

The role of parliaments in the protection and realisation of rule of law and human rights

Monday 7 September, 13:30 – 14:45, Session 3: what should the content of any principles and guidelines?

1. The Rule of Law Guide

In 2012, the Institute I lead – HiiL Innovating Justice, together with the Raoul Wallenberg Institute published a *Rule of Law Guide for Politicians*. The purpose of the Guide was to set out in as clear and simple terms as possible what rule of law is. As the title suggests the target group is politicians – including the parliamentarians that are the topic of this conference. In preparing the Guide we had the help of the *Interaction Council of Heads of State and Governments* and the *Inter-Parliamentary Union*. The main driver behind making the guide was Hans Corell, former Legal Counsel of the UN and a great rule of law leader and also a member of one of Boards of my Institute. Dr. Ronald Janse – now an associate professor and the University of Amsterdam, was the main author. Thanks to Hans's drive, the Guide has now been translated into 15 languages (including for example: Arabic, Russian, Spanish, Chinese, and Kiswahili). We continue to work on more translations.

The Guide sets out what rule of law *is* and also contains special pointers for politicians, including parliaments. To name a few: making sure that laws are made public and known, that new laws are consistent with existing laws, that drafting is good, that laws don't contain retroactive elements, that civil society organisations are involved, and that parliamentarians act within the framework of checks & balances and respect for the roles of the executive and judiciary.

Thinking more about the topic of this conference I must also confess that I found it hard to think of many examples that I have been involved with where parliaments – as institutions – were *the* catalyst for drastic rule of law change. What I have mostly seen is parliaments that

- are under resourced with very little capacity of its members to really *know*

- far too close to the executive
- are not all that present in serious debates
- have a tendency to define democracy as ‘the winner takes all’
- ride the waves of Twitter based populism with little anchoring in rule of law or that make it an afterthought
- that are clientelistic and involved in corruption

These are not nice things to say. I share them with the proviso that I have seen amazing and courageous MP’s on the rule of law frontlines.

I would like to now use the remainder of the 10 minutes I was given to take 2 steps:

- Firstly, recap a few things about what I think we know and do not know about developing rule of law.
- From that, I would like to offer a few thoughts on the value of guidelines and how they might be further developed.

2. What do I think we know and do not know about bringing rule of law?

I will highlight five things.

1. *Developing rule of law is inherently a political and not a technical process.* Bringing laws and training judges is not the same as building roads. One of the key functions of a legal system is to mitigate power. If you start developing rule of law you start tinkering with power. Some will win and others will loose. It is conflictuous, almost by its very nature. For far too long, rule of law and human rights development has been seen as a technical process of ‘simply’ training judges and lawmakers, writing better laws, and building case management systems.
2. *We are learning but we don’t know enough about how rule of law develops (or not), takes root (or not).* In the Guide we tried to make rule of law simple. That was the point of the book. But think about how many *millions* of things need to come together in exactly the right way to make rule of law work? Some magical mix of *good laws, known laws, good government* and a system within which those laws *function, well trained policemen and judges, free media, good*

schools, a sense of community, social glue, a sense of belonging, a basic living standard, faith, health, trust, and a whole lot more. So rule of law is a huge thing. And yet we all use that one concept: rule of law. So whatever we do: modesty is in order. A riddle I came across through regular visits to Mali, this year. The international community has assessed that it does not have a well-developed rule of law. A nation wide justice needs and satisfaction survey we conducted last year shows that there are many justice journeys that are don't work. Separation in a broken marriage, getting an inheritance sorted out, or having a conflict with your employer: the survey tells us these justice journeys have serious flaws and it also tells us where. At the same time: Bamako is the safest African capital city I know. I can walk around there at midnight, with a full backpack and wallet. What makes that happen?

3. *Too often, we get lost in concepts.* Efforts to developing rule of law too quickly get lost in institutional strategies that put a concept (like 'rule of law' or 'independent judges') at the core of what is being done, rather than the goal of rule of law: the nuts and bolts of delivering justice and guaranteeing freedoms to citizens and their organisations.
4. *Too much of what is done is based on beliefs, inadequate assessments, and insufficient learning.* We lack data. We don't use data. The UK Independent Commission for Aid Impact and the OECD have recently made that point again. Only in the last decade have we seen the emergence of some serious data around justice and rule of law. The Rule of Law Index of the World Justice Project is an impressive example: it provides a very good benchmark and tracking mechanism for the quality of a rule of law system. Our institute has developed a Justice Needs and Satisfaction tool, which collects data on justice needs and the quality of justice journeys of citizens. That tool is now being used in Mali, Yemen, Uganda, Indonesia, Ukraine, the UAE, and The Netherlands. We can know much more about how the users of a justice system - the customers - perceive the system. In Yemen we learned that consumer problems were one of the most frequent justice problems for urban citizens, and yet: nobody was doing anything in that field. Data from users does one other important thing: it puts

- the challenges of *users* at the center of strategy design, not concepts and institutions. But collecting data is not enough: our experience has been that donors and recipient countries lack the capacity to use data in their programming. Sometimes, they even lack willingness.
5. *Grand design does not work*. Research shows that ambitious multi-year plans with Big Targets rarely deliver results. Smaller, more open, iteratively developed plans with well-designed (data-based) learning loops are generally more effective. But donors can't really work like that; big design is politically more attractive and administratively easier to sell. Smaller projects entail more overhead and they make less headlines.

3. What can this tell us about the value of guides and guides we may want to develop in the future?

Four things:

1. The five points I just listed must, first and foremost, make us *modest* about the value and impact of guidelines. They have an important role, but what they deliver will never be instant, easy, and straightforward. They need to be made and worked with in a mix with many other things. And they must take into account the lessons we are learning about rule of law development.
2. Secondly, I think we should put more thinking in guidelines about *change processes themselves*. It's one thing to know what *ought* to be done, it's quite another to *do* it. What 'guidelines' can be offered there on change processes?
 - a. *Politically*: can we say more about the political processes that can lead to more rule of law? What stalls those processes? What increases chances of success? Our institute has taken a step in that regard. Together with the Dutch Ministry for Foreign Affairs we assembled in the Peace Palace a carefully selected group of justice leaders at the highest political levels (people who were or had been minister, chief justice, attorney general, and the like) from the main geographical regions of the world, who had all led or were leading impressive justice change. We asked them: what is justice leadership? What

difference can it make? Is it different from other forms of leadership? And if it is, how can it be promoted? There was unanimous agreement that justice leadership is not your average leadership and that it can make a big difference. Out of that meeting the Justice Leadership group was set up this year, modeled after the Elders. It brings together now 8 justice leaders (the group will grow – and can include MPs) who work to provide out of sight coaching, diplomacy, and mentorship to justice leaders at the higher levels of government. We have one concrete case in which this has started. The Foundation will also work to promote research and understanding of the role of leaders in justice change processes. [see www.justiceleadership.org]

- b. *More operationally*: Assuming you have a parliament that works hard for rule of law change and gives you budgets to do it, assuming there is true a justice leader as minister: what does the proverbial director general do to achieve innovation and change around concrete justice needs like the ones the women of Mali told us about? I call that justice innovation. Within the Global Agenda Council on Justice of the World Economic Forum, which I co-chair with Chief Justice Mutunga of Kenya, we have made this notion a core element of our work programme. In a book we published in 2013 – *Innovating Justice* - we worked to bring some of these lessons together. One of the key lessons we learned from researching that book is that putting problems at the core generally works better than putting a rule of law concept at the core. So: working on better procedures for separation after broken marriages is more useful than working to enhance the independence of the judiciary. The latter should be part of the former effort. Another lesson is: it can be a long way from a good idea to a good idea supported by a sustainable funding model. Lawyers generally think about funding models last – which is often too late.
3. We can also think about how we can include data about the rule-of-law-ness of countries, institutions, and processes in guidelines, and how politicians might obtain such data and work with it. Data –

especially data on experiences of users – is a great asset in justice change processes.

4. **Technology** has a lot of innovation to offer. In that sense I have been thinking about turning our Guide into an App. It will be easy to access and carry with you. In addition this will allow us to include much more functionality: adding more layers of specific information, links to local sources, data, etc.. We might also think about guidelines for *processes* that help develop rule of law. This will be something we'll look at with the Justice Leadership Foundation.

Thank you.