SECOND GENERATION RULE OF LAW AND ANTI-CORRUPTION PROGRAMMING ABROAD: COMPARING EXISTING U.S. GOVERNMENT AND INTERNATIONAL BEST PRACTICES TO RACHEL KLEINFELD'S *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM*

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> *We don't have to be stupid or ineffective to fail—just misguided in our approach.*
> – General Stanley McChrystal[1]

Published in 2012, Rachel Kleinfeld's debut book, *Advancing the Rule of Law Abroad: Next Generation Reform*,[2] was selected by *Foreign Affairs* magazine as one of the best foreign policy books of that year.[3] Dr. Kleinfeld has an impressive background and extensive experience with the rule of law. She is the co-founder of the Truman National Security Project and a senior associate with the Democracy and Rule of Law Program at the Carnegie Endowment for International Peace, and she has consulted for the World Bank, the EU, the OECD, various government agencies, and multiple private organizations on building the rule of law in weak states.[4]

I. BREAKING RULE OF LAW DOWN TO ITS CORE

Dr. Kleinfeld explains that Rule of Law (ROL) programming, generally, supports legal, judicial, and law enforcement reform efforts.[5] However, what makes Dr. Kleinfeld's book so informative is not how she defines ROL, but her understanding and articulation of the core elements of ROL. Dr. Kleinfeld explains that ROL is primarily about power and the existence (and ability) of structures to check and balance that power.[6] Additionally, and perhaps secondarily, it is about cultural norms and habits.[7]

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1. MICHAEL T. HALL & STANLEY A. MCCHRYSTAL, ISAF COMMANDER'S COUNTERINSURGENCY GUIDANCE 3 (2009), *available at* http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf.

2. RACHEL KLEINFELD, ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM (2012).

3. *The Best Books of 2012 on Political and Legal Subjects*, FOREIGN AFF., http://www.foreignaffairs.com/features/collections/the-best-books-of-2012-on-political-and-legal-subjects (last visited Oct. 3, 2014).

4. See *Rachel Kleinfeld*, CARNEGIE ENDOWMENT FOR INT'L PEACE, http://www.carnegieendowment.org/experts/?fa=699 (last visited Oct. 3, 2014), for an overview of Dr. Kleinfeld's background and current involvement in deepening the rule of law abroad.

5. KLEINFELD, *supra* note 2, at 7.

6. *Id.* at 15.

7. *Id.*

Therefore, according to Dr. Kleinfeld, ROL programming should fundamentally be about constraining power in a society—both the power of the government and the power of individuals. Her definition of a society that follows the ROL is one in which: (1) the government is bound by, and governs through, pre-existing laws; (2) citizens are treated equally before the law; (3) human rights are respected; (4) law and order prevails; and (5) citizens have access to efficient means to settle disputes.[8]

It is important to note that there is no consensus on the definition of ROL.[9] This is partially due to the fact that development agencies[10] often approach ROL programming with different objectives (e.g., economic, political, human rights, human security, democracy). Dr. Kleinfeld's definition is in line with both the U.S. Agency for International Development (USAID) and the United Nations (UN) definition of ROL. USAID identifies five areas of ROL programming—order and security; legitimacy; checks and balances; fairness; and effective application[11]—in its framework, which was developed in 2010 following the completion of case studies in multiple countries over a period of several years.[12] According to the UN, the ROL:

> refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making,

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8. *Id.* at 213.

9. *E.g.*, OFFICE OF DEMOCRACY & GOVERNANCE, U.S. AGENCY FOR INT'L DEV., GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK 6 (2010), *available at* http://pdf.usaid.gov/pdf_docs/PNADT593.pdf [hereinafter GUIDE TO RULE OF LAW COUNTRY ANALYSIS].

10. Examples include the UK's Department for International Development, the Australian Agency for International Development, the Swiss Agency for Development and Cooperation, and the United Nations.

11. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 9, at 2.

12. *Id.* at 1 n.2.

legal certainty, avoidance of arbitrariness and procedural and legal transparency.[13]

II.   WHY ROL PROJECTS FAIL AND CHALLENGES TO ROL REFORM

According to Dr. Kleinfeld, all ROL programming is conducted in four focus areas: laws, institutions, power structures, and cultural and social norms.[14] Dr. Kleinfeld explains that, historically, laws and institutions have been the main targets of ROL reforms.[15] However, programs focused on laws and institutions often do not address the fundamental popular and professional norms that must be altered to affect meaningful change. Instead, ROL reform efforts need to focus on the role of power structures and culture.[16] ROL programs can do this by: (1) creating horizontal and vertical checks and balances on power; and (2) using researched techniques, based on country-context, that change cultural behaviors, whether in the society as a whole or among ROL professions (e.g., judges, lawyers, law enforcement).

The goal of ROL reform is to help restore the relationship between the state and society.[17] Dr. Kleinfeld believes that when ROL projects fail, it is because the ROL practitioner set shortsighted, narrow goals. Instead of focusing on the reform needs and constraints as seen by locals (e.g., an anti-corruption initiative), outside ROL practitioners tend to focus on building ROL institutions (e.g., court houses, case management tracking systems) that mirror those in the West.[18]

A changed institution should not necessarily be a goal in and of itself. Such programming often does not address the root causes of challenge within the ROL system, such as distrust,

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13. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General,* ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004).

14. KLEINFELD, *supra* note 2, at 20.

15. *Id.* at 11, 213.

16. *Id.* at 213–14.

17. *Id.* at 212–13

18. *Id.* at 11.

systemic corruption, or a lack of capacity—root causes that are all associated with power and culture.

While mirroring Western constructs in programming is an issue, Dr. Kleinfeld may overstate its existence. U.S. Government (USG) programs in the past often emulated Western systems with little in-country context.[19] However, in recent years, the USG development principles have pushed programs to be more focused on hiring local experts and finding best-fit programs instead of using one-size-fits-all approaches. Country context programming is evident through the USG's recent work with the informal justice sector, although more country context programming could be done both in this sector and in other areas of areas of ROL generally.[20]

Liberia provides a strong example of how USAID studied a state's cultural norms and country context to link the informal (i.e., non-state) and formal justice systems. According to a 2008 Oxford University survey, rural citizens use the formal court system in Liberia less than 5 percent of the time for both criminal and civil matters.[21] Liberia is trying to build citizen trust in its formal justice system while at the same time remedying some non-state approaches that run counter to basic

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19. *See id.* at 83–85 (noting that commercial reform law relied on little in-country knowledge).

20. *See* Tonja Chopra et al., U.S. Agency for Int'l Dev., *Fostering Justice in Timor-Leste: Rule of Law Program Evaluation* (2009), http://pdf.usaid.gov/pdf_docs/ PDACM677.pdf (evaluating current programs and community perspectives in Timor-Leste to address the key rule of law challenges in Timor-Leste specifically); Virginia Lambert et al., DevTech Sys., Inc., *Gender Assessment USAID/Panama* (2010), http://pdf.usaid.gov/pdf_docs/pdacr977.pdf (analyzing gender roles in Panama); Keith Henderson et al., The QED Group, LLP, *Evaluation of Rule of Law Programs In Liberia* (2009), http://pdf.usaid.gov/pdf_docs/pdaco233.pdf (reporting changes since the USG launched a rule of law program in Liberia); Amanda C. Rawls, *Policy Proposals for Justice Reform in Liberia: Opportunities Under the Current Legal Framework to Expand Access to Justice*, *in* CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 91 (Janine Ubink ed., 2011), http://www.idlo.int/Publications/WP2rawls.pdf (studying key policy questions that face Liberians); *Projects: Kenya*, USAID LAND TENURE AND PROPERTY RIGHTS PORTAL, http://usaidlandtenure.net/projects/kenya (last visited Oct. 6, 2014) (project to develop basic justice models in Kenya).

21. DEBORAH H. ISSER ET AL., U.S. INST. OF PEACE, LOOKING FOR JUSTICE: LIBERIAN EXPERIENCES WITH AND PERCEPTIONS OF LOCAL JUSTICE OPTIONS 4 (2009), *available at* http://www.usip.org/files/resources/liberian_justice_pw63.pdf.

human rights, gender rights, and Liberia national law. However, most Liberians prefer the non-state system because it is seen as: (1) having lower fees; (2) less arbitrary; (3) more transparent; and (4) less susceptible to bribery.[22]

Through ROL programming, the Ministry of Internal Affairs and the Ministry of Justice (MOJ) have signed several Resolutions/Memoranda of Understanding with informal justice sector leaders. The Carter Center ROL program, supported by USAID,[23] is developing trust and a linkage between the two systems. It is hosting consensus building participatory meetings that, while time-consuming, are effectively building community buy-in for a dual court system with checks and balances.[24] The Carter Center also created community plays, community forums, radio commercials, and music that focused on: (1) how to use the formal system; and (2) important new laws that the non-state system was required to adhere too (e.g., inheritance rights, sexual assault protections, land dispute laws).[25] In Liberia, the MOJ and Carter Center's focus on specifically educating rural people about their rights was an important component to the overall non-state ROL program.[26] While the program had challenges,[27] it has proved successful.

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22. *Id.* at 31.

23. Henderson et al., *supra* note 20, at 4.

24. *See* ISSER ET AL., *supra* note 21, at 81–93 (discussing the objectives and principles that guide justice in Liberia).

25. *Carter Center Assists Liberia's Ministry of Justice in Strengthening Rule of Law*, CARTER CENTER, http://www.cartercenter.org/news/features/p/conflict_resolution/liberia_strenghthen_law.html (last visited Oct. 10, 2014).

26. ISSER ET AL., *supra* note 21, at 92.

27. For example, limiting local elders' ability to handle serious crimes has caused some to see a reduction in justice because the formal courts are still not seen as a credible and viable alternative. *Id.* at 5. Moreover, efforts to harmonize the two systems at times have appeared to be an attack on a "culture rather than on harmful practices." *Id.* To remedy this, USIP has suggested that the government: "Adopt a more nuanced approach to defining jurisdictional limitations—for example, by introducing criteria to determine when crimes may—and may not—be adjudicated by customary authorities. Such criteria might include whether or not the parties prefer customary adjudication, whether or not a third party is affected, whether or not there is a political or ethnic dimension to the crime, etc. Among the benefits of such an approach would be a reduced caseload in the formal courts." *Id.* at 7.

Similar to Dr. Kleinfeld's approach, USAID's *Guide to Rule of Law Country Analysis* also suggests caution before using cookie-cutter ROL programs as avenues to explore. Specifically, it states that "[o]bvious flaws in the legal system (such as lack of judicial independence . . .) are only symptoms. The underlying malady is the power of entrenched political and economic elites who benefit from a compliant legal system or ethnic or regional domination."[28]

ROL practitioners face great substantive challenges, which include: (1) getting political actors to give up power to allow for more accountability and internal controls; (2) changing cultural norms; (3) battling institutional and societal corruption; (4) unanticipated consequences of resource allocation; and (5) strengthening civil society to advocate for change. To succeed despite these and other challenges, ROL programs must incentivize political actors to give up power and change cultural norms, whether by offering motives (e.g., financial rewards, nonfinancial rewards, media oversight, punishments) or by helping civil society actors on the ground push for change. By giving up some power and control,[29] leaders can create needed checks and balances that limit subjectivity in governments.

Dr. Kleinfeld's assessment on the need to change power structures and increase checks and balances is supported by the recent systematic review of existing impact evaluations conducted in the anti-corruption arena by the United Kingdom's Department for International Development (DFID). In *The Effectiveness of Anti-Corruption Policy*, an incredible focus is put on the need for incentivizing political actors to cede control and allow for a change in cultural norms.[30] Popular and professional norms that impede the growth of ROL in countries where there

28. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 9, at 11.

29. Dr. Kleinfeld's examples include independent judiciary, internal accountability mechanisms, media or civil society oversight. *See* KLEINFELD, *supra* note 2, at 97–110 (discussing the role of power and control in rule of law reform).

30. *See* REMA HANNA ET AL., THE EFFECTIVENESS OF ANTI-CORRUPTION POLICY: WHAT HAS WORKED, WHAT HASN'T, AND WHAT WE DON'T KNOW 2–3 (2011), *available at* http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti_corruption_2011Hanna.pdf (focusing on the effect of incentive-based interventions).

is a substantive deficit can range from graft and kickbacks, to gender and human rights violations.

The word "incentive" is used more than 200 times in the 121-page review. The review makes it clear that impact evaluation research on anti-corruption programs has proven that simply creating a monitoring system is ineffective without a simultaneous incentive (and/or consequence) program.[31] In other words, checks and balances are not effective in curtailing anti-corruption without corresponding punishments, financial rewards, nonfinancial rewards, or media oversight. Many of these incentives (and/or consequences) can be done without additional funding.[32]

III. GOAL OF ROL REFORM

ROL reform must establish a respected and fair relationship between the state and society through balanced powers, proper oversight, checks and balances, and a culture norm that supports ROL. This is particularly challenging in societies centered around family, but do not have broader connections to other citizens within the country. It is found that as loyalty to one's country decreases and loyalty to one's family or clan increases, the more difficult it is to create countrywide, functional ROL systems.[33]

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31. *Id.* at 9. Incentive examples include reducing budgets if corruption exists, media publicity, merit pay, audits with strong punishments to name a few. *See id.* at 30–32 (synthesizing various monitoring and incentive programs aimed at reducing corruption). It should be noted that incentive programs have the potential to be "ineffective if the incentive [and/or consequence] is not large enough." *Id.* at 9.

32. *See, e.g.*, *id.* at 32 (discussing a federally implemented program in Brazil that reduced federal funding transfers to local municipalities if audits found the mayor to be corrupt).

33. KLEINFELD, *supra* note 2, at 74; Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 35 J. COMP. ECON. 659, 664–65 (2007) (describing high autonomy cultures that emphasize egalitarianism and uniqueness as less likely to be corrupt than societies that place a cultural emphasis on embeddedness and promote values such as obedience, honoring elders and tradition, seeking guidance in areas other than the law, and putting individual family or clan above country). A study of some fifty nations has stated that having law and order is associated with distinct culture values like autonomy and collectivism, the opposite of embeddedness. *Id.* at 664. Ultimately, the study questions whether practitioners correctly identify culture as something that should always be factored into development programs. *Id.* at 681–82.

IV. FOUR APPROACHES TO REFORM

According to Dr. Kleinfeld, there are four approaches to reform for changing the four focus areas of ROL—laws, institutions, power structures, and cultural and social norms[34]—mentioned earlier. The four approaches for reform are top-down, bottom-up, diplomacy, and enmeshment.[35] Circumstances will determine which approach is most suitable. The best approach may be a combination of approaches.[36]

A *top-down* approach is the most straightforward, which funds institutions and existing leaders to resolve a technical issue (e.g., changed law, better rules, more efficient case system, and infrastructure).[37] While a top-down approach can be useful for technical reforms, technical issues are rarely the problem. Top-down reform is not particularly effective in changing behavior, culture, or needed legal reforms that lack political will. Further, simply codifying better rules does not mean that those rules will be implemented or enforced. To be fully effective, these programs should include technical assistance, training, and socialization of the changes. Program goals should include transparency as well as responsiveness.

Dr. Kleinfeld's point that changing legal text by itself is not enough, that enforcement and incentives must also change, is supported by USAID's 2007 guide *Legal Empowerment of the Poor*, which states that enforcement, done through creating appeal processes, audits, and changing the rules to limit discretion, must also be strengthened.[38] For example, replacing

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Similar to Dr. Kleinfeld, the study suggest that some aspects of certain embeddedness cultures are simply antagonistic to ROL and good governance, and should not necessarily be reinforced but instead be changed. *Id.*

34. KLEINFELD, *supra* note 2, at 20; *see* discussion *supra* Part II.

35. KLEINFELD, *supra* note 2, at 109–10. Dr. Kleinfeld explores each method

36. *See id.* at 111. 57, 91–95, 115–19 (explaining each type through program examples conducted all over the world, including Indonesia, Albania, Nepal, Kyrgyzstan, Romania, and Colombia to name a few).

37. *Id.* at 112–13.

38. JOHN W. BRUCE ET AL., U.S. AGENCY FOR INT'L DEV., LEGAL EMPOWERMENT OF THE POOR: FROM CONCEPTS TO ASSESSMENT 29 (2007), *available at* http://pdf.usaid.gov/pdf_docs/PNADM500.pdf ("Legal empowerment of the poor occurs when the poor, their supporters, or governments—employing legal and other means—create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to

potentially corrupt workers with automated technology can be a very effective anti-corruption strategy that can ensure that new laws are enforced.[39]

The second approach, *bottom-up*, works through civil society, businesses, bar associations, ethics committees, and religious groups to build vertical checks on the power of the government or other powerful actors, such as those in organized crime.[40] By building community support through coalitions, bottom-up strategies create long-term checks on power and can change popular and professional culture.[41] Bottom-up approaches can be some of the most effective strategies in our toolkit. For law reform, in particular, the bottom-up approach works best because it can create cultural acceptance of the laws and government accountability to the people. Breakdowns will often continue until the politically powerful are observant of, and held accountable to, the laws instead of ignoring them.[42]

However, there are disadvantages to the bottom-up approach as well. For example, bottom-up approaches often support non-governmental organizations, thereby doing little to help build the government's actual capacity.[43] Further, picking the wrong partners, such as those without credibility or true expertise, can have negative consequences. Bottom-up work is often tied to corresponding top-down programming.

The third approach is *diplomacy*, which uses political pressure to instigate ROL reforms.[44] Since the 1960's, when the USG began engaging in ROL development, USG motives have expanded to include more than U.S. security interests.[45] Foreign

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escape poverty and marginalization.").

39. HANNA ET AL., *supra* note 30, at 6.

40. KLEINFELD, *supra* note 2, at 118, 125.

41. *Id.* at 117.

42. *Id.* at 213.

43. *E.g.*, INGER ULLEBERG, THE ROLE AND IMPACT OF NGOS IN CAPACITY DEVELOPMENT: FROM REPLACING THE STATE TO REINVIGORATING EDUCATION 29 (2009).

44. KLEINFELD, *supra* note 2, at 126 (describing diplomacy as "the calibrated use of carrots, sticks, and rhetoric" to change government leaders' decisions).

45. *E.g.*, U.S. DEP'T OF STATE & U.S. AGENCY FOR INT'L DEV., LEADING THROUGH CIVILIAN POWER: THE FIRST QUADRENNIAL DIPLOMACY AND DEVELOPMENT REVIEW 6 (2010), *available at* http://www.state.gov/documents/organization/153108.pdf ("America's security depends on diplomacy and development.").

policy goals now add the promotion of democracy, human rights, and economic development to the base motive of U.S. security.[46]

The underlying assumption, or development theory, of the diplomacy approach is that if political actors change, reform will follow.[47] Methods available in diplomacy include sanctions, embargoes, conditional aid, and domestic legislation with international scope and reach. Dr. Kleinfeld writes that diplomacy can be a strong tool when a specific reform is identified.[48] However, she believes it is ill suited for general cultural reforms.[49] With many competing diplomatic priorities, Dr. Kleinfeld suggests that the diplomacy approach is limited due to security and other priorities that overshadow ROL reform goals.[50]

Finally, the *enmeshment* approach requires a country to meet certain preconditions to be eligible for membership in an international organization that supports the ROL, such as NATO or the European Union.[51] The goal of enmeshment is to socialize people into a ROL culture, thereby changing their popular and/or professional norms. Strong enmeshment ties a country into international institutions and can be an effective approach. Soft enmeshment can rarely change a culture unless enough people from the same institution are brought into an enmeshment program together. A softer form of the enmeshment approach socializes elites and professionals through exchange programs.[52] For example, brief cultural exchanges of individuals within large bureaucracies cannot effect change in a bureaucratic culture easily. Enmeshment requires that enough individuals with power and influence be reached to create a ripple effect, which is often difficult to achieve with limited resources.

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46. *Id.* at 10 ("Since our economy is interconnected with the global economy, we are using the tools of diplomacy and development to help achieve balanced and sustainable global growth through an open, rule-based international economic system . . . .").

47. KLEINFELD, *supra* note 2, at 126.

48. *Id.* at 133.

49. *See id.* at 133 (asserting that ROL reform programs should "*not* be coordinated diplomatically, but simply consulted").

50. *Id.* at 129.

51. *Id.* at 134–35.

52. *Id.* at 134–35.

The concept of strong enmeshment, tying one to an international organization, is supported by the 2013 USAID *Strategy on Democracy, Human Rights and Governance*,[53] but questioned by the U4 Anti-Corruption Resource Center.[54]

V.   REFORM STRATEGY

First-generation ROL reforms were primarily top-down and designed to change laws and institutions without changing the relationship between the state and society.[55] The second-generation reforms advocated by Dr. Kleinfeld start by looking at the problems as identified by the citizens of a country (and not just the well connected elites in leadership positions) rather than the problems identified by foreigners.[56] Second-generation ROL programming restores the relationship between a state and society through a comprehensive strategy that attempts to build accountability mechanisms by changing power structures and cultures to support the ROL. The measure of success is not an increased output of a technical program (e.g., number of police trained or courthouses built) but rather a measurable decline in the problem identified (e.g., improved law and order, reduced human rights abuses), with the understanding that better reporting when a problem is being fixed can affect measurement.

For example, the *USAID Strategy on Democracy, Human Rights and Governance* identifies Public Financial Management (PFM) as a program intervention that can contribute to

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53. *See* U.S. AGENCY FOR INT'L DEV., USAID STRATEGY ON DEMOCRACY, HUMAN RIGHTS AND GOVERNANCE 4–8 (2013), *available at* http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG_%20final%20final%206-24%203%20(1).pdf [hereinafter USAID STRATEGY] (providing a framework for the establishment of inclusive democracies through membership in civil society organizations).

54. *See* JESPER JOHNSON ET AL., MAPPING EVIDENCE GAPS IN ANTI-CORRUPTION: ASSESSING THE STATE OF THE OPERATIONALLY RELEVANT EVIDENCE ON DONORS' ACTIONS AND APPROACHES TO REDUCING CORRUPTION (2012), *available at* http://www.u4.no/publications/mapping-evidence-gaps-in-anti-corruption-assessing-the-state-of-the-operationally-relevant-evidence-on-donors-actions-and-approaches-to-reducing-corruption/ (indicating that not a sufficient amount of impact studies have been conducted to conclude the interventions by certain organizations have been effective).

55. KLEINFELD, *supra* note 2, at 19–20, 108.

56. *Id.* at 184–87.

promoting a culture of lawfulness across multiple sectors.[57] PFM programs increase auditing and transparency in accounting, recording, and reporting. If done in multiple government agencies, this can help achieve their budget targets with less corruption. According to a recent evidence-based study on impact evaluations by the U4 Anti-Corruption Resource Center, PFM programs have a strong impact on reducing corruption and fraud by changing incentives and cultures.[58]

Dr. Kleinfeld's second-generation ROL programming focuses on a problem identified by the local society, and not simply reforms outsiders think are needed. Her step-by-step approach, while expressed in a new way, is it not necessarily new itself. What is truly enlightening, however, is her unique and accurate focus on checks and balances of power, cultural and social norms. She also makes it clear who should be designing these programs. While it is often lawyers who implement ROL programs, it is anthropologists, sociologists, and political scientists who have a true understanding of power and culture. These individuals should be involved with the design process.[59] Examples of Dr. Kleinfeld's second-generation programs include: independent judicial schools that promote ethics for judges; bar associations that build ethical codes and professionalism; police academies that include culture of lawfulness as part a doctrine or core curriculum; law schools that build ROL and human rights into their curriculum; and programs that enlist the power of religious groups to fight corruption and change cultural attitudes to condemn corruption publically.[60]

In the 2009 USAID program brief *Reducing Corruption in the Judiciary*,[61] similar types of programs were listed as suggested programs. USAID expressed that it was important to create a culture of lawfulness, particularly in the judiciary, because "adherence to high standards of judicial independence

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57. USAID STRATEGY, *supra* note 53, at 25, 40.

58. *See* JOHNSON ET AL., *supra* note 54, at 17 (discussing to effect of PFMs on curbing anti-corruption).

59. KLEINFELD, *supra* note 2, at 185.

60. *Id.* at 170–71.

61. JAMES MICHEL, U.S. AGENCY FOR INT'L DEV., REDUCING CORRUPTION IN THE JUDICIARY (2009), *available at* http://pdf.usaid.gov/pdf_docs/PNADQ106.pdf.

and impartiality, integrity, accountability, and transparency not only diminish corruption. Respect for these values also makes the judiciary accessible, credible, efficient, and effective in protecting rights, guarding against predation, and helping to assure an environment in which participatory democratic societies can flourish."[62]

However, speaking to the citizenry and utilizing meaningful measurements are not new concepts. It is USAID policy that ROL programs should reflect the values and norms of that society, and if applicable, borrow from regional models while introducing innovations when necessary.[63] USAID's *Guide to Rule of Law Country Analysis* involves four crucial steps: (1) consideration of political and historical context; (2) understanding of political economy; (3) identification of ROL champions and spoilers; and (4) measurement and evaluation.[64] USAID's first step in analyzing a country's ROL system is to take into account the political and historical context and legal traditions, including both past and current events.[65]

For its part, the 2013 USAID *Strategy on Democracy, Human Rights and Governance* mentioned above will help USAID move away from programs that focus on creating systems (e.g., case management systems), and focus more on culture and relationships as outlined by Dr. Kleinfeld. For example, the *Strategy* states that "USAID will support accountability to shift the *incentives* of the ruling elite so they will support meaningful reforms and more inclusive and accountable modes of political and economic governance."[66] In other words, the *Strategy* emphasizes incentivizing leaders to create a culture of lawfulness through checks and balances on power and through social norms.

Again, in the vast majority of cases, USAID hires local experts during initial Democracy and Governance Assessments

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62. *Id.* at 19.

63. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 9, at 6.

64. *Id.* at 3.

65. *Id.* at 21.

66. USAID STRATEGY, *supra* note 53, at 13 (emphasis supplied).

to measure problems identified by the citizenry.[67] For instance, an outsider might see outdated commercial laws as the reason for lack of business development, when in reality the real reason might be institutional corruption. After working with the local citizenry, Step 2 of USAID's ROL Country Analysis is to divide the problem into its institutional, political, and cultural components through a Political Economy Analysis.[68] Third, practitioners should locate both champions and spoilers of the potential ROL program(s) as early as possible in order to make the most informed choices.

In USAID's fourth and final step of program design, evaluation targets and measurement goals, which determine whether the problem is getting better or worse, are created before the project is implemented. True measurements will measure actual program impact. According to USAID's 2011 Evaluation Policy, "[i]mpact evaluations measure the change in a development outcome that is attributable to a defined intervention; impact evaluations are based on models of cause and effect and require a credible and rigorously defined counterfactual to control for factors other than the intervention that might account for the observed change,"[69] (e.g., treatment and control group). In contrast, performance evaluations are more output-oriented, focusing on question such as:

> what a particular project or program has achieved (either at an intermediate point in execution or at the conclusion of an implementation period); how it is being implemented; how it is perceived and valued; whether

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67. This is done per an internal USAID document, *USAID Democracy, Human Rights and Governance Strategic Assessment Framework for Strategy Development. See id.* at 3, 40–41.

68. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 9, at 22–23. A Political Economy Analysis (PEA) examines the actors and institutions that support or oppose reform so the USG can prioritize its efforts by identifying the political feasibility of achieving its reform goals outlined in the assessment. USAID STRATEGY, *supra* note 53, at 24, 38. The PEA would identify the interests, resources, and strategies of key actors to ascertain whether a critical mass of reformists and resources exist, or could be organized to exist, to champion reform. GUIDE TO RULE OF LAW COUNTRY ANALYSIS, *supra* note 9, at 22.

69. U.S. AGENCY FOR INT'L DEV., USAID EVALUATION POLICY 2 (2011), *available at* http://www.usaid.gov/sites/default/files/documents/1868/USAIDEvaluationPolicy.pdf.

expected results are occurring; and other questions that are pertinent to program design, management and operational decision making.[70]

Performance evaluations can provide strong before and after results, however they rarely include rigorous regression analysis or Randomized Control Trials (RCT), which use comparison groups to explain if there is a before and after difference by looking at the counterfactuals.[71]

Further, in recent years, the use of a basket of two to nine indicators has become a trend to measure success in an area of development.[72] By aggregating the results of related indicators, practitioners can better measure success in multifaceted areas, such as transparency and accountability. For example, when measuring the integrity, transparency and accountability of the police, the existence and accessibility of a complaint system is an important accountability indicator.[73] However, as stated by the UN, "it may be irrelevant if there are no effective procedures for alleged incidents of police misconduct or corruption to be investigated."[74] A basket (or index indicator) can draw on "experts' perceptions of the effectiveness of complaint mechanisms with an indicator drawing on public perception of police behaviour provides a more complete and nuanced view of accountability than any one individual indicator."[75] Many of USAID's standard indicators are now basket indicators.

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70. *Id.*

71. *See* BUREAU FOR POLICY, PLANNING & LEARNING, U.S. AGENCY FOR INT'L DEV., TECHNICAL NOTE: IMPACT EVALUATIONS (2013), *available at* http://www.usaid.gov/sites/default/files/documents/1870/IE_Technical_Note_2013_0903_Final.pdf.

72. U.N. DEP'T OF PEACEKEEPING OPERATIONS, OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, THE UNITED NATIONS RULE OF LAW INDICATORS: IMPLEMENTATION GUIDE AND PROJECT TOOLS, at 3, U.N. Sales No. E.11.I.13 (2011). Examples of indexes that use indicators to measure corruption include: UN Vera-Altus Justice Indicators, World Governance Indicator, Failed State Index, World Justice Project ROL Indicators, Transparency International's Corruption Perception Index. JIM PARSONS ET AL., VERA INST. OF JUSTICE, RULE OF LAW INDICATOR INSTRUMENTS: A LITERATURE REVIEW 2–7 (2008), *available at* http://www.vera.org/files/rule-law-indicators-literature-review.pdf.

73. U.N. DEP'T OF PEACEKEEPING OPERATIONS, *supra* note 72, at 3.

74. *Id.*

75. *Id.*

Dr. Kleinfeld concludes with some powerful points—points that USAID have prioritized over the last several years albeit their complications. First, Dr. Kleinfeld believes that practitioners should design a reform program bearing in mind the difference between "best fit" (what is best for the country in its unique circumstances) and "best practice" (often a model based on Western ideals that does not account for existing power structures and cultural context).[76] Second, programs need to be designed to be flexible.[77] Programs must be able to be changed quickly to seize windows of opportunity (e.g., transparency of a major scandal, the Arab Spring, or pro-democracy uprisings) to support the political and cultural reform movements.[78] For it is during these windows of opportunity—when the political will for change exists—that the greatest reforms can be achieved.[79] Third, implementers should program with more local businesses, religious groups, NGOs, and other expert groups in-country instead of international organizations or U.S. companies. For its part, USAID set an agency goal to direct 30 percent of its annual grants and contracts to local partners by FY 2015,[80] in effect tripling USAID's local procurement efforts from only 9.7 percent in FY 2010.[81]

Dr. Kleinfeld's book indicated that there is a need for more impact evaluations, but her book is sparse on actual results from impact evaluations as well. There could have been more emphasis on anti-corruption initiatives, for ROL cannot thrive when corruption is rampant. With that said, there are many more studies focusing solely on anti-corruption programming.

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76. KLEINFELD, *supra* note 2, at 204.

77. *Id.* at 120.

78. *Id.* at 119–20, 184, 209–11.

79. *Id.* at 216.

80. U.S. AGENCY FOR INT'L DEV., USAID FORWARD PROGRESS REPORT 2013, at 14 (2013), *available at* http://www.usaid.gov/sites/default/files/documents/1868/2013-usaid-forward-report.pdf.

81. *Id*. By FY 2012, the percent to local partners had reached 14.3%. *Id.* This is a noticeable improvement since the local organizations often need significant capacity development and training before they can be allocated contract or grant money. *See id.* at 16 (explaining the need for better capacity development before a local partner is ready to manage donor funds directly).

For example, the abovementioned DFID review by Hanna[82] found that anti-corruption programs with the greatest chance of long-term success are those that "change the rules" of the game.[83] These policy interventions aim to change how the government operates to create fewer opportunities or reasons to engage in corruption.[84] There are far fewer studies on how to think about ROL programming as done by Dr. Kleinfeld.[85]

Dr. Kleinfeld's book is an interesting and compelling one because it helps ROL focus on the core ROL objectives (checks and balances on power, cultural and social norms)[86] that allows democracy to flourish.

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82. HANNA ET AL., *supra* note 30.

83. *Id.* at 1.

84. *See id.* at 31 (discussing programs that change the rules of the system to decrease corruption).

85. *See, e.g.*, WORLD BANK LAW RES. CTR., SELECTED READINGS ON LAW, JUSTICE AND DEVELOPMENT (2013), http://pubdocs.worldbank.org/pubdocs/publicdoc/2013/11/250721385389666498/LJD-Nov2013.pdf (listing recent materials written on the topic of "rule of law and development").

86. KLEINFELD, *supra* note 2, at 15.