

## Policy Approach to Rule of Law

*What I call the building blocks of democracy (are) the independence of the judiciary and the rule of law, the rights of individuals, a free media, free association, a proper place in society for the army, strong political parties and a proper, rich civil society. These things together make up a golden thread that can be found woven through successful countries and sustainable economies all over the world (Prime Minister David Cameron, 2012)*

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## Executive summary

1. This paper examines how the UK Department for International Development (DFID) can build on its strengths and adopt a more coherent and ambitious approach to the rule of law.
2. The rule of law is the underlying framework that underpins open and fair societies and economies, where citizens, businesses and civil society can prosper. The rule of law advances five main ends: public authority is bound by and accountable before pre-existing, clear, and known laws; citizens are treated equally before the law; human rights are protected; citizens can access efficient & predictable dispute resolution mechanisms; and law and order are prevalent. The rule of law is inherently political. It is not just about the law; it is about the 'rules', the institutions that determine who has access to power, rights and resources.
3. The rule of law is valued in its own right but also for its association with growth and investment; peace and security; accountability and democracy; and equality and social justice. The evidence shows that institutions, including the rule of law, matter for development. However, the evidence is not able to indicate which institutions are likely to matter more given local context and circumstances. Evidence gaps include how the rule of law evolves and how it can be improved through external interventions.
4. There is an international consensus on the importance of rule of law to peace, security and prosperity. Multilateral and bilateral organisations have been reviewing their approaches, in particular to respond to the challenges faced by fragile and conflict-affected countries. Private foundations and international civil society organisations are important supporters of rule of law initiatives, especially on the demand side of justice.
5. A scoping study reviewing options to better match UK domestic rule of law interests and expertise with demands from partner countries concluded that the UK had a comparative advantage in assisting rule of law reforms. While there is already strong collaboration between DFID and other departments in fragile and conflict-affected countries, in particular through the Building Stability Overseas Strategy, DFID could make more of the 'shared space' between UK domestic, foreign policy and development interests.
6. Within DFID, the majority of explicit rule of law-related work is on security and justice, with commitments to scale up programmes. Governance and wealth creation programmes are relevant for a number of rule of law ends but are rarely developed with an explicit rule of law perspective. Constraints for DFID to deliver a more coherent and scaled up approach include: split policy responsibilities; limited in-house expertise; insufficient UK government policy fora or instruments; and the need for innovation in fragile countries as well as in middle income countries.
7. This paper proposes a new policy approach to help tie in together different elements of open economies and open societies. Instead of starting with specific institutions, the approach starts with clarity on the rule of law ends to be promoted. Interventions are most likely to either strengthen the enabling conditions for the rule of law or target specific issues. They should start with a rule of law diagnosis to address specific problems, focus on direct or indirect changes that benefit poor people, and be politically informed and context specific.

## 1. Introduction

8. 2013 is an important year for the international development community. The UN Secretary General's High Level Panel on the post-2015 development agenda has galvanised efforts to tackle not just the symptoms but also the causes of poverty. The rule of law is central to this vision. It is the underlying framework that enables open, fair and prosperous societies and economies, or what the Prime Minister refers to as the Golden Thread of development.
9. The UK has a long history of promoting the rule of law overseas. The UK Department for International Development (DFID) is known for its ground-breaking work on safety, security and access to justice,<sup>i</sup> including police and wider security sector reform which few other donors were willing to address. DFID is well respected for its work on peace, governance and wealth creation. Other government departments also see strengthening rule of law overseas as critical for delivering HMG interests including, for example, national security and prosperity. DFID is looking at how it can build on its strengths and adopt a more coherent and ambitious approach to the rule of law.
10. This framing policy paper:
  - a) proposes a definition of the rule of law which would improve policy coherence (Section 2 );
  - b) summarises the evidence (Section 3);
  - c) provides an overview of how DFID (section 4) and others have approached rule of law strengthening to date (Section 5); and
  - d) proposes a new policy approach (Section 6).
11. This paper was prepared by the DFID rule of law team and discussed at a meeting of DFID's Development Policy Committee in May 2013. If you have any suggestions, or would like to get involved, please contact Georgia Plank ([g-plank@dfid.gov.uk](mailto:g-plank@dfid.gov.uk)), DFID rule of law policy coordinator.

## 2. What is the rule of law?

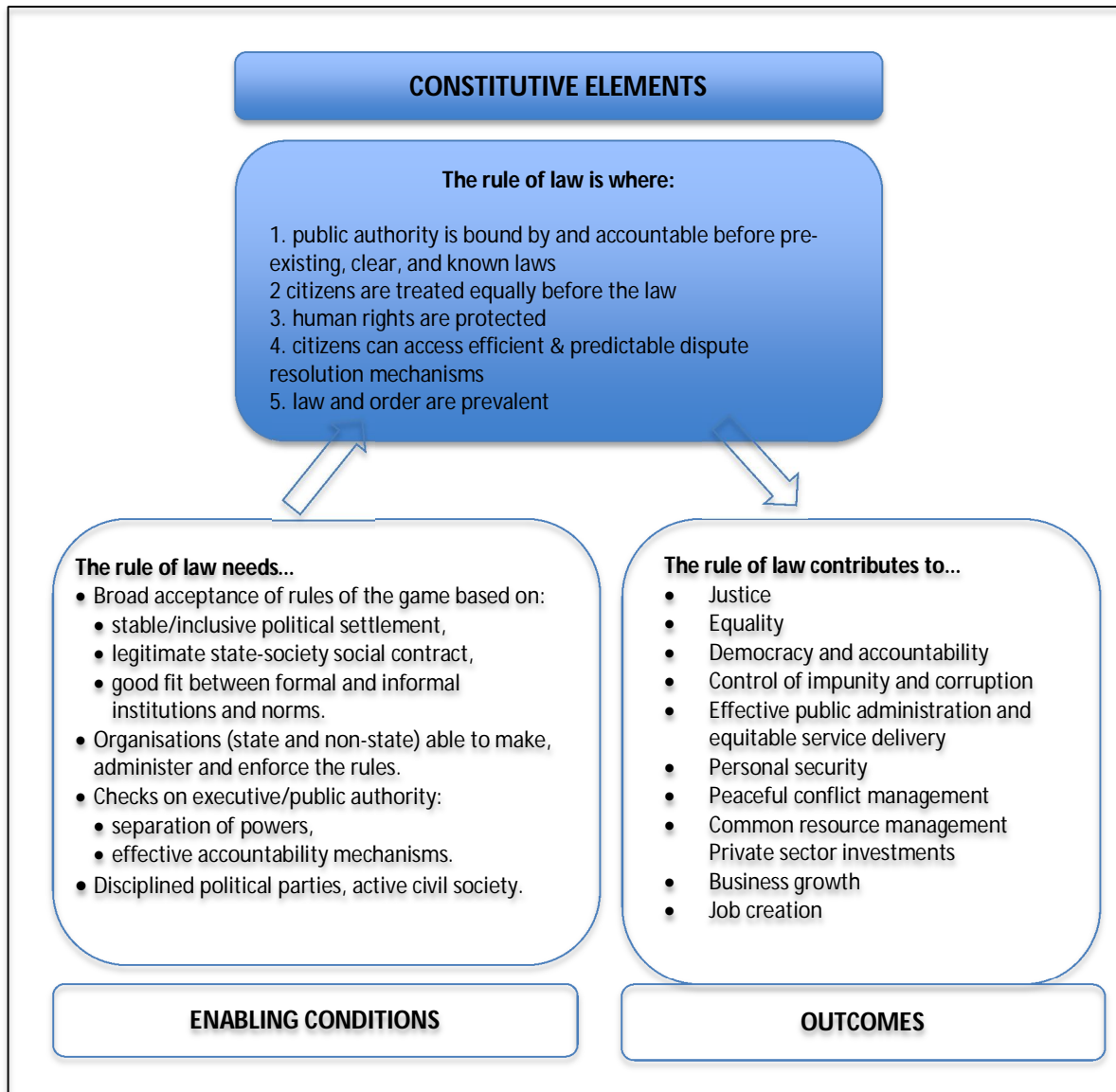
12. The rule of law can be narrowly described as a **system of predictable laws that govern people's behaviour**, regardless of their content or social objectives.<sup>ii</sup> For DFID/HMG, the rule of law also refers to **ends that a society values** and that are generally agreed to be desirable in a fair, open and democratic society. This is consistent with a growing international consensus (see Box 1). It is also consistent with the Prime Minister's more value-driven approach to development and his interest in institutions.
13. The rule of law advances **five main ends** (or its constitutive elements):
- public authority is bound by and accountable before pre-existing, clear, and known laws
  - citizens are treated equally before the law
  - human rights are protected
  - citizens can access efficient & predictable dispute resolution mechanisms
  - law and order are prevalent<sup>iii</sup>

### Box 1: United Nations' Definition of the Rule of Law

'The rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires as well measures to ensure adherence to the principles of supremacy of the 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. Justice is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Its administration involves both formal judicial and informal/customary/traditional mechanisms.'<sup>iv</sup>

14. The rule of law refers to **the legitimate exercise of power**, broadly consistent with social expectations and norms, and in particular the **rules that govern how public officials behave**, including elected officials, government bodies, and non-state governance structures (such as religious leaders or traditional chiefs).<sup>v</sup>
15. **The rule of law is also about the rules that govern how people behave in relation to authority and to each other.** The rule of law not only limits the behaviour of public officials, but also private organisations and citizens, for example when firms respect government regulations and the contracts they enter into. It requires that all citizens accept and abide by the law, whether these are formal rules (such as constitutions, written laws, regulations) or informal rules (such as unwritten customary laws).
16. The rule of law applies at the **international level**: for example international law provides a framework of rights regardless of where people live or who they are, and regulates transnational crimes (e.g. money laundering) which undermine development.
17. In order to understand how the rule of law evolves, and how it can be supported, it helps to separate what the rule of law is (**constitutive elements**), from what is needed to make the rule of law possible (its **enabling conditions**) and from what the rule of law contributes to (its **outcomes**) (see Diagram 1).

**Diagram 1: Rule of law: constitutive elements, enabling conditions and outcomes**



18. For the rule of law to endure, **people must obey the law both because there is a credible threat of enforcement and also because the law is seen to be legitimate and deserve their respect.** People must consider the content of laws and public policies, as well as the processes by which they are made, enforced and adjudicated, to be right and fair.<sup>vi</sup> This was absent under apartheid South Africa, where the government excluded the majority of the population from equal access to political and economic power. Corruption, in all its different forms, reflects a climate of impunity which can be stemmed through both effective *enforcement* of law through criminal justice systems and through broader actions to strengthen the *social drivers* for abiding by the law.

19. **The rule of law is inherently political. It is not just about the law; it is about the 'rules'**, the institutions that determine who has access to power, rights and resources. It is at the heart of open economies and open societies: the rule of law allows the state to function for its citizens and stimulates private sector development for rising prosperity. Where there is minimal rule of law, an elite can capture the nation's wealth, hoard power and control access to entitlements, with impunity for corruption, laws biased in their

favour and poorly or non-enforceable contracts. The opposite of the rule of law is the rule of man, where those with power are above the law and rely on repression, violence or plundering of national resources for their own benefits.

20. How does the rule of law evolve? Elites do not relinquish power or extend rights freely. **Progress towards greater respect for the rule of law results from contestation and bargaining between elite groups**, a central aspect of the process of state-building and peace-building, and the formation of more inclusive and stable political settlements.<sup>vii</sup> Change is a long-term, sometimes generational, process. Political transitions in 'Arab spring' countries are accompanied by a struggle for legitimacy between different forms of law (secular or sharia-inspired), reflecting different state-citizens social contracts.
21. As Diagram 1 shows, various social and political institutions and organisations provide the foundation or **enabling conditions for the rule of law**. For example, the rule of law requires a minimum degree of stability, where the elites agree to behave in a predictable manner and public organisations have some capacity to make and enforce rules.
22. **The rule of law is a constraint on the use and abuse of power, but it is also an enabling framework for society to achieve broader outcomes.** It allows individuals and organisations (e.g. businesses) to go about their daily life and to advance their own development and interest. It makes an important contribution to conflict prevention, enabling disputes to be resolved peacefully, and gender equality, tackling the discriminatory laws and practices that lock women out of equal opportunities.
23. **There is never a state of complete rule of law.** The rule of law comprises a set of different elements, each of which may be realised to a lesser or greater degrees (e.g. restraints on state power, respect for human rights, equality, law and order, or efficient and predictable justice). These elements may evolve at different rates and be in tension.
24. DFID is well known for its work to **remove the barriers** that prevent women and excluded group from accessing justice or enjoying security, (see Box 2).

**Box 2: Rule of law and non-state justice**

Informal or non-state institutions are particularly influential in people's lives in developing countries, t Traditional authorities resolve disputes, are the custodian of common resources, and keep track of births, deaths, residency and land transactions and collect land tax. They often provide quicker, cheaper and more culturally relevant remedies. However, their role can be in tension with other elements of the rule of law: They provide access to justice (a rule of law end) but can also perpetuate abuses, such as unequal treatment of women and minority groups (undermining equality, another rule of law end). They can reflect prevailing power relations and can also be discriminatory, corrupt and coercive. Subtle support can be positive when it expands access to dispute resolution mechanisms, but can do harm if it increases inequality or leads to violence. A case-by-case approach is needed.

In Malawi, DFID has been working with traditional systems of justice for over a decade. 80% of the population are poor and live in the rural areas, with limited access to the formal courts. DFID has been funding the Catholic Commission for Justice and Peace to improve the capability and responsiveness of rural traditional tribunals. Every traditional tribunal now has at least one trained women judge/assessor. Traditional tribunals are more accurately documenting their proceedings. This innovation has contributed to jurisprudence, introducing a system of precedents for how cases are determined. This is also steadily reducing the opportunity for corruption of traditional tribunal assessors. In parallel, the judiciary is training 60 lay magistrates, who have agreed to work in rural areas and fill existing vacancies, in order to improve the access to formal justice in rural courts.

### 3. Why is the rule of law important for poverty reduction?

25. There is an **intrinsic relationship between the rule of law and poverty reduction**. The World Bank's Voices of the Poor studies show that poor people view poverty as being subjected to 'corrupt, callous and uncaring' state power. Poverty is not only a lack of food, basic services, jobs and assets, but also a lack of dignity, voice, power, justice and security. This dimension of poverty cannot be reduced without checks on the use of public authority, law and order, protection of human rights and adequate redress.<sup>viii</sup>
26. There are also **important instrumental linkages between the rule of law, growth and poverty reduction**. The examples below indicate some of the pathways through which different rule of law ends are known to be associated with poverty reduction.
- a) **Growth and investment:** There is an important association between the performance of legal institutions and economic growth. The quality of laws and legal institutions has an influence on economic performance. DFID's own assessment of the literature is that this link is generally persuasive. The literature is rich, and considers the impact of open, competitive and predictable political and economic institutions on the establishment of an environment conducive to investment and economic growth. However, the extensive body of literature focused on rule of law-type institutions and their impact on income, growth and investment<sup>ix</sup> is inconsistent. The array of specific rule of law-related institutions (which spans constitutional arrangements, judicial powers, contract enforcement, business regulation, property and land rights) is very considerable, and the impacts of each on economic dynamics are highly complex, and hard to capture unambiguously. For example, the body of evidence which looks at the relationship between the judicial environment and economic growth is fairly inconclusive, although judicial independence has been found to be robustly linked to growth. There is substantial evidence which links the security of property rights to increased investments, while the evidence supporting the link between secure property rights and access to credit is inconclusive.
- b) **Conflict and security:** Economic growth is a necessary (though not sufficient) condition for poverty reduction,<sup>x</sup> and armed conflict has a known negative impact on economic growth.<sup>xi</sup> As such, the establishment of peace, and law and order, are evidently associated with poverty reduction. War and civil conflict are also obstacles to human development. For example, the rates of poverty, maternal mortality, malnutrition and children out of school are significantly higher in countries that have experienced armed violence.<sup>xii</sup> No conflict-affected country has achieved any of the Millennium Development Goals.<sup>xiii</sup> Other forms of violence and crime also impede economic development because they deter investment and undermine business competitiveness and job creation.<sup>xiv</sup> For example, in Colombia, women who experience severe domestic violence earn on average 70% less in monthly incomes than those who do not, implying a loss in productivity equivalent to 2.43% of GDP annually.<sup>xv</sup> The 2011 World Development Report showed that countries with weak government effectiveness, control of corruption and rule of law have a 30-40% higher risk of civil war and a significantly higher risk of extreme violence than other developing countries. Failure to prevent and combat domestic terrorism can hamper growth. For example, a doubling of terrorist incidents is estimated to reduce bilateral trade with each trading partner by 4%.<sup>xvi</sup>
- c) **Accountability and democracy:** Meaningful democracy is contingent upon the rule of law: government that accepts being bound by the law, and that treats its citizens equally and respects their civil and political rights. There is a strong correlation

between open and competitive political systems and economic growth. While the direction of causality between political and economic development remains unclear, democracies are wealthier, and in the long term, democracy is required for the sustenance of economic growth.<sup>xvii</sup> In addition, a comparatively strong body of evidence demonstrates that particular configurations of state authority, civil society, the media and social accountability mechanisms can improve local service delivery: states held to account before the law tend to become more effective.<sup>xviii</sup>

**d) Equality and social justice:** Gender equality is positively linked with both high growth and better human development outcomes.<sup>xx</sup> Conversely, violence against women and girls, which is rooted in gender inequality, is strongly linked to broad negative health outcomes including maternal and child mortality and morbidity, and greater risk of HIV and AIDS. Girls who experience violence are less likely to complete their education and it reduces women's ability to earn a living. Discriminatory laws and regulations can also lock women out of business, denying them property rights and reinforcing discrimination through labour and family laws.<sup>xx</sup> Inequality between groups is associated with civil conflict.<sup>xxi</sup> The literature suggests various links between the rule of law and human rights, including that a framework protecting civil and political rights promotes the achievement of economic and social rights.<sup>xxii</sup>

27. In sum, the **evidence shows that institutions, including the rule of law, matter for development. However, the evidence is not able to indicate which institutions are likely to matter more given local context and circumstances.** The research shows that sets of formal and informal institutions, rather than single institutions,<sup>xxiii</sup> are important and that the functionality of an institution matters more than its form.<sup>xxiv</sup> This means, as experience bears out, that there are different possible rule of law related pathways to economic development and poverty reduction.<sup>xxv</sup> Above all, the evidence demonstrates that whilst each of the families of rule of law reforms *may* bring developmental benefits, they must be tailored to local context, and must follow a 'problem solving' or 'diagnostics'-oriented approach if they are to facilitate growth and investment.
28. **More research is needed to better understand how the rule of law develops and how it relates to development outcomes.** The evidence base needed to identify which elements of the rule of law are important for which outcomes and under what conditions is either lacking or inconclusive. There is a comparatively limited body of evidence exploring how the rule of law emerges and is consolidated. While there are single country case studies, not enough effort has been devoted to generating rigorous and comparative data about the rule of law (both through research and evaluation).
29. There is also limited evidence on how the **rule of law can be improved through concerted domestic and/or international intervention.** Given the fundamentally political nature of change, which will result from contestation and bargaining, we need to understand better how external funding, expertise and political support can assist.



#### 4. How are international partners supporting the rule of law?

30. The high-level meeting and resolution of the United Nations General Assembly in 2012 reflects **international consensus on the importance of rule of law to peace, security and prosperity**.<sup>xxvi</sup> The High Level Panel on the Post-2015 Development Agenda has proposed goals and targets reflecting the importance of the rule of law for peace, and effective, open and accountable institutions.<sup>xxvii</sup> The New Deal for Fragile States includes inclusive politics, security and justice in its Peacebuilding and Statebuilding Goals.
31. With a few exceptions, the rule of law has not been an explicit and discrete area of development assistance.<sup>xxviii</sup> Instead, **donors have promoted the rule of law by:**
- a. emphasising it as a **high level justification** for their governance objectives, such as the Millennium Declaration; and
  - b. supporting a **specific part of the rule of law agenda**, most often justice and/or security sector reform, or human rights within their democratic governance portfolio, but also commercial law within economic development, and equality within women's empowerment work; or
  - c. working on the rule of law as an **implicit crosscutting issue**, often with a focus on the reform of laws and regulations (e.g. regulatory frameworks for businesses).
32. As a result, there is no tracking of donor funding using a broad definition of the rule of law. Over the past decade there has been a **substantial increase in official development assistance to the legal and judicial development sector** (from \$175m. in 2002 to \$3,232m. in 2011) **and the security sector** (from \$54m. in 2004 to \$973m. in 2011). In 2011, the largest bilateral or multilateral funder of legal and judicial development assistance was the United States (\$1849m.). The UK was 8<sup>th</sup> (\$39m.) In the same year, the UK was the largest bilateral or multilateral funder of security sector reform (\$102m.) with the US second (\$81m.).<sup>xxix</sup>
33. **The majority of rule of law assistance has been focused on the reform of the institutions** thought to be important to the rule of law system, in particular laws, the judiciary and law enforcement agencies. This approach has been criticised for being overly technocratic and insufficiently attuned to the linkages between different rule of law institutions and the broader political, economic and social system within which they are embedded.<sup>xxx</sup>
34. Such shortcomings, and the consequent disappointing results from decades of legal and judicial reform,<sup>xxxi</sup> have spurred **calls for a 'second-generation' of rule of law reforms**.<sup>xxxii</sup> This need for more problem-focused and politically attuned approaches – in short for more flexible and creative programming – is widely agreed to be particularly acute if the development community is to respond to the challenge of peace- and state-building in fragile and conflict-affected countries.<sup>xxxiii</sup>
35. **Changes are already underway** – and, in some areas, have been for some time. Some donors, such as DFID, Sida and UNDP, have championed a poverty, people-centred and/or human rights perspective in their justice and security assistance. This has led to **'bottom-up' programmes that promote the safety, security and access to justice,**

legal empowerment and equality of poor and marginalised groups – often by working with and through civil society organisations and other non-state actors, including informal justice and security mechanisms. The World Bank and European Bank for Reconstruction and Development are championing demand-led reforms on commercial law and justice, by developing strong problems assessment tools.

**Box 3: Scaling up access to justice in Bangladesh**

In Bangladesh, DFID has been able to move from pilot projects to significantly scale up its ambition to improve access to justice. It aims to provide access to community legal services (e.g. alternative dispute resolution, legal aid, legal awareness) to 10 million poor and vulnerable people, including 3 million women and girls by March 2015.

36. Security has gained in importance over the past decade as greater attention is paid to conflict and fragility. A **‘security system reform’ approach** recognises that improvements will not result from technical assistance alone, but also depend upon changes in the governance of the security sector and working with non-state providers.<sup>xxxiv</sup>

**Box 4: Security sector accountability and institutional reform in DRC**

DFID is supporting the establishment of a more capable and accountable state in the Democratic Republic of the Congo (DRC), delivering greater safety and security to its citizens. DFID is collaborating with Stabilisation Unit to develop a theory of change on which to base the programme, with a long term approach – aiming for significant changes within 20 years, not just 5 years, and combining political skills with technical expertise. The programme has adopted an integrated approach, combining community policing and institutional reform with partnerships to improve accountability at all levels – with national and provincial assemblies, civil society organisations, media and with communities themselves. It is starting to have positive impacts. For example, in the Matadi commune, the community was able to raise concerns about drugs and criminality amongst youth in a Forum de Quartier. The local authorities responded immediately by initiating livelihood programmes for the youth.

37. More recently, **several agencies have refined their thinking and approach to the rule of law and the justice sector.**
- a. Out of the intensive work within the **UN** has come a system-wide commitment to, and definition of, the rule of law (see Box 1). This is reflected in new mechanisms for promoting coherence on the rule of law (Rule of Law Global Focal Point).<sup>xxxv</sup>
  - b. The **World Bank’s** new justice strategy advocates a problem-solving and empirically based approach that is ‘anchored in the end needs of users’ and which ‘focuses on the actual realisations and accomplishments rather than the establishment of what are identified in advance as the “right” institutions and rules’.<sup>xxxvi</sup>
  - c. The new **UNDP** governance strategy in conflict and fragile states ‘calls for a flexible approach that are tailored to local context, embrace informed opportunism and balance short and long-term expectations’.<sup>xxxvii</sup>

- d. A recent evaluation of **EU** support to justice and security sector reform recommended a more strategic and political approach, with a focus on service delivery rather than institutional capacities.<sup>xxxviii</sup>
- e. **AusAID** has recently undertaken a thematic evaluation of its law and justice assistance. Key recommendations include the need to adopt more modest, specific and locally relevant goals, and to avoid the promotion of idealised institutional forms and standardised packages of support.<sup>xxxix</sup>
- f. Within the OECD DAC, the **International Network on Conflict and Fragility** is developing a guidance note on how to improve security and justice programmes in situations of fragility, in particular national ownership and political engagement.

38. **Private foundations and international civil society organisations** are important supporters of rule of law initiatives, especially of national civil society organisations focusing on the demand side of justice, including:

- Service delivery and pilot projects, often through support to legal aid / legal empowerment organisations working with community based paralegals. Projects are often designed to demonstrate what works, in collaboration with government institutions (for example the prison service).
- Support to research, monitoring and advocacy organisations for example to contribute to national strategy processes, participate in justice sector coordination meetings, advocate law reform, or monitor the implementation of government programmes.
- Support to organisations to utilize the regional and international human rights bodies to challenge rights violations and bring about reforms – either through strategic litigation / individual cases to international or regional instruments or through advocacy for the regional bodies to adopt new legal standards.

39. **The benefit of non-governmental funding** is the ability to invest in new or established local organisations that may not be able to access official development assistance (ODA). This includes politically sensitive work, such as public interest litigation or advocating for the protection of human rights. Challenges include scaling up projects and institutionalization – even where results and impact have clearly been demonstrated.

**Box 5: How are international foundations supporting the rule of law?**

The **Open Society Foundations** treats law as a specific entry point to resolving wider development problems. It supports legal empowerment, criminal justice, international justice, strategic litigation before international fora, anti-corruption, freedom of information and citizenship. **Omidyar** focuses on government openness, individual empowerment, and invests in technology, property rights and social enterprises. **Ford** focuses on criminal and civil justice. **Oak** focuses on liberty and security, impunity, and human rights defenders. **MacArthur** focuses on implementation of international decisions, transitional justice and criminal justice. **Sigrid Rausing** focuses on human rights.

DFID, in partnership with the Open Society Foundations, has established the Global Legal Empowerment Initiative, and a spin-off organisation, Namati, to strengthen approaches to legal empowerment and gather evidence. A global network, with 1000 members, and a High level Advisory Council, including Amartya Sen, is promoting legal empowerment as a key approach to advance the rule of law, including advocating its inclusion in the post 2015 framework.

## 5. How are HMG and DFID supporting the rule of law?

### *A UK and HMG comparative advantage*

40. A scoping study has reviewed options to better match UK domestic rule of law interests and expertise with demands from partner countries.<sup>xi</sup> It concludes that the UK has a clear comparative advantage in assisting rule of law reforms, with a strong reputation in public sector bodies (e.g. judiciary, law enforcement agencies), the private sector (law firms and professional bodies) and as a development actor. The UK shares institutions and legal traditions with Commonwealth countries who often seek UK expertise. English law is a common choice of law in international contracts. International commercial disputes are brought to the City of London which is seen as a centre of excellence. The UK also has a world renowned legal services market, which generated £20.9 billion in 2011, of which £4 billion were through exports. DFID has a well-established track record, and other donors look to us to set forward looking policies.

41. **There is already strong collaboration between DFID and other government departments in fragile and conflict-affected countries.** Rule of law is a core part of our approach to conflict prevention and building stability overseas. Across HMG, a number of departments are supporting the rule of law from a wide spectrum of agendas: from political, human rights, justice, security to stabilisation and defence. The Foreign and Commonwealth Office's (FCO) Human Rights and Democracy Programme supports work to prevent torture, abolish the death penalty, uphold freedom of expression and of belief, prevent discrimination against women and support human rights in the business context. As part of its work to counter terrorism, the FCO is seeking justice and human rights partnerships with countries where there is both a threat to domestic UK security, and weaknesses in the law enforcement, human rights and criminal justice system.

#### **Box 6: Cross HMG support for security sector reform in Sierra Leone**

DFID, FCO and Ministry of Defence have worked together to support Sierra Leone's security sector since the end of the civil war in the late 1990s. Partners include the Office for National Security, Ministry of Defence, Sierra Leone Police, and civil society. As a result of Conflict Pool and DFID support, the armed forces have been professionalised and downsized, and the police have greater capacity to meet the needs of citizens, including women and children. The improved performance of the security sector is seen as having provided the conditions for peace and stability. The 2007 elections saw the first peaceful transfer of power in the country for decades.

42. The Building Stability Overseas Strategy (BSOS) guides cross-government work and highlights security and justice as key pillars for conflict prevention and stabilisation. The National Security Council (NSC) provides an important mechanism to further align rule of law priorities and develop joint country strategies across government, such as in NSC priority countries. Cross-government funding mechanisms and capacities with a particular focus on fragile and conflict-affected countries include the tri-departmental Conflict Pool and Stabilisation Unit (SU). The Conflict Pool has specific funding windows to support rule of law. Its ability to mobilise both ODA and non-ODA enables it to support integrated approaches to justice and security sector reform. For example stabilisation efforts in Libya started with a police reform programme and has since broadened into a more comprehensive security, justice and defence programme.

**Box 7: Cross HMG support for justice reform in the Occupied Palestinian Territories**

In the Occupied Palestinian Territories, a HMG project has been supporting a more effective criminal justice system in which the Palestinian public will have increased confidence through the institutional development of the Palestinian Ministry of Justice (strengthening its human capacity, transforming its systems and ways of working). The project represents a collaborative effort. It is funded by the UK Government's Arab Partnership Programme Fund, led by the Foreign and Commonwealth Office, and managed through the Consulate in Jerusalem. A DFID Conflict Adviser provides policy and coordination advice. It is implemented by Social Pioneers, a social development agency, and is supported by the UK Ministry of Justice and the EU Police and Rule of Law Support Mission in Ramallah (with the direct involvement of a seconded British expert funded through the Conflict Pool).

43. UK domestic departments (e.g. Home Office, Ministry of Justice) engage in overseas rule of law work to meet a range of objectives. Some are UK domestic objectives, such as human rights compliant prison facilities to meet the preconditions for the transfer of foreign national prisoners. There is a 'shared space' between UK domestic, foreign policy and development interests, which spans a range of issues, from human rights to money laundering. However, **beyond the structures described above for conflict prevention and overseas stability, mechanisms to clarify and respond to this shared UK community of interest are sorely lacking.** The Justice Assistance Network is a working level, voluntary information sharing body. The pro-bono community is poorly integrated in HMG discussions. Domestic departments would like to be considered as 'partners' and not 'suppliers of expertise'. All are looking for a single, stable point of contact on rule of law within DFID to overcome misunderstandings and ensure greater consistency.

*DFID*

44. Within DFID, the majority of explicit rule of law-related work is on **security and justice.** DFID's current security and justice policy was developed in 2000 to be more responsive to the needs of the poor. It has been refined over time. For example the 2009 White Paper considered security and justice as basic services and the 2011 UK Building Stability Overseas Strategy reflected the importance of this agenda in fragile and conflict-affected countries. The 2010 Bilateral Aid Review led to new commitments to scale up security and justice programmes in 12 fragile and conflict-affected countries, and give 10m women and girls improved access to justice and security.

45. At present, DFID is funding **25 bilateral security and justice programmes in 16 countries, with half in fragile states.** DFID spent a total of £45 million in 2011-12 (£18 million on legal and judicial reform and £27 million on security system management and reform). DFID currently takes a sector-wide approach which looks at crucial linkages between different components of a security and justice system, both formal and informal, and which assesses problems from a user's perspective, particularly poor and vulnerable groups. We have developed a focus in certain areas within the sector, where we have a comparative advantage over other donors and where demand and the potential impact has been greatest. These areas include police reform (improving the police's effectiveness and performance in order to enhance the quality of security service provision), community security, access to justice (formal courts, alternative dispute resolution, and legal empowerment) and institutional effectiveness and accountability. Building accountable and effective security and justice systems is also one of the ways in which DFID contributes towards tackling violent extremism.

46. Addressing **Violence Against Women and Girls** is a new area of focus, with direct programmes in **20 Country Offices**. Activities to complement response services are being scaled up (e.g. dedicated police units, specialist prosecutors and judges, access to justice and victim support centres) with integrated prevention strategies and new research to deliver sustainable reductions in prevalence rates (such as community awareness and education programmes, working with men and boys, women's empowerment programmes etc). These programmes address the gender inequalities of power through support for changing social norms, attitudes and behaviours. DFID is also working closely with the FCO to implement the Foreign Secretary's Preventing Sexual Violence Initiative which aims to work through the G8 to address the culture of impunity for sexual violence in conflict, to increase the number of related successful prosecutions and to help other nations build stronger national capabilities.

**Box 8: Tackling violence against women and girls**

Persistently high levels of violence against women and girls are a manifestation of weak rule of law. In Nepal, DFID has been working with the government to set up community committees that encourage women and other marginalised people to report gender-based violence, and provide help for victims. The initiative is now being integrated into a nation-wide government programme. Since 2010, the number of committees has more than doubled (from 462 to 1027). They have recorded 18,704 cases, 85% of which were addressed at the local level and 15% were referred to the district-level authorities for further action. In a recent survey, 73% of respondents stated there was less violence against women since the committees were established.

DFID funds UNICEF to run a child protection project in Malawi, including victim support units, child justice courts and one-stop-centres assisting child victims of rape. These centres, located within major hospitals, provide police, medical and social welfare services under one roof. In the future they will also provide legal services. Between 2008 and 2011, 300 Community Victim Support Units were set up to provide mediation and referral services for victims of violence, exploitation and abuse, handling 15,510 cases. In 2010 alone, 30,000 women and children accessed child-friendly and gender-sensitive police services through the 101 Police Victim Support Units.

47. Security and justice is part of the broader **DFID pillar on Governance and Security**. Between 2010 and 2014, DFID plans to allocate £2.44bn – or 16% – of bilateral programme spend to this pillar. Every DFID country office has committed to delivering results on governance, with most offices supporting a range of discrete and cross-cutting interventions. This includes public sector reform at national and local levels; public financial management, including taxation; political systems, including elections and parliaments; empowerment and accountability, including human rights; and anti-corruption. Since 2010, there has been a new emphasis on empowerment and accountability, and a strengthened approach to anti-corruption, tax and human rights.

48. These governance programmes are relevant for a number of rule of law elements (especially accountable governance and human rights) and sometimes work with justice and security sector institutions (e.g. anti-corruption law enforcement). However, within DFID they are rarely developed with an explicit rule of law perspective, or linked to security and justice programmes. There is a disconnect between a bottom-up, people centred approach, and a relative lack of attention to elite capture of the rule of law through control over institutions (e.g. constitution, judiciaries, police, or economic governance rules). We rarely consider support to non-executive branches together, in their role as checks and balances (judiciaries, parliaments, accountability bodies).

**Box 9: Supporting elections in Pakistan**

DFID has supported electoral processes in Pakistan for over ten years, most recently through two programmes: Supporting Transparency, Accountability and Electoral Processes, which works with citizens, and Supporting Electoral Reforms in Pakistan, building the capacity of the Election Commission of Pakistan. These complementary approaches avoid any disconnect between a bottom up, people-centred approach and institutional technical assistance.

DFID's support has helped to ensure: i) a legal framework for federal elections that meets international standards and Pakistan's international obligations; ii) increased institutional capacity of the Electoral Commission to manage elections and conduct electoral operations; iii) increased citizen understanding of the electoral/voting process, with a particular focus on women; and iv) a domestic observation to increase transparency, scrutiny and credibility of electoral processes. In the 2013 elections, overall voter turnout increased to 55% (47 million voters), from 44% in 2008 (35 million voters), with an estimated turnout of 40% for female voters. An evaluation will address the extent to which DFID funding contributed towards these results.

49. DFID has a large **wealth creation** portfolio but does not have a tradition of rule of law programming that target growth objectives or growth programmes developed with an explicit focus on rule of law ends. For example, there are only a few justice reform and disputes resolution programmes focussed on commercial issues. DFID has a significant investment climate portfolio (approximately £620m across 25 countries) focused on improving the regulatory and especially administrative environment in which businesses operate. Programme results are generally articulated in terms of cost and time savings to businesses and new business activity. The possible contribution to the rule of law is not necessarily made explicit. Since 2010, new commitments have been made to develop a new commercial law and justice programme to support DFID's wealth creation work; and to support the delivery of existing and new property rights programmes. 'Good stewardship' of natural resources for economic development is a priority under the 2013 UK G8 Presidency, addressing how wealth generation from natural resources such as extractives and land is managed.

**Box 10: How DFID's wealth creation programmes contribute to the rule of law**

In the **DRC**, we are working with the Government to implement a treaty which modernises and harmonises commercial, accountancy, audit and arbitration laws and institutions across 17 Francophone African countries (Organisation for the Harmonisation of Business Law in Africa treaty).

In **Pakistan**, through the IFC (International Finance Corporation), a mediation centre annexed to the Lahore High Court has been established. To date training manuals have been produced and 48 judges have been trained in mediation techniques, resulting in over 200 cases being processed through the centre.

In **Sierra Leone**, through the ICF, the establishment of a Fast Track Commercial Court and introduction of alternative disputes resolution methods has halved the backlog of commercial court cases, and reduced the time it takes from filing a case to judgment from 6 years to just two months.

50. There are a number of constraints for DFID to deliver a more coherent and scaled up approach:

- a) In terms of **coherence**, policy work is split between two divisions, and different professional cadres have expertise on different parts of the agenda (e.g. private sector development advisers on investment climate, conflict advisers on transitional justice). A

decision was made in April 2012 not to alter structures. A new virtual rule of law policy team is improving collaboration and coherence - in spite of the current structure, rather than because of it.

- b) In terms of **technical expertise**, few DFID advisers have a track record on the whole or even on parts of the rule of law agenda – legal expertise is in particular thin, especially when applied to growth and investments objectives (e.g. commercial law). The governance cadre includes a dozen trained lawyers, but few are using their legal skills. DFID needs to leverage better technical legal expertise that we can never retain in-house. Consultation with country offices showed there was demand for expertise on a broad range of issues from commercial courts, better case management, to addressing police impunity and combatting corruption and that a centrally funded mechanism to bring this together would be welcomed. Consultation with the pro bono community showed the high demand for their services overseas, in particular by civil society organisations.<sup>xii</sup>
- c) Successful interventions require joined up HMG work. While DFID is working increasingly closely with FCO and MOD, and SU is a source of considerable lessons and expertise for fragile states, links to UK domestic departments are weaker. Other government departments can struggle to work with DFID: we do not offer clear a point of contact with a coherent policy that stretches from anti-corruption law enforcement to legal empowerment. Our interest in HMG partnerships can differ widely across countries and policy areas. There is no **HMG policy forum** or **HMG instrument** to deliver large scale results (beyond SU and the Conflict Pool for fragile states). A new instrument to access UK legal and judicial expertise would help meet the demand identified by the scoping exercise, allow DFID to expand into commercial / international contracts where in-house expertise is weak.
- d) HMG rule of law objectives may also require **new instruments for fragile or conflict-affected states** so our assistance can be more appropriate, flexible and rapidly accessible, in particular in stabilisation environments. Different instruments may also be beneficial for **middle income countries** who may want to access the best of UK expertise, rather than financial assistance.



## 6. A renewed approach to the rule of law

### *Cross-Whitehall policy coherence*

51. The scoping study on improving UK response to partner countries recommends a deeper cross-government conversation to clarify the community of HMG interests, with a shared understanding of the problems and an agreement on how we intend to work in it together, including with the non-governmental pro bono legal sector.
52. DFID is planning to sponsor a new instrument to match UK legal and judicial expertise – both private and public sector – with demand in developing countries. This facility presents an opportunity for the UK community of interest outlined previously to develop a common understanding of and work together within a ‘shared space’ on rule of law. By drawing on the respective strengths of DFID/HMG and the international pro bono community, a central mechanism will deliver more strategic, systemic and sustainable law and justice interventions overseas, thereby strengthening the offer of external legal and judicial support.

### *Adopting a rule of law lens*

53. At a policy level, a focus on the rule of law would help tie in together different elements of the Golden Thread of open economies and open societies. An **explicit rule of law lens** would direct attention to the five constitutive elements or ends of the rule of law and the political, economic and social institutions that are needed to advance these (see Diagram 1). This approach would emphasise the inter-relationship between different types of institutions and the importance of making linkages between different areas of work in order to promote the rule of law.
54. Applying the lens to programmes and policy dialogue, key proposed elements of a policy approach would be:
  - a) DFID should adopt an **ends-based approach**, being clear on the rule of law ends to be supported, and identifying specific objectives where external support is warranted. This will contrast with approaches which start with institutions to be reformed, and would explicitly address how power is distributed and managed in societies. Choices will have to be made: not all rule of law ends can be promoted together, particularly in countries that are undergoing political and economic transition and where institutions are in flux.<sup>xiii</sup>
  - b) **Problem-solving:** This means starting with a comprehensive understanding of the situation but being highly selective within this, identifying realistic and intermediate objectives around particular rule-of-law ends, based on a plausible theory of change. A 2006 review of DFID’s Safety, Security and Access to Justice programmes found that multi-million pound, multi-institutional programmes had been vulnerable to re-design, budget cuts and disengagement.<sup>xiiii</sup> DFID should direct its resources at issues that are a priority for DFID and its partners, where external support is feasible and warranted and where DFID resources are likely have most impact.
  - c) **People-centred:** DFID rule of law objectives should focus on those changes that are most important for poverty reduction. This will include programmes that will have the

most direct benefit for poor people, in particular women and children. For example, more women officers in police stations has been shown to result in a higher rate of citizens reporting sexual violence. This does not mean moving away from programmes which deliver results indirectly, by improving the institutions and social norms that enable poverty reduction. For example, programmes which reduce business uncertainty, by reducing the scope for deals-based application of the law, create incentives for firms to plan for the long-term, expand operations and hire new workers. This creates jobs and raises incomes.

- d) **Politically informed:** Political and social changes, not just technical security sector or legal reforms, are needed to advance rule of law objectives. To be effective, rule of law programmes must be grounded in a sound understanding of the political economy of a specific country or community. This type of analysis helps to identify realistic objectives and the types of activities that might support progress towards them. HMG support also requires staff with political skills.
- e) **Context-specific:** Obstacles and opportunities to advancing specific rule of law ends are located within specific political regimes, socio-economic environment and the presence, strengths and weakness of actors, organisations and institutions. For example, public interest litigation is only a credible option where the judiciary has some degree of independence.<sup>xiv</sup> DFID's choice of objectives and instruments will therefore be guided by country context and chosen according to which ends are most relevant. Annex 1 offers illustrations. Objectives will be different in fragile, stable or middle-income countries. For example, transitional justice may become an issue in fragile states or following political transitions, whereas commercial justice may be a priority in more stable environments. We need instruments that can work in these different contexts.

*What could a rule of law diagnostic look like?*

55. The new country context analysis tool currently being developed by DFID will be very high level. It may lead country offices to decide to adopt a rule of law lens to look at their portfolio or when designing interventions. This lens could be used to undertake country diagnostics where useful.

56. . Diagram 2 offers a starting point. Steps would include:

- Analysis (e.g. political economy analysis)
- Identify rule of law end or ends the UK and partners would like to promote together
- Identification of main problem or obstacle to realising those ends
- Prioritise changes needed to address (e.g. changes in enabling conditions)
- Identification of entry points (taking into account the broader approach and linkages)

57. **There are two main types of entry points for external actors to support rule of law improvements** (see Diagram 2).

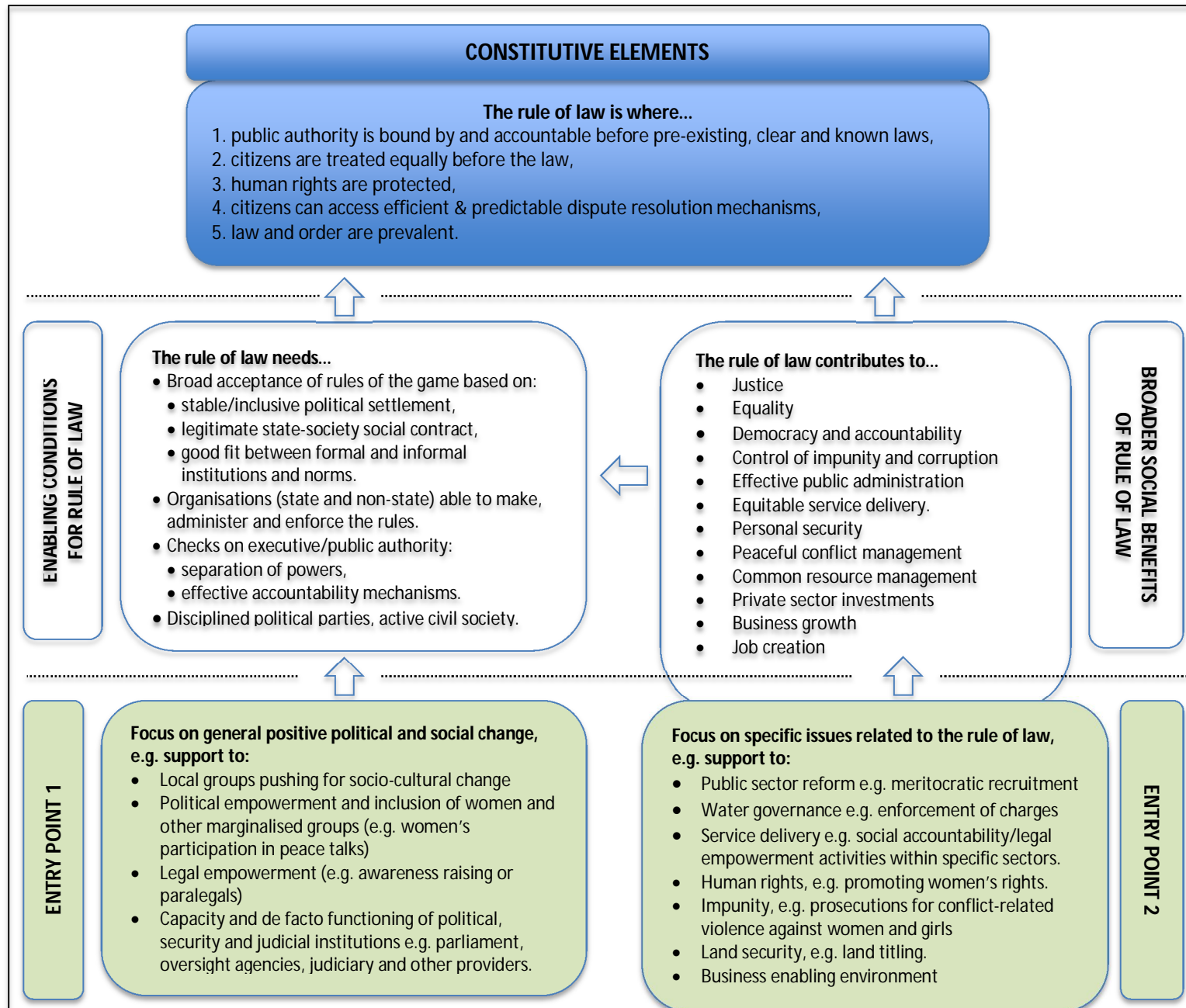
- a) **Support positive changes in the enabling conditions of the rule of law:** These programmes promote political, social and organisational changes that are required for improved rule of law. These activities may be justice and security programmes, such as legal reform, capacity development for the judiciary and other justice providers, and legal empowerment. But they are just as likely to involve other political governance, gender

and human rights programmes that seek to influence power and accountability relations and social norms and expectations, such as parliamentary development, political party assistance or anti-corruption measures or programmes to promote gender equality and combat violence against women and girls.

- b) **Indirect or issue-based support to the rule of law:** These programmes often do not have the rule of law as a primary or explicit objective but nevertheless further the rule of law in important ways. For example, public sector reform programmes may increase meritocratic recruitment or the accountability of public administration or water programmes may involve measures to improve enforcement of water charges. Sector and commercial programmes may use legal strategies and tools to further their objectives, such as equitable access to basic services or enforcement of water charges, or reforms of business regulations.

58. However, within these two entry points, there are a number of other possibilities. The precise nature of the entry point and intervention will depend on the end, objective and context in question.

Diagram 2: Possible entry points for rule of law promotion



## Annex 1: Country contexts and rule of law: examples of features, priorities and illustrative a

Country type	Post-conflict		Fragile / conflict-vulnerable	Stable / dominant party	
	Weak settlement	Promising settlement		Developmental	Stag dec
<b>Example</b>	Iraq	Liberia	DRC	Ethiopia	Ug
<b>Key features/ conditions influencing rule of law reform</b>	<ul style="list-style-type: none"> <li>- Fluid rules, players</li> <li>- Low state capacity</li> <li>- Low trust in state</li> <li>- Non-state actors prevalent</li> <li>- Multiple external actors present, military prominent</li> <li>- Geopolitics primary</li> <li>- External influence high, but traction low (high risk)</li> </ul>	<ul style="list-style-type: none"> <li>- New rules/political settlement</li> <li>- New government with vision and broad legitimacy</li> <li>- Low state capacity</li> <li>- Non-state actors prevalent</li> <li>- Multiple external actors, present, military prominent</li> <li>- Geopolitics primary</li> <li>- Aid dependent</li> <li>- External influence high, good traction (less risky)</li> </ul>	<ul style="list-style-type: none"> <li>- Multiple domestic political players</li> <li>- Political power / control of violence dispersed, settlement uncertain</li> <li>- Rule of game unpredictable</li> <li>- Low state capacity, authority, legitimacy</li> <li>- Low trust in state</li> <li>- Non-state actors prevalent</li> <li>- Geopolitics primary</li> <li>- Aid dependent</li> <li>- External influence low, traction low (v. high risk)</li> </ul>	<ul style="list-style-type: none"> <li>- Stable political settlement</li> <li>- Rule by law, inclusive (elite) politics, party discipline &amp; oversight.</li> <li>- High state authority and capability</li> <li>- Centralised corruption/rent-seeking</li> <li>- Effective public administration</li> <li>- Weak opposition, compromised judiciary</li> <li>- Weak civil society</li> <li>- Low external influence but potential demand for support (low risk)</li> </ul>	<ul style="list-style-type: none"> <li>- Stable politi</li> <li>- Patronage,</li> <li>- President p</li> <li>- Strong stat</li> <li>- service deli</li> <li>- Endemic co</li> <li>- compliance</li> <li>- Weak oppo</li> <li>- Relatively i</li> <li>- judiciary (st</li> <li>- political int</li> <li>- Service del</li> <li>- operate fre</li> <li>- space gover</li> <li>- human righ</li> <li>- Diminishing influence</li> </ul>
<b>Rule of law priorities</b>	<ul style="list-style-type: none"> <li>- Stabilisation</li> <li>- Law and order</li> <li>- Basic state capacity</li> <li>- Harnessing extant social capital</li> <li>- Protection</li> <li>- International terrorism/crime</li> </ul>	<ul style="list-style-type: none"> <li>- Law and order</li> <li>- Transitional justice</li> <li>- Improving state capacity</li> <li>- Improving service delivery to bolster state legitimacy</li> </ul>	<ul style="list-style-type: none"> <li>- Law and order</li> <li>- Conflict monitoring and management</li> <li>- Protection</li> <li>- Basic state capacity / services</li> <li>- Forging/re negotiating settlement</li> <li>- Regional stability</li> <li>- International terrorism/crime</li> </ul>	<ul style="list-style-type: none"> <li>- Support state development plans</li> <li>- Encourage checks and balances on the executive</li> <li>- respect for human rights</li> <li>- Access to justice and gender-based violence</li> </ul>	<ul style="list-style-type: none"> <li>- Support ref</li> <li>- political so</li> <li>- building th</li> <li>- the opposi</li> <li>- and econo</li> <li>- Curb corrup</li> <li>- support do</li> <li>- corruption</li> </ul>
<b>Areas of rule of law intervention</b>	<ul style="list-style-type: none"> <li>- Constitution-making</li> <li>- Settlement mediation</li> <li>- Security sector reform</li> <li>- Non-state justice and security</li> <li>- Conflict mediation</li> <li>- Service provision</li> <li>- Practical legal hybrids</li> </ul>	<ul style="list-style-type: none"> <li>- Institutional capacity-building (justice and security, political governance, economic)</li> <li>- Non-state justice and security</li> <li>- Conflict monitoring</li> <li>- Transitional justice</li> <li>- Legal empowerment</li> <li>- Women's access to justice/ sexual and gender based crimes</li> </ul>	<ul style="list-style-type: none"> <li>- Conflict mediation</li> <li>- Human rights monitoring</li> <li>- Non-state justice and security</li> <li>- Police reform and community policing</li> <li>- Accountability and external oversight</li> <li>- Sexual and gender based violence</li> <li>- Anti-corruption 'pacts' between gvt, private sector and civil society</li> </ul>	<ul style="list-style-type: none"> <li>- Land reform</li> <li>- Commercial / investment climate support</li> <li>- Support to civil society, media reform and democratic institutions.</li> <li>- Access to justice (including legal empowerment)</li> <li>- Social accountability in sector programmes</li> <li>- Diplomacy</li> </ul>	<ul style="list-style-type: none"> <li>- Support to</li> <li>- Support to coalitions.</li> <li>- Support de</li> <li>- accountabi</li> <li>- Diplomacy</li> </ul>

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