Working paper 531

Experimentalism in international support to rule of law and justice

Conference reflections

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Key messages

- Rule of law and justice reform is integral to sustainable development, yet is complex and bound in social norms and political power.
- International support to this agenda is moving away from top-down, state-centric approaches, to be more bottom-up and end-user focused.
- There is also a growing interest in politically smart and adaptive approaches. However, what makes for 'effective experimentalism' is under-documented, under-explored and under-systematised.
- A workshop held by the Overseas Development Institute (ODI) and the London School of Economics and Political Science (LSE) teased out examples of experimentalism. Five key capabilities were identified as important to work in this way:
  - Embrace political complexity;
  - Take advantage of processes of system or norm change;
  - Take advantage of international normative changes;
  - Work across siloes; and
  - Look at how legal problems are framed.
- In problem-focused approaches, actors must ask a series of questions including: What counts as the problem? Who gets to define the problem? What counts as success, and who decides this? How transparent, professionalised or politicised should experimental approaches be?

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1 Introduction

What does it mean for practitioners working on rule of law and justice reform to use experimental approaches?

The rule of law is a product of conflict, dialogue and debate. It is uncertain and unpredictable. As a result, some policy-makers have suggested that we apply experimental approaches to rule of law and justice reform work. In this paper, we understand experimentalism broadly as a policy process that entails problem-spotting, policy prototyping, testing, adaptation, iteration and reflection, in order to account for the complexities of how law, politics and development interact.

'Experimentalism' encompasses 'ways of working' in international development recently described as 'politically smart', 'locally led' and 'problem-driven'. They all take context and political economy seriously, advance locally defined and locally led change processes, and adapt to changing conditions (Andrews et al., 2015; Desai and Woolcock, 2015; Booth and Unsworth, 2014). Do such ways of working already feature in international support to rule of law and justice reform? If so, how? What are the merits and risks inherent in experimentalism? These questions were addressed during a two-day workshop, held by the Overseas Development Institute (ODI) and the London School of Economics and Political Science (LSE) in May 2017.

Drawing on the discussion and presentations at the workshop, this paper:

1. Outlines the context. What do we know about how change happens within rule of law and justice reform? What 'experimentalism' discussions are currently taking place?;
2. Discusses examples of experimental practice at national and international levels. How are donors using opportunity structures? What enabling skills do reformers need to work in this way?;
3. Sets out a series of limits and challenges to working in this way; and
4. Ends with a framework to guide future research and practice in this area.

Any international support to rule of law and justice that takes complexity seriously is highly commendable. Yet it remains imperative to critique the current policy enthusiasm for adaptive, problem-driven and politically informed approaches.

2 Experimentalism in context

Current discussions about experimental approaches to rule of law and justice support are taking place alongside three parallel developments: an evolving (if fragmented) knowledge base on the role of law and justice in politics and development, a renewed interest in the rule of law in the policy and practice community, and a growing appreciation by the international donor community (in discourse, if not in practice) about the complexity of these change processes along with the need to act accordingly.

2.1 Evolving, if fragmented, knowledge base

Rule of law is now accepted as an *intrinsic* good. It represents the possibility of effective constraints on the exercise of power: Bringing about the rule of law is bringing about development. Rule of law is also seen as *instrumental* for achieving other development and governance objectives. In this view it enables growth and (potentially) redistribution, reduces violent conflict, contributes to more accountable and law-bound exercise of public authority, and enhances rights.

In practice there is a gap between acknowledging the importance of rule of law, and progress. International support to rule of law and justice reform has been critiqued since its early manifestations in the *law and development movement* of the 1960s and 1970s.[1] Criticism has centred on the practice of focusing on form over function, top-down, overly technical, legalistic and state-centred processes, and reliance on imported models that are poorly connected to local realities.

Our knowledge of the relationship between law, politics and development has advanced in different sectoral, thematic and disciplinary areas, with growing cross-fertilisation across these. Still, the knowledge on how law and justice institutions affect development outcomes remains fragmented. This fragmentation reflects the following:

- **Geographic divides:** people working in Latin America, sub-Saharan Africa, Asia and the Pacific are rarely in conversation with each other;
- **Functional siloes:** interventions focusing on constitutional or other legal and regulatory reform processes are disconnected from those working on access to justice, legal empowerment, transitional justice or issue-based disputes;
- **Disciplinary and thematic expertise among practitioners:** between
  - lawyers and economists working on law, trade and property;
  - legal anthropologists working on legal pluralism;
  - constitutional lawyers and political scientists working on legal and constitutional reform, judicial review, judicial independence and separation of powers;
  - social and economic rights activists and lawyers working on bottom-up legal empowerment efforts or transnational regulatory and normative frameworks;
  - human rights and transitional justice experts working on post-conflict reconciliation and post-authoritarian redress; and
  - gender experts working on violence against women and girls.
- **Disconnects across scales:** micro-targeted interventions such as locally specific legal empowerment efforts are mostly disconnected from national, regional or international political efforts to reform laws, regulatory frameworks and institutions, and vice-versa; and
- **Institutional narrowness:** focus on formal norms, judiciaries and other law enforcement agencies, with limited (but growing) engagement with legal pluralism and multiple dispute resolution mechanisms.

This fragmentation is replicated in international interventions, but also reflects the increasingly multi-dimensional and multi-actor nature of international support to rule of law, legal change and justice work. Fragmentation is perhaps an inevitable consequence of specialisation and expertise in the field, but also shows how broad and diverse this field has become.

1 Carothers (2006); Davis and Trebilcock (2008); Marshall (2014); Tamanaha et al. (2013); Faundez (2011); Kennedy (2006); Trubek and Santos (2006); Kleinfeld (2012); Bergling et al. (2009); Perry-Kessaris (2011), among others.

2.2 The current policy and practice context

As international support to rule of law and justice has diversified, there is also a growing interest in experimentalism. This takes place in the context of three narratives prominent in policy and practice.

Law and institutions matter for development and peace

First, a set of normative and policy narratives place law, and the rule of law, at the centre of development, and of global governance more broadly.

- The Sustainable Development Goals[2] (SDGs) – and specifically Goal 16 – place rule of law, institutions, and peace on a similar footing to health and education.
- The United Nations Sustaining Peace Agenda[3] identifies rule of law, access to justice and accountability (including transitional justice) as core features of a peaceful society.
- The World Bank's 2017 World Development Report[4] underlines that law and governance are at the heart of the successful design and implementation of policies, and of their failure.

Common across these is the belief that institutional change and law matter for development, peace and state-building. Both shape the possibility of rules, procedures and mechanisms for non-violent dispute resolution that can enable peaceful and inclusive social, political and economic engagement.

Law is the outcome of political contestation while also establishing the rules for it

Second, it is now commonly accepted within policy and practice that institutions (formal and informal) are the result of political contests over the distribution of power and resources (WDR, 2017). These institutions include the role and definition of law in political, social and economic life, and the web of associated mechanisms of judicial oversight, administrative regulation, dispute resolution and rights protection. In turn, the rules of the political game they establish frame the space for action to advance different development agendas, contest power or resist change – either through accepted existing institutional arrangements, or with a view to renegotiating and redefining these.

Support to rule of law and justice needs to embrace complexity

Third, in recognition that rule of law and justice developments are complex and uncertain, there is growing interest among international donors to work in politically smart and adaptive ways.[5] These approaches critique top-down policy-making in favour of provisional, prototyping, and often collaborative policy-making, and promote the need to take complexity and the political economy of institutional change seriously to inform how interventions operate on the ground.

2.3 Embracing complexity

Efforts to examine complexity, power, and political uncertainty are of course not new. In the study of law, politics and society, examining the political complexities of institutional change has been around since at least the 1950s.[6]

Four aspects of the complex intersection between law, politics and development were seen as relevant at the workshop for informing international support to rule of law and justice. These include the broadening use of legal mobilisation strategies by vulnerable groups, legal pluralism and the concomitant broadening of what law – and the rule of law – might mean, the wider political economy of institutional change, and the varying levels at which contestation takes place.

Legal mobilisation by vulnerable and excluded groups

Since the 1960s, and especially since the third wave of democratisation in the 1970s, using law has transcended elite discourse to populate broader imaginaries about its potential to contest and redefine social norms and political power (for instance Kennedy, 2006; Santos and Garavito, 2005). In practice, this has become evident in multiple experiences of bottom-up legal mobilisation. Different forms of 'lawfare' have been the object of socio-legal and political analysis, documenting how vulnerable and excluded groups have increasingly used the law or access to justice – often in combination with other political and social mobilisation strategies – to

2 https://sustainabledevelopment.un.org/sdg16.

3 www.un.org/pga/71/2017/01/20/building-sustainable-peace-for-all/.

4 www.worldbank.org/en/publication/wdr2017.

5 Booth and Unsworth (2014) summarise the key features of these approaches in development practice.

6 This paper does not dwell on the deep and broad literature on policy experimentation, institutional reform, complexity and power. But it is important to give due recognition to older analytical foundations of strategic problem-solving, adaptation and flexibility; and experimentalism in institutional and legal change, regulatory reform and public administration, at the national and global levels (Hirschman, 1995; Lindblom, 1959; Rondinelli, 1983; Sabel, 1993; Sabel and Zeitlin, 2012).

advance their rights or seek redress (Comaroff and Comaroff, 2006).[7]

Support to bottom-up legal empowerment is now an established feature of donor support. At the root of legal empowerment efforts is the calculation that law and justice mechanisms can be leveraged to achieve redistributive objectives. The degree of transformative impact is of course contingent on how power struggles unfold in practice, and the place of law in society.

Legal pluralism

Formal norms coexist with other norm systems and dispute resolution mechanisms (informal political norms, social and religious norms, customary norms, and so on). Many of the countries where reform efforts take place are characterised by especially dense forms of legal pluralism with often competing conceptions of justice. Working out how to navigate these multiple institutional and normative layers is ever-more complex, involving uncertain outcomes, as reforms often take place in contexts of legal fragmentation, legal pluralism, and/or weak states. Most donors now recognise the need to engage with legal pluralism in their rule of law and justice support.

Rule of law and justice 'problems' as part of wider socio-political context

Experimentation in legal and institutional change requires a *systemic view* of whatever problem is being addressed. For instance, interventions aimed at supporting access to justice cannot be seen in isolation from the wider politics of the rule of law and law-enforcement, administrative and regulatory capabilities of the state, or the features of legal pluralism, as they are inevitably interconnected. We know, for instance, that enacting laws to protect women against violence, and improving women's access to *formal* justice mechanisms, without considering the weight of customary and religious norms, can exacerbate the risk of backlash or simply be irrelevant.

Similarly, support aimed at reforming formal laws on land governance cannot ignore the interconnections between the political economy of customary justice relating to land disputes, and the *actual* reach and authority of the state or modes of negotiating justice between different sources of justice provision (such land tribunals, or community dispute resolution mechanisms).

Connecting the sub-national, national and global

Law has become an important way in which people at all levels contest power and resources, something of a shared language. In a globalised world, the interconnections between local/sub-national, national and global levels, and across different domains of law and realities of legal pluralism, matter more than ever. How dispute resolution is governed in one level is affected by the power arrangements and rules in another. At the same time, legal institutions are themselves profoundly contested. Their scope is the product of dialogue and debate, especially as they are called on to solve complex problems that implicate human rights, trade, and many other domains, and their intersections. In line with political developments, institutions are also renegotiated or discarded, reflecting shifting power and geo-political dynamics.

Taking on these issues has implications for the expert, the activist and the development practitioner aiming to apply an experimental approach. If the aim is to frame a problem as more or less open-ended and complex, the approach requires both relevant technical expertise, the skills to navigate this complexity, and the appetite to take as given the inevitability of uncertain outcomes (World Bank, 2017; Urueña, 2017).

Mostly, however, programming does not yet integrate adaptive approaches in any rigorous manner. There are few examples of efforts to systematise an experimental approach which grapple with complexity, uncertainty and the contested nature of rule of law and justice.

And many important tensions persist in the practice of international support efforts. On the one hand, practitioners often assume that there is a shared normative understanding of why rule of law matters, what rights count, and that improvements in rule of law and justice result in win-win outcomes for all. On the other hand, practitioners also increasingly accept that the history of law, justice and institutional reform is contested. It reflects complex power struggles, and competing objectives and ideas, about what a just society looks like, and what rules and dispute resolution mechanisms are necessary for their realisation.

7 The political processes of how law is negotiated (and in turn strategically used to advance power struggles) has been the object of socio-legal and political-legal studies for a long time. This includes battles over the content of law and the use of progressive legal content and justice mechanisms to contest power asymmetries by excluded and vulnerable groups (Santos and Garavito, 2008; Epp, 1998). Mostly, however, observing the politically strategic modes of engagement by different actors underpinning these institutional change processes close up has not tended to inform international support efforts.

3 Experimentalism in practice

International support to rule of law and justice has evolved to address an ever-growing range of rule of law, rights, access to justice and accountability issues, moving away from purely top-down state-centric approaches. International interventions typically involve supporting some aspect of *institutional change* or *agency*.

- 'Institutional change' includes support for institutional, legal and regulatory reforms in multiple (and sometimes competing) fields, such as the definition of rights, state recognition of indigenous rights, support to renegotiating customary norms, regulatory change, trade, climate change, issues of judicial independence, criminal justice and due process.
- 'Agency' includes efforts to increase the capacity for strategic engagement with the law by different stakeholders.

In addition to this growing breadth of work, there is an incipient interest among international donors to work in politically smart and adaptive ways.[8] Despite this acknowledgement, such experimentalism is infrequent, and varied.

International support to rule of law and justice has mostly not been experimental in its approach, but there are experiences where efforts to engage with complexity are evident, and vary considerably. Their experimental dimensions are poorly documented, and programming has generally not purposefully embedded problem-driven adaptation, iteration and testing in programme design.

In this section, we review some of these attempts of politically strategic support to domestic change processes and those involving international actors. We provide examples (some presented at the workshop); consider their strengths, assumptions and limitations; and signal some of the skills, capabilities and opportunity structures that can be most effectively harnessed through international rule of law and justice interventions.

3.1 Domestic change processes

It is useful to see international support efforts as only a small part of the wider domestic change processes they aim to contribute to. Taking this wider context into consideration, experimentalism should be seen not only, or even primarily, in terms of donor practice, but rather as a feature of how different stakeholders (including international actors) engage with the political economy of change processes in law and justice. In this sense, these change processes can be described as politics-as-usual, rather than experimentalism. International actors can learn how to mobilise to effect change from national level political elites, experts and technocrats, activists, citizens. They can then make more informed choices about how to engage with these processes and to what end.

In Colombia, the Constitutional Court (Box 1) became a creative protagonist of the experimental use of law and jurisprudence to protect the rights of vulnerable groups in a context of conflict and peace negotiations. It was also a space for different interest groups to advance their causes. Inevitably, the conditions of conflict and inequality that characterise Colombia limit the scope of the Court's efforts at adaptive adjudication.

In South Africa, too, the Constitutional Court has tended to issue decisions that recognised constitutional rights while providing flexible and open-ended remedies that encourage collaborative problem-solving among conflicting parties under court supervision including in relation to the implementation of remedies (di Giovanni, 2017).

Both in the Colombian and South African case, it is clear that justice 'problems' (as is true of most governance problems) are rarely one dimensional. A challenge for donors is how to identify and prioritise specific aspects of a justice problem. For instance, as gender justice looms large in international support to peace processes, there is growing appetite to support women's rights. But *which* women's rights to prioritise is a contested issue. There is the added risk that the most effectively networked agenda will prevail over those voices less well placed to be heard.

Domestic actors will battle this out – this is the stuff of politics. For donors, the complexities of domestic change processes mean that they need to make difficult but

8 See Denney and Kirwen (2014), Sannerholm et al. (2016), Desai and Woolcock (2015) and Domingo (2016) among others on increased interest in politically smart support to rule of law, justice and security.

Box 1 The Colombian Constitutional Court – an experience in experimentalism

The Constitutional Court of Colombia created in 1991 has engaged in what Urueña (2017) describes as 'experimental governance.' Learning from the limits of issuing rigid top-down, protective rulings on rights issues early on (that resulted in non-compliance) the Court engaged in its own creative approach to specific 'problem-solving' and 'open-ended decisions', enabling it to give meaning to constitutional rights, visibility to vulnerable groups rights, and creating space for dialogue.

For example, a decision on internally displaced persons (IDPs) avoided a

> *'linear problem-solving model, in which the Court identified the problem and outlined the process by which the Government and other stakeholders should solve it. On the contrary [it] identified a set of open-ended solutions (which have been modified several times during the follow-up process) through the input of local stakeholders and desirable results to be achieved by the government.*' (Urueña, 2017: 12)

The Court has issued 11 orders to different state agencies, addressing different vulnerability issues, including on land restitution, indigenous communities, Afro-Colombian rights, truth, justice and reparation for victims, women's rights and disability rights.

This 'experimental approach' by the Court has allowed for judicial and administrative remedies that address diverse needs of the IDPs, the results of which were monitored through a set of indicators adopted by the Court from proposals made by civil society and international agencies, particularly the United Nations High Commissioner For Refugees.

Two unintended consequences of this approach include, first, an absence of an overall plan to address the structural issues behind the causes of displacement. Second, better-connected activist organisations rather than the grass-roots social movements tended to benefit more.

Source: Urueña, 2017

conscious choices about where their priorities lie, what consequences these choices can have on the distribution of power in-country, and the risks of doing harm.

3.2 International change processes

International actors (including in investment and trade law, and more recently transnational activist movements, INGOs and donors) have long engaged in aspects of experimental practice. They have sometimes engaged in politically smart and adaptive ways of using law (national, regional or international) and justice mechanisms to leverage domestic change processes. For example, in the field of international human rights activism and transitional justice, there is a history of strategic and tactical manoeuvring across national, regional or international norms and justice systems and political change processes to address local injustices and legacies of violence.[9] Such stories of change remain underrepresented in current thinking.

In some cases, international actors have provided small levels of funding to locally driven legal mobilisation efforts that benefit excluded groups. In 2007, the Chiquitanos community in Bolivia won legal title to their indigenous territory with the support of Oxfam. The victory followed a 12-year struggle by the community, combining legal and political mobilisation strategies at national, sub-national and global levels and using opportunity structures created through legal and political change and through strategic networking at multiple levels (Green, 2016). The endgame was always uncertain and reliant on political contingency.

In other cases, funders have chosen to accept uncertainty at the outset. This is true of funding support to the NGO, the Social and Economic Rights Institute of South Africa (SERI). SERI has overall sought and secured core funding, which supports the integrated, iterative approach better than project-related funding. Funders have chosen to trust SERI's experimental approaches to achieve the objectives of supporting the rights of vulnerable and marginalised groups.[10]

3.3 Enabling skills and strategic use of opportunity structures

While workshop participants felt that the rule of law reform field was open to experimental ways of working, this is mostly still *ad hoc*, and highly uneven. At the same time, activists and practitioners are mobilising in different ways – mostly undocumented – drawing on five key skillsets or enabling opportunity structures.

9 For example, see Keck and Sikkink's (1998) work on transnational activism and politically smart networking on rights struggles.

10 Presentation at ODI/LSE workshop (May, 2017) by Jackie Dugard.

Embracing political complexity

The skills for embracing political complexity involve the capacity to adjust interventions to what is politically plausible given the context and prevailing power structures. Such skills require detailed knowledge of the relevant micro, meso and macro change processes relevant to the rule of law and justice issue they are working on. They also require being well-networked – understanding the scope for strategic alliances, how different stakeholders are related in state and society, as well as transnationally, and the risks of unintended consequences.

There is also a need to be able to navigate different formal and informal institutions in politically creative ways. For instance, human rights-based approaches are often criticised for being politically blind and too heavily bound by rigid normative and policy principles to which donors and recipient are signatories. According to this criticism, these approaches assume normative certainty about what process and outcomes should look like.

In practice, however, politically creative and problem-focused rights activists (and their funders) work with the understanding that judicial politics is mostly uncertain. Formal court decisions are unknowable in advance. Moreover, in contexts of weak rule of law and state presence or elite capture of justice mechanisms, such decisions are biased. Then there is further uncertainty as to whether *bona fide* court rulings will substantively materialise (especially in relation to social and economic rights). Sometimes, the language of human rights and international norms can provide additional scope for leveraging political pressure on reluctant or non-compliant state bodies.

Politically smart rights or judicial activism thus mostly depends on combining such efforts with other forms of political and social mobilisation. This is at the root of how SERI in South Africa supports legal mobilisation of vulnerable groups. Their strategies are multi-pronged and adapted to the particularities of the cases, but with consideration of the political economy of the issues as stake. For instance, SERI's experience in judicialising the struggle to advance the right to water in informal urban settlements was one of a range of social and political mobilisation strategies, all geared towards navigating an uncertain political environment. Uncertainty was embraced from the start, precisely because part of the aim was to give political voice to those suffering injustices regarding water rights, rather than to realistically expect speedy materialisation of the right to water.

Taking advantage of regime, system or norm change

Activists and reformers have taken advantage of transition settings, peace agreements and constitutional reform processes. Here, the formal rules of the game are explicitly open for negotiation and the balance of power and outcomes are especially uncertain. Smart engagement by donors can give voice to excluded groups or invisible issues, or that raise the reputational risks of non-compliant conduct.

In Kenya, the 2010 constitutional reform process was strategically used by women's movements to shape the text on gender equality and women's rights, and to influence process issues relating to rights protection and access to justice more generally. This involved ongoing multi-level engagement by feminist actors over time to negotiate consensus among women's organisations, and to incentivise buy-in among potential resistors in relation to gender equality objectives. Feminist lawyers among the activists also deployed robust technical knowledge to work out how concrete gender rights 'problems' could be resolved. Donor support was effective when it provided sustained resourcing of women's organisations to go about their experimental business, facilitating peer learning exchanges, building capacity of political skills. Women's organisations were in turn effective in leveraging multiple donor support efforts across different governance domains (justice, political empowerment) to strategically connect different opportunity structures and capabilities in shaping constitutional reform outcomes (Domingo et al., 2016).

The negotiation and current implementation of the 2016 Colombian peace agreement has involved different stakeholders adopting 'a mindset of iterative problem-solving, where local interests and the central government interact to formulate policy' (Urueña, 2017). Different categories of victims' organisations and other civil society actors, each with their competing objectives, have been able to shape the content of the agreement (ibid).

Of course, on paper the 'big bang' (Dam, 2006) of legal and institutional reform is often less transformational than intended, given the gap between formal and informal rules. For example, the rights of people living in poor urban settlements in Dhaka might be assured through public interest litigation, but who's to say their homes won't be bulldozed anyway? (O'Neil, Valters and Farid, 2015). However, politically smart engagement can contribute to tactical strategies that open the space for the renegotiation of power asymmetries, giving voice to excluded groups or invisible issues, or raising the reputational risks of non-compliant conduct.

Taking advantage of international normative changes

International normative changes can spark experimentation in implementation. This is potentially the case of soft law such as the Voluntary Guidelines on land governance – see Box 2. Adept strategists can mobilise at different levels to negotiate alliances to shape the content of norms and the process of their circulation and implementation. While this sort of work is diverse, there are a few common strategies that implementing actors might use strategically as they adapt to prevailing political conditions:

- Advancing legal change;
- Mobilising public opinion and awareness among affected groups benefiting from new international norms;
- Engaging in naming and shaming practices; or
- Resorting to strategic litigation or other forms of access to justice.

Box 2 International normative change, and opportunities for action – food security in Senegal

The establishment of the *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*, a form of soft international law, has created a framework for multi-pronged action. In the case of Senegal with support from IDRC, this has prompted:

- **Action based research**, identifying gaps in the national legal framework and regulatory mechanisms to protect the rights of rural communities from large-scale land acquisition processes.
- **Consultative and participatory engagement** by national researchers with communities to both acquire local knowledge and support awareness raising.
- **Development of community level mechanisms** of land governance, and of accountability on land investment.

The jury is still out on whether the voluntary guidelines have allowed for a more critical probing of the political economy of land governance, or reduced the scope for political contestation.

Source: di Giovanni, 2017

Box 3 Multi-level adaptive and politically informed engagement in Tajikistan

The Swiss Agency for Development and Cooperation (SDC) and UNDP have been working in Tajikistan in the following ways:

Drawing on detailed knowledge in SDC country office of national and sub-national context to identify relevant and locally defined justice problems has resulted in identifying justice needs at different levels and among different beneficiary groups; and the possibility for action given the nature of existing political space. 'Problem' identification has been based on an informed appreciation of these conditions, and windows of opportunity for advancing rights and access to justice – at the national and sub-national levels.

- Focusing on women and their justice needs, taking account of labour migration flows mainly to Russia, and remittance based logic sub-national economies.
- Making the most of available political space and the enabling environment to support women's rights through legal aid legislation and domestic violence policy.
- Investing in legal aid work at the small scale level, focusing on women seeking redress over family issues (in cases of separation, or domestic violence issues).
- Building on early successes in creating a platform for legal aid and support to other components of access to justice, including legal awareness raising, and creative use of social communications strategy.
- Working with government buy-in to support women's rights and legal aid services.

Politically smart and adaptive engagement with different stakeholders at national and sub-national level in SDC country office engagement in UNDP programming. This includes:

- Careful weaving of strategic relationships, alliances and networks, including engaging gatekeepers of social norms (like religious leaders at sub-national and national levels); and building trust among unlikely allies.
- Nurturing and then leveraging critical buy-in to different often parallel reform processes by key government and state bodies such as the Ministry of Justice and the Supreme Court or prosecutor's office.
- Investing in capabilities of lawyers, and CSOs including to make them more politically agile and sensitive to social norms.
- Awareness raising and investment in women's legal voice of women and capacity for legal mobilisation.

Connecting the dots across different components of the justice puzzle has been a key feature of SDC support in Tajikistan, as programme management has included connecting action at multiple levels, to make the most of unfolding windows of opportunity in legal and institutional change processes.

Source: Presentation at ODI/LSE workshop (May, 2017) by Shakarbek Niyatbekov

Work across silos

International and domestic participants in reform – experts, activists, practitioners, local civil society groups – must be able to straddle different sectors, themes and levels (including the technical and the political, the local and the national and the global) and understand the interaction between formal and informal rules. Problem-focused approaches benefit from avoid reinforcing silos, or entrenching blind spots. They must also remain connected with the wider and evolving political economy. Much of the onus here lies on donors.

Take justice sector support in Tajikistan – an example of how programme managers can keep an eye open for positive and mutually supporting intersections across different domains of legal change and access to justice capabilities (Box 3). This was made possible because of the donor's very detailed knowledge of the political economy, and a technical understanding of the wide-ranging opportunities created by legal and institutional reform. It is also important to distinguish between the different actors involved at the intersection between international interventions and locally driven processes, and their respective roles, value they add, skills and knowledge sets, and how the relationship between these is brokered and negotiated.

Looking at how legal problems are framed

The definition of 'problems' does not occur *de novo* or in a political vacuum. Different actors have different ways of framing legal problems, each with political stakes. In Colombia, defining the terms to articulate the interests of different categories of victims and rights claimants among women during the peace negotiations resulted for instance, in two types of rivalries and political tensions:

1. Rivalries between victims' groups (for instance, between victims of sexual and gender-based violence; victims prioritising access to administrative reparations relating to displacement; and LGBT rights); and
2. The effective mobilisation by conservative forces in the referendum on the peace agreement included denouncing the advances in the agreement on LGBT and women's rights as going against traditional family values.

These tensions became a key factor in the defeat of the Colombia peace agreement in the referendum on its approval in October 2016 (subsequently approved following some changes in the agreement).

The Colombian experience precisely underlines the importance of seeing each 'problem' as complex and multi-dimensional, and linked to the wider political economy. It also signals the risks involved in creating open-ended processes that defer (potentially indefinitely) resolving politically intractable problems.

Summary

These insights emphasise the importance of power, practices, problems, players and entry points in shaping the ways in which experimental legal and institutional reform happens, and the role of international support in achieving change that is locally driven. The political nature of rule of law and justice-related change means that outcomes will be uncertain.

We need to develop deeper insights into, and a more robust empirical base on, how the following happen:

- Adaptation to evolving and uncertain political process, where outcomes cannot be known ex-ante;
- Brokering of relations to find common interests and incentives;
- Engagement with the complexities of local processes of problem-definition and politically plausible solutions;
- Strategic awareness of evolving political opportunity structures at the sub-national, national and global levels; and
- Remaining vigilant of the associated risks and potential unintended consequences.

4 Limits and challenges of experimentalism in rule of law and justice support

Experimentalism moves away from the focus on formal over informal rules, on form over function, on the technical over the political, and towards analysis of the actual consequences for who wins/who loses. As important as experimentalism might seem in theory, we must maintain a critical view of how donors and implementers use of it evolves in practice. What follows below are a series of pleas to keep space for critical reflection (Eyben, 2014). These questions may be helpful prompts for practitioners or advocates who wish to pay attention to how experimentalism plays out in practice.

What counts as the problem to be addressed?

Some of those advocating for experimental approaches suggest that problems must be 'politically possible' to resolve (Faustino and Booth, 2014). It makes sense to pragmatically assess what kinds of problems can feasibly be tackled. But this could limit the scope of contestation to those issues that are already acceptable within the existing political and legal order. It also risks identifying either overly localised problems, or overly simplified readings of problems. There are also risks that in deciding the scope and entry-point of a problem, many legitimate voices are excluded. The most effectively connected organisations are likely to be better placed to influence prioritisation of problems (Denney and Domingo, 2016).

What counts as sufficient context, and who determines this?

Any context becomes infinitely more complex the longer you look at it. Any attempt to use law strategically needs to take into account the wider socio-legal context, past attempts to intervene, and how national and community level change have influenced each other in the past. This is particularly true of rule of law reform efforts in conflict-affected and fragile settings. Here, the challenges of political complexity are magnified, as there is often a heightened sense of institutional fluidity and uncertainty in the power configurations in such settings.

A central challenge is that we rarely surface our prior assumptions about what parts of the context we're analysing, how, and why, and with what purpose. For example, the design of a development intervention is often based on contextual analysis prepared for managers in donor countries. This affects what information is determined relevant and how it is presented.

What counts as success, who determines this?

Donor organisations are politically bound by the need to show results to taxpayers and funders (Valters and Whitty, 2017). It is based on the sensible idea that aid spending must be held to account for what it achieves. In practice, this can often lie in tension with the need to accommodate flexibility and uncertainty. Who decides how that tension should be resolved? A development intervention may contribute to a gradual progressive shift in socio-legal norms, but fail to deliver on pre-planned quantitative improvements in well-being. Is that a success? We may require a rethink of our understanding and measure of results in relation to politically intractable and uncertain problems like rule of law development.

How transparent should the relevant actors be?

Donor organisations are bound by political agreements with host countries. Adaptive approaches – in the degree to which they involve under-the-radar political strategies – potentially compromise those agreements, and raise issues of sovereignty. Embracing complexity means being politically smart in navigating informal rules of decision-making, and shaping the coalitions and directions of reform, which often requires selective transparency. At the same time, donor organisations are also bound to be transparent in their work, especially where there is a risk of 'doing harm'. These dilemmas remain insufficiently problematised.

How and where should actors balance technical expertise and political strategy?

Practitioners and theorists agree that technical language might provide political cover within limited political space; or where the international practitioner has a limited mandate. But when, and how, should such a step be taken (when it goes against the grain of ruling elite interests, or when it serves to stimulate intra-elite competition, for example)? And how can the practitioner

be held accountable for this approach? Importantly, experimentalism should not result in the disposing of technical expertise.

These limits and challenges may seem too burdensome for reformers to take on. Experimental approaches do not operate in a vacuum; they can never be implemented 'perfectly'. They will be interpreted and reinterpreted within each context they are attempted. Any practitioner or advocate for these approaches needs to pay close attention to how they work out in practice.

5 Final reflections

Rule of law and justice problems are complex. We must avoid assuming that collaborative and experimental problem-solving is a cumulative process that simply requires people to take the right steps to generate improved rule of law. We must also avoid lapsing into an overly prescribed process of experimentalism that replicates the bureaucratic weaknesses in practice that it seeks to displace. This requires focusing on the political economy of problem identification, empirical feedback loops, and problem-solving, which lie at the core of adaptive approaches, along with the implications for the different actors involved in international interventions. Such a framework may guide both future study of experimental rule of law and justice reform, as well as its practice.

Problem identification

Experimentation is a response to complexity. In rule of law and justice work, the open-ended character of problem identification and solving is especially pronounced given the politically intractable nature of the 'problems' in question. As more international support focuses on conflict settings, the challenge of the unknown and uncertain is magnified.

This raises the stakes in terms of who gets a say in problem identification and prioritisation, and choices about what adaptive and flexible decisions and trajectories should involve, what strategic alliances are palatable, and what the trade-offs might be.

The experimental process

The move from form to function has begun to make inroads, but many issues remain under-problematised:

- **Operational and thematic siloes remain resilient.** Each silo in rule of law reform comes with a specific procedural bias and assumptions about intended change (constitutional reform for legal drafting, transitional justice for processes of truth-telling, and so on);
- **Experimentation is local**, unfolding around a specific problem nominated by a specific polity. In doing so, participants risk losing sight of the broader political process it is embedded in, including in relation to how assumed 'progress' on some legal change or rights gains intersect in practice with sub-national, national and global processes; and
- The contested question of **what counts as evidence of progress**. How can actors accommodate the need to satisfy demands for concrete results, while taking seriously the spirit of iterative learning and empirical feedback loops? Only the latter will enable flexible reorientation of interventions and expectations of what change is possible, plausible and desirable.

Roles and mandates

Experimental reform is provisional and supposedly collaborative because it deals with issues with uncertain outcomes. Yet, traditionally law and justice work has been founded on a division of labour in which technocrats have provided advice and technical assistance, and domestic actors translate that knowledge into a domestic political environment. There is broad agreement that rule of law and institutional reform practitioners are being called on to be more self-reflective, political, and strategic (Eyben, 2014; Autesserre, 2014; Mosse, 2004). It remains to be seen how donors will confront this.

Unpacking the roles of the donor, expert, implementer and activist in legal reform and rights' struggles, and how they interrelate in furthering experimental approaches, remains hugely under-studied. This would help us better accommodate the fact that each 'actor' comes with their own set of objectives. Donors may have explicit mandates from, and responsibilities to, their taxpayers, the recipient state, and intended 'beneficiaries'. The activist may be motivated by concrete objectives. The expert might be driven to bolster her role as knowledge broker or honest broker. And so on.

Summary

What makes for 'effective' experimentation in rule of law and justice support is under-documented, under-explored and under-systematised. Despite modest changes in the enabling conditions in donor organisations to incentivise adaptive approaches, we know little about what effectiveness looks like on the ground. Of course, experimental approaches are, by definition, highly contextual and hard to replicate, meaning an 'evidence base', traditionally understood, will be hard to develop.

At the same time, we do have some ideas about how reformers can be better equipped to do adaptive work. In this paper, we explored some of these ideas, drawing out the importance of adaptation, brokering capacity, responsiveness to local conditions, and a wide-ranging strategic awareness of political opportunities and constraints.

We have set out a series of contextual considerations that affect experimental reforms – political complexity, legal pluralism, the interconnectedness of different spatial levels. We have also suggested a series of practical skills – adaptation, brokering capacity, responsiveness to local conditions, and a wide-ranging strategic awareness of political opportunities and constraints. Considering those themes, we have suggested a framework that might guide both future study of experimental rule of law and justice reform, as well as its practice.

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