Rule of Law Promotion: Global Perspectives, Local Applications

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beyond the economic means of an average civil servant). The prospect of travel may induce the teachers to improve their linguistic abilities, especially in English.

Development assistance in the field of law is, generally speaking, much less expensive than the traditional development projects such as constructing roads or sending food. It follows from the aforesaid, that the building of a functioning market economy in the countries receiving development assistance means not only a decisive contribution to the fight against poverty but even towards the building of a fundament for political democracy and human rights. It is, in any case, clear that international development assistance focusing on market-oriented legal reforms is, in the long run, more conducive to democratic reforms and the protection of human rights than all conferences, courses and other efforts trying to introduce such rights into totalitarian countries with centrally-planned economies.

The Rule of Law Bazaar

VERONICA L. TAYLOR*

Abstract

The thesis of this chapter is that we cannot understand current problems in donor assisted rule of law initiatives – much less devise better approaches – without understanding the institutional frameworks within which such initiatives are designed, funded and delivered. This seems like a self-evident claim, but since the 1990s donor-assisted rule of law projects worldwide have proceeded at such velocity that both participants and critics are struggling to stay apace of law reform of an historically unprecedented kind and quantity.

In this chapter I examine a key component of how rule of law is currently organized – the project.[1] I draw on U.S. projects in which I have been involved, have observed or on which I am currently working, to illustrate some of the political, economic and professional institutional features that are revealed in rule of law project transactions. These include understudied organizational features such as public/private hybrid design and delivery of rule of law projects; the militarization of rule of law; the commodification of law as a development tool; and the rise of a new class of professional – the development lawyer or rule of law specialist.

This is a preliminary survey of some of the institutional design issues that have not been systematically considered in rule of law scholarship to date. There is no strong normative conclusion; rather this essay points the way to further inquiry and stronger baseline research on a range of topics. Assuming no dramatic change in the current cast of rule of law actors, the structural problems of donor-assisted rule of law are unlikely to disappear spontaneously. Thus I predict that rule of law initiatives are likely to attract greater critique. That critique will undoubtedly call into question the legitimacy of the rule of law bazaar, its participants and the legal reform that it is producing.

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[1] For a macro-level analysis of the problems of principal-agent in development programming see Peter Murrell et al (2002): *The Institutional Economics of Foreign Aid: A Principal-Agent Approach*, (Cambridge: Cambridge University Press)

1 The Rule of Law Bazaar

> 'It's like the bazaar – If we say "No" to a foreign donor, they just walk across the street and try to sell to another [local agency] … You foreign donors behave as if you are in the bazaar!'[2]

It is rather humbling to arrive as a western lawyer in a desperately poor country, with a briefcase full of noble intentions, fresh rule of law rhetoric and state-of -the art legal reform products, and to be compared to a carpet seller in the bazaar. Yet the criticism is fair – in country after country, a multiplicity of rule of law actors compete to sell projects to host governments and local civil society partners.

On a recent trip to Afghanistan I followed the usual protocols for new projects – get briefed by the donor (here the US State Department); touch base with the other U.S. agencies on the ground; set up meetings around town with key Afghan counterparts in government and the university sector; call on other donors working in the justice sector; and then connect with key NGOs and implementers with whom we may want to cooperate. Following the Bonn Agreement, the donor with initial responsibility for the justice sector in Afghanistan was Italy. At our courtesy call on the Italian justice sector team, not only did we meet our Italian counterparts, but they also met each other for the first time. The next day, after breaking from a meeting for all justice sector donors, the very capable delegate from the UNDP took me aside and said, by way of welcome:

> "You realize you are operating under an enormous handicap, don't you." "What's that?" I said, nervously adjusting my headscarf. "Well", he drawled "You're the only person in the room who knows what you're doing. You're a law professor educating other law professors – chances are you might actually achieve something".[3]

It was a prescient remark on both counts, but not a happy predictor for Afghanistan as a rule of law project host.

Whether in post-conflict or transition settings, donors promise to coordinate with one another and to transact in good faith with the host government. They also expend considerable time on coordination meetings, spreadsheet

[2] Personal Communication to author by legal academic, Kabul Afghanistan, 2006
[3] Personal Communication to author, UNDP official, Kabul Afghanistan 2006

summaries of projects, aims and outcomes and negotiations about budget priorities. But the promises to coordinate are often cast aside in a frenzy to spend down national pre-allocated budgets, get projects performed and fold the donor tents before global political priorities change. Add to this dangerous and stressful working conditions, security fears, communication difficulties, personal foibles, political frictions with the host government and donor sensitivity about protecting local turf, and the capacity to coordinate may be exceedingly limited. For both donors and hosts, rule of law work frequently looks like a chaotic bazaar.

2 Rule of law Buyers and Sellers

Our rule of law bazaar is both confusing and crowded. Its defining characteristic in the 21st century is the number of market participants, on both the donor and host country side. Table 1 (below) gives just a few examples by category of the types of organizations and individuals engaged in the rule of law marketplace.

Multiplying Actors and Projects

The donor/host divide

Table 1 classifies rule of law actors by organizational characteristics: public, private, national, multilateral, military. However, the clean divisions of the table are not replicated in the rule of law marketplace. The classification collapses at the binary division into donor/host, for example. Countries such and China and South Korea have, in the last decade, been both donors and hosts for rule of law technical assistance. Nor are the donors identified necessarily the distributors or implementers of projects on the ground. In many cases they contract out rule of law to for-profit or non-profit organizations, with variations in the model of distribution, according to national and multinational donor.

Table 1

ROL Actors	Type/Category	Examples from a U.S. perspective
NGOs/NPOs	Churches & Religious Charities	Caritas
	Social Justice NGOs	Oxfam
	Single Issue NGOS	Anti-trafficking groups
	Advocacy groups	Transparency International, Amnesty
	Development Information Networks	Development Gateway
	Philanthropic organizations	Soros Foundation (Open Society Institute), Ford Foundation, Asia Foundation
		Carnegie Endowment
	Think tanks	Global Center for Development
		Rural Development Institute
	Universities	SOAS, Leiden, Maryland, U Washington, ANU
Private Sector	Corporations	Microsoft
	Individual professionals	Lawyers, consultants
	Professional Associations	American Bar Association
National agencies (host)	National development agencies	BAPPENAS (Indonesia)
	National govt agencies	Ministries of Finance, Justice, Attorney-General, Trade, etc
National agencies (donor)	National donor agencies	AusAid, GTZ, JICA, SIDA, USAID
	National govt agencies	Competition Authority/FTC
		Judiciary / Nat'l Centers for Courts

		Departments of Justice, Commerce
Military	Transitional Authority	Iraq, Bosnia
	In-country projects	Provisional Reconstruction Teams (PRT)
Regional/ bilateral	Regional Political groupings	EU
	Regional financial institutions	ADB, EBRD
	Regional development programs	EU- TACIS
	Regional trade blocs	ASEAN, NAFTA, APEC
Global/Multi-lateral	International Financial Institutions	IMF, World Bank
	Multilateral trade groupings	OECD
	Treaty-based organizations	WTO, UN Agencies e.g. UNDP
	Professional Associations	Intl Commission Jurists, LAWASIA
	Industry-based global networks	

Militarization

A striking feature of the table is that the 'donors' range from military deployments through aid agencies and corporations to self-employed individual consultants. What this demonstrates is that, although the funding for rule of law is overwhelmingly public at its source (national governments), the distribution is through militarized and corporatized channels as well as multilateral organizations, national aid agencies, other national agencies and NGO/non-profit organizations.

Militarization of rule of law is not new as a phenomenon. Colonial powers and 20th century military invaders have frequently used military personnel to organize and deliver both military and civilian justice. The 21st century version of this is military resources being used to set up or re-organize police forces, prison systems, prosecution services and courts. The typical scenario for this is a conflict zone or a 'post-conflict' zone which threatens to fall back

into conflict: Iraq, Afghanistan, Timor Leste, the Solomon Islands, Somalia. Views divide about how and how much military forces should be engaged in rule of law work. On one view, the military is a natural organizing institution for what can be chaotic and inefficient delivery of services by multiple national agencies and foreign allies in a conflict situation.[4]

Another build-out of the military model analogizes civilian rule of law initiatives to military campaigns. So, for example, when the US State Department uses the term 'rapid response force' of civilian legal specialists trained for quick deployment in conflict situations, the template in mind is military organization. The supposition behind this new allocation of resources is that the conflict or post-conflict setting will routinely require a rule of law component in the 21st century.

Conversely, the militarization of rule of law is complicated by a lack of application of rule of law, procedurally and substantively, to military interventions themselves. Most dramatically represented by the US renditions and treatment of detainees in relation to terror investigations, public and scholarly scrutiny of military behavior worldwide is increasing in intensity. As rule of law is promoted as a development tool, we can anticipate heightened demand for it to also be applied to donor interventions, both military and civilian.

Public/Private Partnerships

Among and between the organizations listed, there is considerable blurring of profit and non-profit lines. In Europe and Japan a non-profit organization tends to be a tightly regulated vehicle with a narrowly defined character. In the US, by contrast, foundations are relatively tightly regulated and non-profit organizations are simply a corporate vehicle that delivers a tax exemption in return for a showing of one of the socially useful roles defined in the enabling State statute. Many are indistinguishable from closely-held corporations. There is also some debate about what constitutes and independent rule of law organization. Rule of law NGOs are typically in receipt of significant funding from multilateral or government agencies, whether disclosed or undisclosed. A quick look at the financial supporters for Transparency International or the Asia Foundation is instructive. Even those that

[4] An example of militarized rule of law is the inclusion of legal mandates for US and allied Provisional Reconstruction Teams (PRTs) in Afghanistan and Iraq to offer regional dispute resolution fora and confer with local leaders and communities about justice issues in that region. This is a complex and controversial build out of peace-keeping in conflict situations.

have been established as indigenous independent entities, for example the Center for Indonesian Law and Policy Studies (PSHK) in Indonesia, may become dependent on revenue from donors over time.[5]

In the US, the highly politicized privatization of state-building is coming under intense scrutiny. While the Congressional hearings on security contractors in Iraq this year and the subsequent legislative change do not reach into rule of law projects yet, this is only a matter of time.[6]

Epistemic communities

Donors and hosts together form epistemic communities and professional networks. Individuals move fluidly within this table from donor to host, or from donor- to donor- to implementing NGO, taking with them their knowledge, contacts, professional practices and sense of "how we do rule of law".

Problems of distribution

Donor-funded rule of law is organized differently from donor to donor and from national agency to national agency. In the aggregate, its roots are in public or multilateral agencies and its funding from the public purse. However, in contemporary practice, we see extensive privatization of donors and delivery, and a bifurcation between rule of law in the service of public goods and rule of law designed to advance globalized trade, commerce and market opening. Our rule of law 'marketplace' ranges from state-owned enterprises through to self-employed individuals.

The distribution system for rule of law projects is complex. So, for example, Ashraf Ghani asks why we cannot substitute corporations and their supply chain management techniques for projects which are inefficient or where the pricing is deliberately padded.[7] He asks why, for example, project funds may pass from donor through up to five U.S. organizations before reaching the hands of the local 'partner', each intermediary skimming a share. For him, contracting out directly to a multinational corporation and taking advantage of their results-driven expertise is the answer. On the other hand, Bill Easterly takes square aim at "big development" generally and urges its

[5] http://www.pshk.or.id (Accessed September 2008)

[6] For a scholarly discussion of the legal problems of privatized military contractors see Simon Chesterman and Chia Lehnardt, (Eds) (2007) *From Mercenaries to Market: The Rise and Regulation of Private Military Companies*, Oxford: Oxford University Press

[7] Ashraf Ghani and Clare Lockhart (2008) *Fixing Failed States* (New York: Oxford University Press)

abandonment in favor of grassroots, local, bottom-up initiatives that arise from genuine local need and are cost-efficient to deliver.[8]

The problem for rule of law projects is that formal law necessarily involves the state. No amount of 'market-strengthening' or funding of 'intermediate actors' can substitute for functioning laws, state-supported legal institutions and a state polity for which law is a political priority. It is possible, of course, to carve out privatized parallel universes for certain institutions and to have NGOs that perform functions that might be performed by the state in other places. Neither, however, can replace core state legal institutions – the judiciary, the procuracy, lawyers in their role as officers of the court, government lawyers and the legal professional education that produces them. This means that engagement with state actors for rule of law reform is essential. To the extent that the host state is transitional or developing a certain amount of incompetence, waste and corruption is inevitable, as it is in any legal system (New York comes immediately to mind).

Donor Coordination and Absorption

The number and variety of rule of law actors in the marketplace can be bewildering for them and for their host country counterparts. Identifying and coordinating donor projects for rule of law should be possible because the host country legal apparatus is limited and quite often unitary (one court hierarchy, one justice ministry, one procuracy, one national law faculty and one bar association). While most actors recognize that coordination among themselves and with the recipient government and counterparts is important and to be preferred, there are incentives that pull in the other direction. Channell correctly pinpoints the commercial incentives among U.S. development contractors to avoid cooperation and information-sharing.[9] But we should equally note that, in an institutional setting where delivery of rule of law projects is contracted-out, the mechanisms and capacity for, for example, a small USAID team located in Washington D.C. to oversee projects is very limited. Consequently, the result on the ground is often intense competition

[8] William Easterly (2006) *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good,* New York: Penguin Press and (2001) *The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics*. Cambridge MA: MIT Press

[9] Wade Channell, "Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries":<http://www.carnegieendowment.org/files/CP57.Channell.FINAL.pdf>

for politically significant (or profitable, or important) legal reform projects centered on host country legal 'nodes'.

Thus you can – and do – have more than five foreign donors funding different and overlapping aspects of Supreme Court reform in Indonesia. Courts offer a visible institution where change can be observed and measured, ensuring a "quick return" on a rule of law project investment.[10] Courts moreover are validated within the formalism of current rule of law thinking as being the epicenter of a legal system – particularly when viewed from the standpoint of interpreting and enforcing law for foreign investors, or articulating and upholding human rights. The corollary of this hyper-concentration, however, is that other equally important legal institutions may be ignored. In Indonesia, for example, no-one is focused on the absence of a national legal print or digital library. No donor wants to seriously engage with the long-standing and complex problems or overhauling g the basic legal Codes that remain ossified in colonial Dutch after a century. Nor is puzzling through a system to recognize and rationalize customary land ownership going to appeal to donors (or government) where the colonial legacies of formalism and subordination of customary law in this area remain strong.

3 ROL Projects for Sale

Crowding aside, there are some indications that all is not well in the rule of law bazaar. Buyers are beginning to voice complaints. Scholars in the global south perceive very clearly that rule of law resources are tilted towards donors, who with the multilaterals control much of the production and dissemination of rule of law information. Other critics question how we will achieve "ethical development" globally and whose interests are served by current rule of law initiatives. There is an emerging view that rule of law transactions are rigged but that the donors and implementers remain unregulated and unconcerned.

Many of these criticisms are legitimate. They stem from both the structural design of rule of law marketplace and its transactions, and from the normative assumptions that underlie these. Having briefly identified the range of rule of law actors we now look at some of the design features of projects in the rule of law marketplace.

[10] Thomas Ginsburg, "Does Law Matter for Economic Development? Evidence from East Asia," (2000)34: 3 *Law and Society Review* 829

Exchanges for value

Rule of law development aid is not a gift – like other ODA flows, it is propelled by political motivations and underpinned by economic expectations.

How much does rule of law activity account for current ODA spending on development? Separating the financial size of the rule of law marketplace from the larger development enterprise within which it is embedded is difficult. We know the numbers involved are immense and that most of the funding is public; nation states creating ODA budgets for use bilaterally or as contributions to multilateral institutions. Easterly estimates at the total size of western aid at 2.3 trillion over the last 50 years.[11]

National development agencies' and OECD estimates of ODA flows are largely unhelpful because legal reform is not broken out as a separate item. The problem of multiple labels referred to above exacerbates this, even where budgets do use headings such as democracy and governance. Accurate estimates are also difficult, in part because the rule of law bazaar is crowded with buyers and sellers and these aid dollars pass through many hands before eventually being spent in, or for, host country legal systems.

Financially rule of law projects may be part of grants in aid or they may be funded through loans. In some cases rule of law components are part of loan conditionality, most controversially imposed by the IMF in the 1990s in Latin America and then in Asia after the 1997 Asian financial crisis.

The Center for Global Development, however, publishes a useful Commitment to Development Index that weights the national dollar contributions based on, for example, whether the ODA is in the form of "tied aid" and thus loops back to the donor in the form of mandated purchases of labor and equipment from donor country nationals.[12] On some estimates 70–80 % of tied aid reverts to nationals of the donor; public development aid from the United States performs particularly poorly in this regard.[13]

Whether grant, loan or contribution in kind of equipment or services, rule of law donor assistance is generally part of an exchange for value. We confuse the transactional aspects of the exchange by calling our rule of law vendors "donors" and imagining that multinational organizations and national agencies are donating a 'surplus' production of legal knowledge, practices

[11] William Easterly (2006) *The White Man's Burden: Why the West's Efforts to Aid the Rest Have Done So Much Ill and So Little Good,* New York: Penguin Press, p 4

[12] Center for Global Development http://www.cgdev.org/section/initiatives/_active/cdi/ (Accessed September 2008)

[13] Carol Lancaster, (2006) *Foreign Aid: Diplomacy, Development, Domestic Politics,* (Chicago, University of Chicago)

and professionals to nation states that are not 'self-sufficient' in law reform, modern statues, legal training, legal information technology, legal publishing, legal professionals, government regulatory agencies or technocratic legal processes.[14] It is more accurate to see the process as both an actual and a symbolic exchange.

What is being traded here varies with the overt or implicit purpose of the project. In commercial or trade law situations, the trade for assistance is market access, a favorable climate for foreign investors (not infrequently at the expense of domestic business); and/or political access to lobby for these results. In situations where membership of the WTO or EU is at stake, the complete overhaul of the regulatory laws and institutions of the aspiring member state is the price for entry and technical legal assistance and rule of law funding is the accelerant.

Some of the costs borne by the host state in rule of law transactions are less visible. As David Campbell has observed,

> It wouldn't matter if it was just rich countries giving money away. The problem is the way that it distorts the systems of the countries receiving it.[15]

Whether you term it a cost, or a distortion or a disequilibrium, there are hidden costs of rule of law projects, as there are for other forms of aid.

One clear cost is aid dependency. In this scenario the donors have been so long a source of financing for, say, the justice sector that it becomes difficult to remember a time without donor funding or imagine operations without this external source of funds and know-how. Rule of law projects uniformly require 'sustainability' post-project funding, but how to exit in a constructive way is vastly understudied. A second issue is moral hazard – trading policy autonomy (and capacity) for foreign programming. In these scenarios donors do what a state would normally do. This has the effect of freeing the state from resourcing some areas, for example, the judiciary or legal education. The reforms in areas that have not been state policy priorities tend to last as long as the donors continue funding. Another cost is diversion – the magnetic pull of donor priorities that divert resources from core areas of the legal system to the donor concern of the moment – anti-corruption, IPR, anti-money laundering, insolvency, human rights training. The new areas may be funded and focused on to the complete exclusion of other systemic

[14] The key questions being how do we define sufficiency and for what purposes.

[15] Communication to author, Professor David Campbell of Durham Law School, January 2008

reforms that may be more important for strengthening the legal system A further issue is the hollowing-out of local capacity, often under the confusing label, "capacity building". This includes siphoning off state officials and educated elites to serve on donor projects without any mechanism for training their replacements in the institutions from which they have been removed. The creation of a parallel donor economy occurs all over the development world, but is particularly acute in professional fields such as law, where – if the project calls for a senior local hire with judicial experience – there is only one local institution that can supply such a person.

Even with these costs, rule of law transactions would operate and the markets reach equilibrium if both sides are satisfied that they gain. This is the tacit assumption that underlies all of our rule of law projects, but it is an assumption being questioned by both rule of law host countries and rule of law critics. There is, for example, ample data that now argues that direct aid flows are not good predictors of improved economic performance and that, indeed, aid flows can correlate with an economy going backwards. The corollary for rule of law projects is that donor assistance for legal reform and legal institution building is, of itself, no guarantee of an overall improvement in the quality of justice or the performance of a country's legal system. US donor assistance to Ethiopia and Afghanistan in the 1960s is an eerie reminder of this, as USAID-funded teams in the 21st century (literally) re-visit the previously-funded crumbling law schools and stalled legislative reforms. The obvious response to this critique is that rule of law projects have multiple aims, not limited to economic growth and national development, and that the long-term effect of rule of law may be positive on the governance side, regardless of short-term cyclical economic performance.

Commodification of ROL: The Project

Thus far we have been talking about rule of law in abstracted multiple forms. But a typical packaging of donor-assisted rule of law is in the "project" – a kind of standard delivery mechanism for ODA flows.

Some anthropologists claim, persuasively, that the development 'project' has become the development product.[16] By this they mean that, instead of being a means to effect a development outcome, the project itself is the goal and donor and host collaborate in design, delivery and assessment of the project, even as their individual reasons for doing so diverge. In the discussion that follows, we can test this proposition in relation to a model rule of law project and in doing so, note some of the features of 'projects' that may contribute to the contradictions in rule of law outcomes that critics identify.

[16] This is one of a number of interesting themes in Emma Crewe and Elizabeth Harrison (1999) *Whose Development? An Ethnography of Aid* (University Press)

Projects are essentially contractual. A U.S.-style project is designed to be a public procurement instrument. The project will typically have a "needs assessment" conducted by the donor for the host (sometimes but not necessarily conducted in response to a host request), a "scope of work" and a solicitation written by the donor in response to the "needs assessment". It will often have a standardized design, stipulated outcomes (now often in the form of quantitative metrics) and it will typically require standardized project evaluation. For rule of law projects, a core project component is foreign labor: expert advice provided by foreign legal and other professionals.

Standard form contracting

Rule of law projects come in many shapes and sizes. In the discussion that follows I use as an example a USAID-MCC Solicitation from 2007 in Indonesia, which focuses on strengthening the court system, the anti-money laundering authority (PPATK) and the anti-corruption commission (KPK). The thematic linkage is anti-corruption. The court reform component includes introducing and training judges in a code of judicial ethics, requiring wealth reports from judges, creating job descriptions and performance standards for judges and producing a court staffing assessment (with a view to rationalizing the size of the judiciary).[17]

The Millenium Challenge Corporation MCC was created in 2004 to manage monies allocated by the Bush Administration to a new Millenium Challenge Account (MCA). Rather than allocate this new increase in aid budget to the existing agency (USAID) the policy decision was to create a new institution, with a new mandate. MCC projects were to be negotiated directly by the US government with the recipient government as multiyear agreements. They are intended to be contractual – funds delivered against agreed development objectives and indicators of performance. The ostensible rationale was to put the design and responsibility of aid-funded activities in the hands of host governments.[18] But an equally important political

[17] Solicitation Number: Indonesia 07-003 The Millennium Challenge Corporation (MCC) USAID/Indonesia Scope of Work MCC Threshold Country Program for Indonesia Control of Corruption Proposals Submission Closing Date: February 16, 2007

[18] Carol Lancaster, (2006) *Foreign Aid: Diplomacy, Development, Domestic Politics*, (Chicago, University of Chicago) p. 107

objective on the U.S. side is to be able to demonstrate quantifiable results and aid effectiveness. This is reflected in the Request for Proposals (RFP) for this project setting out the Scope of Work:

Key MCA Principles

1. Reduce Poverty through Economic Growth: The MCC will focus specifically on promoting sustainable economic growth that reduces poverty through investments in areas such as agriculture, education, private sector development, and capacity building.
2. Reward Good Policy: Using objective indicators, countries will be selected to receive assistance based on their performance in governing justly, investing in their citizens, and encouraging economic freedom.
3. Operate as Partners: Working closely with the MCC, countries that receive MCA assistance will be responsible for identifying the greatest barriers to their own development, ensuring civil society participation, and developing an MCA program. MCA participation will require a high-level commitment from the host government. Each MCA country will enter into a public Compact with the MCC that includes a multi-year plan for achieving development objectives and identifies the responsibilities of each partner in achieving those objectives
4. Focus on Results: MCA assistance will go to those countries that have developed well-designed programs with clear objectives, benchmarks to measure progress, procedures to ensure fiscal accountability for the use of MCA assistance, and a plan for effective monitoring and objective evaluation of results. Programs will be designed to enable sustainable progress even after the funding under the MCA Compact has ended.[19]

In our example, the USAID-MCC project is embedded in a long-standing funneling of donor aid to the justice sector in Indonesia, which has political value for the current, reformist government of President Susilo Bambang Yudhoyono and on which the functioning of that sector may well now be dependent. Moreover, this is a US-funded project and in the wake of its war on terror, the US has created real compliance challenges for countries like Indonesia grappling with US-led standards in areas such as security, anti-corruption and anti-money laundering.

[19] 2 RFP No.: Indonesia-07-003

In November 2005, the Millennium Challenge Corporation (MCC) selected Indonesia to participate in the MCC Threshold Country Program (TCP.

Although MCC is technically a separate institution, this Request for Proposals we examine here has been "contracted out" to USAID.[20]

This scope of work will ultimately be annexed to a chain of procurement contracts. In style this is a standard form contract, or contract of adhesion. That is, the scope of work is presented as a final design to both the host government and the intending contractor. Here the scope of work includes unusually tightly specified deliverables and performance standards. For the Judicial reform task, the *minimum* deliverables include:

Human Resource Management

1. Develop a judicial ethics code training module for use in training new and existing judges in the Judicial Code of Ethics.
2. Train trainers on the skills and knowledge necessary for training judges on the new Judicial Code of Ethics.
3. 100 percent of all judges within the court system are trained in the Judicial Code of Ethics.
4. Develop training materials and train the trainers on filling out wealth reports in cooperation with the KPK. Completed within 6 months.
5. Conduct training sessions, in cooperation with the KPK, for all judicial and senior non-judicial court personnel within the court system on wealth report submission. Completed within 18 months.
6. Develop monitoring procedures and a data base for insuring compliance by court personnel on wealth report requirements, including the collection of base-line data. Completed within 6 months.
7. Formulate specific job descriptions and minimum position qualification requirements for court staff positions within the court system. Completion within 1 year.
8. Develop minimum performance standards necessary for each court position. Completion within 1 year.
9. Conduct a court staffing assessment to determine the necessary staffing levels within the court system. Completed in 1 year.

[20] The United States Agency for International Development (USAID), in agreement with MCC, is the primary agency overseeing the implementation of the Threshold Program.

10. Conduct a judge distribution assessment to determine the necessary distribution of judges within the court system considering court caseload. Completion in 1 year.

...

12. Develop a computerized information database to manage human resources within the court system, procurement and installation of 200 computers within the court system in support of this database, and necessary training. Completed within 1 year.[21]
    Budget Reform ...
    ed within 1 year.
20. Establish procedures and formats for the public release of court budget information. Completed within 1 year.

Asset Management

21. Identify physical assets needed for effective court operations.
22. 100 per cent of court assets within the court system are accounted for and their use monitored to prevent unauthorized use or theft.

Increased Transparency

23. Assess and upgrade, as necessary, the Supreme Court website capabilities to insure IT capacity exists for online decision publication. Completed in 6 months.
24. Develop on-line decision publications policies and procedures to insure publication meets the necessary public requirements of transparency. Completed in 6 months.
25. Outsource 10,000 backlogged Supreme Court Decisions for final typing. Completed within 2 years.
26. Publish of Supreme Court decisions online. Publication commenced within one year.
27. Development and adoption of complaint procedures to be used by the entire court system for the efficient and accurate receiving and reporting of public complaints on court activities. Completed within 1 year.
28. Create complaint submission forms and public awareness materials on complaint procedures. Completed within 6 months.

[21] 17 RFP No.: Indonesia-07-003

29. Enhance the Supreme Court website capabilities to insure it has the capacity for including additional information on Court activities. Completed in 6 months.

...

33. Develop and publish court information brochures on court activities, court procedures, and court fees (also to be available on-line). To be completed and made available to the public within 1 year and on an ongoing basis

In reality contract deliverables and timelines are frequently renegotiated in light of post-contract events that were not anticipated. How this will be done in this particular project is uncertain, in part because the duration – two years – though not unusually short by project standards, is a short time in which to accomplish the tasks scoped out.

Part of the background to this project is that it builds on the (2003) *Blueprint for Reforming the Supreme Court*, a document created through cooperation between the Court, the national development agency (BAPPENAS), key foreign donors and the project team led by the Asia Foundation. The idea here was to sketch a comprehensive plan for overhauling the Indonesian judiciary in a way that would allow rational divisions of labor and funding among donors. This project is framed as delivery of key elements of that Blueprint (eg computerization of court decision reporting; re-organization of court personnel), but at the time the RFP/Scope of Work was released several other donors expressed serious concerns about duplication of effort and the fact that US political priorities were being grafted to an existing agreement of division of effort among donors.

As with all projects, the host government has consented to this at some level (this may be somewhat coerced or induced consent). A number of sources reported to me when this Scope of Work was circulated in Indonesia that key Government of Indonesia law reform advisors were very unhappy about both the project and its design. Their objections did not prevail. One reason may have been that part of the incentive held out to Indonesia in this particular project is the possibility of improving its 'rating' with the Millenium Challenge Account which would allow Indonesia to graduate from 'threshold' status and thus be eligible for continued and expanded aid funding in to the future.

Partnership

The promise of the MCC project is that the donor will work in "partnership" with the host country. This is a particular version of partnership in which the partner's role is conditioned on performance judged by the donor. Viewed in contractual terms, this is less of a joint venture than a franchise agreement, in which the partner's own political or policy priorities are assumed to be those of the donor. The form of monitoring is spelt out in the Scope of Work:

KEY MCA PRINCIPLES

...

3. Operate as Partners: Working closely with the MCC, countries that receive MCA assistance will be responsible for identifying the greatest barriers to their own development, ensuring civil society participation, and developing an MCA program. MCA participation will require a high-level commitment from the host government. Each MCA country will enter into a public Compact with the MCC that includes a multi-year plan for achieving development objectives and identifies the responsibilities of each partner in achieving those objectives.
4. Focus on Results: MCA assistance will go to those countries that have developed well-designed programs with clear objectives, benchmarks to measure progress, procedures to ensure fiscal accountability for the use of MCA assistance, and a plan for effective monitoring and objective evaluation of results. Programs will be designed to enable sustainable progress even after the funding under the MCA Compact has ended.

The MCA/ MCC experiment is controversial in part because it is so didactic about the role and responsibilities of the "partner", which may or may not be realistic. One of the challenges of this kind of project is that while the host government and the host institution (here the Indonesian Supreme Court) may well have "consented" to the project, complete performance will depend to a great degree on whether the judiciary itself and its supporting institutions – including the private Bar – cooperate in a substantive way.

This project requires 100 % of Indonesian judges to be trained in ethics, evaluated and then – presumably – cease all corrupt activity. Changing judicial mindsets, habits and peer norms is likely to take more than a training course. The creation of job descriptions and performance evaluations is clearly aimed at weeding out problem appointees and trimming the size of the judiciary so that judges have more equitable workloads. This is not an

easy task to achieve in a geographically diverse country where those banished to the under-resourced provinces have every incentive to work to come back to Jakarta, where they then feel an entitlement to take bribes to make up for the disparities in opportunity and income within the system itself. Of course it is possible to redesign the system to eliminate disparities and make rotations transparent and equitable, but whether you can achieve this is two years is highly debatable.

However, formal subordination in a contract does not mean complete powerlessness. A donor eager to fund rule of law projects that are already funded by other donors is also vulnerable. In the result the US may well have to compromise absolute standards in order to show progress to its constituencies. As Channell points out, projects are always evaluated but few are ever formally declared failures.[22] The Indonesian hosts are well aware of this and they know that rule of law funding for Indonesia over the last two decades has produced continuous and significant financial flows.

Standardization of design with variations

Although comparative law, legal sociology and legal anthropology document the diversity of legal systems and legal cultures around the work, rule of law projects are often predicated on standardized interventions, regardless of host country. This standardization is amplified in the benchmarks and indicators developed by the World Bank, USAID and other rule of law actors.

In this project, the indicators are explicitly built in, and improving Indonesia's anti-corruption performance on these indicators is a contract deliverable required of the contractor:

MCC's Control of Corruption Indicator

The Threshold Program is intended to help Indonesia improve its score under the MCC "Control of Corruption" indicator whose value is calculated by the World Bank Institute (WBI, see http://www.worldbank.org/wbi/governance/pubs/govmatters4.html for more details). This indicator measures country performance on the frequency of "additional payments to get things done," the effects of corruption on the business environment, "grand corruption" in the political arena and the tendency of elites to engage in "state capture."

[22] Wade Channell, "Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries": <http://www.carnegieendowment.org/files/CP57.Channell.FINAL.pdf>

Countries are evaluated on the following factors:

- corruption among public officials;
- frequency of corruption; the effect of corruption on the "attractiveness" of a country as a place to do business: irregular, additional payments connected with import and export permits, business licenses, exchange controls, tax assessments, police protection, and loan applications;
- frequency of "irregular payments" to public officials; corruption as an obstacle to business development; improper practices in public sphere; percentage bribes paid as share of revenues from procurement contracts; how many elected and government and border officials, judges or magistrates are thought to be involved in corruption; and
- how well the current government is handling corruption; anti-corruption policies; existence of anti corruption and accounting institutions; civil service transparency and accountability.

II. OBJECTIVES

The GOI has established a set of very aggressive objectives to be achieved in the Program, which is two years in length. Each objective is specifically designed to positively affect certain anti-corruption sub-indicators which, in turn, are intended to positively affect the following overall anti-corruption indicators:

Transparency International's Corruption Perception Index (CPI):

Baseline: 2005 CPI

2.2 out of 10.00

Goal: 2008 CPI

3.8 out of 10.00

And

World Bank Institute (WBI) Control of Corruption Indicator as follows:

Baseline: 2004 Raw Score

-.90

Goal: 2008 Raw Score

-0.25

To achieve overall indicator improvement, the following sub-indicator goals have been established for the Program:

- Prosecution and Conviction of Corruption Officials
  Anti-corruption and Transparency (Source: Freedom House Countries at the Crossroads).
  Baseline 2006: 2.82 out of 7 Target: 3.0

- Pervasiveness of money laundering through banks (Source: Global Competitiveness Report)

  Baseline 2005: 3.6 out of 7 Target: 4.1
- Pervasiveness of money laundering through non-bank channels (Source: Global Competitiveness Report)

  Baseline 2005: 4.1 out of 7 Target: 4.5
- Undocumented extra payments or bribes connected with the awarding of public contracts (Source: Global Competitiveness Report)

  Baseline 2005: 3.4 out of 7 Target: 3.9
- Extent of favoritism by government officials when deciding upon policies and contracts (Source Global Competitiveness Report)

  Baseline 2005: 3.7 out of 7 Target: 4.2
- Undocumented extra payments or bribes connected with getting favorable judicial results (Source: Global Competitiveness Report)

  Baseline 2005: 3.3 out of 7 Target: 3.8
- The extent to which the judiciary/legal system is affected by corruption (Source: Transparency International's Global Corruption Barometer)

  Baseline 2005: 3.8 out of 5 Target: 3.4

The goals outlined above are specific measures of achievement which will assist the MCC in determining Indonesia's eligibility for full Millennium Challenge Compact Status. To that end, the following Activities and Expected Outcomes are expected over the two year life of the Program. Expected Outcomes will be achieved primarily through direct 5 RFP No.: Indonesia-07-003
Technical support with subcontracts to civil society or other organizations as appropriate.

This MCC Scope of Work also reflects a strong preference for standardization. Nothing in the preamble to the Scope of Work indicates that Indonesia is a highly plural legal system with complex systems of both customary (*adat*) law and Islamic law (*syariah)* layered on top of Dutch colonial law, post-independence Indonesian law and a raft of post-Reformasi (post 1998) and donor assisted laws and new regulatory institutions. Islamic law in particular has shown dynamic growth in doctrine, institutions and practice since the 1990s and much of this has been in response to the perceived corruption

of the state system. The Scope of Work is also silent about the institutional history of the judiciary and legal profession in Indonesia, although this has been exhaustively detailed in the leading study of the Indonesian Supreme Court by Dr Sebastiaan Pompe, who was also a key figure in crafting the Blueprint for Reform described above.[23]

This project proceeds solely on the assumption that the Indonesian judiciary is among the world's most corrupt and that, since this is 'the problem' the solutions lie in standardized responses. The claim is credible, but the responses may be problematic.

A key limitation to this standardized format for donor-funded legal assistance, packaged within a short-term project, is that many applications of law are discretionary and transaction-intensive. Behavior of judges is the quintessential example of this: it is precisely the autonomy, flexibility and discretion in decision-making that makes judicial adjudication valuable. This project, of course, is not seeking to produce judicial automatons. But the assumption that you can "train" 100 % of Indonesian judges in ethics cuts across the common sense understanding that the professional formation of judges needs to be tackled at a deeper and earlier level of their education and that compliance is contingent on other forms of self-regulation and peer regulation (none of which are referenced in this Scope of Work.)

Price

How much would it cost to clean up a judiciary? Here the total price for the project (including the components that relate to the other anti-corruption agencies) is USD 24m. However this project is only one of many donor projects focused on the Supreme Court, and it is only one in a series of rule of law projects funded by USAID in Indonesia. So the total price tag, depending on where you place the time line, would be many times higher.

Price as a regulatory mechanism is both a constraint and an incentive. I deliberately use "price" rather than cost when talking about rule of law projects because the development aid marketplace is completely imperfect. As Ghani points out, pricing for ODA projects is administrative, not market driven.[24] By this he means that projects cost what a donor is prepared to pay for them, not the cumulative total of their inputs.

[23] Sebastiaan Pompe, (2005) *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca, Cornell South East Asian Studies Program)

[24] Ashraf Ghani and Clare Lockhart (2008) *Fixing Failed States* (New York: Oxford University Press)

Because we are considering the Scope of Work for an MCC project here and not the final contract document, it is not clear what price design was adopted. One current USAID model for rule of law projects is the Indefinite Quantity Contracts (IQC), which creates multi-million dollar umbrellas under which specific projects and sub-projects are awarded to approved contractors. The individual cost items of those contracts are calculated using USAID-mandated rates for items such as professional services, travel and per diem. These are administrative classifications that may not relate to the actual costs of those items in the US or host country market.

For ROL projects, the largest cost item tends to be labor – hiring foreign and local professionals. In many projects expatriate pay and living expenses eat up a significant proportion of the budget. Two problems arise here. One is that the rates of pay for foreign professionals are typically lower than what could be earned in professional practice at home. This explains why lawyers who do development work tend to be very young, retired or "second career" professionals; people available only for short assignments; or people who are induced or forced to leave their own legal system. Rates of pay increase considerably where there are danger allowances and additional leave benefits built in for hazardous locations, which explains some of the appeal of work in conflict zones. Rates of pay are an issue because they constrain the types of professionals who are available. Project designs notwithstanding, legal drafting or institution building in a development setting is not generic work. It works best when the foreign professional has experience, real expertise and knowledge of the host country. In order to attract qualified professionals, the work-around routinely in short assignments is to simply estimate more hours than the job will actually require, in order to offset the opportunity cost for someone actually qualified to perform the work.

At the same time, locally hired staff is paid at rates that may be 10 % of the expatriate rate, even when the work performed is the same or more complex. The ostensible reason for this is that it avoids a 'parallel economy' where local wages are artificially inflated and talent is leached from local institutions in order to service contractors.

The most controversial aspect of project pricing is the seeming ubiquity of the "cost-plus" contract in U.S. development projects. Here the prime contractor – usually the large private consulting firms that tend to dominate the award of IQCs – add their profit margin to the approved costs. Here I leave aside discussion of performing development work for profit, an issue on which I am agnostic. What can be problematic is the lack of oversight by the donor agency, which permits profit-making regardless of performance,

quality or outcome. Profit and performance that is tacitly accepted then tends to entrench market positions in particular countries. So, despite the fact that these multi-million dollar contracts are publically tendered and sometimes "awarded around" the circle of large contractors to avoid the appearance of favoritism, it is also widely perceived that, barring a complete disaster (and perhaps even then), the incumbent contractor in country X has a huge advantage over competitors. Award of a large contract allows the corporation to capture local legal professional talent, make government connections and gather commercial, political and economic intelligence available only to those already on the ground.

The US model of privatized project delivery is not universal. Both European and Japanese agencies use buy-outs of legal professionals (often their own nationals) and second them from universities, the private sector, the procuracy or think tanks for rule of law project work. In Japan, at least some of the rule of law work is unwaged and is seen as a form of pro-bono national service, not only for judges but also for attorneys, prosecutors and legal academics.[25] In each case the compensation for effort is likely to come in the form of research funds, prestige, and access to policy makers that can be useful for research and teaching purposes, or individual professional fulfillment.

.Between these two models (private for-profit led projects and public pro-bono led projects) lies an intermediate model; a public-private hybrid. We see this in Australia, for example, where public universities have created private arms or affiliated consulting companies through which the university can compete for publically-tendered development work. In parallel are private consulting companies and law firms who may perform projects with mixed teams of public servants, academics and private practitioners.

In the US, the public university sector uses both the technique of affiliates (often formed as non-profit entities) and also competes for federal grants and contracts on its own account as a public institutions. Yet even here there is a cost of participation that has to be recouped – both financially and reputationally. Increasingly the financial threshold is high. For a top-tier state university in the US (a non-profit entity), the institutional overhead charge on externally funded contracts maj be 56 % (or 27 % if performed off-campus). This "overhead" is a publically permitted "profit" that is absorbed and redistributed within the university to fund its core operations, quite separate

[25] Veronica Taylor, 'New Markets, New Commodity: Japanese Legal Technical Assistance' (2005) 23 (2) *Wisconsin Intl L J* 251–281

from the unit performing the project work. U.S. federal government regulation and audit requirements are onerous, as is the requirement that the public institutions do not undercut private competitors through subsidizing these activities.

None of this is an adequate answer to local counterparts and host country policy makers who look at half of the advertised funds disappear and ask "Where has all the money gone?"

Corruption, collusion and capture

In some cases, of course, the available project funds disappear through corrupt diversion, either on the donor side or on the host side. Both scenarios are possible and not infrequent, although rule of law actors are reluctant to discuss cases too openly. Kramer's briefing paper on Corruption and Fraud in International Aid Projects[26] resonates with many rule of law project examples, although we can also add some rule of law contract variations. What neither Kramer nor many other commentators focus on is the direct relationship between the host's capacity to manage funds and their autonomy within the project contract relationship.

In projects administered through a US state university, for example, there is real reluctance to transfer any serious money to local counterparts unless it is under a carefully-drafted sub-contract, or unless these are periodic payments against invoices or receipts. The prospect of the local partner managing large budgets raises issues of risk and liability for the US partner who is ultimately legally responsible for financial reporting and disposition of the funds. Yet a local counterpart who has no budget authority and no experience of planning and executing budgets is both disadvantaged in the project "partnership" and is also denied the experience of become a competent project manager. For real "technology transfer" to occur in projects, quite often what is needed is not the rule of law component, but a public administration or management component that would actually move the local partner to a level where they could both manage their part of the rule of law project and set themselves up for future opportunities. Examples abound of NGOs and entrepreneurial local professionals who have overcome this hurdle, but in public and legal institutions it remains a barrier to legal development.

[26] Michael W. Kramer "Corruption and Fraud in International Aid Projects"; (2007) U4 Brief CMI CHR Michelsen Institute May 2007 No 4 www.U4,no (accessed September 2008)

Reliance on technocratic law and technology

A popular response to the problems of corruption and inefficiency in rule of law projects has been to substitute technology for human processes.

Much can be said about the nexus between technology and development. In our MCC project we see an example of one effect of technology, which is to telescope legal evolution. By this I mean that the intended effects of the technology (transparency, efficiency, accountability) are attributes of post-industrial regulation. These are being overlaid on legal systems that have not spontaneously evolved to that form. A popular hearsay example in Indonesia is that of computerization of Indonesia's Immigration and Customs service. All has proceeded well, including the supply of the IT equipment, anecdotally reported as being from a company was owned by the brother of a (then) key government figure.

In our MCC project, a significant proportion of the deliverables depend on computerization and digitalization of information. Thus the Scope of Work mandates expenditure on technology in both type and dollar terms:

> In the cost proposal, the contractor will comply with the following:
> The contractor shall budget no less than $ 1,200,000 for information technology capacity hardware improvement (excluding software development) in support of the judicial reform portion of the proposal.
> – The contractor shall budget no less than $1,200,000 for information technology capacity hardware improvement (excluding software development) in support of the electronic government procurement (e-GP) portion of the proposal.
> – The contractor shall budget no less than $100,000 for information technology capacity hardware improvement (excluding software development) in support of the PPATK enhancement portion of the proposal.
> – The contractor shall budget no less than $1,000,000 for corruption indices to be conducted in support of the KPK enhancement portion of the proposal.
> – The contractor shall budget no less than $150,000 for non-information technology equipment procurement in support of the KPK enhancement portion of the proposal.
> – The contractor shall budget no less than $80,000 for subcontracts/subgrants to civil society in support of the e-GP portion of the proposal.

In the judicial reform part of this project, one of the core problems identified is a backlog of 10,000 Supreme Court cases, for which decisions need to be written and published. So this project requires the contractor to publish these digitally. This has been a longstanding request/directive of donors which the Supreme Court had resisted for sundry reasons.

In reality, as Butt's study of the Constitutional Court makes clear, a threshold problem here is that there is no established practice of writing decisions in an analytic style that is legally robust.[27] This may be because judges produce opinions with an eye to their market value in bribes, or hedge their decisions with in order to deliver a particular political outcome. Equally, the poor quality of decisions is sometimes explained as fealty to formal statutory law by a cohort of judges who have no commercial experience. In any case, the system provides no incentives to value the intellectual quality or style of their opinions. Digitally publishing court opinions will make transparent that institutional vacuum, but it will not, of itself, cure the causal factors.

An allied example would be legal education rule of law projects that mandate the use of computers and proprietary systems such as the Lexis/Nexis or Westlaw databases but neglect the evolutionary steps of instruction in the conventions of creating and managing legal knowledge.

Relational contracting

Thus far we have looked at the formal contours of a project and some of its designed rigidities. At the same time, both the formal documentation and professional knowledge in the field concedes that these highly-structured formal documents depend on an unspecified component of relational contracting. This is evident in both the design and the execution phases of projects. First, the project solicitation documents, including the Scope of Work, put considerable emphasis on the choice of Chief of Party and the identity and experience of both the foreign consultants and the local hires. The Program activity comprises an aggressive range of activities, counterparts and participants and therefore requires significant coordination and organization to ensure coherence and consistency. The skills and expertise of the Chief of Party and the home office project manager are critical to the success of this effort and to the optimal use of resources.

It is axiomatic in project tendering that the prize will go to the corporation who can secure the best candidate as Chief of Party and back that with

[27] Simon Andrew Butt, *Judicial Review in Indonesia: Indonesia's Constitution Court and Judicial Reform* (Unpublished PhD dissertation, University of Melbourne)

a credible and qualified team who have good reputations within the USAID universe and with local counterparts. It is also typically important that the Chief of Party have a good working relationship with the local USAID Director and staff, the people to whom s/he will report on a regular basis. This is one place where epistemic ties come to the fore – in a world where development lawyers rotate around global trouble spots and operate in difficult and unfamiliar settings there is a strong human preference for working with colleagues who are known, congenial and competent. This explains some staffing patterns where rule of law practitioners and moving in clusters from project to project. It also explains some of the mobility of templates, ideas and project designs as these are imported laterally by this cadre of development lawyers.

The MCC contract is particularly stringent with regard to qualifications:

> VII. QUALIFICATIONS
>
> The contractor will recruit resident and short-term personnel with strong professional skills, distinguished in their respective fields of expertise, with prior global and preferably regional experience in anti-corruption reform. All staff should have an awareness and appreciation of local culture and traditions, and a substantive understanding of the current legal situation in Indonesia. A strong appreciation of Indonesian program "ownership" and the ability to work with the Indonesian partners is absolutely essential for the success of this program.

At the same time the contract preserves an absolute hierarchy between the foreign consultants and the local hires. Compare the job description below:

> **A. Expatriates.**
> *Long Term*
>
> 1. **Chief of Party (Labor Category: Anti-Corruption; Level: Senior):** At least 12 (twelve) years relevant comprehensive anti-corruption professional experience in successfully implementing aggressive anti-corruption programs in support of court, prosecution, and anti-money laundering reform, as well as promoting system wide public relations and dialogue to advance anti-corruption reforms as part of overall government and justice sector reform agendas, is required. Superb technical expertise in justice administration combined with extraordinary communication skills are essential for this position. Excellent skills needed in intercultural communication and proven

> experience in facilitating among judiciary, prosecution, procurement and key supporting institutions. Demonstrated ability to establish strong working relationships with senior representatives of the judiciary, prosecutors, government procurement, and civil society. Possess the ability to develop a network of contacts among international donor officials and non-government staff. The Chief of Party must be a U.S. Citizen. The candidate must have a master's degree in relevant field. Prior experience working with the Indonesian judiciary and a substantial understanding of a civil law system is preferred. Experience working in Indonesia is mandatory.
>
> **B. Indonesian Staff**
>
> 1. Indonesian Anti-Corruption Expert: Minimum 10 (ten) years of direct technical experience and strong technical knowledge of anti-corruption issues and initiatives within the Government of Indonesia and the overall Indonesian judicial system is required. Direct experience in judicial, prosecutorial, procurement, and anti-money laundering reform strongly desirable. Strong oral and written communication skills. The candidate must have a master's degree in relevant field. Prior experience working in the judiciary body is desirable.

This hierarchical ordering assumes in part that there is no locally qualified professional who could act as Chief of Party. Even where there is no legal requirement to spend aid dollars on donor country inputs, there is a strong tendency to prefer the personnel and legal products of the donor country (or region). At one level this is driven by ignorance and familiarity – the nationalism of law writ large. From a skills standpoint it is debatable that a foreign national is always preferable to a local legal professional. However, from a political standpoint it is probably true. Rule of law – like other forms of development – is partly economic and political diplomacy. So donors like Japan creating centers for Japanese law in Uzbekistan, for example, would want to preserve a Japanese 'face' for the project even as they train and recruit local lawyers. An EU-funded legal technical assistance project that aims to improve a host country's chances for EU membership will, understandably, focus on and push EU conceptions of law and standards. In the MCC example, we can think of the Chief of Party as being responsible for executing a political strategy as much as a rule of law project. Part of the job is convincing the local USAID office, the D.C. office, the government and

ultimately the US taxpayer that all is proceeding well and that Indonesia will be cleansed of corruption shortly.

The second level at which relational contracting becomes important is in the execution – the multiple interactions, negotiations, agreements and understandings that are formed with local counterparts in the course of delivering the different components of the project. Here the identity, temperament and experience of the Chief of Party and the project staff matter enormously.

The point is well put by an Indonesian staff lawyer observing donor-funded projects in a field very close to the MCC project. She says:

> The problem is trust. My Indonesian colleagues simply don't trust any foreign legal consultants any more … [Project A] is good but [Company X] is terrible. They treat Indonesian partners very badly and they are not honest … [Project B] is in trouble because their Chief of Party really does not know what he is doing. He knows less that I do about [this area of law] because I previously worked in that agency and lived and breathed [this area of law] every day. But he can't work out how to make good relationships with local colleagues.[28]

Much is bound up in this complaint, including issues of sovereignty and national pride, the negotiation of status between local and foreign lawyers and a tendency to lay blame on the other party when projects hit road bumps. The core claims, however, are about dishonesty, lack of legal competence and lack of cultural competence. Those should concern us because they go to the heart of the ability to carry out effective cross-national projects and they call into question lawyers' claims to professionalism, regardless of the setting. How development lawyers end up in this situation is an issue I take up separately in a subsequent paper.

Knowledge asymmetry

The rhetoric of development work emphasizes knowledge-sharing and in particular technical knowledge transfer from donor to host entities. So in a self-identified altruistic marketplace with a high percentage of professionals, it should be relatively easy to call for voluntary knowledge sharing and networking. If we have a "problem of knowledge" we can solve this by simply building more frameworks within to share – websites, conferences, books, weblogs, listservs.

[28] Interview with bilateral donor Indonesian staff member, 31 May 2007, Jakarta

At the meta-level of development aid flows we see an explosion of information and critique about the processes, projects and outcomes of development, including rule of law initiatives. We see this in the World Bank website(s) where the "knowledge bank" has become so overblown that it has digital arterial sclerosis: much of the "knowledge" is self-serving and it is so voluminous that it is almost unusable. A better organized example is the USIP Inprol site – a global listing of legal development professionals and select documents.[29] Here again, however, the impetus is partly political and the choice of what information is posted is reserved to that US government affiliate. Better examples are those that are genuinely open access for third parties. This is really a misnomer, because the third part (recipient country citizen, activist group, donor country citizen) is in a real sense the principal in the rule of law transaction – it is in their name and on their account (literally) that the projects are carried out. A site that almost embodies this ideal is AsianLii.[30]

At the project level, however, there is an acute tension between the call to altruistic knowledge sharing and the incentives for actually doing this. A baseline issue is that most contractual transactions suffer from some degree of knowledge asymmetry; each party has knowledge that the other does not and key informational elements are often lacking at the time that parties agree to form and perform the agreement.

So in our MCC example, on the donor side is the technocratic knowledge and experience in building judicial institutions and on the Indonesian side is the local political, cultural personal knowledge, including an understanding of who will support and who will thwart the project, and in relation to what kinds of incentives.

The problem of knowledge asymmetry is exacerbated when the delivery format is private or for-profit. Where there is no or little public funding on the host side, for example, there is not simply a temptation to commercialize legal and technical knowledge but also a necessity. This explains why the outstanding Indonesian information portal www.hukumonline.com (lit. "law online") is partitioned into free-access and subscription sections. Despite 50 years of ODA Indonesia still lacks a national law library in print, so that hukumonline and its sister institution, the Daniel S. Lev Memorial Library, are actually national assets. Completely free access resources such as AsiaLii would be preferable, but it is difficult to duplicate in developing countries

[29] http://www.inprol.org/visitorhome (accessed September 2008)
[30] http://www.asianlii.org/ (Accessed September 2008)

the very rich institutional support that AsianLii enjoys as an offshoot of AustLii in Australia.[31]

Privatized delivery of rule of law brings with it questions of intellectual property. Claims that project information, designs and tools are proprietary function as a major impediment to information sharing in the rule of law marketplace. Formally and legally ODA-funded project work belongs to the donor and can be released, shared, adopted or changed subject to the donor's policy. Project contracts are typically very prescriptive about how project documentation is to be 'branded' and how the donor and implementing contractor are to be identified. This leads to a world full of beautiful co-branded one page advertisements for rule of law projects. Generally, however, donors are woeful at (a) enforcing the accessibility to the project deliverables for other implementers, and the ultimate consumers in host countries; (b) managing the value of the project so that it produces useful knowledge in a transferable form and/or IP; and (c) managing and redeploying the IP so that there is a cycle of learning, cost recovery on the initial investment and product that is more than just the personal knowledge of those involved.

Donors are not the only players who have problems with transparency and information sharing.

Quite often host governments or local partners do not want information about rule of law projects to circulate openly. A visceral reason is that information is power. So, for example, when a simple, sensible proposal from a USAID contractor in Afghanistan was made to create a spread sheet showing the qualifications of law professors around the country and donor-funded training that they had received since 2001, it was rejected by local project staff. It was a sensible suggestion from a foreign standpoint because it surveyed human resources and might avoid duplicative training or travel. It was wildly unpopular and subverted by local staff and the university leaders because it might expose institutional strengths and weaknesses hitherto unknown and preclude individuals from taking up study abroad or other donor-funded opportunities that they might otherwise enjoy. As security deteriorated, it could also pose a threat to individuals who cooperated with the U.S. and might be persecuted for this in future. At a deeper level we can also observe that it employs a highly technocratic form of knowledge management – the spreadsheet – in a place where oral information and disinformation is the norm. This is rather threatening to established leaders in a system where donors and their sponsorship of new, foreign qualifications

[31] http://www.austlii.edu.au/ (Accessed September 2008)

present real challenges to established elites who have traded on style, rhetoric and physical power.

For host countries, information sharing about projects, budgets and status in the rule of law sector sometimes works quite well. But this information is also politically charged and so we can easily foresee a situation in the MCC project discussed thus far where various players might seek to suppress distribution of information about, for example, levels of corruption in the judiciary.

Conclusion: Does Institutional Design of Rule of Law Matter?

This essay has focused on rule of law as a development product, a commodity packaged and traded as part of ODA flows.

I have tried to show how the way in which rule of law is designed and delivered on the ground, using the "project" vehicle, creates rigidities and consequences that contribute to failure of rule of law to meet its advertised objectives. In particular I drew attention to the multiplication of rule of law actors and the complexities of rule of law distribution; the tendency to privatize, militarize and corporatize rule of law delivery; the standardization of projects in corporatized rule of law delivery and the features of such standard-form contracts that sit uneasily with development outcomes.

None of these problems is particularly unique to rule of law projects. However, the size of the rule of law marketplace and the speed at which the work is performed suggests that not all projects will be of uniformly good quality. We know that the world is littered with failed legal reform projects. One consequence is that failed rule of law projects – or those that fail to deliver on their advertised promises – have costs.

An immediate cost is to the prestige and viability of development as a taxpayer funded activity of the first world. A second cost is to first world legal professions' power and profits: billions of dollars earmarked for legal reform work continue to flow into developing countries. While the host countries may change, an emerging profession of development law specialists pursues the work and the money around the globe. There is a professional stake in boosting the image of development lawyers. Project failure or impairment, of course, may have many causes. However, to date the agency or responsibility of the lawyers involved has not been squarely addressed. Few people are watching or checking the work of development lawyers and few, if any,

penalties apply for unskilled or unethical legal work performed in the developing world. I take up this theme in a subsequent essay.

But equally, there are costs on the host country side. Poor rule of law projects may undermine the legitimacy of donor-assisted reforms within the local legal system.

One feature that is distinctive about law is that, beyond statutes, computer data bases and detention facilities, it is concerned with social ordering through the formal creation and diffusion of norms. Those concepts, values and practices are delivered through human decision-making and adjudication, much of which is discretionary and transaction intensive. On this view, law is not simply a technocratic exercise and there are limits to which legal tasks can be routinized, computerized and standardized. Building formal law and legal institutions thus becomes an activity in which both the foreign and local professionals engage that is saturated with professional values, ideally justice, equity, honesty, transparency, equality and efficiency.

Thus the identity and behavior of the foreign legal professional matters, in both performing project work and in standing in for a model of a "modern" lawyer. Professional conduct in rule of law work is closely scrutinized and commented upon by local observers. Project problems or failures of professional conduct directly affect both foreign professional prestige and the reputation of rule of law projects.

Within the chaos of the rule of law bazaar, the projects and interactions between foreign and local professionals engaged in rule of law establish some of the working norms for that legal system. If rule of law projects fail to incorporate appropriate practices and norms, we can hardly complain when projects fail or local partners or institutions decline to value the work that is being performed. As Christopher Kremmer notes, "No-one should ever feel sorry for the carpet-seller".[32]

[32] Christopher Kremmer (2002) *The Carpet Wars: A Journey Across the Islamic Heartlands* (Harper Collins)

Odious Debt or Odious Payments? Using Anti-corruption Measures to Prevent Odious Debt

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Abstract

This chapter examines the use of anti-corruption measures to prevent illicit financial flows and to promote the rule of law in countries in transition. It examines ways to stem the tide of so-called "odious" payments and to stop such payments, when made, from moving offshore into foreign bank accounts. To the extent that such payments leave a country, fewer funds are available to repay sovereign debts in the event of a regime change, or to feed and shelter the population. This chapter focuses on emerging anti-corruption mechanisms as a means of dealing with odious payments and odious debt. It also examines the role of financial institutions (banks) as gatekeepers. Part I of this chapter focuses on the way in which banks are involved in odious payments: lending or extending credit, advising corrupt regimes, and helping hide the assets of political elites. Part II examines the use of a "publish what you lend" framework to provide for transparency in sovereign lending. Part III focuses on the use of anti-corruption measures to deal with capital flight. The use of procedures, such as heightened scrutiny for politically exposed persons, may be an important step in stopping capital flight when odious debt payments are being concealed by financial institutions. Also, the criminalization of illicit enrichment or inexplicable wealth may prove a valuable tool for prosecuting corrupt leaders.

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