



Conflict | Law | Peace
Innovations for Rule of Law Promotion and Transitional Justice

Impulse Paper No. 2:

**User-centred Law:
What Law, Which Rights Do People in Fragile Contexts Need?**

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I. Introduction

State fragility is characterised, among others, by weak institutions and the decline of formal law. In order to protect populations, reduce violence and, more generally, stabilize the conflict-affected societies, basic legal and institutional frameworks thus need to be rebuilt and effectively implemented. But – where to begin? This impulse paper distinguishes between three main phases of conflict. It discusses how the most essential normative elements, which form the basis for human rights protection, peace-building and state reconstruction, can be identified. It further argues that state as well as non-state institutions need to be taken in consideration if measures to promote the rule of law and to enable transitional justice are meant to be effective.

II. Conceptual approach

For the purpose of this paper, three main stages of conflict can be differentiated: Active conflict, the post-conflict situation and the stage of consolidation. As much as circumstances differ from stage to stage, the needs of the affected populations change.

1. Active conflict

As far as this stage is characterised by violence, insecurity and the breakdown of public order, rule of law promotion can only take place within a rather limited scope. Primarily, law-based approaches will need to focus on ending the conflict, minimizing its impact, and protecting civilians through the enforcement of international humanitarian law and human rights law, possibly with an emphasis on the rights of internally displaced people (IDPs) and refugees. At the same time, preliminary measures can be taken to prepare future state building and transitional justice processes, such as the collection of evidence of war crimes and human rights violations.

2. Post-conflict

As the levels of violence decrease, opportunities for rule of law promotion grow. Nevertheless, the risk of taking inapt measures or setting wrong priorities should not be underestimated. In the best case, this only means that resources are wasted. More often, though, such mistakes intensify problems and cause new conflicts. In this stage, the main challenge is to understand which normative systems and mechanisms of conflict resolution do exist, are generally accepted and effectively applied. The rules that actually regulate society may differ considerably from the 'law in the books'. Also, the degree of erosion and dysfunctionality of existing institutions is not easy to determine. Without a thorough context analysis, appropriate measures for the post-conflict period cannot be developed. This takes time. As windows of opportunity can close quickly, temporary solutions such as interim constitutions and the rule by decree may be relied upon, but they must be carefully designed in order not to impede further development.

3. State consolidation

The more stable a situation becomes, the more opportunities for mid-term and long-term planning arise. In order to seize them, contexts must be regularly reassessed and measures to strengthen the rule of law and to facilitate transitional justice must be readjusted. Enabling a gradual evolution from reactive to stabilizing to preventive patterns of action is key. Moreover, academic research and field experience both reveal that exclusively focusing on the state, its law and its institutions is insufficient. The civil society must be included in the planning, implementation and evaluation of rule of law and transitional justice measures in order to assure their effectiveness and legitimacy.

III. Identifying the essential law

Certain aspects of rule of law promotion and transitional justice facilitation typically coincide with the abovementioned conflict stages. The following list is neither authoritative nor exhaustive:

Active conflict	→ Post-conflict	→ State consolidation
International humanitarian law	Constitution-building	Functioning of state organs, parliamentary law, elections
Human rights law	Human rights law	Administrative law
IDP / refugee law	Land law	Private & economic law
Collection of evidence of war crimes and atrocities	Transitional justice processes, international criminal law	Higher legal education
	Justice & corrections reforms	
	Bar associations & legal aid	

Linking state and non-state
justice
Legislative drafting
Legal education (practice-
oriented)

Although this list reflects international practice to some extent, there is no uniform approach to rule of law promotion and transitional justice in fragile contexts. Time-consuming preparatory activities can already take place at an earlier stage of conflict. For example, it can be sensible to invite young, talented jurists immediately after the end of conflict to participate in higher education programmes abroad in order to prepare them for public offices and academic positions in their home country.

As mentioned above, a systematic, comprehensive context analysis remains essential. To this end, a number of general guidelines shall be observed. First of all, context analyses ought to reflect the complexity of the situation, which is why multidisciplinary teams should carry them out. Anthropologists who are familiar with normative traditions within societies are as important as specialized jurists who are able to understand the local state law. Political scientists will be needed to explain the conflict dynamics in order to reduce risks. Other disciplines might also be of help, depending on the situation and objectives. Second, context analyses must reflect the interrelations between rule of law promotion, transitional justice and other fields of activity, particularly SSR (security sector reform). Thinking in silos inevitably leads to insufficient coordination and, in the worst case, contradictory action, and is thus a serious obstacle to success. Third, in order to avoid conflicts of interest, independent institutions or individuals who will not be involved in the subsequent project implementation should conduct the required context analyses. Fourth, it is advisable to place the needs of local populations in the centre as overly technocratic state-building efforts have proven unsuccessful in recent years. However, determining these needs is a particularly demanding task of assessment teams. Fifth, such teams ought to assess the pre-existing and planned initiatives of local and other international actors, in order to avoid redundancies and ideally create synergies.

IV. The challenge of differing normativities

Legal pluralism is a reality in all societies. It tends to be more pronounced in countries of the Global South and to increase in conflict situations when state institutions erode. When it comes to stabilising fragile states and societies in conflict, differing normativities pose specific challenges. To begin with, identifying them can be difficult, particularly for jurists who have not been confronted with intrasocietal legal pluralism previously. The second challenge is understanding their functioning, local acceptance, and scope of application. In many cases, customary law is handed down orally from generation to generation and constantly changes, and therefore cannot be studied as easily as positive law. Third, jurists who are used to working in rather unitary legal systems might have difficulties recognising that the structures of other normative orders may fundamentally differ. Traditional or religious norms usually do not follow the systematic approaches developed in Europe in the early modern period, when law was steadily separated from ethics and morality, and their internal arrangement might be different from the familiar classification between public, civil, criminal, and other areas and sub-areas of law. For example, the structure of the Islamic shari'ah is primarily based on the distinction of sources, principles, and schools of interpretation.

Legal pluralism is a highly politicized field where opposing interests collide and diverging values contend. International assistance to rule of law reforms and transitional justice processes cannot ignore these conflicts; donors and implementing organisations must evaluate their scope for action and take a position, which will inevitably cause discontent in some segments of the local population and which might even be controversial in their own countries. The controversy over collaborations with non-state justice institutions illustrates this conflict and reverberates the global ‘universalism vs. relativism’ discourse on human rights and cultural values. Supporting specific forms of law and its institutions may even fuel conflict and incite opposition. Being aware of the political nature of any effort to foster the rule of law and enable transitional justice is a precondition of success. Donors and organisations involved in these areas cannot shirk their responsibility if they want to contribute to the achievement of higher-level objectives such as stabilisation, peacebuilding and sustainable development. While the respect of international human rights should be considered a “red line” for their engagement in fragile contexts, it may be noted that their protection can demand collaboration with traditional and religious institutions.

Another challenge that is closely related to the phenomenon of differing normativities is the question of what people actually believe to be ‘the law’ and ‘their rights’. Particularly in countries with high rates of illiteracy, the understanding of norms can strongly diverge from their original meaning. At times, they resemble rumours that reflect the interests and desires of those who pass them on. This observation once again confirms that legal transfers cannot be planned and carried out as if norms were commercial goods; in fact, norms change whenever they are inserted and applied in a different context, and may have unexpected effects.

V. The significance of institutions

Finally, when discussing law and normativity, the relevance of institutions cannot be ignored. Once again, it is indispensable to look beyond the state. Non-state institutions that develop and apply norms and enforce them exist in all societies, and they certainly play a larger role in fragile contexts than elsewhere.

Three main types of institutions can be differentiated. The functions of state institutions, such as parliaments, administrations and courts in formulating, implementing and enforcing state law are generally known. However, there are also cases of state institutions that apply traditional or religious law, such as the social courts in Ethiopia. Second, there are hybrid institutions that are formed or at least formally accepted by the state, but consist of laypersons and apply combinations of state and non-state law, such as the *aksakal* courts in Kyrgyzstan and the village courts in Bangladesh. Third, traditional or religious institutions resolve disputes in many societies, such as tribal chiefs in South Sudan, indigenous courts in Bolivia and *jirgas* in Afghanistan. In many cases, they also complement the norms they apply with state law.

In addition to the mentioned functions, institutions are also needed in order to raise awareness of rights and of how to pursue these rights, i.e. how to navigate the institutions that are involved in the process of rendering justice. Donors and organisations that aim to strengthen the rule of law and facilitate transitional justice must carefully choose which ones to work with, and assess the possible – desired as well as undesired – effects of their decisions. They will have to enhance not only the functionality of these institutions, but also their integrity in order to build popular trust on them.

VI. Contributors

This paper is based on a talk among experts who convened at the German Federal Foreign Office on 1 November 2018 for an open exchange of ideas. On behalf of RSF Hub, Tilmann J. Röder (moderation), Marie-Thérèse Schreiber and Viktoria Vogt participated. RSF Hub is grateful to all scholars and practitioners who contributed to this paper:

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About RSF Hub

RSF Hub is a project-based think tank funded by the German Federal Foreign Office fostering knowledge transfer between politics, academia and field practice in the area of rule of law promotion and related topics such as transitional justice. RSF Hub organises, in collaboration with various partners, expert talks and round tables. Team members teach at universities and train ministry staff, speak at events, contribute to blogs and publish academically. For more information on the Hub's activities see <http://www.fu-berlin.de/rsf-hub>.

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