi's legal culture. © 2007 Oxford University Press. Source: Scopus

41. **Gloppen, S., Gargarella, R. & Skaar, E. (2010). Introduction: the accountability function of the courts in new democracies. Democratization, 10(4), 1-6.**

No abstract available: <http://www.tandfonline.com/doi/abs/10.1080/13510340312331293997>

42. **Golub, S. (ed.). (2010). Legal Empowerment: Practitioners' Perspectives Legal and Governance Reform. Lessons Learned. No. 2 International Development Law Organization. http://www.idlo.int/documents/legal_empowerment_practitioners_perspectives_book.pdf**

43. **Graff, M. (2008). Law and finance: Common law and civil law countries compared - An empirical critique *Economica*, 75 (297), pp. 60-83.**

Abstract

The 'theory of law and finance' argues that the common law system provides a better framework for financial development and economic growth than the civil law tradition. This paper identifies a number of problems that cast doubt on the soundness of the empirical basis of this literature. However, this analysis supports the idea that the legal tradition is a major factor in shaping corporate law. In particular, while there is not much evidence that common law countries protect financial investors better than civil law countries I find support for the assumption that financial investors are treated differently across legal families. © The London School of Economics and Political Science 2007. Source: Scopus

44. **Grugel, J. and Piper, N. (2009). Do Rights Promote Development?. *Global Social Policy*, vol. 9, no. 1, pp. 79-98. <http://gsp.sagepub.com/content/9/1/79.abstract>** (accessed Feb.13).

Abstract

Human rights of various sorts are now seen as central to the development process. We argue that rights claims can sometimes be effective in advocacy campaigns for some rights if those campaigns can find a way to resonate with the predominately liberal ideas that shape the global political economy. But this is not always possible and many 'rights', especially economic rights or claims made by or on behalf of some social groups, are difficult to put onto the agenda of states. We suggest as a consequence that there is a need to be wary of an unreflective embrace of rights discourses and that other arguments for development and justice are also required, alongside sustained theoretical reflection on and engagement with the state.

Source: website above.

45. **Haggard, S., MacIntyre, A., Tiede, L. (2008) "The rule of law and economic development" Annual Review of Political Science, 11, pp. 205-234.**

Abstract

With the enormous expansion of scholarship on this subject, "rule of law" has come to mean different things - ranging from security and order to the operations of courts and the administration of justice. We review the various streams of theoretical and empirical research by academics and practitioners, emphasizing the connections to economic development. The core logic is that security of property rights and integrity of contract underpin, respectively, investment and trade, which in turn fuel economic growth and development. However, property rights and contracts rest on institutions, which themselves rest on coalitions of interests. Formal institutions are important, but, particularly in developing countries, informal institutional arrangements play a significant part as well. These considerations lead us to caution against an exaggerated confidence in the ability of development assistance to implant new institutions for the rule of law.

Copyright © 2008 by Annual Reviews. All rights reserved.

46. **Haggard, S., and Tiede, L. (2011).The rule of law and economic growth: Where are we? World Development, 39(5), 673-685.**

Abstract

It is widely assumed that the rule of law is essential for economic growth. However, the rule of law is clearly a multidimensional concept, encompassing a variety of discrete components from security of person and property rights, to checks on government and control of corruption. We review the theory underlying these different causal mechanisms linking the rule of law to economic growth, and provide an introduction to some outstanding measurement issues. We find that the correlation among different components of the rule of law concept are not tight among developing countries and that some inferences about the effects of property rights protection may not be warranted. © 2010 Elsevier Ltd.

47. **Hamzić, V. (2011). The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos. Human Rights Law Review, vol. 11, issue. 2, pp. 237-274.**

Online at <http://hrlr.oxfordjournals.org/content/11/2/237.short> (accessed Feb.13).

Abstract

This article analyses the past and present positions of the concepts of *sexual orientation* and *gender identity* in international human rights law and Islamic legal tradition in order to establish a rationale for the protection and empowerment of the millions of members of various Muslim communities who suffer from discrimination and prejudice solely because of their perceived or actual gender

LITERATURE REVIEW – NOT POLICY

and/or sexual diversity. It argues that the systemic oppression of 'queer Muslims' runs against the fundamental principles of both analysed global(ised) legal systems, and that the notions of gender identity and sexual orientation, as pronounced in the Yogyakarta Principles, should be upheld in framing the related legal, religious, social and human rights claims.

Source: website above.

48. **Harper, H. (2011). Customary Justice: from Program Design to Impact Evaluation, International Development Law Organisation** <http://www.idlo.int/Publications/CustomaryJustice1.pdf> (accessed Feb.13).

Description

Is intended to provide guidance to international and national actors on the potential role of customary justice systems in fostering the rule of law and access to justice in post-conflict, post-disaster and development contexts. The book wishes to provoke thought among practitioners about the objectives of customary law interventions, to encourage critical assessments of the criteria on which programming decisions are made, and to provide tools to assist in gauging the extent to which interventions are having a positive impact.

Source: website above.

49. **Harper, H. (ed.) (2011). Working with Customary Justice Systems: Post-conflict and Fragile States, International Development Law Organisation** <http://www.idlo.int/Publications/CustomaryJustice2.pdf> (accessed Feb.13).

Description

Working with Customary Justice Systems: Post-conflict and Fragile States is a collection of articles from the "Legal Empowerment and Customary Law Research Grants" program, where seven bursaries were awarded to scholar-practitioners to develop and conduct empirically grounded and evidence-based research programs to evaluate the impact of an empowerment-based initiative involving customary justice. The case studies illustrate that what is effective is situation-specific and contingent upon a variety of factors including, among others, social norms, the presence and strength of a rule of law culture, socioeconomic realities and national and geo-politics.

Source: website above.

50. **Hodžić, R. (2010) "Living the Legacy of Mass Atrocities: Victims' Perspectives on War Crimes Trials", Journal of International Criminal Justice, Vol. 8, Issue 1, pp. 113-136, 2010.** Online at <http://ijci.oxfordjournals.org/content/8/1/113.abstract> (accessed Feb.13).

Abstract

This article examines the dominant perceptions of war crimes trials among victims from Prijedor, a municipality in Bosnia and Herzegovina. Largely based on interviews with victims who have testified in trials before international, state and district courts, and victims who have never testified, non-governmental organization activists working with victims in their communities, and some professionals involved in Prijedor-related cases, the article attempts to cast new light on the factors which create and shape these perceptions. Considering the nature of the violence experienced by the community in question and the relatively substantive judicial response to it, the Prijedor case offers insights relevant to similar communities around the world and important lessons for courts and tribunals seeking to ensure that their work is capable of providing some sense of justice to victims.

Source: website above.

LITERATURE REVIEW – NOT POLICY

51. **Horn, N., and Bösl, A. (eds.), (2009). Human Rights and the Rule of Law in Namibia (2nd edited edition). Konrad Adenauer Foundation, Macmillan, Namibia.**
<http://www.kas.de/namibia/en/publications/16045/>
http://www.kas.de/wf/doc/kas_16045-1522-2-30.pdf?091123204331 (accessed Feb.13).

Description

The publication focuses on major aspects and the current condition of the management of the rule of law and the observance of basic human rights in Namibia, and attempts to critically analyse the successes and failures.

Source: website above

52. **Hudson, A. & GOVNET Secretariat (2009). Aid and Domestic Accountability: Background Paper.**
<http://www.oecd.org/social/gender-development/42811639.pdf> (accessed Feb.13).

No abstract available

53. **International Bar Association (2008). The Rule of Law: A commentary on the IBA Council's Resolution of September 2005. IBA. Online at www.ibanet.org** (accessed Feb.13).

No abstract available

54. **International Commission of Jurists (ICJ), Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity, March 2007. Online at <http://www.unhcr.org/refworld/docid/48244e602.html>** (accessed Feb.13).

Summary

Drafted, developed and discussed by a group of human rights experts. Following an experts' meeting held at Gadjah Mada University in Yogyakarta, Indonesia from 6 to 9 November 2006, 29 experts from 25 countries with diverse backgrounds and expertise relevant to issues of human rights law unanimously adopted the Yogyakarta Principles.

Source: website above.

55. **International Monetary Fund (Nov 2012). Liberalizing Capital Flows and Managing Outflows - Background Paper. Online at <http://www.imf.org/external/np/pp/eng/2012/031612.pdf>** (accessed Feb.13).

Executive Summary (Extract)

Capital flows have increased significantly in recent years and are a key aspect of the global monetary system. They offer potential benefits to countries, but their size and volatility can also pose policy challenges. The Fund needs to be in a position to provide clear and consistent advice with respect to capital flows and policies related to them. In 2011, the International Monetary and Financial Committee (IMFC) called for further work on a comprehensive, flexible, and balanced approach for the management of capital flows. This paper proposes an institutional view to underpin this approach, drawing on earlier Fund policy papers, analytical work, and Board discussions on capital flows.

Source: website above.

56. **Isser, D., and Chopra, T. (2012). Women's Access to Justice, Legal Pluralism and Fragile States Albrecht, P. et al (eds), Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform, IDLO and Danish Institute for International Studies.**
http://www.idlo.int/Publications/DIIS_Book.pdf

No abstract available

57. Kahn-Fogel, N. (2012). **The troubling shortage of African lawyers: Examination of a continental crisis using Zambia as a case study.** *University of Pennsylvania Journal of International Economic Law*, 33 (3), pp. 719-789.

Abstract

This Article examines the critical shortage of lawyers in Africa, using Zambia as a case study. The Article draws on information from a variety of sources, including field interviews, survey data, and case data from Zambian courts, in addition to secondary source material. Though other work has dealt with access to justice in Africa broadly and with issues that affect access to justice, including African legal education, prison conditions, and alternatives to formal legal representation, this Article is the first comprehensive analysis of the causes of the scarcity of African lawyers, the effects of the shortage, and potential avenues for addressing the crisis, including measures for making more efficient use of currently available legal resources and reforms to increase the size of the African bar. Now, because of the extreme scarcity of African lawyers, most criminal defendants go without representation, and most Africans with civil claims have no reasonable possibility of hiring a lawyer. The causes of this crisis date to colonial policies that discouraged higher education for native Africans. More recently, donor fatigue and the limited availability of public resources for education, compounded by World Bank and IMF austerity measures, have perpetuated the problem. Likewise, poor policy choices at African law schools and African bar admissions programs have exacerbated the dilemma. Zambia, and other countries in the region, could enhance the impact of their limited legal communities by allowing the use of contingency fees, reducing or eliminating the civil caseloads of overburdened and understaffed legal aid departments, and making more extensive use of paralegals. African law schools could improve the quality of their graduates by implementing policies to combat rampant dereliction of duty by their faculties, pedagogical reforms, and policies to increase student access to learning materials. Additionally, low bar pass rates would likely improve if bar admissions programs reformed their curricula, changed hiring practices, and implemented transparent grading practices. Ultimately, growth of the African bar is crucial to ensuring adequate safeguards of the rights of criminal defendants, litigating complex civil claims, negotiating the balance between the competing traditions of the dual legal systems of most African countries, and building and sustaining societies subject to the rule of law.

Source: Scopus

58. Kassahun, Y. (2006). **An Overview of Law Reform in the Economic Development Context, Epilogue,** in McInerney, T. (ed.) (2006). **Searching for Success: Narrative Accounts of Legal Reform in Developing and Transition Countries.** *Legal and Governance Reform: Lessons Learned No. 1 International Development Law Organization (IDLO).* <http://www.idlo.int/Publications/15.pdf>
No Abstract available

59. Kaufmann, D. (2004). **Human Rights and Governance: The Empirical Challenge prepared for: 'Human Rights and Development: Towards Mutual Reinforcement' Conference, World Bank Institute.** Online at <http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/humanrights.pdf> (accessed Feb.13).

Abstract

We undertake to address some of the challenges related to the measurement and empirical analysis issues in this field, offering an exploration of the evidence and links between human rights, governance and development. We assess recent data and trends on human rights, and review the links between the first generation human rights (political and civil rights) and second generation (socio-economic) human rights. Based on the evidence, we suggest that first generation human rights have not advanced significantly worldwide in recent times, and, importantly, that these first

LITERATURE REVIEW – NOT POLICY

generation human rights may causally affect the country's second generation human rights outcomes and performance. The results pointing to the causal link from first generation human rights to improved socio-economic outcomes are apparent at the aggregate country-wide level as well as the micro project level.

We then explore the empirical linkages between both generations of human rights, on the one hand, and other governance dimensions, on the other. In particular, within governance, we explore how rule of law, corruption, and corporate ethics interface with civil liberties and related human rights variables. We suggest that components of governance, such as corruption, are a mediating link between first and second generation human rights issues, and a determinant of development outcomes.

These findings, if corroborated through further research, have important implications for the donor aid community and emerging economies alike. In particular, it would point to the potential need to account for first generation human rights issues in enhancing effectiveness of development aid and its projects (either associated with the 'socio-economic second generation' human rights, or with other development projects). Further, it would also point to the need to deepen the integration of the corruption and rule-of-law dimensions of governance in aid strategies so to enhance effectiveness related to socio-economic human rights and development.

Source: website above.

60. Kaufmann, D., Kraay, A., and Mastruzzi, M. (2009). **Governance Matters VIII: Aggregate and Individual Governance Indicators, 1996-2008. World Bank Policy Research Working Paper No. 4978. Online at SSRN: <http://ssrn.com/abstract=1424591> (accessed Feb.13).**

Abstract

This paper reports on the 2009 update of the Worldwide Governance Indicators (WGI) research project, covering 212 countries and territories and measuring six dimensions of governance between 1996 and 2008: Voice and Accountability, Political Stability and Absence of Violence/Terrorism, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption. These aggregate indicators are based on hundreds of specific and disaggregated individual variables measuring various dimensions of governance, taken from 35 data sources provided by 33 different organizations. The data reflect the views on governance of public sector, private sector and NGO experts, as well as thousands of citizen and firm survey respondents worldwide. We also explicitly report the margins of error accompanying each country estimate. These reflect the inherent difficulties in measuring governance using any kind of data. We find that even after taking margins of error into account, the WGI permit meaningful cross-country comparisons as well as monitoring progress over time.

Source: website above.

61. Kim, H. and Sikkink, K. (2010). **Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries. International Studies Quarterly, 54, pp. 939–963. Online at <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2478.2010.00621.x/full> (accessed Feb.13).**

Abstract

Human rights prosecutions have been the major policy innovation of the late twentieth century designed to address human rights violations. The main justification for such prosecutions is that sanctions are necessary to deter future violations. In this article, we use our new data set on domestic and international human rights prosecutions in 100 transitional countries to explore whether prosecuting human rights violations can decrease repression. We find that human rights prosecutions after transition lead to improvements in human rights protection, and that human rights prosecutions have a deterrence impact beyond the confines of the single country. We also

LITERATURE REVIEW – NOT POLICY

explore the mechanisms through which prosecutions lead to improvements in human rights. We argue that impact of prosecutions is the result of both normative pressures and material punishment and provide support for this argument with a comparison of the impact of prosecutions and truth commissions, which do not involve material punishment.

Source: website above.

62. **Lamp, N. (2011). Conceptions of war and paradigms of compliance: the 'new war' challenge to international humanitarian law. *Journal of conflict and security law*, vol. 16, iss. 2, pp. 225-262. <http://www.scopus.com/record/display.url?eid=2-s2.0-80051719685&origin=inward&txGid=95CB8A9ACBE9289FE72E1D485DF536E6.WeLimyRvBMk2ky9SFKc8Q%3a7> (accessed Feb.13).**

Abstract

The article argues that the so-called 'new wars' pose a fundamental challenge to international humanitarian law (IHL). Although not historically new, this type of war differs in crucial respects from the conception of war that underlies the traditional paradigm of compliance of IHL. At the heart of this paradigm lie certain assumptions: that IHL embodies a compromise between the interests of the warring parties and humanitarian concerns, and that the warring parties face a number of incentives to comply with the law. The article argues that these assumptions lose their plausibility under the circumstances of the 'new wars'. As a result, the traditional enforcement mechanisms of IHL invariably fail in these conflicts. The second part of the article discusses the international legal response to the 'new wars'. In particular, it considers international criminal prosecutions, the activities of the International Committee of the Red Cross and measures by the United Nations Security Council. In the common elements of these measures the article identifies the contours of a new paradigm of compliance in IHL that shifts the emphasis from voluntary compliance to external enforcement. © Oxford University Press 2011; all rights reserved.

63. **Lankhorst, M., and Veldman, M. (2011). Engaging with Customary Law to Create Scope for Realizing Women's Formally Protected Land Rights in Rwanda. IDLO Customary Justice Working Paper Series, International Development Law Organization in conjunction with the Van Vollenhoven Institute, Leiden University. <http://www.idlo.int/Publications/5LANKHORST.pdf>**
No abstract
64. **Leonardi, C., Moro, L.N., Santschi, M., and Isser, D.H. (2010). Local Justice In Southern Sudan: A joint Project of United States Institute of Peace and Rift Valley Institute. *Peaceworks No.2*, p. 58. <http://www.usip.org/publications/local-justice-in-southern-sudan> (accessed Feb.13).**

Summary

Since its establishment five years ago under the Comprehensive Peace Agreement (CPA), the Government of Southern Sudan (GoSS) has struggled to create a justice system that reflects the values and requirements for justice among the people of Southern Sudan. For both political and practical reasons, chiefs' courts and customary law are central to this endeavor. A key question facing the GoSS is how to define the relationship between chiefs' courts (and the ideas about law that they embody) and the courts of Southern Sudan's judiciary, while ensuring equal access to justice and the protection of human rights.

Policy discussions and recent interventions have focused on ascertainment, whereby the customary laws of communities (usually defined as ethnic groups) would be identified and recorded in written form, to become the basis for the direct application, harmonization, and modification of customary law.

LITERATURE REVIEW – NOT POLICY

This report empirically analyzes the current dynamics of justice at the local level, identifying priorities for reform according to the expressed needs and perceptions of local litigants. Our findings are based on field research conducted from November 2009 to January 2010 in three locations in Southern Sudan: Aweil East, Wau, and Kajokeji.

Source: website above.

65. **Luopajarvi, K. (2003). Is there an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?. International Journal of Refugee Law, vol. 15, iss. 4, pp. 678-714.**

Online at <http://ijrl.oxfordjournals.org/content/15/4/678.abstract> (accessed Feb.13).

Abstract

As internal displacement often occurs as a result of systematic human rights violations, internal strife or armed conflicts, the capacity and/or willingness of the government concerned to provide assistance and protection to the IDPs is often doubtful. Thus, a state may not request help, or reject offers of assistance to its displaced population. Questions therefore arise as to whether and when the international community can provide either surrogate or complementary assistance to the internally displaced without the consent of the government concerned. By focusing on an analysis of the scope and content of the existing norms relating to state obligations to accept offers of international humanitarian assistance, this article attempts to clarify how international law addresses the questions relating to state obligations to accept international assistance to IDPs.

Source: website above.

66. **Maru, V. (2011). Allies unknown: social accountability and legal empowerment. Health and Human Rights, vol. 12, no. 1, pp. 83-93.**

<http://www.hhrjournal.org/index.php/hhr/article/viewFile/213/292> No abstract

67. **McCorquodale, R., (editor) (2010). Business, the International Rule of Law and Human Rights. Chapter 3, The Rule of Law in International and Comparative Context, British Institute of Comparative and International Law, London 2012.**

<http://www.biicl.org/publications> (accessed Feb.13).

Book Summary

The maintenance and promotion of the rule of law is of fundamental importance for the human dignity and well-being of people everywhere, providing the foundations for good governance, an effective economy and a fair society, and affecting the daily lives of people around the world. Its relevance extends across a wide range in the affairs of people and states: in the laws of armed conflict; laws outlawing corruption and governing constitutional affairs; in energy and environmental rights; the respective roles and powers of the various arms of government and agencies at national, regional and international level; the independence of the judiciary; and in human rights.

This book explores some key issues concerning the rule of law in the international and comparative context, clarifying key aspects of the rule of law and applying them to real life examples across the world, including:

- the impact of business on human rights;
- anti-competitive practices and the role of the European Union bodies;
- the development of international investment law;
- the use of comparative law to inform national decision-making; and
- the effects of international criminal law and practice.

Source: website above.

68. Muchlinski, P. (2003). **Human rights, social responsibility and the regulation of international business: The development of international standards by intergovernmental organisations.** *Non-State Actors and International Law*, vol. 3, iss. 1, pp. 123-152
<http://www.ingentaconnect.com/content/mnp/nail/2003/00000003/00000001/art00005>
(accessed Feb.13).

Abstract

This paper considers the role of IGOs in the process of developing new, human rights oriented, norms of corporate social responsibility. It develops an argument based on an identifiable distinction between at least three main ideological positions: the "hard libertarian", the "normative liberal" and the "regulatory functionalist". Each takes a different position on the need for, and the extent of, international standard setting activity in this area. However, at least among the latter two positions, an apparent consensus is emerging that some kind of international minimum standard for good corporate behaviour should be in place.

Source: website above.

69. Nettelfield, L. J., (2010). **From the Battlefield to the Barracks: The ICTY and the Armed Forces of Bosnia and Herzegovina**". *International Journal of Transitional Justice*, Vol. 4, Issue 1, pp. 87-109, 2010. Online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1555558 (accessed Feb.13).

Abstract

This article examines attitudes among soldiers in the Armed Forces of Bosnia and Herzegovina - many of whom stood on opposing sides of the war front over a decade ago - toward the International Criminal Tribunal for the former Yugoslavia. It is based on an anonymous survey of 463 soldiers conducted in five Bosnian cities: Sarajevo, Mostar, Tuzla, Banja Luka and Bijeljina. The author finds that soldiers believe the Court has made some successes toward its extended mandate, in particular in its contribution to various aspects of democratization. Court architects hoped war crimes trials would bolster the prospects for long-term peace and stability in the country. This article addresses a segment of society not often given voice in scholarly studies of transitional justice and adds to the growing scholarship on former combatants.

Source: website above

70. O'Brien, M., Stapenhurst, R. & Johnston, N. (eds.) (2008). **Parliaments as Peacebuilders in Conflict-Affected Countries.** Washington, D.C.: The World Bank, p.78.
<https://openknowledge.worldbank.org/handle/10986/6532>
<https://openknowledge.worldbank.org/bitstream/handle/10986/6532/450880PUB0Box3101OFFICIALOUSE0ONLY1.pdf?sequence=1> (accessed Feb.13).

Abstract

The role of parliament in conflict-affected countries becomes even more evident when the correlation between poverty and conflict is considered. This book is pioneering in that it considers what parliaments in conflict-affected countries can do, while performing their normal everyday functions, to not only contribute directly to conflict prevention but also aid peace building by combating poverty. By addressing issues of poverty, equitable distribution of resources, and economic development, parliamentarians can attempt to guard against the creation of an enabling environment that is prone to the escalation of conflict. In line with their respective missions, the World Bank Institute and the Commonwealth Parliamentary Association have examined issues facing parliamentary development in the hope of strengthening parliaments' capacity to tackle the diverse challenges they face. Among those challenges is meeting growing community expectations of the contribution parliaments make to resolving important issues and addressing community demands. In recognition of the rising number of parliaments that are operating in conflict-affected societies, the

LITERATURE REVIEW – NOT POLICY

World Bank Institute has sought to better understand the challenges faced by parliaments in conflict-affected countries and the role parliaments can play in conflict management and poverty alleviation.

Source: website above.

71. **O'Connor, V. (2012). Common Law and Civil Law Traditions: A Practitioners Guide. INPROL - International Network to Promote the Rule of Law. <http://inprol.org/publications/common-law-and-civil-law-traditions> (accessed Feb.13).**

Introduction (extract)

The goal of this Practitioners' Guide is to provide an overview of both common law and civil law legal traditions—comparing and contrasting them—so that practitioners deploying to post-conflict or developing countries can become familiar with them, and more easily work in a country that follows a tradition that is unfamiliar to them. Understanding comparative legal traditions is not just of theoretical value to the practitioner. There are very real and practical benefits to understanding comparative legal systems, and potentially, very negative consequences to not understanding them. This Practitioner's Guide will provide a broad and high-level overview of both common law and civil law legal systems, with the hope of filling any knowledge-gaps about these systems that practitioners may have. This should provide a good starting point for the practitioner to understand a particular common law or civil law system and how it operates. Knowing that most states practitioners will work in are legally pluralistic, we cannot simply declare any given country to be common law or civil law. The common law or civil law is just one subsystem of the broader legal reality of the post-conflict or developing country. That said, it is an important subsystem and one that many practitioners will be working with on a day-to-day basis.

Source: website above.

72. **Odinkalu, C. A., (2006). Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa. Pp. 141-167, in: Sage, C., and Woolcock, M. (eds), The World Bank Legal Review: Law, Equity, and Development, Volume 2, Washington, DC: World Bank and Martinus Nijhoff, p. 143.**

Online at <https://openknowledge.worldbank.org/handle/10986/6899> (accessed Feb.13).

Online at

<https://openknowledge.worldbank.org/bitstream/handle/10986/6899/568260PUB0REPL1INALOPROOF0FULL0TEXT.pdf?sequence=1> (accessed Feb.13).

Abstract

The World Bank legal review: law, equity, and development, volume two, is a publication for policy makers and their advisers, attorneys, and other professionals engaged in the field of international development. It offers a combination of legal scholarship, lessons from experience, legal developments, and recent research on the many ways in which the application of law and the improvement of justice systems promote poverty reduction, economic development, and the rule of law. In keeping with the theme of the World Development Report 2006: equity and development, and following the success of the World Bank Group's legal forum on 'law, equity, and development' in December 2005, volume two of the World Bank legal review focuses on issues of equity and development. The volume draws together some of the key ideas of the Legal Forum, including articles by many of its distinguished participants, and explores the role of equity in the development process, highlighting how legal and regulatory frameworks and equitable justice systems can do much to level the playing field in the political, economic, and socio-cultural domains, as well as how they can reinforce existing inequalities.

Source: website above.

73. Olsen, T., Payne, L., and Reiter, A. (2010). **The Justice Balance: When Transitional Justice Improves Human Rights and Democracy**. *Human Rights Quarterly*, Volume 32, Number 4, pp. 980-1007. <http://muse.jhu.edu/journals/hrq/summary/v032/32.4.olsen.html> (accessed Feb.13).

Abstract

Evidence from the Transitional Justice Data Base reveals which transitional justice mechanisms and combinations of mechanisms positively or negatively affect human rights and democracy. This article demonstrates that specific combinations of mechanisms – trials and amnesties; and trials, amnesties, and truth commissions – generate improvements in those two political goals. The findings support a justice balance approach to transitional justice: trials provide accountability and amnesties provide stability, advancing democracy and respect for human rights. The project further illustrates that, all else being equal, truth commissions alone have a negative impact on the two political objectives, but contribute positively when combined with trials and amnesty.

Source: website above.

74. Orvis, S. (2003). **Kenyan civil society: Bridging the urban-rural divide?**. *Journal of Modern African Studies*, 41 (2), pp. 247-268.

Abstract

While African civil society seemed a beacon of hope for democracy in the early 1990s, by the end of the decade many scholars had come to view it as extremely weak, lacking a domestic constituency and therefore any significant political or civic impact. Critics have been particularly concerned about urban-based 'democracy and governance' NGOs' limited influence on and connection with the rural majority of the citizenry. This article examines this question in Kenya, looking at four NGOs that have used civic education and paralegal programmes to establish a rural presence. Based on a survey of participants, it concludes that although the programmes are relatively new, they have begun to have a measurable impact on citizen understanding of politics, and have given the NGOs a noticeable rural presence. They have done so, however, by relying on ethnic, clan, partisan and other 'non-civil' networks to build supporters.

Source: Scopus

75. Park, A. (2008). **Consolidating peace: rule of law institutions and local justice practices in Sierra Leone**. *South African Journal on Human Rights*, vol. 24, iss. 3, pp. 536-564. Online at http://www.sabinet.co.za/abstracts/ju_sajhr/ju_sajhr_v24_n3_a9.html (accessed Feb.13).

Abstract

The strengthening of rule of law institutions is increasingly recognised as a key component to consolidating peace in post-conflict situations. Ensuring fairness under the law (and the appearance of fairness) whilst expanding access to justice in rural areas has become a chief plank in peacebuilding efforts in Sierra Leone following a decade-long civil conflict born of corrupt mismanagement in this failed post-colonial state. However, in order for justice institutions to be meaningful, local practices must be engaged. Despite discourse suggesting that justice is 'universal', socio-legal scholars have demonstrated that justice and its performance are cultural artefacts. Any robust peace in Sierra Leone must twin increasingly globalised rule of law institutions with local meanings and practices of justice. At the same time, local justice practices must be articulated with human rights. Moreover, the post-conflict period opens a unique space to expand Sierra Leonean local justice practices to stay the hand of vengeance following an inter-communal war where regular people became perpetrators, and almost everyone became a victim. Drawing on fieldwork conducted in Sierra Leone, this article will examine the development of rule of law institutions in Sierra Leonean peacebuilding and attempt to suggest how these institutions might coexist with local,

LITERATURE REVIEW – NOT POLICY

'traditional' justice practices. Moreover, the article also offers a critique of rule of law programming, drawing analogies to the criticisms mounted against the Law and Development Movement.

Source: website above.

76. **Park, A.S.J. (2010). Community-based restorative transitional justice in Sierra Leone. *Contemporary Justice Review: Issues in Criminal, Social, and Restorative Justice*, 13(1), 95-119.**

Abstract

Community-based restorative transitional justice is an important feature of peace consolidation, maximizing access to justice and facilitating reconciliation. Examining post-conflict Sierra Leone as a case study, the author draws on existing justice practices in Sierra Leone as examples of restorative responses to war criminality. Specifically, the traditional reintegration of former male and female combatants and the emergence of a new project, 'Fambul Tok' are detailed. The author discusses and compares the Special Court for Sierra Leone and the Truth and Reconciliation Commission to point to gaps in transitional justice that call for community-based restorative strategies.

© 2010 Taylor & Francis.

77. **Parsons, J., Thornton, M., Bang, H.E., Estep, B., Williams, K., and Weiner, N. (2008). Developing Indicators to Measure the Rule of Law: A Global Approach. A Report to the World Justice Project, The Vera Institute of Peace. Online at http://www.altus.org/pdf/dimrol_en.pdf (accessed Feb.13).**
No abstract available

78. **Pasqual, L. (2009). Time for Action: Implementing CEDAW in Southeast Asia. UNIFEM, Bangkok Online at http://cedaw-seasia.org/resource_documents.html#time4action (accessed Feb.13).**

Summary

This publication presents the various ways in which both governments and civil society actors have used the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) to make the promise of non-discrimination and equality one step closer to reality for women. The book is born out of UN Women's concentrated efforts in raising awareness about the Convention and women's right among both duty bearers and rights holders in seven countries in Southeast Asia – Cambodia, Indonesia, Lao PDR, the Philippines, Thailand, Timor-Leste, Viet Nam. It shows how CEDAW has been used in advocacy for stronger legal frameworks that prohibit discrimination against women and advance women's human rights, in sensitizing the justice system to protect the rights of women, in guiding local development and budget allocation processes. It demonstrates the innovative ways in which civil society organizations are popularizing CEDAW, reaching out to excluded groups of women, and using it as a means to hold their government accountable.

Source: website above.

79. **Peerenboom, R. (2009). The Future of Rule of Law: Challenges and Prospects for the Field. *Hague Journal on the Rule of Law*, vol. 1, pp. 5-14.**
Online at <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=4614076&fulltextType=RA&fileId=S1876404509000050> (accessed Feb.13).

Abstract

The rule of law field has come a long way in the last several decades. Yet, given the diversity of competing definitions and conceptions of rule of law, there remain serious doubts about whether there is such a thing as 'a rule of law field'. Moreover, despite a growing empirical literature, there remain serious doubts about the relationship, and often the causal direction, between rule of law and the ever-increasing list of goodies with which it associated, including economic growth, poverty

LITERATURE REVIEW – NOT POLICY

reduction, democratization, legal empowerment and human rights. In considering where the rule of law field is headed, and the possible contribution of a dedicated journal such as this to the development of the field, I focus on four areas that respond to the preceding concerns (though neither the list of concerns nor the responses are in any way meant to be exhaustive). The first area is conceptual or theoretical, and highlights the need to move beyond attempts to generate a consensus definition, in favor of adopting a more pragmatic perspective that accepts multiple perspectives and conceptions, and takes advantage of the diversity of definitions and measures to test the relationship between rule of law and the increasing list of other social goods. The second is methodological, and highlights the need to switch from increasingly insistent prescriptions based on increasingly comprehensive and specific Euro-American institutions, rules, practices and norms toward a more process oriented approach that recognizes a greater role and responsibility for target countries and is more open-ended and tolerant of institutional innovations and differences in norms, practices and outcomes. The third is empirical, and highlights the need to move beyond the current broad empirical studies of rule of law to a more focused study of particular institutions, rules and practices in achieving various desired outcomes, as well as more focus on what works at what level of development and under what socio-political conditions. The fourth is disciplinary, and highlights the need for greater interdisciplinary work given the integral relation of legal reforms to other reforms, as well as the need to bridge the gap between academics and rule of law practitioners so as to provide policy-makers more effective guidance.

Source: website above.

80. **Peerenboom, R. (2005). Human Rights and Rule of Law: What's the Relationship?. Georgetown Journal of International Law, vol. 36, 2005; UCLA School of Law Research Paper No. 05-31. Online at <http://ssrn.com/abstract=816024> (accessed Feb.13).**

Abstract

This article considers several explanations for the international human rights movement's sudden heightened attention to rule of law.

The human rights movement has increasingly encountered conceptual, normative and political challenges. Perhaps, as de Mello suggested, rule of law will be a "fruitful principle to guide us toward agreement and results," and "a touchstone for us in spreading the culture of human rights."

We still live in a world where widespread human rights violations are the norm rather than the exception. Rule of law is seen as directly integral to the implementation of rights.

Rule of law may also be indirectly related to better rights protection in that rule of law is associated with economic development, which is related to better rights performance.

Rule of law is integral to and necessary for democracy and good governance. Attempts to democratize without a functional legal system in place have resulted in social disorder.

Rule of law is said to facilitate geopolitical stability and global peace. According to some, it may help prevent wars from occurring in the first place. It also provides guidelines for how war is carried out, and is central to the establishment of a rights-respecting post-conflict regime.

Post 9-11 concerns over terrorism have also focused attention on rule of law.

In addition, rule of law provides a rhetorical basis for challenging the world's sole reigning superpower.

Taking each of these factors in turn, I critically analyze the relationship between rule of law and human rights. The relationship is complex and defies easy summary across such a broad range of issues. Nevertheless, a provisional summary that highlights some of the key findings and conclusions may be helpful. First, on the whole, rule of law is desirable. However, it is clearly no panacea for any of these problems.

Second, rule of law is more useful in addressing some concerns than others. Appealing to rule of law will do little to resolve the conceptual and normative difficulties at the core of the human rights agenda.

LITERATURE REVIEW – NOT POLICY

Third, the empirical evidence to support the assertion that rule of law leads to more rights and wellbeing is limited, and subject to doubts about causality. There is good reason to believe that wealth rather than rule of law is mainly responsible for better rights performance, although rule of law may also have some independent impact.

Fourth, although rule of law and liberal democracy generally go hand in hand, they need not. Rule of law is possible in non-democratic states, and in democratic but non-liberal states. Rule of law may proceed, and is generally a precondition for, democratic consolidation.

Fifth, we should not put too much faith in the ability of rule of law to prevent war, limit atrocities during war, or rein in a superpower bent on going its own way.

Finally, rule of law is only one component of a just society. In some cases, the values served by rule of law will need to give way to other values. Invoking rule of law in most cases signals the beginning of normative and political debate, not the end of it.

Source: website above.

81. **Pham, P., Vinck, P., Stover, E., Moss, A., Wierda, M., and Bailey, R. (2007). "When the War Ends: A Population-Based Survey on Attitudes about Peace, Justice, and Social Reconstruction in Northern Uganda", Berkeley-Tulane Initiative on Vulnerable Populations. A joint project of UC Berkeley's Human Rights Center and Tulane's Payson Center for International Development and International Center for Transitional Justice.**

Online at http://www.ictj.org/sites/default/files/ICTJ-Uganda-Justice-Attitudes-2007-English_0.pdf (accessed Feb.13).

No abstract available

82. **Poe, S., Tate, N. and Keith, L.C. (1999). Repression of the Human Right to Personal Integrity Revisited: A Global Cross-National Study Covering the Years 1976–1993. International Studies Quarterly, 43, 291–313. <http://onlinelibrary.wiley.com/doi/10.1111/0020-8833.00121/abstract> (accessed Feb.13).**

Abstract

Here we seek to build on our earlier research (Poe and Tate, 1994) by re-testing similar models on a data set covering a much longer time span; the period from 1976 to 1993. Several of our findings differ from those of our earlier work. Here we find statistical evidence that military regimes lead to somewhat greater human rights abuse, defined in terms of violations of personal integrity, once democracy and a host of other factors are controlled. Further, we find that countries that have experienced British colonial influence tend to have *relatively fewer* abuses of personal integrity rights than others. Finally, our results suggest that leftist countries are actually less repressive of these basic human rights than non-leftist countries. Consistent with the Poe and Tate (1994) study, however, we find that past levels of repression, democracy, population size, economic development, and international and civil wars exercise statistically significant and substantively important impacts on personal integrity abuse.

Source: website above.

83. **Rodrik, Subramanian and Trebbi (2004). Institutions Rule: the primacy of institutions over geography and integration in economic development. Journal of Economic Growth, 131. <http://www.nber.org/papers/w9305> (accessed Feb.13).**

Abstract

We estimate the respective contributions of institutions, geography, and trade in determining income levels around the world, using recently developed instruments for institutions and trade. Our results indicate that the quality of institutions trumps' everything else. Once institutions are controlled for, measures of geography have at best weak direct effects on incomes, although they

LITERATURE REVIEW – NOT POLICY

have a strong indirect effect by influencing the quality of institutions. Similarly, once institutions are controlled for, trade is almost always insignificant, and often enters the income equation with the 'wrong' (i.e., negative) sign, although trade too has a positive effect on institutional quality. We relate our results to recent literature, and where differences exist, trace their origins to choices on samples, specification, and instrumentation.

Source: website above.

84. **Ringer, T. (2007). Development, Reform, and the Rule of Law: Some Prescriptions for a Common Understanding of the “Rule of Law” and its Place in Development Theory and Practice. *Yale Human Rights and Development Law Journal*, vol. 10, pp. 178-208.**

Online at <http://www.law.yale.edu/documents/pdf/LawJournals/ringer.pdf> (accessed Feb.13).

Abstract/ Note

In spite of the ubiquity of the phrase in contemporary development discourse and policy, there exists no generally, or even substantially, agreed-upon definition of the “rule of law” for the purposes of development. This Note investigates the intellectual and normative tensions created by the conceptual conflict surrounding the rule of law in development theory and practice. Drawing on both moral and economic understandings of human development, I attempt strenuously to identify the obstacles to consensus on the meaning of the rule of law. I conclude that the rule of law must be construed as a means of development rather than one of its fully-fledged ends. I also advocate greater attention to the dynamic character of institutions in the developing world, and theoretical moderation in specifying the normative goals of rule of law.

Source: website above.

85. **Ryngaert, C. and Van De Meulebroucke, A. (2011). Enhancing and Enforcing Compliance with International Humanitarian Law by Non-State Armed Groups: an Inquiry into some Mechanisms. *Journal of Conflict & Security Law*, vol. 16, iss. 3, pp. 443-472.**

Online at <http://jcsf.oxfordjournals.org/content/16/3/443.abstract> (accessed Feb.13).

Abstract

As international humanitarian law (IHL) is binding on non-state armed groups (NSAGs) without their having participated in its development and adoption, for effective compliance it is key that NSAGs give their actual consent to be bound by IHL norms. Various legal instruments are, and can be, used to this effect: unilateral declarations, codes of conduct, special (bilateral) agreements and multilateral agreements. All these instruments have their advantages and drawbacks. The most important drawback is probably that NSAGs use these instruments to curry favour with the international community, without their having internalized the norms or having provided for a rigorous system of monitoring compliance with the norms laid down in the instruments. However, some outside actors have made commendable efforts to engage NSAGs with a view to improving compliance, such as the ICRC, Geneva Call (an NGO) and the UN Security Council. Given the nature of NSAGs—they are often ragtag bands whose goals determine their means—it is not always self-evident to draw their attention to compliance with IHL norms. International actors have to tread carefully, but sanctions should not be eschewed in case of persistent breaches of IHL. Such sanctions may include travel bans, and prosecution of both NSAGs and their leaders under international criminal law.

Source: website above.

86. **Ruggie, J. (2008). Protect, Respect and Remedy: A Framework for Business and Human Rights. *Innovations: Technology, Governance, Globalization*, vol. 3, iss. 2, pp. 189-212. Online at**

<http://www.mitpressjournals.org/doi/pdfplus/10.1162/itgg.2008.3.2.189> (accessed Feb.13).

No abstract available

87. **Santiso, C. (2003). Economic reform and judicial governance in Brazil: balancing independence with accountability. *Democratization*, 10(4), 161-180.**

Abstract

Conventional wisdom on judicial governance posits that an independent judiciary is the single most important prerequisite of the rule of law. However the case of Brazil demonstrates that this is not necessarily the case, as there exist tensions and trade-offs between independence and accountability. The democratic constitution of 1988 clearly succeeded in isolating the judiciary from political interference, thus enabling it to perform its role as an institution of horizontal accountability in particular through the judicial review of executive decrees. However, Brazil's unrestricted independence has progressively become a hindrance to effective economic governance, a policy area in which the judiciary has especially asserted itself. The central question is whether the judiciary is too autonomous, lacking effective mechanisms of democratic accountability and external control. The paradox is that excessive independence makes it particularly difficult to reform the judiciary. This study assesses the governance of the judiciary in Brazil and its impact on economic reform. It argues that the challenge of judicial reform resides in strengthening the countervailing mechanisms of accountability to enhance the judiciary's social responsiveness and political responsibility. Finding the right balance between independence and accountability is the defining challenge of judicial governance in Brazil.

Source: Scopus

88. **Schlaeppli, E., and McCabe, C. (2008). Rule of Law, Justice Sector Reforms and Development Cooperation: SDC Concept Paper, Swiss Agency for Development and Cooperation. Online at: <http://otp.unesco-ci.org/training-resource/conflict-prevention/rule-law-justice-sector-reforms-and-development-cooperation-sd> (accessed Feb.13).**

Description

This concept paper begins by identifying the essential elements of the rule of law in the context of decentralization, poverty reduction, economic development, and peace building. The second part looks at the growing trend to include the rule of law dimension in legal and judicial reform projects. The third part provides illustrative to show that the legal dimension of development can be addressed in a variety of contexts and manners with different partners and entry points. (Adapted text from source: Abstract)

89. **Schwendimann, F. (2011). The legal framework of humanitarian access in armed conflict. *International Review of the Red Cross*, vol. 93, iss. 884, pp. 993-1008. Online at <http://www.icrc.org/eng/resources/documents/article/review-2011/irrc-884-schwendimann.htm> (accessed Feb.13).**

Abstract

Obtaining and maintaining humanitarian access to populations in need by humanitarian actors is a challenge. A wide range of constraints on humanitarian access exist, including ongoing hostilities or an otherwise insecure environment, destruction of infrastructure, often onerous bureaucratic requirements, and attempts by parties to armed conflict to block access intentionally. The difficulties that these constraints present to humanitarians are frequently compounded by a lack of familiarity – on the part of states, non-state armed groups, and humanitarian relief organizations – with the legal framework. The main purpose of this article is to lay out the existing international legal framework regulating humanitarian access in situations of armed conflict.

Source: website above.

90. Sen, A. (1999). *Development as Freedom*. New York: Knopf. Analysis in the current paper is based on Pearce, N. (2001). *Development as Freedom*. A. Sen. Book review, *International Journal of Epidemiology*, 30(4), 907-908. <http://ije.oxfordjournals.org/content/30/4/907.2.full.pdf+html>
No abstract available

91. Sengupta, A. (2010). *Inclusive growth as rights-based development* *Journal of Asian Public Policy*, 3(3), 215-222.

Abstract

In this overview essay, the late Professor Arjun Sengupta traces the theoretical and operational roots of contemporary approaches to growth and redistribution in general. In particular, he argues the case of pursuing 'inclusive growth' in the process of development. After a critical examination of the applicability of various approaches to welfare policy, the essay focuses on a human rights-based approach, arguing that it is an indispensable moral, legal and operational rationale for enabling and securing the potential inclusiveness of growth. The main argument is that a growth process becomes inclusive when every individual has access to the different elements of the well-being, without being prevented from enjoying these rights because of any legal and social barrier. In matching economic growth and development, governments should therefore prioritize the fulfilment of human rights over all other policies. © 2010 Taylor & Francis.

92. Singh, N. (2009). *Fighting rural poverty, inequality and low productivity through legal empowerment of the poor*. *Journal of Peasant Studies*, 36(4), 871-892.

Abstract

The purpose of this essay is to introduce the work of the Commission on Legal Empowerment of the Poor (CLEP) to the broader academic community interested in the challenge of eradicating rural poverty and promoting the structural and institutional changes which underpin such a challenge. While rural development research in the past has included work on several components of the legal empowerment of the poor (LEP) agenda such as property and labour rights, much less attention has been given to the other two pillars of the framework - access to justice and rule of law and business rights - which together constitute the four pillars of LEP. However the real difference and value added is the power of the systemic interaction among the pillars and the empowerment approach to change. In this approach, change is initiated bottom up with legal identity, organisations, information, and voice of the poor. In other words an active citizenry, complemented by a democratic and effective state. None of this happens naturally as vested interests and skewed power and asset relationships are bound to get in the way of change to greater equity. Such change is only likely to come through iterative contestations between organisations of the poor, the middle class, and the state. This approach is not presented as a panacea but one which will hopefully complement and accelerate what is already working. © 2009 Taylor & Francis.

93. Sfeir-Younis, A. (2004). *The violation of human rights as a determinant of poverty*. *International Social Science Journal*, 56(180), 321-325.

Abstract

This paper focuses on the relationship between poverty and human rights, with particular emphasis on situations where issues of ethnicity and discrimination are present. Hitherto, the relationship between poverty and human rights has not been clearly understood and little empirical research is available on the matter. As a result, seemingly sharply contrasted perspectives continue to exist. The prevailing view in economic development is that poverty alleviation programmes are so diverse and encompassing that it will be via poverty alleviation programmes that human rights will be fulfilled. However, in the human rights community, the prevailing view is that violations of human rights are a

LITERATURE REVIEW – NOT POLICY

major cause of poverty and, as a corollary, to deny people their rights is, by definition, a way to keep them poor. In fact, both approaches hold substantive truth and value added. Human rights should be regarded as a human endowment, and thus as a form of capital. They are, to that extent, as important as all the other forms of capital that participate in the development process and in the process of poverty alleviation. To disregard the importance of human rights is tantamount to keeping people in poverty. © UNESCO 2004.

94. **Siddiqi , B. (2012). Law Without Lawyers: Assessing A Community-Based Mobile Paralegal Program In Liberia. International Development Law Organization 2012.**
http://www.idlo.int/Documents/Liberia_pager.pdf (accessed Feb.13).

Introduction (extract)

This research investigates the effectiveness of a new, untested initiative to enhance legal empowerment and access to justice through the improved operation of both customary and formal legal systems. At the core of the intervention is the provision of pro-bono legal services to individuals with limited access to formal justice, by mobile paralegals (“Community Legal Advisors”, or CLAs) trained to work at the intersection of customary and formal law. CLAs provide free referrals, advice, and advocacy, as well as direct mediation services and attempt to bridge both legal systems in the course of their work. They travel to villages on motorbikes, visiting each community at least once a month and often staying overnight. The program hopes to strengthen the functioning of customary legal systems both directly and indirectly, by informing individuals about their fundamental rights and national laws, with a focus on land, inheritance, sexual violence, and labor issues; providing informal oversight over agents of the customary and formal systems; and breaking the de facto monopoly on justice currently enjoyed by customary leaders, by providing a direct alternative via mediation, and by lowering the costs of accessing the formal system.

Source: website above.

95. **Sisters in Islam (2011). CEDAW and Muslim Family Laws: In Search of Common Ground. Musawah, Selangor, Malaysia**
Online at <http://musawah.org/cedaw-and-muslim-family-laws-search-common-ground-0> (accessed Feb.13) and online at http://www.musawah.org/sites/default/files/CEDAW%20%26%20Muslim%20Family%20Laws_0.pdf (accessed Feb.13).

Summary

This report documents the trends identified in the Musawah research project on the Convention on the Elimination of All Kinds of Discrimination against Women (CEDAW), which examined States parties' justifications their failure to implement CEDAW with regard to family laws and practices that discriminate against Muslim women. The research reviewed documents for 44 Muslim majority and minority countries that reported to the CEDAW Committee from 2005-2010. This report presents Musawah's responses to these justifications based on Musawah's holistic Framework for Action. It includes recommendations to the CEDAW Committee for a deeper engagement and more meaningful dialogue on the connections between Muslim family laws and practices and international human rights standards.

Source: website above.

96. **Sivakumaran, S. (2011). Re-envisaging the International Law of Internal Armed Conflict. European Journal of International Law, vol. 22, iss. 1, pp. 219-264. Online at**
<http://ejil.oxfordjournals.org/content/22/1/219.full.pdf> (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

Abstract

The regulation of internal armed conflict by international law has come a long way in a very short space of time. Until the early 1990s, there were a minimum of international law rules applicable to internal armed conflict. Today, the situation has changed almost beyond recognition with a healthy body of international law applicable to internal armed conflict. This change has taken place in three principal ways – through analogy to the law of international armed conflict, through resort to international human rights law, and through the use of international criminal law. Each of these approaches stressed its similarity to internal armed conflict or to international humanitarian law. They proved immensely important, filling in what was a more or less blank canvas. However, there are limits to how far they can take us. Today, the canvas is no longer blank and a step back is needed in order to assess the existing state of affairs. Focusing not on the similarities between international and internal armed conflicts or between the various bodies of international law, but on their differences, will allow us to ascertain what further work is in order. It will allow us to identify gaps in regulation and refine relevant rules. It will also force us to re-think our approach to particular issues. Only in this way will we be able to develop the international law of internal armed conflict further.
Source: website above.

97. Skaar, E., Serra Van-Dúnem, J.O. (2006). **Courts under construction in Angola: What can they do for the poor?** Working Paper - Chr. Michelsen Institute, 20.
<http://www.cmi.no/publications/publication/?2457=courts-under-construction-in-angola>
(accessed Feb.13).

Abstract

This paper is about the role that may be envisioned for the courts in Angola with respect to the poor. Looking at the period from 1992 - 2004, it analyses the factors that are necessary for getting social rights litigation successfully through the courts - and what kind of impediments that exist. In spite of rather wide constitutional guarantees of a large number of social, economic and cultural rights, Angola is a highly unequal society where discrimination has been rampant in many spheres of social, political and economic life. Yet, the state has not been challenged with upholding these constitutional guarantees. This paper tries to identify some of the conditions necessary for such cases to be introduced to courts and to be effectively ruled upon by judges. What obstacles would a poor litigant, whose rights had not been respected, be faced with? Would the case be likely to be brought to court - and if it were, would it be favourably received? The paper's tentative conclusion is that the failure to implement social and economic rights in Angola is not primarily due to constitutional limitations, but rather due to the lack of resources among the poor as well as to lack of human and technical resources within the justice system itself.
Source: website above

98. Snyder, J.L., and Vinjamuri, L. (2003/04). **"Trials and Errors: Principle and Pragmatism in Strategies of International Justice"**. *International Security*, Volume 28, Number 3, Winter 2003/04.
<http://www.mitpressjournals.org/doi/abs/10.1162/016228803773100066>
No abstract available: see page 1
99. Stapleton, A. (2010). **Empowering the Poor to Access Criminal Justice: A grass Roots Perspective**. *Legal Empowerment Working Papers*, No. 2, International Development Law Organization.
http://www.idlo.int/publications/LEWP/LEWP_Stapleton.pdf (accessed Feb.13).

Executive Summary

This paper describes and documents the origins, evolution, strategy and impact of the Paralegal Advisory Service (PAS) in Malawi, a program that has become an independent NGO – the Paralegal Advisory Service Institute (PASI) – and that is now emulated in several other countries. PAS is

LITERATURE REVIEW – NOT POLICY

significant not simply because its model has been adapted across Africa and more recently in Bangladesh, but because it represents a low-cost method of providing effective legal advice and assistance for ordinary people in conflict with criminal law.

It argues that the current trend in development thinking is progressively cutting off support for such civil society work and legal services for the poor to the detriment of development, human rights and justice, and that the experience of PAS and similar organizations suggests that the international community needs to rethink an approach that is in danger of proving counterproductive. In short, the needs of the poor in the justice sector are being sacrificed on the altar of donor “harmonization”. It asserts that government cannot “go it alone” in providing legal aid services to its people and that PAS demonstrates the benefits that accrue from a public/private partnership in this field. It concludes with the recommendation that donor agencies should not pursue an uncritical strategy but hold national governments accountable to principles of good governance which include *inter alia* the active promotion of such partnerships.

Source: website above.

100. **Stover, E., and Weinstein, H.M. (eds) (2004). My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity. Cambridge University Press. Online at <http://www.cambridge.org/aus/catalogue/catalogue.asp?isbn=9780521834957> (accessed Feb.13).**

Abstract

My Neighbour, My Enemy tackles a crucial and highly topical issue - how do countries rebuild after ethnic cleansing and genocide? And what role do trials and tribunals play in social reconstruction and reconciliation. By talking with people in Rwanda and the former Yugoslavia and carrying out extensive surveys, the authors explore what people think about their past and the future. Their conclusions controversially suggest that international or local trials have little relevance to reconciliation. Communities understand justice far more broadly than it is defined by the international community and the relationship of trauma to a desire for trials is not clear-cut. The authors offer an ecological model of social reconstruction and conclude that coordinated multi-systemic strategies must be implemented if social repair is to occur. Finally, the authors suggest that while trials are essential to combat impunity and punish the guilty, their strengths and limitations must be acknowledged.

Source: website above.

101. **Tamanaha, B. Z. (2004). On the Rule of Law: History, Politics, Theory. Cambridge University Press, Cambridge, UK. Online at <http://www.cambridge.org/us/catalogue/catalogue.asp?isbn=0521843626> (accessed Feb.13).**

Abstract

The rule of law is the most important political ideal today, yet there is much confusion about what it means and how it works. This 2004 book explores the history, politics, and theory surrounding the rule of law ideal, beginning with classical Greek and Roman ideas, elaborating on medieval contributions to the rule of law, and articulating the role played by the rule of law in liberal theory and liberal political systems. The author outlines the concerns of Western conservatives about the decline of the rule of law and suggests reasons why the radical Left have promoted this decline. Two basic theoretical streams of the rule of law are then presented, with an examination of the strengths and weaknesses of each. The book examines the rule of law on a global level, and concludes by answering the question of whether the rule of law is a universal human good.

Source: website above.

102. **Tamanaha, B., Z. (2007). Understanding Legal Pluralism: Past to Present, Local to Global. 30(1) Sydney Law Review Vol. 29, St. John's Legal Studies Research Paper No. 07-0080.**

LITERATURE REVIEW – NOT POLICY

Online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1010105 (accessed Feb.13).

Abstract

Although it has not yet penetrated mainstream legal academia, the notion of legal pluralism is gaining momentum across a range of law-related fields. It has been a major topic in legal anthropology and legal sociology for about two decades, and is now getting attention in comparative law and international law. This recent convergence on the notion of legal pluralism is fuelled by the apparent multiplicity of legal orders, from the local level to global level. There are village, town, or municipal laws of various types; there are state, district or regional laws of various types; there are national, transnational, and international laws of various types. In addition to these familiar bodies of law, in many societies there are more exotic forms of law, like customary law, indigenous law, religious law, or law connected to distinct ethnic or cultural groups. There is also an evident increase in quasi-legal forms, from private policing and private judging, to privately run prisons, to the ongoing creation of the new *lex mercatoria*, a body of transnational commercial law that is almost entirely the product of private law making activities.

These multiple, often uncoordinated, coexisting or overlapping bodies of law may make competing claims of authority; they may impose conflicting demands or norms; and they may have different styles and orientations. This potential conflict generates uncertainty or jeopardy for individuals and groups in society, who cannot be certain in advance which legal regime will be applied to their situation. It also creates opportunities for individuals and groups to strategically invoke or pit one legal order against another.

This article will lay out a framework to help examine and understand the pluralistic form that law increasingly takes today. Legal pluralism, it turns out, is a common historical condition. Part I of this article will portray the rich legal pluralism that characterized the medieval period, and it will describe how this pluralism was reduced in the course of the consolidation of state power. The article will then elaborate on new forms of legal pluralism that were produced in the course of colonization. These historical contexts will set the stage for contemporary legal pluralism, which combines the legacy of this past with more recent developments connected to the processes of globalization. Part II of the article will focus on the academic discussion of legal pluralism. Although the notion of legal pluralism is gaining popularity, from its very inception it has been plagued by a fundamental conceptual problem: the difficulty of defining "law." Debates over this conceptual problem have continued unabated for three decades. Moreover, just as the notion of legal pluralism has begun to take off, the theorist who contributed the most to its development announced that, owing to its insoluble conceptual problems, legal pluralism should be discarded. This turnabout is a fascinating intellectual story in itself. Part II will lay out a brief account of the conceptual problem that plagues legal pluralism and will indicate why it cannot be resolved. Scholars who invoke legal pluralism without an awareness of this conceptual problem and its implications risk building upon an incoherent and unstable foundation.

Finally, Part III will articulate an approach to contemporary legal pluralism that avoids the conceptual problems suffered by most current approaches, while framing the important features of legal pluralism. It is drawn from and combines the insights produced in legal anthropology, comparative law, international law, and globalization studies, in the hope that the framework can provide common ground for a cross-disciplinary focus on legal pluralism.

This article was delivered as the 2007 Julius Stone Address at the University of Sydney School of Law. Source: website above.

103. **Tomasevski, K. (2005). Strengthening Pro-poor Law: Legal Enforcement of Economic and Social Rights'. Human Rights and Poverty Reduction Background Paper, ODI, London.**
Full text online at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4355.pdf> (accessed Feb.13).
No Abstract available

104. **Thoms, O., Ron, J., and Paris, R. (2008). The effects of transitional justice mechanisms: A summary of empirical research findings and implications for analysts and practitioners. Centre for International Policy Studies, University of Ottawa.**

Online at

http://www.humansecuritygateway.com/documents/CIPS_Transitional_Justice_April2008.pdf (accessed Feb.13).

Extract From Executive Summary

The last two decades have witnessed a remarkable proliferation of “transitional justice” (TJ) processes in post-conflict and post-authoritarian societies. TJ mechanisms include trials and other judicial proceedings against individuals alleged to have committed gross violations of human rights; truth commissions designed to establish a factual historical record of past wrongdoing; reparations to victims of past abuses; and vetting of individuals to determine if their past activities or affiliations render them ineligible for public office, law enforcement or other key roles. There is also a mounting debate over the desirability and effectiveness of TJ as a means of consolidating peace, promoting human rights and democracy, and healing the effects of past wrongs. TJ proponents, on the one hand, argue that some form of transitional justice is beneficial for a transitioning society’s emergence from war or authoritarianism. TJ sceptics, by contrast, argue that the pursuit of TJ can itself undermine prospects for peace or negotiated transitions from authoritarianism. These debates are now particularly contentious with regard to Afghanistan, Northern Uganda, and East Timor. At the core of these debates lies a series of claims and counter-claims about the causal effects of transitional justice mechanisms. Does TJ strengthen or threaten peace in transitional societies? Does it lead to greater or less respect for human rights and the rule of law? Does it foster reconciliation or exacerbate divisions? We believe that it is essential for local and international policymakers to engage these questions with systematically collected and analyzed evidence.

Source: website above.

105. **Ubink, J. (ed.). Customary Justice: Perspectives on Legal Empowerment, International Development Law Organisation. <http://www.idlo.int/Publications/CustomaryJustice3.pdf> (accessed Feb.13).**

Description

Customary Justice: Perspectives on Legal Empowerment features articles by leading authors, country specialists and practitioners working in the areas of traditional justice and legal empowerment, discusses key aspects of traditional justice, such as for example the rise of customary law in justice sector reform, the effectiveness of hybrid justice systems, access to justice through community courts, customary law and land tenure, land rights and nature conservation, and the analysis of policy proposals for justice reforms based on traditional justice. Discussions are informed by case studies in a number of countries, including Liberia, Eritrea, the Solomon Islands, Indonesia and the Peruvian Amazon.

Source: IDLO website

106. **Van Cranenburgh, O. (2009). Restraining executive power in Africa: horizontal accountability in Africa’s hybrid regimes. South African Journal of International Affairs, 16(1) <http://www.tandfonline.com/doi/full/10.1080/10220460902986230> (accessed Feb.13).**

Abstract

This article presents an overview of African regime types and the limits on restraining executive power, institutionally as well as through party politics. Particular attention is given to the lack of separation between the legislative and executive branch of government in most African countries

LITERATURE REVIEW – NOT POLICY

and the great powers assigned to presidents. Both issues imply a lack of possibilities to hold the executive accountable, or what O'Donnell called 'horizontal accountability'. Moreover, the pattern of one-party dominance, which can be related in part to concurrent elections for the presidency and parliament, strengthens executive power and implies a low incidence of government coalitions. The analysis points to the limits of existing constitutional instruments to restrain executive power, such as censure, impeachment and presidential term limits. The author argues that donors should use their considerable agenda power to assist local pressures for reform.

Source: website above.

107. **VanDuzer, J.A., Simons, P., and Mayeda, G. (forthcoming Feb 2013). Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators.**
Online at <https://publications.thecommonwealth.org/integrating-sustainable-development-into-international-investment-agreements-955-p.aspx> (accessed Feb.13).

Description

As International Investment Agreements (IIAs) continue to evolve and become increasingly complex, a key challenge for developing countries is how to maintain coherent investment obligations that are consistent across any overlapping treaty provisions. An even greater challenge is the effective negotiation of trade in services and investment commitments in Preferential Trade Agreements to make foreign investment supportive of development.

This guide is designed to assist developing countries to negotiate IIAs that are more effective in promoting their sustainable development. It identifies and consolidates emerging best practices from existing treaty models, evaluating the costs and benefits of different approaches; suggesting new and innovative provisions to encourage foreign investment flows; and outlining how states can achieve coherence among their IIAs.

Source: above website

108. **UN Women, UNICEF and UNDP (2007). "Informal justice systems: charting a course for human rights-based engagement", New York, p. 19.**
Online at www.unicef.org/protection/INFORMAL_JUSTICE_SYSTEMS.pdf (accessed Feb.13).
109. **UN Women (2011). Progress of the World's Women: In Pursuit of Justice. UN Women, New York.**
Online at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf> (accessed Feb.13).
110. **UNICEF, State of the World's Children 2012: Children in an Urban World, Executive Summary and Full Report, New York 2012.**
111. **United Nations Conference on Trade and Development (2012). Investment Policy Framework for Sustainable Development.**
<http://www.unctad-docs.org/files/UNCTAD-WIR2012-Overview-en.pdf> (accessed Feb.13).
112. **United Nations Development Programme and Inter-Parliamentary Union. The Global Parliamentary Report: The changing nature of parliamentary representation (2012).**
Online at
<http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Parliamentary%20Development/Global%20Parliamentary%20Report%20Executive%20Summary%20-%202012%20English.pdf> (accessed Feb.13).

LITERATURE REVIEW – NOT POLICY

Online at

[http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Global Parliamentary Report English.pdf](http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Global_Parliamentary_Report_English.pdf) (accessed Feb.13).

113. **United Nations Development Programme (2008). Making the Law Work for Everyone and Commission on Legal Empowerment of the Poor. Volume 1, Report of the Commission on Legal Empowerment of the Poor, United Nations Development Programme, New York, One-page summary Online at <http://www.gsdr.org/go/display&type=Document&id=3140> (accessed Feb.13). Full text Online at http://www.unrol.org/files/Making_the_Law_Work_for_Everyone.pdf (accessed Feb.13).**
114. **United Nations General Assembly (1958). Universal Declaration of Human Rights.**
115. **United Nations General Assembly (2006). 'In-depth Study of all Forms of Violence against Women: Report of the Secretary-General', UN Doc A/61/122/**
116. **United Nations General Assembly (2009). Legal empowerment of the poor and eradication of poverty. (A/64/133). Online at <http://www.unrol.org/files/N0940207.pdf>, paragraph 3 (accessed Feb.13).**
117. **United Nations Human Rights Office of the Commissioner (2011). Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN, New York and Geneva. Online at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed Feb.13).**
118. **United Nations Office of the High Commissioner for Human Rights (2006). Rule-Of-Law Tools For Post-Conflict States: Prosecution initiatives. United Nations, New York and Geneva. Online at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> (accessed Feb.13).**
119. **United Nations Security Council (2004). The Rule of Law and Transitional Justice in Conflict and Post- Conflict Societies. Report of the Secretary-General, UN Doc. S/2004/616, 3 August, p. 4. Online at <http://www.unhcr.org/refworld/category/REFERENCE/UNSC,,,45069c434,0.html> (accessed Feb.13).**
120. **World Bank Group (2010). Investing Across Borders: Overview. World Bank, Washington, D.C. Online at <http://iab.worldbank.org/~media/FPKM/IAB/Documents/Overview-IAB.pdf> (accessed Feb.13).**
121. **World Bank. World Development Report 2011. Conflict, Security and Development. World Bank, Washington, D.C.**
122. **World Bank. World Development Report 2012: Gender Equality and Development. World Bank, Washington, D.C.**