



POLICY BRIEF

Politically smart and adaptive approaches to Rule of Law support in situations of conflict and fragility

Pilar Domingo, Samuel Sharp and Linn Häggqvist

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This brief highlights how support to rule of law and justice in situations of conflict and fragility could benefit from integrating politically smart and adaptive approaches, to ensure that interventions contribute to real and lived change for all. The objective of this paper is to review what this means in practice for justice and rule of law policy makers and practitioners, taking stock of ILAC's own experiences in this regard.



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Introduction

At the core of rule of law is the objective of placing constraints on the exercise of power, holding the state and all power holders to account, enabling equal access to justice for all in order to ensure the protection of their rights, peaceful dispute resolution between justice seekers as well as between them and the state.

The rule of law field has changed considerably in the last two decades and its centrality to sustainable development has been confirmed on the international agenda. At the same time, questions remain as to the extent to which hitherto mainstream approaches to international support to rule of law reform and ways of working have yielded lasting impact.

In this context, the International Legal Assistance Consortium (ILAC) is transitioning towards rethinking rule of law support and adopting adaptive approaches to design and implementation of rule of law and justice assessments and programming, to maximise impact and transformative change.

Since 2018, the Overseas Development Institute (ODI) has accompanied ILAC as the organisation has moved towards integrating politically smart and problem-driven approaches in the way they and their members work, and how best to capture and amplify existing practices which may already be integrating these ways of working. Important steps to strengthen ILAC's assistance, including capacity building, technical assistance and peer-to-peer support, assessments and contribution to policy dialogue initiatives, have been taken over the past few years. In the Autumn of 2020, ILAC and ODI hosted a webinar series on Developing Adaptive and Innovative Rule of Law Programmes, to harness ILAC's contribution towards innovation and progress. This brought together a wide range of ILAC members to share knowledge and lessons learned with the purpose to inform future initiatives for ILAC and other rule of law actors.

This brief paper shares reflections from this process, as well as recommendations from evaluations and other knowledge products that ILAC is addressing in its day to day work to support rule of law: on how politically smart and adaptive approaches may be applied in ILAC's work, to the justice and rule of law field more broadly, and some of the challenges and limitations to such processes. In addition, the paper reflects on what the still-evolving field on adaptive management can learn from its application to justice and rule of law challenges.

Developments in rule of law and justice support

Advancing the rule of law is a politically ambitious enterprise, as it involves regulating social, political and economic exchange in any society. In practice this means that how rule of law unfolds in practice has political impact in terms of the processes by which power and resources are allocated, and how accountability over these works. There is resistance to rule of law principles at the best of times, by unruly elites or illicit interests, so that political monitoring of rule of law institutions and processes is a constant need. In contexts of fragility and conflict, resistance to rule of law may be especially blatant. However, in all contexts, resistance to rule of law is not always outright, and often consists of strategic political and legal maneuvering to undermine rule of law, independence of the judiciary or legal protection for individuals and their rights.

Despite the deeply political nature of rule of law and justice sector reform objectives, international support efforts have tended to replicate top-down and so-called technical approaches premised on pre-set assumptions about how change happens, and what interventions should look like in order to advance different rule of law objectives. These approaches can take the form of importing models from other contexts to rule of law support. They also assume that change is linear and cumulative. And the focus on legalist approaches, moreover, assumes that technical approaches are politically neutral. However, first, technical or legal approaches are likely to have distributive impact, especially in the degree to which they alter normative content or process dynamics; second, the changes they bring, are likely to be susceptible to political resistance, manipulation or capture (depending on wider political economy conditions).¹

But change is afoot. Recent developments in rule of law and justice programming reflect several parallel processes of policy change, learning and a broadening of rule of law and justice reform agendas. More recently there is also increased focus on fragile and conflict-affected contexts.

First, there has been a broadening of objectives and thematic areas in international support to rule of law. It now encompasses a wide range of intervention types. In conflict-affected situations this includes, among other activities, support to local mediation and dispute resolution during conflict, maintaining and investing in legal and identity documents across different justice needs and processes (such as birth certificates, marriages, property titles), documenting legal needs deficits and human rights issues, including in support of possible future transitional justice efforts, supporting legal empowerment of different vulnerable or excluded groups and investing in institutional capabilities through support to courts, regulatory bodies, criminal, civil and administrative justice systems, support to (or preparation for) legal and constitutional change as a component of peacebuilding, and post-conflict institutional reform.

Second, and relatedly, this broadening of the rule of law agenda mirrors evolving policy developments and policy narratives. Within these narratives, the rule of law is acknowledged as relevant in achieving the global goals of rules-based norms, human rights and inclusive and accountable political settlements. In the policy space SDG 16, justice and rule of law is placed in the frontline of inclusive governance, democracy and peacebuilding. This is further underlined through the language of ‘people

centred justice’ which speaks of justice delivery that takes account of legal needs and capabilities of citizens. This is further echoed in in the SDG 16+, whereby SDG 16 is seen as an accelerator for the whole 2030 sustainable development agenda.²

Third, the Sustaining Peace Agenda underlines the rule of law and justice in conflict prevention and conflict resolution. The World Development Report (WDR) 2011 stressed that the likelihood of violent conflict increases with the absence of access to justice and citizen security. The WDR 2017 further stressed the value of justice and security institutions in conflict enabling societies to resolve their differences peacefully. And the UN/World Bank 2018 Pathways for Peace report underlines the role of rule of law in conflict prevention.

Finally, there is growing language in the rule of law and justice space on the merits of integrating adaptive approaches to programming as a vehicle to contribute to real and lived change for all. The objective of this paper is to review what this means for justice and rule of law support.

While adaptive approaches are relevant in all areas of international assistance, a starting question is to consider what it means to be adaptive in fragile and conflict-affected situations (FCAS). On the one hand, the levels of uncertainty that characterise these contexts means that adaptive and politically informed approaches may be of particular relevance. At the same time, these same levels of uncertainty make conditions for design and implementation of activities challenging, and contribution towards measurable positive results close to impossible. Recurrent features of FCAS include heightened levels of violence, heightened levels of institutional fragility and pluralism, heightened levels of grievances, political and social polarisation. And the ‘rules’ underpinning rule of law might themselves be the object of contestation. Given these features, adaptive capacity, flexibility and understanding the rapidly changing political economy conditions of the context are especially important.

Applying politically smart and adaptive approaches to rule of law and justice support

Adaptive and politically smart approaches emerged amongst development professionals recognising that traditional approaches rely too heavily on pre-specified assumptions about how change happens in order to advance specific governance, development or humanitarian objectives. Traditional governance and development programming has tended to involve pre-set plans and activities, based on fixed, linear pathways to achieving ‘results’. Such an approach is often not well suited to the complexities and context-specific realities of development or governance challenges, where change is rarely linear. The intended change processes or ‘problems’ that governance and development programmes aim to address are messy, political and not amenable to purely technical solutions. Contributing to addressing these problems more effectively requires having the skills and organisational capacity to be more adaptive and politically informed about the political economy conditions of context.

By now the language of adaptive approaches has become widely known. These approaches build on a range of initiatives intended to promote more adaptive and politically smart programming, as well as more long-standing critiques of international practice. The more recent history of these approaches includes, among others, such phrases as doing development differently (DDD), thinking and working politically

(TWP), adaptive management, and problem-driven, iterative, adaptation (PDIA).³ Despite their different acronyms, these approaches share several principles and have all emerged out of a shared recognition of the above-mentioned shortcomings. Here we set out some of those principles alongside their application to justice programming and support and/or emerging examples of the practice among ILAC members' work.

Principles of adaptive and politically smart approaches to programming

1. Context is everything – from 'best practice' to 'best fit'. Support for rule of law needs to be based on locally defined needs and conditions rather than prior assumptions about 'best practice'. This does not imply abandoning international rule of law standards and lessons from other contexts, but instead adapting how lessons and standards are used to align with contextual realities.

2. Start with the 'problem' rather than the 'solution'. The aim is to arrive at a context-relevant solution. This requires understanding the specific nature of the problem and the intended change objective, as is relevant to the context.

3. Ensure that problem identification is locally driven. Problems should speak to the justice needs of the intended beneficiary population, and as identified by that population, or by local reform champions. Of course, problem identification still involves making choices, and there is always the question of whose priorities and voices prevail in how problem identification works, what change objective is prioritised and how resources are allocated to activities.

Importance of local ownership and partnership in ILAC's Syria programme

- Investing in local partnerships is crucial to ensure relevance and that change processes are locally driven. The evaluation report of ILAC's Syria programme showed that the programme was built on relationships established in the previous programme and benefited from the trust established with the community of Syrian legal professionals. This helped ILAC to design capacity-building efforts that were relevant to their professional needs and could be delivered in an effective and efficient manner.
- International rule of law and justice actors need to rely on local actors for information. The starting point to successful programming is to have a diverse network of partners, who can feed the design of a programme with reliable information and contribute to operational solutions for the programme implementation.
- Partner selection in fragile and conflict-affected contexts must be handled carefully and assessed on a continuous basis based on changing power dynamics. For rule of law and justice support, the main targets for interventions are state institutions. Although there may appear to be institutions such as 'courts' and 'parliaments' operating in conflict-affected contexts, international actors may be misled to believe that these 'institutions' hold an aura of legitimacy that they actually do not hold on the ground.⁴

4. Approach the ‘problem’ through political economy analysis. Applying political economy analysis to understanding core ‘problems’ in order to capture the blockages to advancing the rule of law, can help to uncover the specific ways in which context-specific institutional, political, social and economic factors interact to shape justice, governance and development outcomes. This includes examining structural factors and agency-related conditions which enable or impede change in support of rule of law. Importantly, political economy analysis should focus on the specific problem and change objective, and not only on the national context in which the problem and change objective is embedded. In addition, as change regarding rule of law affects power relations, and structures of exclusion and discrimination, it is important to ensure that the political economy analysis addresses intersectionality. Understanding intersecting power imbalances related to factors such as gender, ethnicity, social class, rural-urban and age among others can play a crucial role in identifying where there are blockages or opportunities for change and what strategic coalitions can help to advance different aspects of rule of law and justice. Such factors are critical to understand from the stage of design and throughout implementation to ensure that activities are implemented effectively and are not contributing to further discrimination, conflict or splintering of society.

By way of summary, see Box 1 on the analytical components of a political economy framework that can be used to identify the nature of the rule of law ‘problem’ in question.

Box 1: Analytical components of a political economy framework

Relevant structural factors & Institutions –formal and informal

- Relevant factors of the wider historical, geographical, political economic and social context
- Belief systems and dominant ideas about the 'problem'
- Formal rules: legal and constitutional norms; regulatory mechanisms
- Informal rules, and the practice of how rules are interpreted and applied,
- Customary norms
- Wider social and cultural norms
- Nature of resource and capacity constraints on the system

Agency-related factors Incentives, interests and power imbalances, and capacity for action

- Who are the relevant stakeholders?
- How are different relevant groups positioned in relation to each other and to above institutional factors? Issues of power relations between relevant actors.
- What is the nature of their interests, beliefs and motivations in relation to the change objective? How do these actors gain or lose from intended change process? How/why do they resist change?
- How are resources allocated, relating to knowledge, access to legal aid etc.

Intersection between structure and agency Spotting opportunities for action.

- In reviewing the above, where is there room for securing buy-in from key actors?
- How does changing the formal institutions, or process related resources at any point of the problem dynamics affect incentives, beliefs and potentially conduct?
- What are the opportunity structures that might emerge from legal change, process related change, investment in resources and capabilities?
- Where is there potential for cultivating buy-in from key stake-holders, or forging strategic alliances for change and innovation?

Adapted from Domingo and Denney (2013).

5. Identify change processes that are politically plausible. Be realistic in the scale of the problem that can be addressed with international rule of law assistance, tailored to the level of resources available. Taking account of the findings of the political economy analysis of the ‘problem’, identify potential avenues for change that are not just technically feasible but also politically plausible. This includes identifying where there is scope for buy-in from influential actors, or for building strategic alliances and coalitions (or at least acquiescence) of powerful stakeholders. Through this process of ‘thinking politically’, various entry-points for reform may be identified, and a programme can think creatively about how to utilise these.

6. An initial theory of change developed around the ‘problem’ needs to be reoriented as necessary throughout implementation, in response to changing conditions. The pathway of change is likely to counter unexpected challenges and changes. This requires integrating flexibility and adaptive capacity in programme design to enable activities to change as the programme is implemented. Fluidity in context conditions is likely to be high in situations affected by fragility, violence and conflict.

7. Adaptive capacity during implementation can be strengthened through systems of testing and learning. Processes can be designed into programmes to regularly test assumptions and what is and is not working in implementation, and why. On the basis of this learning, as well as to changes in the context, programmes should be able to adapt their activities. This is supported through results frameworks that recognise the messy and non-linear routes to achieving impact, and support programme flexibility to do so.

8. Work in politically-informed ways. Being politically smart is not intended to mean a one-off political economy analysis report that informs programme design, but an ongoing strategic mindset and approach. This requires deep knowledge of the political context by those involved in the design and implementation of activities. It also requires the political skills on the ground to make use of this knowledge and to have the agility of navigating informal networks and changing context conditions. This includes, as possible, identifying and communicating with key actors and coalitions that may support change, building in participation and feedback of those programming is intended to benefit, and identifying new entry points as these evolve. It is also important to underline that not all individuals in the design and implementation process can have all these skillsets and deep knowledge of context. But collective and organisational incentives can be built over time to motivate and reward these ways of working at the individual and team level.

Politically smart work with the Tunisian Administrative Tribunal

- ILAC's member National Center for State Courts (NCSC) worked in partnership with Tunisian Administrative Tribunal to improve tribunal services through a focus on judicial statistics.
- Three lessons for problem-driven programming:
 - » Define when and where to use international experts in a targeted manner. Do not over-rely on them – many reports gather dust and recommendations are not followed. Prioritise building local partnerships and ownership to put recommendations into practice and ensure sustainability.
 - » Do not try to move too quickly. Building of partnerships and ownerships is time consuming – it may give a sense of stagnation but it pays off later on.
 - » Often there is an overfocus on changing laws or legal procedures - here what was effective was the focus on improving practical procedures and operations of court administration.
- Establishment of a working group proved to be a useful structure. NCSC and the Administrative Tribunal established a working group that owned the process. By having a working group, the challenge of changes in leadership and priorities were more easily circumvented. This illustrates the importance of mobilising a diversity of actors, as relying on one interlocutor can have negative consequences on the initiative if that person moves on to another position.

Conclusion

There is no doubt that over the last ten years the language of adaptive and politically smart approaches has become more prominent in international programming in governance and development support. However, actual design and implementation has been much more experimental and ad hoc in practice. The reality is that this remains an evolving field, with much to learn from how its principles are being applied to address tangible challenges in different sectors (and the utility and challenges of doing so).

In sum, there is much that rule of law programming can learn from adaptive approaches. This includes acknowledging the political nature of rule of law and justice provision and addressing

people's legal needs. This means that technical knowledge should be complemented with political understanding of the context and the problem. It is also important to ensure that reform agendas are both locally owned and locally driven, including in terms of processes of problem definition, and identifying pathways for change that are in keeping with what is politically plausible, while also attentive to wider inequalities and power imbalances. This includes integrating the possibility for politically informed strategic choices in cultivating the necessary alliances and buy-in from key actors that will enable transformative change. Embedding cycles of intentional learning to enable iterative adaptation of initial theories of change can contribute to improving the effectiveness of rule of law support. In turn, there is a great deal that the field of adaptive programming can learn from how it is applied in practice to justice and rule of law problems and change objectives. This includes the following:

- The terminology and acronyms associated with political economy analysis and adaptive approaches are jargonistic in unhelpful ways and can be exclusionary in practice or confined to academia. There is a need for direct and accessible language that is relevant to all stakeholders.
- Political knowledge is critical, but it does not replace technical expertise relating to the issues in question. The combination of diversified expertise and the 'when and how' to use them is key. Overly reductionist approaches to change are not helpful. Rather, (local) technical expertise is still fundamental. Political economy analysis provides an analytical perspective and mindset which should inform decisions on design and process throughout the life of a programme, including on technical choices.
- It is important to maintain the link between problem-driven approaches and local ownership. For many ILAC members and other international rule of law actors alike, the key to working in a problem-driven way was the quality of partners they work with, and their understanding of the context and dynamics.
- Do not let perfect be the enemy of the good. The variety of tools and recommendations for how to work in more adaptive and politically smart ways can appear unhelpfully demanding. Organisations may build incrementally on existing ways of working, incorporating elements of adaptive methods and emphasising politically informed mindsets, noting the below point.
- Adaptive and politically smart ways of working already characterise programme implementation in many cases, even if this is not explicit in a programme logframe or design. The experience on the ground of ILAC member organisations demonstrate that elements of these approaches are in many cases already a feature of how they work. It would be fruitful to document these practices more systematically in order to inform more purposeful intentions to integrate adaptive approaches. This would provide lessons for the wider adaptive agenda, and contribute to the knowledge on how it can be scaled up and applied more systematically, rather than presenting adaptive management as an entirely new concept or approach to rule of law support.
- Over time, organisational constraints can inhibit ways of working that are adapted to context, experimental and politically agile. There is a need for buy-in at the leadership level in order to encourage process-oriented learning and adaptation, work with locally grounded agendas for change, and respond to political economy conditions.

It is critical to underline that adaptive approaches are by no means a magic bullet to achieving change. In conflict-affected and transitional situations, the politics of rule of law change may be particularly challenging. ILAC member organisations have long-term experience of working in politically challenging settings, where finding alternative entry points is especially difficult. For instance, members commented how, in contexts of increasing authoritarianism, it is challenging to figure out the incentives and interest structures of actors, including as a matter of ensuring that the 'do no harm' principle prevails. And finally, substantive change in the promotion of rule of law will always face resistance, and the risk of reversal is a permanent feature of all polities. Rule of law involves placing limits on the exercise of power. The temptation for power-holders everywhere to elude the rule of law is a constant.

Resources to explore further

Adaptive and politically smart approaches

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Politics of rule of law, and rule of law reform

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2. See McIntosh, L. (2019) SDG 16: *The rule of law at a crossroads*. Policy Brief 1, 2019. ILAC; and The Global Alliance for Reporting Progress on Peaceful, Just and Inclusive Societies (2019) *Enabling the implementation of the 2030 Agenda through SDG 16+: Anchoring peace, justice and inclusion*. United Nations; and the Pathfinders (2019) *Justice for All: The report of the Task Force on Justice*.
3. See Pett, J. (2020) *Navigating adaptive approaches for development programmes: A guide for the uncertain*. ODI
4. Example raised by local partner during the webinar series on Developing Adaptive and Innovative Rule of Law Programmes in October 2020.

About the Authors

Pilar Domingo is a Senior Research Fellow at ODI.

Samuel Sharp is a Research Officer at ODI.

Linn Häggqvist is a Programme Officer at ILAC.

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The views and opinions expressed here do not necessarily reflect the views and opinions of all ILAC members.



**International
Legal Assistance
Consortium**

ILAC Secretariat
Stockholmsvägen 21,
SE-122 62 Enskede, Stockholm, Sweden
Phone: +46 (0)8-545 714 20 info@ilac.se
www.ilacnet.org

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