

NOREF Report

The rule of law in peacebuilding contexts: lessons from Somalia

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Executive summary

Rule of law (RoL) programming is caught in the middle of the peacebuilding/statebuilding discussion. Twenty-first-century post-conflict RoL programming seems to have become more statist in character and highly focused on the criminal justice chain. A key question, however, is how external RoL/statebuilding assistance can address the gap between society and the central state so as to in effect give the RoL a greater peacebuilding function. Southern Somalia provides an example of failed RoL/statebuilding, but in Somaliland the existence of an inclusive political settlement has allowed United

Nations RoL assistance to contribute not only to core state capacities, but also to engagement with civil society and arriving at innovative programming modalities, which in practice signifies an expanded interpretation of the concept of the RoL and thus of its social impact. Examples are given of engagement with “informal” customary systems and other sectors so as to contribute to the construction of more socially embedded police and justice practices capable of providing greater legitimacy to the state.

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Introduction

After a decade of practice, neither taxpayers in rich countries nor populations in “target” countries can draw much solace from the limited impact of rule of law (RoL) support programmes over the past decade. Responding simply that the RoL is a long-term proposition is also unsatisfactory. This is technically true, perhaps, but the RoL should not be considered as a technical proposition, but a broader governance one in which social actors can act as catalysts. Greater rigour is necessary in defining RoL objectives. In peacebuilding contexts the real challenge is to think beyond the attainment of equality under the law and due process for all. But how do we get there if we ignore that the RoL is also about people working with authorities to attain not simply stability and non-violence, but development and prosperity? Distinguishing justice from the judiciary and the RoL from the “rule of lawyers” becomes imperative. Nor is it “justice and the RoL”, but rather access to justice embedded and anchored in the RoL. This is more than a matter of semantics, inasmuch as a justice-driven approach to the RoL should offset post-war statebuilder stabilisation temptations to place “security” first, and leave the RoL and justice, including oversight, for later. Mounting, but sometimes intentionally ignored, evidence tells us that security and the RoL do not form a sequential proposition, at least not if democratic governance is the goal. This outcome seems to escape fragile post-conflict policy settings obsessed with state creation, as in Somalia: diplomats speak openly of creating a state almost of any character, at any price, by almost any means, under strict foreign tutelage, including military intervention. And when this has happened, rapacious governing authorities have shown to have little regard for and incentive to seriously embark on RoL-mandated judicial and security sector reform (or its construction from scratch), or indeed to end resource wars when war and the state themselves are the primary resources. In this way, international initiatives with the objective of achieving legitimate and stable governments that can deliver peace achieve the exact opposite.

But is the international community also partly to blame for meagre RoL results in post-war and fragile settings? In contrast to donor RoL

programming for Latin America in the 1990s, which emphasised procedural reform, the new RoL assistance to fragile states seems to demand more focus on state security than on democracy. This brings us back to definitions and targets, and how RoL programming has been caught in the middle of the peacebuilding/statebuilding discussion. Twenty-first-century post-conflict RoL programming seems to have become more statist in character, highly focused on the criminal justice chain. But in key country contexts where central government has been at best an abstraction to most people – or at worst a bad historical nightmare – no amount of external RoL/statebuilding assistance has seemed sufficient to significantly reduce the gap between society and the central state, particularly in outlying areas. The current operational thinking is that bringing government closer to the people is a matter of enhancing service delivery, particularly – insofar as the RoL is concerned – policing and judicial services. Quite logically, therefore, the emphasis has been on the criminal justice chain (with correctional services support playing a secondary role).

Lessons from Somalia

For United Nations (UN) and donor programming purposes, there are three government counterparts in Somalia: Puntland, Somaliland and South Central. The last of these is characterised by a very weak and somewhat dysfunctional central government that is limited in its reach to Mogadishu and propped up by African Union (AU) troops. There are two fundamental realities that shape UN RoL efforts in South Central: the continuing war against al-Shabaab and the UN and AU becoming a belligerent party in this war. The UN Development Programme (UNDP) – the principal RoL actor – has found it difficult to maintain a degree of political neutrality in its RoL development interventions in this region. Yet, by encompassing matters of justice and rights, citizen-state relations, and security, the RoL programme is dealing with issues that go to the heart of the Somali conflict. The lesson here may be that “doing” RoL in support of unviable governments and in a war setting may be ineffective (in relation to the amount of resources invested) if it has an overly heavy focus on hard

security. Some have argued that a security-minded international donor community has made UN RoL and other programming resources part of the war economy and that statebuilding in this context is arguably in itself a “driver” of conflict, along with the questionable assumption that the absence of the state lies at the root of the crisis. But if it was the abuse of state power rather than its absence that provoked decades of violence, then the problem is perpetuated, at least in the minds of a majority of citizens.

In Puntland, although more stable and with most of its territory under government control, the government’s authoritarian nature has constituted a context that also influences programming in the direction of security, with limited support for a very weak executive-oriented judiciary that is overly dependent on international actors. However, unlike South Central, there has been room for promising work with traditional institutions and local peacebuilding efforts. Somaliland has provided the highest return on RoL investment. A stable government bent on gaining international recognition and proving itself legitimate to the population and the international community has made stringent efforts to uphold power sharing (sometimes to the detriment of a possible meritocracy), organised political parties, delivered on two elections, and pushed police and judicial reforms.

Specific lessons learned

- **The RoL is most effective as the product of a broad, socially acceptable legitimate government and an internal political settlement.** There is a massive difference in results between progress achieved with the police in Somaliland and Puntland, and those achieved in South Central. In the first two cases police forces were established *after* political settlements and are therefore largely perceived as “national” police forces. This was not the case in Mogadishu, where police acted less as a civilian population protector than as a backup for the army. Much international lip service was paid to the development of a judiciary and a prison system, but the resource investment and impact on the ground continue to be minimal. By contrast, progress has been

evident in urban Somali areas in the north, particularly those with elected district councils.

- **RoL programming should be preceded by thorough risk assessments.** This is a crucial consideration in areas of Somalia that are being vacated by al-Shabaab and are affected by mixed contending local forces, including clan rivalries intertwined with the interests of neighbouring states with military forces inside the country. In Puntland, more analysis is needed as to the nature of the government and its alleged links to piracy and private international security forces. Even in Somaliland, risk assessments need to be applied to its most conflictive subregions where police do not appear to be impartial. The application of the UN-wide Human Rights Due Diligence Policy should assist us in better facing the question of whether support for the police is shoring up authoritarian governments.
- **Investing in political economy analysis and baseline assessments.** We are working in complex political settings and yet this complexity is not sufficiently studied. Until we had some baselines in place in Somalia (focus groups, surveys and key interviews), there was little possibility of understanding, let alone measuring, perceptions and preferences, including the high levels of trust in “traditional” institutions. Unless we appreciate how the context influences the programme, we will not be able to capture how the programme impacts on the context. In Somalia, this translates, for example, into ensuring the balanced clan make-up of the police, and guaranteeing the representation of and sensitivities to minorities and women. Unless we get our sociological facts right, we will be unable to understand why an intervention is a success or failure (defined in whose terms?) – was it the design, the strategy, the management, the nature of the work itself, or factors beyond the programme’s capacity to influence? Many mistakes could have been avoided had we first carried out a proper investigation of how traditional social structures carried out governance and conflict resolution, as opposed to the promotion of a politically correct donor-driven Western procedural RoL statebuilding template.

- **Rhetoric and reality.** External evaluations were important in reminding us that our policy and programmatic emphasis on bottom-up approaches, community-driven policies and decentralised rural outreach were all fine – the trouble was translating policy into concrete practice. A similar pattern was caused by the programmatic insistence on tackling “root causes”, and localising “solutions” and (by implication) “problems” that posed the danger of absolving external, regional and international drivers of the conflict or inflating the role of presumed alQaedalinked terrorists. After all, if the problem formulation is inaccurate, so too will be the “solutions” that result.
- **Correctly identifying and periodically reviewing and prioritising areas of work.** This implies the application of what UKAid and others call a “theory of change” to the design of the programme. It should be redundant to highlight the importance of consultation with national staff, local authorities and citizens in developing programme design and problem formulation, but unfortunately it is not. In Somalia, often the concepts themselves (reconciliation, community security, resilience, civilian policing) were problematic, and difficult to translate and communicate to counterparts.
- **Across-the-board RoL roll-outs.** Building on an established peace process, RoL programming chiefly entrusted to UNDP escaped the security-first conundrum. It operationalised support to the three classic criminal justice components in a complementary and mutually reinforcing manner with a strong emphasis on accountability. A decade after its inception, and working with a fraction of the resources committed to state creation in the south, elected Somaliland authorities currently possess new police, judicial and correctional systems. Much more effort is required, but the foundations are there and palpable to the population.
- **Strong parallel civil society components.** It was important to provide targeted support to *sharia*-encompassing university legal faculties in order to create professionals to staff the judicial system. In addition to infrastructure and faculty support, it was also crucial to provide affirmative action scholarships to women and minority clans. One result was the first two female prosecutors and assistant attorneys-general in 20 years in Somalia.
- **Progressively placing more emphasis on the demand and community side of justice/policing.** Courts and Ministry of Justice capacity building should be complemented by strong and free legal assistance and access to justice initiatives. Case-centered legal assistance progressively gave way to a focus on legal empowerment and the creation of rights awareness among the population and community-based paralegals who are also community leaders and mobilisers in their own right. Not all law students or even legal assistance providers make good paralegals, because their training and career expectations are built around formal litigation. People also demanded a fully fledged lawyer whenever possible. However, providing legal training to community organisers and local leaders enhanced and accelerated development impact.
- **Rights-based police training.** Somaliland police are recognised today by the population as distinct from the military and increasingly trustworthy. Huge gaps remain, but the concept of community-accountable policing is trickling down, according to surveys and local consultations. Legitimacy building is a longer-term proposition, and not the product of donor-driven timescales and legislative fiat. We have found, however, that key Somali police authorities in Somaliland are already best placed to influence local perceptions by always consulting with local traditional authorities and leaders who have the capacity to deal with conflict. Parallel work with the so-called “informal” sector is proving crucial to the construction of the “modern”.
- **Organisation for crime prevention and community security.** Building on traditional community policing norms, local security committees have been organised in liaison with local judicial and municipal authorities, and are supporting them in dispute resolution processes in a bottom-up approach to statebuilding. Another such example was UN-

supported NGO targeting of youth at risk of being recruited for terrorism, piracy or criminal activity. Communities negotiated with judicial authorities case by case to arrive at alternative sentencing for youth and donor-supported education for civic and economic reintegration. Both measures have produced a drop in crime rates. Here it has proved important to build on local capacities to unpack the different types of violence affecting the community and to help local committees, with police participation, identify which forms of violence – e.g. gang or gender-based violence – could be tackled and contained locally. Municipal authorities proved to be correct in insisting with donors and the UN that external support for local governance has to be linked to support for local security arrangements.

- **Taking social reality and not technical know-how as a starting point.** It is important to review the skills of development and RoL practitioners, to deal with systems that are still much trusted and used by Somalis, to be realistic about what RoL programming brings into a “pluralist” setting, and to recognise these practitioners’ tendency to go in and “set things right” by applying their technical training. The same practitioners sometimes place more emphasis on categorising practices, as opposed to understanding how they relate to one another and interact on the ground. Of course, they bring agency mandates and technical capacities that need to be reflected in the programmes, but the technical insertion design should be done in dialogue with and not in opposition to the “client” and its culture. We continue to learn that while the political without the technical can be hot air, the technical without the political is positively dangerous.
- **Working with the grain of sociocultural systems.** Finally, a review of donor post-conflict programming has concluded that there is a need to “broaden the understanding of aspects of legitimacy that derive from people’s shared beliefs and traditions; not just from a Western state model”.¹ This has been an overdue

realisation in the case of Somalia. Support for “best practice” elements of the informal systems, including conflict resolution and restorative justice mechanisms, which could support “hybrid” models of policing and justice provision, should be considered. Knowledge of social reality and culture should represent a starting point for any RoL programme. Similarly, programmes should be developed that are cognisant of cultural norms, with their limitations (e.g. patriarchy) and potential (e.g. alternative dispute resolution and restorative justice). We should be aware that “traditional” contexts are subject to constant change and that they could act not only as a positive counterweight to Western models based on punitive procedures, but may potentially contribute to social empowerment.

- **If it works, don’t fix it.** We are now told to work with the informal. We are not told “how”. Worse still, we tend not to ask “whether”. We learn from baseline evidence that in all of Somalia people use the “informal” more than the formal. Therefore, we feel the need to focus more on customary and *sharia* justice systems. But it is seldom clear what kind of work should be pursued by focusing on the “informal”. Nor is the question raised that if indeed the informal is to be trusted and used, what can the UN and donors bring to it? Perhaps it is our knowledge of these systems that is in fact informal. There are, for example, communities in Somalia who have managed to preserve some of their traditions and culture, and we suspect that this situation could partly explain why the districts in which they live are relatively peaceful, even without formal policing. In one case – the remote Bendarbeyla fishing village – women effectively motivated elders and the community against piracy by using traditional songs and dance to transmit anti-piracy messages.² We also know that past efforts to do away with or even “reform” the customary system failed, and efforts to “harmonise” customary, *sharia* and statutory law have not proven successful. Yet we were reminded daily that the so-called

1 OECD (Organisation for Economic Co-operation and Development) DAC (Development Assistance Committee), *The State’s Legitimacy in Fragile Situations: Unpacking Complexity*, Paris, OECD, 2010, executive summary.

2 “Piracy is not good. And it isn’t suitable for you. So don’t destroy my dream. Don’t lose the time I have been teaching you. What I need for you is to become president, not to be a pirate. Don’t make me cry and don’t put yourself in a dark place!” – a traditional song written by a mother warning her son after she became aware of his desire to become a pirate.

“informal” has played an important role in mitigating conflict, preventing or containing violence and resolving disputes – particularly in areas where the state was absent, but also at times and in places where the state police and judicial systems were functioning. The main lesson here is to build on socially preferred peacemaking mechanisms instead of defeating them through outside “modernisation”, which often leads to the extension of the reach of corrupt and incompetent external actors. Local capacities for peace have indeed been reduced by politicians and militia leaders who operate with one eye on foreign aid providers and another on external patrons, be they diaspora elements or regional military suppliers, with an interest in controlling governance arrangements on the other side of the border by way of the patronage of “friendly” clans.

- **We should seriously consider the consequences of changing the traditional system in a way that might weaken its positive features.** In Somalia, the formal and informal authorities work in interaction, particularly in terms of justice and security. The real challenge to the international donor community is to understand how this happens and how this interaction could be improved from both a capacity and human rights alignment perspective – what some would call the development of a “hybrid” model that gradually reduces people’s distrust of the state. This is also part of the process of state-society bargaining so crucial to the RoL. “Dividing” the formal from the informal is misleading when we find that practices are intertwined on the ground. “Fixing” parts of the informal (e.g. how it addresses women’s rights and violence against women) has its own challenges in Somalia: a greater understanding of the customary system revealed that some proposed externally induced remedies could undermine the fabric of the larger system. For example, anthropologists indicated that dealing with individual grievances differently could affect the way the system deals with compensation payments, which are critical to preventing cycles of violence and revenge through collectively guaranteed settlements. Arguably, among other factors, the breakdown of traditional society is cited as both the cause

and result of chaos in Somalia. Peace will depend in large part on stitching back together the basic units of society and reconstructing their livelihood on their own, and allowing the informal systems to continue to develop and change, hand in hand with the growth of “modern” RoL structures. Each will need the other. Two decades of international development assistance malpractice have failed to produce a viable government in Mogadishu or an end to insurgencies. Perhaps mindful of history, donors and the UN convened a meeting of elders from the whole of Somalia in order to help approve a new constitution and government in Mogadishu. For its part, al-Shabaab has also failed to impose its own humourless, Salafist version of the RoL and governance, having in some regions subverted customary practices and offended leaders. Fortunately, ordinary Somalis have maintained their curious habit of going about their business despite external agendas. One also suspects that the Arab uprisings may deliver outcomes that prove the possibility of combining religious culture with a rights-sensitive RoL.

- **Making all justice systems work better for women.** None of the three dominant legal systems in Somalia deals adequately with cases of violence against women. Referring women victims to the formal courts has often proved counterproductive, as money, clan affiliations, corruption and patriarchy have influenced proceedings. Judges routinely send back abuse cases to the traditional sphere, with women thus suffering shame multiple times. Of course, justice-centred RoL must, as a matter of principle, continue to include women’s access to justice and security as clear outcomes. The first preferred response by the international community was to refrain from interfering with the traditional courts and to focus instead on making the formal system more effective. This, however, did not get us closer to the desired outcome in terms of access to justice for women. The solution was to work with Somalis who were themselves (and not by external induction) struggling for legal reform and justice for women. In Somaliland, RoL programmes redoubled support for women’s organisations whose members contested and influenced elders in their own way. Further,

these same women's organisations pushed for police and formal judicial reform. Support was provided to women's research capacities to arrive at their own reading of local and national power relationships and the ensuing shaping of their own political and social agendas. For example, in a five-year period we witnessed a reduction in the forced marriage of widows. As there can be no justice or security without justice and security for women, adopting gender as an entry point to establishing the RoL proved effective, lending itself not simply to improved social accountability, but also – in terms more difficult to measure – to the democratisation of social relations and positive cultural change. Cognisance of an emerging Islamic feminist discourse is favouring this tendency. Rather than being perceived as imposing a Western agenda, RoL practitioners need to engage with culturally sensitive feminist thought, putting labels aside and enabling women to fight their own battles in their own ways.

- **Reviewing the skills sets necessary for RoL practitioners.** From a social science perspective there is a growing need to introduce a more in-depth understanding of our daily work as development actors. Similarly, RoL practitioners should not be afraid of the complexity of contextual understanding and of reporting on a complex picture that may inform broader global comprehension and practice. Skills derived from the social sciences should become as important as technical ones so as to base technical interventions on solid knowledge of the history and traditions of the societies “requiring change”. In order to build on existing social norms, there is a need to know how they evolved and got there, with specific attention to the potential role of young men and women in propelling this change. Remarkably, many RoL practitioners and policymakers tend to display little interest in cultural dynamics, relying more on narrow skills sets and prepackaged tools. This is not a minor consideration in the light of the current increased importance being attached to the identification and delivery of civilian RoL capacities, but it does beg the question of the effectiveness of short-term technical interventions.

Are we learning?

In September 2012 the UN General Assembly will review the concept of the RoL and the UN effort to bring more clarity, capacity and accountability to its delivery on the ground. Of course, there will inevitably be some disappointment in light of the multiple understandings of the theory and practice of the RoL itself, including and particularly within the UN peacebuilding context. From the present writer's perspective, the UN may be headed in the wrong (security-first) direction.

Firstly, the Civilian Capacity Steering Committee (UNCivCap) has largely confined its understanding of the RoL to the “relatively narrow area of police, justice and corrections”. Certainly, the criminal justice chain is key, but the broader linkage to nationbuilding and even peacebuilding, as well as the concrete experience of the past ten years, would argue for a more expansive understanding of the concept of the RoL that believes that to be effective, institutions must be socially embedded and reflect not simply government demands (the expansion of state power to “govern” society), but instead what makes good sense holistically and over the longer term. Although justice is deemed by UN CivCap to encompass the non-formal and community-based dimensions, these feature only as secondary considerations relegated to a footnote.

Secondly, the debate should be informed by the OECD DAC report entitled *The State's Legitimacy in Fragile Situations: Unpacking Complexity*.³ Because the international community is only one source of legitimacy for any government, other societal sources need to be engaged and properly understood. We have to ask whether social systems and the business class contribute to governance and the construction of the RoL even in the absence of formal state structures. The answer to statelessness is not necessarily creating or imposing a state, unless of course the *raison d'être* is primarily to serve geopolitical interests.

Thirdly, the internal UN global focal point arrangements discussion – at times quite heated – is more than a turf battle. In practice, many observers believe there are two contrasting

³ See footnote 1.

RoL frameworks. There is a RoL practice and theory, centring on the security sector side of statebuilding, allegedly favoured and practised by the UN Department of Peacekeeping Operations, and there is a different development and social perspective on RoL, pursued by UNDP. The latter, imperfect as it may be, provides better linkages to and experience with governance, community-based work and livelihoods issues. In addition, there is the further likelihood of subordinating the RoL to security sector reform, both conceptually and operationally. This could mean placing policing under security sector working groups, as opposed to its more valid insertion in RoL and human rights review and assessment undertakings. In Somalia, UN agencies, donors and government ministries are unable to agree as to whether the Justice and Corrections Technical Working Group should report to the Joint Security Committee or set itself up independently.

In considering the interpretation and application of the RoL on the ground, the UN and donors should underscore the importance of defending the development space in post-conflict settings – a space increasingly seen as secondary in the light of critical humanitarian and security priorities. RoL interventions and social development are two sides of the same coin, and a broader peacebuilding framework must encompass both in order to

arrive at states with broad social legitimacy. In terms of the division of labour, such an approach would particularly depend on partnerships encompassing the UN Children’s Fund, UN-Habitat, the UN High Commissioner for Refugees and the Office of the UN High Commissioner for Human Rights, with their respective counterpart line ministries, in order to better foster RoL values in a whole-of-government approach, as opposed to the RoL as the preserve of judicial and security ministries. We tend to forget that institutions attain legitimacy less through Security Council resolutions – ignored by most of the population – than through parallel efforts to open spaces for the participation of the “other”; i.e. a more culturally sensitive peacebuilding approach to governance and statebuilding. The RoL challenge is as cultural as it is legal, and it must be addressed in more creative and careful ways – which is not to diminish the importance of legal issues to social actors who also use international law to leverage their demands for internal sociopolitical change. Unfortunately, this leverage diminishes in direct proportion to the proliferation of illegal unilateral acts at the multilateral level. For the RoL to work within the nation state, it must also be consistent with its practice outside of it. For the sake of the RoL at home, the UN’s September global RoL discussion must indeed be genuinely global.

