



DEFINING THE RULE OF LAW

IMPROVED LAWS, INSTITUTIONS,
AND PRACTICES



ABOUT ADVOCATES FOR INTERNATIONAL DEVELOPMENT

Advocates for International Development (A4ID), founded in 2006, is a global charity that believes the law can, and should, be used more effectively to advance fair and sustainable development. A4ID aims to inspire and enable lawyers to join the global fight to eradicate poverty by advancing the United Nations (UN) Sustainable Development Goals (SDGs). Through A4ID, the world's top lawyers provide free legal support to organisations, working to advance human dignity, equality and justice. Its work has so far impacted in over 130 countries.

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A4ID's Rule of Law Expertise (ROLE UK) Programme is funded by the Foreign, Commonwealth and Development Office (FCDO). It supports partnerships to provide pro bono legal and judicial expertise with the aim to strengthen the rule of law in Official Development Assistance (ODA)-eligible countries. The Programme's Knowledge Hub provides the pro bono legal sector with access to targeted and relevant information to inform and improve their technical assistance in development contexts.

ACKNOWLEDGEMENTS

This document is an abridged version designed by A4ID for external publication of a technical paper

drafted by the Harvard Law and Development Society (LIDS), with the support of Orrick LLP.

DEFINING THE RULE OF LAW

PROCEDURAL ELEMENTS

Laws should be general, clear, public, relatively stable, and non-retroactive. Processes and institutions should enable the correct application of these laws by being fair, and open. The emphasis should be measuring the rule of law through conformity with proposed formal standards.

SUBSTANTIVE ELEMENTS

The rule of law demands that laws are just, and protect individual rights. Emphasis is on concepts such as justice, fairness, and democracy.

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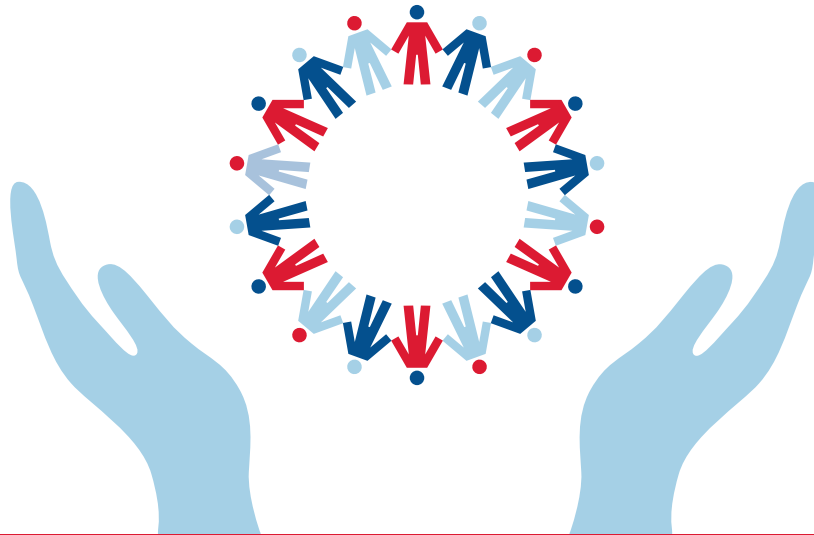
The rule of law is a concept according to which **laws, institutions, and practices** ensure that everyone, including **the government, public and private entities**, and citizens, are **accountable to laws** that are public, fair, equally applied, independently adjudicated, and compliant with international human rights law, with the aim of achieving an orderly and just society, and **sustainable development**.

FUNCTIONAL ELEMENTS

The rule of law's function is to constrain governments, subjecting their actions to judiciary review.

DEVELOPMENTAL ELEMENTS

Rule of law as an inherently positive principle of governance but also as a means to achieve development objectives, such as the eradication of poverty.



1 ENHANCING LAWS TO STRENGTHEN RULE OF LAW

THE FEATURES OF ENHANCED LAWS

- Formal and procedural features of the law: laws should be general, public, accessible, clear, non-contradictory, non-retroactive, and stable whilst maintaining the possibility of adaptation.
- Substantive features of the law: laws should comply with fundamental rights, and promote a just, and inclusive society.

THE CHALLENGES OF ENHANCING LAWS

It can be helpful first step, for countries undertaking legal reforms, to observe the model laws of other countries with similar characteristics and issues.

However, 'legal transplant' - importing laws from one country to another - does not take the local context into consideration and may be perceived as a form of colonial imposition.

Therefore, model laws and 'best practices' should always be adapted to the local context and be mindful of the local culture, traditions, and history.

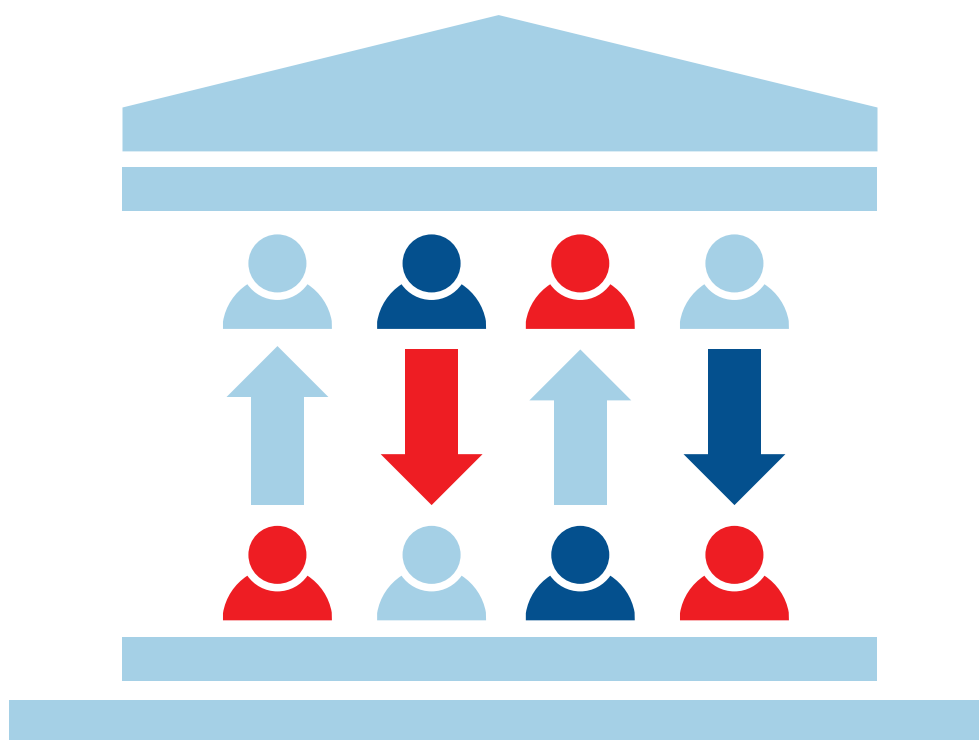
Context analysis is an essential step to not only determine whether legal reform is needed, but also to establish the timing of and the process for reform. Legal reform will have more impact when it addresses the most pressing issues in society. Constitutions and laws not only catalyse change but are also the result of culture changes that have

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already taken place in a society or are well underway, and advocated for by certain groups.

The process for legal reform should ensure that all relevant groups and stakeholders are duly informed and consulted, with specific attention to marginalised groups.

Reforming laws is often insufficient if it is not accompanied by an effort to ensure that new laws are applied, fairly interpreted, and adapted over time when necessary.



RULE OF LAW STRENGTHENING IS A POLITICAL PROCESS

Understanding the social, economical, and political dynamics of power structures and wealth distribution is critical in advancing the rule of law.

Analysing the political context would help to identify the main ‘winners’ and ‘losers’ of the legal reforms, therefore recognising stakeholders that would resist or champion the change.

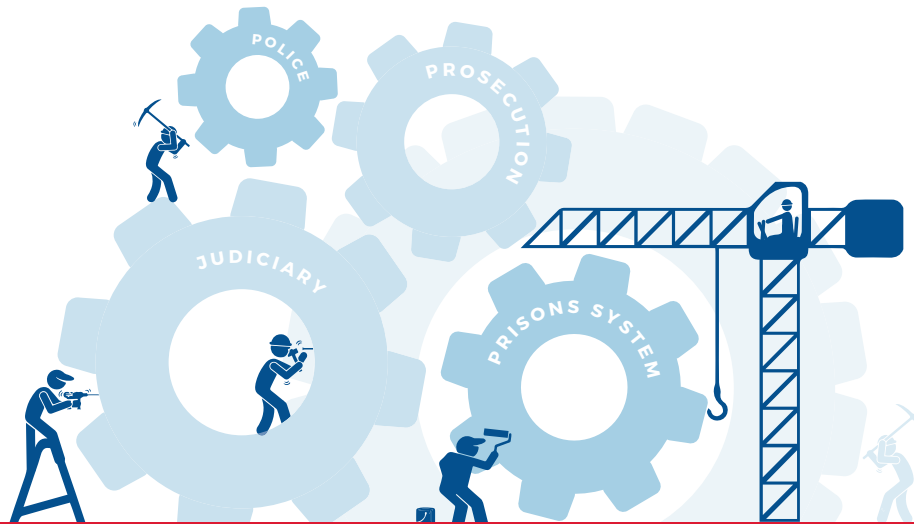
Power holders can include a variety of institutions and groups, such as the government in power, political parties, businesses, interest groups, and in certain contexts, criminal groups. Such forces can play a key role in the success or failure of implementing legal or institutional reforms. Acknowledging these power structures helps to understand why reforming laws is not enough to improve the rule of law.

Power holders include a variety of institutions and groups, such as the governmental and political parties but also businesses, interest groups or, even in certain contexts, organised criminal groups.

Similarly, institutional strengthening, which was the focus throughout the 1990s and early 2000s, often failed to produce significant improvements in the rule of law because it did not address the political, and the cultural dynamics.

Development organisations can be reluctant to engage with power structures, limiting themselves to so-called technocratic reforms that only meant to fill gaps between the current and ideal performances of

these institutions. However, filling in these gaps is not structurally helpful if these reforms ignore the political forces that might cause such gaps in the first place. Legal reforms must take into consideration powerful forces that are involved in the production and implementation of the law. Without these forces accepting and adopting the reforms, the rule of law cannot improve.



2 TRANSFORMING INSTITUTIONS TO STRENGTHEN THE RULE OF LAW

Promoting the rule of law includes supporting institutions integral to the rule of law, such as the judiciary, prosecution, police, prison systems, the legal profession and legal aid systems, through technical assistance and the development of tools and policies to build their capacity and enhance their skills.

COURTS

The judiciary must be independent. This means judges are free of influence and pressure, and can decide cases only based on fact and law.

In addition to independence, public confidence in the judiciary depends on its ability to adjudicate matters in a timely manner. This requires human, financial, and technological resources. Building the skills of judges and other judicial officers in case management is a crucial part of justice sector reforms. Ensuring courts have up-to-date computers and case management software can prevent excessive judicial backlog. Allowing courts to access legal

codes and higher court decisions can improve consistency in the application of the law.

A major challenge within the judicial system that can undermine the rule of law is the lack of access to courts, which can prevail for several reasons. Courts tend to be more prevalent in urban areas and lacking in rural areas. Also, cultural and financial barriers can prevent many citizens from accessing courts, which underscores the importance of the availability of legal aid. Marginalised groups often face further challenges, including a lack of awareness of their rights.

PROSECUTION

One broad challenge to the prosecutorial system is the issue of prosecutorial discretion. While prosecutorial discretion can allow for a more reasonable and equitable application of criminal laws, it also places significant power

in the hands of prosecutors.

Consistent professional training for prosecutors is important to promote ethical prosecution in line with the goal of protecting human rights for all.

LEGAL AID

Legal aid is an important part of improving access to justice. Unfortunately, there are several barriers preventing sufficient provision of legal aid, particularly insufficient funding. Rural areas frequently lack any kind of access to legal aid. Furthermore, in some countries, there is a shortage of lawyers, resulting in shortage of legal aid suppliers.

While civil legal aid is important and almost universally underfunded, legal aid is even more critical in the criminal justice system. Access to legal aid for those detained, arrested, or imprisoned, and for those suspected, accused of, or charged with a criminal offense is necessary to uphold human rights.

Beyond legal aid, governments can look outside the

legal profession. Increasing legal information centres can increase public knowledge of the legal system, using the support of paralegals to address the shortage of lawyers. Another way to increase access to legal aid in a country is to authorise civil society organisations (CSOs) to provide legal advice and representation, as they are often equipped to do so and can help combat the shortage of lawyers and funding for legal aid.

Pro bono legal services provide another channel for increasing access to legal services. Pro bono work can be conducted by private lawyers or through law school clinics that use law students. In order to develop a culture of pro bono, bar associations and law firms can mandate pro bono work or create aspirational targets.

LAW ENFORCEMENT

The police not only require access to updated equipment and technology but they also require adequate training. In order to be able to police, consistent with human rights, they need to be trained in the ethics and values of democratic policing.

Policing systems also face several distinct challenges. First, while the police are the primary symbol of government power and source of social control, a central goal of policing in current times should also be the

protection of human rights. Instilling appropriate attitudes in the police both culturally, and through training, requires addressing this tension. Second, police in weak rule of law environments sometimes focus on the protection of those who hold wealth and power, which undermines public confidence in the police and the rule of law. Finally, a temptation to focus all attention and resources on fighting crime in the short-term can lead to the side-lining of important long-term reforms and to the perpetuation of racial and social inequalities.

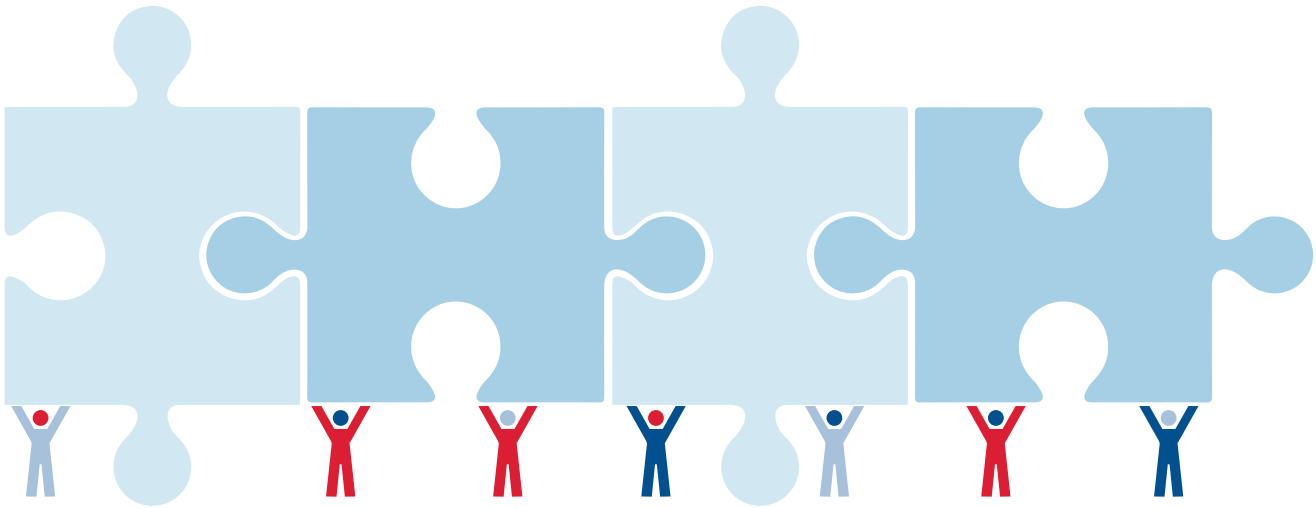
INFORMAL JUSTICE SYSTEMS

A common misconception in the legal community, especially in the Global North, is to reduce justice systems to formal justice procedures. However, it is crucial to recognise that informal justice systems form a key part of individuals' and communities' experience of justice and the rule of law, with over 80% of disputes resolved through informal justice mechanisms in some countries. They present several advantages, such as physical accessibility, familiar procedures, norms and language, which facilitates identification with these mechanisms.

However, informal justice systems are often criticised

for their violation of women's and minorities' rights, their patriarchal nature, and their violation of national and international laws, including international human rights law and standards.

Formal and informal justice systems are not two separate entities. Instead, they are interlinked processes where justice providers and pathways to justice often overlap both systems. Effective contribution to the strengthening of the rule of law in a foreign country thus requires knowledge and awareness of the complex judicial context of the said country.



3 CHANGING PRACTICES TO STRENGTHEN THE RULE OF LAW

Practices here refer to informal social norms and cultural behaviours, as well as formal professional codes of conduct.

SOCIAL NORMS AND CULTURAL BEHAVIOURS

These play an essential role in the improvement of the rule of law. Social norms that support the achievement of the rule of law reinforce laws and institutions. Some cultural norms can also impede the achievement of the rule of law.

First, certain cultural habits, such as entrenched corruption may weaken the 'vertical accountability' that society places in the government, thereby diminishing a social pressure which could otherwise have an influence on the government's respect for the rule of law. Due to the lack of social pressure, political good conduct might not be driven by the anticipation of an upcoming election or the ending of a political career.

Second, social norms may weaken the 'horizontal accountability' that individuals may exercise towards one another. Where the community has no interest in enforcing laws, there is simply no 'social cost' for individual citizens who do not abide by formal rules.

There are possible culturally sensitive incentives to encourage behaviours that support the rule of law. Forces such as social standing, reputation, and concern

with neighbours' opinions and peer pressure constitute important incentives for citizens to comply with the rule of law. There are different ways to promote a 'culture of lawfulness'. For instance, public participation in rule of law reforms can reinforce social cohesion, and citizens' trust in the government and the justice system. Communication through ad hoc dialogues or permanent fora between the population and justice system's stakeholders may build mutual trust. Schools can also include a rule of law curriculum, as the youth are actually considered to be a highly receptive audience for rule of law messages. Religious institutions and other proponents of moral authority, such as artists or local respected figures, may also encourage change through statements and teachings.

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PROFESSIONAL BEST PRACTICES

Rule of law initiatives, especially institutional reforms, should also address the professional norms that exist in rule of law institutions. However, what is considered ‘best

practices’ in one country may not have the same effect everywhere, therefore the local context should always be considered.

Governmental Actors

A critical issue concerning the professional practice of governmental actors is the abuse of power. It should be entrenched in professional culture that the exercise of power should not lead to unfair, unreasonable, irrational, unmotivated, or oppressive decisions. The International Code of Conduct for Public Officials states that public officials have a duty to act solely in the public interest. This means that they must ‘perform their duties and functions efficiently, effectively, and with integrity, in accordance with laws or administrative policies’, and in a ‘fair and impartial’

way. Furthermore, ‘they shall at no time afford undue preferential treatment to any group or individual’, nor shall they use their power ‘for the improper advancement of their own or their family’s personal or financial interest’. In the same vein of avoiding conflict of interest, they should ‘declare business, commercial, and financial interests or activities. They shall not use public money improperly, nor solicit or accept ‘any gift or other favour that may influence the exercise of their functions’. They should also ‘disclose personal assets and liabilities’.

The Judiciary

The Basic Principles on the Independence of the Judiciary adopted under the auspices of the UN, state that the independence of the judiciary is to be guaranteed by the state, and ‘it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary’.

The Basic Principles furthermore state that the ‘judiciary shall decide matters before them impartially, on the basis

of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason’.

To encourage a virtuous cycle of both professional culture, and citizens’ compliance with the rule of law, it is important that the public has a perception of independent and impartial judges.

Lawyers

According to the standards of professional ethics, lawyers must encourage respect for the administration of justice and the rule of law and seek to improve it.

Since the role of lawyers and the legal profession varies in different societies, best practices for lawyers are unlikely to be universally applicable. However, legal education should emphasise the importance of lawyers’ professional and ethical obligations as aspects of the role of lawyers in society. An independent legal profession must also

gain the trust of the public, which requires collaboration between a country’s bar association and government that results in communication to the public.

One challenge concerning bar associations is their dual nature: while they serve to promote the legal profession in its role in furthering justice and the rule of law, they also serve to protect and benefit lawyers. This can lead to the prioritisation of lawyers’ interests over interests of the general public. The elite nature of the legal profession

can also exacerbate the problem of lawyers elevating their interests over those of the poor or disadvantaged and work to maintain existing power structures.

Lawyers should also engage in pro bono work in order to serve communities that might otherwise not have

access to the justice system and might be disadvantaged by authorities and people in positions of power. Lawyers should work to promote equality and fight racism, sexism, and inequalities of marginalisation,

Businesses

Over the past several decades, pressure from consumers, shareholders, governments, international organisations and local communities has led businesses to develop strategies that consider social and environmental impact, as well as the effects on governance and human rights, all of which affect the rule of law.

The UN Global Compact lists Ten Principles that businesses should follow to fulfil responsibilities in the areas of labour, environment, anti-corruption, and human rights, such as making sure ‘that they are not complicit in human rights abuses’. The UN Global Compact also

developed a Business for Rule of Law Framework that provides guidance on how businesses can respect and support the rule of law. The Framework specifies that businesses’ actions must ‘respect’ the rule of law throughout its value chain, which requires them to respect human rights as well as to actively not engage in corruption and not to undermine the rule of law. Moreover, the Framework encourages business to go beyond their responsibility to ‘respect’ and to ‘support’ the rule of law through voluntary action to strengthen legal frameworks and promote more accountable institutions.

Development Sector

Donors should coordinate among themselves and better communicate with local partners.

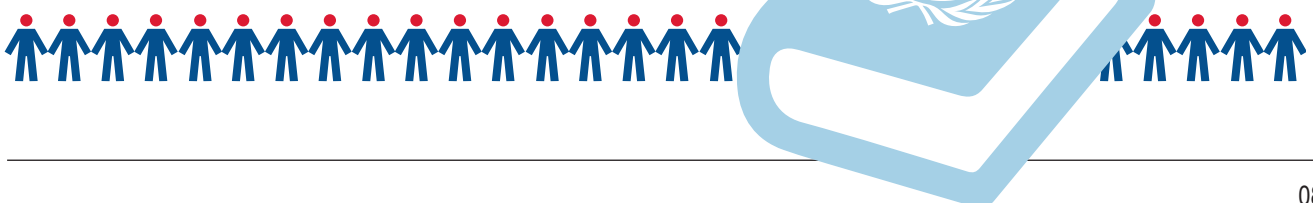
They should remain problem-driven and focus on supporting partner countries to address issues they have identified as priorities, rather than aiming to implement what are considered best institutional practices in Global North countries.

Development actors should embrace political complexity, meaning they should consider political opportunities and constraints when planning interventions. Changes in power dynamics, in institutional culture, in national or international law or norms, can all provide a window of opportunity for promoting reforms that support rule of law development. Development actors should also ‘work across silos’ by paying attention to and working with a

wide range of formal and informal institutions.

International organisations and NGOs should also employ experts from different backgrounds, ranging from sociologists to anthropologists, to ensure that cultural norms are addressed from a multidisciplinary perspective.

Top-down approaches, in which assistance is provided to rule of law institutions, and bottom-up approaches, where assistance is provided to civil society, can be complementary. Empowering civil society to push for legal and institutional reforms and to hold authorities to account can lead to a more domestically rooted and sustainable process of change.



CONCLUSION

This summary paper provides a working definition of the rule of law and outlines the improvements needed for laws, institutions, and practices to improve the rule of law. All these elements are interrelated and equally important in the process of improving the rule of law.

Improved laws will not be able to improve the rule of law without adequate implementation. Implementation of laws may not occur without a strong institutional framework. Furthermore, improved laws and institutions may not lead to an improved rule of law if cultural and professional practices offset their benefits and purpose.

While formal legal and institutional reforms can contribute to improved rule of law, special attention should be given to power structures and cultural behaviours. Addressing these aspects will help rule of law initiatives to be more effective and sustainable.

Reforms should involve citizens and communities, so that they are grounded in society. A virtuous cycle can be created, in which citizens and communities would have the incentive to hold their government, institutions, and peers accountable to those rules and to respect those rules themselves.

Therefore, it is appropriate to conclude with the following statements:

The **rule of law** is a concept according to which, institutions, and practices ensure that everyone, including the government, public and private entities, and citizens, are accountable to laws that are public, fair, equally applied, independently adjudicated, and compliant with international human rights law, with the aim of achieving an orderly and just society, and sustainable development.

Rule of law strengthening is inherently **political**. Understanding and addressing power structures and dynamics is of paramount importance for the success of

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rule of law reforms.

Enhanced laws lead to improved rule of law when they fulfill formal, procedural and substantive requirements. Before making a legal reform, the local context is taken into consideration, the need for reform is carefully assessed, and a strong institutional framework is present for implementation.

Strengthened institutions improve the rule of law by guaranteeing the fair and efficient implementation and application of the law. All rule of law institutions and professionals – judges, judicial officers, prosecutors, lawyers, police, etc; - play a key role in building and reinforcing the rule of law.

Change of practices will improve the rule of law where the right incentives promote a culture of lawfulness. This is fundamental to the rule of law and strengthening the improvements made to the legal and institutional frameworks. Following professional best practice will also help rule of law actors be more effective and create an enabling environment for improved rule of law.

