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### ***The Politics of Rule of Law Systems in Developmental States: 'Political Settlements' as a Basis for Promoting Effective Justice Institutions for Marginalized Groups***

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## **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.

## **Keywords**

Rule of law, access to justice, justice systems, elite politics, political settlement, institutional form, institutional function, policy frames, political organization, state-society relations

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## 1. Introduction

This paper seeks to summarise, synthesise and analyse existing literatures on the interrelationship between “the rule of law” (and, where appropriate, access to justice) and political settlements. More specifically, it explores the politics of “what works” in rule of law systems, identifying the political factors and conditions that contribute to different modes of functioning of equitable legal systems, with the overall aim of drawing out any lessons on the forms of politics that help produce pro-poor<sup>1</sup> outcomes.

The paper considers evidence linked to the following questions:

- How do political settlements – that is, processes of intra-elite bargaining – shape the justice systems and the access available to poor and marginal groups? How can elite-led agreements on the rule of law develop into more inclusive agreements that benefit poor and marginal groups, particularly women (e.g. in relation to property rights)?
- How can the rule of law and access to justice be organised in ways that promote political stability, economic growth and social and political inclusion?
- To what extent and in what ways can primary forms of justice help protect and promote the rights of poor and excluded groups, especially women? How can the capacity of primary justice organisations be developed?
- In terms of economic growth, to what extent can informal justice systems substitute for the absence or weak functioning of formal legal institutions?
- What capacities does a state require to institutionalise more equitable forms of justice system – that is, forms that give poor and marginalized groups greater access to, and a heightened capacity to participate in, dispute resolution forums?
- What is the relationship between access to justice and processes of citizenship formation over time?

To do so, it assesses the existing stock of knowledge by reviewing key theoretical frameworks and empirical evidence. It does so with a view to framing some of the forward research agenda of the Effective States and Inclusive Development program (ESID), and thus offers some tailored suggestions with regard to key research gaps in the literature and clear research directions that can be taken forward.

The paper proceeds in eight sections. The introduction outlines methods of selection for the literature reviewed and provides a conceptual overview of debates around the rule of law and political settlements. Section 2 details the conceptual framework and analytical methodology, deriving from the literature five key dimensions of the politics of pro-poor

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<sup>1</sup> We acknowledge the difficulties with the term “pro-poor” in the literature, including contests over relative and absolute gains (Ravallion 2004, Kraay 2006). As we focus on the rule of law and access to justice in this paper, we use the term in the context of the ability of poor, marginalised and disadvantaged groups to be equitable participants in a rule of law system and to pursue their claims in an effective manner (Rawls 1999, Habermas 1994, Habermas 1995).

growth. These five dimensions follow as sections 3-7: institutional form, institutional function, policy frames, political organization and contingent factors. Finally, section 8 concludes.

### *Literature and selection criteria*

Toward the goals of the paper, we provide a synthesized review of academic and policy literature from articles, chapters, monographs and papers that address at least one component of the politics of "what works" with respect to the intersection between political settlements and the rule of law.<sup>2</sup> The resulting literature was then narrowed by ESID's focus on developmental states and societies in contemporary non-fragile context. As a result, most pieces with a theoretical focus on fragility, or with an empirical focus on the rule of law in fragile states (as determined by the World Bank's CPIA scores<sup>3</sup>), were discounted. This initial global search brought up several regions or countries repeatedly: China, India, (South) East Asia, post-Soviet transitions, Latin America (limited by a focus on Anglophone literature), and histories of industrialized economies. Subsequent searches were then performed to focus on these areas or regions.

From this body of literature, almost all non-Anglophone literature was removed.<sup>4</sup> An emphasis was placed on conceptual or review work from after 1999, although this did not exclude important pre-1999 work, nor did it exclude empirical work rooted in a particular period. The literature was then further narrowed as we placed an emphasis on documents we judged to be of most interest to the academic community. This comprised articles in peer-reviewed journals; papers from high-ranking US law journals (these are as a rule non-peer reviewed, meaning there was a greater emphasis on our professional judgment to discern useful papers); and monographs and edited volumes from well-known university presses.

We then included grey literature in three ways: (i) a review of the public databases of the World Bank, the Inter-American Development Bank, the Asian Development Bank and the African Development Bank (these being the key institutions practicing in the rule of law area in developmental states); (ii) a review of outputs of DFID-commissioned research centres on law, governance and cognate areas to identify relevant research outputs of these centres; and (iii) targeted web searches (particularly through Google Scholar) for documentation on specific types of intervention into primary or front-line justice services.<sup>5</sup>

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<sup>2</sup> The selection criteria for the literature reviewed began with the following key search terms: "rule of law"; "access to justice"; "elite politics" OR "elite pact" OR (elite AND "political settlement"); "economic growth" OR "economic development".

<sup>3</sup> <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/STRATEGIES/EXTLICUS/0,,menuPK:511784~pagePK:64171540~piPK:64171528~theSitePK:511778,00.html>

<sup>4</sup> While this removed several studies, particularly of China and Latin America, there is a sufficient plurality of English-language literature by practitioners and independent academics to avoid undue bias in the study.

<sup>5</sup> Search terms were "public defender"; paralegal; "mobile court"; "pro bono"; lawyer AND "national service" OR "youth corps".

The selection criteria outlined above were at every stage supplemented by our own subjective judgment. We used our expertise to delimit what was (or was not) of value in two ways: removing literature from the overall bibliography, and including literature that did not come up in searches but were known to be valuable.

*Conceptual overview*

The literature reviewed highlighted a wide variety of conceptual debates around the rule of law. ESID’s joint emphases on the politics of rule of law, and on “what works”, helps narrow the field of salient conceptual debate.

*Rule of law and developmental states*

It is axiomatic that the rule of law shapes political, economic and social activity (Dworkin 1986). This is held in theory and in practice: in the context of developmental states, for example, the World Bank saw a functioning system of the rule of law (“ROL”) as central to transitions from middle-income to high-income status – without going into detail as to what constitutes ROL (World Bank 2007: 26). Adherence to the rule of law is often taken to mean the willingness of the state or sovereign to subject itself to the same rules as everyone else (Raz 1977, Bingham 2010). The United Nations (2004; 2008) sees it variously as a principle of governance, an adherence to international standards, and a series of norms. A Rawlsian view (Rawls 1999) would emphasize social process, while Dworkin (1986) highlights the normative value of outcomes. The term has been used in many other ways besides: Tamanaha (2004) and Carothers (2006) note the plethora of definitions, many rooted outside the Western traditions underpinning much of the foregoing.

This leads to a proposition: that ROL is an “essentially contested concept” (introduced by Gallie 1956, and applied to ROL by Waldron 2002; Waldron 2008), ontologically incapable of being definitely defined, taxonomised and catalogued. There have been significant attempts to provide such taxonomies, and to outline what “the rule of law” is or should be, both in theory and, significantly, in practice. However, a substantial body of literature has arisen highlighting the constant debate and dissonance between conceptions of ROL, seeking to stress contest in definitions (Bergling, Ederlöf and Taylor 2009). Table 1, below, details some of the key works in conceptualizing ROL over the last forty years.

**Table 1: Key Understandings of ‘the Rule of Law’ (ROL)**

<b>Study</b>	<b>Methodology</b>	<b>Summary of key findings</b>
Trubek and Galanter (1974)	Review of personal experience with ROL reform.	Argued that the “first wave” of ROL reform in the late 1960s and early 1970s was ethnocentric and concerned with exportation and transplantation of models rather than understanding “what works”.
Teubner (1997)	Analysis of legal pluralism at global level.	Highlights moves to shift political debates to legal disputes, increasing the

		importance of expert technique but reducing potential for social change.
Peerenboom (2002a); Ohnesorge (2003)	Historical review of ROL/development nexus in China and Northeast Asia respectively.	Debates over the content of ROL are not relevant; law is pressed into the service of development rather than (a form of liberal democratic) ROL being a precondition.
Tamanaha (2004)	Intellectual history, based on key texts.	Multiplicity of conceptual definitions and frameworks of ROL employed to support politicized concepts and exigencies of development institutions.
Carothers (2006)	Review of the current state of ROL practice in development.	ROL desired by everyone, agreed on by few, and fundamentally contested in content. ROL projects often executed poorly with little attention to context.
Trubek and Santos (2006)	Critical academic analysis of trends in ROL.	Persistent debate about ROL attributes, but formulaic, state-centric body of responses in practice (e.g. building courthouses, training judiciaries).
Trebilcock and Daniels (2008)	Global review of ROL and development practice.	Essentially contested concept, but shares procedural attributes of limiting state/elite power, universal applicability, etc.

Two things are clear from the foregoing. First, ROL is under-theorised in practice. Carothers (2009: 51) finds that “a tendency exists toward uncritical and sometimes wishful thinking about [ROL: there are powerful] temptations, to believe certain things about the rule of law and its place on the international stage that are misleading and sometimes unhelpful.” Development practitioners’ use of ROL tends to be driven by institutional models and transplantable modes of doing business, with a general emphasis on securing property rights as a key institutional precondition to economic growth (Dam 2006b; Desai, Isser and Woolcock 2012). For example, analyses of the justice sector generally focus on sets of written norms (including Coasean strong property rights protection), organizational structures and human capacity that affect the efficiency, quality, fairness, consistency and accessibility of judicial processes (Reiling et al 2007, USAID 2010, African Development Bank 2001, World Bank 2002, Asian Development Bank 2004, Vera Institute 2008).

This approach is compounded by the limited methodologies used to inform the evidence base. We do not seek to generalize: studies such as Owen and Portillo (2003) and Dale (2009) are robust both in their tools of data gathering (from case tracking to end user surveys) and data analysis. Yet Hammergren (2002a, 2002b, 2003a, 2003b), taking an overview of analyses of ROL programming (with an emphasis on Latin America), sees several flaws: in the main, they are taken too early, have weak causality, are not sufficiently robust to alternative specifications and interpretations<sup>6</sup> and rarely operate at a level of local granularity. For example, an evaluation of Chilean criminal procedure reform did not gather comparable samples, making difference-in-difference impossible, and did not control the cases tracked for socio-economic, demographic and criminological conditions (Vera Institute 2004). Similar problems are seen in an evaluation of a World Bank-supported court modernization program in Venezuela that informed the Bank's own assessment of the project (noted by Perdomo 2006).

As a result, Peerenboom (2002a: 48) can conclude, for example, that development institutions' policies in China towards ROL have been unsuccessful as they have not taken the time to understand its role: it is not an essential precondition for social order nor for economic growth in that country context (although Dam 2006b comes to the opposite conclusion on the basis of ROL's historical role in market formation).

Second, technical understandings of ROL mask political contestation around this "essentially contested concept" and its role in shaping politics, society and the economy, as is clear from the bodies of literature exploring the intersections of these three disciplines with law. As examined by law and politics scholars, ROL plays a key role in the development of a political system, but one that is subject to political contest rather than technical intervention. Ginsburg (2010) finds that independent courts can be anything from "upstream triggers" for democratization to "downstream guarantors of authoritarianism", depending on the nature of the politics surrounding them, while Halliday (2010) and Dezalay and Garth (2002) explore the social and political role of legal professionals (including judges and academics) in giving function to institutional form. As examined by socio-legal scholars (such as Merry 1988; Moore 1989; Rittich 2006; Perry-Kessaris 2010), the politics of ROL also play a key role in social transformation: Levi and Epperly (2010) turn to the role of group politics in generating, transmitting and (crucially) upholding social norms that shape ROL, while Pistor, Haldar and Amirapu (2010) examine the similar group politics at the intersection of ROL and the realization of women's rights. Finally, a very broad body of law and development literature looks at the politics of ROL and its implications for economic development (usefully summarized in Tamanaha 2004; Kennedy 2003; David Kennedy 2006; Santos 2006; Faundez 2011).

Clearly, the latter point highlights the relevance of an understanding of ROL based on political settlements. Exploring the politics of ROL in the context of developmental states implies a state with some level of functioning; in other words, with a semi-functioning formal system with the ability to resolve disputes, enforce rules, enable political, economic and social activity, and hold actors accountable (Olivier de Sardan 2009: 6). Exploring the

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<sup>6</sup> This point is reiterated by Bamberger, Rao and Woolcock (2010), who emphasize the importance of taking a mixed-methods approach to both data gathering and analysis in the assessment of development interventions, especially those that seek to accommodate local contextual variation.

“politics of what works” adds extra complexity: it requires analyses of the politics of (localized) micro-level non-state systems; analyses of macro-level state systems; analyses of the politics of linking or delinking the two; and how these links are mobilized by different elite actors. Here, ROL does not describe a pre-determined end-state of laws and institutions, but the role law plays in structuring the very politics of “what works” (perceived and/or in reality) for the poor.

#### *Rule of law and political settlements*

A political settlements approach to ROL helps foreground some of the hidden politics of ROL reform in developmental states highlighted above. This paper does not attempt to provide an authoritative overview of the literature on political settlements. Relying on Di John and Putzel (2009), Khan (1995) and Leftwich and Sen (2010), it uses the notion of political settlements as a mode of inquiry into ROL. Given ESID’s subjects of inquiry, this paper emphasizes the politics of ROL, elite negotiation and bargaining, the broadening of ROL and political settlements, and the politics of “what works” with regards to pro-poor growth and ROL.

From the ROL perspective, Kennedy (2002) provides a useful conceptual starting point. Following Hohfeld (1917), he argues that a property right is in fact a “bundle[] of rights”: “When we talk about property, in particular, we are referring to a collection of rules some of which authorize injury and others of which forbid it. Whenever there is a gap, conflict, or ambiguity in property law, one side can invoke all the rules in the “bundle” that suggest protection, and the other the rules in the bundle that suggest freedom of action” (201). By implication, the politics of power are inherent in “bundles” of property rights and their ability to be continually contested and redefined. As property rights form a key part of the interface between ROL and development, this politicization of rights can form the basis of an understanding of ROL and political settlements. It is important to note that, while this idea is important in legal theory, both Hohfeld and Kennedy’s papers remain under-cited in development/ROL theory: for example, they are not cited to support this point in any of key texts in Table 1 above.

ROL is also key to equilibria between elite groups (North, Wallis and Weingast 2009; Hadfield and Weingast 2011; North *et al* 2007; Helpman 2008: 2). A political settlements approach establishes the importance of intra- and inter-elite negotiation and bargaining, and the movement of constituent boundaries of the elite. As a result, it adds depth to the institutional arrays of new institutionalist approaches. Institutional understandings are still important to much of the literature surveyed (structuring the arguments of Hilbink 2007, Peerenboom 2002a; Bueno de Mesquita and Root 2000; Domingo and Sieder 2001 amongst others) meaning this view has the potential to enrich debate and policy, but also lacks an easily-recognizable body of literature.

Focusing on the “politics of what works” requires instrumentalism in approach – meaning a move away from models and fixed end-states (commonplace in ROL thinking: Carothers 2006; Tamanaha 2004) to focus on end users and how to improve development outcomes for them. As a result, we do not seek to break down and construct a taxonomy of ROL as a series of institutions (the judiciary, courts, ombudspersons offices, etc.) or interventions (capacity-building, training, legal empowerment, etc.). Rather, we trace the politics of shifts in how legal systems are arranged in the context of adherence to rules and control of power by rules (which may intersect with institutions or types of intervention, but does not require

an exhaustive description of them), without making *ex ante* normative judgments on their value. As a result, this review focuses on how elite politics use the ROL system as part of their political contests/coalition-building, what the dynamics between justice systems and elite politics are over time, and how these dynamics broaden from involving elite politics to the politics of other class groups.

There are tensions in the literature of understandings of the relationships between elites and ROL. For example, Holston (1991: 1) and Gauri and Brinks (2008: 26) see law as a political tool mobilizable by elites. Olomola's (2010) study of linkages between formal and informal institutions in Nigeria's cotton industry found that Licensed Buying Agents – powerful actors in the middle of the cotton supply chain – “are fond of influencing the judicial process and bring[ing] any lawsuits against them to a deadlock” (31), disempowering registered farmers. This can be contrasted with the opposing view in the literature that sees law as a restriction on elites (Peerenboom 2002a: 2; Trebilcock and Daniels 2008; Raz 1977). For example, in countries such as Nigeria elites have their patrimonial networks threatened by the enforcement of laws, especially anti-corruption law, leading to an empty “rhetoric” of ROL (Chabal and Daloz 1999: 104, 136).

As a result, the perspective of political settlements is useful in understanding this relationship. North, Wallis and Weingast (2009: 43; 134-136) contend that rules and norms/institutions to resolve disputes must be antecedent to any political settlement, as they frame the engagement between elites (meaning political settlements become less important). However, the authors are only really speaking of transitional moments between limited and open access orders, and do not make it clear how, if at all, the “rules of the transition” affect the nature and institutional array of the consequent settlement. By contrast, Berger (2008: 38-46) argues that law needs elite political support to be effective, but that over time it must respond to broader-based norms as well. This understanding places an emphasis on the *dynamics* of the political settlement: that is, how it broadens over time to include middle class and poor groups, and how this process interacts with the nature of ROL in a polity to affect pro-poor outcomes.

## **2. Conceptual framework, analytical methodology and initial results**

### *Framework*

In the context of ESID and its emphasis on political settlements, this paper sees a ROL system as framed by and a framework for a political system – in other words, not separable from political considerations of the arrangements shaping political, economic and social order. In line with Maravall (2003: 264), we do not look to shifts between “normative stereotypes” or pre-determined end-states driven by a combination of rational choice and institutional forms to find the politics of “what works”, nor do we focus predominantly on the generation and amendment of rules of the game by elite political actors for political and economic ends (an approach taken by Maravall and Przeworski 2003; Tsebelis 2002; and others) – in other words, we do not solely engage with on checks on political/state power (Cheema 2005). Rather, beginning with Maravall and Przeworski's (2003: 5) notion that ROL is a system that informs people what to expect from others, we understand the politics of what works with regard to ROL as an exploration of how these expectations are shaped

within and between groups as political settlement broadens, taking in political, economic, social dimensions. In that sense, it resembles thicker, non-formalist conceptions of ROL (Trebilcock and Daniels 2008: 1-58), with both sources and objects that go beyond state institutions. We understand the politics of ROL as complex and needing to be unpicked: elites use ROL; however, legalization is powerful and can be used in unpredictable ways against elites by other elite groups or by non-elite actors (Gauri and Brinks 2008).

ROL is often discussed as requiring a minimum of all people being equal and accountable before the law (Fukuyama 2011; United Nations 2004: 4<sup>7</sup>). However, “what works” in terms of pro-poor development and growth can be more complex than that. Literature studying the role of ROL in supporting rapid growth in East Asia has suggested that the arrays of laws, regulations and legal institutions were designed to allow for informal networks to thrive and state discretion and executive authority to be exercised with varying degrees of limited (or absent) legal checks (Peerenboom 2004; Jayasuria 1996; Jayasuria 1999; Li 2003; Amsden 2001: 251-283; Allen and Qian 2010; noting that critics of this literature tend to find fault with the overemphasis, rather than existence, of such difference, along with its appropriation to justify political repression: Thio 2004; Lindsey 2004; Nelson and Cabatingan 2010).

This complexity extends to ROL and political development. In Pinochet’s Chile, Barros (2003: 197-8) finds that the four branches of the military created a system of rules which “set off a conflictive process that result[ed] in a promulgation of a constitution to further regulate the terms of their association. This Constitution, in turn, set[] into operation institutions that subsequently limit[ed] the original rule makers, with the peculiar outcome that the military’s immediate political power [was] eventually dissolved according to procedures contained in its own rules.” In this case, resonant with North, Wallis and Weingast (2009)’s later findings, the process of authoritarian rule structuring itself to maintain harmony between factions ended up subjecting itself to rule-based behavioural constraint (217). Yet some states that have very limited or no legal scrutiny of the executive can sometimes drive forward inclusive or (nominally) pro-poor measures. In Malawi, Cammack and Kanyongolo (2010: 45) found that “single-party, autocratic government provided the best environment for [an effective sanctions regime] to emerge, while the immediate transition years saw a breakdown in order, a weakening of state control and de-professionalising of the public service coupled with rapid urbanisation and a higher demand for public services, all of which resulted in less effective public goods delivery.” These examples recall Alexander (2002)’s exploration of ROL and political development as both “institutionalized certainty” and “institutionalized uncertainty”.

In this paper, we limit ourselves by understanding ROL for developmental states as the *state* being able to provide (a) some legitimate and durable measure of dispute resolution, (b) enforcement, (c) conditions enabling political, social and economic activity, and (d) accountability. The extent to which elite actors hold themselves to account through law will not be a given dimension of ROL but will be interrogated in the context of “the politics of

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<sup>7</sup> According to the Secretary-General, ROL 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. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”

what works". As a result, we explore the *dynamics of how elites and end users contest within themselves and between each other the shape of institutions, and how this institutional array feeds back into and shapes the politics of these contests*. This requires multiple units of analysis: institutions, elites, and end users.

### *Methodology*

We undertake a review of the literature outlined above, based on the key questions highlighted by ESID. We reformulate these questions somewhat in the light of the foregoing conceptual study and framework; however, they should cover similar ground to the original set.

1. What is the interrelationship between elite politics and the shape and dynamics of a rule of law system with regard to pro-poor growth and political inclusion?
2. What is the interrelationship between politics of the poor and the shape and dynamics of a rule of law system with regard to pro-poor growth and political inclusion?
3. What is the interrelationship between elite-poor politics (that is, the broadening of the political settlement) and the shape and dynamics of a rule of law system with regard to pro-poor growth and political inclusion?
4. What role do informal systems play in (1) to (3) above?
5. To what extent and in what ways can primary forms of justice help protect and promote the rights of poor and excluded groups, especially women?

It is important to note that the relationship between ROL and citizenship is a very big and complex issue that would add another layer of complexity to an already complicated paper. As a result, we touch on it here but do not give it full treatment.

In general, we find that there is a limited evidence base to evaluate interventions on justice and ROL (a finding supported by Carothers 2006 and DfID 2010). Findings or conclusions are often based on either: limited user survey and data-gathering with little to no comparative data; macro analyses of historical trends (in countries, regions or globally) to a limited level of depth; detailed case stories of interventions; or legal-anthropological work detailing localized processes.

### *Initial analysis*

The conceptual literature, along with aggregate reviews of trends in building ROL, offer *five* dimensions along which the politics of pro-poor growth and inclusion shape and are shaped by ROL:

- Institutional form
- Institutional function
- Policy frame
- Political organization

- Contingent factors

The literature reviewed comes from a very broad range of disciplines or fields. In order of most to least frequent, they are: law; development; economics; political science; anthropology; sociology; democracy studies; social mobilization/participation; communication and media; cognitive studies; citizenship studies.

There is a clear implication that ROL in developmental states is not an effectively-constituted field. As a result, the papers reviewed, while of interest and academic merit, did not speak a great deal to the intersection between ROL and political settlements/elite politics in developmental states. The majority either took an institutionalist perspective, focusing on the impacts of institutional change; or recounted a macro-level political narrative, with little analysis of how that fed into legal institutional change (and how that, in turn, shaped political discourse). We try to pull these together in a manner faithful to the questions above throughout the subsequent analysis. We offer some conclusions, key messages, and, given the paucity of analytical and evaluative studies, offer some suggestions about areas for further research.

### **3. Institutional form: hybridity and contested autonomy**

We find an emerging trend in the conceptual literature around ROL to argue for function over form<sup>8</sup>, or to move to discredit formalists as lacking an understanding of context (Sage, Menzies and Woolcock 2009; Desai, Isser and Woolcock 2012; David Kennedy 2006; Santos 2009; Twining 2003; von Benda-Beckmann 2002; Tamanaha 2008). Similar arguments emerge from the recent push for “best fit” rather than “best practice” approaches to institutional reform (Booth 2011b), and to “good enough” standards as legitimate initial benchmarks for initiatives to enhance the quality of governance (Grindle 2004). Yet, when taking a view that centres on the “politics of what works”, form remains important: certain institutional blueprints, shaped by political settlements, go on to shape the evolution of the political settlement between elites. For example, Coffee (2001: 80) argues that the form that a market regulator adopts (such as self-regulation, an independent body, a political committee etc.) will, as the market develops, shape the evolving political consensus between elites. He studies pre-Great Depression market regulation and finds that it was state-based (a legacy of the original American political settlement); this drove significant unregulated and fraudulent cross-state securities transactions, contributing to the 1929 crash and leading to creation of the Securities and Exchange Commission in 1934. Clearly in such a line of argument, form is closely linked to function: elites looking for certain functions may shape institutions to forms that, for the purposes of securing legitimacy for

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<sup>8</sup> For present purposes, ‘function’ refers to how well a given institution or system performs in practice (i.e., what it “does”), whereas ‘form’ refers to its structure or appearance (i.e., what it “looks like”). See Pritchett, Woolcock and Andrews (2010) for a detailed discussion of the significance of this distinction for development.

current and subsequent actions, appear likely to fulfil (on the basis of experiences elsewhere) those functions.<sup>9</sup>

### *Hybridity*

A central message in the literature when understanding the politics of the development and reform of ROL is that *hybridity* is key to effective institutional form<sup>10</sup>. Understanding the politics of hybridity thus becomes central to effective reform. We find two main and often-conflated types of hybridity in the literature on ROL. First, there is hybridity between established models of the state and economic activity, such as (neo-)liberal versus developmentalist; democratic versus autocratic; modern versus pre-modern, etc (Duncan Kennedy 2006). In other words, developmental states move along their own developmental paths (Fukuyama 2010); indeed, Adler and Woolcock (2010) and Sage, Menzies and Woolcock (2009) argue that all ROL systems are by their nature hybrid and dynamic, as they draw upon a variety of models or sources of legitimacy as a response to the changing exigencies of circumstance.

Trubek (2008) categorizes the role of ROL in such hybrid orders as sitting somewhere between law-as-state-tool (developmentalist), law-as-encumbrance (neo-liberal) and law-as-framework (new developmental; or human and social developmental), depending on the state. Hybridity requires law to play many of these roles, meaning ROL will look very context-specific. There is no fixed endpoint and 'best-practice': literature on East Asia and China outlined above (Peerenboom 2004 and others) explore the extent to which the developmentalist approach to ROL served those countries in terms of rapid growth. Arbib and Martin (2010), Cavarozzi (1992), Kurtz and Brooks (2008) and Weyland (1996), for example, explore the macro perspective of legal institutions supporting economic growth in South America, especially Brazil, and find that the role of law changed rapidly as the state reoriented its interventionist capacity to tighten political control but reduce state intervention in economic sectors (for example, by introducing a new Competition Law and Innovation Law), especially those considered essential: the automobile and computer industries. In South Asia, Peerenboom (2008b) and Sarker (2004, albeit with a more orthodox critique of neo-patrimonialism in Bangladesh's public administration) have touched on the fluidity of ROL in different areas of social, political and economic life between developmentalism, neo-liberalism and new developmentalism, while in Pakistan, USAID (2008) suggest that this is overlain with tensions between the religious and secular.

The second form of hybridity derives from the first: hybridity reflecting an institution or array of institutions that draw on multiple sources of political authority and legitimacy to support a hybrid model of the state. Take, for example, states with low judicial independence whose judiciary protects property rights, even against the state (Glaeser *et al* 2004: 276 highlight Singapore as such an example). We found a significant literature on how law, as a tool of state elites, shapes the macroeconomy, particularly in Latin America: e.g., Cavarozzi (1992), Kurtz and Brooks (2008), Weyland (1996), Bresser-Pereira (2011). Trubek (2008: 22-23)

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<sup>9</sup> We note that North, Wallis and Weingast (2009) imply that organizational form is a sign to elites, although they take a very static view, implying that this form belongs to one of their three orders and that they can only shift from one order to another, rather than being involved in the dynamic politics of elite contest and (re-) formation.

<sup>10</sup> The notion of institutional 'hybridity' has its fullest historical expression in Bayly (2004).

and Trubek (2009) emphasize that the “politics of what works” will be complex here – as these states emerge, elites need both flexibility and stability, arrayed in ways that reflect their existing claim on state assets following the dissipation of authoritarianism in much of Latin America, and the subsequent move to acquire assets following fiscal and financial crises in the 1990s. Both papers argue that this issue has not been answered and indeed our understandings are only just emerging.

This finding is reinforced by a tension in the literature of the impact of elite domination on the hybrid nature of ROL. Scott (1998: 24-25) argues that elite domination and top-down paternalism tends to lead to simplification or standardization as part of a rationalizing bureaucracy that is itself a tool of power, taking in and attempting to homogenize the middle class, urban proletariat and peasantry. However, Dodson (2002: 219) and Foweraker and Krznic (2002: 46-47), in their studies of Latin America, find that elite domination can lead to hybrid orders such as “institutionalized informality” that are not rationalized in all dimensions of the state and which can be captured. The latter paper compiles a range of indicators in Latin America, coupled with qualitative surveys of Brazil, Colombia and Guatemala, and finds that “the armed forces and the police remain largely unaccountable to elected civilian government. The landed oligarchy frequently resorts to violence to protect its private property. Consequently, oligarchic actors are free to pursue political power through competitive party politics; but the poor, the powerless, and the minorities remain unprotected and subject to abuse.”

As the underlying political settlement broadens to include the poor, the nature of hybridity remains complicated. Diversity can be pro-poor: Scott (1998: 184-187) famously argues for engaging *metis* within firms and at local level policy making. Thus Haldar and Stiglitz (2008) compare and contrast land-titling programs for the poor based on de Soto (2000) and the microcredit programs of Mohammed Yunus’ Grameen Bank. They find microcredit to be more effective owing to its ability to leverage local knowledge of likelihood of repayment and local laws and norms to spur violators to repay. Yet, recent critiques have charged microcredit as being an unregulated, non-standardized and non-transparent vehicle for financial exploitation, usury and the persecution of women (Kalpana 2008 offers an important summary).

The formation of Township-Village Enterprises (TVEs) in rural or peripheral China in the late 1980s and early 1990s provides a useful case study for the emergence of pro-poor hybrid ROL institutional forms as the political settlement broadens, and one that has been touched on by several commentators. Dam (2006a: 39-45) discusses their emergence: a “de facto alliance of local government and small collective enterprises” (40), which was used by local bourgeois entrepreneurs to avoid a predatory state dynamic in the absence of private property. As Peerenboom (2002a: 471, 479) puts it, “if you can’t beat them, join them”. Despite the attempts to avoid the predatory local state, there was not insignificant local-level predation in impoverished villages or those had few other sources of revenue, and in which officials did not have the material means to serve either as patrons or as community benefactors (Unger and Chan 1999: 71-72). Peerenboom (2002a:486) highlights the very different nature of this view of ROL; furthermore, he stresses that this hybrid arrangement consists of a historically-contingent and context-specific array of legal institutions driving and framing the emergence of TVEs. As TVEs began to falter in the 1990s, this gave rise to a retrospective analysis of why they arose and why they failed. Synthesizing literature along with his own research, he argues that:

TVEs reflect[] a host of context-specific factors, including the deepening of market reforms. As markets developed, TVEs faced increasing competition from SOEs, foreign-invested enterprises (FIEs), international companies, and even other TVEs. Most TVEs relied primarily on abundant unskilled labor to keep prices down and gain market share. Without more sophisticated technology, many were not able to survive in the face of intensified competition... The lack of clear property rights also hindered growth and development. Outside investors were reluctant to buy into TVEs given the lack of clear ownership rights and the influence of local government on management decisions. Seeking to minimize unemployment, village leaders would take from the rich to support the poor, forcing strong companies to purchase or subsidize weaker ones.

This reflects the lesson from Adler and Woolcock (2010) and Sage, Menzies and Woolcock (2009) that hybrid forms are by their nature dynamic over time. For example, Guthrie (1998: 281-282) finds that the practice of *guanxi* - or personalized networks of influence - in China is declining in importance, especially in large-scale industry, as competitiveness becomes more important. As a result, Mushkat and Mushkat (2005: 254-258) and Gilley (2004: 125-127) find that it is being replaced by a rational-bureaucratic legal system.

#### *Legal pluralism, Informal norms and institutions*

One prevalent challenge when it comes to hybridity and establishing “what works” is the role of informal institutions. They do often “work” (in the positive rather than normative sense), and often prevail over non-elite groups. As a result, the politics of broadening to non-elite economic or social groupings often becomes a story of how to manage relationships between formal and non-formal systems, or more accurately the politics of how to understand and shape the complex hybrid institutions that arise out of the different legal systems that have weight in a given polity.

A foundational step to be taken from Tamanaha (1993), Twining (2009) and Woodman (1998) is that legal pluralism – “the fact that real social life is prodigal of sovereigns” (Gordon 1984:69), each making their own brand of law that might overlap, cooperate or compete – is a social fact, rather than an ideological or normative statement of how the world ought to look. von Benda-Beckman (2002) calls for a better understanding of this social fact, requiring “empirical research and ...theoretical understandings of the many variations we find in the empirical constellations of legal pluralism and of the ways in which these different constellations influence the actual social, political and economic conditions in the areas and the lives of the people concerned” (74). There has been limited research responding to this call, which we attempt to summarize here, but this remains an area for further empirical study.

Lived experiences of legal pluralism are often mediated through some form of “informal” institution: a “socially shared rule... usually unwritten, that [is] created, communicated, and enforced outside of officially sanctioned channels” (Helmke and Levitsky 2004: 727).<sup>11</sup> The

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<sup>11</sup> While we use “informal” institutions and cognate terms throughout, we are mindful of and subscribe to the caution against overly stark dichotomies between state/non-state, formal/informal, modern/traditional etc. (Tamanaha 2000; Merry 1988:875-879). The importance of the idea of legal pluralism as social fact in the literature requires an understanding of the complex interplay of different institutional forms. We simply use the

hybridity that often results from a multiplicity of informal institutions arises as a result of the interaction between different layers of institutional spaces (including formal and informal) (Merry 1988), and engenders corresponding dynamics of contestation over power and resources (Meagher 2010), connecting informal institutions and social networks to the politics of the mediation of power.

Thus, on the one hand, the literature portrays locally-embedded institutions whose meaning can be contested by local actors; they are, in that sense, inclusive. In rural Karnataka, for example, Ananth Pur (2004) conducted a study of “informal local governance institutions” (“ILGI”) such as customary village councils, taking in 30 sample villages. Exploring disputes, justice, and legal recourse, she finds that ILGI’s form an important facet of the array of ROL institutions for the rural poor:

It is generally believed that traditional justice institutions in India thrived during the colonial rule and gradually faded out thereafter... This belief is not supported by my field evidence from Karnataka, where ILGIs are involved in dispute resolution in all the 30 sample villages... Villagers do not necessarily see dispute resolution by ILGIs as an end point, but rather as the first opportunity for justice because it is quick, affordable and accessible... In most villages, disputes brought before the ILGIs may be taken to the police station or to the formal legal system if not satisfactorily resolved there. The types of disputes that come before the ILGI are varied. They include petty disputes, thefts, encroachment issues, minor property disputes, drunken brawls, and marital problems including spouse abuse, desertion, bigamy, and alcoholism. Land or property disputes, between siblings and/or other people, are usually brought to the ILGI in the first instance. If they are not resolved to the satisfaction of both parties, then the ILGI advises them to approach the formal institutions of justice. Criminal cases are handed over to the police. Sexual offences are deemed to be extremely serious, and may lead to the ILGI meting out very heavy penalties. (8)

The politics behind ILGIs in Karnataka can create benefits that accrue to women, especially when viewed as locally-embedded informal institutions to compete with the formal. Ananth Pur and Moore (2010) find that “[i]n the absence of easy access to institutions of justice, rural women in Karnataka particularly seem to value [customary village councils] as they provide them with some semblance of security within the village. Literate respondents were particularly likely to see the benefit of having simultaneous access to both CVCs and Grama Panchayats. People believed that there was less corruption in Grama Panchayats when their ‘own’ CVC members were keeping watch” (17).

Furthermore, the interaction between formal and informal institutions – the *hybrid dynamics* – in the context of adhering to rules has an impact on a broad range of development and local governance issues. Building on Ananth Pur and Moore (2010)’s research, Institute of Development Studies (2010: 52) finds that these councils are moving beyond traditional roles and are “becoming more active in seeking access to public funds, influencing decisions about development projects, and raising matching contributions.”

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terminology of informality to indicate arrays of institutions that are not understood to be of the state in the orthodox liberal-democratic tradition.

However, informal institutions can also be exclusionary or simply embed a set of norms, values and behaviours that are hard to dislodge. For example, Ghana has a legacy of customary law whose embedded hierarchies were strengthened by British indirect rule, which established Native Courts and judicial recognition of custom. In the context of this history, Crook, Asante and Brobbey (2010: 24-27) find that justice surveys in Ghana indicate that customary land dispute panels are least attuned to popular ideas and expectations about how to settle land disputes, catering to a relatively narrow and elite set of clients using very formal traditional procedures. Panels are too embedded in the power relations of local land ownership and social hierarchies to offer adequate settlement. As a result, the politics of hybridity can also be exclusionary, relying on vertically-integrated patronage networks that do not focus on the poor and emphasize in-groups rather than inclusion.

The World Bank's institutional review of Bolivia provides a useful example of politics shaping institutional form and vice versa: in Bolivia, accountability institutions are shaped by the factional organization of political parties, in that "oversight and participatory instruments... were sometimes co-opted by political parties and interest groups, which weakened transparency and accountability. [We see] a conflict-ridden struggle to gain partisan control over municipal resources... Political parties were found to exert disproportionate influence in local affairs, undermining civil society's oversight mechanisms" (Narayan-Parker 2002: 308). That being said, in their localities, Bolivians "pressed their demands through their territorial base organizations and vigilance committees, despite shortcomings of the system. A degree of community representation was created that had been weak or nonexistent in the past... electoral accountability was improved as local officials were now elected throughout the country, providing opportunities for traditionally marginalized groups to participate in municipal government" (309).

The challenge posed by the literature, then, is to understand how effective hybrid arrays of formal and informal institutions come about in developmental states. In some cases, informal institutions may have more legitimacy than the state, and exercising state power to remove them may lead to political backlash or disengagement. This leads to complexities of the politics of state-non-state engagement. In others, the politics of non-state institutions may preclude the state from pursuing inclusive or pro-poor objectives through linking with these institutions, or indeed at all: in 1950s South Africa, for example, the Afrikaner Broederbond (a secret society comprising key political leaders of Afrikaner South Africa) operated as an informal, highly conservative body opposed to any debate around or liberalisation of apartheid (Lester, Nel and Binns 2000). They worked to override "practical" segregation involving labour quotas for black South Africans, infiltrating the Native/Bantu Affairs Department and drafting a bill ending these quotas and enforcing strict segregation (Worden 2000: 122-123).

Fritz, Kaiser and Levy (2009: 45) offer four possible relationships between formal and informal institutions: complementary; accommodating; substituting and; competing/subverting. Stephens (2009:145) fleshes this out in the context of ROL systems, highlighting the politics of each move. Policy makers can expand state control of the justice system; attempt to enhance the cultural relevance of the formal system by aligning it with customary systems; attempt to 'improve' the quality of informal justice through state oversight and the insertion of legal or constitutional human rights standards; or attempt to subjugate informal processes in a structural hierarchy below the state.

### Autonomy

The politics of hybridity in ROL systems play out in one key area of institutional form: the autonomy of justice institutions. This is discussed in the literature (for example, by Fukuyama 2011: 408) as the ability of justice institutions to behave as autonomous political actors in order to carry out particular functions. This is clearly very contingent on the evolving political settlement. In China, for example, Peerenboom (2002a: 14) shows that judges are political appointees. However, Peerenboom (2008a: 5) suggests that putative reformers need to disaggregate the politics of the Chinese state in order to understand how reform might occur. Some low-hanging reforms are manageable, such as improving case processing times, but reforms really have to be understood as political, causing turf battles and conflicts between the component parts of the state, each of which have to be understood (at least analytically) as separate and distinct power holders.

A complex understanding of autonomy that takes elite politics into account militates against the transplantation of independent “forms”. Focusing on the politics of what works means understanding autonomy as a contested concept that creates political winners and losers. This has a great deal of impact on the sort of expertise needed to support change that “will work”. There is a significant literature on this issue, with an emphasis on ROL. For present purposes, we highlight Dezalay and Garth (1996), Dezalay and Garth (2002), Kennedy (2005), Kennedy (2008), and Kothari (2005) as forming the basis of this literature. Garth (2002: 393) explores the politics of expertise in guiding reform directed at autonomous justice institutions: “The first law and development movement... left a legacy in Brazil of corporate lawyers with an expertise in U.S. corporate law and good connections to U.S. lawyers. The relatively scarce expertise they possessed became more valuable as the economy changed. If we trace the careers of this group, we find remarkable success in corporate law, the state, and the financial sector. These individuals led the movement to rewrite laws to conform to U.S. standards in, among other places, securities and intellectual property. The U.S. investment paid off both locally and for the United States. What did not happen, however, was substantial reform of the judiciary or reform of legal education.”

Viewed in the light of political settlements, autonomy becomes much more complex and politicized: there is a tension between autonomy as a *sine qua non* for functioning ROL systems (as, for example, argued by Fukuyama 2011) and autonomy as a contested political objective whose configuration will be affected by and will affect the shape of ROL in a particular polity.

## 4. Institutional functions: accountability and basic obligations

In terms of the politics of what works in developmental states, the literature has emphasized the ability of ROL institutions to perform an accountability role and to support the state in meeting its basic obligations, as both of these functions cut across other dimensions of state policy-making (Fukuyama 2011), for example enabling the delivery of basic services (Gauri 2011).

### Legal accountability

The literature on accountability refers to the ability to hold power-holders to account to some degree through a ROL system (Fukuyama 2011: 582-584). The politics of movements towards greater accountability are contingent on political organization and the pragmatism of the political settlement: i.e., a deep-seated understanding that moves to bolster elite legitimacy (including the ceding of some power) will need to occur as an economy grows (Peerenboom 2008b: 5, Peerenboom 2007). However, the way in which those politics express themselves can differ significantly, from violent to non-violent revolution, through to incremental transition. This can be as much a result of historical contingency and accident as an outcome caused by an effective and evolving political settlement; to this end, Fukuyama (2011: 589-606) contrasts the Glorious Revolution in Great Britain with the evolution of accountability in Denmark, indicating that the lack of violent conflict in Norway was a product of historical circumstance (such as the free flow of ideas into Norway) as much as design.

This caveat having been established, the literature does offer some patterns in the context of the politics of accountability. One message from Latin America is that this might involve a *greater* politicization of justice actors – particularly the judiciary and lawyers. In the region, there has been a move from seeking to establish positivist, apolitical justice actors to a situation in which people have increasingly been able to bring cases of a political nature – to do with electoral law, or civil and political rights – as judges have taken political decisions to rule against the government. For example, in Pinochet's Chile, some Chilean judges made antigovernment decisions, even though the Supreme Court justices leaned toward the government (Correa Sutil 1997). In Venezuela, "the judges of the First Court for Administrative Contentious matters [*sic*] issued several important rulings against some policies enacted by President Chávez's government. After several incidents, the government's special police took over the court building and the judges were fired" (Perez-Perdomo 2006: 187).

As the political settlement broadens, so the politics of legal accountability processes shifts. In Kenya, Benequista (2009) finds a combination of three factors to be key to understanding how the poor mobilized legal accountability institutions to stop evictions perceived as illegal: legal action (injunctions against evictions), media (to expose planned evictions) and local politics (strikes, block roads, use of District Commissioner). In India, a fourth factor – legal education – is highlighted from a campaign against evictions and compulsory purchases to support a private thermal power plant. Nevertheless, recalling Holston (1991), Holston (2008) and Holston (2011), legal processes of accountability often remain limited in their utility to the poor, often as a result of the institutions' form not taking into account the deprivation and exclusion they face, and thus not developing a more hybrid form that is inclusive of the poor. Newell and Wheeler (2006: 15-16) argue that

[a]pproaches to accountability that rely solely on legal reform are unlikely to appreciate the limits of the law, in terms of access and reach, for the majority of the world's poor. For example, constitutionally guaranteed rights (as with the right to water in South Africa and the right to health in Brazil) can create new possibilities for demanding accountability. Yet the difference in how these rights fit into legal traditions is critical. In Brazil, social mobilisation around constitutional provisions has provided an entry point for political struggles over accountability because the judiciary does not fill that space, while in South Africa court cases such as *Grootboom v Republic of South Africa* have had a more central role. [...] By contrast,

in India, despite the fact there is a strong tradition of using public interest litigation, there has also been resort to mock legal processes such as citizen hearings. And in Mexico, where there is little possibility of resolving accountability struggles through legal structures perceived to be convoluted and corrupt, social mobilisation around political objectives is key to increasing accountability. While law often allows for equity of treatment, it can also reinforce social inequities. In Bangladesh, the laws covering workers' rights date from the colonial period and heavily favour educated men. Women, who work almost entirely in the informal sector, do not fall under the auspices of these laws in practice. In Kenya and India the colonial Land Acquisition Act has been invoked to remove people from their land, often without compensation or redress... An apolitical view of promoting accountability through law reform, capacity building, training judges and the like is unlikely to yield improved access for the poor unless structural barriers and social hierarchies that inhibit meaningful use of the law by the poor are also addressed.

### *Basic obligations*

These can be expressed in terms of the ability to exercise state power to enable political, social and economic activity (Fukuyama 2011: 601). This is contingent on the formation of a political constituency that sees the state as having certain basic obligations; this can be due to material impacts on people's lives, implying a need for grass-roots mobilization and action. For example, Berger (2008) examines the use of the courts to compel the state to provide antiretroviral drugs to combat AIDS in South Africa in line with the constitutional provisions upholding economic and social rights, seeing the law of basic obligations as shaping a contest between the poor and the state. However, basic obligations can also bear relevance to intra-elite settlements: for example, Coffee's (2001) history of the development of securities markets in the US and UK found that a new political constituency developed that desired legal rules capable of filling in the inevitable enforcement gaps that self-regulation left.

The ability to participate in the political determination of what constitutes a basic obligation can have important impacts on the poor and marginalized. For example, protective laws on the surface appear to provide protection for women against harmful and dangerous occupational environments. However, they can also subvert women's ability to make choices and operate to restrict their access to a wider range of employment opportunities. These laws might include total or partial restrictions on women to work at night, accept employment abroad, or engage in what are considered dangerous occupations, such as mining, deep water fishing, those involving chemicals, among others (World Bank 2011: 234-235).

## **5. Policy frames: pragmatism and equity**

### *Pragmatism*

The literature brings out the importance of pragmatism to successful politics of ROL reform, both in terms of building intra-elite coalitions, and in terms of broadening the political base for ROL reform to poor and marginalized groups. Pragmatic approaches to the politics of ROL impact the effective evolution of the political settlement.

Examining the pace of reform is instructive. The ROL literature offers a contrast between incrementalism (particularly in China: Dam 2006a) and a “big bang”<sup>12</sup> (for example in post-Soviet countries: Ford 2001). The current literature, if not the abiding structures and incentives of large development agencies, seems to favour incremental reform, not least because building political constituencies for ROL reform takes time – Pritchett and de Weijer (2010) and Pritchett, Woolcock and Andrews (2010) suggest several decades, even in the *fastest* reforming countries. Even putting in place a new legal framework for economic transactions can be complex. Processes need to be established, norms internalized and expertise built to adjudicate disputes. Godoy and Stiglitz (2006) consider the implications of post-Soviet states and their experience with asset-stripping. If a “big bang” opens opportunities for the capture of economic resources and political and business elites are closely tied, politics may favour the rapid removal of assets even though it will lead to inequality and lack of inclusiveness, along with a ROL system that allows assets to be exported and does not emphasize competition.

There is significant literature in praise of incrementalism, especially with regard to the experiences of China and countries in South-East Asia (Peerenboom 2002a, Peerenboom 2008a, Peerenboom 2008b, Dam 2006a, Dam 2006b, Przeworski *et al* 2000, Friedman and Gilley 2005). However, incremental reform can also enable elites to sequence reform in ways that suit them, and reject reform that might undermine their interests even though it might be beneficial to the poor or marginalized. Take, for example, forest reform in Andhra Pradesh, in which lobbies of the rich worked to undercut reform that would increase regulation and oversight and which threatened their economic and political interests (Reddy *et al* 2010: 5; Sarin and Springate-Baginski 2010: 32). Or take the shift to different types of ROL in China. Mushkat and Mushkat (2005: 254-258) and Gilley (2004) argue that the Chinese Communist Party is turning to process-based rules that operate regardless of outcome, and away from an instrumental, discretion-based system of using the law. In 2002 the Chinese Communist Party pledged to promote “socialist political civilization” (*shehui zhuyi zhengzhi wenming*), which Jiang Zemin earlier defined as a polity that is “institutionalized and standardized and that operates by following proper procedures”.

Finally, the role of international actors in a political settlement affects the pace of reform. If they play a key role, the pace of reform may be distorted owing to their institutional imperatives. For example, Dam (2006a: 39-40) argues that China may have benefitted from a continuation of leadership and an ability to resist the international, while post-Soviet states lacked the former and so international actors stepped in to fill the gap.

### *Equity*

The literature reviewed discusses the importance of shaping ROL to help meet the material needs of the poor to shore up political support (Mushkat and Mushkat 2005, Newell and Wheeler 2006), alternatively framed as using ROL to buy off the disenfranchised (Peerenboom 2002a). Gauri and Brinks’s (2008) edited collection contrasts South Africa

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<sup>12</sup> This approach is based on Shleifer and Vishny’s (2002: 10-11) discussion of post-Soviet privatisation: “Privatization then offers an enormous political benefit for the creation of institutions supporting private property because it creates the very private owners who then begin lobbying the government...to create market-supporting institutions...[Such] institutions would follow private property rather than the other way around.”

(Berger 2008) and India's (Shankar and Mehta 2008) approaches to economic and social rights. Both allow litigation for economic and social rights and thus some judicialisation of the policy space. South Africa restricts judicial powers of review of government actions to standards of judicial review, stopping the judiciary from making specific policy prescriptions: for example, in the *Treatment Action Campaign* case of 2002, the Constitutional Court held that the government had to make available free anti-retroviral drugs to reduce the risk of mother-to-child transmission of HIV, but did not tell the government how to achieve this aim nor what any relevant thresholds (for example, of severity) should be. This standard of review limits the judicialisation of the political space. By contrast, India has generated its own standards of review, allowing judges to conduct direct data gathering, appoint investigative commissions, and make specific policy prescriptions to legislature; for example, in the *People's Union of Civil Liberties* case, the Supreme Court held that the government must improve children's nutrition, and must do it through the provision of a hot meal for every child at school. Upon frequent delays in implementation, the Court appointed a commission to investigate bottlenecks and make remedial suggestions to the government (Desai 2010).

As a result, the politics of an equitable policy frame for ROL – that is, one that broadens the political settlement by the equitable provision of goods and services to the poor and allows for social mobility (Fukuyama 2011: 599-600) – turns on the politics of the justice actors within the system. One consequence of this, in India, is the emergence of the judiciary as a political class, which is required for the system to continue to work in an aggressively pro-poor fashion, but which may cause backlogs and reduce faith in impartiality (Dennis and Stewart 2004, Hirschl 2004).

## **6. Political organization: coalitions and communication**

### *Coalitions*

There is a substantial literature on mobilization, participation and social movements, and a still-substantial subset that deals with mobilization, law and citizenship.<sup>13</sup> We do not propose to do a thorough review of this literature; rather, we focus on the politics behind the mutual shaping of law and the political mobilization of coalitions for changes in ROL,<sup>14</sup> particularly the mechanisms for broadening ROL and ensuring that, in the process, systems operate in pro-poor ways.

The nature of coalitions intersects with a range of different tools that have influenced the broadening of the political settlement through law and justice. For example, public interest

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<sup>13</sup> See, for example, Moore (1989: 41-42) on legal pluralism and citizenship; Somers (1993) on citizenship as an "institutional process" determined by law and political cultures; Thompson and Tapscott (2010) on how elite politics are mediated through state legal institutions to shape citizenship; Cortez Ruiz (2010) on the struggle for legal rights on the part of indigenous populations in Mexico; and Scott (2009: 32-37) on the nexus between law, documentation, and hierarchies of citizenship.

<sup>14</sup> We recall here the contested nature of ROL discussed above; when we refer to changes in ROL in the context of political organization, we do so with reference to changes in institutional form, institutional function and enabling policy frames that support pro-poor outcomes outlined in the foregoing sections.

litigation, often aimed at changing the existing political settlement by altering “structured inequalities and power relations in society” (Gloppen 2008: 344), has opened a judicial space in which groups can form and mobilize around specific issues, particularly socio-economic claims (which have tended to link the urban and rural poor with middle-class activist networks: Gauri and Brinks 2008). Access to information laws have opened spaces for new coalitions around specific issues such as rural corruption (linking activists and the rural poor: Jenkins and Goetz 1999) and more general issues such as press freedom and government accountability (in Mexico, this was driven by coalitions of urban middle-class activists and intellectuals: Gill and Hughes 2005). Legal empowerment tools (“the use of legal services and related development activities to increase disadvantaged populations’ control over their lives”: Golub 2003) entail interventions often driven by civil society actors such as legal education, legal coalition-building and community paralegal programs.

Such tools are important in ensuring pro-poor outcomes. Yet in the context of the “politics of what works”, the nature of political organization is common across these interventions as a factor determinative of the nature of outcomes. Gloppen (2008: 348), for example, talks about “associative capacity” and Gill and Hughes (2005: 126-129) about the “formation of a pragmatic and adaptive coalition of... advocates”. As an instance of this, we note the controversy over the extent to which these approaches are neutral tools to be wielded by the poor or political acts requiring politics and ideology (contrasting Golub 2003, 2010 with Baxi 1982 and Rajagopal 2003). As a result, given the emphasis in this paper on the politics of ROL, we do not give full treatment to legal empowerment or other types of intervention; rather, we aim to map from the literature the impact of political organization in structuring ROL in ways more likely to be amenable to the poor.

The organization of political groupings plays an important role in shaping ROL in two ways: first, direct political support to contests surrounding the use of and changes to a particular set of rules and institutions; and second, indirectly shaping and being shaped by ROL institutions through the (re-)generation, contestation and consumption of shared understandings (see Gauri, Woolcock and Desai 2011).

Forging direct political support for changes to ROL often entails calling upon a combination of foreign support and domestic coalitions, with different sources of legitimacy and different political aims (Daniels and Trebilcock 2004). At the domestic level, it also requires some group cohesion without mass cooptation (Fukuyama 2011: 562, 598) – thus, in Tanzania, Mahdi (2010: 4) highlights the importance of organizing representation for small coffee growers who operate independently from large cooperatives who could otherwise capture regulatory reform. However, this analysis is contested by Peerenboom (2008b: 10-12) who juxtaposes India with the “East Asian Model” (“EAM”). He argues that India remains democratic, which (in this view) has resulted in lower growth; the EAM has followed a path of authoritarianism-growth-democratic reform, and indeed Latin America has shifted from authoritarianism to patronage through patronage democracy to democracy (Daniels and Trebilcock 2004). By contrast, Lele and Quadir (2004: 3) argue that India remains democratic, as law protects the interests of the entrenched and dominant classes who hold “economic, political and ideological sway over the subaltern classes”, benefitting from vertically-integrated political parties coupled to low human development.

As a result, it is important to understand not just the cohesion of groups contesting rules, but the broad base and cohesion of possible beneficiaries from rule contests. For example,

creating justiciable socio-economic rights moves particular social and economic contests to the courts. Gauri and Brinks (2008: 335-340) argue that there is a well-documented concern about beneficiary inequality (i.e., that only the rich can litigate). However, the group of potential beneficiaries from a particular successful challenge is vast – for example, in the *Treatment Action Campaign* case, all maternal HIV sufferers in South Africa. Gauri and Brinks go on to argue that ensuring the broadest base of potential beneficiaries requires significant civil society or state support to participate in such contests. This requires a particular emphasis on women: Banda (2009: 133) finds that financial cost, especially in developing countries, is a key reason cited by women for delaying or failing to seek redress.

There is thus a strong link in the literature between direct political support, and indirect shaping – coalitions are relevant to broadening a political settlement through ROL inasmuch as they deal with the creation of a cohesive group who share a common understanding of the role of the courts in solving *their* problems. Joshi (2010), in a study of recent employment guarantee schemes in India, explores essential preconditions for this to happen, which echo the preconditions for broad-based legal accountability discussed above. He finds that

for the law to work for poor people, at least initially a significant amount of energy, time, and resources have to be devoted to pursuing rights through the courts. Without a strong membership organization or support from an NGO, access to justice for the poor is difficult. Second, a strategy of pursuing litigation has to be adopted by activist organizations prior to any actual dispute, so that robust cases with detailed documentation can be built up for litigation. Third, such a formal confrontational strategy can be costly in terms of everyday organizational functioning and interactions with the local authorities. Finally, although the anticipated material benefits of successful court cases (in the form of increased wages) can be a powerful force for mobilizing rural workers, a litigation strategy may not deliver relief to the aggrieved—the poorest—because of the long time the judgments take. (626)

As a result, the internal and external politics of third party participation in rule systems clearly have a strong impact on pro-poor outcomes, including the legitimacy of their claims to represent the poor. Maiti (2009: 29-33) explores this in the context of comparative labour relations in Gujarat and West Bengal. In Gujarat, in order to meet significant demand, labour contractors (non-political actors) hire a large number of migrant workers from out-of state based on informal networks, and most are at-will employees. Contractors are comfortably able to bribe labour inspectors if caught. Employees thus remain part of their informal network that brought them to work. In West Bengal, however, labour unions play this role in a context where alternative employment options are very low. As political actors, they retain clear constituencies, and employees form part of their union as a political unit. As a result, union representatives risk action against them in the public domain if such bribery were to occur, and thus engage in bribery or similar activity to a lesser degree.

Third party participation is complicated by the politics of justice actors themselves – the judiciary, lawyers, academics, ombudspersons and similar institutional actors – their links to elite-led coalitions, their relationship with the balance of power and their investment in the status quo. In Andhra Pradesh, for example, enforcement of forest regulation through the courts has been stymied by the forest regulator itself appearing as an interested party in cases (Reddy *et al* 2010: 6). The complex politics of judicial independence in China shows the importance of seeing justice actors as part of a political process. Reforms to the (Party-

appointed) judiciary are highly political, causing turf battles and conflicts between component parts of the state. The Party is able to adjudicate between these component parts; as a result, there is a tension between the proposition that strengthening ROL will weaken the Party's discretion (a "good"), and the ability to do so in a way that significantly changes the existing power dynamic and creates an independent political actor in the judiciary, given that the Party is needed to mediate tensions (Peerenboom 2008a: 7). Again, women are significantly affected by the political moves of justice actors, as they are in general ill-represented by them: such actors are often gender biased or are composed of few or no women themselves (World Bank 2011: 307, 347).

Direct political support for ROL reform also depends on the relative power of elites (Fukuyama 2011: 779-780). As a result of Kennedy's (2002) and Hohfeld's (1917) understandings of property rights, we understand from Holston (1991: 721-723) that the politics of power has to be used to quash competing property claims from non-elite groups, or groups not partaking of the political settlement (through litigation, legislation, influencing adjudicators, patrimonial networks, etc). This view sees law as a political tool. As a result, legal education, legal empowerment strategies and mobilization become important – not just for group formation and cohesion, but to provide the tools to non-elite groups to exploit this political tool<sup>15</sup> – as does driving down barriers to access to justice from both the supply and demand side (for example, the provision of legal services or lowering barriers to achieving standing in court). For example, Adler, Porter and Woolcock (2008), in a study of Cambodian land titling, find that

[a]bsent formal institutions which are able to deal with major conflict in a way which is perceived as fair, the poor use a variety of advocacy strategies to gain extra leverage in their negotiations with wealthier or more powerful parties. In the most successful cases the poor act collectively to approach powerful administrative officials, often district and provincial governors, to intervene on their behalf. Appeals to the media, local human rights NGOs and national level institutions have also proven useful. When formal law is drawn upon in these cases it is to legitimate multi-faceted bargaining strategies rather than with any expectation that the state could be relied upon to enforce the law in an equitable fashion. Such strategies clearly have the potential to shift decisions in favor of the poor in individual cases. There is, however, little in the way of institutional structure for this sort of bargaining. As such, collective action around land issues tends to be local, ephemeral and targeted at powerful individuals within the administration. (3)

Again, civil society is extremely important in framing the effective exploitation of law (Scott 1998: 5), but is difficult to make and manage, relying on significant presumptions about the public sphere (and its legal framing through speech laws etc.), vernaculars, social relations and identity (Di John 2009, Lockwood *et al* 2010 Wayne Nafziger and Auvinen 2002, Avritzer 2002, Fung 2003). Thus Hoffman and Bentes (2008) highlight low levels of knowledge about their rights among the poor on Brazil, while Berger (2008: 47-48) discusses elite action to hoard information and legislate against CSOs in South Africa.

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<sup>15</sup> Gibson and Woolcock (2008) assess the extent to which a development project (in Indonesia) pursuing an empowerment agenda is in fact able to cultivate heightened capacities among marginalized groups to negotiate more effectively with political elites.

The second dimension of coalition-building around ROL – the shaping and contesting of institutions – is achieved through discursive limits imposed by ROL that frame the intersubjective meaning of issues – that is, the socially generated shared understandings of what ROL is and what it should do, and the comprehensible limits of what it might be. These facilitate or hinder the formation of groups: for example, Gauri, Woolcock and Desai (2011: 23) analyse the World Bank’s justice reform project in Afghanistan and show that the Bank is trying to shift popular understandings of the citizen-formal justice system relationships in Afghanistan from a dynamic founded on tribal (lack of) engagement with the state to a “state service/end user” dynamic. Hyden (2010: 8) extends this idea to the self-image held by parliamentarians in Ghana as “delegates and guardians of their constituents.” This overshadows the role of parliament as a deliberative democratic forum, as parliamentary cohesiveness gives way to locally embedded politics.

The implications from the literature are twofold. First, analysts cannot take a static view of political settlements and the concomitant ROL system: a constant reproduction of meaning and shifts in who shares a particular meaning system means that constituencies who can participate in the “politics of what works” for ROL systems (e.g., who can litigate, who considers themselves to be an “employee” and thus participate in an employment tribunal, etc.) are constantly shifting. This will have important implications for analysis, data collection and monitoring methodologies, project design, and so on. Second, there is a similar problematization to be undertaken of the internal administrative dynamics of a justice system: analysts need to understand the politics of justice actors and how they construct themselves (Dezalay and Garth 1996; Dezalay and Garth 2002).

### *Communication*

Communication is an important corollary of coalitions: the meaning they ascribe to rules requires an appreciation of communicative spaces as areas of political contestation about rules and the roles of actors. Thus Fukuyama (2011:600-601) argues that a broadly communicated faith in the common law of England provides a foundation for high levels of trust in the judiciary, while Peerenboom (2008b: 7) shows that surveys about the Indian Supreme Court show high levels of faith in the institution despite low levels of faith in its ability to execute its function, displaying a colonial legacy akin to that found by Fukuyama in England.<sup>16</sup> The literature on communication also displays a sensitivity to vernaculars that will allow the poor to engage with and contest rules and roles (Barron, Diprose and Woolcock 2011). Benequista (2009) studies programs that used theatre to reach out to the poor, while Stefanova, Porter and Nixon (2010) explore the use of theatre to build awareness of legal issues relating to customary law and land leasing in Vanuatu. Cornwall and Coelho (2007: 22-23) nuance the importance of communication. They argue that context and political culture matter: again, law shapes communicative spaces as well as being shaped by them, from regulating the ability to speak (such as speech rights for women) to providing physical spaces for such expression.

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<sup>16</sup> Rindermann (2008) performs a large-N empirical study of education, cognitive ability, and positively valued political conditions in developed countries as part of the cognitive sciences literature. He indicates that the rule of law (in this context understood as promoting property rights and economic freedoms) is strongly associated with increased intelligence and search for knowledge. However, the research doesn’t go beyond this finding and we do not seek to make claims beyond our professional expertise.

There are implications from these studies for elite-poor politics and ROL. When there is divergence and dissonance between elite and local narratives and no space to allow for contest between the two, this can lead to low inclusiveness and poor access to justice. Scott (2009: 334-337) brings to light a strong belief in the effectiveness of state judicial officers at the national level in China in the mid-nineteenth century, and the predatory realities of local magistrates at the sub-national level.

## **7. Contingent factors**

A final, overarching message of the literature reviewed is that the politics of “what works” in the context of ROL and political settlements is very contingent, especially on history and colonial legacies (an issue raised in detail by Bayly, Rao, Szreter and Woolcock 2011; see also Benton 2002 and Harris 2010). Fukuyama (2011: 606) finds that the pre-existing allocation of rights, resources and entitlements is important to trajectories of ROL. Olivier de Sardan (2009: 12), in a study of local governance in West Africa, addresses the history of clientelism in West Africa and the resultant “venality of justice” in a chief’s judicial/administrative role. Thus Harris (2010: 169) finds in his comparative study of the Dutch and British East India Companies’ impact on ROL that the pervasiveness of contingent factors is so strong that “it is wise to recognize that conditions are different and that preferences in tradeoffs are different in different localities, and accordingly there should be plurality in policy recommendations.”

Rather than legacies, Lachmann (2002: 174-175) highlights *unexpected impacts* from large-scale historical change in early-modern England. As the ecclesiastical establishment in the seventeenth century was weakened by the monarch in a political process of rewriting the elite balance of power, so the authority of clerical courts was undermined. The gentry were for the first time able to turn to common law courts to claim enclosure over manorial land, regarding which clerical courts had previously supported peasant claims.

Cornwall and Coelho (2007) and Roque and Shankland (2007) see similar mutations on a smaller scale and over a much shorter period of time as part of specific development projects. In Luanda, Associations of Water Committees (“ACAs”) were formed as representative associations to participate in the management of water standposts, which entailed organizing water distribution, collecting payment for water from residents, keeping the area clean and carrying out maintenance of the standpost. ACAs decided to federate to increase their negotiating power with the provincial water company. This required them to delocalize – to become independent from their membership base, breaking the chain of accountability initially established to support their representative function and placing in question the legitimacy of their supervisory function. The scope for this mutation derived from the wider lack of clarity on organizational models and political/institutional rules of the game around water in Angola.

## **8. Conclusions**

As this review has hopefully made clear, much remains to be done to enhance the coherence and utility of the theory, research and practice informing the provision of effective

justice systems for marginalized groups. Indeed, there remains a sizeable and enduring gap between the near-universal consensus regarding its general importance, on the one hand, and, on the other, its conspicuously thin record of actual policy accomplishment. Explaining the persistence of this gap, and devising effective strategies for narrowing it, must of necessity begin with revisiting core theoretical assumptions and the operational frameworks to which they give rise, even as such frameworks need to be informed by – and remain in active dialogue with – more detailed, context-specific evidence on whether and how prevailing justice systems ‘work’ from the perspective of actual and potential users of these systems, especially the poor.

Beyond the familiar (and somewhat self-serving) academic conclusion that “more research” is needed to enhance policy effectiveness, we argue that ‘justice’ and ‘the rule of law’ are both “essentially contested concepts” (Gallie 1956) whose primary work is done through the productive debates to which they give rise in a given political space; which is to say, “more research” as conventionally understood will only yield marginal improvements in conceptual clarity and add only incrementally to our cumulative knowledge – the political salience, legitimacy and action-ability of such concepts much be negotiated anew in each setting, between different epistemic groups (professions) and across divides of gender, ideology and class. Such negotiation and deliberation is inherently a contested, dynamic process, likely to yield an idiosyncratic outcome that is a unique hybrid of local and external inputs.

*Further research:* empirical studies on the politics of what works in the context of political settlements and ROL are few and far between. Instead, studies tend to examine and compare types of intervention in narrowly delineated sectors. The studies that do exist mainly appear in the grey literature: in this review they have mainly come from DfID-funded research consortia and from the Justice for the Poor group at the World Bank. Within the non-grey literature, analyses tend to be macro-historical or legal-analytical. Studies from this literature that might provide an empirical basis for policy making or for future research are in the main Gauri and Brinks (2008) and the chapters within (including Berger 2008, Shankar and Mehta 2008 and Hoffman and Bentes 2008), Hilbink (2007), Holston (1991) and Holston (2008).

However, even when there is empirical research, it has tended to be a story of elite and/or elite-poor politics (for example, the works in Gauri and Brinks). There is a significant lack of understanding of how the ROL affects and is affected by the broadening of a political settlement to include the (urban) middle class. Furthermore, there is a lack of rigorous studies of primary justice interventions. Dale (2009) offers a thorough analysis of paralegal interventions in Sierra Leone, Maru (2010) offers a qualitative overview and assessment of the World Bank’s access to justice and legal empowerment efforts, and the International Growth Center will be carrying out a DfID-funded study of access to justice and legal empowerment in Liberia and Sierra Leone.<sup>17</sup> Yet rigorous studies – single country or cross-country – of the politics of primary interventions, such as mobile courts, are rare.

Finally, studies often tend to be very sectoral, in that they focus on specific organizations within the justice sector, such as the judiciary or courts, rather than conceiving of and

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<sup>17</sup> <http://www.theigc.org/article/law-without-lawyers-improving-access-justice-liberia-and-sierra-leone-governance-accountabil>

examining ROL – as we have attempted to do in this paper – as a structural variable in economic, social and political life (Gauri and Brinks (2008) are a notable exception, considering ROL as a variable in service delivery). As a result, clear lessons to be gleaned regarding the interaction between ROL and broader political forces are limited. This is reflected in practice: World Bank and GTZ analyses of the water sector in Yemen briefly discussed its legal and regulatory frameworks but did not delve deeper, avoiding how norms and political relationships might shape the implementation of these frameworks (Ward *et al* 2007).

One general recommendation is thus that ROL analyses be mainstreamed across the sectors that will constitute further research by ESID; this will surely generate valuable insights for policy makers and practitioners. For mainstream development issues such as growth and employment, the delivery of basic services, and land and natural resource governance, ROL is relevant both as a macro-level framing issue (the legal and regulatory framework) and as a micro-level means of allowing for contest, vindicating rights and entitlements and containing disputes (an approach that Heckman 2010 takes in his study of the welfare state). As a result, mainstreaming ROL into ESID studies that look at the broadening of political settlements to the urban middle class, or which might, as a component, take in primary justice services (for example, mobile courts as a component of local level service delivery) would contribute substantially to the existing literature.

Even on the basis of this preliminary evidence, however, some clear implications emerge for policy and practice. First, scholars and practitioners alike need to invest in richer data-gathering exercises, in empirical tasks that de-homogenize people based on conceptual as well as material differences; this will entail taking history and anthropology (especially of justice actors) seriously. Second, we need to invest more substantial (and substantive) resource in the monitoring and *real-time* evaluation of ROL interventions; there needs to be constant reassessment, clear articulation of goals, with space for practical innovation, combined with modesty about timelines, trajectories and a realistic appreciation of the value of pragmatism. Third, greater effort needs to be extended to invigorating communication programs or programs supporting construction of spaces for public engagement and discursive participation. This means not just indicating goals or imparting knowledge, but allowing groups (especially women, the poor and marginalized groups) to participate, contest meaning, understand benefits, and form coalitions; it means recognizing that ROL reform is inherently a site of contestation, for which enhancing access to it is not just a matter of the removal of factors that stop an individual from bringing a case (e.g., geography, cost, etc.), but removal of obstructions to effective and sustained participation (communication, education, awareness).

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