

Building the Rule of Law Abroad

Definitions, Methods, and Tactics

Rachel Kleinfeld, Executive Director, Truman National Security Project
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- 1. What Are We Trying to Achieve?*
- 2. What Do We Need to Change?*
- 3. How Can We Intervene to Create Change?*

Rule of Law Building
Definitions:

*What are we trying to
achieve?*

There are two types of definitions: Ends Vs. Institutions.

Institutions

“The rule of law depends on having appropriate laws on the statute book, a trustworthy, efficient and independent judiciary and effective law enforcement.” (Pierre Landell-Mills, OED

Evaluation of World Bank Assistance for Governance, Public Sector Management, and Institutional Reform)

- **Judicial Reform**
- **Police Reform**
- **Legal Reform**

Ends

The societal goals the rule of law is meant to fulfill.

- **Government subject to law** (no corruption, extrajudicial murder)
- **Equality before the law** (for clerics, wealthy, etc)
- **Law and Order** (security)
- **Human Rights**
- **Predictable, efficient justice**

Most practitioners use institutional definitions: they are simple to budget and plan.

But with institutional definitions, what does reform mean? Does it get us what we want?

What does it mean for the institutions to be “better”?

- Japan has a 99% conviction rate.
 - America had a reasonable level of the rule of law long before computers existed.
 - Will it really chill the commercial prospects of Afghanistan not to have the most modern bankruptcy law?
 - Britain has no bill of rights or written constitution.
 - Is the death penalty against the rule of law, or necessary for the rule of law?
- Too often, reform means “making institutions like those in the U.S.”. But these reforms do not necessarily get us to the goals we are trying to achieve by building the rule of law.**

Institution-based definitions are predisposed to pitfalls that harm success

- **Failure to achieve goals:** Focusing on one institution at a time ignores need for cross-institutional reform and coordination.
- **Apolitical:** Can ignore the political incentives *for* keeping institutions functioning poorly. Budgeting is a political act, even in a poor country.
- **Miss forest for trees:** Can miss larger reform needs: political change, cultural change.
- **Institution-modeling:** Copying of Western institutions can lead to poor reform, needless arguments between different legal systems, and charges of hypocrisy.
- **Reform-drift:** Proliferation of unfocused reforms to make institutions “better”.

Institutional reform can undermine Rule of Law end goals

Ends-based definitions let us think about what we are trying to accomplish, creatively.

If we have a problem with crime...

The solution might require more jails and better trained police. But we might also think about...

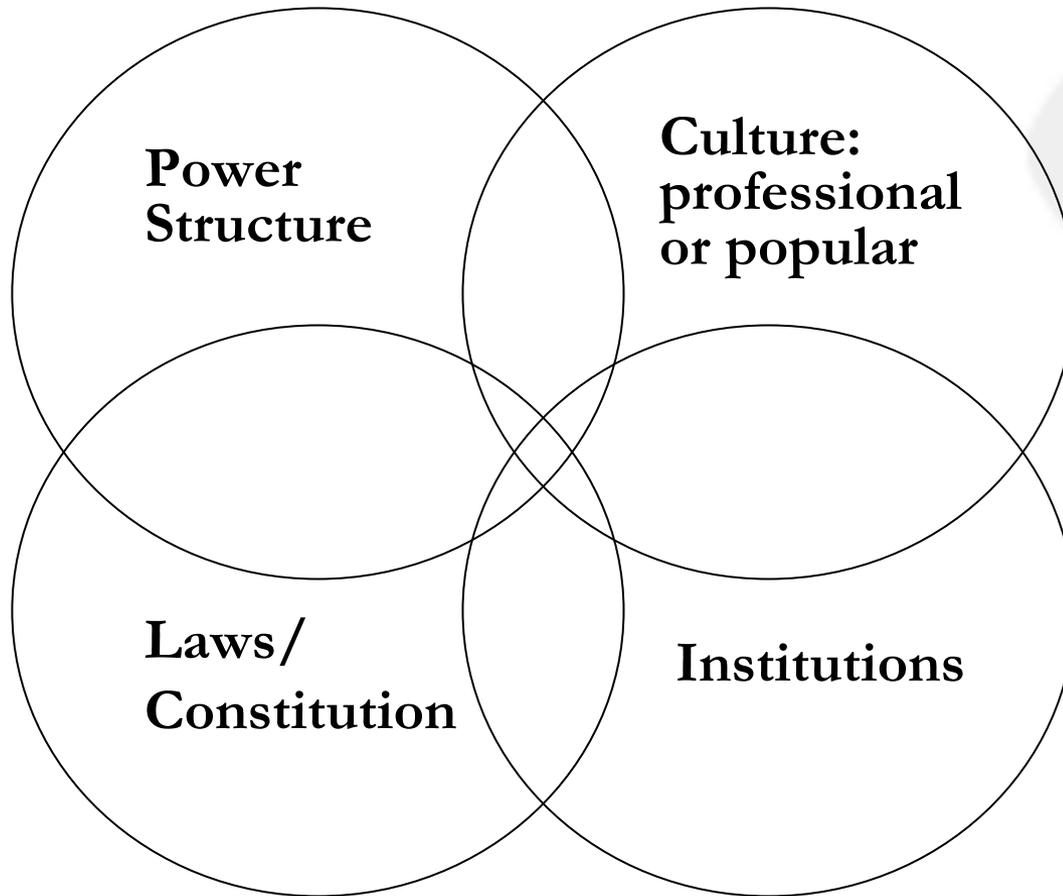
- After-school programs, vocational training for teenagers, or job programs to get young men off the street;
- Social pressure--as with the terrorist rehabilitation program in Saudi Arabia, or a neighborhood watch in America;
- Heavier sentences for offenders--or lighter sentences, if young offenders are being hardened/inducted into gangs while in prison;
- Marriage dowries;
- Paying some offenders to police others--as in anti-gang activities in the U.S.;
- Cultural programs to deglamorize crime/gangs/terrorism.



*Rule of Law Building
Objects:*

*What do we need to
change?*

There are four areas of society we can focus on changing to improve the rule of law



We can work to change the power structure, the culture, the laws, or the institutions of another country to achieve:

- A government subject to law
- Equality before the law
- Law and Order
- Human Rights
- Predictable, efficient justice

Each object can affect the others--and considering each broadens your range of tactics

Problem: The economic system is broken and trust in the government is low because of rampant corruption

- **Laws:** Create bright-line anti-corruption and nepotism laws, with strong sentences. (*But will the culture support these? Can they be enforced?*)
- **Institutions:** Force government officials to publish financial information. Create anti-corruption watch-dog groups. Increase pay of public officials. (*How do you counter apathy about corruption? Institutionalized corruption?*)
- **Culture:** Train the press to report on corruption. Teach schoolchildren that corruption is shameful. Bring religious figures together to condemn corruption. Promote reformers within institutions. Create elite groups of non-corrupt public officials. (*How do these cultures sustain themselves against the “real world?”*)
- **Power:** Create a powerful, well-funded anti-corruption commission. Support a candidate who is making his/her name on an anti-corruption platform. Build up an independent judiciary to prosecute governmental corruption (*But what about corruption within the judiciary? Are powerful forces too strong to allow these interventions to succeed?*)

In all cases, rule of law reform entails affecting the power relationships within a society

The Rule of Law is about who has the ability to make, break, and enforce the rules that control wealth, privilege, and power.

Every rule of law reform takes power away from some person or group. Some reforms may be perceived as privileging the reformer itself--the U.S., the military, or other outside intervener! And some reforms give power to a person or group that otherwise lacks the force to hold onto this power.

It is essential to consider power dynamics and the perceptions of loss or gain of power for successful reform.

Unthoughtful reform can cause cynicism towards the entire rule of law exercise.

*Rule of Law Building
Methods of Intervention:*

*How can we intervene to
create change?*

There are four main methods of intervention to target objects we wish to change in other countries

- **Top-Down** (Development Aid and Technical Assistance)
- **Bottom-up** (Civil Society Aid, Empowerment, Cover)
- **Diplomacy** (Rhetoric, Conditionality, Carrots and Sticks)
- **Enmeshment** (Socialization into rule of law structures, international and national--WTO, NATO, IMET Program, etc.)

For any rule of law intervention, you can create a conceptual template to determine your strategy

End Goal of Reform

(Human rights, law and order, reduced corruption, etc.)

	Top-Down	Bottom-Up	Diplomacy	Enmeshment
Power				
Culture				
Institutions				
Laws				



Your choice of end goals, and tactics, should ideally result in a strategy

End Goal of Reform: Government abides by law

Intermediate goal: (Judicial independence and a non-corrupt judiciary)

	Top-Down	Bottom-Up	Diplomacy	Enmeshment
Power		X	X	
Culture	X	X		
Institutions	X			
Laws				

To get government to abide by law we decide judicial independence is important. Our strategy involves funding civil society organizations to press for an independent judiciary, while we ensure that our high level political delegations speak about the importance of judicial independence. We decide to educate future judges on the importance of judicial independence to change their professional culture, and will educate schoolchildren on the role of checks and balances to bolster civil society's support. We will put funding and technical assistance into the judiciary to reduce corruption once the judiciary is independent.

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