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# RULE OF LAW PRACTITIONER'S GUIDE



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Cover Photo: Kenyan lawyer and Law Society of Kenya's CEO Mercy Wambua prepares for a demonstration against impunity and disobedience of court orders in Nairobi on February 15, 2018. Kenya's Chief Justice on February 7 criticised the government for defying a number of court orders which he said placed the rule of law under threat, after a High Court ruling suspending the government's order for a broadcasting shutdown, which it found arbitrary and repressive, had been ignored. Yasuyoshi Chiba/AFP

## DISCLAIMER

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# ACRONYMS

|       |  |
|-------|--|
| CDCS  | Country Development Cooperation Strategy           |
| CLA   | collaborating, learning, and adapting              |
| CSO   | civil society organization                         |
| DRG   | democracy, human rights, and governance            |
| HICD  | Human and Institutional Capacity Development       |
| JSR   | Journey to Self-Reliance                           |
| LER   | USAID Learning, Evaluation, and Research Office    |
| PEA   | political economy analysis                         |
| RFI   | request for information                            |
| RCT   | randomized control trial                           |
| ROL   | rule of law  |
| SDG   | Sustainable Development Goals                      |
| SOW   | scope of work                                      |
| TWP   | thinking and working politically                   |
| USAID | United States Agency for International Development |

# INTRODUCTION

The Center for Democracy, Human Rights and Governance (DRG) promotes peace, prosperity and freedom around the globe through self-reliant, citizen-responsive democratic governance that respects human dignity, rights and the rule of law (ROL). The priorities of partner countries and of development assistance broadly naturally fluctuate accordingly to changing human and environmental needs, political and economic realities, and innovation. However, strong, effective ROL is the foundation for realized democratic governance and critical to every aspect of USAID's development agenda. The existence of ROL is the enabling environment across sectors for the provision of fair, accountable services and systems. ROL also supports the recognition, regulation, protection and enforcement of rights - fundamental to achieving peace, security, and progress towards social and economic development.

USAID has and continues to be a leader in ROL programming across the globe. USAID's work encompasses the entire spectrum of ROL, including enhancing access to justice, improving the administration of justice, and developing equitable and working legal and regulatory frameworks to support government, private sector, and citizen access in the health, economic, and education sectors. This work is difficult; progress is incremental and difficult to measure. Notably, ROL is a collective endeavor; no single institution can provide for ROL or protect it from erosion. Accordingly, USAID engages a variety of partners in its ROL promotion efforts, from justice-administering institutions such as courts to professional standard setting institutions such as bar associations and justice-guarding or service delivery civil society organizations. Also, as the ROL is a significant aspect of healthy, democratic relationship between a state and its citizens, USAID's ROL efforts encompass work directly with communities and citizens.

Recognizing the inherent challenge of ROL reform, USAID has invested in learning from its efforts. [USAID's 2010 Rule of Law Strategic Framework](#) (ROL Framework) delineates ROL promotion across five interrelated "essential elements": 1) Order and Security; 2) Legitimate Constitutions, Laws and Legal Institutions; 3) Strengthened Checks and Balances; 4) Fairness and Human Rights; and 5) Effective Application of the Law. The ROL Framework, and USAID's other publications, support its field personnel in the difficult challenges of the assessment, design, management, and evaluation of ROL programs.

USAID's learning on ROL continues to advance. For example, in addition to the ROL Framework, USAID has developed a series of innovative tools, including procurement reform, political economy analysis, and adaptive management, that help to target and strengthen ROL interventions. This Practitioners Guide (Guide) is intended to supplement the ROL Framework with an examination of these and other tools, processes, and lessons learned gathered over the past ten years. This Guide thus strengthens ROL program design and implementation by expanding on the tools, objectives, and necessary considerations at each stage of the program cycle.

This Guide is designed for USAID personnel engaged in the day to day practice of ROL programming. The Guide serves as an adjunct document and should be used alongside the ROL Framework, not in place of it. The Guide summarizes new learning, describes available resources, but does not prescribe any one practice over another. As noted above, there is no single pathway to achieving ROL development objectives. The ROL Framework and this Guide support USAID personnel developing ROL programs with updated information on how and when to use new tools and approaches in the program cycle to plan/design, deliver/implement, assess/monitor and evaluate, and adapt development programming. The Guide takes a practice-oriented approach, providing guidance based on experience, international standards and good practice.

As noted above, the Guide is organized around USAID’s program cycle. In doing so, it identifies new concepts, approaches, and resources in development assistance that have significant applicability to the ROL field. To introduce readers to these concepts and approaches, the Guide provides a brief overview of their fundamental ideas and how to apply them to ROL programs. It also suggests additional reading and provides links to resources that contain greater detail and guidance. The learning and tools summarized by this Guide are bound together by the recognition that ROL is an inherently political endeavor that does not have a standard pathway to success. As such, this Guide highlights USAID’s policy and practice on using tools like co-creation and political economy analysis (PEA) to understand local systems to achieve success in ROL programming. Developing practices such as adaptive management and complexity aware monitoring also help USAID staff to “work with the grain.”<sup>1</sup>

## ADVANCES IN DEVELOPMENT CONCEPTS AND ROL PROGRAMS

The ROL remains one of the U.S. government’s highest priority development goals, in part owing to the central role it plays in achieving national security objectives. The 2017 U.S. National Security Strategy makes clear the ROL is at the intersection of U.S. interests and values and that the United States will “promote a development model that partners with countries that want progress, consistent with their culture, based on...the rule of law.”<sup>2</sup> The 2018-2022 Department of State and USAID Joint Strategic Plan and the 2018 Stabilization Assistance Review also highlight the centrality of ROL to countering instability, transnational crime, and violence.<sup>3</sup>

In addition, the ROL is fundamental to the success of other development priorities fundamental to the self-reliance goal that partner countries develop “the capacity to plan, finance and implement solutions to local development challenges, and a commitment to see these through effectively, inclusively, and accountably.”<sup>4</sup> It is about change from within, improving livelihoods, mobilizing domestic revenue, and bolstering educational and health outcomes. ROL is particularly important to these objectives. For example, participatory legal enabling environments are crucial to ensuring equality in



health service delivery. Likewise, capable and independent criminal justice systems are vital to preventing the influx of counterfeit medicines.



Avaz received a birth certificate at a USAID-supported Free Legal Aid Center in [Kyrgyzstan](#). Photo Credit: Max Shubovich

Advancing the capacity and commitment to the ROL continues to be a priority goal for many of USAID’s developing country partners and also at an international level driven in part by the Sustainable Development Goals (SDGs). SDG 16 encapsulates the ROL, noting that justice is foundational to achieving all SDGs. SDG 16 seeks to “promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable, and inclusive institutions at all levels.”<sup>5</sup>

While the number of people living in democracies has grown globally, progress has faltered, particularly in the area of ROL, resulting in significant development problems. The 2019 Pathfinders Task Force on Justice revealed that globally –

- Over 250 million people living in conditions of extreme injustice, including modern slavery, statelessness, and high levels of insecurity.

- Some 1.5 billion people suffer unresolved justice problems, ranging from unreported violence or crime to land insecurity to denials of basic public services.
- Over 4 billion people are excluded from the opportunities the law provides, including 1 billion who lack legal identity, 2 billion employed in the informal sector, and another 2 billion lacking verifiable land tenure or dependable housing.<sup>6</sup>



*Protest outside the Saket Court Complex for fatal gang rape of student on a New Delhi bus. Photo Credit: Prakash Singh/AFP*

Each of these individuals is vulnerable to exploitation and/or abuse as well as unable to access the economic opportunities and public services vital to raising their standard of living. Each is also emblematic of the costs of injustice and the benefits of investing in strengthening the ROL worldwide. These figures underline the systemic nature of injustice and highlight that the benefits of improved ROL are far reaching. For instance, increasing access to dependable justice services can reduce conflict, stabilize insecure countries, and save the global economy almost \$70 billion a year.<sup>7</sup> Securing legal identity can improve health and education outcomes.<sup>8</sup>

These realities are crucial to USAID’s efforts and goals, as these and similar large-scale legal problems hold the potential to undermine progress towards sustainable development and self-reliance. Partner countries justice systems are integrally connected to other domestic systems – economic, educational, health. Laws are the means by which rights are established; criminal and administrative sanctions deter and punish corrupt and criminal behavior. The more trusted a justice system is, the more effective it is, the more it works in concert with other systems to encourage nationwide development.

Moreover, integral to USAID’s efforts to mitigate the need for foreign assistance is the mobilization of domestic revenue sources to finance partner development agendas and progress. The ROL undergirds long-term prosperity and growth by encouraging licit economic activity, protecting property rights, and helping partner countries participate in international markets. When ROL is weak, criminal actors are enabled, citizens utilize illicit sources of income, and domestic revenue generation suffers.

The research noted above describes systemic development problems and reveals how the legal problems and justice needs of ordinary people all over the world implicate every aspect of life, from employment to housing to education to health. As such, when legal issues go unresolved and accumulate across a developing society, the impact on

national social, economic, and physical well-being can be substantial. It is incumbent upon development practitioners to understand these trends, and to identify and utilize tools that have proven effective in countering those challenges.

Supporting partner countries' self-reliance, USAID invests for impact, measures distinctly, and supports our partners to sustain the results they achieve. To accomplish these related goals effectively, we need to better understand why a particular intervention is needed, what assistance can help address the challenges revealed, and how our assistance should be structured and delivered. Here must be a continual and objective assessment of ROL programming to understand what is and isn't working, learn from both successes and failures, and adjust paths of assistance. This Guide aims to help by explaining new tools and practices applicable to ROL programming and suggesting where in the program cycle they can be applied to examine context and challenges and support programming that meets aid effectiveness markers.

In addition, USAID has identified lessons for development assistance in general and ROL reform in particular during the past several decades of programming (see box). These and other lessons have been incorporated into the cycle of preparing for, managing, and evaluating programs and are applied here to ROL programs.

#### LESSONS LEARNED in ROL Programming

- Binary analytical constructs like “supply and demand” are only useful to a point and can tend to crowd out key issues of perception and impact in favor of an instrumental, institutional focus.
- Focusing on a particular institution instead of taking a systems approach has proven ineffective, as no institution operates in isolation. A system must be able to accommodate an institution's new policies and procedures; without systemic changes to support those by an institution, those changes will create havoc within the system.
- Although the importance of political will has been acknowledged, an emphasis on providing technical solutions without a sufficient analysis and incorporation of findings of contextual politics, power dynamics, and incentives can render technical solutions ineffective.
- In order to improve the justice system, strengthening the policies and procedures of justice institutions must take place alongside any provision of training and equipment.
- Drafting new laws that conform to international standards and treaties is a good first step. However, tracking and facilitating their implementation and realization of the rights they contain will lead to greater sustainability of reform and assistance efforts.
- Efforts to replicate Western justice institutional structures demonstrated that countries need institutions that reflect their realities and their needs. Helping to instill a process of change management is more important than achieving an institutional arrangement familiar to Western observers.

# IMPROVING RULE OF LAW PROGRAMMING



*Lawyers in charge of the Kamal Matmati case, a member of the Islamist movement Ennahdha who was arrested in 1991 during Ben Ali's rule and tortured to death, gather in the Gabes court on May 29, 2018. The first court case brought by a Tunisian commission. Photo Credit: Stringer/AFP*

The USAID Program Cycle (ADS 201) is the Agency's operational model for planning, delivering, assessing, and adapting development programming in a given region or country to advance U.S. foreign policy. Accordingly, this Guide aims to help USAID personnel develop ROL programming within that model, providing specific tools and learning relevant to each stage. The concepts, approaches, and tools discussed below are a complement to the ROL Framework's presentation of foundational concepts around the ROL, identification of key technical matters, and comprehensive attention to justice and security interventions.

One of the core understandings that USAID's decades-long development efforts have yielded is that the ROL is necessarily cross-sectoral and political. The issues presented by challenges to and weaknesses in the ROL require development programmers and implementers to understand the roles law plays in societies. Among the difficult lessons USAID has learned but continues to grapple with (see box above) is that law cascades through societies' social groups, financial transactions, and political contestations; it affects the everyday lives of ordinary people in both direct and indirect ways. There is no one central institution to strengthen, no key capacity to enhance; in sum, no linear quick-fix solution to weak ROL exists. Indeed, USAID's experience confirms that ROL

development challenges require nuanced, long-term solutions and commitments from partner countries.

The relationship between any society and its laws and legal institutions is complex. Law is part social ordering system, part economic regulatory framework. The question of whether a society abides by the ROL implicates considerations of legitimacy, politics, policy, economics, social relations, as well as legal and judicial processes and practices. The ROL is inherently hard to define and therefore difficult to measure; improving the ROL often requires change to the core institutions, norms, practices, and feedback loops most central to it, and can easily take generations.

Obeying the law should be among the highest social norms for any society. Even when it is, compliance with the law is too often far from simple. Laws can be confusing, remote or inaccessible to those it regulates, and may or may not reflect prevailing behavioral and cultural norms. In addition, for reasons of cost and practicality, no jurisdiction could reasonably hope to coerce its citizens to follow the law. Rather, compliance with the law is often a question of individual choice; governments play a key role, incentivizing choices that contribute to a just and equitable society, making law and law-administering institutions more accessible, and deterring choices that injure society and individuals. This tension between government, law, and individuals is complex, context-specific, and evolving. So, the question of who has complied and who has not – the administration of justice – is necessarily incomplete and partial, with winners and losers.



*Msogwaba community members together with lifa Lesive community development Agency during a peaceful March against women and child abuse in Mpumalanga, Msogwaba. Photo Credit: Freedom House*

Recognizing these realities, USAID undertakes ROL programming on the basis of information and analysis reflecting a nuanced understanding of the local context, actors, relationships, dynamics, and incentives that drive behavior. As the programmer's initial goal is — as always — to do no harm, his or her primary objective is to support actors within the local system, those individuals and institutions best able to clearly delineate problems that affect the ROL. Moreover, USAID recognizes that its programming cannot in most, if not all, instances, provide a full solution; instead, USAID seeks to help local actors address root causes as a part of a larger, sustainable solution.

As practitioners look to develop ROL programs in line with the [USAID program cycle](#) — plan/design, deliver/implement, assess/monitor and evaluate, and adapt — they should apply the following concepts from the outset:

1. Use the USAID **local systems framework** for sustainable development that emphasizes “best fit” solutions appropriate to the context, without simply imposing Western standards, norms, and models.
2. Utilize **co-creation** methods to refine these solutions and foster and encourage local ownership of their implementation to maximize the efficiency and durability of USAID assistance.
3. Embrace a **thinking and working politically (TWP)** approach using **political economy analysis (PEA)** to identify and navigate the political dynamics, underlying power structures, interests of different groups, and incentives that are driving behavior in the local system and how these interests can impact development outcomes to ensure that program design and implementation are politically feasible and technically sound.
4. Ground programs and activities in empirically valid **theories of change**, based on the technical and political analysis of the local system. Build in flexibility and “pause and reflect” moments that allow both USAID and implementers to test and revise the theory of change and adapt approaches and interventions through **collaborating, learning, and adapting (CLA)** as the local context and dynamics change.
5. Incorporate **complexity awareness monitoring** methods that help to identify outcomes and impacts of program interventions and output indicators to effectively collaborate, learn, and adapt based on clear data and evidence of what works, what does not, and why.

This Guide presents these concepts below along a linear program cycle timeline to help readers absorb the relevant detail, recognize their interdependence, and reduce redundancy; however, program planners and managers should freely apply the concepts and tools at any point in the program cycle that they are relevant and useful. The Guide also refers the reader to existing internal and external resources, and provide some context for using them.

As described below, USAID tools support effective and realistic design and delivery of ROL assistance that offers real potential for positive, measurable impact. Moreover, technical ROL experts from USAID’s Center for Democracy, Rights, and Governance are readily available to support field staff in every aspect of program development, implementation, measurement, and evaluation.

# DEVELOPING USAID ROL PROGRAMS

## PROGRAM PLANNING AND DESIGN

Per the USAID Program Cycle, missions use strategic planning to define an overall strategic approach and then undertake a project design process to guide their execution (ADS 201.3.3). Similarly, the ROL Framework provides a four-step process for gathering information that is critical to creating a quality ROL program design. It also provides an annex with illustrative assessment questions, a list of types of data an assessment team should gather, and a sample assessment scope of work (SOW).

ROL problems and programs address complex, interdependent issues and involve multiple partner country actors. ADS 201.3.3 notes that the design process necessarily recognizes that development seeks to influence complex systems and requires integrated tactics to achieve higher level results and sustainability of outcomes. Strategic planning and program design should be informed and driven by an assessment which examines past USAID programs, political and historical context, the legal framework, and current resources, dynamics and capacity of ROL actors and systems. Missions may also consider other types of analysis to inform this function. Programs should keep in mind priorities and opportunities for reform that reflect local ownership and needs, supporting locally-driven justice innovations and developments in the local system. Program designers should look not only at principal actors in the **formal justice system** (judiciary, prosecutors, attorneys) but also **non-state justice systems** and other actors that may have an interest in and/or influence over the local systems (elites, politicians, other government officials).



*Dr Tatu Kamau, the petitioner in the case seeking to have anti-Female Genital Mutilation laws declared unconstitutional, gives her testimony before a three-judge bench at the Milimani Law Court, at the Nairobi High Court, in Nairobi, on October 24, 2019. Photo Credit: Stafford Ondego/AFP*

Knowing the key actors in the system and their priorities is important; however, to truly understand the relevant technical challenges, USAID personnel must also navigate the political interests and power dynamics within that system likely to be crucial to the long-term sustainability of ROL program achievements. USAID has multiple tools to aid in this effort, which will be on-going from program design through implementation and evaluation. These tools can be delineated into two types. The first involves using a co-creation method to bring multiple stakeholders together to produce mutually valued outcomes.

Grounded in USAID policy (ADS 201.3.3.7), **co-creation** builds on understanding the various local systems (justice, civic, economic, legislative, political) that are implicated by ROL programming and uses a participatory design process to develop durable, locally-relevant solutions to difficult problems. Co-creation is a time-limited process that involves shared power and decision-making to generate a specific outcome; in this sense, it is inherent to, and grounded in, USAID’s longstanding efforts to build commitment as well as capacity of partner countries driven by local ownership. Co-creation is also a proven methodology for, and an inherent part of, the iterative adaptation that programming toward effective ROL requires. As ROL cannot be separated from culture and context, programming must engage culture and context to succeed. Co-creation is a means of doing so.

The second type of tool for managing the political concerns inherent in any ROL program is closely linked to co-creation and involves learning to think and work politically. A thinking and working politically (**TWP**) approach is more of a mind-set than tool, but often begins with the use of USAID’s Applied Political Economy Analysis (PEA) assessment framework tool. Undertaking a PEA is a crucial step for DRG officers to understand the complexities of the local system and the political dynamics at play before attempting to plan and design ROL programming. These dynamics are often unobserved, but they can nevertheless waylay the soundest of technical interventions. Understanding the informal power dynamics behind formal institutional structures may also help determine where to best focus limited resources.

- Ten Principles for Engaging Local Systems**
1. Recognize there is always a system.
  2. Engage local systems everywhere.
  3. Capitalize on our convening authority.
  4. Tap into local knowledge.
  5. Map local systems.
  6. Design holistically.
  7. Ensure accountability.
  8. Embed flexibility.
  9. Embrace facilitation.
  10. Monitor and evaluate for sustainability.

## Local Systems

**Concept.** The **Local Systems Framework** is rooted in the reality that achieving and sustaining development outcomes depends on contributions from multiple and interconnected actors, their relationships, and the incentives that guide them. “Local” can mean a community, a district, a province, or nationwide and may include actors



from across the spectrum - governments, civil society and the private sector. Focusing on systems recognizes the more inclusive set of actors, their roles in producing development outcomes, and how effectively they fill those roles. It assumes that actions and outcomes are best understood in terms of interactions among elements in the system and that there are more obscure dynamics that animate a system and have significant impact on a system's outcomes.

USAID has developed a local systems framework, termed the "5Rs," and issued a supporting technical note to support field teams seeking to identify strengths and weaknesses in existing local systems and better understand where to focus resources and plan interventions to most effectively leverage and strengthen existing local systems:

- **Resources:** Local systems transform resources into outputs.
- **Roles:** Most systems involve many actors who take on defined roles.
- **Relationships:** Interactions among actors in a local system establish various types of relationships, such as commercial, administrative, or hierarchical.
- **Rules:** Both formal and informal, rules help to assign and define roles, determine the nature of relationships, and establish terms of access to the resources on which the system depends.
- **Results:** These are not only outputs and outcomes, but they also refer to the overall strength of the local system.



*Gabra community clan elders holding a community dialogue on women's rights. Photo Credit: Mercy Mumo*

**Application to ROL.** The ROL is an inherently local concept: “justice” means different things to different populations and the rules and processes to deliver justice differ from locale to locale. Accordingly, ROL programs involve multiple systems, institutions, actors, and processes connected across significant policy and regulatory issues central to governance. USAID staff will benefit from using the local systems framework to include in their analysis additional perspectives.

For example, USAID supports the establishment and effective operation of independent judicial systems. True independence has a structural institutional dimension, and so the judiciary may legally have independent decision-making authority. However, it may not have functional control at the operational level -- where its independent decisions are made real -- because it does not actually control its budget or staff. It is common for the Ministry of Justice (MOJ) to have administrative responsibility for court employees, court building maintenance, and supplies for court operations. In order to address a budget or personnel deficiency in the courts, a program may include a public administration type of intervention, or work with the MOJ to improve the capacity of support staff and infrastructure.

The Local Systems Framework approach asks USAID analytical efforts to look beneath the surface in other ways too. When a partner country government’s judicial system is weak or under-resourced, local populations may turn to informal or traditional mechanisms, and leaders outside the formal justice system. The Local Systems Framework directs ROL programmers to look not only at principal justice system actors (see box, right) but also at others with an interest in, or influence over, how justice is actually delivered. These may include:

- Ministries of Justice or Finance that have the final say over budgets
- Civil service entities that often oversee non-judicial court staff
- Justice or security coordinating entities, including Judicial Service Commissions
- Centralized government entities that may control adequacy and maintenance of buildings
- Government institutions that may have their own administrative adjudication divisions linked with the courts by an appeals process
- Related support services for survivors of crimes, such as gender-based violence or trafficking-in-persons, provided by government entities and/or non-governmental organizations, including medical, social, educational, and other services that are linked to justice and security systems
- Informal justice and traditional or customary dispute resolution mechanisms (which are currently broadly included in non-state justice institutions)

#### Institutions and Actors in a Local Justice System

The ROL Framework lists the principal “institutions” of the justice sector as: judiciaries, ministries of justice, legislatures, prosecutors’ offices, public defenders’ offices, ombudsmen’s offices, law enforcement agencies, prisons, regulatory bodies, law schools and bar associations, human rights organizations, public interest law groups, legal assistance NGOs, legal advocacy organizations, alternative dispute resolution NGOs, media associations, and non-state justice institutions.

- Civil society organizations (CSOs) and professional associations of lawyers and legal professionals working on justice-related issues, such as legal aid or dispute resolution, as well as those that work with marginalized and vulnerable populations (including women, LGBTI, youth, the poor, indigenous peoples, and other ethnic minorities)
- Media that cover ROL-related issues
- The private sector, including business associations, which has an inherent interest in a justice system that will enforce contracts, resolve disputes, and protect investments
- Organized crime groups or corrupt officials who may influence, coerce or infiltrate the local justice system and/or local politics which may influence appointments
- The local population, what it needs from the justice system, how well it is being served and can access the system, and how vigorously the population is willing to press for those services

#### An Unlikely Ally: The Local Bank

USAID's *Juntos para la Prevención de la Violencia* (JPV — Together for the Prevention of Violence) project in Mexico is working toward breaking the cycle of violence and crime through the development of local prevention systems. In one such system in Tijuana, the local bank facilitated the formation of homeowner associations to deal with insolvent mortgages following the 2008 housing crisis. The bank wanted to rebuild and invest in the area, but community members were reluctant to purchase there because of security challenges.

JPV linked the bank with service providers to promote crime prevention through environmental design and facilitated training on using tools to identify vulnerability to risk and measure crime reduction. The project forged a strategic alliance among these groups to better incorporate social indicators in their efforts and ultimately improve the value of the land. This collaboration reduced crime in the area by increasing residents' sense of ownership and community engagement, thereby strengthening community fabric. The bank reduced insolvency rates from 80 percent to 20 percent, which also contributed to a reduction in crime as homes were occupied, property values increased, and the community became more engaged. The bank is now piloting seven more projects and collaborating with JPV to measure the crime rates and effects of these interventions as a means of focused deterrence, especially to understand if crime is truly reduced or simply displaced to neighboring communities.

There are many institutions and actors that will affect the 5R analysis and that have attributes that can strengthen ROL programming (see box, right).

**Resources.** USAID's [Local Systems: A Framework for Supporting Sustained Development](#), [The 5R's Framework in the Technical Cycle: Technical Note](#), [Non-state Justice System Programming](#), [Indigenous Peoples' Policy and Tools](#), [Gender Integration](#), and the [ROL Strategic Framework](#). See also United States Institute of Peace's [Systems Thinking for Peacebuilding and the ROL](#).

## Co-Creation

A key aspect of any ROL reform effort involves obtaining local buy-in to the goals of the reform process and any supporting projects. Not only is the ROL an inherently political – and often controversial – endeavor, it also directly implicates the social norms and values of the society. The question of 'what is justice' in a specific situation can be a deeply individualistic question, governed by perceptions of history, status, power, and

voice. ROL programs often prioritize change to institutional practices (such as continuing legal education or random case assignment) which can easily run into bureaucratic hurdles. As such, ROL programs can readily benefit from efforts to maximize local ownership and understanding in the program's goals and processes. A ROL program's capacity to create and sustain change may depend on how participatory it can be over time and how rooted it is in local ownership and agendas that will champion reforms beyond the life of donor funding and initiatives.

**Concept.** Bringing people together to produce a mutually valued outcome is not new to USAID. Indeed, participatory approaches have figured prominently in a variety of USAID programs, helping to specifically identify problems to be solved and to ensure activities are tailored to the local context. This is co-creation: a process of working together, sharing ownership of the process and the decision-making it requires. Co-creation is best suited for situations where there is no one single organization with sufficient expertise or perspective to solve a problem, or where key stakeholders do not share a common understanding of the barriers or problem sets to be addressed. These circumstances are almost always present when ROL is weak, ineffective, or unequally realized.

There is no one-size fits all plan or process for co-creation. In the design phase of the program cycle, it is specifically useful to better understand development challenges and improve the activities designed to solve them. Co-creation is a catch-all term and thus can take many forms. A common format for USAID ROL design efforts is the multi-stakeholder workshop, such as when a court automation program works to bring together all the actors with a stake in a planned new IT system to ensure that each stage of the process is clear, every viewpoint is considered, and all available resources support the project's goals. However, co-creation need not be event-focused: a request for information process (RFI) to gain implementing partner input on relevant lessons learned can also be a co-creation process. In addition to the stakeholder workshop format described above, there are a variety of [pathways to co-creation](#) at the activity level, including grant competitions, idea platforms, and memoranda of understanding. Co-creation is often, though not required, undertaken during the procurement process. USAID recommends early consultation with procurement specialists to facilitate the use of co-creation methods in ROL programs. Co-creation is interconnected to CLA, another USAID tool for achieving reform in a local, complex multi-stakeholder system confronting difficult interconnected challenges CLA is discussed below and its processes and methods can be used in concert with co-creation.

**Application to ROL.** As noted, ROL problems tend to be deeply political and inherently complex. Perceptions of the potential outcomes of a ROL program can vary widely: some may perceive it as bringing efficiency, while others might see a diminishment of power or income. Also, ROL programs often have a narrow implementation constituency (such as the staff and organization of a new judicial inspection unit) but a broader beneficiary constituency (e.g., the entire judiciary). Conceptually, programs to improve the ROL often aim to create independence, accountability, transparency, and efficiency. As such, they are also seeking to directly impact trust relationships between

government agencies and personnel (such as judges or police) and the citizens and communities they are mandated to serve.

Co-creation can be an especially valuable tool for ROL programming because of the diverse, and frequently conflicting, interests at play in the operation of a justice system. A justice system is not a unified system; rather, it is an interdependent, inter-related, interactive system of systems: the criminal justice sphere alone contains at least a policing system, a prosecution system, a court system, and a corrections system (including probation, diversion, and parole supervision components). As such, nearly every “justice problem” is a problem directly involving the equities of several institutions, and likely implicating the resources, expectations, and jurisdiction of multiple others. As a design approach, one of co-creation’s key strengths is its capacity to provide an organized structure for bringing multiple actors together to define and then tackle a common problem.

Thus, ROL assistance often raises concerns that can be partially ameliorated through participatory processes. Co-creation approaches can help with each of these challenges by creating shared understanding of the problems to be solved and enabling all viewpoints, especially those contrarian notions, to be aired. When major stakeholders or constituencies do not share an interest in the goals of a ROL program, the activities are unlikely to succeed. In addition, co-creation methods can also bring new thinking about local solutions and ideas to solve agreed upon problems. For major projects, co-creation may also include government-to-government partnerships; in such instances, USAID is not only identifying the most efficient path to a shared goal, but also increasing partner countries’ development of resources and capacities necessary along its path to self-reliance. The participation of interested actors through co-creation can also support burden-sharing, joint monitoring and oversight processes, and coalition building.

#### Collaboration and Shared Ownership: Case Tracking in Ghana

USAID’s Ghana Case Tracking System (CTS) project applied an iterative, inclusive co-creation approach to the development of the country’s first inter-agency criminal case tracking database. Beginning at the design stage, key Ghanaian justice sector agencies participated in a series of workshops to jointly define the issue at hand (the slow processing of criminal cases), agree to a solution (an integrated database for all agencies to use), and provide input to the system prototype.

At implementation stage, the project employed a user-based approach, defined by frequent consultations, review, and feedback from each of the six participating agencies. Actual end-users and IT specialists tested the system, and the project’s software developers continually made refinements and adjustments based on feedback provided. By the conclusion of the software testing phase, 88 modifications and 16 new functionalities had been made to the system, resulting in a CTS truly co-designed and tailored to the needs of Ghana’s justice sector.

**Resources.** For more information about co-creation processes, a wide variety of resources are available. The Office of Acquisition and Assistance’s Professional Development and Training Division has experts to support the development of co-creation in ROL projects. In addition, OAA acquisitions specialists are available to consult on co-creation generally from the outset of any project development. OAA’s [Co-creation Discussion Note](#) provides useful background information. Other resources

include: USAID's [Collaboration, Learning and Adapting Toolkit](#) and a summary of a recent USAID/Guatemala experiment using a [Broad Area Announcement](#).

## Thinking and Working Politically (TWP) and Political Economy Analysis (PEA)

The second step of the ROL Framework's four-step assessment process is to “understand the roles of major players and their commitment to reform” which can be done through **TWP PEA**. Because ROL institutions directly administer decisions that uphold the power structure of a state and govern the state’s monopoly on the use of force, the ability to fully grasp and consider the interests of key actors and the dynamics of relationships and power when undertaking ROL programming is significant. Commitment to reform is likely to vary across the many stakeholders in the justice system, e.g. Ministries of Justice, courts, prosecutors, legal aid offices, law enforcement. A ROL program’s path forward will reflect the priorities of those who wield and are in power in partner countries, and whether their concerns are evident or not, a ROL program’s success depends on their political acceptance.



Supreme Court Chief Justice Renato Corona was impeached in the Senate trial as part of an anti-corruption drive by President Benigno Aquino in Manila. Photo Credit: Bullit Marquez/AFP

**Concept.** USAID numbers among the many donors and development actors recognizing that understanding formal and informal political relationships can reveal barriers and pathways to promoting sustainable reform. The USAID [TWP](#) approach has three core principles: (1) strong political analysis, insight, and understanding; (2) detailed appreciation of and response to the local context; and (3) flexibility and adaptability in program design and implementation. Each of these is crucial to an effective ROL program.

TWP encourages program staff to widen their program design ‘viewpoint.’ Considering strong technical solutions in light of potential political limitations is helpful; developing technical solutions within a politically informed framework can be a significant step towards achieving more durable results. PEA analyses support TWP; the PEA framework is an analytical tool to understand the reasons

why things work the way they do and identify the incentives and constraints affecting the behavior of actors in the relevant system(s).

**Application to ROL.** Justice systems are inherently complex and politically salient, inasmuch as justice actors exercise significant powers to resolve disputes as well as arrest, imprison, sanction or fine, and expose corrupt or criminal actions. Accordingly, ROL reform is self-evidently a political process. Moreover, the very notion of justice is inchoate, defined as much by law as by history, culture, and identity. As a result, perception is an important component of any analysis of the operation of, prospects for reform to, the ROL.

#### Understanding the Political Context

Judicial selection, oversight, and discipline tend to be highly political processes because judicial rulings can limit or allow the actions of powerful government leaders and elite citizens. Projects that are tasked with supporting the neutrality and transparency of policies and procedures around these processes often encounter overt agreement to collaborate but a steady stream of obstacles in reality, where support cannot be implemented because the assigned counterpart entities lack personnel, resources, authority to act, and insulation from backlash around their actions taken. Before expending significant project resources, USAID and project staff should conduct a PEA to identify phases of intervention with progression of support dependent on full implementation of each previous phase.

Ascertaining whether the exercise of such powers is appropriate in a particular instance may be driven by seen and unseen social, political, economic, and cultural factors. These issues are all connected; they cannot be seen in isolation from the wider politics of the how the law and its enforcement affects different populations; industries; government law enforcement, administrative and regulatory capabilities; and informal sectors. ROL reforms often implicate political concerns or local administrative practices, including which laws or standards require amendment, where institutional reform might improve service delivery, or how training assistance might improve capacity.



*Kozimdjani Kamilov, Chairperson of the Supreme Court of Uzbekistan being interviewed by international and domestic journalists, at the conclusion of the 'Transparency and Accessibility of Courts: An Important Factor in the Protection of Human Rights' work. Photo Credit: Jaloliddin Badalov*

Also, these politics are subject to rapid change. ROL programs launched after a political transition or another catalytic event may, for example, experience frequent rotation of key officials. Public expectations for visible reform or convictions of corrupt officials may be high and create perverse incentives. ROL programs can play an important role in providing not only technical support, but in navigating and responding to these expectations. Thus, in addition to assistance to justice service providers, it is also important to consider how people grapple with everyday legal problems and perceive and interact with their government.

It is vital to recognize TWP, as an approach, runs throughout the life of a ROL project. **PEA** is by its nature, an iterative process. Ideally, analysis that will be repeated throughout the program cycle. During strategic planning, a mission may conduct a series of broad or focused PEAs. PEA analysis can consider a country as a whole, a specific sector of governance, or even a set of institutional actors. The most common approach to undertaking a PEA is to consider one or two important ROL problems that development assistance might be able to ameliorate. Such analyses then flow into broader strategic planning, such as defining development objectives during a Country Development Cooperation Strategy (CDCS) process or into project design to determine technically sound and politically savvy interventions.

Additional, subsequent PEAs can be undertaken at critical intervals to inform implementation and adapt interventions as needed, including: initial co-creation; annual work planning; monitoring, evaluation, and learning (MEL) plans and periodic progress reviews (“pause and reflect” moments); mid-term evaluations to make course corrections; and final evaluations to determine lessons for future programs. TWP PEA is not a one-time effort, but a consistent internal process of implementation that fosters a culture of CLA, with management tools where operational and strategic decisions are systematically interlocked with evidence-based information that captures context complexities and emergent programmatic risks and opportunities. The table below provides a summary overview of the PEA process. The PEA documentation cited below elaborates on the use of the tool and experts in USAID’s Democracy, Rights, and Governance Center are available to help field staff design and implement TWP approaches and PEA analyses.



## BASIC STEPS FOR A PEA OF THE LOCAL JUSTICE SYSTEM

|     |  |
|-----|--|
| 1.  | Determine purpose and level of the PEA, based on the identified ROL problem.   |
| 2.  | Select the PEA research team.  |
| 3.  | Use PEA analytic framework to develop a clear awareness of the ROL problem's context.  |
| 4.  | Given the PEA's purpose, determine what is needed to understand to address the ROL problem; this will define the field work focus.   |
| 5.  | Develop list of key local actors to interview (these will likely be a subset of the actors in the local system mapped in the planning and design phase and depending on the specific focus of the PEA).  |
| 6.  | Conduct literature review.   |
| 7.  | Conduct fieldwork (interviews and focus groups) using the following guiding questions:<br>a. Who are the champions or spoilers with the leverage to mobilize change in the PEA focus? Why? (Explore: motives, interests, actions taken or not taken, which other actors share that view.)<br>b. Where are the roadblocks that hinder, or the windows of opportunity to advance, the PEA focus? |
| 8.  | Consolidate and analyze findings.  |
| 9.  | Draft report/prepare output(s) to share findings and analysis; circulate/present to team members or partners for feedback.   |
| 10. | Finalize report/output.  |
| 11. | Share report or output(s) per dissemination plan.  |
| 12. | Use findings to align with the study's purpose and desired applications (e.g., design, to inform ongoing implementation, evaluation).  |

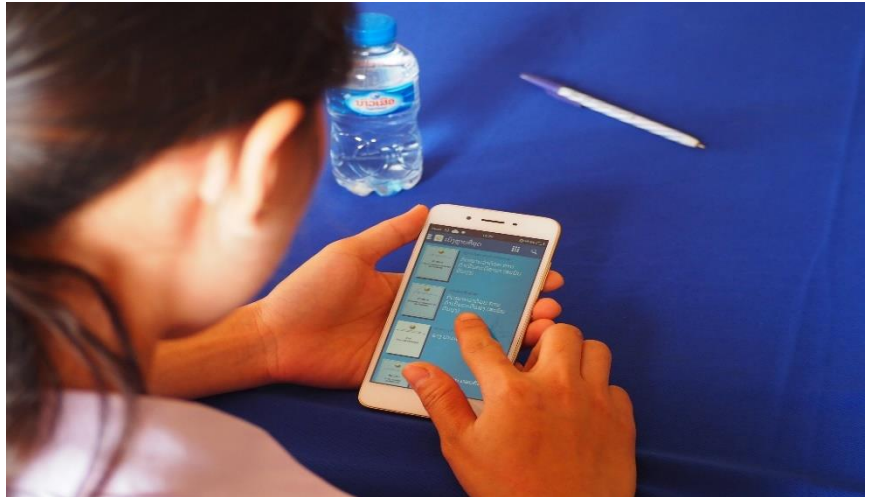
A PEA is not based solely on questionnaires, but on open conversations with relevant ROL actors; these will include many or all potential actors, but it will ultimately involve those most relevant to the specific ROL problem. These conversations should be kept within the interest of the specific focus of the PEA, and the interviewer should neither be judgmental nor try to convince the interviewee of a point of view. A PEA does not seek to “sell” an approach or a programmatic focus; rather, it looks to uncover the hidden (just as an iceberg is “hidden,” resting below the surface) aspects of the local system that drive or constrain behavior. Given potential political sensitivities and to truly understand the view of the person being interviewed, the most important part of PEA fieldwork is to listen. Use the guiding questions in the table above to help the conversation along and always remember to keep asking the key question: **Why?**

**Resources.** Step-by-step guidance on conducting a PEA can be found in USAID’s [Applied PEA Field Guide and supporting materials](#), which is part of an evolving learning agenda in the donor community to incorporate political considerations and analysis, learn from and adapt to failures, and to promote local ownership and durable results. Additional frameworks include the Netherlands Ministry of Foreign Affairs’ [Strategic Governance and Corruption Analysis Framework](#) and the Department for International Development’s (DFID’s) [Beginners Guide to PEA](#). See also the Developmental Leadership Program’s guide, [Everyday Political Analysis](#).

## PROGRAM DELIVERY AND ADAPTIVE MANAGEMENT

Since the release of its ROL Framework, USAID has also revised its program cycle guidance, now found at ADS 201. Program designs, SOWs/SOOs, and program descriptions are required to be based on a **theory of change** that reflects a development hypothesis.

Recognizing that rapidly changing environments, unforeseen occurrences and challenges, and evidentiary results from program monitoring data are all best addressed through flexible models, program design must leave room for changes, reflecting the **CLA** framework. Undergirding the emphasis on building a model for change is USAID's recognition that effective development requires systems thinking. Societies, economies, and justice



*The Lao Law App, developed by USAID in collaboration with the Ministry of Industry and Commerce and Ministry of Justice, has enabled university students, law professionals and the public to easily search the law and database of legal documents within seconds. Photo Credit: Athit Chanthath*

systems, for example, are far more than collections of institutions. They are complex systems, composed of multiple interacting, interdependent, interrelated sub-systems, in which linear, technocratic and siloed approaches are unlikely to yield positive and durable results. PEA and TWP, noted above, are based on systems thinking. An institution-focused tool that also embodies a systems approach and includes an implicit CLA cycle is the USAID **Human and Institutional Capacity Development (HICD)** model developed in 2011. HICD is highly applicable to ROL programming, which so often seeks to improve the institutional performance and service delivery of justice institutions.

### Theory of Change

**Concept.** An essential foundation of program design requires grounding and developing programs in empirically valid and reliable theories of change, which describe how and why a program's purpose is expected to be achieved in a given context. A complete theory of change includes five components:

- The context in which the development problem is situated, including root causes — politics, processes, resources, as well as technical issues — of the problem and conditions in the operating context that may affect outcomes.

- An “if-then” statement explaining causal outcomes needed to achieve the desired change that illustrate the relationship between program elements and the program’s purpose.
- Major interventions that will be undertaken to lead directly or indirectly to these outcomes.
- Key assumptions that underlie the success of the theory of change: programmatic assumptions about which key outcomes will lead to other higher-level outcomes and context assumptions of external factors outside the program’s control that are needed for success.
- Key indicators to monitor how progress unfolds during implementation.

Developing the theory of change ensures that planning is done with the focus on ultimate intended outcomes, rather than focusing on resources, outputs, or interventions. The process of arriving at the theory of change should include the local systems and PEA analyses described in the previous sections so that they are context-aware, appropriate, and politically informed and that solutions to be implemented to address the specific ROL problem or problems are sustainable within the local system. Developing a theory of change provides an opportunity for a group of people to illuminate different beliefs about how change is expected to take place and promote shared buy-in for the approach selected. It is important to include diverse stakeholders in the design team to challenge received wisdom and assumptions and to suggest and consider novel approaches.

**Application to ROL.** In the course of program design, a ROL assessment will usually reveal a number of systemic issues, such as lack of judicial independence from the executive branch, lack of communication and/or coordination among justice actors, or a large access to justice gap. By way of example, case backlogs are also a frequent concern in developing and transitioning justice systems, and court automation systems are often requested by partner country governments. USAID’s publication, [Designing and Implementing Court Automation Projects: Practical Guidance for USAID DRG Officers](#), provides greater detail and an array of useful information. However, even the most efficient case management system will not solve the underlying dynamics that inhibit efficiency in case processing. Training judges may provide a basis for better judgements, but will not address the very real pressure of the executive branch’s influence. To overcome this, ADS 201 now requires missions to produce a theory of change to underpin the program’s design.

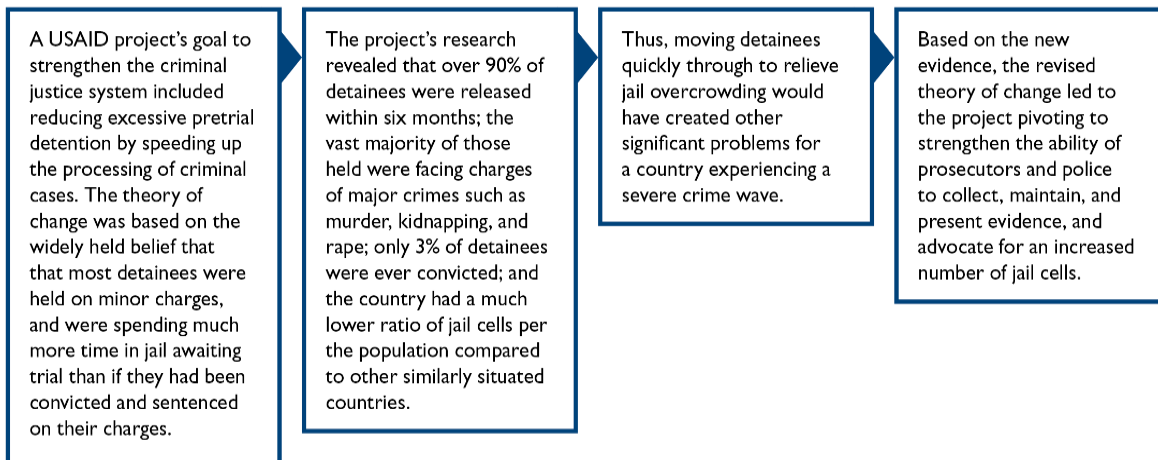
**Adapting a Theory of Change with PEA**

Through the PEA process, the USAID Colombia Justice for Sustainable Peace (JSP) Project was able to identify opportunities for adapting their theory of change. The analysis brought to light areas where interventions were less efficient and helped identify more effective entry points for support that would have never been realized otherwise.

A sound theory of change depends on the correct identification of root causes of development problems. A common problem raised in a justice system is a lack of

efficiency, the slow movement and disposition of civil and criminal cases; all too often, the assumption of the root cause is the lack of process or automation, and the identified solution is to provide hardware and software, or training, or both. As described in greater detail in USAID’s aforementioned “Designing and Implementing Court Automation Projects” guidance, a closer examination of lengthy delays often reveals that lack of automation is seldom a significant issue. Multiple potential causes exist, including the lack of time standards in the legal framework; lack of enforcement of time standards; ineffective performance management or internal management controls; corruption of court staff or judges; inadequate resources to notify parties and witnesses of dates for court proceedings; attorneys pressure judges to grant continuances that would allow for continued collection of attorney’s fees; inadequate judicial attendance to time devoted to hearings; unwillingness of judges to move cases along efficiently; lack of standardized, known, efficient procedures; and lack of coordination with other government actors needed to handle cases.

Providing hardware and software resolves none of these problems, and, equally importantly, this has no bearing on and does not address the issue of whether the various actors involved possess the political will or commitment to take on the judicial problem(s) at hand. In fact, automation tends to amplify the existing procedures and competencies of personnel. If procedures are efficient, personnel are capable, and sufficient local will exists, automation can help. But where they are not, automation serves as a distraction and an obstacle. Instead of improving timeliness of case decisions, automation can be a burden, particularly where systems are not willing to give up paper processes and so end up with a dual system that doesn’t provide effective solutions. A solid theory of change, supported by data as evidence, is the essential foundation of effective ROL program interventions.



**Resources.** USAID’s [ADS 201](#); USAID’s [How-To Note on Developing a Project Logic Model and its Associated Theory of Change](#); and USAID’s [How-to Guides for](#)

[Biodiversity Programming](#), which provides guidance on developing situational models, using results changes to depict TOCs, and defining outcomes and indicators.

## Collaborating, Learning and Adapting (CLA)

**Concept.** CLA is a framework for management practices developed in the USAID Learning Lab that helps improve development effectiveness by making those practices more systematic and intentional throughout the program cycle and ensuring that the necessary resources are dedicated. Integrating CLA into program design helps to ensure that ROL programs are grounded in a strong evidence base, and it can be iteratively adapted to accurately address the determined ROL problem(s) as the local context changes throughout implementation. CLA principles seem intuitive or even obvious, but by assembling them into a framework, USAID is both calling attention to their importance and requiring in ADS 201 that field staff incorporate them into program design. Integrating CLA principles throughout program design can help address challenges by thinking through:

- **Collaborating:** Are we collaborating with the right partners at the right time to promote synergy over stove-piping?
- **Learning:** Are we asking the most important questions and finding answers that are relevant to decision-making?
- **Adapting:** Are we using the information that we gather through collaboration and learning activities to make better decisions and adjustments as necessary?

Using CLA creates a culture that values openness, relationship building, and continuous learning, promoting a continuing loop of collaboration and adaptive management. As such, it is integrally related to co-creation and can help build and maintain trusting relationships between assistance providers and partner country officials and organizations that are important to achieving durable results. To maximize assistance effectiveness, the goals are to use the knowledge and data gained from implementation, take opportunities to pause and reflect on performance, hold evaluations, gather knowledge about the context, and use other sources to adjust interventions and approaches.



Supported through USAID's Transparency Rapid Response Project, the Datathon event gathered Mexican data scientists, programmers, software developers and civil society members to analyze data from federal public contracts in Mexico with the objective of detecting corruption risks using different databases from the National Digital Platform. Photo Credit: Manuel Silva Coache

**Application to ROL.** Though justice reform is often seen as a technocratic endeavor, interventions focused on delivering or building “best practices” have not generally created sustainable positive results. Rather, because justice is an ephemeral, highly personal concept and because the delivery of effective justice services necessarily implicates history, culture, and identity, ROL and justice reform is thus always an iterative process. In essence, justice reform must be iterative and adaptive in part because the idea of “justice” is almost always dependent on individual values and visible politics. As a result, only “best fit” approaches are likely to work, and the “fit” is not apparent at project inception, USAID ROL reform programs regularly employ CLA principles.

USAID ROL programs employ stakeholder analysis, consultations, and partnerships to work to achieve change plans that are appropriate to the local context. USAID works with its implementing partners to pilot new initiatives before taking them to scale. In addition, USAID ROL programs should collect a wide variety of quantitative and qualitative data (including end-user and other perception surveys) to monitor progress and identify needed adaptations.

As leaders of key justice institutions change, willingness to work with donors shifts. The reform of one institution – such as a court – may not be an appropriate model for another, such as a legal aid office. Programming must attend to the changing dynamics of

the local context in order to maximize the effective use of funds. Without flexibility built into programming, funds can be expended and yet achieve few results; interventions may be completed but the results go unused. Experience has demonstrated that shifting programmatic focus to collaborative partners can produce greater results (see box, below). Maintaining at least minimal relationships with partners who may not be fully collaborative still optimizes the ability to shift again if necessary. However, successful programs, such as anti-corruption programs that result in high-level arrests or convictions, can dampen enthusiasm for continued reform.

The importance of donor coordination in ROL programming is fundamental. Ideally, donors will complement each other's efforts, especially in reforming foundational architecture of the legal system. Collaboration with other donors remains essential but is often overlooked and undervalued both at an operational and political level. In one country, instructors from civil law countries provided training to partner country judges and prosecutors at the same time as instructors from common-law countries. Because the two systems structure the roles of prosecutors and judges in investigations differently, their partner country counterparts were receiving different, and at times contradictory, sets of instructions about their roles.

#### Opening Doorways to Collaboration

In the West Bank, USAID's ROL program planned to work with law schools, civil courts, and family courts. After program start-up, the law school deans submitted a joint letter to USAID outlining the interventions to which they would agree, but they differed drastically from previous planning and were not feasible financially. Opportunities in civil courts were limited for various reasons, so the program turned to the family courts, which had only received occasional *ad hoc* training from donors in the past. The family courts welcomed the program, and a comprehensive reform effort emerged, ranging from court renovation to accommodate the needs of women, the elderly, and the disabled; software development and deployment; judge and court staff training (for many, the first they ever received); public financial management efforts; enhancement of counseling units that resolved one-third of cases, saving judicial resources; and addressing gender-based violence through collaboration of judges, court staff, and other entities. Another door opened after the anticipated doors closed, and as a result, women, children, elderly, and other vulnerable groups have benefited.

**Resources.** USAID's [CLA Toolkit](#) walks through phases of the program cycle to assist program planners in intentionally building CLA principles into program design. USAID ADS 200 resource on [Donor Coordination](#) and USAID's [Development Cooperation Toolkit](#).

A library of resources searchable by tags is available [here](#). The CLA [Maturity Matrix](#) contains step-by-step instructions on implementing CLA principles and practices at various stages of the program cycle. USAID's [CLA Literature Review](#) also highlights key findings and implications of the use of CLA. Additional relevant information is available from a joint USAID-DFID project, the [Global Learning for Adaptive Management](#) initiative. An initial paper, [Making Adaptive Rigour Work](#), seeks to strengthen adaptive management practices and provides three key lessons for improving monitoring, evaluation, and learning as part of a CLA effort.

## Human and Institutional Capacity Development (HICD)

**Concept.** USAID developed the HICD model to address one of its greatest challenges — institutional strengthening — recognizing that individual and institutional performance is a struggle in development environments, even without political, social, security, and economic upheavals. Past development activities were heavily oriented toward training solutions on the assumption that the lack of skills and knowledge were the only, or even the primary, issue that individuals and institutions face. As USAID’s systems analysis tools have evolved, so too has its understanding of potential



*Aferdita Bytyci, president of the Basic Court of Pristina, walking the halls of the court, which has the largest caseload and territorial jurisdiction of any in Kosovo. Photo Credit: Jessica Benton Cooney/USAID*

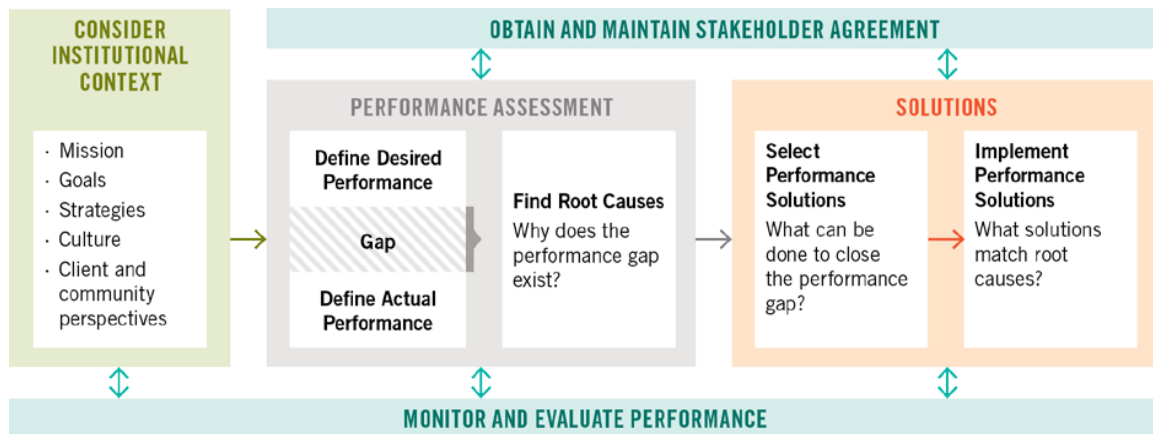
solutions. USAID now recognizes that institutional strengthening alone is not enough and training does not have an impact until the knowledge or skills acquired by the trainees have been successfully applied to a specific work situation, which, in turn, results in measurable performance improvement. To take a more expansive view of institutional performance gaps, USAID developed the HICD model, which can be used in conjunction with analyses such as PEA and flexible management techniques such as co-creation and CLA, to change institutional behavior. HICD looks at organizations as adaptive systems, taking a holistic view of the various aspects of performance.

HICD is based on the Gilbert Behavior Engineering Model, which identifies six performance factors needed for optimal performance at both the environmental and individual levels: (environmental) information, resources, tools, and incentives; and (individual) knowledge, skills, capacity, and motives. HICD views organizations as adaptive systems that are constantly challenged to respond to their changing environments and comprise interrelated functions that are affected by and react to changes in other parts of the organization.

The HICD process (see Exhibit I) begins with a facilitated self-assessment to determine performance gaps and their root causes and then to identify and implement performance solutions, monitor those solutions to determine progress, measure the impacts, and repeat the cycle to achieve continuous performance improvement.



## EXHIBIT I. STEPS IN THE HICD PROCESS



**Application to ROL.** Justice institutions provide a key service to citizens; in many countries, they go beyond dispute resolution and serve as administrative functions that people need in their daily lives. Justice institutions’ poor performance affects enjoyment of human rights, limits access to justice, disincentivizes political participation, degrades economic opportunity, and interferes with stability in business relationships. Recent research by the OECD hypothesizes that developing countries may lose between .5 and 3% of GDP to problems that effective justice services could help ameliorate.<sup>9</sup>

The institutions emblematic of justice – courts, prosecutors, and police – are often hampered by inadequate and/or inefficient use of resources, antiquated civil service rules and job descriptions, insufficient data processing and case management tools, and a lack of skilled personnel and incentives for staff to gain and apply needed skills. Furthermore, justice personnel may not have the ability to hire, promote, or redesign positions to fill the changing roles produced by justice reform. In short, ROL reform nearly always involves a high degree of institutional reform. And, as noted above, simple technocratic solutions, though appealing, are unlikely to generate positive change.

The HICD model offers a systems-sensitive tool for analyzing institutional weaknesses as well as a range of options for working on promoting institutional capacity improvement. As indicated after an appropriate local systems analysis and/or PEA, it can be applied to a specific justice institution, to a department, or even to a process within an institution. Utilizing an HICD process will require a thorough outside analysis of the partner institution, and that institution must be committed to the process.

Justice institutions may be reluctant to open up to an outside organization for a variety of reasons. It may fear an intrusion into its independence or be concerned about domestic politics and “showing weakness.” Or, as is often the case in developing and transitioning countries, individual elites within the justice system may be concerned that steps that shine light on how the system currently works may lead to investigations. Justice institutions are far from immune to the influence of organized crime, the scourge of corruption, or the effects of other illicit practices. In contexts where the judiciary is emerging or wants to emerge from significant external interference, judges are often resistant to have outsiders delve into institutional functioning. A local systems or PEA

can help reveal the sources for such recalcitrance. HICD can provide additional options for addressing the fundamental problem – the poor performance of the institution – and make it more user-friendly and accessible for citizens narrowing the justice gap.

One of the key lessons of an HICD perspective on institutional performance is to expand the range of options for ROL program designers and managers. Some ROL programs rely extensively on training as a primary intervention with an eye towards addressing institutional performance by improving individual capacities. However, “success involves changing behaviors, shifting incentives, overcoming power imbalances and catalyzing anticipated changes in one part of a social, economic, political, and environmental system that can have unforeseen effects elsewhere.”<sup>10</sup> As the Behavioral Engineering Model illustrates, training alone is insufficient to address the performance of justice sector institutions. If training is required, programs should focus on developing training capacities that can support and sustain systems change, such as the establishment or strengthening of an embedded training unit/trainer within an institution to maintain continual learning and iterative capacity development.

For example, one issue that HICD (and PEA) analyses can bring into consideration is the role that local social norms play in incentivizing, positively or negatively, certain types of behaviors by individuals within the justice system and related systems, such as land management or public administration. In every state group and social networks overlaps, sometimes working in concert, sometimes in competition, with formal state structures. Social and identity groups – tribal, ethnic, religious, community – can figure prominently in the politics of power and influence, which can often play important roles in the functioning of the justice system and institutional actors, and the decisions they make.

Mapping the local system and using PEA to consider the broader contextual factors and identify the desired performance of the justice institution within the local system – given technical and political considerations – will help to accurately define performance gaps. Similarly, PEA is crucial to determine politically informed performance solutions that will leverage the commitment of the relevant institution’s leadership while still addressing the real root causes of the gaps in performance. HICD can then help turn these data into actionable steps in institutional reform.

Often, ROL programs rely heavily on lawyers, judges, and other legal professionals to provide technical assistance. Justice institutions are, in fact, public institutions, with all the issues found across any other institution. ROL programs must engage professionals from a variety of backgrounds who can apply their expertise to address strengthening the variety of potential weaknesses in the system, such as budgeting or human capital planning.

Similarly, reform programmers should also recognize that there are multiple potential entry points for an individual seeking to resolve a problem or address a justice need. Some entry points are expressly not part of the formal justice system. For example, in some contexts, [traditional and customary dispute resolution mechanisms](#) may be viable ROL program partners. Also, as described further in USAID’s guidance on [court](#)

[automation programs](#), private sector actors such as information technology regulators and programmers can be crucial partners. A USAID ROL program in Mexico has partnered with a local bank to help reduce insolvency as part of a holistic approach to reducing and preventing crime (see box in previous section).

**Resources.** USAID’s [Human and Institutional Capacity Development Handbook](#) is a short, easy-to-read guide that offers step-by-step instructions on how to implement the method. The Handbook also contains an annex of templates that can be downloaded and links to numerous resources to support HICD implementation. Organization functioning measurement tools abound. Pact has made available several such tools that are well suited for international development projects: the [Organizational Capacity Assessment tool](#) and the [Organizational Performance Index](#); their [Capacity Building Gold Standard](#) handbook has standards, a section on key lessons, and a comprehensive list of tools for various stages and strategies of the HICD process.

## PROGRAM MONITORING AND EVALUATION

ROL programs have had difficulty in measuring outcomes. As an initial matter, the administration of justice is highly complex, comprising multiple independent and interdependent systems. In addition, too often it has been easier to avoid the difficulty of measuring change sought via limited inputs into a complex system. Assumptions about social interactions – which are present and understood in Western models of justice, such as the legitimacy of the national government – have also had a negative impact on ROL program measurement.<sup>11</sup> In sum, it has been easier to fall back on measuring outputs — for example, the number of judges and legal personnel trained. As the profession of international development matures, these output measures are no longer acceptable. ROL programs must increase efforts to devise **outcome measurements**, overcoming the challenge of measuring complex concepts that often lack universal agreement in definitions of success. USAID’s Learning Lab has produced guidance on five **complexity- awareness monitoring** methods that help to identify the outcomes and impacts of program interventions. The idea that ROL programming must contain randomized control trials (RCTs) is generally disfavored.

Among the difficulties in using RCTs in ROL program are questions of attribution. As complex systems, collecting the data needed to evaluate impact may be too costly, especially in a low capacity context. Identifying a counterfactual (comparison group) may be difficult for big policy questions, such as the impact of a change in ethics rules for judges. RCTs or highly organized and structured surveys may be useful in measuring service delivery – such as legal aid – interventions, but even these have their difficulties. Not the least of such concerns are the ethics of denying essential legal services. However, there are counter arguments and tested means of randomization that may help ameliorate these and related concerns. Crucial to the question of effective measurement is the early involvement of experts. USAID’s Democracy, Rights, and Governance Center can provide important support to field staff in this regard.

## Outcome Measurement



During her four-year term, Judge Aferdita Bytyci, president of the Basic Court of Pristina, has made the court system more transparent and accountable with [USAID's support](#). Photo Credit: Jessica Benton Cooney/USAID

**Concept.** Development began measurement efforts with output indicators that program staff could easily capture and with results mostly under the program's control. An often-favored output indicator is, of course, the number of people trained. Output indicators are important to capture, representing the activities of the program and how the program's money is spent.

Because of increasing pressure from Congress to justify development budgets, and to improve programming based on evidence, output indicators are now being sidelined in favor of outcome measurements. This type of measure can occur at different levels of results; USAID refers to outcomes at the highest level of outcome as the impact measurement, which identifies changes in the socioeconomic condition of program beneficiaries. Outcome measures address what the effects of the output indicators are. For example, for people trained, did they increase their knowledge and skills? Have they applied the knowledge and skills gained to improve their job performance? Has that job performance increased the efficiency of their institution's service delivery? And ultimately, the impact is whether improved service delivery of an institution has improved the lives of beneficiaries.

**Application to ROL.** ROL programs have proven difficult to measure at outcome levels for numerous reasons: the complexity of concepts; the long-term nature of change compared with short-term programming; the effects of not including systems that are

needed to make changes to the justice sector; the political dynamics, often hidden, that typically have significant effects on interventions; and difficulty accessing data on subject matter that often contains secretive, protected, or confidential information – if such data was even collected. Deficiencies in program design will readily affect the ability to measure the program’s impact. Attribution is a key question in this regard, as having a logical framework that adequately addresses the complexity of a justice system is not easy. For example, it was relatively frequent in donor-funded efforts, including by USAID, to see programs that claim to seek to improve judicial independence have as a central outcome improving court administration. The experience of donors and experts in this regard is that service-level interventions, such as improving the timeliness of case resolution, are not a direct indicator of changes to judicial independence, which has a larger array of factors.<sup>12</sup>

The past decade has seen a resurgent focus on data collection and integrity of measurement in development programs in general and more specifically in ROL programs. Organizations such as the Hague Institute for Innovation of Law (HiIL) and World Justice Project are pioneering new methodologies for measuring justice and examining justice issues on a global scale (see box). Compilations of justice and security outcome indicators are now available, as are measurement methods that are more useful and appropriate for justice sector programs. Technology applied to data collection and analysis has made some types of data collection faster, more accurate, and more cost-effective. Automation interventions, such as case management software, now routinely build in paths to capture data and generate meaningful outcome reports can be used to make management decisions, such as allocation of judicial time for different types of cases. Court management software can track fees and fines collected to promote transparency, monitor judicial and court staff’s participation in training, provide caseload control, and assign cases randomly to judges.

#### Measuring Justice

HiIL’s Justice Needs and Satisfaction Survey (JNS) is an innovative tool to measure justice from the perspective of citizens. Carried out in more than 18 countries to date, the JNS surveys people about the legal problems they have confronted, how they were resolved, and their perception of the costs and quality of the outcome. This bottom-up approach provides a unique perspective on how citizens encounter justice in their daily lives, and can help ensure that solutions are truly addressing the right problems through people-centered approaches.



Event to raise awareness of violence experienced by women in El Salvador. Photo Credit: María José Villalta

Because of the complexity of many justice concepts, direct measurements that accurately capture the facets of a concept are often too expensive, time-consuming, or difficult to collect. Instead, proxy indicators have proven more feasible for ROL programs — indicators that measure the reflection of a concept, rather than the direct measure itself. For example, measuring changes in citizens’ trust in justice services for gender-based violence would require public opinion surveys, one of the more expensive and unwieldy of data collection methods. A proxy indicator could be the change in number of victims of gender-based violence who bring cases to state justice officials, adjusting for changes in frequency of occurrence of these acts. Another approach to measuring outcomes of complex justice concepts is to use a basket approach, where several indicators that each measure a different facet are combined to consider changes in that concept.

USAID is consistently innovating and collecting experience to aid its field staff in this regard.

For example, USAID published a compendium of useful indicators and guidance for programs related to security governance, the [Security Sector Governance and Justice Indicators Guide](#), and also regularly evaluates [program success and publishes the results](#). In addition to the resources identified below, program designers and managers are strongly encouraged to contact the Democracy, Rights and Governance Center for assistance.

**Resources.** The International Centre for Criminal Law Reform and Criminal Justice Policy’s [Using Indicators to Help Improve the Justice System](#); USAID’s [Security Sector Governance and Justice Indicators Guide](#); Vera Institute’s [Measuring Progress toward Safety and Justice](#); UN Women and Council of Europe’s [A Framework for Measuring Access to Justice](#); Safer World’s [Evaluating for Security and Justice](#); UNDP’s [The Indicators We Want – Measuring Peace, Justice, and Effective Institutions](#); World Justice Project’s [Global Insights on Access to Justice](#); and The Hague Institute for Innovation of Law’s [Justice Needs and Satisfaction Surveys](#).

## Complexity-Aware Monitoring

**Concept.** Monitoring programs designed to impact the behavior of actors within complex systems is an evolving science. USAID uses a variety of tools and approaches to

monitor the performance of its programming. For [USAID](#), performance monitoring and complexity aware monitoring are not the same: "complexity-aware monitoring is distinct from performance monitoring as practiced in USAID and is intended to complement performance monitoring when used for complex aspects of projects and strategies." In addition, as donors have become more aware of the role that social norms, community practices, and other non-institutional factors play in the process of development, there has been a trend in the donor community to use RCTs – the so-called 'gold standard' – to measure behavior change.

As noted above, RCTs are controversial in the justice reform context. For example, it can run up against another important goal of USAID's justice programming, local ownership. A critical feature of effective RCT-based measurement is that programming must remain constant throughout, as deviation from implementing activities consistently can invalidate the results. But, as described above, ROL programs often should revise work plans to take advantage of opportunities and steer them effectively in dynamic contexts, particularly when the program's purpose is to influence social change. The principles and approaches of complexity aware monitoring may prove useful to improving the learning feedback from ROL programs.

USAID's Learning, Evaluation, and Research (LER) Office identified five methods that they termed "complexity-aware monitoring" to track unpredictable aspects of programs, where cause-and-effect relations are poorly understood. Although performance monitoring measures the predictable, complexity awareness methods measure the unpredictable — when factors and actors outside of program control have a major impact on program results, there are multiple pathways of change, and systems dynamics are crucial.

The five methods included in complexity awareness are: a) sentinel indicators, which are measurable proxy indicators that signal the need for further investigation; b) stakeholder feedback, which seeks diverse perspectives of partners, beneficiaries, or other key groups that are not part of the project; c) process monitoring, which tracks both predicted and emergent processes by which outputs lead to outcomes; d) most significant change, a stock-taking method that is useful for capturing wide ranges of group perspectives and can help to identify unintended consequences resulting from program interventions; and e) outcome harvesting, a method that identifies broad ranges of results and works backward to describe and verify program contribution to those results.

The LER Office distinguished between *complicated* programs, in which there are long chains of cause and effect, multiple paths to results, causality works differently in different contexts, multiple agendas and values are identified, and experts are needed; and *complex* programs, in which there is uncertain and unpredictable cause and effect that does not repeat for every occurrence of a result. Complexity awareness methods are useful to capture intervention impacts in complex types of programs such as ROL programs.

**Application to ROL.** Concepts of justice change over time and differ among cultures, including among groups and individuals within the same society. ROL program goals tend to be complex, although specific interventions and lower-level results can be simple or complicated. For example, affecting the ability of the judicial branch to serve as a check on the executive branch is complex. A program seeking to achieve this might decide to support increasing judicial capacity to interpret and apply laws against the state when warranted and to produce clear decisions supported by law, logic, and facts in cases. Training judges to understand the applicability of the law to the state and to write clear, logical decisions that apply law to facts (lower-level results) can be simple. Increasing the willingness of individual judges to apply their knowledge and skills to clarify their decisions in cases brought against the state is complicated because of other factors, such as a judge’s willingness to risk retribution by the state.

ROL programs should measure the effects of interventions correspondingly. For instance, one measurement could be whether judges learned new knowledge about the application of the law and skills in opinion writing from training. Simple interventions are measured by pre-training test scores compared with post-training test scores; whether the judges implement their knowledge and skills can be determined by evaluating their post-training decisions against specified criteria that outlines and applies relevant law and facts in a written decision. Because of the many factors that individual judges might weigh in producing decisions against the state when cases warrant that outcome, it is difficult to attribute increased judicial willingness to rule against the state solely to program interventions, and a complexity awareness method to measure program contributions is useful.

**Resources.** [USAID’s slides briefing on the Discussion Note; USAID’s Complexity Aware Monitoring Discussion Note; Global Integrity’s case study of work under the Making All Voices Count initiative, which was partially funded by USAID; additional information can be found at \[betterevaluation.org\]\(http://betterevaluation.org\), including discussions of complexity aware monitoring practices, such as outcome harvesting and most significant change.](#)

## CONCLUSION

USAID’s decades of work promoting the ROL has demonstrated the inherent complexity of the work. On the one hand, the justice system is cognizable. It has familiar institutions and actors, inclusive of police, prosecutors, judges and court personnel, to corrections officers as well as Ministries of Justice and civil society. It has public practices and routines. It is relevant to all individuals within a jurisdiction. On the other hand, the justice system is an iceberg, with the bulk of the incentives, competing (and sometimes contradictory) political imperatives, and multiple drivers of observable behavior hidden from public view. Thus, reforming a justice system requires a system lens, political savvy, and capacity to iterate. It also must be set on a long-term timeline. There are no quick and easy fixes. As the foregoing is illustrative, USAID’s efforts have also developed many tools, reference guides, and other supportive mechanisms. Given the importance and complexity of this work, USAID maintains a cadre of ROL experts



in the DRG Center that are ready to support the work of field-based staff – from ROL assessment to design to implementation – and develop effective and adaptive ROL programs

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<sup>1</sup> Brian Levy, *Working with the Grain: Integrating Governance and Growth in Development Strategies* (Oxford Univ. Press 2014).

<sup>2</sup> National Security Strategy of the United States of America 2017, at 38-39, available at <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

<sup>3</sup> See *Stabilization Assistance Review: A Framework for Maximizing the Effectiveness of U.S. Government Efforts to Stabilize Conflict-Affected Areas* (U.S. Department of State 2018), available at <https://www.state.gov/wp-content/uploads/2018/11/283589.pdf>.

<sup>4</sup> USAID Policy Framework: Ending the Need for Foreign Assistance, 26 (USAID 2019), available at [https://www.usaid.gov/sites/default/files/documents/1870/WEB\\_PF\\_Full\\_Report\\_FINAL\\_10Apr2019.pdf](https://www.usaid.gov/sites/default/files/documents/1870/WEB_PF_Full_Report_FINAL_10Apr2019.pdf).

<sup>5</sup> Goal 16, available at <https://sustainabledevelopment.un.org/sdg16>.

<sup>6</sup> Measuring the Justice Gap, 5 (World Justice Project 2019), available at [https://worldjusticeproject.org/sites/default/files/documents/WJP\\_Measuring%20the%20Justice%20Gap\\_final\\_20Jun2019.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP_Measuring%20the%20Justice%20Gap_final_20Jun2019.pdf).

<sup>7</sup> *Pathways for Peace: Inclusive Approaches to Preventing Violent Conflict* (2018), available at <https://openknowledge.worldbank.org/handle/10986/28337>.

<sup>8</sup> *Justice For All: Final Report of the Task Force on Justice* (2019), available at [https://docs.wixstatic.com/ugd/90b3d6\\_746fc8e4f9404abeb994928d3fe85c9e.pdf](https://docs.wixstatic.com/ugd/90b3d6_746fc8e4f9404abeb994928d3fe85c9e.pdf).

<sup>9</sup> *Ibid* at 21.

<sup>10</sup> ODI Briefing Note, *Making Adaptive Rigour Work: Principles and Practices for Strengthening Monitoring, Evaluation, and Learning for Adaptive Management*, 2 (Overseas Development Institute 2019), available at <https://www.odi.org/sites/odi.org.uk/files/resource-documents/12653.pdf>.

<sup>11</sup> See, e.g., Keinfeld, R. and Bader, H, *Extreme Violence and the Rule of Law: Lessons from Eastern Afghanistan* (Carnegie Endowment for International Peace 2014), available at <https://carnegieendowment.org/2014/04/23/extreme-violence-and-rule-of-law-lessons-from-eastern-afghanistan-pub-55391>.

<sup>12</sup> The International Journal for Court Administration recently devoted a special issue to this question. It is available here, <https://www.icajournal.org/29/volume/9/issue/3/>.

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