Growing Political Will From the Grassroots: How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions

Fran Quigley

Available at: https://works.bepress.com/fran_quigley/1/
Growing Political Will From the Grassroots: 
How Social Movement Principles Can Reverse the Dismal Legacy of Rule of Law Interventions 

Fran Quigley* 

ABSTRACT 

The international community’s efforts to promote the rule of law and human rights in developing countries have been largely unsuccessful, a record of disappointment typically attributed to a lack of political will for reform in the host societies. As a result, an estimated four billion people worldwide are without access to human rights associated with the rule of law, and suffer without recourse from discrimination, theft, and physical and emotional harm.

It is time for rule of law promoters to draw upon the lessons of social science, particularly the study of social movements. This article represents the first effort to view the challenge of instilling political will for law reform through the prism of social movement theory and its analysis of events like the U.S. civil rights movement, the South African anti-apartheid movement and the Eastern European democracy movement.

This social movement analysis reveals substantial reason for optimism about achieving significant law reform in developing countries. Rule of law promoters must re-orient their approach and begin supporting the existing and evolving grassroots law reform organizations which mirror in key respects the organizations that have proven to be the catalysts for change in social movements. Properly supported, these organizations can grow and nurture the political will for access to justice so desperately needed by billions of people in the developing world.

TABLE OF CONTENTS 

I. Introduction—Leah J. and the Missing Rule of Law 
II. The Popular Yet Elusive Rule of Law 
   a. Historic Support for Rule of Law 
   b. Rule of Law Defined 
   c. Investment in the Rule of Law—Late 20th and early 21st Centuries 
III. The Law as Paper Tiger—The Case of Kenya 
   a. Strong De Jure Rights Protections 
   b. De Facto Lawlessness 
IV. The Widespread Failure of Efforts to Develop Rule of Law 
   a. Top-Down Efforts to Instill the Rule of Law 
   b. The Lack of Political Will for Reform 
V. Growing Political Will for Law Reform: Applying the Lessons of Social Movements 
   1. Political opportunities for challengers 
   2. Forms of organization allowing mobilization, 
   3. Framing of grievances
4. Repertoires of contention
   VI. Conclusion—Leah J. and Access to Justice

   

   Introduction

   Leah J. is a slender 30-year-old Kenyan woman who is the mother of two children, a
daughter age six and a son age nine. In August of 2007, her husband, who was HIV-positive like
Leah, died. The day she buried her husband on the land of their rural home in the Kerio South
region, Leah’s father-in-law walked up to her and insisted that she and the children leave
immediately. Her sisters-in-law sneered to Leah, “We do not have enough land to bury you here,
too.”

   In soft Kiswahili, Leah tells how she and the children fled to the city of Eldoret and
stayed in the homes of whatever friends would take them in for a few days. Her husband had not
left a will, and she could not gain access to his small pension from his work as a police officer, or
to a bank account he had held. Leah could not find work, and she and the children were often
hungry and without food. Leah routinely was separated from the children when there was not
enough room for everyone at a friend’s home. She could not afford mandatory school uniforms
or lunch fees, so the children attended school only sporadically. Leah soon learned that her in-
laws were trying to sell some of her husband’s land.¹

¹ Interview with Leah J. in Eldoret, Kenya (Jan. 8, 2009).
According to the laws of Kenya, none of this should have happened. The country’s Law of Succession Act clearly states that, as the surviving spouse, Leah had a life interest to her husband’s land and other property.\(^2\) Kenya is party to a wide array of human rights treaties addressing property rights, guaranteeing due process and prohibiting gender discrimination.\(^3\) International agencies, including the World Bank, the U.S. Agency for International Development (USAID), and the United Nations Development Program (UNDP), along with many international non-governmental organizations, have spent significant resources in Kenya and throughout the developing world in efforts to promote the rule of law. These efforts include billions of dollars devoted to building court facilities, buying equipment, and training judges, legislators, and police on the rule of law and human rights.\(^4\)

But when Leah’s legal rights were violated, she could not afford access to a lawyer or the courts, and the police and other government officials were not available to intervene to protect her or her children. For Leah, the *de jure* law respecting her rights was a mere paper tiger, and all the treaty signatures and investment by the international community in Kenya’s rule of law had

---


zero effect. Her story is echoed in the experiences of billions of other people in the developing world who are no closer than Leah to achieving access to justice, and as a result suffer through poverty, physical harm and emotional humiliation.\(^5\)

To date, the international community’s efforts to instill the rule of law and human rights in developing countries have been guided by the disciplines of law and economics.\(^6\) But these law reform initiatives have been largely unsuccessful, a record of disappointment typically attributed to a lack of political will for reform in the host countries. Since law and economics have been demonstrably unable to solve the problem of missing political will, it is time for rule of law implementers to draw upon the lessons of sociology, particularly the study of social movements. This article represents the first effort to view the challenge of instilling political will for law reform through the prism of social movement theory, which provides a fresh yet historically and theoretically sound approach to achieving the worthy goal of growing the rule of law and human rights in developing countries.\(^7\)

Part One of this article will summarize the significant historical and theoretical support for the concept of the rule of law, which has led to billions of dollars of investment in

---

\(^5\) COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, AND UNITED NATIONS DEVELOPMENT PROGRAMME, MAKING THE LAW WORK FOR EVERYONE 19 (2008) (estimating that four billion people worldwide are excluded from the rule of law.)


\(^7\) In this article, the use of the metaphor of “growing” political will for the rule of law is an intentional choice over similar terms such as “building” or “implementing” the rule of law. As this article discusses, rule of law efforts have traditionally been dominated by the literal act of building courthouses and other physical or procedural structures based on an external vision for how justice should be applied in developing countries. The study of social movements shows that much better results are likely to be obtained when efforts focus on nurturing the natural process of indigenous advocates employing their superior understanding of local conditions to “grow” their own version of law reform.
programming devoted to promoting human rights and the rule of law in developing countries. Part Two will review the situation in Leah J.’s home country of Kenya as a case study of how the prevailing formal law and human rights treaties have little or no impact on the lives of most of the country’s citizens, especially women and the poor. Part Three outlines the largely unsuccessful record of the prevailing approach to developing rule of law, an approach that focuses on state institutions and a top-down method for promoting reform. Most rule of law practitioners and commentators blame that record of failure on a lack of political will to embrace the called-for changes in the host countries. Finally, Part Four explores how the principles derived from the sociological study of social movements can be applied to create more effective strategies for promoting the rule of law and human rights. That social movement analysis shows there is substantial reason for optimism about achieving significant law reform in developing countries. If rule of law promoters can re-orient their approach toward the support of existing and evolving grassroots law reform organizations, these organizations can grow and nurture the political will for access to justice so desperately needed by Leah J. and billions of others.

I. The Popular Yet Elusive Rule of Law

The “rule of law” has long been considered to be the ideal format for governance that limits state power in an economically and socially efficient manner. Despairing of the likely supply of philosopher-kings, Plato endorsed the rule of law: “If law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.” The Magna Carta famously promised that no

---

free man would be imprisoned or his property seized “except for lawful judgment of his equals or by the law of the land.”⁹ Max Weber wrote extensively on the role that stable, predictable law plays in enabling economic transactions leading to growth and prosperity.¹⁰ In modern western democracy, there is no more enduring maxim than the John Adams-drafted statement in the Constitution of Massachusetts directing that the commonwealth would be a “government of laws and not of men.”¹¹ Even the Marx-influenced 20th century historian E.P. Thompson boldly pronounced the rule of law as “an unqualified human good.”¹²

Yet this broad and enduring agreement on the value of the rule of law has not led to any similar consensus on what exactly the rule of law entails.¹³ The World Bank, the key actor in contemporary rule of law programming, articulates a four-part test:

One, the government itself is bound by the law;

Two, every person in society is treated equally under the law;

---

⁹ MAGNA CARTA Clause 39 (1215)


¹¹ MASS. CONST. Part 1, Art. XXX

¹² E.P. THOMPSON, WHIGS AND HUNTERS 266 (1975) (“...the rule of law itself, the imposing of effective inhibitions on power and the defence of the citizen from power’s all-intrusive claims, seems to me to be an unqualified human good.”). However, Thompson never backed away from his lifelong insistence that unjust laws need to be challenged. See, e.g., Daniel H. Cole, “An Unqualified Human Good:” E.P. Thompson and the Rule of Law, 28 Journal of Law and Society 177, 197 (2001).

Three, the human dignity of each individual is recognized and protected by law; and

Four, justice is accessible to all.¹⁴

The debate over the meaning of the rule of law tends to come down to the question of whether the law invoked is “thick,” encompassing broad social and economic goals, or “thin,” meaning a narrow guarantee of specific and predictable procedure.¹⁵ Although a minority of scholars see the rule of law as a “thin” procedural phenomenon—where clear and enforceable laws meet the criteria as long as there is some minimal restraint on the power of the state¹⁶--most contemporary definitions of rule of law include respect for and enforcement of basic human rights¹⁷ and most rule of law and development actors now encompass within their plans a broad range of social objectives like health, education and gender equality.¹⁸

---


¹⁶ See, Joseph Raz, The Rule of Law and Its Virtue, in LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY, 291 David Dyzenhaus, Arthur Ripstein eds. (Toronto Studies in Philosophy, 2007) ("The rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise) human rights of any kind or the respect of persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequities and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened western democracies. This does not mean that it will be better than those western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.") See also, Brian Tamanaha, The Lessons of Law and Development Studies, 89 Am. J Intl. Law 470, 476 (1995).

In the 1960’s, as many countries made the transition from colonialism to independence, a “law and development” movement emerged. The movement was based on the concept that the rule of law would be an economic building block for these new nations, with human rights and democratic development “spilling over” from economic growth.\textsuperscript{19} As a U.S. law professor who was one of the law and development promoters from that era says now, the premise was that the U.S. model for legal structures could and should be “transplanted” to other nations, chiefly through systems of legal education: “If we could reform Chilean legal education to make it just like ours, it was assumed this would provide what was wanted.”\textsuperscript{20}

By the early 1970’s, this jurisprudential paternalism had proven so unsuccessful that it was discredited by even its own original proponents, most notably Marc Galanter and David Trubek in a \textit{Wisconsin Law Review} article revealingly entitled “Scholars in Self-Estrangement,” in which they pronounced the law and development model as “naïve and ethnocentric.”\textsuperscript{21}

\begin{footnotesize}
\begin{enumerate}
\item Since the Bank and others come to the rule of law question from a perspective focused on its economic value, it should be noted that human rights may have tangible economic value, since there is evidence of a strong empirical link between civil liberties and the performance of government projects. \textit{See}, Jonathan Isham et al., \textit{Civil Liberties, Democracy and the Performance of Government Projects}. 11 The World Bank Economic Review 219 (1997).
\item David Trubek, \textit{The “Rule of Law” in Development Assistance: Past, Present and Future} in Trubek and Santos, \textit{id.} at 74, 78.
\end{enumerate}
\end{footnotesize}
In the early 1990’s, law and development made a big comeback under the guise of “the rule of law” or “law reform,” a foundation of the aid strategies of major international development investors, including most notably the World Bank, the Inter-American Development Bank, the United Nations Development Program, and bilateral programs such as the U.S. Agency for International Development. The key theoretical impetus for rule of law efforts during this era came from the neoliberal perspective, often referred to as “the Washington Consensus,” which held that private-sector economic development was enabled by strong government institutions providing consistent enforcement of laws, especially in areas of contract and legal title to property. Indeed, despite the involvement of the global north legal community

22 I will use the terms “rule of law” and “law reform” interchangeably throughout this article in referring to these development interventions, and will follow the prevailing practice in development discussions, see note 14, of considering these terms to include the concepts of basic human rights, especially freedom from discrimination on the basis of gender or ethnicity, access to judicial systems, and legal accountability of state actors like the police.


26 USAID, GUIDE TO RULE OF LAW COUNTRY ANALYSIS: THE RULE OF LAW STRATEGIC FRAMEWORK supra note 17 at 14.

through such programs as the American Bar Association Rule of Law Initiative, it is economists and not lawyers who have been the chief source of talking points for the current wave of rule of law promotion.

Likely, the most widely recognized of the current rule of law proponents is the Nobel laureate economist Amartya Sen, who asserts that development is a concept that goes beyond mere economic well-being to embrace political freedom and social opportunities. A personal witness to the devastating Bengal Famine of 1942, Sen made one of his most compelling arguments for individual freedom in his assertion that no nation with a functioning democracy and free press has ever suffered a famine. Since information flows freely in those settings and democratic governments must respond to the will—and, presumably, outrage—of the people, widespread suffering is averted.

Sen’s conclusion that freedom and economic and social well-being are inseparable components of a country’s development leads to his embrace of the rule of law:

It is hard to think that development can really be seen independently of its economic, social, political or legal components. We cannot very well say that the development process has gone beautifully even though people are being arbitrarily hanged, criminals

---


29 See, Larson-Rabin, supra note 20 at 218.


31 Id. at 51.

32 Id. at 178-186.
go free while law-abiding citizens end up in jail, and so on. This would be as counterintuitive a claim as the corresponding economic one that a country is now highly developed even though it is desperately poor and people are constantly hungry . . . (So) In answering the query, "What is the role of legal and judicial reform in the development process?", we must at least begin by noting the basic fact that legal development is constitutively involved in the development process, and conceptual integrity requires that we see legal development as crucial for the development process itself.33

Peruvian economist Hernando De Soto has made his own well-known argument for the rule of law, a distinctly capitalist celebration of the economic empowerment that flows from clear and enforceable property rights. DeSoto reviewed the challenges faced by the poor in Peru, Haiti, the Philippines, Egypt, and Mexico, and concluded that the poor people whom he observed were severely disadvantaged by the lack of coherent laws and structures governing property rights. The vacuum of verifiable title to property leads to the inability to obtain credit for assets like houses and small businesses, enforce contracts or conduct trade outside a very small network.34 De Soto said that the dysfunctional legal systems of most developing countries stifled entrepreneurship and growth, a point he dramatized by demonstrating that it took sustained effort for 289 days to legally open a small garment workshop outside Lima.35 De Soto found similar bureaucratic barriers in the other countries he studied, and concluded that clear and


35 Id at 18-20.
legally enforceable titles, along with transparent and straightforward licensing and contract mechanisms, were the keys to development for the poor and their countries.36 These same conclusions were echoed recently by the United Nations Development Programme’s Commission for the Legal Empowerment of the Poor, which was co-chaired by DeSoto and former U.S. Secretary of State Madeline Albright.37

These arguments by Sen, DeSoto, and others contributed to a surge in investment in multilateral and bilateral efforts designed to promote the rule of law. The Vice President and General Counsel of the World Bank reported in 2004 that the Bank had engaged in over 600 rule of law projects.38 One calculation that same year concluded that the World Bank alone had spent $2.9 billion on rule of law projects since 1990,39 a figure consistent with the Bank’s reporting of spending nearly a half-billion dollars per year on Rule of Law loans from 2003-2008, and almost $5.5 billion per year in a sector it labels “Law and Justice and Public Administration.”40 The U.S. General Accounting Office (which changed its name to the U.S. Government Accountability Office in 2004) reported in 1999 that the U.S. alone had spent $970 million on rule of law

36 Id. at 56-58.
37 COMMISSION ON LEGAL EMPOWEREMENT OF THE POOR, supra note 5 at 15.
40 WORLD BANK ANNUAL REPORT supra note 4 at 57.
programming, much of it in Latin America, in just one five-year period in the 1990’s. USAID reported having spent $14.3 million in “rule of law and human rights” in 2007. These agencies have claimed that their rule of law programming addresses not only economic development and human rights, but also poverty, democratization, and peacemaking.

Such broad claims for such significant investments have led to observations that the rule of law concept has been oversold. The rule of law is described, usually sarcastically, as “the motherhood and apple pie of development economics” and the “silver bullet” in development, the “holy grail” of good governance, “the preeminent legitimating political ideal in the world today,” aggressively touted “with missionary zeal” or hawked like “a product on late night television.” If Sen is the most cited of rule of law proponents, Thomas Carothers, vice president for studies at the Carnegie Endowment for International Peace, plays that role for the chorus of voices insisting that, despite the investment of rhetoric and dollars in “rule of law” efforts in developing countries, the emperor has very little covering:

42 USAID FISCAL YEAR 2008 AGENCY FINANCIAL REPORT supra note 4 at 16.
43 Samuels, supra note 23 at 3.
44 THE ECONOMIST, supra note 13.
46 Jensen, supra note 27 at 336.
49 Kleinfeld Belton, supra note 13 at 5.
Unquestionably, (rule of law) is important to life in peaceful, free and prosperous societies. Yet its sudden elevation as a panacea for the ills of countries in transition from dictatorships or statist economies should make both patients and prescribers wary. The rule of law promises to move countries past the first, relatively easy phase of political and economic liberalization to a deeper level of reform. But that promise is proving difficult to fulfill.\textsuperscript{50}

Although it generally is agreed that elements of the rule of law are positively associated with economic development,\textsuperscript{51} there is very little in the way of rigorous evaluation of the billions of dollars in investments in rule of law programming.\textsuperscript{52} Carothers and others have pointed out that there is scant evidence that the expensive efforts in recent decades to implement the rule of law have succeeded in improving either the economic or the political climate in the host countries.\textsuperscript{53}

\footnotesize{\textsuperscript{50} Carothers, supra note 6 at 95.}
\footnotesize{\textsuperscript{52} See, Linn Hammergren, \textit{International Assistance to Latin American Justice Programs: Toward an Agenda for Reforming the Reformers}, in BEYOND COMMON KNOWLEDGE, supra note 27 at 301, Samuels, supra note 23 at 15, Jensen, supra note 27 at 361-65.}
II. Law As Paper Tiger—The Case of Kenya

From her vantage point in rural Kenya, Leah J. would no doubt agree with the skepticism about the impact of rule of law interventions. Although there is justifiable concern about the absence of rule of law in the developing world as a whole, it is useful to zoom in to look at the example of how rule of law and human rights exist—or don’t—at ground-level in Kenya.

In terms of economic development and civic freedom, Kenya is below-average but not among the globe’s very worst performers. Kenya ranked 144th out of 180 countries in the Human Development Index published by the United Nations Development Programme in 2008, and is listed as “Partly Free,” compared to 42 countries listed as “Not Free,” in Freedom House’s 2009 rankings of political rights and civil liberties.54

However, Leah J.’s home country offers a stark example of discordance between the law on paper and the true application of rights on the ground. On paper, the situation looks promising: Kenya has a formal court system that dates back to its colonial roots, and decides cases based on Kenyan statutory law, Kenyan and English common law, tribal law, and Islamic law.55 Its formal judicial system consists of five levels of Magistrates’ Courts, a High Court, and

---


a Court of Appeals. Magistrate courts handle about 90% of the cases before the judiciary. Customary law of ethnic groups is allowed to apply in civil cases only if it is not “repugnant to justice and morality or inconsistent with any formal law.” Kadhis’ courts rule on the basis of Sharia law and work alongside magistrates in areas with a significant Muslim population.

Kenya is a party to the International Covenant on Civil and Political Rights, which prohibits discrimination on the basis of gender, mandates fair criminal procedures, and insists on equal rights during and after marriage. Kenyans are guaranteed these and a generous variety of other rights by virtue of their country’s acceding to the International Covenant on Economic, Social and Cultural Rights, the African Charter on Human and People’s Rights, and the Convention on the Elimination of all forms of Discrimination Against Women. Kenya’s constitution includes guarantees of protection against gender discrimination and a prompt and

56 Id.
58 The Judicature Act, Cap. 8, Sec. 3(2) (Kenya) (1977).
59 The Kadhis’ Courts Act, Cap. 11 (Kenya) (1967).
60 International Covenant on Civil and Political Rights, supra note 3 at Art. 26.
61 Id. at Arts. 9, 14.
62 Id. at Art. 23.
64 CONSTITUTION, Chap. V, Sec. 82 (1997) (Kenya). However, this provision goes on to contradict the spirit of its broader language by excluding the anti-discrimination guarantee from applying in family law, succession cases and instances where customary law applies, leading one commentator to conclude that “the result is that at no time are (Kenyan) women guaranteed protection from gender-based discrimination.” Bonita Ayuko and Tanja Chopra, The Illusion of
transparent adjudication of criminal charges, and its statutes clearly prohibit assault, which can include domestic assault, and protect rights of inheritance by widows and daughters.

Amidst much fanfare, the Kenyan government in 2006 enacted the Sexual Offences Act criminalizing rape and sexual harassment, and the attorney general promised an ambitious program of training for police and judges on the new law.

But despite these substantial affirmations of justice, the rule of law has little application in the lives of most Kenyans, and the human rights which are so repeatedly and openly promised in official documents are largely absent in reality. Women in particular suffer from a lack of legal protection, as domestic violence, sexual assault, forced marriages, land theft, and

---

65 Id. at Sec. 83.
66 Penal Act Cap 63, Sec. 251 (Kenya) (2003).
67 The Succession Act, Cap. 160 (Kenya) (1981). The Succession Law does contain key limitations, however, including a bar on widows being the sole administrators for their husbands’ estates and allowing exemptions to certain communities, including Muslims, based on tradition. Id. at Sec. 2.
68 Country Report on Human Rights Practices, Kenya 2007 (U.S. Department of State, Washington D.C.) 2008. The Sexual Offense Act does contain a disturbing “poison pill” that may discourages full reporting: if a complaint is found to be false, the complainant is subject to punishment equal to the offense originally alleged. The Sexual Offenses Act, Act 3 of 2006, Sec. 38 (Kenya) (2006). A great deal of faith in the judicial system is necessary for a victim to risk that kind of boomerang result by coming forward to file a complaint.
70 State Department supra note 68.
economic exploitation are all perpetrated against Kenyan women with near-impunity. Female circumcision is prohibited by law, but remains a routine practice in many Kenyan communities. Women perform an estimated 80% of Kenya’s agricultural work, but own only 5% of the land. After an extensive 2002 investigation, Human Rights Watch reported of Kenya, “(Women’s) rights to own, inherit, manage, and dispose of property are under constant attack from customs, laws and individuals who believe that women cannot be trusted with or do not deserve property.”

Leah J.’s case discussed at the beginning of this article represents a disturbingly common phenomenon that occurs when a Kenyan widow, often left with young children after a husband succumbs to HIV/AIDS, either is forced to marry her brother-in-law or is driven off the land necessary to support her family. In Kenya, gender-based violence is disturbingly common, but

---


73 See, *Justice for the Poor-Kenya* (World Bank, Washington DC) 2008. (“Under official law, women have the right to inherit land from their fathers and deceased husbands, but cultural, informational and institutional barriers often prevent women from claiming those rights. As a result, women are increasingly marginalized and pushed into extreme poverty . . . Gender discrimination in the formal labor sector persists because women’s earnings are less than men’s, women and men are occupationally segmented (and) women often work under poor conditions.”)

74 Ayuko and Chopra, supra note 64 at 23.

75 Ngondi-Houghton, supra note 72 at 27.


successful prosecution of the crime is disturbingly rare. A hospital-based advocacy program in western Kenya that supports survivors of gender-based violence as they pursue criminal charges recently reported little success in several dozen cases. Even after advocates convinced police to waive their typical fees charged to persons wishing to file the report of a crime, women who had survived assault faced a cumbersome bureaucracy, allowance of alleged perpetrators to re-contact and intimidate survivors, and indifference of police and prosecutors.78 A recent review of women’s legal status in the pastoralist societies in northern Kenya reported rampant domestic violence, but such pervasive police indifference to the crime that women said they had stopped bothering to report when they were assaulted.79 The same study concluded that women’s lack of access to basic legal protections “demonstrates that the inclusion of women through international conventions, domestic legal reform and gender quotas in participatory processes is illusory.”80

Kenyan police are notorious for shooting criminal suspects81 and shaking down citizens for petty bribes.82 The Kenyan National Commission on Human Rights estimated there were 700 extrajudicial killings by police in 2007, and thirteen Nairobi robbery suspects were shot and killed in one day alone.83 Police rarely are arrested or prosecuted for excessive use of force.84


79 Ayuko and Chopra, supra note 64 at 14.

80 Id. at 7.


83 State Dept., supra note 68.
The Kenyan court system suffers from enormous case backlogs,\textsuperscript{85} with as many as a million cases pending in 2008 and 300,000 sitting before Nairobi’s high court alone.\textsuperscript{86} The judiciary is plagued by undue influence from the executive branch\textsuperscript{87} and a reputation for overall corruption.\textsuperscript{88} Despite the Ministry of Justice’s dismissal of 23 judges for corruption in 2003,\textsuperscript{89} the African Union’s African Peer Review Mechanism in 2006 still found “a visible lack of independence of the judiciary” in Kenya.\textsuperscript{90} That conclusion was not surprising, given that the President of Kenya has regularly wielded his power to transfer judges to unattractive outposts when he disapproves of their rulings.\textsuperscript{91}

\textsuperscript{84} Auerbach \textit{supra} note 92 at 292.

\textsuperscript{85} State Dept., \textit{supra} note 68.

\textsuperscript{86} COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, \textit{supra} note 5 at 32.


\textsuperscript{88} \textit{Id.} See, also, The Kenya Bribery Index 2007 (Transparency International, Nairobi) 2007 at 12 and Tanja Chopra, Reconciling Society and the Judiciary in Northern Kenya (Justice for the Poor/Legal Resources Fdn. Trust) 2008 at 16.

\textsuperscript{89} Marc Lacey, \textit{A Crackdown on Corruption in Kenya Snares Judges}, N. Y. TIMES, October 26, 2003.

\textsuperscript{90} State Dept. \textit{supra} note 68. See also Matthews, note 87 at 570 (visiting U.S. attorney who attempted to practice in Nairobi in 2006 and 2007 pronounced the judiciary she encountered “plagued by corruption, improper influence and partiality.”)

\textsuperscript{91} Mary A. Ang’awa, \textit{A View From Kenya}. Winter 2009 Human Rights 23 (Kenyan High Court judge reports being transferred to distant outpost after supporting judicial independence reforms.) See, also, Matthews, \textit{supra} note 87.
The civil courts are generally off-limits to the poor, who cannot afford either filing fees or hired counsel. The financial bar to formal courts leaves most aggrieved parties with no alternative but the customary system, Islamic courts, or appeals to chiefs or elders. While these forums can often produce just results, cultural biases against the rights of women, for example, can make them an inadequate substitute for formal adjudication. Indigent criminal defendants are not appointed counsel unless they are accused of a capital crime. But those few defendants who can afford counsel are often acquitted because the police, not attorneys, handle most of the court prosecution duties. Kenya’s prisons are violent, overcrowded, and the site of

---


93 Open Society Institute, supra note 69 at 22, 24. It should be noted that the United States, whose judicial system is often held up as a model for developing countries to emulate, also largely fails to insure counsel for the poor in civil legal matters; see, e.g. Debra Gardner, Justice Delayed Is, Once Again, Justice Denied: The Overdue Right To Counsel In Civil Cases, 37 U. Balt. L. Rev. 59 (2007), has significant problems assuring competent counsel to indigent criminal defendants, see, e.g., Mary Sue Backus & Paul Marcus, The Right to Counsel in Criminal Cases, A National Crisis, 57 Hastings L.J. 1031 (2006), is criticized for an over-politicized judiciary, see Upham supra note x at 32, and for adopting a post-September 11, 2001 “monarchical” presidential model. See, Karen E. Bravo, Smoke, Mirrors, and the Joker in the Pack: On Transitioning o Democracy and the Rule of Law in Post-Soviet Armenia, 29 Houston J Int’l L 489, 573 (2007).


95 See, Alloys Onomdi Namga v. Republic of Kenya, Case No. Criminal Appeal 7 of 2006, eKLR at http://docs.thecourt.ca/top_court_talk/omondi.pdf (November 24, 2006) (although Kenyan law does not specifically require appointment of counsel to indigent defendants in any case, it is custom in Kenyan courts to appoint such counsel to defendants accused of murder).

96 Chopra, Reconciling Society and the Judiciary, supra note 88 at 15.
unchallenged police torture,\footnote{State Dept., supra, note 68.} and the clogged court system compels many Kenyan criminal defendants to wait in those prisons for years before receiving a trial.\footnote{Robert Winslow, Crime and Society: A Comparative Criminology Tour of the World—Kenya, Available at \url{http://www-rohan.sdsu.edu/faculty/rwinslow/africa/kenya.html}}

Beyond the justice system, broader evidence of a missing rule of law was provided by the 2007 Kenyan presidential election, which non-partisan domestic\footnote{Kenyan Election Observers’ Log, Dec. 29-30, 2007 (Kenyans for Peace and Truth with Justice) 2008, available at \url{ftp://ftp.wizzy.com/pub/wizzy/kenya/KPTJelectionobs.pdf}} and international\footnote{Jeffrey Gettleman, Disputed Vote Plunges Kenya Into Bloodshed, N.Y. TIMES, Dec. 31, 2007.} election observers concluded was stolen by the incumbent Mwai Kibaki.\footnote{After the election, a joke which circulated in Kenya was based on the premise that the incumbent President and three others went into a room and all cast secret ballots to choose the next president, with the results to be tallied by the Election Commission appointed by the president. Who won this election, as the joke would have it? The incumbent president, by 11 votes.} Widespread ethnic and political violence followed the announcement of the disputed result, and over 1,000 people were killed and a half-million persons were internally displaced.\footnote{See From Ballots to Bullets (Human Rights Watch), 2008, available at \url{http://www.hrw.org/sites/default/files/reports/kenya0308web.pdf} (detailed account of the Kenyan 2007 election and post-election violence, and the involvement of political leaders in causing and stoking the turmoil.)}

As Kenyan High Court Judge Mary A. Ang’aaw wrote, the lack of faith in the justice system played a large role in the decent into chaos:

When the results were announced, the losers felt cheated and were angry. When they were told, “If you are not satisfied with the election results, go to court and challenge them.” They responded, “We have no confidence in the judiciary; we refuse to go to court.”
As a judicial officer of twenty-seven years at that time, fourteen on the High Court of Kenya, this remark cut me to the core. Instead of organized and rational legal intervention, violence broke out and the country burned.\textsuperscript{103}

Amnesty International, Human Rights Watch and other human rights organizations found significant evidence that much of the post-election violence was coordinated and supported by political actors, but no high-level leaders have been either arrested or prosecuted.\textsuperscript{104} The post-election violence followed a pattern of attack by one group and then retaliation by another, which is not an unfamiliar sequence in Kenya. Human rights observers blame this pattern of retribution, and the country’s history of mob attacks and violence connected to land disputes and alleged criminal behavior, on a prevailing lack of confidence in the Kenyan criminal justice system’s ability to bring perpetrators to justice.\textsuperscript{105} These ground-level conclusions are consistent with the findings by William Easterly that countries are at a greater risk of ethnic conflict if their governments cannot or do not enforce rule of law concepts like protection of minorities and property rights.\textsuperscript{106}

Kenya has been ranked in the bottom 16\% of global governments in the World Bank’s Governance Matters measures, which include evaluation of variables such as accountability,

\textsuperscript{103} Ang’awa, \textit{supra} note 91.

\textsuperscript{104} Human Rights Watch, \textit{supra} note 102.

\textsuperscript{105} See, State Dept., note 68. A recent survey showed that, in rural Kenya, only 7\% of the population says it reports disputes to the police, with the vast majority preferring instead to bring their complaints to chiefs, elders, or other informal venues. However, chiefs themselves are civil servants in Kenya and are empowered under law to maintain order in their jurisdictions. See, Chopra, \textit{Reconciling Society and the Judiciary}, \textit{supra} note 88 at 10 and The Chiefs Authority Act, Cap. 128, Sec. 6 (Kenya) (1997).

political stability, control of corruption and rule of law. Kenyan human rights lawyer Dr. Connie Ngondi Houghton told the country’s Commission on Legal Empowerment of the Poor in 2006, “The edifice of the legal and justice system . . . is not designed to cater to the interests of poor, women, children, refugees and other groups . . . The entire system is broadly insensitive and exclusionary.” Even Kenyan Vice President Stephen Kalonzo Musyoka, in September of 2008, conceded publicly that the majority of Kenyans have no access to justice through the courts.

III. The Widespread Failure of Efforts to Develop Rule of Law

In its discordance between abstract guarantees of justice and the lawlessness endured by the poor citizenry, Kenya represents the norm among developing countries, not the exception. Countries throughout Latin America, Africa, and Eastern Europe struggle to provide access to justice, and a recent review of African police forces found widespread corruption. Poor


109 Press Release, Republic of Kenya Office of the Vice President, Legal Aid and Awareness Scheme Launch (Sep. 18, 2008).


police response, predictably followed by vigilante justice, occurs in much of Africa.\textsuperscript{112} The Kenyan government is not alone in largely ignoring the human rights treaties it has pledged to uphold. Of the 42 countries that Freedom House rated as “Not Free” in its 2009 rankings, all but seven are parties to the International Covenant on Civil and Political Rights.\textsuperscript{113} A study of African Union states members’ responses to recommendations of the African Commission on Human and People’s Rights from 1994-2004 showed an overall lack of compliance with the recommendations.\textsuperscript{114} Oona Hathaway’s quantitative analysis found no human rights treaty for which ratification by a country was associated with that country’s engaging in better human rights practices, and several treaties where ratification was actually associated with worse practices.\textsuperscript{115}

Rule of law programming has been largely designed as a “top-down” approach to achieving legal reform, with the focus of intervention being on state institutions and the elites of the justice system. The World Bank vice president has formally announced that since “judges are the key to an effective and efficient legal system, the Bank's activities concentrate on judicial training; judicial codes of conduct; evaluation and discipline; qualification, appointment and


promotion of judges."¹¹⁶ The practical application of this strategy is that rule of law spending is dominated by intervention with the judiciary and other elite-level government actors.¹¹⁷ In development discussions, the term “law reform” is sometimes even literally equated with “judicial reform."¹¹⁸

The manifestation of this judiciary-centered approach is found in the significant expenditures on courthouse structures, equipment, judge training, and international judicial exchanges, with markedly smaller amounts set aside for grassroots interventions. World Bank staff admits that part of the allure of investing in court buildings and equipment is that they are expensive, and therefore help achieve the bizarre-but-true priority for Bank personnel: ensure that money is spent: “Disbursements are a primary indicator of a project’s progress,” writes Linn Hammergren, senior public sector management specialist in the World Bank Latin America Regional Department. “The task manager’s main concern, then, is to keep the money flowing.”¹¹⁹ For example, a nearly $70 million law reform project in Guatemala, funded by World Bank, USAID, and the European Union, among others, was dominated by court construction and judicial training.¹²⁰ The Bank evaluated the results of its investment as

¹¹⁶ World Bank Office of Legal Vice President, supra note 14 at 4.
¹¹⁷ See, Daniels and Trebilock supra note 51 at 30, 119, Carothers supra note 53 at 8, Trubek in Trubek and Santos, supra note 18 at 86.
¹¹⁸ Carothers, supra note 53 at 8. See, also, Jensen supra note 27 at 345.
¹¹⁹ Hammergren in BEYOND COMMON KNOWLEDGE, supra note 27 at 314. See, also Jensen supra note 27 at 350-51.
¹²⁰ Implementation and Completion Report on a Loan of U.S. $33 Million to the Republic of Guatemala for a Judicial Reform Project, (World Bank, Washington, DC) March 10, 2008 at 4-5. However, the report does note that USAID interventions in Guatemala, including 24-hour courts to address arrestee backlog, were successful. Id.at 43.
“moderately unsatisfactory,” using its official project completion report to candidly acknowledge the limited efficacy of money spent on buildings and seminars: “Although so obvious as to hardly bear mention, without counterpart buy-in, a judicial or institutional reform effort will not get far. It is the corollary to this statement that is more important: buy-in means not just accepting the donor contributions, but rather internalizing and actively pursuing the change goals behind them.” 121

Rule of law assistance strategy often includes support for direct legal services and funding for civil society advocates for legal rights, usually bundled under the heading of “access to justice” programming. But those investments are characterized by critics like Erick Jensen as “lip service interventions:” “Lip service interventions always find their way into donor reports, but they receive very little if any MDB (multilateral development bank) funding . . . Activities related to access to justice for disadvantaged sectors—women, the poor, lower castes—are always a part of the standard package, but more often than not, the very last part.”122 The World Bank appears poised to prove Jensen correct yet again in a forthcoming 2009 $40 million loan to Kenya, which the Bank and Kenya’s Chief Justice report will be focused on judicial administration, training and computerization.123

121 Id at 42.


Most observers have concluded that the recent decades’ rule of law efforts have been largely ineffective in achieving either meaningful legal reform or significant economic development, and the prevailing judiciary-centered approach has earned particular criticism:

A limiting and unsuccessful emphasis on “form” rather than “function” seems to have dominated much of the rule of law reform over the years. Programs have typically focused on institutional objectives and formal legal structures without a measured understanding of the political and economic dynamics that prevented such structures from existing in the first place. The focus on formal institutions has largely resulted in shell-like institutions, unenforced and poorly understood legislation, and judges and police with little commitment to the rights and values sought to be entrenched through the reform.

Similarly, Frank Upham compared the top-down rule of law approach to the Soviet Union’s failed economic model and bluntly pronounced the record of law reform as “dismal.”


125 Samuels, supra note 23 at 17-18. For other criticism of the institutional bias in approaching rule of law programming, see Carothers, supra note 53 at 12, Daniels and Trebilock, supra note 51 at 119, Golub supra note 122, and Maria Dakolias, Legal and Judicial Development: The Role of Civil Society in the Reform Process. 24 Fordham Int’l L.J. S26, S30 (2000-2001).

126 See Upham, supra note 51 at 6.
Indeed, empirical evaluations of judiciary-centered reforms have not shown significant positive effects on availability or efficiency of justice.\textsuperscript{127} Analyses of rule of law efforts in Latin America have shown that most programs there have had neither indirect effects on economic development or significant direct impact on the law as it applies to the people.\textsuperscript{128} The U.S. General Accounting Office concluded the U.S.’s extensive rule of law investments in the former Soviet Union were largely ineffective,\textsuperscript{129} a conclusion also reached regarding rule of law efforts in Kosovo.\textsuperscript{130} Karen Bravo labeled the adoption of new laws, a new constitution and the ratification of human rights treaties in Armenia, reforms generously supported by bilateral and multilateral aid and loans, as “smoke and mirrors” designed to hide corrupt elections and an increasingly autocratic system of government.\textsuperscript{131}

A defining characteristic of this formalistic approach to rule of law programming is its reliance on “transplants” of legal systems characteristic of the global north into developing countries, an approach whose well-chronicled failure in the 1960’s law and development era did not preclude it from being replicated just as unsuccessfully in later “rule of law” development

\begin{itemize}
\item \textsuperscript{127} Jensen, \textit{supra} note 27 at 358-59.
\item \textsuperscript{128} See Prillaman, \textit{supra} note 110 at 163-65. \textit{But, see}, Linn Hammergren, \textit{Fifteen Years of Judicial Reform in Latin America: Where We are And Why We Haven’t Made More Progress} (United Nations Development Programme, 1999) Hammergren, a World Bank and former USAID official, has argued in several venues that the Latin American rule of law programs have provided some value, but she is also candid about their flaws: “(T)he traditional, institutionalized remedies -- new laws, higher budgets, more courts, or massive judicial purges -- have not worked any miracles and occasionally have made things worse.” \textit{Id.} at 7.
\item \textsuperscript{130} Brooks, \textit{supra} note 48 at 2280, 2290-2301.
\item \textsuperscript{131} Bravo,\textit{supra} note 93 at 499, 517.
\end{itemize}
strategies. Efforts to transplant a theoretically high-functioning legal system into new postcolonial countries were and are mistakes of both hubris and strategy. Thomas McInerney is among many observers who argue that the countries’ own indigenous civil society leadership—which in most cases helped lead the struggle for independence—needed to be supported in its own efforts to grow and apply its own system of justice. “Inclusive and deliberate legal reform is the sine qua non of legitimate law and democracy,” McInerney writes. “The democratic process itself is necessary to determine the concept of rights.”

But rule of law funders have candidly admitted that their reform efforts have been regularly launched without the involvement of the non-elite public who the legal systems were designed to serve. Unsurprisingly, this top-down, ethnocentric approach to rule of law reform has not effectively engaged customary forms of dispute resolution by non-state actors like tribal councils, which are the forum for as much as 80% of cases in developing countries.

132 Trubek in Trubek and Santos, supra note 18 at 86 (discussion of failed “transplant” strategy during law and development era). See, also, Daniel Berkowitz et al., Economic Development, Legality and the Transplant Effect, 47 Eur. Econ. Rev. 165, 181-86 (2003) (quantitative analysis showing significantly lower levels in indicators for rule of law in countries where unfamiliar law was transplanted compared to countries which adapted legal systems that more closely resembled customary law.)

133 See, note 93 for discussion of the many ways in which purportedly model legal systems like the U.S.’s fails to measure up to rule of law ideals.

134 See, e.g., COMMISSION ON LEGAL EMPOWERMENT OF THE POOR, supra note 5 at 3. (“Reforms that are imposed, no matter how well-intended, rarely take root in society. To be recognized as relevant and legitimate by a broad majority of people, laws must be anchored in existing values, customs and structures, and also be consistent with human rights obligations.”)

135 McInerney, supra, note 124 at 124, 128.


preferred by many litigants,\textsuperscript{138} and are sometimes quite effective at resolving disputes.\textsuperscript{139} Although economists like DeSoto\textsuperscript{140} and Douglass North\textsuperscript{141} long ago identified the central role which the informal economy plays in the lives of the world’s poor, the formal approach to rule of law is not well-suited to address this critical sector.\textsuperscript{142}

One likely explanation for the dominance of this exceedingly formal, elite-focused approach to law reform is that rule of law programs are largely designed by lawyers from the global north, who have been criticized for a lack of background in the field of development.\textsuperscript{143} It appears these lawyers have been comfortable with the strategy of implanting a global-north style legal system onto another culture, and have preferred to pursue that strategy via court construction projects and convening meetings and seminars with elite judicial officers and government leaders.\textsuperscript{144}

In sum, rule of law scholarship reveals a remarkable degree of consensus that the recent decades’ interventions have largely failed. That scholarship also contains a remarkable degree of consensus as to the reason for the failure. The concluding diagnosis has been the inability to achieve “political will” for reform of existing legal systems which show little regard for human rights.\textsuperscript{145}

\begin{footnotes}
\item[\textsuperscript{138}] Commission for Legal Empowerment for the Poor, \textit{supra} note 108 at 6.
\item[\textsuperscript{139}] See Widner, \textit{supra} note 111 at 66. See also, Samuels, \textit{supra} note 23 at 18-19. But, see, Mwenda et al., \textit{supra} note 94. Ayuko and Chopra, \textit{supra} note 64 at 40 (such forums can apply entrenched biases against the rights of women.)
\item[\textsuperscript{140}] See, DESOTO, note 34.
\item[\textsuperscript{141}] See, DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 67 (1990).
\item[\textsuperscript{142}] COMMISSION FOR LEGAL EMPOWERMENT OF THE POOR, \textit{supra} note 5 at 17-19.
\item[\textsuperscript{143}] See Samuels, \textit{supra} note 23 at 21 and McInerney, \textit{supra}, note 124 at 117-18.
\item[\textsuperscript{144}] See, \textit{generally}, Barron \textit{supra} note 45 at 8, Carothers, \textit{supra} note 53 at 12-13.
\end{footnotes}
rights, transparency, and predictability of justice. United Nations leadership, western law professors, African grassroots legal activists, economists USAID, and the World Bank itself specifically identify political will as the chief barrier to achieving rule of law in developing countries. Even when the terminology varies, the conclusion is the same: The World Bank has conceded that social and political reform is needed to achieve law reforms, while some rule of law commentators refer to the need for “cultural change” or “deep societal changes,” and recognize that human rights guarantees are more dependent on political factors than on legal ones.

145 Commission for Legal Empowerment for the Poor, supra note 108 at 5.
146 Goodpaster, supra note 53 at 11.
147 Commission for Legal Empowerment for the Poor, supra note 108 at 6.
148 DeSoto, supra note 34 at 158-9 (“Implementing major legal change is a political responsibility . . . creating an integrated system is not about drafting laws and regulations that look good on paper but rather about designing norms that are rooted in people’s beliefs and are thus more likely to be obeyed and enforced.”)
149 Hammergren in BEYOND COMMON KNOWLEDGE, supra note 52 at 297.
150 See, supra, note 45 at 29.
151 Hammergen, supra, note 136 at 12 states that the ubiquitous references to political will in law reform discussions do not indicate an agreed-upon meaning for the term (“(Political will) is the slipperiest concept in the policy lexicon. It is the sine qua non of policy success which is never defined except by its absence.”) I disagree. In the rule of law context, the term seems to be used in a fairly uniform context: Political will represents the existence of empowered institutions or individuals, whether motivated by their own initiative or by outside pressure, committed to the principle that law restricts the state’s autonomy and delivers a responsibility for transparency, accountability and the protection of equity and human rights.
153 Dakiolas, supra note 125 at S27, Kleinfeld Belton, supra note 13 at 22, and Frank Emmert, Administrative and Court Reform in Central and Eastern Europe, 9 Eur. L.J. 288, 301, 304 (2003).
154 Samuels, supra note 23 at 19.
The widespread frustration over the inability to achieve political will for reform reveals the limitations of the legal and economic theories upon which law reform efforts are based. Carothers says, with substantial justification, that “rule of law proponents are short on knowledge on how rule of law develops in societies and how such development can be stimulated beyond simplistic efforts to copy institutional norms.”

Carothers went on to articulate more clearly the unknowns within the rule of law movement:

Clearly, law is not just the sum of courts, legislatures, police, prosecutors, and other formal institutions with some direct connection to law. Law is also a normative system that resides in the minds of the citizens of a society . . . Major questions abound, still unanswered. For example, how does the will to reform develop? Can it be generated and if so how? Should we assume that institutions change through gradualist reform processes willed by persons inside the system? Does public pressure play a major role? What about abrupt, drastic change provoked by persons outside the institutions who are dissatisfied with their function or who have their own goals about what institutions to have?

Carothers is undoubtedly correct that most rule of law promoters seem unaware of how these developments occur. But this does not mean that the questions he poses have not been studied and analyzed. In fact, the examination of how this kind of social and political change occurs is the very heart of the sociological study of social movements. The analysis of social

155 Viljoen, supra note 114 at 32-33.

156 Carothers, supra note 53 at 3.

157 Id. at 10.
movements would have predicted the failure of recent decades’ top-down efforts to inculcate the political will for meaningful law reform. And social movement research provides guidance on how to pursue these important goals much more effectively going forward.

Most scholarly analyses of rule of law efforts, and agency-sponsored reporting of their shortcomings, seem to run up against the barrier posed by the absence of political will for law reform, then come to an exasperated halt.\textsuperscript{158} It is time to scale that wall, and to do so by integrating lessons from the study of social movements to the process of designing effective methods to promote the rule of law and human rights.

IV. Growing Political Will for Law Reform: Applying the Lessons of Social Movements

For several decades, social scientists have analyzed the dynamics of social change, especially the movements that successfully advocate for that change. Studies of efforts like the U.S. civil rights movement of the mid-twentieth century,\textsuperscript{159} the Indian independence movement of a slightly earlier era,\textsuperscript{160} the South African anti-apartheid movement,\textsuperscript{161} democracy movements

\textsuperscript{158} Brooks, supra note 48 at 2325 does note that anthropologists and sociologists, among others, have much to offer in the evaluation of how to influence rule of law norms.

\textsuperscript{159} See, e.g., Lewis M. Killian, Organization, Rationality and Spontaneity in the Civil Rights Movement, 49 Am. Soc. Rev. 770, 782 (1984).

\textsuperscript{160} See, e.g., CHARLES TILLY, SOCIAL MOVEMENTS, 1768-2004 90-92(2004).

in Russia and Eastern Europe, and the women’s empowerment movement in Chile have revealed the existence of a “classical social movement agenda” which includes:

1. **Political opportunities** for challengers to engage in successful collective action,
2. **Forms of organization** allowing mobilization,
3. **Framing of grievances** to dignify claims, connect them to other claims and help produce a collective identity among claimants, and
4. **Repertoires of contention** to engage in collective action.

These components reflect the resolution of a long-standing debate among social movement scholars over the relative importance to be attributed to the psychological state of movement actors as opposed to structural conditions inside and outside the movement. The “classical collective behavior” theory, which held that social movements come about because of spontaneous behavior of aggrieved parties responding to increased discontent, was the dominant U.S. perspective until the 1970’s. Then, the “resource mobilization” theory, holding that

---

162 See, e.g., Elena Zdravomyslova, *Opportunities and Framing in the Transition to Democracy: The Case for Russia*, in COMPARATIVE PERSPECTIVES IN SOCIAL MOVEMENTS OPPORTUNITIES, MOBILIZING STRUCTURES AND FRAMING 122-137 (Doug McAdam et al. eds. 1996)


social movements derive from more rational and strategic action constrained by external societal forces like governments or elites, proved to be more robust under quantitative analysis.\(^{167}\)

Now, the most credible observers of social movements find a combination of these psychological and structural factors to be present in movement genesis. For example, Lewis Killian, in his study of the Tallahassee, Florida civil rights movement, found that key roles were played by both impromptu passionate marches and existing student, church and NAACP (National Association for the Advancement of Colored People) organizations. Killian concluded, “New developments in theory have reminded us that organization, resources and planning are essential to the success of a social movement and should not be neglected in practice or research . . . (But) social movement theory must take into account spontaneity and emergence and the forces that generate them.”\(^{168}\) In recognition of the fact that political scientists and historians engage in their own analyses of the forces that cause societal changes, Doug McAdam, Sydney Tarrow and Charles Tilly have begun the process of a broad theory synthesis by connecting the segregated studies of social movements, revolutions, democratization, etc. into a study of “contentious politics.”\(^{169}\)

The important lesson that social movement studies provide for rule of law promoters is that there are clear differences between the structures of movements that have successfully created the “political will” for change and their own failed efforts to establish support for rule of


\(^{168}\) Killian, supra note 159 at 782.

\(^{169}\) See, McAdam, Tarrow and Tilly, supra note 165.
law and human rights in developing countries. It is unfortunate that this lesson was not learned before billions of dollars had been committed to court buildings and judicial seminars that have provided little or no impact in the lives of Leah J. or others similarly situated. But the good news is that it is not too late to change course and achieve significant results. With respect to the rule of law and human rights, the core elements of the classical social movement agenda appear to exist in much of the developing world right now, including the settings that have proven to be the most inhospitable to prevailing top-down methods to promote rule of law. A significant historical opportunity for real reform is at hand, especially if rule of law promoters can re-orient their approach to support the grassroots advocates who can deliver the political will that has proven so elusive to date.

This article will conclude by employing the four components of the classical social movement agenda as the structure to assess the overall climate for growing political will in support of the rule of law. Of course, it is impossible to review every developing country for its readiness to serve as a host of a rule of law movement, and there is no one-size-fits-all blueprint for such a movement. But this discussion reveals both the current opportunity for dramatic change and a clear path to guide rule of law promoters toward a more effective approach.

A. Political opportunities for challengers to engage in successful collective action.

In analyzing the first element of the classical social movement agenda, it is clear that external factors like population growth, governmental policies, funding availability and the presence or absence of elite allies impact political opportunity, and thus the formation and relative success of social movements. But, to some extent, movement actors can also create

their own political opportunity by “framing”--a process which will be discussed in more detail below--the current moment as ripe for dramatic action for law reform and human rights, i.e. “right here, right now, we have a chance to make history.” Such framing needs empirical validity in order to endure, but there is evidence to support that rhetoric of opportunity in many parts of the early-21st century developing world.

The nations in question are, for the most part, young democracies that may be poised to follow the rights development trends of more mature democracies, most of which have seen successful struggles for property rights, the rights of women and marginalized minorities, overcoming official corruption, etc. DeSoto in particular draws parallels between the struggle for property rights in the current developing world and the fits and starts of U.S. 19th century progress toward defining similar rights, and social scientists at least as far back as Gunnar Myrdal and T.H. Marshall in the mid-twentieth century have identified trends, if not


172 See, e.g., Bravo, supra note 93 at 579-580. For purposes of this social movement discussion, I am referring to countries not immediately emerging from conflict. However, it should be noted that those countries, although likely less ripe in terms of organizations ready to assume the call for reform, are also existing in moments of civic fluidity providing political opportunity for change. For a review of efforts to promote the rule of law in post-conflict countries, see Samuels, supra note 20.

173 DeSoto, supra note 34 at 105-51.

174 GUNNAR MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 998-1004 (1944).

175 THOMAS H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS 10-14 (1950). But, see, Guillermo O’Donnell, Reflections on Contemporary South American Democracies, 33 J. Lat. Am. Stud. 599, 603-04 (arguing that the Marshall-ian pattern of rights development from civil and political rights into social rights has not occurred in most of South America.)
universal patterns, of rights evolution in democratic societies. Evidence to support the notion of
an increasing receptivity to the rule of law in developing nations comes from data showing a
recent surge in use of courts in the African countries of Botswana, Uganda and Tanzania, and a
corresponding willingness of heads of state in those countries to grant increased autonomy to the
judiciary.\textsuperscript{176} Similar results come from a study showing Pakistanis see formal courts as more
likely to provide justice than traditional forums.\textsuperscript{177} These examples are significant, given the
historical tendency of people in developing countries to mis-trust the impartiality and
effectiveness of the formal judicial system.\textsuperscript{178}

The trend of an increasing expectation of justice is also consistent with social movement
research findings that government support for reform, even if it is a non-binding expression of
support, will increase the opportunities for a social movement demanding that the government’s
rhetoric of reform be matched by its actions.\textsuperscript{179} As noted in Parts Two and Three above, there is
no shortage of official recognition of the value of rights protection in developing countries,
expressed in treaty signings and favorable language in constitutions and statutes. Although the
rhetoric has little or no immediate effect in the legal protections available to citizens like Leah J.,
social movement research suggests the near-empty promises may raise popular expectations of

\textsuperscript{176} Widner, supra note 112 at 72-73.

\textsuperscript{177} Matthew J. Nelson and Erick Jensen, \textit{Supporting Access to Justice Under the Local
Government Plan: Small Scale Technical Assistance}. (The Asia Foundation, Islamabad Pakistan)

\textsuperscript{178} See, Kleinfeld Belton, supra note 13 at 10, COMMISSION ON LEGAL EMPOWERMENT OF THE
POOR, supra note 5 at 34. See, also, Bravo, supra note 93 at 561 (noting that Armenians
respond to corruption in government by general disregard of the rule of law.)

\textsuperscript{179} See, Meyer and Minkoff, supra note 170 at 1475, and J.Craig Jenkins and Charles Perrow,
\textit{Insurgency of the Powerless: Farm Worker Movements (1946-1972)}, 42 Am. Soc. Rev. 249, 265
justice, which in turn increases the prospects for long-term reform.\textsuperscript{180} Leaders who claim the mantle of human rights may soon be called upon by their citizens to practice what they preach.

Further evidence of political opportunity for rights and law advocacy comes in the guise of transnational civil society actors, who now play a larger role in human rights promotion across the globe than at any time in history.\textsuperscript{181} In social movement parlance, groups such as these whose goals are to help individuals outside their own direct membership are known as “universalistic”\textsuperscript{182} advocates. The recent decades’ dramatic improvement in electronic communication enhances the connection that universalistic actors like Human Rights Watch and Amnesty International can have with the developing world. The flow of information goes both ways: the transnational advocates share information about successful rights advocacy with the aggrieved in the developing world, and indigenous rights advocates relay back the details of their plight to the universalistic advocates who can lend their help to the cause.\textsuperscript{183} One key capacity offered by transnational civil society actors is attracting media attention, which is clearly an important element in the opportunity for formation and mobilization of a social movement.\textsuperscript{184} The global movement against apartheid in South Africa provides a notable recent example of an

\begin{footnotes}
\textsuperscript{180} Meyer and Minkoff, \textit{id.}.

\textsuperscript{181} See, Julie Mertus, \textit{From Legal Transplants to Transformative Justice: Human Rights and the Promise of Transnational Civil Society}, 14 Am. U. Int’l L. Rev. 1335, 1336 (1999). See, also, McCarthy and Zald, \textit{supra} note 166 at 1225 (technological capacity recognized as key resource for social movements well before internet technology was widely available).


\textsuperscript{183} See Widner, \textit{supra} note 112 at 1368 (discussion of how transnational human rights NGO’s use fact-gathering, monitoring and reporting in the “mobilization of shame” against human rights violators).

\textsuperscript{184} Meyer and Mankoff, \textit{supra} note 170 at 1478.
\end{footnotes}
effective transnational-local advocacy partnership.\textsuperscript{185} A lesser-known precedent can be found in Chilean legal advocates’ documentation of human rights abuses during the 1970’s and 1980’s. The information compiled by indigenous advocates was used by transnational human rights groups to pressure the Chilean government and obtain consistent United Nations condemnation of the government’s human rights record.\textsuperscript{186}

In comparing successful social movements to the recent clumsy efforts to instill rule of law, the most fundamental contrast is found in the role of the elite. As discussed above, the strategies of multilateral and bilateral investors in the rule of law have concentrated on direct attempts to try to win the hearts and minds of the judicial and political elite—which more than one commentator has pointed out is a strategy inherently unlikely to succeed, given that the current systems’ dysfunctional nature provides substantial benefits to those very elites.\textsuperscript{187} Ironically, then, given these investors’ limited attention to indigenous service providers and movement actors to date, a key component of political opportunity for rule of law movements is the existence of sympathetic, motivated and deep-pocketed funders like the World Bank.\textsuperscript{188}

\textsuperscript{185} Thorn, supra note 139 at 48-126.

\textsuperscript{186} Hugo Fruhling, From Dictatorship to Democracy: Law and Social Change in the Andean Cone of South America, in MANY ROADS TO JUSTICE: THE LAW-RELATED WORK OF THE FORD FOUNDATION GRANTEES AROUND THE WORLD 61-81(Mary McClymont and Stephen Golub eds. 2000).

\textsuperscript{187} See Kleinfeld Belton, supra note 13 at 9, Daniels and Trebilock, supra note 51 at 129-130, Carothers, supra note 53 at 104. The ill-fated “law and development” movement of the 1960’s also focused on training of lawyers and judges. See, Barron, supra note 45 at 6.

\textsuperscript{188} As Brooks, supra note 48 at 2239 notes, it is inherently arrogant for rule of law funders to try to “improve” other cultures considered to be deficient in the areas of justice and rights. But Brooks correctly concludes this kind of intervention, and a growing consensus on law and rights norms, is an unavoidable product of the globally interrelated nature of 21st century society, not to mention the international agreements codifying these norms. Of course, this “arrogance” by more developed nations offers its own political opportunities for indigenous law reform actors wishing to promote some aspects of global north legal norms.
Even though the World Bank, USAID, etc. are clearly elites themselves, and non-indigenous elites at that, there is substantial precedent for them to play key roles in successful social movements. The Indian independence movement, the U.S. civil rights movement, the South African anti-apartheid movement and the U.S. farm worker movement, among many others, were all supported financially by elite individuals and organizations.

In assessing the potential value provided by outside supporters of social movements, Craig Jenkins and Charles Perrow’s study of U.S. farm worker movements is particularly instructive. In comparing the failed 1946-1952 attempt by the national Farm Labor Union to organize farm workers and the successful effort by the United Farm Workers in 1965-1972, Jenkins and Perrow found no difference in the levels of farm worker discontent, the talents and dedication of the organizers, and the methods of contention. The difference between success and failure, they concluded, was the support of outside “liberal” groups like church organizations and organized labor, which was far more substantial for the latter movement, and the reaction of political elites, which was less hostile to the second effort. Jenkins and Perrow conclude this scenario was not just fortuitous to the second movement, it was a prerequisite for its success: “Are deprived groups like the farm workers able to sustain challenges, especially effective ones,

---

189 DAVID ARNOLD, GANDHI 92 (2001) (“One cannot but be struck by the extent to which India’s saintly Mahatma and foremost peasant leader was bankrolled by the capitalist class.”)


191 See Thorn, supra note 161 at 32-33, 67.

192 Jenkins and Perrow, supra note 179 at 266.
on their own? We think not . . . For a successful outcome, movements by the ‘powerless’ require strong and sustained outside support.”

The most obvious support which rule of law proponents can provide indigenous rights advocates and service providers is financial and technical assistance on reform advocacy, in keeping with the tradition of social movements obtaining such resources from outside individuals and organizations. International financial support may be the only option for advocates challenging their country’s status quo, since they are by their contentious actions disqualifying themselves from much of the possible funding from their own government or country elites. Support from the development agencies is also consistent with an existing, if vastly under-utilized, component of these agencies’ “access to justice” efforts. Although the World Bank organizations are prohibited by their Articles of Agreement from interfering in the political affairs of the countries they serve, there is precedent, albeit poorly funded precedent, for Bank efforts to establish human rights, empower women and minorities, and tackle governmental corruption. In fact, the World Bank’s “Justice for the Poor” program, based in seven countries in East Asia and Africa, nurtures and supports local initiatives working toward what the Bank itself calls “pro-poor justice reform.” And USAID officials have reported that integration of non-governmental organizations into their rule of law planning efforts has caused the agency to

---

193 Id. at 251.

194 See, Golub, supra note 122 at 21.

195 INTERNATIONAL DEVELOPMENT ASSOCIATION, ARTICLES OF AGREEMENT. Art. V, Sec. 6 (1960).

196 Golub, supra note 122 at 24. See, also Hammergren in BEYOND COMMON KNOWLEDGE, supra note 52 at 299 (World Bank is increasing its involvement with civil society actors).

devote increased attention and support to human rights, legal services, advocacy and civil society actors. 198

B. Forms of organization prepared for mobilization.

Social movements are built on a foundation of organizers, movement organizations, and networks of communication among movement actors. Historical accounts of social movements usually wind their way back to critical early action by organizers, with notable examples including the U.S. student anti-war movement of the 1960’s, 199 the welfare rights movement of the same era, 200 and the Muslim Pashtun movement 201 and Indian independence movement 202 of the early and mid-twentieth century. For example, the Montgomery, Alabama bus boycott of 1955 and 1956, a landmark development in the U.S. civil rights movement, was originally organized not by Dr. Martin Luther King, Jr. or other ministers who subsequently became the movement’s spokespersons, but by the lesser known E.D. Nixon, president of the Montgomery NAACP, and Jo Ann Robinson of the local Women’s Political Council. 203 Within the civil rights movement, successful organizers included those who came from within the ranks of the local aggrieved, like Nixon and Robinson, as well as external civil rights activists, such as the students

198 Hammergren in BEYOND COMMON KNOWLEDGE, supra note 52 at 311.

199 Jo Freeman, On the Origins of Social Movements, in WAVES OF PROTEST: SOCIAL MOVEMENTS SINCE THE SIXTIES 12-14 (Jo Freeman and Victoria Johnson, eds. 1999)


202 Tilly, supra note 160.

from northern states who were the principal organizers in many Mississippi locations.\textsuperscript{204} To build the movements, these organizers tapped into existing organizations like the NAACP and African American churches and created new networks of communication among movement actors.

Such networks are crucial. Scholars have concluded that the ability of social movements to grow and recruit new members is directly related to the extent to which the movements are linked to other groups.\textsuperscript{205} For example, the timing of the U.S. women’s liberation movement of the mid-1960’s was dependent chiefly upon the creation of new networks of communication among women who had shared un-networked grievances for decades.\textsuperscript{206}

The nodes for rule of law networks are present in the wide variety of grassroots rights advocacy organizations that currently exist throughout the developing world. In Leah J.’s home country of Kenya, a recent conference on legal empowerment for the poor included civil society groups devoted to land reform, women’s empowerment, children’s advocacy and HIV support.\textsuperscript{207} The Law Society of Kenya has mobilized lawyers to advocate for human rights and provide direct legal assistance to the poor,\textsuperscript{208} a network of community-based groups in the Malindi district have successfully organized to win concessions on access to water,\textsuperscript{209} and women’s


\textsuperscript{206} Freeman, supra note 199 at 11.

\textsuperscript{207} Commission for Legal Empowerment of the Poor, supra note 108 at 1-2.

\textsuperscript{208} Daniels and Trebilock, supra note 51 at 126.

\textsuperscript{209} Lucie E. White, African Lawyers Harness Human Rights To Face Down Global Poverty, 60 Me. L. Rev. 165 168 (2008).
groups have formed to provide civic legal education and rescue girls from early marriages.  

This is not a new phenomenon in Kenya, which can trace its independence back to similar organizations. In one of many examples of African civil society actors creating political will for dramatic change in the waning days of colonialism, The Kikuyu Central Association, an early 20th century advocacy organization focused on land issues, was led by a young Jomo Kenyatta, who later helped lead the Kenya African Union. The KAU joined with other organizations like the East African Trades Union Congress in the campaign that would eventually lead to independence from Britain and Kenyatta’s installation as Kenya’s first president.

Throughout Africa, there is a thriving civil society devoted to human rights advocacy at a local level, including community-based legal advocacy efforts in Somalia, South Africa, Tanzania, Liberia, Malawi, Burkina Faso, Ghana, Togo, and Sierra Leone.

---

210 Ayuko and Chopra, supra note 64 at 37.


212 Samuels, supra note 23 at 30.

213 Open Society Institute, supra note 69 at 128.


216 Id. at 232.

217 DANIEL MANNING, THE ROLE OF LEGAL SERVICES ORGANIZATIONS IN ATTACKING POVERTY 50 (1999.)

218 White, supra note 209 at 168-69.

219 Manning, supra note 217 at 51.
among other locations. Grassroots organizations are poised to play critical roles in law reform advocacy throughout Latin America, reports Maria Dakiolas, where “(t)hey are particularly effective in drawing attention to issues or groups that may otherwise be overlooked or whose political voice is weakest. Women, ethnic minorities, and other groups who do not always enjoy equitable representation in formal institutions often form NGO’s (non-governmental organizations) in order to make their voices heard.”\textsuperscript{221} Dakiolas provides a broad discussion of how these Latin American reform organizations network in classic social movement fashion.\textsuperscript{222}

A key advantage that such indigenous grassroots advocates possess over “top-down” law reform actors is their demonstrated ability to work in both formal and customary legal forums, the latter of which presents an area of clear weakness for current rule of law interventions.\textsuperscript{223} These civil society actors have shown a willingness to use paralegals and community advocates in addition to licensed attorneys in direct representation, and have engaged effectively with community leaders who often take the place of formal judges in dispute resolution.\textsuperscript{224} For example, in 2004, legal advocates in western Kenya responded to the problem of women being denied their rights to inheritance by facilitating discussions among Luo ethnic group elders about their community’s values in regards to women’s well-being. Advocates discovered that the elders actually held a great deal of pride in a community self-image of supporting and protecting

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{220} Vivek Maru, \textit{Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide}, 31 Yale J. Int'l L. 427 (2007).
\item \textsuperscript{221} Dakiolas, \textit{supra} note 125 at S48.
\item \textsuperscript{222} Id. at S49-S52.
\item \textsuperscript{223} See, Samuels \textit{supra} note 23 at 18-19.
\item \textsuperscript{224} See Open Society Institute, \textit{supra} note 69 at 29, Samuels, \textit{supra} note 23 at 18.
\end{itemize}
\end{footnotesize}
women. When confronted by advocates with evidence that the treatment of many Luo widows did not meet that standard, the elders changed the tribal practice to install women as trustees of the land after their husbands’ death, thus ensuring women’s rights to remain on the family property after being widowed.225

Referencing this kind of legal advocacy success by civil society actors, Stephen Golub has called for a switch in the rule of law paradigm away from a focus on state institutions and elites and toward “legal empowerment,” the use of legal services and other development activities that are “grounded in grassroots needs but can translate that community-level work into impact on national laws and institutions.”226

As Golub notes, indigenous organizations working on legal issues have potential value and impact beyond rule of law or even human rights concerns. The World Bank, USAID and other rule of law actors have noted repeatedly that strong civil society organizations help alleviate poverty and broadly empower the citizenry,227 and Ernest Gellner and other

225 Chopra, supra, note 71.

226 Golub, supra note 122 at 103. See, also, Stephen Golub, Make Justice the Organizing Principle of the Rule of Law Field, Hague Jnl. on the Rule of L (Published Online by Cambridge University Press Jan 23 2009 ), available at http://journals.cambridge.org/download.php?file=%2FROL%2FS1876404509999936a.pdf&code=47125c0f00d4d4acbe3d4e84592ebdd3. (arguing that the concept of broadly defined “justice,” including social and economic rights, should replace the rule of law as the focus of international development agencies.)

commentators see the existence of a vibrant civil society of advocates as a precondition to democracy itself.\textsuperscript{228}

One obvious role for rule of law funders is to support these groups in forging the networks that will enable them to fully realize their potential for making a positive impact on their communities. Successful models for that kind of networking support already exist: Bangladeshi human rights advocates found their influence increased after an external law reform funder, The Ford Foundation, enabled them to band together to share information and strategies.\textsuperscript{229} Similarly, Alternative Law Groups (ALG’s) in the Philippines have created a network of over twenty small organizations working on legal empowerment issues such as land reform, labor issues and the laws regarding rape and assault.\textsuperscript{230}

Social movement outcome research, notably including Aldon Morris’ analysis of the 1960 African American sit-in movement that was a pivotal development in the U.S. civil rights struggle,\textsuperscript{231} shows that the relative strength of these organizations, as measured in terms of size, network ties, internal organization and fundraising ability, will ultimately determine the success

\begin{itemize}
\item \textsuperscript{228} ERNEST GELLNER, CONDITIONS OF LIBERTY: CIVIL SOCIETY AND ITS RIVALS 184-89 (1994). See, also, Eric Dannenmaier, Democracy in Development: Toward a Legal Framework for the Americas, 11 Tul. Envt’l L.J. 1,5 (1997) ("In a society where individuals are not historically inclined to join a policy dialog directly, these (civil society) organizations are an important proxy for the public voice.")
\item \textsuperscript{229} Stephen Golub, From the Village to the University: Legal Activism in Bangladesh, in MANY ROADS TO JUSTICE, supra note 185 at 133-134.
\item \textsuperscript{230} Stephen Golub, Participatory Justice in the Philippines, Id. at 197-226.
\item \textsuperscript{231} Aldon Morris, Black Southern Student Sit-In Movement: An Analysis of Internal Organization, 46 Am. Soc. Rev. 744 (1981).
\end{itemize}
of the rule of law movement.²³² Properly supported, existing and evolving law reform groups and their leaders are poised to play the pivotal roles that social movement historians,²³³ along with iconic movement organizers like Saul Alinsky,²³⁴ have long identified for existing organizations and advocates. As Kirsti Samuels notes in discussing the future of the efforts to instill rule of law, “Domestic political reform pressure and local political reform champions are essential for real (rule of law) change. There must be a systematic focus on identifying and supporting “agents of change” who have a driving will to reform.”²³⁵ In large part, these hoped-for “agents of change” are already in place, in the form of the community-based legal reform actors that permeate the developing world.

C. Framing of grievances.

Social movement research has grown increasingly interested in the concept of framing. Erving Goffman, in his influential 1974 book, Frame Analysis: An Essay on the Organization of the Experience, outlined the process of individuals constructing their own reality by organizing events in a way that gives coherent meaning and guides their future action.²³⁶ In their efforts to create political will for reform, social movement actors are challenged to create enduring frames

²³² See, Gamson, supra note 182 at 89-108. For a dissenting view, suggesting that organizations weigh down and de-radicalize movement actors, see Piven and Cloward, supra note 199 at 1-37.


²³⁴ SAUL ALINSKY, REVEILLE FOR RADICALS, 85-88 (1969)

²³⁵ Samuels, supra note 23 at 21 (quoting in part Carothers, supra, note 53 at 9).

that diagnose the problems, articulate solutions and then motivate the key populations.\textsuperscript{237} As Robert Benford and David Snow put it, the social movement organizer’s task is to create frames that will “move people from the balcony to the barricades.”\textsuperscript{238}

Grassroots legal advocates possess a uniquely advantaged position from which to devise compelling frames. Every paralegal’s intervention to help a woman escape domestic violence and every attorney’s successful effort to ensure inheritance rights for orphans is a victory not just for the individual clients but also for the rule of law writ large. Properly leveraged, the stories emerging from this direct representation can explain a broader pattern of injustice in a dramatic and personal way, and thus has “framing” value far beyond the individual cases involved.

Blaming a dysfunctional system and its political leaders for a widespread lack of justice may seem intuitive, but research on the psychological phenomenon of “system justification” shows a common human predisposition to defend and justify the status quo, even among those who are most harmed by the existing system.\textsuperscript{239} Therefore, social movements must proceed around issues that are framed in sympathetic terms that are understandable to the population at large, the media, and the leaders who are being pressed to make changes. Reitzes and Reitzes point out that “symbolic interactionist” social psychologists and community organizers like Alinsky share the recognition that organized action comes about when private grievances are

\begin{thebibliography}{99}
\bibitem{238} \textit{Id.}
\end{thebibliography}
redefined as a community’s shared social problem. Advocates who directly confront tangible ground-level instances of injustice are ideal frame articulators, since empirical credibility of the collective action frame is a key factor in whether the frame will have resonance. For example, arguing from experience that petty police bribery is not just a problem for one or two unlucky people, but rather a policy problem for an entire political district, provides the connectivity that transforms one legal client’s complaint into a collective call for systemic change.

These framing opportunities are not lost on legal advocates throughout the developing world, who demonstrate there is no “either/or” choice to be made between the roles of providing direct legal representation and making calls for broader law reform. Many advocates have already shown their willingness to take the lessons learned, and the credibility earned, from representing individuals to provide community messages of education and empowerment. For example, Bangladeshi legal service providers are very active “framers” of justice issues. They investigate and expose issues including police torture, deaths in garment factories, dowry-related abuses, official responses to violent crimes against women and children and a lack of secret balloting in village voting; they engage in high-profile litigation to stop slum evictions, they actively cultivate the media, and they mobilize the community to conduct legislative lobbying. Advocates in a World Bank-sponsored program in Ecuador which included legal services programs for poor women drew upon their ground-level experiences to generate a

---


241 Benford and Snow, supra note 237 at 620.

242 See, e.g., Manning, supra note 217 and MANY ROADS TO JUSTICE, supra note 186.

243 Manning, supra note 217 at 23-31 and Golub IN MANY ROADS TO JUSTICE, supra note 186 at 143.
comprehensive report and a national workshop that led to broad reform recommendations. A Haitian legal advocacy group, Bureau des Avocats Internationaux, directly represents prisoners and other victims of human rights abuses while simultaneously seeking policy changes by publicizing their clients’ plight within Haiti and to the U.S. government, international media and a network of Haiti-oriented U.S. activists.

During the 1970’s and 1980’s, legal advocates in Peru, Chile and Argentina responded to authoritarian governments by representing victims of political suppression and violence, and their public airing of the abuse of their clients’ rights led to international condemnation and supplied indigenous dissenters with empirically verifiable accounts of repression that countered government “frames” of fairness and freedom. The inherent conflict and personal stories of legal cases make for compelling media coverage on human rights grievances, as the Constitutional Rights Project in Nigeria discovered in the 1990’s when it initiated several cases challenging the government’s abuse of power. The Rights Project found that the media in that repressive environment gave coverage to court actions even when mass demonstrations were not reported on. Although the authoritarian governments insured that these groups’ legal challenges were not successful on an individual level, the widespread dissemination of the facts and arguments associated with the cases has been hailed as one of the most effective strategies

244 McInerney supra, note 124 at 140-42.


246 Fruhling, supra note 186.

247 Helen Hershkoff and Aubrey McCutcheon, Public Interest Litigation: An International Perspective, in MANY ROADS TO JUSTICE, supra note 185 at 288.
for resistance to these regimes, since the advocacy process triggered and legitimated internal and external criticism of the governments.\textsuperscript{248}

The framing process is particularly crucial when the aspiring movement is presented with a galvanizing moment or crisis. High-profile grievances, whether the subject of formal litigation or not, are often ideal vehicles for providing both the galvanizing moment and the opportunity to frame the issue as an injustice applicable to a broad population.\textsuperscript{249} The most iconic U.S. example of both framing and galvanizing is the litigation challenging racial segregation in public schools, which culminated in the 1954 U.S. Supreme Court decision in \textit{Brown vs. Board of Education.}\textsuperscript{250} Ironically, the Brown decision had little immediate effect on school segregation, but it has been described by Richard Kluger as “the catalytic event that began the Second Reconstruction paralleling the one after the Civil War” and the parent of the mass civil rights movement.\textsuperscript{251}

Similarly, an International Court of Justice ruling in 1971 against continued South African control and apartheid-themed occupation over an area then called ‘South-West Africa’ triggered statements of support from church leaders, educators and tribal chiefs, followed by widespread strikes that led to more favorable labor agreements and continued the momentum toward the eventual liberation of “South-West Africa” into the independent nation of Namibia.\textsuperscript{252}

\textsuperscript{248} Fruhling, supra, note 186 at 64.

\textsuperscript{249} See, William Felstiner et al., \textit{The Emergence and Transformation of Disputes: Naming, Blaming and Claiming}, Law and Society Rev. 631, 639-40. See also Dakiolas, supra note 125 at s45-46.

\textsuperscript{250} 347 U.S. 483 (1954).

\textsuperscript{251} RICHARD KLUGER, SIMPLE JUSTICE 753-54 (2004).

\textsuperscript{252} WAGING NONVIOLENT STRUGGLE, supra note 200 at 205-16.
Subsequent public interest litigation in southern Africa helped chip away at tangible components of apartheid, such as pass laws and prisoner abuse, as well as its veneer of invincibility.253

D. Repertoires of Contention

A “To Be Determined—Maybe” sign needs to be hung on this final item of the classic social movement agenda, which refers to the actual techniques for collective action. However, a glimpse of the future forms of action may be provided by documented instances of citizens of the developing world mobilizing around rights issues. A legal-clinic-turned-law-reform organization in Ghana organized public marches, petition drives and litigation to challenge a requirement that cash be paid up front before accessing health care.254 Senegalese women mobilized against female genital mutilation through lobbying religious and traditional leaders—including dramatic displays of razor blades formerly used in the procedure--and led the successful effort to legally ban the practice in several villages.255 In South Africa, organized women’s groups played a key role in ending apartheid through direct action including strikes, civil disobedience and protests,256 and then engaged in nonviolent disruptions of constitutional negotiations until


254 White, supra note 209 at 168-69.


women were accorded a significant role in the process. A Chilean environmental advocacy group sued and halted a concession of public land to the timber industry.

Although such public interest litigation may seem like an obvious choice for legal advocates, social movement history suggests caution before adopting lawsuits as a reform strategy. Litigation, because it can be costly, slow, and overly reliant on a few elite attorney actors is not always the best repertoire of contention for a movement. Empirical analysis of law reform efforts in the U.S. have concluded that the courts tend to follow behind popular reform movements, not initiate them. In contrast, the extra-institutional pressure of protests has been shown to have a demonstrable effect on policy outcomes. Even an important lawsuit does not call upon the movement actors to publicly demonstrate their depth and breadth, an important component of advocacy that Charles Tilly has labeled “WUNC” (Worthiness, Unity, Numbers, Commitment) displays.

But even when litigation is not the ideal choice, legal actors can turn to other repertoires of contention. In 2007, lawyers in Pakistan conducted high-profile street demonstrations against President Gen. Pervez Musharraf’s attempts to dismiss the country’s chief justice and impose


258 Dannenmaier supra note 228 at 31.

259 See, Michael McCann and Helena Silverstein, Rethinking Law’s Allurements: A Relational Analysis of Social Movement Lawyers in the U.S., 261, 262-64 IN CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat and Stuart Scheingold, eds., 1998)


261 Meyer and Mankoff, supra note 69 at 1479.

262 Tilly, supra note 160 at 4.
emergency rule. Lucie White writes of an example of how lawyers teamed with traditional social movement organizers to educate and empower Black villagers to block a forced removal in apartheid South Africa. Frank Bloch has chronicled how law school clinics have increased access to justice, partly through legal literacy programming, in South America, Africa, and South and East Asia. An historical example of the key non-litigation role that lawyers can play in framing a grievance and triggering broader action is found in the removal of Guatemalan dictator General Jorge Ubico y Castaneda in 1944, when 45 lawyers wrote a series of articles in a Guatemala City newspaper and became the first to ever publicly call out the General about corruption in the judiciary. The articles triggered teacher and student protests, demonstrations and a public strike. Within a month, Ubico resigned.

Multi-country reviews of legal advocacy programs by the World Bank and the Ford Foundation show that rule of law interventions work best when they support law reform advocates who leverage their credibility and knowledge from grassroots representation to use a variety of techniques to make convincing arguments for reform. Cambodian legal service providers, informed by the daily experience of representing poor tenants and landowners, helped

---


266 Joshua Paulson, *Ousting a Guatemalan Dictator—1944*, in WAGING NONVIOLENT STRUGGLE, supra note 162 at 149-155

267 Manning, supra note 217.

268 MANY ROADS TO JUSTICE, supra note 186.
develop new land law for the country. South African legal advocates supplemented rights-oriented litigation with nonviolent resistance to attempts to remove blacks to “homelands,” and helped inform and empower the country’s labor movement, which played a key role in opposing apartheid. Burkina Faso advocates launched legal literacy programs, Chinese legal service providers engaged in high-profile litigation and public reporting on behalf of women workers, and Croatian advocates engaged in community human rights education.

Given the prevalence of settings in the developing world where formal litigation is overshadowed by informal application of customary or religious law, it is important to note the transformative opportunities presented by rights advocacy in these traditional forums. As one observer of such traditional legal forums noted, they may be imperfect, but they are not static: “They are continuously evolving socio-economic cultural constructs affected and altered by internal and external forces which place pressure on those within.” Inside and outside of formal legal systems, indigenous advocates are positioned to access a variety of repertoires of

---


270 Golub in MANY ROADS TO JUSTICE, supra note 186 at 32-33.

271 Id. at 50.

272 Manning, supra note 217 at 51, and Aubrey McCutcheon, Contributing to Legal Reform in China in MANY ROADS TO JUSTICE, supra note 186 at 181-84.

273 Manning, supra note 217 at 52.

contention to place pressure for change, and some are already doing so on a scale limited by their scant resources.\textsuperscript{275}

Just as there is no boilerplate set of repertoires of contention, there is no instruction manual setting out a step-by-step sequence for social movements. But the research of Meyer and Mankoff on African American civil rights movements\textsuperscript{276} and Piven and Cloward’s review of welfare rights movements,\textsuperscript{277} among others, suggest that movement actors would ideally build organizational strength and a record of issues framing while preparing for “galvanizing moments” of ripe opportunity for protests and rapid change. Viewed through this prism, a developing nation’s rule of law movement calling for broader and deeper recognition of women’s rights, for example, is likely now in a stage preceding dramatic protests such as the bus boycotts or sit-ins of the U.S. civil rights movement or the mass pro-democracy demonstrations in Eastern Europe and the Soviet Union. At this stage, the key rule of law movement actors are the legal services providers and grassroots law reform advocates who are building expectations of justice, forging networks of supporters, and framing the case for human rights. By supporting these efforts, rule of law funders can play a critical role in laying the foundation for movement actors to seize the opportunity for substantial, transformative change.

Conclusion


\textsuperscript{276} Meyer and Mankoff, supra note 146 at 1484.

\textsuperscript{277} Piven and Cloward, supra note 200.
A little over one year after being driven off her land, Leah J. was attending a support group meeting for HIV patients in Eldoret when she heard about a new one-attorney legal aid program that was connected with the HIV treatment center. Leah told her story to the attorney, Juliet Mule, who immediately went to Kenya’s High Court in Eldoret and obtained an order allowing Leah to withdraw 25,000 Kenyan Shillings, about $322 U.S., from a bank account that was in Leah’s husband’s name. Leah is using the money to rent a home and pay the children’s school fees, in addition to the transportation and search fees she needs to help Mule document title to the land owned by Leah’s husband and stolen by his family.

When Leah has the family land restored to her, she dreams of starting a business selling second-hand shoes. She knew all along she had the right to the marital property, but she also had no idea that a poor person like her could ever hope to enforce that right. When she relates the positive turn in her fortunes after finding a path to justice, Leah’s voice becomes stronger. “I’ve talked to the other widows to let them know,” she says. 278

Juliet Mule is letting other widows know, too. She has spoken about legal rights to support groups for people living with HIV/AIDS, and is eager to make presentations to schools and community groups, conduct media outreach and to train local elders and other community leaders in the law. But Mule’s fledgling organization, the Legal Aid Centre of Eldoret,279 is just a

278 Interview with Leah J., supra note 1.
279 In my role as director of operations for the Indiana-Kenya Partnership (also known as the Academic Model for Providing Access to Healthcare (AMPATH)), the HIV care program in western Kenya referred to here, the author helped found the Legal Aid Centre of Eldoret (LACE).
two-person shop funded solely by small donations from private U.S. supporters, and Mule spends her days and evenings responding to the glut of legal emergencies like Leah’s.\textsuperscript{280}

Juliet Mule, like countless other direct legal services providers and community-based rights advocates across the developing world, stands ready to help grow the elusive political will for the rule of law. Mule and her contemporaries are living proof that significant elements of successful rule of law social movements are already in place: political opportunity exists in many developing countries, movement actors are ready to frame justice issues so as to garner popular support, advocates like Mule and their clients like Leah J. are forging networks of both advocates and the aggrieved, and there are many proven models of effective repertoires of contention for law reform. After two decades of misguided investments, rule of law funders must seize this opportunity to support social movement actors who can shape and deliver rule of law from the grassroots up.

\textsuperscript{280} Interview with Juliet Mule, Eldoret, Kenya, June 8, 2009.