

**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<sup>1</sup>

I. INTRODUCTION

Rachel Kleinfeld authored *Advancing the Rule of Law Abroad: Next Generation Reform* (2012), which was selected as one of the best foreign policy books of 2012 by Foreign Affairs Magazine. Dr. Kleinfeld has an impressive background and experience in Rule of Law (ROL). She is the co-founder of the

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1. Command Sergeant Major Michael T. Hall & General Stanley A. McChrystal, *ISAF Commander's Counterinsurgency Guidance*, INTERNATIONAL SECURITY ASSISTANCE FORCE KABUL AFGHANISTAN, 3 (2009), [http://www.nato.int/isaf/docu/official\\_texts/counterinsurgency\\_guidance.pdf](http://www.nato.int/isaf/docu/official_texts/counterinsurgency_guidance.pdf).

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## II. BREAKING RULE OF LAW DOWN TO ITS CORE

Rachel Kleinfeld explains that Rule of Law (ROL) programming, generally, supports legal, judicial, and law enforcement reform efforts.<sup>2</sup> 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.<sup>3</sup> Additionally, and perhaps secondarily, it is about cultural norms and habits.<sup>4</sup>

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.<sup>5</sup>

It is important to note that there is not widespread consensus on the definition of ROL. This is partially due to the fact that development agencies<sup>6</sup> often approach ROL programming with different objectives (e.g., economic, political, human rights, human security, or democracy). Dr. Kleinfeld's

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2. RACHEL KLEINFELD, *ADVANCING THE RULE OF LAW ABROAD: NEXT GENERATION REFORM 7* (2012).

3. *Id.* at 15.

4. *Id.*

5. *Id.* at 213.

6. Examples include: UK Department for International Development (DFID), Australian Agency for International Development (AusAID), Swiss Agency for Development (SWD), and the United Nations (UN) to name a few.

definition is in line with both the USAID and UN definition of ROL. USAID identifies five areas of ROL programming (Order and Security; Legitimacy; Checks and Balances; Fairness; and Effective Application),<sup>7</sup> which was developed in 2010 after completing case studies in multiple countries over a period of several years.<sup>8</sup> According to the United Nations, ROL is

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, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>9</sup>

### III. ROL PROJECT FAILURES 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.<sup>10</sup> Dr. Kleinfeld explains that, historically, laws and institutions have been the main targets of ROL reforms. 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.

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7. RULE OF LAW DIVISION, U.S. AGENCY FOR INT'L DEV., *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework 2* (2010), [http://pdf.usaid.gov/pdf\\_docs/PNADT593.pdf](http://pdf.usaid.gov/pdf_docs/PNADT593.pdf).

8. *Id.*

9. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, 4, U.N. Doc. S/2004/616 (Aug. 23, 2004).

10. KLEINFELD, *supra* note 2, at 15–16.

Instead, ROL reform efforts need to focus on the role of power structures and culture. 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 within rule of law professions (e.g., judges, law enforcement, lawyers).

The goal of ROL reform is to help restore the relationship between the state and society.<sup>11</sup> 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.<sup>12</sup>

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, 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.<sup>13</sup> 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 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.<sup>14</sup>

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11. *Id.* at 211–13.

12. *Id.* at 11–14.

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

14. *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/PDADM677.pdf](http://pdf.usaid.gov/pdf_docs/PDADM677.pdf) (evaluating current programs and community perspectives in Timor-Leste to address the key rule of law challenges in Timor-Leste specifically);

Liberia provides a strong example of how USAID studied a state's cultural norms and country context to link the informal (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% of the time for both criminal and civil matters.<sup>15</sup> 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 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.<sup>16</sup>

Through ROL programming, the Ministry of Internal Affairs and the Ministry of Justice (MOJ) have signed several Resolutions/MOUs with informal justice sector leaders. The Carter Center ROL program, supported by USAID,<sup>17</sup> is developing trust and a linkage between the two systems. They are hosting consensus building participatory meetings that, while time consuming, are effectively building community buy-in for a dual court system with checks and balances.<sup>18</sup> The Carter Center also created community plays, community forums, radio commercials, and music that focused on: 1) how to

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Virginia Lambert et al., DevTech Sys., Inc., *Gender Assessment USAID/Panama* (2010), [http://pdf.usaid.gov/pdf\\_docs/pdacr977.pdf](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](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); USAID Land Tenure and Property Rights Portal, *Project: Kenya*, <http://usaidlandtenure.net/projects/kenya> (last visited Oct. 1, 2014, 11:50 AM) (project to develop basic justice models in Kenya).

15. Deborah H. Isser et al., U.S. INSTITUTE OF PEACE, *Looking for Justice: Liberian Experiences with and perceptions of Local Justice Options* 4 (2009), [http://www.usip.org/files/resources/liberian\\_justice\\_pw63.pdf](http://www.usip.org/files/resources/liberian_justice_pw63.pdf).

16. *Id.* at 31.

17. HENDERSON ET AL., *supra* note 14, at 4.

18. *See* Isser, *supra* note 15, at 81–93 (discussing the objectives and principles that guide justice in Liberia).

use the formal system; and 2) important new laws that the non-state system was required to adhere to (e.g. inheritance rights, sexual assault protections, land dispute laws).<sup>19</sup> 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.<sup>20</sup> While the program had challenges,<sup>21</sup> it has proved successful.

Similar to Dr. Kleinfeld's approach, the USAID Guide to ROL Country Analysis also suggests caution before using cookie-cutter ROL programs as avenues to pursue. Specifically, it states that "Obvious flaws in the legal system (such as lack of judicial independence, severe administrative failings, or corruption) 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."<sup>22</sup>

ROL practitioners face great substantive challenges, which include: a) getting political actors to give up power to allow for more accountability and internal controls; b) changing cultural norms; c) battling institutional and societal corruption; d) unanticipated consequences of resource allocation; and e) 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

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19. *Carter Center Assists Liberia's Ministry of Justice in Strengthening Rule of Law*, THE CARTER CENTER (Oct. 10, 2014, 10:22 AM), [http://www.cartercenter.org/news/features/p/conflict\\_resolution/liberia\\_strengthen\\_law.html](http://www.cartercenter.org/news/features/p/conflict_resolution/liberia_strengthen_law.html).

20. Isser, *supra* note 15, at 92.

21. 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.

22. RULE OF LAW DIVISION, U.S. AGENCY FOR INT'L DEV., *supra* note 7, at 11.

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,<sup>23</sup> 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 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 give up control and allow for a change in cultural norms.<sup>24</sup> Popular and professional norms that impede the growth of rule of law in countries where there 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 115-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<sup>25</sup> (note incentive programs can also be "ineffective if the incentive [and/or consequence] is not large enough").<sup>26</sup> 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

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23. 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).

24. 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), [http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti\\_corruption\\_2011Hanna.pdf](http://r4d.dfid.gov.uk/PDF/Outputs/SystematicReviews/Anti_corruption_2011Hanna.pdf) (focusing on the effect of incentive-based interventions).

25. *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).

26. *Id.* at 9.

these incentives (and/or consequences) can be done without additional funding.<sup>27</sup>

#### IV. 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/clan increases, the more difficult it is to create country-wide functional ROL systems.<sup>28</sup>

##### A. *Four Approaches to Reform*

According to Kleinfeld, there are four approaches to reform for changing the four focus areas of ROL mentioned earlier (laws, institutions, power structures, and cultural and social norms). The four approaches for reform are top down, bottom up, diplomacy, and enmeshment. Circumstances will

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27. *See id.* at 32 (discussing the federally implemented program in Brazil that reduces federal funding transfers to local municipalities if audits find the Mayor to be corrupt.).

28. KLEINFELD, *supra* note 2, at 74. *See also* Amir N. Licht et al., *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, 9 (2002), <http://dev3.cepr.org/meets/wken/7/756/papers/licht.pdf> (explaining that societies whose culture emphasize individual uniqueness and view individual people as equals are less likely to be corrupt than countries whose culture is of the embeddedness structure (i.e., honoring elders and tradition, obedience, looking for guidance in areas other than through the law, putting individual family or clan above country)). The authors state that having law and order is associated with distinct culture values like autonomy and collectivism, the opposite of embeddedness. *Id.* at 9–10. The authors conclude by questioning whether practitioners correctly identify culture as something that should always be factored into development programs. *Id.* at 39. Similar to Dr. Kleinfeld, the authors 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.* at 37–39.

determine which approach is most suitable. The best approach may be a combination of more than one approach.<sup>29</sup>

### 1. *Top Down Approach*

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).<sup>30</sup> 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 *Legal Empowerment of the Poor Guide*, which states that enforcement, done through creating appeal processes, audits, and changing the rules to limit discretion, must also be strengthened.<sup>31</sup> For example, replacing potentially corrupt workers with automated technology can be a very effective anti-corruption strategy that can ensure that new laws are enforced.<sup>32</sup>

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29. See KLEINFELD, *supra* note 2, at 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).

30. *Id.* at 112–13.

31. John W. Bruce et al., U.S. AGENCY FOR INT'L DEV., *Legal Empowerment of the Poor: From Concepts to Assessment*, 29 (2007), [http://pdf.usaid.gov/pdf\\_docs/PNADM500.pdf](http://pdf.usaid.gov/pdf_docs/PNADM500.pdf) (“Legal empowerment of the poor occurs when the poor, their supporters, or governments—employing legal or other means—create rights, capacities, and/or opportunities for the poor that give them new power to use law and legal tools to escape poverty and marginalization.”).

32. HANNA ET AL., *supra* note 24, at 6.

## 2. *Bottom Up Approach*

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 organized crime.<sup>33</sup> By building community support through coalitions, bottom up strategies create long-term checks on power and can change popular and professional culture.<sup>34</sup> 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.<sup>35</sup>

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. 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.

## 3. *Diplomacy Approach*

The third approach is diplomacy, which uses political pressure to instigate ROL reforms.<sup>36</sup> Since the 1960's, when the USG began engaging in ROL development, USG motives have expanded to include more than U.S. security interests.<sup>37</sup> Foreign

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33. KLEINFELD, *supra* note 2, at 125.

34. *Id.* at 115–18.

35. *Id.* at 213.

36. *Id.* at 125

37. DEP'T OF STATE & U.S. U.S. AGENCY FOR INT'L DEV., *Leading Through Civilian Power: The First Quadrennial Diplomacy and Development Review*, 6 (2010), <http://www.state.gov/documents/organization/153108.pdf> (“As President Obama has said, 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.<sup>38</sup>

The underlying assumption, or development theory, of the diplomacy approach is that if political actors change, reform will follow. 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. However, she believes it is ill-suited for general cultural reforms. With many competing diplomatic priorities, Dr. Kleinfeld suggests that the diplomacy approach is limited due to security and other priorities that overshadow rule of law reform goals.<sup>39</sup>

#### 4. *Enmeshment Approach*

Finally, the enmeshment approach requires a country to meet certain preconditions to be eligible for membership in an international organization that supports the rule of law (such as NATO or the European Union).<sup>40</sup> A softer form of the enmeshment approach socializes elites and professionals through exchange programs. The goal of enmeshment is to socialize people into a rule of law culture, thereby changing their popular and/or professional norms. Strong enmeshment, tying a country into international institutions, 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. For example, short two-week cultural exchanges of single individuals within large bureaucracies cannot change a bureaucratic culture easily. Enmeshment requires that enough individuals with power and influence are reached to create a ripple effect, which is often difficult to achieve with limited resources.

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38. *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 ...”).

39. KLEINFELD, *supra* note 2, at 129.

40. *Id.* at 134–35.

The concept of strong enmeshment, tying one to an international organization, is supported by the new USAID Strategy on Democracy, Human Rights, and Governance,<sup>41</sup> but questioned by the U4 Anti-Corruption Resource Center.<sup>42</sup>

### *B. Reform Strategy*

The first generation of ROL reforms were primarily top down and designed to change laws and institutions without changing the relationship between the state and society.<sup>43</sup> 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.<sup>44</sup> 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 (number of police trained, or courthouses built) but rather a measurable decline in the problem identified (i.e., 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 Democracy, Human Rights and Governance (DRG) Strategy identifies Public Financial Management (PFM) as a program intervention that can

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41. See U.S. AGENCY FOR INT'L DEV., *USAID Strategy on Democracy Human Rights and Governance*, 4–8 (2013), [http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG\\_%20final%20final%206-24%203%20\(1\).pdf](http://www.usaid.gov/sites/default/files/documents/1866/USAID%20DRG_%20final%20final%206-24%203%20(1).pdf) (providing a framework for the establishment of inclusive democracies through membership in civil society organizations).

42. 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), <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).

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

44. *Id.* at 184–87.

contribute to promoting a culture of lawfulness across multiple sectors.<sup>45</sup> 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.<sup>46</sup>

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 check 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.<sup>47</sup> 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 publicly.

In the 2009 USAID *Reducing Corruption in the Judiciary Program Brief*, 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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45. U.S. AGENCY FOR INT'L DEV., *USAID Strategy on Democracy Human Rights and Governance*, *supra* note 41, at 25, 40.

46. See JESPER JOHNSON ET AL., *supra* note 42, at 17 (discussing to effect of PFMs on curbing anti-corruption).

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

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.”<sup>48</sup>

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.<sup>49</sup> USAID’s ROL Country Analysis involves four crucial steps: 1) political and historical context; 2) political economy analysis; 3) identification of ROL champions and spoilers; and 4) measurement and evaluation.<sup>50</sup> USAID’s first step in analyzing a country’s ROL system is to take into account the political and historical context and legal traditions.<sup>51</sup>

For its part, the new 2013 USAID DRG strategy 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.”<sup>52</sup> 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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48. James Michel, U.S. AGENCY FOR INT’L DEV., *Reducing Corruption in the Judiciary: Office of Democracy and Governance USAID Program Brief*, 19 (2009), [http://pdf.usaid.gov/pdf\\_docs/PNADQ106.pdf](http://pdf.usaid.gov/pdf_docs/PNADQ106.pdf).

49. RULE OF LAW DIVISION, U.S. AGENCY FOR INT’L DEV., *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, *supra* note 7, at 6.

50. *Id.* at 3.

51. *Id.*

52. U.S. AGENCY FOR INT’L DEV., *USAID Strategy on Democracy Human Rights and Governance*, *supra* note 41, at 13 (emphasis added).

to measure problems identified by the citizenry.<sup>53</sup> 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.<sup>54</sup> 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." (ex. treatment and control group).<sup>55</sup> In contrast, performance evaluations are more output oriented, which include "what a particular project or program has achieved (either at an intermediate point in

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53. This is done per USAID's internal *Democracy and Governance Assessment Framework for Strategy Development*. See *id.* at 3, 40–41.

54. RULE OF LAW DIVISION, U.S. AGENCY FOR INT'L DEV., *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, *supra* note 7, 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. U.S. AGENCY FOR INT'L DEV., *USAID Strategy on Democracy Human Rights and Governance*, *supra* note 41, 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. RULE OF LAW DIVISION, U.S. AGENCY FOR INT'L DEV., *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework*, *supra* note 7, at 22.

55. EVALUATION POLICY TASK TEAM, U.S. AGENCY FOR INT'L DEV., *USAID Evaluation Policy*, 2 (2011), <http://www.usaid.gov/sites/default/files/documents/1868/USAIDEvaluationPolicy.pdf>.

execution or at the conclusion of an implementation period); how it is being implemented; how it is perceived and valued; whether expected results are occurring; and other questions that are pertinent to program design, management and operational decision making.”<sup>56</sup> 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.<sup>57</sup>

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.<sup>58</sup> 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. 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.”<sup>59</sup> 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

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56. *Id.* at 2.

57. BUREAU FOR POLICY, PLANNING & LEARNING, U.S. AGENCY FOR INT’L DEV., *Technical Note: Impact Evaluations* 1–10 (Sept. 2013), [http://www.usaid.gov/sites/default/files/documents/1870/IE\\_Technical\\_Note\\_2013\\_0903\\_Final.pdf](http://www.usaid.gov/sites/default/files/documents/1870/IE_Technical_Note_2013_0903_Final.pdf).

58. U.N. DEPT 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 (2001), [http://www.un.org/en/events/peacekeepersday/2011/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf). 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 INSTITUTE OF JUSTICE, RULE OF LAW INDICATOR INSTRUMENTS: A LITERATURE REVIEW, at iii–7 (2008), <http://www.vera.org/files/rule-law-indicators-literature-review.pdf>.

59. U.N. DEPT 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 (2001), [http://www.un.org/en/events/peacekeepersday/2011/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf).

nuanced view of accountability than any one individual indicator.”<sup>60</sup> Many of USAID’s standard indicators are now basket indicators.

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) versus “best practice” (often a model based on Western ideals that does not account for existing power structures and cultural context).<sup>61</sup> Second, programs need to be designed to be flexible.<sup>62</sup> Programs must be able to be changed quickly to seize windows of opportunity (e.g. transparency of a major scandal, Arab Spring, or pro-democracy uprisings) to support the political and cultural reform movements.<sup>63</sup> For it is during these windows of opportunity—when the political will for change exists—that the greatest reforms can be achieved.<sup>64</sup> Third, implementers should program with more local businesses, religious groups, NGOs, and other expert groups in-country instead of international organizations or US 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,<sup>65</sup> in effect tripling USAID’s local procurement efforts from only 9.7 percent in FY 2010.<sup>66</sup>

Dr. Kleinfeld’s book indicated that there is a need for more impact evaluations, but her book is sparse on actual

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60. *Id.*

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

62. *Id.* at 120.

63. *Id.* at 119–20, 184, 209–11.

64. *Id.* at 216.

65. U.S. AGENCY FOR INT’L DEV., *USAID Forward Progress Report 2013*, 14 (2013), <http://www.usaid.gov/sites/default/files/documents/1868/2013-usaid-forward-report.pdf>.

66. *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).

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. For example, the DFID review by Hanna, mentioned above, found that anti-corruption programs with the greatest chance of long-term success are those that ‘change the rules’ of the game.<sup>67</sup> These policy interventions aim to change how the government operates to create fewer opportunities or reasons to engage in corruption.<sup>68</sup> There are far fewer studies on how to think about ROL programming as done by Dr. Kleinfeld.<sup>69</sup>

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67. HANNA ET AL., *supra* note 24, at 1.

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

69. *See* WORLD BANK LAW RESOURCE CENTER, *Selected Readings on Law, Justice and Development* (2013), <http://pubdocs.worldbank.org/pubdocs/genericServlet?action=viewContent&guid=250721385389666498> (listing recent materials written on “rule of law and development”).