

A shotgun marriage

Political contestation and the rule of law in fragile societies

CRU Report

Erwin van Veen



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Abstract

The limits of, and opportunities for, rule of law development emerge from processes of political contestation. It is through such processes that individuals and groups with resources compete to influence and establish the formal and informal rules for how power can be distributed, exercised, enforced and constrained in a society at a particular point in time. This means that the characteristics of the process of local political contestation matter a great deal for the meaning and shape of the rule of law. It also means that domestic politics and culture are the primary entry points for rule of law development.

There is evident tension between this observation and the imperatives of the rule of law concept in its universal and abstract version. The universal claims of the international rule of law agenda contrasts particularly sharply with national political, social and cultural idiosyncrasies in fragile societies because of their legacies of violence, contested legitimacy and intentional political exclusion.

This paper examines the practical consequences of the characteristics of domestic political contestation in fragile societies for rule of law development. It offers fresh thinking on how rule of law development can be pursued in such contexts that breaks significantly with the current discourse and collective wisdom.

Executive summary

The limits of, and opportunities for, rule of law development emerge from processes of political contestation. It is through such processes that individuals and groups with resources compete to influence and establish the formal and informal rules for how power can be distributed, exercised, enforced and constrained in a society at a particular point in time. This means that the characteristics of the process of local political contestation matter a great deal for the meaning and shape of the rule of law. It also means that domestic politics and culture are the primary entry points for rule of law development. There is evident tension between this observation and the imperatives of the rule of law concept in its universal and abstract version. The universal claims of the international rule of law and human rights agendas contrast particularly sharply with national political, social and cultural idiosyncrasies in fragile societies because of their legacies of violence, contested legitimacy and intentional political exclusion. This situation has three major implications for international support for rule of law development.

To start with, rule of law development in fragile societies must be understood and conceptualised as a contested change management effort situated primarily in the political – not judicial – realm that starts from a very modest basis. Early exits from violence and fragility have tended to be fairly autocratic in nature, with elites capturing both key political and security institutions. They have typically allocated significant resources to a development-oriented strategy while also engaging in inclusive elite buy-in and patronage practices. In terms of the rule of law, this suggests that power needs to be consolidated before it can be regulated more impartially. If that is the case, the chief purpose of rule of law promotion is to recreate the norms, incentives and institutions for peaceful conflict resolution in ways that are compatible with such power consolidation. This suggests a quite different focus and logic than the generally assumed positive correlations between rule of law promotion and democratisation, economic growth or statebuilding do. In fact, there is little evidence to support any such correlations in the first place.

Moreover, the ambitions for, and approaches to, rule of law development in fragile societies need to become much more realistic by taking greater account of practical limitations and local norms. For example, it will have to be accepted that the laws and legal institutions of many fragile societies will purposefully not be equally accessible, functional and useful for a long time. Rule of law promotion efforts need to engage with this reality by exploring what limited reform is possible and/or what regress can be prevented. Under the logic of the political order of fragile societies, the passage of new laws or judicial institutional performance improvement initiatives will not necessarily

represent effective ways of improving the quality of the rule of law. Instead, three areas of focus deserve greater attention than they currently receive:

- *Strengthen executive authority.* This centres on the ability of the executive to check centripetal tendencies in elite rent-seeking and competition so that they do not turn into unsustainable excesses. From a rule of law perspective, this means a focus on the norms, principles, laws and regulations on the basis of which executive authority functions in hybrid governance contexts with the aim of ensuring it is strong enough, but does not become a source of abuse in its own right.
- *Establish a 'rule of law for elites'.* This amounts to clarifying and improving the rules for power competition, elite asset ownership and privileges of office in ways that both satisfy incumbents and allow for the gradual popular expansion of elite rights in the course of time.
- *Increase intra-constituency voice.* This means strengthening the ability of individuals and groups to articulate, discuss and challenge leadership behaviour on the basis of the logic and interests of particular organisations or factions within a leader's constituency. In short, the degrees of freedom of elite behaviour in respect of his/her exercise of power have to be gradually reduced, funnelled into more peaceful and practical channels of negotiation and contestation, and institutionalised.

Finally, the false impression of consensus that prevails in the international discourse on what the rule of law amounts to, and how it should be implemented, must be called into question. A highly political concept, which has important values and ideals to offer, has been smothered by layers of declaratory rhetoric and a quasi-halo of normative superiority based on form instead of function. In consequence, international actors spend too little time and effort, in particular in fragile societies, on finding out whether their understanding of the rule of law is similar to that of those they seek to engage with, and what change in the political order of a particular context is feasible. Generating such understanding requires in-depth political-economy analysis, as well as a design that allows programmes to engage in processes of political contestation. This is the case for sensitive constitutional redesign as much as it is for innocuous-looking efforts to improve legal aid. Many legal aid claims will, for example, centre on land belonging to powerful elite members.

On a closing note, it is no doubt easier to keep working from a concept that is appealing in its aspiration but largely unattainable than it is to come to terms with, and muddle through, the operational realities of bringing about incremental and progressive change in fragile political orders. However, if the ambition is to support long-term, positive development in fragile societies on grounds of solidarity, humanity and self-interest, instead of just providing palliative life support, a more practical approach to rule of law development seems long overdue.

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First, a profound willingness exists in both organisations to critically examine internal working practices and external world views. This is essential to continuously re-assess and improve the content of their policies, as well as the link between their policies and the actions they support. From experience, I know that changing bureaucratic practices is a difficult business, but it starts with an openness to reflection and new insights. It is there.

Second, both organisations have allowed me to look deep into their inner workings in full confidence of my ability to develop a nuanced understanding of the issues they face and the objectives they seek to realise in the complex field of rule of law development. This has enabled my thinking to progress beyond conceptual reflections and enriched it with a healthy dose of practical policy and field realities. I hope I continue to do justice to their trust.

From this perspective, I am especially appreciative of the support of Alejandro Alvarez, Christi Sletten and Pall Davidsson of UNDP and Marieke Wierda and Wilma van Esch of the Dutch Ministry of Foreign Affairs. Within Clingendael, Megan Price has been a great sounding board.

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It remains to state that the contents of the report are, as always, my own responsibility. I look forward to discussing them and having them challenged.

Introduction

The term 'rule of law' inspires by evoking the idea that accessible, equitable and transparent justice is necessary, possible and capable of giving human interaction greater moral depth, whether such interaction takes place between states, organisations or individuals, in private or in public spheres. This is an attractive proposition because it makes the 'rule of law' a global rallying call that offers a stark and positive contrast with the realities of life for many people in many countries. The concept also resonates with basic human values such as equality and fairness.¹

At the same time, it is problematic to position the rule of law as a concept with a universally clear, agreed and relatively fixed meaning because many of the concepts that give substance to it, such as human rights, good governance and religion, are both globally and locally contested.² Societies have debated the scope and meaning of such notions passionately for decades – sometimes fighting over them – before settling on provisional answers.³ The debate never really stops. The provisional answers, including the associated principles, laws and regulations, therefore emerge from processes of local political contestation in which the interests of different social forces clash.⁴ These processes are grounded in norms and culture. It is the strength of these social forces and the relative weight of their interests that determine what goes by the name of justice, whether this takes the form of regulations, laws, customary justice or high constitutional principles.

This means that the characteristics of the process of local political contestation matter a great deal for the meaning and shape of the rule of law – much more so than the

1 See for example the Universal Declaration of Human Rights: <http://www.un.org/en/universal-declaration-human-rights/> (accessed 2 March 2017), Sen, A., *The Idea of Justice*, London: Penguin Books, 2010; Bingham, T., *The Rule of Law*, London: Allen Lane, 2010.

2 The findings and arguments of the 2011 and 2017 World Development Reports are illustrative: World Bank, *Conflict, Security and Development*, Washington DC: World Bank, 2011; World Bank, *Governance and the law*, Washington DC: World Bank, 2017.

3 The quest for equal rights for black citizens in the United States offers a remarkable illustration of the duration and violence that can characterise such contestation: 100 years separated the end of its civil war in 1865 and the march on Selma in 1965 by Martin Luther King and his followers. Heifetz, A., *Leadership without easy answers*, Cambridge: Harvard University Press, 1994.

4 Samuel Huntington argued that political institutions arise out of the clash between social interests. In a sense, laws can be considered as political institutions if the latter are seen as mediating different sociopolitical interests. See: Huntington, S., *Political Order in Changing Societies*, New Haven: Yale University Press, 1968.

international imperatives of a fairly abstract concept with universal ambition. It also means that domestic politics and culture are the primary entry point for rule of law development. This reality often appears to be downplayed in international policy discourse. In part, this is a consequence of the tension between the United Nations (UN), which, as an organisation, aspires to push global norms, and some of its members that resist such intrusion into their domestic affairs. This tends to lead to a more technical, state-centric approach to the rule of law – as opposed to a more political, human-centric approach.⁵

A complicating factor here is that a number of UN member states are represented by elites that lack domestic legitimacy and/or abuse their positions of public authority, and yet are considered representative interlocutors at the global stage.⁶ This puts a double bind on the rule of law in the sense that it suffers internationally from sanitisation and 'evasive implementation', while domestically it often does not enjoy substantive or procedural legitimacy.⁷

It is from this perspective that this paper examines implications of political order in fragile societies for rule of law development.⁸ It focuses on fragile societies because it is here that the tensions between the reality of rule and the aspiration of the rule of law are greatest due to legacies of violence, contested legitimacy and purposeful political exclusion.⁹ Such tensions are magnified by the universal claims of the international rule

5 For instance: Kavanagh, C. and B. Jones, *Shaky foundations: An assessment of the UN's rule of law support agenda*, New York: New York University CIC, 2011.

6 Compelling accounts of this phenomenon include: Utas, M. (ed.), *African conflicts and informal power: Big men and networks*, London: Zed Books, 2012; Malejacq, R., 'Warlords, intervention and state consolidation: A typology of political orders in weak and failed states', *Security Studies*, 25:1, 85-110, 2016; North, D., J. Wallis and B. Weingast, *Violence and social orders: A conceptual framework for reinterpreting recorded human history*, Cambridge: Cambridge University Press, 2009. Numerous case studies also support this assertion such as: Van Veen, E., N. Grinstead and F. El Kamouni-Janssen, *A house divided: Relation- and coalition-building between Iraq's Shi'a*, The Hague: Clingendael, 2017; Phillips, S., *Yemen: Developmental dysfunction and division in a crisis state*, Birmingham, Development Leadership Program, Research Paper 14, 2011.

7 See also World Bank (2017), *op.cit.*, p. 90.

8 Political order is the extent to which political institutions manage to resolve disputes between different social forces and adapt in response to the changing nature of such social forces. See: Huntington (1968), *op.cit.*; Fukuyama, F., *The Origins of Political Order: From Prehuman Times to the French Revolution*, New York: Farrer, Straus and Ginoux, 2012; Fukuyama, F., *Political order and political decay*, New York: Farrer, Straus and Ginoux, 2014. A political system refers to the system of government in place.

9 For a good introduction to the thinking and phenomenon of fragility: Di John, J., *Conceptualising the causes and consequences of failed states: A critical review of the literature*, London: LSE (Crisis States Research Centre), Working paper no. 2, 2008. To get a sense of 'justice differentials' between fragile societies and their more peaceful cousins, consider the ratings of the World Justice Project's Rule of Law Index 2015: <http://data.worldjusticeproject.org/> (accessed 31 May 2016).

of law and human rights agendas that contrast sharply with national political, social and cultural idiosyncrasies in fragile societies.¹⁰ The paper takes a pragmatic approach and seeks to identify practical entry points for how rule of law development can be stimulated in the political orders of fragile societies. It develops these entry points into an outline of a theory of change that can help improve (inter)national rule of law policy development and programming efforts. Admittedly, this is a vast endeavour, to which it is hoped this paper will make a modest contribution.

Although the first draft of this paper dates from May 2016 (it was written as a discussion piece for a workshop on global rule of law programming), it now follows the publication of the 2017 World Development Report on 'Governance and the law'. The paper has gratefully made use of parts of this report's research and expands on it in relation to the specific topic of rule of law development in fragile political orders.¹¹

The paper goes about this inquiry as follows. Section 2 discusses the concept of the rule of law in its various 'degrees of thickness' and 'shades of grey' between reality and aspiration. Section 3 subsequently examines the (im)possibilities of rule of law promotion in the context of the general development trajectories of fragile societies. It aims to provide a realistic general starting point for thinking about what sort of broad effects may be expected from rule of law development and how the concept relates to other meta-concepts like democracy, economic growth, statebuilding and political settlements. Using a simple model of political contestation, Section 4 subsequently analyses how political order in fragile societies shapes the rule of law. The aim here is to create more clarity on how rule of law prospects derive from broader processes of political contestation and dynamics of power. Section 5 argues for a practical shift in rule of law promotion that is both normatively and practically more recognisant of the realities of the political order of fragile societies. Such a shift requires shifting international discourse away from its present false consensus on the meaning of rule of law development into the realm of political dispute, and putting programs that seek to promote the rule of law on a more adaptive footing. Annex 1 provides working definitions of key terms used in the paper.

10 The supremacy of law as proclaimed by the 'rule of law' has an Anglo-Saxon slant to it. Terms like 'Rechtsstaat' (German) or 'État de droit' (French) are more specific by referring to the desire (or need) to bind the state to the law, thus solving the problem created by Hobbes' Leviathan - which in turns solves the problem of violent anarchy.

11 Richard Sannerholm offers interesting reflections on the 'role of law' vs. 'rule of law' terminology of the 2017 World Development Report here: <http://www.kpsrl.org/blog-series-justice-and-peace/blog-series-justice-and-peace-discussion/t/governance-and-the-role-of-law-getting-the-vowels-right> (accessed 27 March 2017).

1 Problematizing the 'rule of law' as a concept

Key messages

- In fragile societies, the 'thin' (largely procedural) conceptualisation of the rule of law is too devoid of substance to generate just outcomes, while the 'thick' (more substantive) version is too prescriptive of such outcomes to stimulate practical progress.
- Both 'thin' and 'thick' conceptualisations of the rule of law insufficiently recognise its development as a gradual and lengthy process of progressive expansion of rights and entitlements that might start from a decidedly limited, exclusionary and undemocratic basis, and feature significant regression.
- The international declaratory reality of the rule of law serves two main purposes: providing an aspirational dot on the far horizon and enabling domestic contestation for progressive rule of law development. As a result, 'rule of law' must be conceptualised such that it allows for significant variations in both substance and form that remain both grounded and aspirational.

Every serious work on the rule of law seems to start with a definition of the concept, or at least a discussion of the matter. This is undoubtedly because few concepts are as vague and disputed, and yet as relevant and promising, as the 'rule of law'. This paper is no exception.

An interesting starting point is the distinction that some analyses make between 'thin' and 'thick' versions of the rule of law.¹² The former amounts to a largely procedural understanding of the notion in which the process of obtaining a 'justice outcome' has to meet certain criteria in order to be considered 'just' (and hence, in accordance with

12 Kleinfeld Belton, R., *Competing Definitions of the Rule of Law: Implications for practitioners*, Washington DC: Carnegie Endowment for International Peace, Carnegie Papers no. 55, 2005; Kavanagh, C. and B. Jones, *Shaky Foundations: An Assessment of the UN's Rule of Law Support Agenda*, New York: New York University, 2011; World Bank (2017), *op.cit.*

the rule of law).¹³ For example, it should be public, impartial and accessible. As this approach says little about the substance of the law, understandably it leads to a focus on the systems, mechanisms and procedures at work at the different stages of the justice chain that ultimately lead to justice outcomes. It also leads to a focus on the institutions involved in each step and their capabilities to ensure due process.¹⁴ This concept of the rule of law offers a practical lens for understanding and working with reality that is premised on procedural normativity. It is reflected in the organisational set-up of a number of international rule of law development programmes and international agencies, such as the UN Global Focal Point on Police, Justice and Corrections.

‘Thick’ vs. ‘thin’ versions of the rule of law

The ‘thick’ version of the rule of law contends that correct procedure alone cannot bring about ‘just outcomes’ because the substance of those outcomes matters as much as how they are arrived at. In this version, it is generally held that just outcomes must be reflective of the rights and duties conveyed by existing international treaties and/or domestic entitlements and obligations related to human, political and social rights.¹⁵ It is no surprise that this ‘thick’ understanding of the rule of law resonates strongly in UN declarations and statements.¹⁶

The 2017 World Development Report contends that ‘thin’ versions of the rule of law have largely given way to ‘thicker’ versions that move from a focus on procedure to a focus on substance, with greater attention to normative standards of rights, fairness and equity.¹⁷ While this may be true at a declaratory level, the reality of much international rule of law promotion is that it uses ‘thin’ approaches – meaning a focus on procedure, systems and institutions – to realise ‘thick’ objectives.¹⁸ In other words, activities that improve

13 Such criteria are for example described in: Bingham, T., *The Rule of Law*, London: Allen Lane, 2010; Fuller, L., *The Morality of Law*, New Haven: Yale University Press, revised edition, 1969.

14 Kleinfeld Belton (2005), *op.cit.*

15 Bingham (2010), *op.cit.*; Marshall, D. (ed.), *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward*, Cambridge: Harvard University Press, 2014.

16 Consider for example the Universal Declaration of Human Rights: <http://www.un.org/en/universal-declaration-human-rights/> (accessed 2 March 2017); the UN’s Human Rights Up Front campaign launched in 2013 or Marshall (2014), *op.cit.*

17 World Bank (2017), *op.cit.*

18 See for instance: ADE, *Thematic Evaluation of the European Commission Support to Justice and Security System Reform*, Final report ref. 1295, Brussels: European Commission, 2011; Independent Commission for Aid Impact, *Review of UK Development Assistance for Security and Justice*, Report 42, London: ICAI, 2015; Van Veen, E., *Improving Security and Justice Programming in Fragile Situations: Better Political Engagement, More Change Management*, Paris: OECD, Development Papers No. 3, 2016; Kavanagh and Jones (2011), *op.cit.*

institutional performance, build capacity and increase access to justice are implicitly assumed or explicitly expected to contribute to bringing about normative change and to be adequate for ensuring its enforcement in a procedurally correct manner.

One problematic issue here is that in the 'thin' approach to the rule of law, justice institutions tend to be understood mostly in the formal sense, i.e. those that are part of the internationally recognised state. This excludes a significant number of institutions relevant to rule of law development, such as the hybrid forms of governance that characterise rule in fragile societies, customary institutions, and the even less tangible webs of relationships that connect state, hybrid and customary institutions.¹⁹ It exemplifies how the assumption of the existence of a universal meaning of the 'rule of law' is equated with a particular institutional manifestation in the form of the Western, Weberian state – which flies in the face of the evidence that governance in fragile societies will, for the foreseeable future, follow more hybrid trajectories – and may well feature a hybrid 'end-state' as well.²⁰ Another problematic issue is that the 'thin' approach to the rule of law does not take much account of the dense, interlocking and overlapping texture of social norms, beliefs and behaviours that the 'thick' version of the rule of law is implicitly imbued with. A final problematic issue is that developing the rule of law requires a great deal more than promoting 'legal public goods' such as affordable legal aid, efficacious laws and a professional judiciary. Even when accounting for laws having 'agency',²¹ it would be remarkable if systems that fall significantly short on the rule of law were able to bring it about via judicial system(s) as their principal instrument.²²

19 This is similar to how the World Bank defines law as "the positive de jure rules that are officially on the books of a state". Although the World Bank fully recognises that the law defined in this manner is only one of many rule systems that exist in parallel, it is a bit odd not to consider these systems as 'law' where their functionality is similar, especially given the lack of evidence that the World Bank cites on how transitions to the rule of law are actually achieved. World Bank (2017), *op.cit.*

20 For example: Themnér, A. and M. Utas, 'Governance through brokerage: Informal governance in post-civil war societies', *Civil wars*, 18:3, 255-280, 2016; T. Hüsken and G. Klute, 'Political orders in the making: Emerging forms of political organization from Libya to northern Mali', *African Security*, 8:4, 320-337, 2015; Malejacq (2016) *op.cit.*; Utas (2012), *op.cit.*

21 As for instance evidenced by: Ginsberg, T. and T. Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes*, Cambridge: CUP, 2008.

22 Just as corrupt systems have generally failed to reduce corruption through anti-corruption laws or institutions alone. See: <http://foreignpolicy.com/2016/05/24/some-countries-really-are-more-corrupt-than-others/> (accessed 31 May 2016). Persson and Sjöstedt extend this argument by calling the broader relationship between formal-institutional design and the quality of government into question, suggesting instead that the social contract exercises significant influence on elite behaviour as a key component of the quality of government. Persson, A. and Sjöstedt, M., 'The Political and Historical Origins of Good Government: How Social Contracts Shape Elite Behavior', in: Dahlström, C. and Wängnerud, L., *Elites, Institutions and the Quality of Governance*, London: Palgrave Macmillan, 2015.

Apart from these practical challenges, a simple distinction between ‘thin’ and ‘thick’ conceptions of the rule of law is likely to gravitate towards the latter in the *rhetoric* of the international discourse (but not in international practice). This is in part because it is more attractive for the UN to advocate for a ‘thick’ conception due to its standard-setting and norm-promoting character, despite the significant variation in the quality of the rule of law of its members. It is also because autocracies have an interest to be seen as good global citizens and will, on paper, espouse a ‘thick’ conception as well. The resulting gap between rhetoric and reality can be observed in many rule of law development programmes that profess to advance global norms, but either work on ‘thin’ conceptions of the rule of law, or are rather beholden to the state they are working in. Abstractly, this tension is well illustrated by the fact that the UN Secretary-General’s 2004 definition of the rule of law was conspicuously absent from the 2012 UN General Assembly (UNGA) declaration on the rule of law, suggesting a continued lack of agreement among members.²³

The ‘thick’ definition of the rule of law is also problematic. This is because it tends to define the substance of laws that merit the label ‘compliant with the rule of law’ as domestic implementation of the rights and entitlements expressed in international treaties, agreements and conventions. However, for some signatories these commitments emerged out of mature political orders with high levels of legitimacy, wealth and representation, while other signatories were (and are) still in situations of (recurrent) conflict, in the process of stabilising and constructing their political order, and/or may have seen their domestic political processes truncated by international interventions.²⁴ In short, the thick definition does not sufficiently allow for conceptualisation of the rule of law as a gradual and lengthy process of progressive expansion of rights and entitlements that might start from a decidedly limited, exclusionary and undemocratic basis, as well as feature significant regression at times.

A brief review of recent political-legal history makes it clear that the speed with which rights and entitlements were encoded internationally has appreciably outpaced domestic processes of political contestation in a number of places, particularly fragile societies.²⁵ This is not to say that the resulting international treaties have no inspirational

23 United Nations, *The rule of law and transitional justice in conflict and post-conflict societies*, New York: Report by the Secretary-General (S/2004/616), 2004; UN General Assembly, *Declaration of the high-level meeting of the General Assembly on the rule of law at the national and international levels*, New York, A/RES/67/1*, 2012

24 The constitutional drafting process in Iraq offers a case in point: Van Veen et al (2017), *op.cit.*

25 Consider for example the timespan of the political-legal developments described in Bingham (2010), *op.cit.* See also: World Bank (2017), *op.cit.*

or aspirational value, they do.²⁶ But it does mean that it is fallacious to expect that the rights and entitlements so enshrined will create *de facto*, or even *de jure*, rights within all national legal orders at roughly the same time or that convergence can and should be realised in the near future.²⁷ In short, governments of many fragile societies may have signed up to the internationally generated content of the 'thick' version of the rule of law, but neither the nature of their political order nor their 'state of justice' enables them to give significant meaning to such declaratory intent – even if they intended to comply with it. In turn, this means that international rule of law development interventions, such as aid programmes, must take a pragmatic, incremental approach in the realisation that much of the international declaratory reality of the rule of law serves two chief purposes. One is that it provides an aspirational dot on the far horizon without, however, having concrete programming value. The other is that local actors can use declaratory reality to engage in domestic contestation for progressive rule of law development, sometimes with international support.²⁸ This requires a readiness to deal with elite resistance against citizens claiming their rights – and the possible fallout of such a situation.

Balancing reality with aspiration

For the reasons discussed, neither the thin nor the thick versions provide a working definition of the rule of law that adequately balances reality with aspiration. The thin version is too devoid of substance to generate just outcomes, while the thick version is too prescriptive of such outcomes to stimulate practical progress in fragile societies. This makes it useful to think of ways to conceptualise the rule of law that allow for significant variations in substance and form, but that also remain coherent and aspirational. More relativity is required without becoming adrift in cultural relativism. The substance of the rule of law can vary according to culture, time or place if one accepts those to whom laws apply as a yardstick for what is 'just'. The form of the rule of law can vary because many different institutional pathways – ranging from informal customs to highly formalised international courts – can achieve the same ends.²⁹ With this in mind

26 For example, Marshall (2014), *op.cit.* argues that they can be used to nudge and cajole countries into better rule of law performance.

27 This is certainly unlikely to happen in the absence of an effective transposition and enforcement mechanism along the lines of prejudicial questions and direct applicability of parts of European Union law.

28 Ginsberg and Moustafa (2008), *op.cit.*; World Bank (2017), *op.cit.*

29 See for example: Isser, D., *Customary Justice and the Rule of Law in War-Torn Societies*, Washington DC: USIP, 2011; Bingham (2010), *op.cit.*

and on the basis of a number of existing works on this matter,³⁰ it might make sense to conceptualise the rule of law as:

“ *A non-linear development in which the accessibility, quality of proceedings, content and enforcement of customs and laws that give expression to rights and entitlements are gradually expanded in such a way that increasing numbers of people perceive and experience these as just most of the time in terms of the solutions they produce in response to differences*”

This conceptualisation is complex and will not serve as a rallying point for practical rule of law advocacy efforts. Nevertheless, it has several advantages for policy and programming purposes.

- It accepts legal plurality without assuming a dichotomy between formal and informal law that will ultimately be decided in favour of the former (note the qualifier ‘custom and law’).
- It allows for understanding the ‘rule of law’ as a process instead of a state of affairs (note the qualifiers ‘a ... development’ and ‘most of the time’).
- It recognises that progress can be uneven and variable across the various sites of legal plurality, featuring regress as well as progress (note the qualifiers ‘... non-linear...’ and ‘most of the time’).
- It indirectly allows for considering the degree of participation or inclusion in the process of law-making (note the qualifier ‘increasing numbers of people’).
- It allows for balanced consideration of the ideal and reality by referring to both ‘perceptions’ and ‘experiences’ as relevant measures of whether justice mechanisms are effectively institutionalised and performing adequately.

Such an approach is consistent with the observation that not much is actually known about how and why transitions to ‘thicker’ versions of the rule of law happen. Current knowledge largely tells us what does *not* happen, i.e. it is well established that the rule of law is not a precondition for rapid economic growth or effective governance. More generally, it has also become clear that developmental change does not happen in accordance with the tenets of the liberal peace agenda.³¹

30 For example: Domingo, P., *Rule of law, politics and development: The politics of rule of law reform*, London: ODI, 2016; Marshall (2014), *op.cit.*; Kleinfeld Belton (2005), *op.cit.*; Isser (2011), *op.cit.*

31 See for example: North, Wallis and Weingast (2009), *op.cit.*; World Bank (2017), *op.cit.*; Paris, R. and T. Sisk (eds.), *The dilemmas of statebuilding: Confronting the contradictions of postwar peace operations*, Abingdon/ New York: Routledge, 2009; Valters, C., E. van Veen and L. Denny, *Security progress in post-conflict contexts: Between liberal peacebuilding and elite interests*, London: ODI, 2015.

2 Why rule of law engagement in fragile societies?

Key messages

- Early exits from violence and fragility have tended to be fairly autocratic in nature with elites capturing both key political and security institutions. They have typically allocated significant resources to a development-oriented strategy while also engaging in inclusive elite buy-in and patronage. From a rule of law perspective, this suggests that power needs to be consolidated before it can be regulated more impartially.
- There are no proven generalised relations of plausibility or causality between rule of law promotion and democratisation, economic growth or statebuilding. Constructing programmes on the basis of this logic is likely to be spurious and even risky.
- In contexts of recurrent cycles of violence that must be broken to enable development, the chief purpose of rule of law promotion is to recreate the norms, incentives and institutions for peaceful conflict resolution.
- This can be achieved by combining advocacy with capacity building from both the bottom-up and top-down that is grounded in a sound understanding of the local political economy. Substantively, rule of law promotion can focus on 'taming' security institutions, building peaceful dispute resolution capacity and recreating social trust. The nature of political contestation defines the realm of possibility.

Having explored the rule of law concept in general, it is useful to now briefly examine the perceived relationship between rule of law engagement in fragile societies and the promotion of other significant concepts such as democracy, economic growth and statebuilding, since they are often articulated as being linked in political discourse and development policies. Because such linkages influence the thrust and expectations of development policies and programs, they ought to be scrutinized beyond the sterile platitudes one encounters at times.

Exits from fragility: rule before rule of law

To do this meaningfully, one must start by reviewing existing knowledge about what pathways out of fragility have looked and can look like. Although available evidence on the dynamics and characteristics of exits from fragility is partial, provisional and in areas disputed, it is sufficient to paint a broad canvas of how developmental change might happen in the political orders of fragile societies.³² It should be added that while such a canvas is helpful in framing the thinking about fragility and understanding what it may mean for rule of law development, it has little prescriptive value because the weight, composition and interaction of core variables is context-specific. In other words, existing knowledge represents averages with significant deviations from the mean.

Major works suggest that the following elements have been present in a number of successful (emerging) exits from fragility in places such as Ghana, Mozambique, Cambodia, Rwanda, Ethiopia and Vietnam.³³ Taking the opposite view is also worthwhile as evidence exists aplenty to suggest that the absence of these elements plays a major role in perpetuating the conflicts that deepen fragility over time.³⁴ In a highly stylised version, they can be presented as follows:

To start with, a dominant group of elite players emerged that gradually managed to establish (control over) a reasonably effective state security apparatus (without necessarily establishing a monopoly on the use of violence), key resources (including

32 For a critical discussion of existing knowledge gaps: Jones et al. (2012), *op.cit.*; World Bank (2011), *op.cit.*; Di John (2008), *op.cit.*

33 A successful exit from fragility is considered here as the avoidance of a relapse into conflict and the creation of some developmental momentum as expressed in terms of, for example, UNDP's Human Development Index scores. Major works include: Putzel, J. and J. Di John, *Meeting the challenges of crisis states*, London: LSE (Crisis States Research Centre), 2012; Fukuyama, (2014), *op.cit.*; Huntington (1968), *op.cit.*; World Bank (2011), *op.cit.*; Booth (2012), *op.cit.*; North et al. (2009), *op.cit.*; Acemoglu, D. and A. Robinson, *Why Nations Fail: The Origins of Power, Prosperity and Poverty*, London: Profile Books, 2013. See also: Boege, V., A. Brown, K. Clements and A. Nolan, *On Hybrid Political Orders and Emerging States: State Formation in the Context of Fragility*, Berlin: Berghof Foundation, Berghof Handbook Dialogue No. 8, 2008; Di John (2008), *op.cit.*; Allen, C., 'Understanding African Politics', in: *Review of African Political Economy*, No. 65:301-320, 1995. Brett offers an interesting reflection on the debate about the tension between the content of the liberal paradigm and the practical barriers to its realisation in fragile societies: Brett, E., *Liberal Theory, Uneven Development and Institutional Reform: Responding to the Crisis in Weak States*, London: Destin/LSE, Working Paper No. 12, 2002. A non-published paper based on five case studies for the 2011 World Development Report pointed to similar points in respect of exits from fragility.

34 Utas (2012), *op.cit.*; Hüsken and Klute (2015), *op.cit.*; Malejacq (2016), *op.cit.*; De Waal, A., 'Mission without end? Peacekeeping in the African political marketplace', *International Affairs*, 85: 1, 99-113, 2009; Themnér, A. and M. Utas, 'Governance through brokerage: Informal governance in post-civil war societies', *Civil wars*, 18:3, 255-280, 2016.

rents and aid), the rules for political competition, and a nationally valid narrative on identity and representation that was able to withstand counter-mobilisations. Political parties or political coalitions regularly served as vehicles to acquire power and major shocks tended to play an enabling role by creating opportunities for power consolidation. The resulting control often took the form of hybrid governance and institutional arrangements that merge both personal/bureaucratic and informal/formal aspects of power and authority. The emergence or non-emergence of a dominant elite group or coalition can be viewed as 'juncture 1' out of fragility that either branches off into the path of 'rule by gun' – reflecting a relapse into fragmentation of power – or into the path of 'rule' – reflecting solidifying power consolidation.³⁵ It is useful to note that the persistence of fragility suggests that many countries have not experienced the emergence of a consolidated and dominant group of elite players, but rather face the central problem of fragmented and inconclusive competition between different power centres – sometimes under the guise of patronage-based democracy (Yemen 1990–2016, Mali 1991–today, Lebanon 1990–today), warlordism (Afghanistan in the 1990s, Democratic Republic of Congo (DRC) to today, Somalia 1991–today) or oligopolistic autocracy (Myanmar until 2015, Nepal until 2008; Burundi since 2010).

Where a dominant group of elite players emerged that consolidated both power and rule, it tended to be relatively inclusive of the major contending elites. It was also able to use instruments of rule, administration, security forces and resources to co-opt or coerce individuals and groups within the broader elite to maintain power and enforce discipline in respect of key political decisions, policy directions and rent allocations. The nature and level of executive strength was an important factor in making coherent use of such instruments.³⁶

Furthermore, dominant elite players used such executive strength to prioritise social and economic progress based on a relatively clear vision (in areas like safety, education, water, infrastructure and investment) through a mix of statist and market economic policies while seeking to retain control of both the political and security sphere.³⁷ In short, they had a reasonably strong development orientation that was premised on staying in power. In many countries, elite behaviour regressed from an initial opening for more development-focused policies to pursue narrower and more material self- and group-interests. The extent to which elites display a development-orientation can be viewed as 'juncture 2' of pathways out of fragility. Its different branches lead

35 The 'juncture' image is based off the 'critical junctures' discussed by Acemoglu and Robinson (2013), *op.cit.*

36 On this point: Putzel and Di John (2012), *op.cit.*

37 For a critical reflection on the possibilities of many low-income African states to actually provide a public service bundle in line with prevailing international statebuilding expectations: Mwenda, A., <http://andrewmwendasblog.blogspot.nl/2016/05/africa-thinking-outside-box.html>, 2 May 2016 (accessed 22 June 2016).

to continuation of 'rule', gradual regression to 'rule by gun' – reflecting predation of different kinds – or 'rule by law' – reflecting greater predictability with elites continuing to enjoy privileged political and socio-legal status.

Box 1 What do we mean by 'rule'?

Rule by gun refers to a situation in which the (perceived) threat or use of violence, based on the possession of coercive capacity, determines how power can be exercised. Power is A's (person or group) capacity to bring about outcomes favourable to A's preferences or desires.

Rule by law refers to a situation in which the law provides a basic legal framework to organize relations and adjudicate disputes between members of the general population. The exercise of power in the form of public authority by the elite over the general population may in part be contestable by law, but the legal framework applies mostly to non-elites.

Rule of law for elites refers to a situation in which the rules for the exercise of power between elites are relatively institutionalised and enforceable but do not necessarily have application beyond those elites. It is the corollary of the 'rule by law' (see the preceding point).

Rule of law refers to a situation in which the rules for the exercise of power are valid, transparent and enforceable for all across a particular territory.

Global rule of law refers to the same situation but without the territorial constraint, applicable to the entire global community of humankind.

Dahl (1991); Ginsburg and Moustafa (2008); North et al. (2009); Sen (2010).

Inevitably, socio-economic progress elicited social contestation. As the quality of life improved, new social forces emerged and the legitimising narrative of the ruling elite lost credibility because the demands put upon it changed.³⁸ Such contestation was met by effective repression, ineffective repression, or sociopolitical innovation in which adjustments took place to accommodate new players and power relations.³⁹ The degree

38 Huntington (1968), *op.cit.* discusses this at length.

39 The 2016 protests in Oromia (Ethiopia) offer an interesting example of a mix of effective repression (dominant) and concession (limited). See: Van Veen, E., *Unrest in Ethiopia: Plus ça change*, Brussels: EU ISS, Issue Alert 9, 2017.

of adaptability of the political order can be viewed as ‘juncture 3’, whose different paths lead to continuation of ‘rule by law’, regression to ‘rule by gun’ – reflecting continued elite dominance via more repressive means – or a proto- ‘rule of law’ – reflecting political opening.

This is not to say that the countries whose development followed this trajectory will turn into mature democracies over a few more decades. Rather, it means that they have achieved the impressive accomplishment of avoiding a relapse into violent conflict and making initial development gains. As sustained exits from fragility are rare,⁴⁰ it is not clear that these exits are replicable on the basis of a generalised narrative. However, their broad trajectory offers a way of thinking about power and the rule of law in the context of fragility. At least two observations can be made on the basis of this brief discussion, which are relevant to thinking about a theory of change for rule of law development in fragile societies:

First, it points to the need for prioritising the creation of the capability and ability to rule as a precondition for being able to develop the law along the lines of the rule of law. This reflects the enduring validity of the classic insight of Thomas Hobbes that some order must exist before a preferred order can be discussed. Or, as Samuel Huntington put it, ‘it is the degree of government that matters’.⁴¹ The consequence is that rule of law promotion should focus on the consolidation of power rather than on keeping it in check by fragmenting it. However, this needs to be done in ways that consolidate power as inclusively as possible, and by ensuring that those in charge of whatever order emerges remain incentivised to continue developing and expanding it instead of freezing it to their own advantage.⁴² Provocatively put, this may mean that a potentially oligopolistic or autocratic state may be required before lasting progress towards the rule of law can be made – without the certitude, or a mechanism in place to ensure, that this step will actually be taken once power is more centralised.

Second, the preceding discussion also suggests that working towards the rule of law is likely to require ‘detours’ that are not in line with current international rule of law prescriptions and preferences. For example, it seems quite likely that output legitimacy (equitability of results) is more important and sustainable than input legitimacy (equitability of opportunity) at certain stages of development. Concretely, this may well mean that elections are either better not held or that it is more clearly recognized they will serve a façade function.

40 World Bank (2011), *op.cit.*

41 Huntington (1968), *op.cit.*

42 Rule of law promotion initiatives that give new or greater rights to individuals, groups or organizations that can influence elite interests, are one way of preventing atrophy. On this matter, see for example World Bank (2017), *op.cit.* (chapters 7-8).

A licentious relationship with democratisation, growth and state building

In speech, declaration and policies, rule of law development in fragile societies is regularly connected with democracy promotion, stimulating economic growth and statebuilding. This raises the question of precisely how the rule of law influences, or is influenced by, such companion meta-concepts. To start with, it is remarkable that statements linking these meta-concepts tend to be either teleological or amorphous in nature. The former suggests a clear line of causality whereas the latter implies an ill-defined relation. Examples of both can be found in the 2012 UNGA declaration on the rule of law – arguably still one of the most recent and most high-profile documents that can be interpreted as expressing some consensus on the rule of law.⁴³ The UNGA posited clear, two-way causality by stating that: ‘We reaffirm that human rights, the rule of law and democracy are interlinked and mutually reinforcing...’ [paragraph 5]. Extrapolating from this statement, general thinking about the linkage between the rule of law and democracy centres on the assumption that, without government being bound by law, the freedom and plurality required for the growth of democratic practice have little chance of emerging.⁴⁴

It does not require a great deal of research to cast significant doubts on the validity of this general assumption. A brief look at current affairs suffices. On one side of the rule of law spectrum there are quite a few democracies that face significant rule of law challenges. One can consider, for example, the massive incarceration rates in the United States, where the principle of ‘three strikes and you’re out’ violates both the principle of proportionality and the requirement that each case is judged on its merits.⁴⁵ The continued discrimination against minorities, such as the Roma in Europe, provides another example. The inaccessibility of justice systems due to e.g. case overload and a lack of translation capacity required for timely and due process – as is the case in Belgium – offers a third.⁴⁶ In the middle of the spectrum there are many patronage-based democracies, such as the DRC, Mali or Afghanistan, that feature characteristics

43 UN General Assembly (2012), *op.cit.*

44 See for example Carothers, T., *Promoting the Rule of Law Abroad: The Problem of Knowledge*, Washington: Carnegie Endowment for International Peace, 2003; Carothers, T., ‘Rule of Law Temptations’, in: *The Fletcher Forum of World Affairs*, Vol. 33:1, Winter/Spring, 2009; Goldston, J., ‘New Rules of the Rule of Law’, in: Marshall (ed.) (2014), *op.cit.*

45 The course of justice in a case like this one in Louisiana (US) also offers pause for reflection: <http://www.economist.com/news/usa/21719521-failings-go-beyond-state-no-trial-sight-17-alleged-gang-members> (accessed 30 March 2017).

46 The respective European Union (EU) ‘Justice Scoreboards’ offer an interesting overview of such rule of law shortcomings amongst the supposedly advanced democracies of the EU. Online at: http://ec.europa.eu/justice/effective-justice/scoreboard/index_en.htm (accessed 10 June 2016).

of democracy but rather fewer of the rule of law.⁴⁷ Paradoxically, at the far end of the rule of law spectrum there are autocracies such as Uganda that have seen relatively independent judiciaries carve out appreciable scope for autonomous action. In such circumstances, the judiciary will not mount direct attacks on the political or security foundations that keep the regime in power, but instead snipe at the margins – to sometimes consequential effects.⁴⁸ Even a simple scan suggests that the relationship between the rule of law and democracy is fairly unclear. If anything, available evidence suggests that proto-forms of democracy – or at least pluralist political elites and institutions – have tended to precede the rule of law rather than the reverse.⁴⁹

Another direct causal link that is at times advanced in political discourse or development policies is between the rule of law and economic growth. The argument here tends to be that the investment, innovation and entrepreneurial energies needed for economic growth can only flourish in an adequately delineated and properly regulated environment in which private interests can pursue profit freely. Impartial enforcement of laws and regulations is said to be essential, as is keeping state intervention to a minimum.⁵⁰ Common sense and evidence suggest even more clearly than in the case of democratisation that this claim is problematic in its general form. For example, (semi-) autocracies like Ethiopia, Rwanda and Saudi Arabia have shown steady economic growth for decades while democracies like Greece, Japan and Spain have been moribund. In similar vein, foreign direct investment continues to pour into countries not exactly characterised by the rule of law.⁵¹ Moreover, research exists that argues that the absence of the rule of law prevents poor countries from growing faster, while other research suggests that this is not the case, in part because investment in fragile societies with contested rule is influenced more by personal relations and expected profits.⁵²

More specific to fragile societies is the assumed set of relations between the rule of law and statebuilding. Until recently, the common wisdom used to be that democratisation,

47 Contrast for example: Van Veen et al. (2015), *op.cit.* with Bingham (2010), *op.cit.*

48 Ginsberg and Moustafa (2008), *op.cit.*

49 This is in line with research of scholars like North et al. (2009), *op.cit.*; Acemoglu and Robinson (2013), *op.cit.*

50 See for example Carothers (2003), *op.cit.*; Carothers (2009), *op.cit.*; Goldston, in: Marshall (ed.) (2014), *op.cit.*

51 UNCTAD, *World Investment Report 2015: Reforming International Investment Governance*, Geneva: UNCTAD, 2015 (http://unctad.org/en/PublicationsLibrary/wir2015_en.pdf; accessed 1 June 2016).

52 For a more pro-rule of law take on this issue: Fukuyama (2011), *op.cit.* (in particular: footnote 4, chapter 17). Yet, this is often constrained to a narrow focus on the quality of property rights and contract enforcement; for a more negative take: Booth, D., *Development as a collective action problem: Addressing the real challenges of African governance*, London: Overseas Development Institute, Africa Power and Politics Program, 2012.

liberalisation and rule of law promotion were essential elements of the statebuilding package that could help bring about exits from fragility. This was captured by the dictum ‘all good things go together’, suggesting that working on these three aspects in parallel is mutually reinforcing and beneficial. Such logic informed a fair number of international peacekeeping missions and aid programmes alike.⁵³ It is well exemplified in the 2012 UNGA declaration on the rule of law, which states that: ‘We emphasize the importance of the rule of law as one of the key elements of conflict prevention, peacekeeping, conflict resolution and peacebuilding, stress that justice, including transitional justice, is a fundamental building block of sustainable peace in countries in conflict and post-conflict situations...’ [paragraph 18].⁵⁴ Yet, research suggests with increasing clarity that there is not much evidence that liberalisation, democratisation, low levels of corruption or the rule of law are in fact developmental *inputs*.⁵⁵

At least two major insights can be inferred from this short discussion of conceptual relationships between democracy, economic growth and statebuilding on the one hand, and the nature of rule of law development in fragile societies on the other.

To start with, rule of law promotion in the operational sense should not be justified by explicit or implicit generalised relations of plausibility or causality with democratisation, economic growth or statebuilding. While there may be some space for doing this at the declaratory level of international discourse, it is dangerous to do so in respect of interventions at the country or programmatic level because the dynamics and relationships between these meta-concepts are unclear and appear to be grounded more in ‘policy-based evidence’ than ‘evidence-based policy’.⁵⁶ What is required to justify, design and implement rule of law promotion interventions via diplomacy or aid in a responsible fashion is focused examination of local justice ethnographies in the context of a particular (sub)national political economy.

Moreover, if the rule of law is more a development output than a development input, strategies for rule of law promotion should focus on laying its political foundations before working on its justice core. This means addressing the question of how political order can be stabilised and then progressed, as well as engaging particular justice

53 Valters et al. (2015), *op.cit.*

54 UN General Assembly (2012), *op.cit.*

55 See for example: Di John (2008), *op.cit.*; North et al. (2009), *op.cit.*; Acemoglu and Robinson (2013), *op.cit.*; Fukuyama (2014), *op.cit.*; Valters et al. (2015), *op.cit.* Fukuyama for example basically argues that, historically, strong states were established of which the particular bureaucratic-political configuration subsequently allowed the gradual creation of rule *by law* and incremental democratisation of which the franchise was often initially restricted.

56 See also on this point: Kavanagh and Jones (2011), *op.cit.*

institutions from the perspective of how they can contribute to stimulating a progressive political order.

Day-to-day human security and justice as a practical alternative

The issues highlighted in previous sections suggest a rather different answer to the question of what international engagement – and rule of law promotion in particular – in fragile societies might achieve. It is less likely to realise ambitious objectives such as progressing democracy, enabling economic growth and building states in the image of the liberal peacebuilding paradigm, and more likely to be a practical, modest affair that needs to confront the problem of violence before everything else.

Breaking cycles of violence is the essence of creating a chance for moving out of fragility. Yet, for a variety of reasons such cycles are persistent and resistant to intervention.⁵⁷ The longer violence persists, the deeper legacies of trauma become, social trust reduced and authority fragmented. Ultimately, this results in degeneration of governance structures. Such regress can be clearly observed in its emergent stages in Syria and Libya or in its advanced stages in Yemen and the DRC.⁵⁸ Liberia and Afghanistan might serve as examples where structures are rebounding somewhat after prolonged periods of conflict. It is not correct, however, to conceive of degenerate governance structures as ‘voids’ or ‘ungoverned spaces’. Instead, they represent hybrid configurations of informality, authority and legitimacy that emerge out of the interaction between pre-existing institutions, violence and power, as well as customs and social needs. They are skewed in the sense that they amplify rather than correct power differences. This also makes them vulnerable to shocks and disruption.⁵⁹

In such a context, the chief purpose of rule of law promotion is to recreate the norms, incentives and institutions for peaceful conflict resolution.⁶⁰ As the previous sections have suggested, this may require tacit acceptance of power consolidation in the hands of elites that were either involved in the violence or whose interests in progressing the rule of law beyond solidifying their rule are limited. Keeping control over the mechanisms of political competition and the tools of security might be the price for advancing the rule of law on other fronts. The problem here, as discussed, is that there is neither a guarantee nor automaticity of such elites engaging in, or even quietly permitting, further

57 World Bank (2011), *op.cit.*

58 For an interesting recent example of militia rule in Assad-held Syria, see this article in Spiegel Online: <http://www.spiegel.de/international/world/assad-power-slips-in-syria-as-warlords-grow-more-powerful-a-1137475.html> (accessed 27 March 2017).

59 Utas (2012), *op.cit.*

60 I am grateful to Pall Davidsson for pointing this out during our engagement in a stimulating workshop.

rule of law reform that respects their rule once they feel securely ensconced in power. Instead, they can revert to nepotism, kleptocracy or outright plunder.⁶¹ Because the factors that influence the relevant possibilities are decidedly local in nature, this problem cannot be addressed in a general sense. The analysis does suggest, however, two important process pointers for rule of law promotion:

- It should always be grounded in a deep understanding of the local political economy and in particular the nature and drivers of elite interests. On that basis, it should strategically combine bottom-up (focusing on citizens, civil society and customary governance) with top-down (focusing on the state, 'informal' elites and hybrid governance) components to take account of the fact that elites can be influenced horizontally (by their peers) and vertically (by their constituents).
- It also needs to contain both advocacy and capability elements to increase abilities for both peaceful resolution of disputes and peaceful contestation of interests. While interests are malleable over time, pressure and argument are needed. A fallacy on the part of external interveners is to push for democratisation as the way of achieving such contestation. The problem here is that available evidence is pretty clear that emergent democracies are unstable forms of government with a high risk of regress.⁶² In countries that are still characterised by (the threat of) violent conflict, it might be irresponsible for external actors to push for the rapid introduction of democratic templates, especially if these reduce democracy to elections.⁶³

In substantive terms, rule of law promotion can help in breaking cycles of violence in several ways. To start with, there is a need to create and maintain a basic level of security in terms of the absence of violence.⁶⁴ This points to a need to engage in security sector development to stabilise situations of latent or actual violence. Security sector development initially serves to prevent security organisations, such as militias, state forces, gangs or guerilla groups, from spreading insecurity. Gradually, it can help to strengthen the governance and capabilities of such organisations to maintain order (rather than simply not disrupting it).

61 The work by Mancur Olson on the incentives of 'roving bandits' v. 'stationary bandits' remains instructive here: Olson, M., 'Dictatorship, democracy and development', *American Political Science Review*, Vol. 87, No. 3, 1993.

62 See for example: Higley, J. and R. Gunther (eds), *Elites and democratic consolidation in Latin-America and Southern Europe*, Cambridge: CUP, 1992; O'Donnell, G. ad P. Schmitter, *Transitions from authoritarian rule: Tentative conclusions about uncertain democracies*, Baltimore: John Hopkins University, 2013.

63 Van Veen, E. and V. Dudouet, *Hitting the target but missing the point? Assessing donor support for inclusive and legitimate politics in fragile societies*, Paris: OECD/INCAF, 2017.

64 Note that this does not necessarily require establishing - or even aiming for - a monopoly on the use of violence. See for example: Utas (2012), *op.cit.*; Malejacq (2016), *op.cit.*; De Waal (2009), *op.cit.*

In parallel, efforts to promote the rule of law ought to strengthen institutions, processes and habits that offer alternatives to using security organisations for the resolution or mitigation of violent conflict. Usually such practices already exist informally,⁶⁵ but they tend to have been damaged by conflict or subject to pressures like regress of traditional authority and urbanisation. Nevertheless, as state justice systems are often in a worse state and completely distrusted, rule of law promotion typically has to work with what is available with the aim of gradual improvement. As Amartya Sen has highlighted, the choice is between justice alternatives that are feasible in reality, not between reality and an ideal.⁶⁶ Given the intractability and magnitude of problematic issues in fragile societies, addressing recognisable and resolvable injustices seems a better focus for rule of law promotion than trying to bring a 'just society' about.⁶⁷

Finally, a measure of trust must be restored between people and authority (formal or informal; state or customary; hybrid or otherwise) for alternative dispute resolution mechanisms to work. Trust is often a function of prior experience, legitimacy and effectiveness. Both its horizontal (i.e. between individuals/communities) and vertical (i.e. between individuals/communities and institutions of authority) dimensions require attention. It is here that the deconstruction of enemy images, reconciliation and truth-finding initiatives enter the scope of rule of law promotion, as do the more institutional-type confidence-building measures that the 2011 World Development Report points to, such as adequate vetting and appointment procedures. This is arguably the least tangible part of rule of law promotion and the hardest to get right because it requires solid grounding in local customs and norms.

The local nature and dynamics of processes of political contestation ultimately decide how and how far the rule of law can be promoted on such matters. It might be argued that this is the case for any area of development and such an argument would not be wrong. Yet, two issues make the linkages between the dynamics of political contestation

65 Isser (2011), *op.cit.*, World Bank (2011), *op.cit.*; World Bank (2017), *op.cit.* Informal denotes customary justice, tribal justice, community security and mediation practices, as well as sometimes aspects of state-provided justice.

66 Sen, A., *The Idea of Justice*, London: Penguin Books, 2010.

67 John Rawles, in contrast, focused more on establishing an 'ideal state of justice'. For this purpose, he introduced his 'original position', which is a hypothetical situation in which (wo)men have to decide on what criteria they would agree to regulate their relations and behavior when they have no knowledge or reference to social status, possessions or opportunities in life of either themselves or of others. In his view, this produced two criteria to determine what is just: 1) there is absolute equality between individuals in the assignment of their rights and duties, i.e. there is no variation of liberties across subjects; and: 2) social and economic opportunities must be openly accessible to all and produce gains for all, including for the least well-off members of society. In essence, he conceptualized justice as fairness via an absolute and singular understanding of impartiality. See: Rawles, J., *A Theory of Justice*, Cambridge: Harvard University Press, revised edition, 1971.

and rule of law development stronger than those that connect political contestation with many other development issues.

The first issue is that in every society, customs, rules and laws delimit, express and enable political power, colour its legitimacy and indicate how it can be employed in the form of public authority. Laws and the like provide the procedural framework for substantive contestation over power, rights, duties and identity at the level of both individuals and organisations. The World Bank dubs this the 'command' role of the law. However, this framework itself, i.e. rules for making other rules, is also subject to contestation. The World Bank dubs this the 'constitutive' and 'contestation' roles of the law.⁶⁸ By its very nature, the rule of law requires that rules with direct effect are derived from legitimate and procedurally correct rules with indirect effect. This means that rule of law promotion can be regressed or advanced by political contestation at several levels at the same time instead of at just one level, as in many other areas.⁶⁹

The second issue is that rule of law promotion involves the societal challenge of agreeing impartial criteria for what is 'just'.⁷⁰ Because justice is a relative concept that goes to the core of our dignity and humanity as individuals or collectives, it is at the core of the political agenda of any country. Debates about corruption, resource distribution and development are at heart debates about justice. Alignment of views and practices on this matter will happen endogenously, gradually and via iterative rounds of debate.⁷¹ The legal pluralism that one can find in many fragile societies, and indeed in some more developed ones, suggests that a number of different procedural and substantive standards for what is considered 'just' can co-exist. These will slowly have to be reconciled at least in part if a generally accepted understanding of rule of law promotion is to be created. For example, is equality before the law more important than elite buy-in of rule of law reform? Is the speed of justice more important than its thoroughness?

68 World Bank (2017), *op.cit.*

69 The World Bank differentiates three 'roles of law' that can be scenes of political contestation (laws that regulate behavior, that organize power and that organize change). Conceptually, it is also possible to simply differentiate between rules with direct effect (on a natural or legal subject) and indirect effect (typically setting up a regulatory framework of some sort), which produces two levels of political contestation.

70 In this paper, 'justice' is considered to be the outcome of the rule of law 'at work'. This makes justice the fair and reasonable resolution of a difference and the rule of law the entire set of enabling factors, such as institutions, processes, customs/norms, laws and regulations that enable justice as an outcome.

71 On the experimental nature of how such development processes might be conceptualized: Berg, L-A, D. Isser and D. Porter, 'Beyond Deficit and Dysfunction: Three Questions towards Just Development in Fragile and Conflict-Affected Settings', in: Marshall (2014), *op.cit.*; Andrews, M., *The Limits of Institutional Reform in Development: Changing Rules for Realistic Solutions*, Cambridge: CUP, 2013; Kleinfeld, R., *Improving Development Aid Design and Evaluation: Plan for Sailboats, Not Trains*, New York: Carnegie Endowment for International Peace, 2015; Van Veen and Rijper, A., *Re-perceiving results: Aid programs and change in fragile societies*, The Hague: Knowledge Platform Security and Rule of Law, 2017.

Are individual rights more important than collective rights? Is it more humane to lock someone up for several years or to give him or her 100 lashes?⁷² Local customs, practices, power structures and international standards guide such choices that lead to imperfect trade-offs in every society. In fragile societies, resource scarcity and limited administrative capacity make such choices even starker.

In short, understanding and influencing the dynamics of political contestation is paramount for contextualising, conceptualising and realising rule of law promotion. Political contestation, in turn, takes place within the boundaries of a given political settlement that manifests a deeper political order at a particular point in time.

72 It is instructive to contrast Rawls and Sen on this matter. Rawls suggests it is possible to create a single standard of impartiality by stripping all social characteristics and labels from the imaginary community that he puts in his 'original position'. Their interests become identical in a shared basic state of individuals as human beings. Yet, Sen objects by highlighting how such a situation can still produce 'a plurality of impartialities' because it does not exclude the possibility that individuals in the 'original position' hold different - and therefore multiple - impartial criteria. In other words, several gauges of impartiality can exist in parallel without any one being inherently superior. Sen suggests that this plurality can only be 'resolved' by open and high-quality public deliberation. Rawles (1971), *op.cit.*; Sen (2010), *op.cit.*

3 Political contestation and rule of law development in fragile societies

Key messages

- Coercive capacity, a reliable support base that provides influence, human resources and legitimacy, and adequate financial means are key resources to acquire and maintain power in fragile political orders. Rule of law promotion strategies that directly seek to reduce elite control over these resources will probably fail. A more gradual approach towards establishing 'rule of law for elites' is more likely to work. This means accepting there are classes of citizens with different legal rights and possibilities.
- Once it has been established that legal means – however unequal their quality and access – are the accepted framework/norm for (political) dispute resolution, their principles can be gradually extended across social classes and groups. There is no automaticity to this process. It is a protracted political fight for the slow expansion of rights and institutions.
- Administration of political decisions is not a straightforward matter in the hybrid and fragmented nature of governance in fragile political orders. Practically, this means that rights and duties will need to be renegotiated to give effect to their implementation after they have been agreed on paper. Rule of law promotion must therefore go well beyond legislative frameworks and institutions and reach down into actual practices by which rights are conferred and obtain meaning.

A political settlement is shorthand for the (in)formal agreement between elite groups that encapsulates the key norms, behaviours and 'rules' on the basis of which a country is governed at a particular point in time.⁷³ In particular, it contains a set of (in)formal representation, control and distribution rules between national political elites that guide

73 Here, rules refer mostly to the unwritten and/or tacit criteria and principles that guide group/individual relations and actions, not to rules in the legal sense of enforceable standards that are made public.

governance and resource allocation. In the process of getting to or revising a political settlement, elite groups are understood to negotiate the extent to which they can pursue their interests on the basis of their relative power and skill within the boundaries of what their constituencies tolerate. Interests can lie at any point on the ‘fully collective’ to ‘fully individual’ spectrum and are likely to vary across issue areas. The (in)formal agreement that results from these elite negotiations, it is argued, influences the type of institutions that can exist and the nature of their performance.⁷⁴ For example, an informal parameter of Iraq’s political settlement is that, whatever their differences, its main Shi’a parties unite when this is needed to retain their dominance over the central Iraqi state.⁷⁵ Among other things, this means that presumably ‘independent’ institutions, such as the Independent High Electoral Committee or the Commission for Accountability and Justice (in charge of de-Ba’athification), are likely to be independent only to the degree that their work is aligned with the dominating political logic. At present, there are two key problems associated with the application of the concept of political settlement in studies of conflict and fragility:

- Variation in the nature of the elite deal that is encapsulated by a political settlement is hypothesised to generate different institutional possibilities in terms of organisational structures, their configurations and growth potential. Yet, political settlement thinking has so far hardly specified what general characteristics matter and how such variation might actually play out across different types of settlement.⁷⁶ Paradoxically, many excellent case studies of political settlements exist

74 Annex 1 offers a definition of political settlement. Relevant literature includes: Parks, T. and Cole, W., *Political Settlements: Implications for International Development Policy and Practice*, San Francisco: The Asia Foundation, Occasional Paper No. 2, 2010; Menocal, A., *Inclusive political settlements: Evidence, gaps and challenges of institutional transformation*, Birmingham: University of Birmingham, 2015; Di John, J. and J. Putzel, *Political Settlements: Issue Paper*, Birmingham: GSDRC, 2009; Hudson, D. and Leftwich, A., *From Political Economy to Political Analysis*, Birmingham: Developmental Leadership Program, Research Paper 25, 2014; Bell, C., *What we talk about when we talk about political settlements: Towards inclusive and open political settlements in an era of disillusionment*, Edinburgh, Political settlements Research Programme, 2015.

75 Van Veen et al. (2017), *op.cit.*

76 This argument is expanded in: Hudson and Leftwich (2014), *op.cit.* Khan offers some initial exploration of the matter in relation to the productive sector (Khan, M., *Political settlements and the governance of growth-enhancing institutions*, unpublished, 2010 – available online: <http://eprints.soas.ac.uk/9968/>), while Kelsall contributes a broad typology of political settlements (Kelsall, T., *Thinking and working with political settlements*, London: ODI, 2016). A part of the problem (not discussed here), is that the notion ‘political settlement’ mixes three separate processes together – coalition building processes between key elite groups, processes of institutionalization that create the machinery and regulatory framework of governance, and leadership processes that create the ideas, relations and action required for strategic decisions in respect of the former two – without adequately relating them to each other.

at the country level, but the general conceptual framework of political settlements remains underdeveloped.⁷⁷

- The elite focus of political settlements means that they introduce a bias towards perpetuating existing 'arrangements to rule' between the selected few, overlook 'hidden' social capacities, and underemphasise alternative political pathways to developmental change.⁷⁸ This risks reinforcing structural conflict drivers that mostly benefit those with guns, funds or status, and entrenching existing inequalities.

It is for these reasons that this section uses a simpler – and arguably more neutral – input-throughout-output model of how power influences political decision making. It applies this model to analyse key dynamics and characteristics of processes of political contestation in fragile societies. Such examination generates vital insights into the possibilities of rule of law development in fragile political orders.

An input-output model for analysing political contestation

A simple yet elegant way of analysing processes of contestation between different interests and ideas that take place in every polity is to examine how power influences political decision-making at its input, throughput and output stages. Political decisions are those that allocate or apply public authority or public resources. Power is their currency.⁷⁹ In fragile societies, power tends to be distributed very unevenly and to manifest itself fragmentally. Consider, for example, the references throughout the academic literature that describe political order in fragile societies as 'neo-patrimonial', 'limited-access' or 'praetorian'.⁸⁰ The first label refers to the personalised organisation of politics on the basis of patron-client relations, with public authority and public resources largely being seen as the private property of ruling elites as long as these remain

77 See for example Sarah Phillips' research on Yemen and Somaliland for the Development Leadership Program, the work by Ginny Hill and Peter Salisbury for the Chatham House Yemen Forum, or the political-economy analysis of Clingendael's Conflict Research Unit on Lebanon, Ethiopia, Mali, Iraq, Libya, Syria, Somalia and Zimbabwe.

78 Di John and Putzel describe political settlements as 'two level games', indicating that elites are neither all-powerful nor exist in isolation, but instead face constituency interests, internal competition and pressures from other elite groups that can provide incentives for change. See: Di John, J. and J. Putzel, *Political Settlements: Issue Paper*, Birmingham: GSDRC, 2009. Yet, it is probably fair to say that the constituency-elite level is understudied.

79 The history of political thought from Plato onwards centers in large part on the question of how power is generated and used, how it can be contained and how it can be harnessed for the good of society. For example: Ryan, A., *On Politics: A History of Political Thought from Herodotus to Present* (Ch. 12), London, Penguin, 2013. Annex 1 and Box 2 provide a simple definition of power.

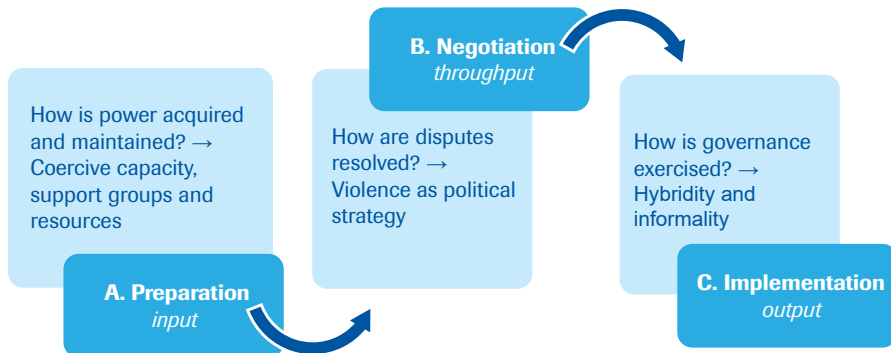
80 For a fairly comprehensive overview: Di John (2008), *op.cit.*

legitimate, credible and provide patronage to their clients.⁸¹ The second label refers in part to the restrictions that elites intentionally enact to limit access to organisational forms and positions of authority. This keeps competition down and elite permeability low. Both purposely keep power and resources concentrated in the hands of dominant elites.⁸² The third label refers to the politicisation of social forces that results from the clash between their respective interests in the absence of credible, authoritative and capable mediating institutions.⁸³ This is in part because the very legitimacy to mediate is disputed.

The core elements of a power-based input-throughput-output model of political decision-making are as follows:

- *Preparation (input phase)*: This is the phase preceding actual political contestation and focuses on the question of how the participating forces are constituted in relative terms and what resources they require to contest effectively.
- *Negotiation (throughput phase)*: This is the phase of actual political contestation and focuses on the nature of dispute resolution between political elites.
- *Implementation (output phase)*: This is also a phase of actual political contestation, but within the parameters of whatever agreement or result was reached in the previous phase. Implementation is considered to be the continuation of contestation by other means.

Figure 1 The role of power at various stages of political contestation



81 Chabal, P. and J.-P. Daloz, *Africa Works: Disorder as Political Instrument*, Indiana: Indiana University Press, 1999; Allen (1995), *op.cit.*; Fukuyama (2014), *op.cit.*

82 North et al (2009), *op.cit.*

83 Huntington (1968), *op.cit.* Although this term predates the use of 'fragile society', it can be applied to it.

While it is theoretically possible for political contestation in fragile societies to be characterised by a (proto-) version of the rule of law – consider variations on Plato’s philosopher-king or even Hobbes’ absolute but moderate sovereign – it is highly improbable. This is because elites in fragile societies are typically much smaller, more powerful, less inclusive and less accountable than in more developed societies. This tends to reduce the level of political competition and increases the concentration of resources or benefits.⁸⁴

Box 2 What do we mean by ‘politics’ and ‘political’?

Politics is a shorthand reference to the process of political contestation.

Political contestation is the process through which clashes between different socio-economic and political objectives that have a bearing on the organisation of the state and the exercise of public authority are framed, considered and decided. Individuals and groups alike mobilise power to participate and pursue their interests in this process.

Political order is the extent to which political institutions manage to resolve disputes between different social forces and adapt in response to the changing nature of such social forces.

A *political settlement* denotes the implicit or explicit understanding between (part of) a country’s leading group(s) on the division of power between them. This is expressed in the form of a set of (in)formal representation, control and distribution rules that guide governance and resource allocation.

Power is A’s (person or group) capacity to bring outcomes about that are favourable to A’s preferences or desires.

Huntington (1968); Dahl (1991); Parks and Cole (2010); Laws (2012)

84 On this point, see also: Fukuyama (2014), *op.cit.*; North et al. (2009), *op.cit.*; Putzel and Di John (2012), *op.cit.*; Acemoglu and Robinson (2013), *op.cit.* who all have fascinating historical examples on offer.

As a result, the orientation of elite interests becomes an important issue. On the basis of what mix of self-, group- and/or developmentally-articulated interests do elites govern fragile societies?⁸⁵ A priori, a healthy dose of skepticism seems appropriate. The general history of political practice provides ample evidence for the dictum that ‘power corrupts, and absolute power corrupts absolutely’.⁸⁶ In short, narrow self-interests feature prominently in elite considerations if left unchecked. In addition, fragile societies are rich in incentives for pursuing self-interest and poor in effective institutional constraints to prevent this.⁸⁷

Input: How power is acquired and maintained

In political settlement terms, the question can be framed as to how elites maximise their influence, position and authority in relation to other elites prior to negotiating (in)formal agreements that confirm and perpetuate their status and interests. The existing literature suggests that at least three resources are relevant to the acquisition and maintenance of power: coercive capacity; a reliable support base that provides influence/access, manpower and legitimacy; and adequate financial resources.⁸⁸

Coercive capacity

Coercive capacity helps to acquire and maintain power either by virtue of eliminating political rivals entirely (assassination, torture and gaoling are common methods in many fragile societies),⁸⁹ or by resolving political disputes through (threat of) force when more peaceful methods are absent or perceived as less effective.

In fragile societies, such capacity can be obtained in a number of ways. The most straightforward manner is to co-opt parts of the national security apparatus so that their

85 The problem with the focus of some authors on incentives is that intentions, morality and substantive aims are largely left out of account as explanatory factors of political behaviour. See for instance: De Mesquita, B. and A. Smith, *The Dictator's Handbook: Why Bad Behavior is Almost Always Good Politics*, New York: Public Affairs, 2011.

86 Statement attributed to John Emerich Edward Dalberg-Acton, first Baron Acton.

87 See for instance: De Mesquita and Smith (2011), *op.cit.*; Fukuyama (2014), *op.cit.*; Chayes, S., *Thieves of State: Why corruption threatens global security*, London: Norton and Company, 2015. Dahlström and Wängnerud note that corruption is merely one indicator of a low quality of government. Dahlström, C. and L. Wängnerud, (2011), *op. cit.*

88 The threat or use of violence as a conflict resolution strategy is ubiquitous in the political order of fragile societies but largely prevented in other societies via a reasonably effective *de facto* monopoly on the use of violence.

89 For a fine-grained and hair-raising account of why and how assassination can take place: Goldman, F., *The Art of Political Murder: Who Killed Bishop Gerardi?*, London: Atlantic Books, 2010.

loyalties shift away from government or state to particular elite members/groups. Such co-optation can be direct or indirect. Direct co-optation is when security forces will not obey their formal line of command in certain situations and instead receive and execute orders from an informal line of command. The armed forces in Yemen under President Saleh and the DRC are examples. Today, the Burundian armed forces present an acute case of gradual disintegration of professional integrity and command loyalty. Indirect co-optation is more passive and happens when elements of the security forces will not respond to orders that go against the interests of their patrons. Lebanon's factionalised security organisations, which also serve as vehicles for patronage for competing elites, might serve as illustration.⁹⁰

Alternatively, elite members can use militias to threaten or exercise violence to strengthen their negotiation position, acquire power directly, enforce order, or maintain the status quo. This effectively creates another security apparatus parallel to the state, usually with the explicit purpose of exerting pressure through political violence. Such capacity does not have to be maintained on a permanent basis, a credible threat of mobilisation may suffice. Examples include the *Imbonerakure* in Burundi (the youth wing of the ruling party that was not disbanded after the Burundian civil war), which is presently used to intimidate and eliminate opposition figures, independent media and disloyal regime members. It has the implicit and sometimes explicit support of part of the Burundian police force and the national intelligence service.⁹¹ In Iraq, the *Hashd al-Shaabi* (Popular Mobilization Forces) acts as a coercive capacity in parallel with the regular Iraqi security forces. It consists of a broad array of mostly Shi'a militias, a number of which are associated with leading elite members and some with foreign patrons like Iran. Their sectarian bias is generally seen as aggravating the dynamics of the conflict with the Islamic State.

Finally, elite members can develop and maintain ties with organised crime organisations or small groups and individuals in state security forces to provide them with a more modest coercive capacity for targeted intimidation and tailored violence. This can take the form of loose or permanent networks of individuals or groups across legal and illegal organisations to produce hitmen and death squads operating under the guidance of middlemen connected to elite members. For example, elements of the Guatemalan military intelligence and presidential guard worked with small criminals and informants to clandestinely eliminate political opponents.⁹² The reach of such coercive capacity is, of course, more limited than that provided by control over parts of the state security

90 Van Veen, E., *Elites, power and security: How the organization of security in Lebanon serves elite interests*, The Hague: Clingendael, 2015

91 International Crisis Group, *Burundi: A Dangerous Third Term*, Nairobi/Brussels: ICG, Africa report no. 235, 2016

92 See Goldman (2010), *op.cit.* for an example.

apparatus or by maintaining militias. Thus, it mostly serves to neutralise or eliminate particular individuals rather than to exercise territorial control or support broader increases in power.

Which type of coercive capacity can be constructed to engage in processes of political contestation will depend on the particularities of the fragile society involved, but in general these capacities have two aspects in common. They will be based on a set of loyalties – typically ethnicity, party affiliation or religious beliefs – that are different from and more important than either professional loyalty or national identity. Secondly, those engaged in the associated coercive activity will tend to operate with near impunity and not be kept in check effectively by regular security forces. This is due to their close association with key elite members who will also tend to hold significant economic and political power.

A reliable support group

Building a reliable support group also helps elites acquire and maintain power.⁹³ Elites do not exist in isolation. They require a support group, or followers, which they can mobilise as a source of influence and that confers legitimacy on both their person and position. The corollary is that elites also face limitations and obligations towards their support group. While the political dynamics between elites and their support groups appear to be in need of further study, a useful distinction has been made between essential and interchangeable support group members.⁹⁴ Essential members are those whose support is a must-have to acquire or stay in power. This is usually because they control an essential resource (e.g. a set of votes, a particular capability, an organisation or a source of legitimacy). They can be thought of as second-tier elites or even peers in relation to top-level political contenders.⁹⁵ Consider, for example, the essential role of Yemen's military chiefs and certain tribal leaders in enabling President Saleh's rule before 2011.⁹⁶ In contrast, interchangeable support group members can be regarded as the 'muscle' or 'volume' of the support base. Among them, there will be bright, up-and-

93 In the context of this analysis, a 'support group' can be regarded as synonymous with a 'constituency' on the provision that representation should not be understood in the democratic sense of a leader acting on behalf of a particular social group. In the personalised politics and power asymmetries of fragile societies, it is more the group that supports the leader than the leader that represents the group.

94 De Mesquita and Smith (2011), *op.cit.*; Fukuyama (2014), *op.cit.* This paragraph and the following two are indebted to the work of De Mesquita and Smith in particular.

95 However, true peers are at risk of elimination at the next possible opportunity when they are perceived as an alternative to the ruler when he has sufficient power to do so. De Mesquita and Smith provide interesting examples from Iraq's Saddam Hussein's Iraq to Cuba's Fidel Castro.

96 For more detail: Phillips, S., *Yemen: Developmental Dysfunction and Division in a Crisis State*, Birmingham: Development Leadership Program, Research Paper 14, 2011.

coming individuals who can replace essential members when needed and possible. For an aspiring politician-cum-elite-member, his/her constituency ideally takes the form of a pyramid with a minimal number of essential members at its top and a maximum number of interchangeable members at its bottom.

A particularity of political order in fragile societies is that constituency members hold very few (or none at all) enforceable civil rights that are independent of their constituency membership. This puts them in a situation of dependency that is open to abuse and manipulation. It also reduces their scope for intra-group coordination as it increases the cost of collective action.⁹⁷ In turn, this means that political decisions and policies can prevail that would lead to rapid loss of political power in a democracy where, for example, the right to vote can be exercised freely and independently.⁹⁸ The *de facto* underdevelopment of the bundle of entitlements associated with citizenship in fragile societies, combined with limited access to organisations and elites, ensures that interchangeable constituency members typically have poor mobility and influencing options.

Unsurprisingly, this tends to limit intra-group contestation and political challenge. It also results in longer tenure of smaller elite groups. If these elites are relatively development-oriented, this can generate positive results, while the reverse holds when they behave more self-interestedly.⁹⁹ In contrast, the power base of essential members of the support group increases their mobility and influencing options (they can afford it). Should these essentials come to suspect that the rewards for their support are no longer secure or that a better offer is available, they can shift sides or renegotiate benefits.

Control over resources

Finally, control over sufficient resources helps elites acquire and maintain power. This holds for all political orders. Yet, what matters is how such resources can be obtained and used, and what purpose they can serve. In a mature democracy, incumbent governments will tend to propose public policies to distribute public resources in ways that resonate with large parts of the electorate. In such a system, the number of essential constituency members is typically too large to enable individual payments. It is

97 Olson, M., *The logic of collective action: Public goods and the theory of groups*, Cambridge: Harvard University Press, 1965

98 Sundell, A., 'Stability and Stagnation', in: Dahlström and Wängnerud (2015), *op.cit.*; De Mesquita and Smith (2011), *op.cit.*

99 For a critical discussion of assumptions on elite orientation in fragile societies: Di John (2008), *op.cit.*; Booth (2012), *op.cit.*

therefore in the interests of political leaders to allocate resources to public goods.¹⁰⁰ Unsurprisingly, in the autocracies and patronage democracies that characterise many fragile societies, the situation is different.

In autocracies, control over resources for maintaining political power is typically assured through a 'stationary bandit' setup.¹⁰¹ This means that a ruler taxes the population and economic activity with the purpose of optimising his profits in the long run, so that he or she can adequately and reliably reward his essential constituency members.¹⁰² The 'ruler' can be an individual or a coalition. The situation has several important economic and security effects.¹⁰³ The first is that the maximum tax rate falls short of complete appropriation because this would remove any incentive to produce or invest. The second is that it is rational to provide public goods to the extent that their presence increases production, which the regime can tax. The third is that other actors with coercive capacity will generally be eliminated because maximisation of taxation requires a monopoly on the use of force.¹⁰⁴ This creates a basic measure of safety in the sense of the absence of open conflict and at least some enforcement of order. An interesting consequence is that durable autocracies, in which leaders (the stationary bandits) enjoy longer tenures, are associated with higher standards of living and less corruption.¹⁰⁵ Stability is not only a requirement, but is often also a characteristic of autocracies. As autocrats generally ensure that they have control over the rules for political competition, the economy and the security apparatus, instability tends to occur as a result of (protracted) external shocks or leadership changes.¹⁰⁶ The key point for this paper is, however, that the ruler has incentives to create at least a measure of rule *by law*. This means that there is some legal predictability and transparency, with the main aim of promoting wealth generation that can in part be appropriated.

In patronage democracies, control over resources for acquiring and maintaining political power is typically obtained through relationships and mechanisms of mutual

100 De Mesquita and Smith (2011), *op.cit.* The corollary seems to be that larger support groups result in more inclusive leadership and policies.

101 Olson (1993), *op.cit.*; see also North et al. (2009), *op.cit.* and Di John (2008), *op.cit.*

102 Many case studies exist that illustrate this dynamic. Consider, for example, the role of someone like Mohammad Mahklouf in supporting the regime of Syria's Bashar al-Assad: Briscoe, I., F. Janssen and R. Smits, *Stability and economic recovery after Assad: Key steps for Syria's post-conflict transition in Syria under Assad*, The Hague: Clingendael, 2012.

103 There are, of course, further detrimental effects such as the suppression of political/civil liberties and the use of force for a range of regime purposes.

104 Olson (1993), *op.cit.*

105 Sundell, in: Dählstrom and Wängnerud (2015), *op.cit.*

106 Consider the 'domino-effect' of the Arab Spring, the current drop in oil prices for the foreign and economic policies of the Gulf countries and the unrest that the approaching end of President Bouteflika's tenure is creating in Algeria.

obligation/reciprocity that connect elites with their popular base.¹⁰⁷ Political parties can play a key role in such democracies by effectively representing affiliative structures for patronage distribution and vote collection. Typically, patronage systems feature resource flows that move up (e.g. cuts of, or payments for, favours, goods and services that were obtained thanks to prior intercession by those in positions of authority – such as licences, privileges or jobs) and down (e.g. material goods, jobs, educational opportunities or services). In addition, due to their position of political power or public authority, political leaders at the top of the apex might benefit from rents extracted from natural resources, aid or trade that come with far fewer requirements of reciprocity attached. Such rents can be used for self-enrichment, oiling the wheels of the patronage system, or public policies.

In patronage democracies with vibrant political plurality, clientelism is competitive. Hence, power and resources are more fragmented than in autocracies. It is more difficult for elites to obtain and manage resources in ways that sustain power. As a result, it may not be possible to centralise power to the degree necessary for enabling either long-term rule or pursuing long-term policy objectives. Such political orders can, however, be capable of creating political equilibria in which an appreciable volume of quasi-public goods and services are provided and distributed on the basis of the logic of clientelism. The USA from 1850–1900 is an interesting example, or perhaps present-day Ghana.¹⁰⁸

In patronage democracies that are limited to one or two political parties, it is more straightforward to centralise power. A single party, or a strong executive, is likely to come to dominate a centralised system of rent-seeking and -allocation.¹⁰⁹ In such cases, party membership can become a substitute for citizenship in terms of enabling access to services like education, housing and public transport.¹¹⁰

In short, opportunities for rule of law development in patronage democracies depend on the dynamism of political competition. If several factions compete for power in a more or less pluralistic system, elite rotation is likely to be higher and elite permeability greater. If elites also have ownership of significant economic assets, an incentive arises to develop effective property rights, for example. Elite rotation and permeability mean, after all, that political power can be lost, while effective property rights help ensure that economic

107 Fukuyama (2014), *op.cit.*; Sundell, in: Dählstrom and Wängnerud (2015), *op.cit.* Note that many patronage democracies could also be labelled façade democracies given the high probability of continuity of rule.

Executive presidential systems appear to be at particular risk of this phenomenon. It seems to be a thin line that separates autocracies from single party democracies with a strong executive.

108 Fukuyama (2014), *op.cit.*

109 Booth (2012), *op.cit.*; Di John (2008), *op.cit.*; Putzel and Di John (2012), *op.cit.*

110 Bates, R., *When things fell apart: State failure in late-century Africa*, Cambridge: CUP, 2008.

power is not lost at the same time.¹¹¹ In short, property rights for elites seem a realistic prospect in relatively competitive patronage democracies. This is but an example of what has been called ‘rule of law for elites’, i.e. laws with a limited constituency, or laws that allocate different rights depending on a person’s legal class.¹¹² However, while such a construct may initially serve elites, it is not hard to imagine other social groups gradually pressing for expansion once elite-oriented property rights exist. The same process of ‘legalising’ elite privileges into elite rights that can subsequently be broadened or mainstreamed is also imaginable in respect of other privileges, sources of revenue or rent that elites enjoy.

In contrast, patronage democracies with few competing factions or a strong party-dominated executive are closer to autocracies in the sense that incentives for rule of law development are more likely to arise out of the desire to maximise resource appropriation in the long term. This points to the business climate and the regulatory framework for economic competition as potential entry points for rule of law development.

Throughput: How political disputes are resolved

Fragile societies are in part considered fragile because of the incidence and/or likelihood of significant levels of organised violence occurring within and across their borders. This is because the threat or use of violence is necessary, attractive and feasible for many – elites in particular – in pursuing their interests in the political order of fragile societies. In other words, it is a highly rational political strategy.¹¹³ It is necessary because elites want to ensure protection of their interests in the absence of reliable, neutral enforcement mechanisms that can do so. Having a capacity for violence also serves as an ‘insurance policy’ should their peers renege on the political settlement that is in place. It is attractive because elites can threaten or use violence instrumentally to increase their control over government, resources or other assets/

111 Polishchuck, L. and G. Syunyaev, ‘Property rights without democracy: The role of elites’ rotation and asset ownership’, in: Dählstrom and Wängnerud (2015), *op.cit.*

112 North et al. (2009), *op.cit.*; see also Fukuyama (2014), *op.cit.*; Polishchuck and Syunyaev, in: Dählstrom and Wängnerud (2015), *op.cit.*

113 See, for example: Jones, B., M. Elgin-Cossart and J. Esberg, *Pathways out of Fragility: The Case for a Research Agenda on Inclusive Political Settlements in Fragile States*, New York: New York University, 2012. Newman argues that the process of statebuilding was, and will remain, an inherently violent endeavour because it involves the imposition of central control and authority over competing or co-existing power centres that are likely to resist as they wish to protect their autonomy. Newman, E., ‘The violence of statebuilding in historical perspective: Implications for peacebuilding’, *Peacebuilding*, 1:1, 141-157). See also: Boege et al. (2008), *op.cit.*

privileges that generate rents or status. In a fashion, it is also attractive for non-elites because mobilisation of (the threat of) violence represents a means to obtaining greater status or resources in the absence of alternative routes that are blocked through the logic of 'limited access'. It is feasible because mobilising violence is cheap, while its use is politically and legally relatively unconstrained. In short, threatening or using violence tends to be a profitable elite strategy from a cost/benefit perspective.¹¹⁴

This does not, however, necessarily lead to a Hobbesian state of nature in which rule by gun is the standard, militias proliferate, and violence is a constant feature of everyday life. While such places exist, as in parts of the eastern DRC, Somalia, Yemen and Afghanistan/Pakistan, they are not the norm because such a situation is intolerable.¹¹⁵ Instead, it is more common for elites to set themselves up as 'stationary bandits' and centralise the use of violence as much as possible. This can be done, for example, by keeping capabilities for violence limited to a small group of elite players that restrict political plurality by running a patronage democracy in oligarchic fashion (e.g. Mali or Lebanon), or by keeping capabilities for violence centralised under an autocratic regime (e.g. Syria before 2011).¹¹⁶ These options were discussed in greater detail in previous paragraphs.

An implication from a rule of law perspective is that the creation of a proto-form of rule of law for elites is likely to be an important first step. This effectively means that different rules will apply to different social groups for a significant amount of time. In its most simplistic form, there could be rules that guide elite behaviour that are more flexible and not necessarily enforceable all the time, laws that guide the actions of the many that are more rigid and enforceable most of the time, and connective tissue between the few and the many, which consists of social prerogatives and partial institutions that influence how cases will be decided, or laws applied, which have litigants of different social classes.¹¹⁷

114 Kaldor, M., *New and Old Wars: Organized Violence in Global Era*, 3rd edition, Stanford: SUP, 2012; World Bank (2011), *op.cit.*; North et al. (2009), *op.cit.*; Bates (2008), *op.cit.* This situation leads to a poverty-conflict trap. Poor governance and high levels of poverty facilitate the outbreak of violence that in turn reduces governability and increases poverty (Fukuyama (2014), *op.cit.*). Paul Collier dubbed this the conflict trap in 'The Bottom Billion' (Collier, P., *The Bottom Billion: Why the bottom countries are failing and what can be done about it*, Oxford: OUP, 2007).

115 Thomas Hobbes as discussed in Ryan (2013), *op.cit.*

116 Olson (1993), *op.cit.*; see also North et al. (2009), *op.cit.* They differentiate between fragile limited access orders and basic limited access orders. A key difference between these two orders is the extent to which the state is merely the collective representative of the elite factions united in a political settlement behind it, or enjoys a limited degree of functional independence that influences elite factions in turn.

117 Fukuyama (2014), *op.cit.*; North et al. (2009), *op.cit.*

Reality is likely to be more complex, with different degrees of legal certainty and enforceability across both social groups (the wealthier, more powerful and more influential will enjoy greater rights and security) and types of cases (those that touch on key power or economic interests will tend to progress slower or be decided in favour of those that are socially more prestigious). To avoid misunderstanding, this is not a desirable state of affairs, but reflective of the reality of many fragile societies.¹¹⁸

Such a situation offers two pathways for rule of law development. The first pathway takes the form of efforts to stimulate deeper institutionalisation and progressive expansion of 'rules-for-elites' to include a greater part of the population over time. Before such a dynamic can take hold, the underlying political settlement has to be fairly stable and feature some resilience against internal and external shocks. In turn, this points to the importance of the predictability, acceptance and enforcement of a settlement – and in particular to the set of institutions necessary to imbue it with these characteristics – before a rule of law for elites can replace violence as a key method for resolving differences.¹¹⁹

Existing research suggests that factors contributing to the durability of a political settlement include the extent to which it is inclusive of the major contending elites; the degree of balance it achieves between available resources and elite interests; the level of executive ability available to maintain this balance in the face of fragmentation, competition and shocks; and the degree of legitimacy the settlement can establish over time (e.g. in the form of 'developmental legitimacy' that results from achieving economic progress).¹²⁰ The recurrent nature of violence over past decades has made it abundantly clear that achieving a durable political settlement is no small task and that the role of external actors in this process is typically very limited.¹²¹

The second pathway for rule of law development takes the form of increasing the accessibility, transparency and fairness of the laws and rules that are valid for the 'many'. In all likelihood, appreciable progress can be made in areas that are relatively unrelated to elite interests, such as family matters. Further rule of law development might then use

118 It is also reflective of the reality of many well-developed societies, although obviously to a different degree, as has been clearly illustrated by the Panama papers (<https://panamapapers.icij.org/>) or Luxembourg leaks (<https://www.icij.org/project/luxembourg-leaks>) (both accessed 27 April 2017).

119 Derived from Booth (2012), *op.cit.*; Putzel and Di John (2012), *op.cit.*

120 *Ibid*, Parks and Cole (2010), *op.cit.*; Booth (2012), *op.cit.*; Allen (1995), *op.cit.*; Di John (2008), *op.cit.* The 2011 World Development Report provides the basis for a policy-relevant, evidence-based discussion on inclusivity.

121 See, for example: World Bank (2011), *op.cit.*; Newman (2013), *op.cit.*; Kaldor (2012), *op.cit.*; Bliesemann de Guevara, B., 'The state in times of statebuilding', *Civil Wars*, Vol. 10:4, 348-368, 2008; De Waal (2009), *op.cit.*; Van Veen and Dudouet (2017), *op.cit.*

such entry points to expand into adjacent areas of law and create a type of snowball effect. From a sociopolitical perspective, this could lead to the purposeful creation of a growing imbalance between the reliability of rules in certain areas as opposed to the unreliability of rules in other areas that can, in turn, promote further reform as it mobilises new social forces.

Output: How governance is exercised

Hybrid governance refers to processes in which the application of public authority and the administration of governance is negotiated and constituted between interlocking sets of informal and formal institutions that include the state. More concretely put, the national elites that are nominally in charge of fragile *states* often have to negotiate the reach and currency of their power with other centres of authority and legitimacy insofar as their local application in fragile *societies* is concerned.¹²² Consider, for example, the projection of state authority into the north of Mali via proxies and informal relations (a territorial example),¹²³ or clerical ‘consultation’ on government policy in Saudi Arabia (a more ‘spiritual’ example).¹²⁴ While negotiations about the implementation of political decisions are also normal practice in mature democracies, especially in those of the federal kind, political contestation about the business of governance in fragile societies features several significant differences.

To start with, in fragile societies the state faces rival sets of loyalties and (informal) rules that can be as strong or stronger than its own.¹²⁵ In this sense, the state is just one competitor among several. In addition, and in reflection of such diverse loyalties and rules, fragile societies also typically feature a patchwork of informal and formal institutions that are not necessarily bound to the state and which enjoy substantial legitimacy as a consequence of the loyalties and rules that sustain them, as well as appreciable autonomy and capability.¹²⁶ In narrower rule of law terms, this is visible in the legal pluralism typical of many fragile societies. It points to the need to consider how elements of their existing colonial, state and customary legal systems can be reconciled or innovated towards locally-grounded legal systems that can meet the

122 See for example: Newman (2012), *op.cit.*; Boege et al. (2008), *op.cit.*; Bagayoko, N., E. Hutchful and R. Luckham, ‘Hybrid security governance in Africa: rethinking the foundations of security, justice and legitimate public authority’, *Conflict, Security & Development*, 16:1, 1-32, 2016; Utas (2012), *op.cit.*; Malejacq (2016), *op.cit.*

123 Chauzal, G. and T. van Damme, *The Roots of Mali’s Conflict*, The Hague: Clingendael, 2015; Hüsken and Klute (2015), *op.cit.*

124 Al-Rasheed, Madawi, *A History of Saudi Arabia*, 2nd edition, Cambridge: CUP, 2010.

125 Putzel and Di John (2012), *op.cit.*; Boege et al. (2008), *op.cit.*

126 For example: Bagayoko et al. (2016), *op.cit.*

‘justice demands’ of the 21st century. In this process, the state justice system should not ‘automatically’ enjoy pre-eminence because several sets of rules and loyalties exist in parallel. Bestowing superiority upon it might contribute to conflict and is likely to serve particular groups at the expense of others.

Moreover, whether the consequences of such parallel or ‘institutional multiplicity’ are negative or positive from the perspective of effective administration largely depends on whether these institutions compete, collaborate, co-exist with or substitute for each other, including with or for the state.¹²⁷ The history of the Western world shows that the dominance of a single set of loyalties and formalised rules has tended to emerge out of protracted periods of conflict over political power.¹²⁸ A number of researchers of contemporary processes of state formation have argued, however, that the co-existence of parallel and intertwined layers of informal/formal and state/non-state institutions is likely to be a permanent feature of the structure of political order in the 21st century, especially in fragile societies.¹²⁹

Finally, an important aspect of hybrid governance in fragile societies is the significance of informal economies that can be captured or ‘regulated’ by those with the wherewithal to impose themselves (be it criminal gangs or business-connected politicians), who tend to appropriate their surpluses. From this perspective, informal economies are a source of revenue that facilitates the continued existence of alternative power bases and the emergence of new ones. They have a symbiotic relation with clientelist politics. Expanding an informal economy can therefore be a risky development, despite the merits it might also have.¹³⁰

In short, having political power at the national level represents only part of the ability to rule in fragile societies, since public authority and public administration often have to be effectuated via interwoven power centres and their intermediaries. These layers

127 Helmke and Levitsky, cited in: Bagayoko et al (2016), *Ibid*; Di John (2008), *op.cit*.

128 Consider Germany’s unification under Otto von Bismarck that culminated in the Austro-Prussian war of 1866; the Magna Carta of 1215, the wars of the Roses from 1455 to 1487 and the English civil war between 1642–1651 that produced what today is called the United Kingdom; or the making of France as artfully described in: Weber, E., *Peasants into Frenchmen: The Modernization of Rural France, 1870–1914*, Stanford: SUP, 1976.

129 See for example: Boege et al. (2008), *op.cit.*; Booth (2012), *op.cit.*; Utas (2012), *op.cit.*; Malejacq (2016), *op.cit.*

130 Hesselbein, G., *Patterns of Resource Mobilisation and the Underlying Elite Bargain: Drivers of State Stability or State Fragility*, London: LSE, Crisis States Research Centre, 2011; Schoofs, S., *Making Sense of Informal Economies in Fragile Contexts: Issues, Dilemmas and Questions*, The Hague: Clingendael Conflict Research Unit, 2015

are infused by the logic of patronage and the threat of violence. This has several consequences for rule of law development.

The most obvious consequence is that even if elites could somehow be induced to improve the quality of political decisions, public policies and laws/rules from a collective goods-type perspective, they would still face difficulties in having their decisions, policies and laws administered due to the fragmented nature of governance and administration.¹³¹ The less obvious corollary of this situation is that the seemingly neutral area of public administration is likely to be as contentious as the political arena itself.¹³² This makes it of vital importance that international initiatives promoting local governance and the rule of law treat the 'aftermath' of political decision-making (i.e. actual implementation) as part of the main act.¹³³ It is here that the actual business of governing comes to life.

Another consequence is that hybrid governance facilitates transnational connections between foreign sponsors and domestic centres of authority that operate in parallel to the state because such institutional multiplicity creates a range of meaningful entry points for external agendas and interests to exercise influence. Consider, for example, Saudi sponsorship of Wahabi centres of religious belief and advocacy throughout the Sahel, or Rwandan funding for militias in the eastern DRC. Such transnational connections reflect and perpetuate the limited reach of the state in terms of both its legitimacy and its administrative penetration, something that rule of law promotion efforts should more consciously take into account.¹³⁴

131 In relation to this point, Booth (2012), *op.cit.* notes that the political cost of making electoral promises to deliver collective goods is both high and unlikely in a clientelist system since tailored benefits tend to be preferred.

132 This realisation, for example, starts to emerge in: Bergling, P., L. Bejstam, J. Ederlöv, E. Wennerström and R. Sannerholm, *Rule of Law in Public Administration: Problems and Ways Ahead in Peacebuilding and Development*, Stockholm: Folke Bernadotte Academy, 2008.

133 Derived from Newman (2013), *op.cit.*

134 Putzel and Di John (2012), *op.cit.*

By way of conclusion: a few provocative thoughts

A major problem that arises from promoting the rule of law in the political order of fragile societies is that the normative and practical demands of the concept are generally too exacting, perhaps biased, and certainly too aspirational. Depending on how these demands are pursued, effects might be produced that are not actually productive. For example, resistance, tension and loss of confidence will inevitably result from efforts that seek to realise aspects of the rule of law in fragile societies exactly as they prevail in other parts of the world. Resistance arises from the lack of respect that copy-paste efforts show for traditions, histories, norms and sociopolitical realities elsewhere. Tension is generated by the ideological clash between modern justice systems in developed countries and the patchwork of semi-legal systems in fragile societies. Loss of confidence occurs both domestically and internationally when the ambitious objectives and practical realities of rule of law promotion efforts continue to diverge after sustained implementation efforts.

Towards a practical shift in rule of law promotion

A practical shift in rule of law promotion would therefore seem desirable: from normative form to practical function. Its aim is to take better account of the state of development of fragile societies, and to work on the basis of a more gradual approach to change without losing a moral compass.¹³⁵ However, this compass cannot be calibrated to the more classic 'end-state' thinking of rule of law development. Instead, it should take much greater account of practical realities and local norms. For example, it will have to be accepted that the laws and legal institutions of many fragile societies will purposefully not be equally accessible, functional and useful for a long time. Rule of law promotion efforts need to engage with this reality by exploring political boundaries to scout for reform possibilities, or to prevent regress. Moreover, under the logic of the political order

135 This is analogous to the argument made by Berg *et al.* in Marshall (2014), *op.cit.* The programmatic flexibility that a more gradual and more political approach to rule of law promotion suggests, calls for a significant increase in the use of 'adaptive programming' as the default aid approach to stimulating positive change. Adaptive programming is a recent field of research-policy-practitioner innovation. See, for example: <https://twpcommunity.org/> or <http://www.dlprog.org/tags/thinking-and-working-politically.php> (accessed 30 March 2017); Van Veen and Rijper (2017), *op.cit.*; Derbyshire, H. and E. Donovan, *Adaptive programming in practice: Shared lessons from the DFID-funded LASER and SAVI programmes*, 2016.

of fragile societies, the passage of new laws or institutional performance improvement initiatives will not necessarily represent effective ways of improving this situation. Instead, a much greater focus on culture and the norms that guide behaviour might be appropriate.

This means that both the substantive focus and procedural approach of many existing rule of law promotion efforts are likely to need rethinking so that it becomes less moral in its universal ambitions and more local in the practical difference it makes. Pivotal to achieving such a practical shift is focusing on processes of political contestation. The durability and orientation of the political settlement that demarcates the playing field for political contestation in fragile societies is particularly relevant to promoting the rule of law. Durability results in part from the institutionalisation of peaceful relations and workable rules between elites. Durability-related aspects amenable to rule of law interventions include strengthening executive authority, establishing 'rule of law for elites', and increasing intra-constituency voice to support greater elite accountability.

- *Strengthening executive authority* centres on the ability to check centripetal tendencies in elite rent-seeking and competition so that they do not turn into unsustainable excesses. From a rule of law perspective, this means a focus on the norms, principles, laws and regulations on the basis of which executive authority functions in hybrid governance contexts.
- *Establishing a 'rule of law for elites'* amounts to clarifying and improving the rules for power competition, elite asset ownership and privileges of office in ways that both satisfy incumbents and allow for the gradual popular expansion of elite rights in the course of time.
- *Increasing intra-constituency voice* means strengthening the ability of individuals and groups to articulate, discuss and challenge leadership behaviour on the basis of the logic and interests of particular organisations or factions within the constituency. In short, the degrees of freedom of elite behaviour in respect of the exercise of power have to be gradually reduced, funnelled into more peaceful and practical channels of negotiation and contestation, and institutionalised.

As at least the partial consent of elites is essential to achieve these three points, their interests need to be respected while, at the same time, possibilities for social progress are created. This generates an evident dilemma. Resolving it amounts to the art of political reform. Tried-and-tested methods include strategic use of time (e.g. windows of opportunity and appropriate time horizons) to instigate reforms, creating composite reform packages from which key political decision makers benefit more than they lose (this optimises the leverage that differences in intensity preferences can generate) and

increasing the pressure on elites to take painful decisions because the alternative might be worse.¹³⁶

An additional problem is that political settlements are generally not very amenable to external influence as processes of political contestation are highly endogenous in nature. Evidence to date suggests no other way of addressing this hard-to-stomach observation than a corresponding lowering of expectations of the influence of externally sponsored rule of law promotion efforts.

Building blocks for such a shift

Suggesting that a practical shift in rule of law promotion is desirable obliges one to make a number of propositions as to what this could look like. The table below seeks to capture potential elements succinctly with the aim of stimulating further debate. It provides a basis for thinking about a more general ‘theory of change’ on rule of law development in the political order of fragile societies in the 21st century.¹³⁷ Developing such a theory would obviously require much more research and consultation. Yet, it is a vital exercise given the current poor track record of rule of law interventions. A modest contribution such as this paper could help.

¹³⁶ On the last point see: Acemoglu and Robinson (2013), *op.cit.*; World Bank (2017), *op.cit.*

¹³⁷ Such a theory would be situated between broader theories of political change, state formation and statebuilding, and programme- and project-specific theories of rule of law change in particular contexts. In short, a mid-level theory.

Table 1 Building blocks for a practical shift in rule of law development in fragile societies

GENERAL ASSUMPTIONS	
<p><i>On political contestation in fragile societies</i></p> <ul style="list-style-type: none"> • The use of violence is a rational strategy to acquire and maintain power and needs to be disincentivised before much else can be done • From this perspective, the ability to rule needs to be strengthened before law can be created in the sense of the 'rule of law' • This suggests that quests for the parallel realisation of democracy, market economy and rule of law (the 'all good things go together' paradigm) need to be discarded in exchange for painful trade-offs • In particular, development in the justice (and security) domain does not just take longest, in all likelihood it also takes place last (or late) 	<p><i>On rule of law development in fragile societies</i></p> <ul style="list-style-type: none"> • Relations between rule of law, democracy, economic growth and statebuilding are unclear to the extent that general claims of causality or even interlinkage should largely be considered as 'policy-based evidence' • As the rule of law seems to be a development output more than a development input, rule of law activities should prioritise laying its political foundations over advancing justice, especially in its institutional form • Basing rule of law promotion interventions on a classic end-state understanding of the rule of law in developed societies is a poor way of developing the prevalent legal pluralism in fragile societies into a functional justice ecology that is legitimate and functional
RELEVANT OUTCOMES FOR RULE OF LAW DEVELOPMENT	PATHWAYS TO RULE OF LAW OUTCOMES
<ul style="list-style-type: none"> • Strengthening the durability of political settlements by reinforcing executive authority, promoting 'rule of law for elites' (institutionalising peaceful dispute settlement for elites) and supporting greater intra-constituency voice in ways that allow for the progressive expansion of rules and rights over time • Supporting the emergence of 'rule by law', implicitly accepting that many laws will not apply some of the time to certain sections of the elite ('rule of law for elites') • Initiating or supporting identification, exposure to public debate and mediation of parallel sets of norms for what is 'just' that, upfront, have equal coherence and validity 	<ul style="list-style-type: none"> • Working with the reality of political and legal pluralism to consider how their different elements can be reconciled or innovated rather than reformed • As part of this, exploring local norms, values and expectations more deeply to ensure ideas about how to develop the rule of law are meaningful and have 'local fit'. Once identified, comparing and contrasting feasible 'rule of law' alternatives rather than comparing reality with a remote, idealized rule of law end-state • Emphasising softer aspects of capacity building like norms, organisational culture and capacities to engage in debate/reflection over hardware-oriented capacity building
EXAMPLES OF TYPES OF ACTIVITIES	
<ul style="list-style-type: none"> • Promoting the establishment of rules that regulate political competition and economic production to the benefit of existing elites, as long as the emergence of new (i.e. non-elite) agents can also be stimulated (at the same time or over time) • Professionalising those justice processes that are critical to daily law experiences of citizens in the non-political sphere • Developing effective property rights (starting with elites) • Encouraging greater elite permeability and rotation through e.g. tertiary education or scholarship opportunities 	

Barriers that will need to be overcome

Rule of law development is in large part about political contestation. Not only does the rule of law arise from processes of political contestation, it also represents a way of engaging in such processes and can help resolve contested issues. This makes it a highly disputed, divisive, sensitive and, therefore, politicised area in every society. On the basis of this insight, the paper argued for a practical shift in rule of law promotion that is more pragmatic and function-oriented. However, a number of significant barriers will need to be overcome to change the way in which rule of law development in fragile societies is being thought of and practised today.

The first barrier is that a false impression of consensus prevails in the international discourse on what the rule of law amounts to and how it should be implemented. One way of viewing this problem is to argue that a highly political concept, which has important values and ideals to offer, has been smothered by layers of declaratory rhetoric and a quasi-halo of normative superiority based on form instead of function. Supporting evidence for such a frame is the incredibly conceptual and operational diversity among the statements of member states in response to the 2012 UNGA declaration on the rule of law, the contrast between their statements and their national realities, as well as the reduction of the rule of law to a sub-element of Sustainable Development Goal 16 (about peaceful and inclusive societies) in the recently adopted 2030 UN Agenda for Sustainable Development, which succeeded the Millennium Development Goals.¹³⁸

Part of the difficulty in taking a more practical approach to rule of law promotion is therefore doing so publicly. It goes against the prevailing international discourse, which makes it a hard as well as an inconvenient sell. This also makes it easy for initiatives and programmes not to think through and engage with the fact that the rule of law emerges from processes of political contestation and that the particularities of these processes in fragile societies require a much more sociopolitical approach to rule of law development than what might be the case elsewhere. Concretely, this means that international actors are likely to spend too little time and effort finding out whether their understanding of the rule of law is similar to that of those they seek to engage with and

138 See: Carothers (2009), *op.cit.*; Marshall (2014), *op.cit.* Contrast, for example, President Kibaki of Kenya's statement during the 2012 UN Rule of Law high-level meeting that "... Kenya had been dedicated to promoting the rule of law and that goal remained as important today as it had at the country's independence..." (source: <http://www.un.org/press/en/2012/ga11290.doc.htm>, accessed 11 June 2016) with the involvement of substantial numbers of the country's politicians and officials in organised crime, large-scale corruption and fraud as analysed in: Gastrow, P., *Termites at work: A report on transnational organized crime and state erosion in Kenya*, New York: International Peace Institute, 2011. See also: United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development*, New York: UN, 2015.

what change in the political order of a particular context is feasible. Generating such understanding requires in-depth political-economy analysis, as well as a design that allows programmes to engage in a process of political contestation.¹³⁹ For example, rule of law programmes in fragile societies often work to increase the provision of legal aid. If this is done effectively, litigants will inevitably run into existing elite interests. Hence, for such programmes to be effective, they will need to be designed to protect paralegals and litigants when this moment arrives; dispose of mechanism(s) for collectivising and pressing claims where necessary (many claims are likely to centre on land belonging to the same elite members, for instance); and have built or secured social support networks (e.g. religious organisations) with powers of popular mobilisation and social pressure to engage in the associated political contestation.

An associated, more operational, barrier is the fact that international rhetoric about rule of law promotion tends to dominate over practical recognition of the limitations of fragile societies, which makes it difficult for programmes to operate effectively. Programmes are incentivised to err on the side of caution, sticking with the international rhetoric. If they don't, they might jeopardise sign-off, funding or both. Reducing such negative incentives requires greater tolerance for ambiguity among senior decision makers and donors about the nature of rule of law progress in fragile societies. Where this is absent, programmes are likely to feature overly-ambitious, but ultimately not very realistic, objectives. The resulting structural underperformance makes learning difficult as the causes for failure are sought within contextual parameters rather than in the nature of the discourse and the wishful thinking that drives the process of setting programme objectives.¹⁴⁰ From this perspective, the often-invoked lack of 'political will' for change is a convenient way to 'explain' inconvenient realities and distract from structural problems in conceptualisation and design. Recurrent failure also creates long-term credibility problems for actors supporting rule of law promotion.

A concrete example is the persistence of hardware-oriented train, build and equip efforts as key rule of law promotion strategies. By themselves, such approaches are generally flawed because hardware-oriented capacity-building initiatives assume that the functions of many public institutions in fragile societies are similar to those in more developed countries, i.e. to safeguard rights, deliver on citizen entitlements, keep abuse of political power in check and/or advance the public good. Yet, this is often not the case since their primary function in fragile states tends to be to organise and deliver

139 The problem of technical or apolitical programming approaches to rule of law development despite the highly political nature of the subject matter is discussed in detail in: Sannerholm, R., S. Quinn and A. Rabus, *Responsive and Responsible: Politically Smart Rule of Law Reform in Conflict and Fragile States*, Stockholm: Folke Bernadotte Academy, 2016.

140 See, for example: ADE (2011), *op.cit.*; Independent Commission for Aid Impact (2015), *op.cit.*; Van Veen (2016), *op.cit.*; Kavanagh and Jones (2011), *op.cit.*

the political and economic arrangements concluded between the elite groups that are usually in charge.

On a final note, it is no doubt easier to keep working from a concept that is appealing in its aspiration but largely unattainable than it is to come to terms with, and muddle through, the operational realities of bringing about incremental and progressive change in fragile political orders. However, if the ambition is to support long-term, positive development in fragile societies on grounds of solidarity, humanity and self-interest, instead of just providing palliative life support, a more practical approach to rule of law development seems long overdue.

Annex A Definitions of key terms

Term	Definition	Sources (if any)
<i>Political contestation</i>	The process through which clashes between different socio-economic and political objectives are framed, considered and decided that have a bearing on the organisation of the state and the exercise of public authority. Individuals arise, groups form, and both mobilise power to pursue their interests to participate in this process.	Based on: Huntington, S., <i>Political Order in Changing Societies</i> , New Haven: Yale University Press, 1968
<i>Political order</i>	The extent to which political institutions manage to resolve disputes between different social forces and adapt in response to the changing nature of such social forces.	Huntington, S., <i>Political Order in Changing Societies</i> , New Haven: Yale University Press, 1968
<i>Political settlement</i>	The implicit or explicit understanding between (part of) a country's leading group(s) on the division of power between them. This is expressed in the form of a set of (in)formal representation, control and distribution rules that guide governance and resource allocation. Such understandings evolve over time and are grounded in underlying agreements <i>within</i> particular leading groups that enable and constrain what can be agreed <i>between</i> different leading groups.	Parks, T. And W. Cole, <i>Political settlements: Implications for International Development Policy and Practice</i> , Occasional paper no. 2, The Asia Foundation, 2010; Laws, E., <i>Political Settlements, Elite Pacts and Governments of National Unity: A conceptual study</i> , DLP Background Paper 10, 2012.
<i>Elites</i>	Individuals or groups with significant power or influence in processes of political contestation and/or the utilisation of a nation's tangible and intangible resources.	Author, inspired by several readings

Term	Definition	Sources (if any)
<i>Theory of change</i>	A set of interlinked assumptions on how change in a particular area happens, how possibilities and priorities of change can be identified, and what constitutes progress.	Stein, D. and C. Valters, <i>Understanding Theory of Change in International Development</i> , London: JSRP, 2012
<i>Rule of law</i>	A state of affairs in which the accessibility, quality of proceedings, content and enforcement of custom and law, written or oral, are such that most people perceive or experience it as just most of the time in terms of the solutions it produces in response to differences	Author, inspired by several readings
<i>Power</i>	A's (person or group) capacity to bring about outcomes favourable to A's preferences or desires.	Dahl, R., <i>Modern Political Analysis</i> , London: Prentice Hall International (5 th edition), 1991
<i>Democracy</i>	A political regime characterised by free and open elections, with relatively low barriers to participation, genuine political competition, and wide protection of civil liberties.	Dahl, R., <i>Polyarchy: Participation and opposition</i> , New Haven: Yale University Press, 1971

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