PRACTITIONER’S GUIDE

Defining the Rule of Law and Related Concepts

February 2015

Written By:
Dr. Vivienne O’Connor
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The International Network to Promote the Rule of Law (INPROL) is a global, online community of practice. Members come from a range of relevant disciplines and backgrounds. What we all have in common is that they work on rule of law reform issues in post-conflict and developing countries, from a policy-, practice-, or research-perspective. We also share a desire to learn and innovate together as a community in order to improve their rule of law knowledge and practice.

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I. Introduction

People who have lived under a dictatorship or an oppressive regime know all too well what it is like to live in the absence of the rule of law. Those in power are above the law and do what they want without consequence. Human rights are routinely violated. The poor and vulnerable in society receive no protection from the law and the police can unfairly target them, while protecting the rich and powerful. A person speaking out against the regime risks imprisonment, torture, and even death.

After conflict, everyone calls for a new era where the rule of law is respected. Yet, people - from ordinary citizens to those in government - have a hard time explaining what they mean by the “rule of law” and what exactly it looks like in practice. This is not surprising given their lack of direct, personal experience with the rule of law. The first step in effectuating the rule of law is articulating a clear vision of it. While it is good to know what the country does not want, the government and citizens need to articulate what they want in a positive sense and what the rule of law will look like in their particular society. The vision can serve as a reference point for government and citizen actions and decisions about future reforms.

This Practitioner’s Guide will explain the concept of the rule of law, as well as a number of complementary concepts that overlap with and reinforce it. These complementary concepts are common cries of disenfranchised and oppressed citizens fighting an oppressive regime: “justice,” “access to justice,” “human rights,” and “human security.” So closely intertwined are these concepts that for ordinary people, they are seen as one in the same. When people call for the rule of law, they may also mean that they want justice or human security. When people call for human rights, they may also mean that they want fair access to justice. Yet legal scholars and the rule of law community have broken down these related concepts into distinct definitions, masking the reality of a post-conflict state, where they are all seen as one or as interchangeable.

Section I will discuss the meaning and scope of the “rule of law” from theory to practice. Sections II through VI will provide an overview of the concepts of justice, access to justice, human rights, and human security. Section VII will look at how these concepts relate to and reinforce one another and the rule of law. Finally, Section VIII will summarize and bring all the definitions together in one omnibus definition.
II. What is the “Rule of Law”?  

A. Introduction

The rule of law is said to, among other things, promote peace and development, prevent conflict, ensure social justice, advance human security, protect people from fear and want, and end hunger and poverty. There is, however, no concrete evidence that it can bring about any of these outcomes. Does that mean we should question the rule of law as a worthy goal for post-conflict states? Even in the absence of empirical proof of its other benefits, most people would answer “no.” Like the concept of justice, people see the rule of law as an inherently good and necessary goal in itself.

Before exploring the definition of the rule of law in detail, there are a few preliminary points that should be made. First, the definition of the rule of law is not a new concept. Circa 350 BC, Plato and Aristotle both wrote about the rule of law concept and since then legal philosophers have debated its meaning. Second, legal philosophers have yet to find a unanimously accepted definition of the rule of law.

Third, while many people expect the rule of law definition to talk about particular legal institutions (e.g., courts, prisons, police, public administration) and provide a template for a “model” justice system, the rule of law definition is “ends-based.” Therefore, it is better to think of the rule of law as an ideal rather than a recipe for the institutional design of a justice system after conflict.

Fourth, the rule of law definition is aspirational. Colleagues from post-conflict countries have remarked upon how depressing it is to look at the definition because the reality in their countries is so far removed from it. However, it is fair to say that no country--developed or developing, post-conflict or stable--fully meets the standards set out in the rule of law definition. There certainly should not be any expectation that a country torn apart by conflict will be able to realize the rule of law in two, ten, or even twenty years. Transformation takes time. But it is possible, and steps can be taken from the earliest moment after conflict to move a country closer to the ideal of the rule of law.

B. The Rule of Law Defined

It took until 2004 for a working definition of the rule of law to be developed by the international rule of law community. The definition was developed by the United Nations. It has been widely accepted by other organizations in the international rule of law community and it brings together nicely the major philosophical and scholarly ideas on the rule of law.

The definition is quite overwhelming upon first reading. It contains fifteen
complex legal concepts. Here it is in full:

[The rule of law] 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 the 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.

The remainder of Section II will explain the definition in detail. The UN definition has been paraphrased in each subsection and this paraphrased text will form the basis of the consolidated definition of the rule of law, justice, access to justice, human rights, and security, discussed in Section VII.

C. The Core Rule of Law Idea: Accountability and the Supremacy of the Law

In demonstrating the concept of accountability and supremacy of law, the contrast is often made between rule by law and rule of law. In a state where there is rule by law, there is law but those in power are not subject to it. They do what they like and are above the law. In contrast, the rule of law requires that everyone be accountable to the law, even government officials. Accountability refers to the ability to ensure that both public officials and private citizens are responsible for their behavior and if it breaches the law, they must suffer a sanction.

Law does not enforce itself. Someone or some institution needs to hold others accountable. So how is accountability implemented in practice? There are two types of accountability mechanisms: (1) horizontal accountability, and (2) vertical accountability. “Horizontal accountability mechanisms” refer to state legal and judicial entities that can require a public actor or private person to answer for their actions. These entities provide checks and balances on the actions of public officials. If their actions are found to breach the law, they can be sanctioned. For example, if a public servant violates the law, the action may be subject to a “judicial review.” Likewise, they provide checks on private citizens. For example, when a person breaches the criminal law, he or she can be arrested and tried by the courts and may be imprisoned or fined. Horizontal accountability can be termed “hard accountability” as the accountability mechanisms in question have legal powers to impose sanctions on individuals or institutions. Horizontal accountability is very much linked to the separation of powers and judicial independence because it needs a strong and independent court system to implement it.

The rule of law definition centers on accountability through state institutions that have the power to hand down sanctions to those who break the law.
Another form of accountability should also be mentioned however. “Vertical accountability” is essential where horizontal accountability mechanisms are not functioning adequately to hold public officials accountable. Vertical accountability involves citizens holding state entities accountable through mechanisms such as the media or civil society oversight, lobbying, monitoring, and reporting. In contrast to horizontal accountability, which involves an intrastate system of controls, vertical accountability consists of external checks. This can be thought of as “soft accountability,” as those holding rule-breakers accountable have no formal powers to sanction a public official. However, there are material and political consequences that can flow from vertical accountability. Politicians who have been exposed as violating the rule of law may not be re-elected for example. In addition, civil society can lobby state institutions responsible for horizontal accountability to hold the person accountable.

Accountability—horizontal or vertical—is conspicuously absent during a dictatorship or a conflict. A dictator, his inner circle, and elites who support the dictator act completely above the law. Lack of accountability and impunity after conflict is also an issue because the justice system is often not functioning properly. But a lack of accountability is not confined to dictatorships or post-conflict countries. Unfortunately, in many other countries, leaders, the elite, and the rich are not accountable to the law. This may be because they pay bribes (corruption), for example, or because public servants are afraid to investigate rich and influential people for fear of the consequences. Thus, the principle of everyone being accountable to the law is not implemented. Accountability is uneven and selective, with the poor, marginalized, and powerless being held accountable to a much higher degree that the rich and influential.

Improving accountability after conflict is an incredibly challenging task. It requires massive shifts in power, and furthermore, it requires individuals and groups to give up the power they have (which they are often not willing to do). As one activist says in the powerful movie The Square: “The rich don’t want freedom. They are already free.” The reality is that the rich and powerful also do not want accountability. The benefits that come along with its absence are too great. While there may be technical dimensions to increasing accountability after conflict, the re-shifting of power is a highly political activity and should be approached as such.

D. The Content of Laws: International Human Rights Standards, Legal Certainty, and Legal Transparency

When a rule of law definition contains requirements about the content of laws, it is called a “thick” definition of the rule of law. Contrast this with a “thin” definition, which only requires that there is law (any law), and that everyone is accountable to it. Under a thin definition of the rule of law, the laws in Nazi Germany or Apartheid South Africa would not breach the rule of
law principle.

The UN rule of law definition is a “thick” definition and has much to say about what the content of laws should be. It is not enough that there is law; the law must contain certain values. As Thomas Aquinas said, “an unjust law is not a law.” Similarly, HLA Harte a British legal philosopher said, “there is a certain minimum moral element to law, without which it is not simply bad law, but not law at all.”

First off, the UN definition requires that all laws “are consistent with international human rights norms and standards.” The term “norms” means legal obligations arising from international human rights treaties that the state is bound by. The term “standards” means human rights obligations that come from UN documents other than treaties (e.g., sets of standards voted on by the UN General Assembly). This is quite an onerous requirement, particularly for countries emerging from conflict, which would effectively need to reform every law on the books to comply.

Secondly, the rule of law definition requires that laws be “legally certain.” Legal certainty requires:

1. The law must be clear, precise, and foreseeable so that a citizen can regulate his or her conduct. He or she must be able to foresee with reasonable certainty the consequences of any given action.

2. Laws must not operate retroactively to hold a person accountable for behavior, which at the time it was undertaken was not illegal. This concept is especially important with criminal law and is expressed in the criminal law concept of “no crime without law, no penalty without law.” It is recognized in the domestic law of most countries and in international human rights law.

3. Laws must be written. Legal certainty requires that there is written law. The law can either be written in a legislative act or can come from case law, which is written up in the form of judgments and is published in law reports or online. The person or body issuing the law should, of course, have the powers under the law (e.g., the Constitution) to make that law. If a law is unconstitutionally made, it is considered invalid and contradictory to the rule of law. The fact that the rule of law must come from legislation or case law raises some potential issues regarding customary or traditional justice, which does not always rely on written laws or written judgements.

4. Laws must be accessible to the citizen. This means that the laws are publicly available to citizens.

In addition to legal certainty, the rule of law requires that laws are “legally transparent.” This concept is essentially the same as legal certainty. The term
legal transparency has been taken to mean that the effects of the law can be seen easily, just as one can see easily through a clean window.\textsuperscript{25}

E. The Drafting and Passage of Laws: Procedural Transparency and Public Promulgation

In addition to elaborating on various content issues related to the law, the rule of law definition has much to say about how the laws are drafted. In order to comply with the rule of law, laws must be drafted with “procedural transparency” and must be “publicly promulgated.”

Procedural transparency requires that the process by which a law is drafted is known and easily seen by the public.\textsuperscript{26} In other words, the making of the laws should be guided by public, stable, and clear rules.\textsuperscript{27} In practical terms, this means that laws cannot be drafted behind closed doors, although it certainly would not go so far as to require that the public witness all aspects of the drafting process. As a middle ground position, procedural transparency requires that members of the public are aware of:

1. Which agency or authority is responsible for the drafting of new laws;
2. Any formal process by which new proposed legislation is to be circulated in advance of being passed; and
3. Any formal process that offers a citizen the ability to provide comments on draft laws.

In many post-conflict states, the concept of procedural transparency is routinely breached by governments rushing to introduce new laws without adequately attending to the procedural elements of law-making, unfortunately much in the same way the prior regime or dictatorship did.

The second procedural requirement of the rule of law definition is public promulgation, which requires:

1. That a new law should be officially declared to the public by the body responsible for its passing (e.g., the executive or the legislature);
2. After the official proclamation, the law must be published, for example, in an Official Gazette, a written Statute Book, or online; and
3. The law must be publicized so that the community at large is aware of their legal obligations arising under it. This links back to the principle of legal certainty, discussed above, and its requirement that laws be accessible to the public. It also is closely linked to the concept of “access to justice,” discussed below, because part of the requirement of accessibility is that ordinary citizens are aware of the law and their legal obligations under it.
In most countries, there is a period of time between the law being approved and it coming into effect. This period of time is called the “vacatio legis.” According to the Venice Commission, “the issue of the proper vacatio legis is one of the key principles of a law-abiding state.” It is during this time that publication, distribution, and publicization of the law should occur. In addition, during this time, the state should undertake training of justice actors on the new law, institutional reforms, and modifications that the law requires.

F. The Application of the Law by Public Officials (including the Justice System)

The rule of law requires that in applying domestic laws, public officials (including judges, police, and prosecutors) apply the law equally, independently, fairly, and non-arbitrarily.

Equality Before the Law and Equal Enforcement of the Law

Studies have shown that the perception of unequal treatment of citizens is the number one source of public discontent with the justice system. The UN rule of law definition speaks about “equality before the law” and “equal enforcement” of the law, both of which essentially mean the same thing.

Equality before the law is a human right. It has been interpreted as meaning equality with regard to application and enforcement of the law; “public officials must not apply the law in an arbitrary or discriminatory manner.” The concept of arbitrariness will be discussed below. Discrimination refers to “distinction, exclusion, restriction or preference” on the basis of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

The unfortunate reality in many countries is that laws are not applied equally to all. Powerful or wealthy individuals are treated preferentially or have the money or influence to exert pressure on public officials to apply the law in the way that is beneficial to them. Equality before the law requires strong, independent courts, which is the next rule of law element we will discuss.

Judicial Independence

The right to judicial independence is also a human right and a part of the “separation of powers” doctrine discussed below. Judicial independence can be broken into three elements:

1. Independence;

2. Impartiality; and

3. Public confidence.
There are both collective and individual aspects of independence. Collective independence, or institutional independence, requires that the court system be insulated from any outside pressure, whether the source is within or outside the government. For example, the executive or government ministers cannot control judicial functions, nor can any decision of the courts be subject to revision by the government (except in the case of judicial review or a reduction of a sentence under the authority of law). Judges must also not be subject to internal pressure by fellow members of the judiciary. The only thing the judge must take into account in applying the law is the law. To ensure institutional independence, the courts should have sufficient funds to perform their functions. If the courts do not, they may be subject to outside pressure from those in control of the courts’ budget.

Individual or personal independence “means that the terms and conditions of judicial service are adequately secured so as to ensure that individual judges are not subject to executive control.” The law must clearly set out the terms and conditions for judicial appointment, qualifications for appointment, the duration of the terms of service, and the conditions for promotion, transfer, and cessation of functions. In addition, judges should receive adequate salaries. Typically, if judges do not have adequate salaries, they are more vulnerable to corruption and lack of independence.

The concept of impartiality requires that a judge act without favor, bias, or prejudice in hearing a case. The judge must decide matters before him or her without prejudice and without improper influence of a direct or indirect nature from any source, for any reason. For example if a judge has a close relationship with one of the parties or has a personal or economic interest in the case, he or she is not impartial. Judges must excuse themselves from a case if there is actual or perceived partiality. If a judge does not excuse himself or herself when appropriate, there should be a mechanism in the law for a party to a case to request that the judge be disqualified. Finally, judges must not engage in activities or maintain interests in activities or entities that affect their impartiality or appearance of impartiality, such as being part of a political party.

The final element of judicial independence is public confidence. The judiciary must ensure that there are procedures in place to enhance public confidence. Specifically, there should be transparency regarding the judiciary’s activities and composition and representivity. To ensure transparency, the judiciary should ensure that court judgments are made public, in addition to making information about the courts (workload, budget, staffing allocations) publicly available. Representivity requires that the composition of the judiciary reflect the various branches of society (i.e., men and women, ethnic and linguistic groups, different geographical locations).

**Fairness in the Application of the Law**
Everyone has an intuitive sense of what is fair and what is unfair. Yet, there is no universal definition of fairness. Fairness is best determined based on a particular context; once people are given a set of facts and a context, they can determine if there is an element of unfairness. Tom Tyler argues that fairness on the part of the justice system can be assessed based on subjective perceptions of the following criteria:

1. **Representation**: The degree to which parties affected by a decision are allowed to be involved in the decision-making process and to make their case;

2. **Consistency**: Similarity of treatment and outcomes across people or time or both;

3. **Impartiality and the Suppression of Bias**: The ability to suppress bias and prevent favoritism or other external biases. This is in line with the requirement of judicial impartiality. Also important here is honesty and an effort to be fair on the part of the decision-maker;

4. **Decision Quality**: The ability of a procedure to affect solutions of objectively high quality;

5. **Correctability**: The existence of opportunities to correct unfair or inaccurate decisions;

6. **Ethicality**: The degree to which the decision-making process accords with general standards of fairness and morality.

Also important in creating fairness in decision-making is the quality of interaction that people have with state actors, and whether the authorities are paying attention to what the citizen is saying. Having one’s views taken into account is important because it is a message about one’s standing in a social group. This inter-personal context matters greatly, as does being treated politely and having respect shown for your rights. Personal contact with those who work in the justice system that are perceived as fair have the potential to increase public trust and confidence. The police and the justice system can also gain public legitimacy by being fair.

A final element of fairness that should be mentioned is the concept of a “fair trial,” a right which is expressed in international human rights law. The concept of a fair trial includes all the other fair trial guarantees in international human rights law, while being “broader than the sum of the individual fair trial guarantees.”

**Avoidance of Arbitrariness**

Decisions or behaviors are arbitrary when they are unreasonable and decided upon at the discretion of a person rather than by reference to the law. To
avoid arbitrariness, legal issues must be resolved by “law not discretion.” Public officials must act in good faith and must not exceed the limits of their powers as set out in the law or act unreasonably. In addition, decisions of public officials should be open to legal challenge through the courts. This reinforces other rule of law elements, such as accountability to the law and supremacy of law.

G. Participation in Decision-Making

Participation is often considered as an after-thought and something that is nice to do but impractical in the so-called “emergency culture” of a post-conflict state. New or transitional governments often say they are too busy to reach out to people for input on policy decisions. In the alternative, they say they do not know how to engage constituencies in a participatory manner. While often an overlooked element in the rule of law definition, “participation in decision-making” is a determinant of the success or failure of efforts to promote the rule of law, and it should be taken very seriously. Social psychology tells us that people care deeply about their level of inclusion or exclusion in social groups. Research has shown that exclusion of groups based on race, ethnicity, religion, or geographical location and origin is associated with higher risks of civil war and violent upheaval. Conversely, participation in decision-making creates feelings of identity, inclusion, and self-determination.

Some argue that citizens participate in this decision-making process through electing representatives, who then make decisions on the citizens’ behalf through a form of indirect participation. For most people, this is grossly inadequate:

New machinery is needed which acknowledges realistically the impossibility of hearing everybody's opinion, yet encourages those who wish to voice their grievances and to share their knowledge to come forward and to do so in a setting that is not over-formal or intimidating.

This right to expansive, popular participation in the exercise of legislative, executive, and administrative powers has also been found to be part of a person’s human right to “take part in the conduct of public affairs.” According to the United Nations Human Rights Committee, citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.

A participatory approach does not mean that everyone who participates will have their way or have their view adopted. Ultimately, there will be those who agree with, and those who do not agree with, a proposed law or policy decision. What is important is that citizens have the opportunity to communicate with each other and decision-makers in the making of rules.
and decisions that affect them, and that their views are considered and reasons for the final decision are provided. The latter elements mirror some of the indicators of fairness, discussed above.

Participation is not just a valuable end in itself but can also lead to the realization of other important goals. Its ability to nurture identity, inclusion, and self-determination has already been mentioned. Importantly, when done well, participation can also begin to repair or build the relationship between those in power (the government) and the ordinary citizens (the governed) and grow the trust between both. During periods of dictatorship, conflict, and colonization, the relationship between the central government and the citizens is one of fear and distrust. After conflict, even when the government faces have changed, societies appear to recreate the same dynamics and relationship with the new government as they did with the old. Unfortunately, new officials often unconsciously govern in the same way as the prior regime; they do what they know and have seen done in the past.

The broken relationship between the people responsible for the state machinery and the population needs to be mended and trust needs to be increased. According to researchers, “there is no single variable which so thoroughly influences inter-personal and group behavior as does trust.” Participation, inclusivity, and dialogue between the state and society can repair or develop the foundation for trusting relationships. Equally so, participation may repair the broken relationships between different sectors of the population, who may be in conflict with each other (e.g., ethnic, religious, or racial divisions).

Not only can participation create the foundation for good state-society relations and build trust, but it can also play a role in enhancing the legitimacy of the government, its policy decisions, and its actions. This is because “legitimacy is essentially a relational term,” and when relationships are perceived as illegitimate, decisions of the government are then perceived as illegitimate, which undermines compliance with the law and accountability. Conversely, when the conditions for public deliberation exist, the outcome (e.g., a law or policy) will be legitimate.

**Trust**

**Trust** is “this unobservable set of motives and intentions that people infer from behaviors that they observe in others.”

*Tom R. Tyler, Why People Cooperate: The Role of Social Motivations, (Princeton: Princeton University Press. 2011), pg. 95*

**Legitimacy**

Legitimacy is a complex concept, with various organizations providing different definitions. The following are some examples:

Legitimacy has been defined as: “a broad-based belief that social, economic and political arrangements and outcomes are proper and just. The concept is typically applied to institutions. Legitimacy is acquired by building trust and confidence among various parties. Forms of legitimacy include process legitimacy...
Legitimacy, in turn, can lead to voluntary compliance with the law. Research has shown that citizens comply with the law, not because of the threat of punishment, but because they view the legal authority they are dealing with as having a legitimate right to dictate their behavior. When the

**Citizen Behavior**

Citizens also obey the law because of a sense of internal morality and because of concerns about social relations but “legitimacy is a far more stable base upon which to rest compliance than personal or group morality.”


Legitimacy, in turn, can lead to voluntary compliance with the law. Research has shown that citizens comply with the law, not because of the threat of punishment, but because they view the legal authority they are dealing with as having a legitimate right to dictate their behavior. When the
government and the justice system are seen as illegitimate, people turn away from the state and find their own accountability mechanisms. Consequently, a lack of legitimacy is often accompanied by an absence of a “culture of rule of law” or a “culture of lawfulness,” meaning a culture “where the majority of people in a country believes in and acts in accordance with the rule of law.”

Finally, a participatory approach to rule of law reform can help identify the rule of law problems in a post-conflict society from the vantage point of the ordinary citizen. Moreover, dialogue between the government and citizens can generate the ideas needed to solve these problems at the local and national level. It can also generate energy for and create change in communities.

**H. Separation of Powers**

In order for power to be checked and to facilitate horizontal accountability, discussed previously, the executive, legislative, and judicial branches of government must be separate and the various powers of each should be clearly defined. The concept of the separation of powers is usually expressed through a country’s constitution and is intimately linked to the concept of judicial independence, discussed above.

**III. Justice**

**A. What Does “Justice” Mean?**

Everyone has an intuitive sense of justice, yet it is a concept that is best understood in its absence. That said, in order to strengthen justice in conflict affected countries, a clear idea of what justice is in the positive sense is required. Just as with the rule of law, the UN has defined the concept of justice. Justice is defined as follows:

“[J]ustice” is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant. The international community has worked to articulate collectively the substantive and procedural requirements for the administration of justice for more than half a century. The remainder of this section will explain the definition in detail. The UN definition has been paraphrased in each section and this paraphrased text will be used in the consolidated definition of rule of law, justice, access to justice, human rights, and security, discussed in Section VII.
B. The Aims or Outcomes of Justice: Accountability in Protecting and Vindicating Rights and Preventing and Punishing Wrongs

The definitions of the rule of law and justice start off with the same concept: accountability. In contrast to the rule of law, which talks about the general concept of accountability of individuals to the law, the definition of justice rests on accountability when a person commits a wrong or violates the rights of another. The definition of justice is talking about criminal accountability or criminal responsibility.

Criminal justice is spoken about as consisting of “substantive justice” and “procedural justice.” The UN definition first deals with substantive justice or the “justice of outcome.” So what outcomes do we seek through justice? The definition speaks of justice as having two central outcomes: (1) the protection and vindication of rights, and (2) the prevention and punishment of wrongs. These are two well-known rationales from the criminal law: the “harm principle” and the “moral wrong” principle.

The harm principle says that “the only purpose for which power can be rightfully exercised over any member of a civilized community against his will is to prevent harm to others.” Harm has been defined as a violation of a person’s rights. Under this principle, “the criminal law exists to prevent the use of freedom to abuse the freedom and destroy the rights of others. Crimes to put it simply are offenses with victims.” The idea that only offenses that have victims should be legislated for presents a slight problem for the criminal law however. The question arises about whether a government should criminalize “victimless offenses” such as possession of drugs or the illegal copying of DVDs, for example. Many legal scholars argue therefore that the harm principle alone is insufficient and that sometimes the state needs to exercise legal paternalism. This is where the “moral wrong” principle comes in to supplement the “harm principle.” Under the moral wrong principle, the law can be used to address moral wrongs, as defined by a particular society. It should be noted of course that broad criminalization of moral wrongs could be problematic. For example, a collective social agreement on a moral wrong may be “more the expression of prejudice than of moral judgement.” Furthermore, it may not be possible to get a societal consensus on moral wrongs. Scholars therefore advise policymakers to take the middle path, “honourable and safe,” and to use only legal moralism where the harm principle is insufficient.
C. The Justice Process: Justice as Fairness, the Rights of the Accused, the Interests of Victims, and the Well-Being of Society

It is not enough that justice be served. Studies have shown that citizens care about the process by which justice is arrived at, as much as they care about just outcomes. The process by which justice is served should meet certain basic minimum procedural standards. In other words, there must be “procedural justice” in addition to “substantive justice.” Procedural justice is crucial to ensuring the legitimacy of the justice system. Where there is procedural justice, people are more likely to comply with the law and to defer to the authorities dispensing justice.

According to the UN definition, the justice process should be fair and it should protect the rights of the accused. In addition, it must consider the interests of victims and the well-being of society.

The first procedural requirement—fairness—is central to justice. Fairness is also a criteria that is included in the rule of law definition. Its essential elements have been discussed previously under the rule of law definition and they apply equally to justice. To recap, there should be: (1) consistency in treatment and outcomes across people or time or both; (2) suppression of bias and favoritism; (3) the criminal justice process should effect solutions of objectively high quality; (4) correctability, meaning the existence of opportunities to correct unfair or inaccurate decisions; (5) representation and involvement of the parties affected in the decision-making process; and (6) ethicality and adherence of the justice process to the general standards of fairness and morality. As mentioned previously, another aspect of fairness is the concept of a “fair trial,” a right expressed in international human rights law.

Secondly, the concept of justice requires that the rights of the accused are protected. Domestic laws and international human rights law contain certain minimum safeguards for the protection of accused persons in the criminal process. For example, Article 14 of the International Covenant on Civil and Political Rights sets out what are considered “widely accepted principles of procedure.” In order for there to be true justice, the justice system should diligently uphold these rights. In most post-conflict countries, the criminal law inherited from the regime does not adequately protect the rights of the accused. There is much work to be done in raising the level of human rights protection that the justice system affords.

Third, justice requires regard for the interests of victims. It is interesting to contrast the word “rights of the accused” with “interests of victims” in the UN justice definition. While international human rights law has articulated an agreed upon set of rights for accused persons, there is no binding treaty on the rights of victims. Instead, there is the non-binding United Nations
**Victims**

*The treatment of victims in domestic criminal proceedings is discussed in detail in the INPROL Practitioners Guide on Common Law and Civil Law Systems.*

**Mechanisms for Administering Justice**

*Justice may be administered either through the formal justice system or through traditional dispute resolution mechanisms.*

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*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.* Different countries treat victims differently under the criminal law. In some countries, victims can have lawyers present during a trial and can cross-examine witnesses and submit their own evidence. In other countries, victims can even mount their own “private prosecution,” if the prosecutor decides not to proceed with the case. Contrast this with countries where the sole role of the victim is to testify as a witness in court or at the sentencing hearing. Clearly, the UN definition does not require that all countries introduce a bill of rights for victims. Instead, its minimum standard is that the criminal justice process have regard for the interests of victims during the criminal process.

Finally, during the criminal process, regard must be had for the well-being of society at large. This communitarian goal of criminal law stems from the philosophy that the criminal law should serve the interests of the entire community and not just individuals.

### D. Mechanisms for Administering Justice

According to the UN definition, justice can be administered through: (1) formal mechanisms, meaning a criminal justice system, or (2) “traditional dispute resolution mechanisms.” The recognition that traditional or customary justice systems are a legitimate mechanism for administering justice is significant, given that it is estimated that 80% disputes worldwide are resolved through customary justice mechanisms.

### IV. Access to Justice

#### A. What Does “Access to Justice” Mean?

The concept of “access” has been mentioned many times already in this guide. The rule of law requires that citizens (under the concept of legal certainty) should have access to the laws so that they know what their rights and obligations are. Under the expanded definition of accountability, discussed above under the rule of law definition, citizens should “enjoy the benefits of the law.” In order to ensure the benefits of the law, they need to have proper access to justice that is affordable and efficient. In order for there to be justice (while not expressly stated in the definition), it is self-evident that a citizen requires access to the justice system.

“Access to justice” also exists as a stand-alone concept. Access to justice has been defined by the UN as:

> [T]he ability of people to seek and obtain a remedy through a formal or informal institution of justice for grievances, in conformity with human rights standards.

The remainder of this section will explain the definition in detail. The UN
definition has been paraphrased in each section and this paraphrased text will be used in the consolidated definition of the rule of law, justice, access to justice, human rights, and security, set out in Section VII.

B. The Ability of People to Seek and Obtain a Remedy for Grievances

The definition of access to justice talks about an individual being able to “seek and obtain a remedy” for grievances. So, the question becomes: what needs to be in place for people to seek and obtain a remedy? First off, there needs to be “justice”, as defined above, as well as a functional, fair, and legitimate justice system and laws in place: if there are no laws and the justice system does not work, having access to it is beside the point.

But just because there are laws and a justice system doesn’t necessary mean people will access the system. Certainly, the rich and the powerful will access the system, and it will work for them. But what about if a citizen is poor or from a vulnerable, minority, or marginalized group? The justice system in most countries does not protect the poor and disenfranchised.

In determining how the poor and disenfranchised can effectively access the justice system, a 2002 worldwide study asked them directly about why they do not feel willing or able to do so. The following barriers are commonly identified as barriers to accessing justice:

1. **Financial and Legal Representation Barriers**: With regard to the formal state justice system, ordinary citizens cannot afford a lawyer or court fees. In addition, in countries where corruption and the paying of bribes are essential to have a case heard, the citizen may not be able to afford the bribes. One of the reasons many citizens choose to access justice through informal or customary justice systems is because they are cheaper.

2. **Geographic Barriers**: With regard to the formal state justice system, there are often no justice institutions in close proximity. One cannot be said to have access to justice if the nearest police station is a three-day walk away. In contrast, customary justice systems are located locally and are familiar to local people.

3. **Linguistic Barriers**: With regard to the formal state justice system, the citizen may not speak or be familiar with the working language of the justice system. In many countries that are former colonies, the justice system operates in the colonial language rather than the local language. In theory, interpretation and translation services should be provided to address this issue but in many countries, resources are so scarce that there is no money to buy pens and paper for the court, let alone to hire professional interpreters. The customary justice system is often a preferential justice forum for citizens because it operates in
their local language.

4. **Fear and Intimidation Barriers:** For many citizens, especially those who lived under dictatorship, the formal justice system is something to be afraid of. There is often a lack of trust and confidence in the justice system. For others, the formality of the system is quite intimidating. If individuals are afraid of or intimidated by the justice system, they cannot effectively access it. With regard to the customary justice system, if a person is from a majority group, the person may not have the same fear and intimidation for the customary system as they do for the formal system. But if you are a woman or from a minority or vulnerable group, it is likely that the same fear and intimidation barriers exist in relation to customary justice.

5. **Knowledge Barriers:** People do not know their rights and they do not know how to have those rights enforced. They are lacking “legal awareness” or “legal literacy.”

These barriers need to be broken down in order for everyone in a country to be able to access the justice system effectively. Putting this together in a positive statement:

1. Justice must be affordable;
2. Justice must be local;
3. Justice must be delivered in a language citizens understand;
4. Citizens (who cannot afford it) should be granted the assistance of a lawyer;
5. The justice system must serve the people and must work to inspire their trust and confidence; and
6. Citizens must understand their rights and obligations under the law and how to seek a remedy if their rights are violated.

C. **Access to Justice Through Formal or Informal Institutions**

Like the definition of justice, access to justice also recognizes that a remedy may be obtained from either a formal institution (e.g., a court) or an informal institution (e.g., a customary justice forum).
D. Compliance with Human Rights Standards

The definition of access to justice requires that justice be carried out in compliance with international human rights standards. This has been discussed previously because it is also a requirement of the rule of law and justice.

V. Human Rights

There has been lots of talk already in this guide about human rights. The rule of law requires that laws comply with “international human rights norms and standards.” The definition of justice tells us that the criminal process should protect the rights of the accused. The requirement that justice be administered consistent with international human rights standards is also part of the access to justice definition. Human rights also represent a goal in itself.

There is often some confusion in post-conflict states about the meaning and scope of human rights. It is first worth distinguishing between “human rights” as a concept and “international human rights law.” The general concept of human rights refers to rights and values that are universal, inalienable (meaning they cannot be taken away), and inherent, solely because we are human. International human rights law gives legal expression to the concept of human rights and makes it more concrete and, in a sense, more limited. Through various treaties, international human rights law articulates a finite list of civil, political, economic, social, and cultural human rights. When states sign and ratify a treaty, they are legally required to respect and protect the specific rights in the treaty and ensure that they are realized in their respective countries through the law and through the actions of public officials.

International human rights law is a vast topic and will not be dealt with in full in this guide. That said, because the rule of law, justice, and access to justice all require the realization of international human rights law, everything in this guide that talks about pursuing these goals will indirectly advance human rights.

VI. Human Security

The word “security” holds a deeply negative meaning for those who have lived under repressive regimes. Security under dictatorships really means “state security” or “national security” and is associated with torture, brutality, secret prisons, secret police, and intelligence agencies. Insecurity is used as an excuse by regimes to dispense with human rights and enforce emergency laws that in the case of Syria and Egypt, for example, lasted decades and was used to justify much ill treatment of citizens.
Yet, the term “human security” means something quite different, something positive and protective. Human security refers to “the every day security of individuals and the communities in which they live rather than the security of states and borders.”\textsuperscript{97} It includes physical security (protection from violence and abuse) and the feeling of safety and freedom from fears that allows for individual well-being.\textsuperscript{98} It means security in the home. It means that children can feel safe to walk to school, women can feel safe to go to the market, and that people feel like they and their property are protected. As Nelson Mandela said, “[f]reedom would be meaningless without security in the home and in the streets.”\textsuperscript{99}

Ironically, dictatorships and oppressive regimes offer more predictability, and some would say, more safety (at least for those who do not break the rules) than post-conflict states. Personal and property crime tend to be relatively low compared to other countries, mostly because people are afraid of the treatment they will receive if caught by the regime. During the first few months after conflict, feelings of security and safety are high. Unfortunately, time and again, feelings of insecurity and lack of safety grow as time moves on and crime and violence increase. Despite their newfound freedom, people in conflict-affected countries have confided that they wish the dictator were back in power. An Iraqi lawyer once told me, “under the Saddam regime, I knew how to keep safe and to keep my family safe. Now I don’t know what to do to stay alive.”

If the major challenge of the rule of law is dealing with power dynamics, the challenge for human security lies in the reality that post-conflict states are exponentially more insecure and unsafe than states operating under oppressive and dictatorial regimes. When this happens, citizens in post-conflict states who are scared say that the government should get tough, forget about human rights, and focus on making them feel safe. The implication is that the government should forget about protecting the rights of those who are causing the insecurity. Unfortunately, this type of approach leads the country back to the same approaches and behaviors of sacrificing rights for security that existed under dictatorship. While not explicitly stated in the definition, human security should be grounded within the framework of human rights and the rule of law.

**VII. How Do All the Rule of Law Concepts Relate to One Another?**

As we have seen, there is much overlap between the concepts of the “rule of law,” “justice,” “access to justice,” “human rights,” and “human security.”

The rule of law should be thought of as an important goal in itself but also as the foundation stone for other important goals. It is imperative for the realization of justice\textsuperscript{100} (and consequently access to justice) and human
Rights.\textsuperscript{101} It also provides a framework for advancing human security.\textsuperscript{102}

Justice is a necessary pre-requisite for “access to justice.” Justice protects human rights (when individuals are held criminally responsible for violating the rights of others) and the rights of accused persons are protected during the administration of justice. Conversely, human rights have been stated as being the foundation of justice.\textsuperscript{103} Finally, for there to be human security, there must be justice. In fact, many in the international rule of law community in particular have begun to use “justice and security” together as a combined goal.

Elements of “access to justice” are dispersed throughout the definitions of the “rule of law” and are implicit in “justice,” as discussed above. Moreover, if human security is to be protected, individuals need not only “justice” but also “access to justice.”

Many people consider that “human security” is implicit in the UN definition of “rule of law,” as part of “law and order.”\textsuperscript{104} Conversely, human security should be pursued consistently with the rule of law and human rights.

\textbf{VIII. Putting It All Together: An Expanded Definition of the Rule of Law and Its Related Concepts}

Pursuing any one of the aforementioned goals – namely, the rule of law, justice, access to justice, human rights and human security - has a positive effect on the other goals. In fact, it is very hard to break apart these goals. Many have argued that creating all these distinct goals creates artificial divisions between concepts that are part of each other. Therefore, this guide concludes by bringing together the various definitions discussed above into an expanded and paraphrased definition of the rule of law.

What follows is the expanded definition:

\textbf{ACCOUNTABILITY:} No matter who you are, if you break the law you must answer for your action and receive a sanction (e.g., prison, fine, barring from legal office). If a person commits a wrong or violates the rights of another, he or she should be held accountable, either through the formal state justice system or through customary/traditional justice systems.

\textbf{THE CONTENT OF LAWS:} The laws must protect the human rights of all persons, including the rights of the accused and the interests of victims. They must be clear, precise, prospective (i.e., they do not punish past conduct that was not illegal at the time), accessible, and they must allow citizens to understand their rights and obligations.

\textbf{THE DRAFTING OF LAWS:} All citizens should know what government
agency is responsible for drafting new laws, when the laws will be circulated for comment in advance of being passed, and how the individual citizen can have a voice in the law reform process. After the law is passed, the law must be published, and the public must be notified about the new law and their rights and obligations under it.

**THE APPLICATION OF LAWS:** Laws must be applied equally, independently, fairly, and non-arbitrarily by public officials.

**PARTICIPATION IN DECISION-MAKING:** Citizens must have the opportunity to participate directly in the exercise of legislative, executive, and administrative decision-making with the goal of repairing the broken relationships between the state and society, increasing trust in, and the legitimacy of, the government and improving general compliance with the law.

**SEPARATION OF POWERS:** There must be separation between the executive, legislature and the judiciary and the various powers of each should be clearly defined.

**ACCESS TO JUSTICE:** All citizens must have access to justice mechanisms to seek a remedy for grievances. In order for there to be access to justice, justice mechanisms must be affordable, close by, conducted in a language citizens understand, and citizens (who cannot afford it) should be granted the assistance of a lawyer. The justice system must serve the people and must work to inspire their trust and confidence. Finally, citizens must understand their rights and obligations under the law and how to seek a remedy if their rights are violated.

**SAFETY AND SECURITY:** Citizens should feel that they and their property are safe and secure. They should be protected from violence and abuse.
IX. Endnotes


11. Inspiration for this definition was found in UK Department for International Development, Justice and Accountability Briefing Note (London: UK Department for International Development, 2008), 12.

12. Ibid., 3.


14. UK Department for International Development, Justice and Accountability Briefing Note, 3.


16. Ibid., 16.


23 The principle is recognized as a right in the International Covenant on Civil and Political Rights, 999 UNTS 171, article 15; the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 22, article 7; and the American Convention on Human Rights, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25, article 9.
26 Ibid.
30 The principle of “equality before the law” is recognized in various international and regional human rights treaties (e.g., the International Covenant on Civil and Political Rights, 999 UNTS 171, article 26, and the Inter-American Convention for the Protection of Human Rights and Fundamental Freedoms, article 24).
33 International Covenant on Civil and Political Rights, 999 UNTS 171, article 26.
35 See e.g., the International Covenant on Civil and Political Rights, 999 UNTS 171, article 14(1).
41 International Bar Association, Minimum Standards of Judicial Independence, ¶ Paragraph 1(b).

Ibid., 63.
Ibid., 64.
Ibid.
Ibid.
Ibid., 68.


Tyler, Why People Obey the Law, 137.
Ibid., 150.
Ibid., 175.

Ibid.

The right to a “fair” hearing is set out in a number of international and regional human rights instruments, including Article 10 of the Universal Declaration of Human Rights; Article 14(1) of the International Covenant on Civil and Political Rights; and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.


Bingham, The Rule of Law, 48.
Ibid., 60.
Ibid., 50.


Tyler, Why People Cooperate, 139.


International Covenant on Civil and Political Rights, 999 UNTS 171, article 25(a).


Tyler, Why People Cooperate, 43.


Ibid.


Tyler, Why People Obey the Law, 25.


77 Murphy, “Another Look at Legal Moralism,” 50-56.

78 Ibid., 50, 52.


82 Ibid.

83 Ashworth, Principles of Criminal Law, 44-45.

84 Tyler, Why People Obey the Law, 5.


86 Tyler, Why People Obey the Law, 163.

87 Tyler, Why People Cooperate, 94.

88 Ibid., 93.

89 The right to a “fair” hearing is set out in a number of international and regional human rights instruments, including Article 14(1) of the International Covenant on Civil and Political Rights and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.


93 Ibid.


102 United Nations General Assembly, “Secretary-General Proposes Strategy.”
103 International Covenant on Civil and Political Rights, 999 UNTS 171, Preamble.