Legislative Reform in Post-Conflict Settings

A Practitioner's View

Nathalia Berkowitz[*]

Abstract

Following conflict, considerable effort is often dedicated to legislative reform. This effort includes not only domestic actors but also international actors frequently acting with the aim of establishing the rule of law. This article seeks, first, to provide some context for legislative reform in post-conflict settings and outline some of the criticisms that have been made. Drawing on the work of legislative experts, the article then identifies some of the simple questions that those involved in legislative reform ask and discusses some of the key challenges in answering them. The article suggests that establishing the rule of law is more than putting laws 'on the books' and that the way in which legislation is created may itself contribute to developing the rule of law. It suggests that as the rule-of-law community develops new approaches, it might find it useful to draw on the approach of legislative experts and their concern with how effective legislation is created.

Keywords: post-conflict, rule of law, law reform, legislative reform.

Imagine this: a small office just big enough to squeeze in two simple desks, three or four uncomfortable chairs, a standing fan and a printer. Deliberately dark against the heat and humidity, light filters into the room from the one small barred window through which, if you sit in the right place, there is a glimpse of white and yellow frangipani flowers. It is the late 1990s, and this is my office in the prosecutors' building adjacent to a provincial court in rural Cambodia, where I am working for an international organization. It has been raining, which means that the electricity has cut off and I'm trying to decide whether to run the printer or the fan through a car battery, our only source of electricity. My Khmer assistant suddenly appears, unexpectedly animated, he says, "The judges want to see you; they have a case and don't know what the law is."

It is my first introduction to one of the many challenges of legislative reform faced in many post-conflict settings and why it matters. The judges of the provincial court are not uneducated or stupid; they are simply dealing with a situation well known to legal professionals in post-conflict settings: the law is unclear.

* Nathalia Berkowitz is a former Barrister and legislative drafter working as an independent consultant focusing on rule of law reform. Nathalia has over 10 years' experience supporting legislative reform and judicial process in countries around the world. She is a UK [Government] deployable civilian expert and faculty member of the University of Salamanca's Global and International Studies Program. She can be contacted at nathaliapendo@gmail.com.

European Journal of Law Reform 2019 (21) 1
doi: 10.5553/EJLR/138723702019021001006

All around the world, lawyers are working outside of their own countries, with the aim of assisting post-conflict states or territories to build – or rebuild – their laws. Those who engage them are often keen to achieve 'results' – often in the form of legislation that complies with international standards and contributes to effective rule of law. Post-conflict settings vary widely and have a wide range of different legal systems. Despite this, some common challenges may be encountered in relation to legislative reform. Having set out some context for legislative reform in post-conflict settings, this article suggests that effective legislative reform involves asking and answering simple questions. These include questions such as what is the law (and the practical situation) now, what do we want to achieve (*i.e.* what do we want the law to be), and what are the options and constraints for achieving it, including where behaviour change is the desired outcome, what might make people change their behaviour. Answering these questions may be challenging in post-conflict settings. What, if anything, might this mean for the rule of law and those who seek to encourage it, and what perspectives, if any, might legislative experts bring?

A Context

I Post-Conflict Settings

As Brown and others point out, the 'post-conflict' situation is not so easy to define. This is particularly the case with conflicts that happen within states. Hostilities do not generally end abruptly, after which there is complete peace. Instead, disputes and/or fighting may continue at a low level, sporadically or restart a short while later. The move from conflict to peace may be only one of multiple transition processes, occurring simultaneously. For example, there may be a process of democratization, a move to a market economy, and/or a reorganization of basic political structures of the state.[1] These transitions may all be occurring in a context where conflict has damaged the economy and impacted the human resources available to achieve effective change (*e.g.* people may have been prevented from gaining skills, may be unwilling to serve for political reasons, may

1 G. Brown, A. Langer & F. Stewart, *A Typology of Post-Conflict Environments*, CRPD Working Paper No. 1 September 2011, pp. 3-7. Available at: https://soc.kuleuven.be/crpd/files/working-papers/wp01.pdf (last accessed 5 April 2018).

doi: 10.5553/EJLR/138723702019021001006

have left the country[2] or may have been killed[3]). Simultaneously, sovereignty disputes may exist, with some contesting the authority of central government to govern or legislate (at least in part of the country – for example in Somalia, Kosovo and Iraq). In Isser's words, societies emerging from conflict are characterized by "the condensed and accelerated process of shifting political and power structures, demographic movements, and mass social flux".[4]

Since post-conflict settings vary widely, specific issues for legislative reform will be different in each. Post-conflict settings, for example, include countries with civil law systems, common law systems and many hybrids. They include countries in which formal written state law is the norm and others in which much of the population relies on forms of customary, religious or other parallel systems of law. They include states that have clear procedures for legislative reform and others where the procedures and processes are unclear, opaque, unused or in development. They include states with different levels of resources, including of educated, skilled or experienced staff, and different levels of economic development.

II Rule of Law

Improving the rule of law is much discussed and much touted as the aim of many international post-conflict reform efforts. And yet the term may be used by different people to mean different things.[5] The UN Secretary General's Report of 2004 defined the rule of law as:

2 With reference to the Kosovo judiciary during the UNMIK period, Betts, Carlson & Grisvold note: "In addition to the deficiencies in the physical infrastructure, judicial expertise in Kosovo was sorely lacking. Prior to the conflict, the vast majority of judges were Kosovar Serbs. Following the conflict, few Kosovar Serb judges remained in Kosovo, and those who did were largely unwilling to serve. The Kosovar Albanian legal professionals had little recent experience as judges or prosecutors. Since the revocation of Kosovo's autonomy in 1989, virtually no Kosovar Albanian legal professionals had been allowed to enter the legal system, and Kosovar Albanian attorneys who practiced their profession did so mainly in the private sector, primarily as defence counsel." W.S. Betts, S.N. Carlson & G. Grisvold, 'The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law', *Michigan Journal of International Law*, Vol. 22, 2001, pp. 371-377.

3 L.M. Trzcinski & F. K. Upham, 'Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia', *Asian Journal of Law and Society*, Vol. 1, 2014, pp. 55-78, at 58: "As many as two million people died during the Khmer Rouge's five years in power, and the annual rice production declined to less than one million tons (as compared to more than seven million tons in 2010). These material costs were exacerbated by the elimination of almost all educated people, so that by the time that the Vietnamese invaded in 1979 and established the People's Republic of Kampuchea (PRK) with Hun Sen at its head, there remained fewer than ten lawyers and 50 doctors and virtually no one with the legal or technical capacity to administer a cadastral system."

4 D.H. Isser (Ed.), *Customary Justice and the Rule of Law in War-Torn Societies*, Washington, DC, United States Institute of Peace Press, 2011, p. 5.

5 Belton identifies the rule of law as encompassing five different elements: (1) government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient court rulings and (5) human rights. *See* R.K. Belton, 'Competing Definitions of the Rule of Law, Implications for Practitioners', *Carnegie Papers* Number 55 January 2005. Available at: http://carnegieendowment.org/2005/01/21/competing-definitions-of-rule-of-law-implications-for-practitioners-pub-16405 (last accessed 5 April 2018).

doi: 10.5553/EJLR/138723702019021001006

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[6]

Carothers observed, "it might well be argued that the making of laws is the most generative part of a rule-of-law system."[7] In post-conflict settings, the rule of law may play a special role by establishing rules that provide for a clear and non-violent means of resolving disputes.[8] The UN definition requires that the content of legislation complies with international human rights norms, but also requires that the legislation produces or contributes to legal certainty, transparency and the avoidance of arbitrariness. Following conflict, as observed by Boon, "the process of legal reform is of critical import because it determines who is involved in the discussion and what fundamental values are incorporated into the new legal order."[9] O'Connor considers that the UN definition requires that the process by which legislation is developed is publicly known and is guided by clear and stable rules . To what extent the UN definition of the rule of law allows space for customary/traditional laws, especially where they are unwritten, is unclear. O'Connor's view is that legal certainty requires that law be written.[10]

III International Lawyering

Since colonial times, lawyers have been developing and writing legislation for countries in which they do not live. Boon described this as entering a new phase with the UN post-conflict administrations in East Timor (UNTAET, 1999-2002) and Kosovo (UNMIK 1999-2008) and the Coalition Provisional Authority in Iraq (2003-2004), where the international administrations found themselves in a position of effectively running the country.[11] But they are not the only ones. Many international actors are working either on legislative reform or on programmes that may affect it; they include UN agencies; regional bodies such as the European Union; state organizations, such as USAID, DFID and GIZ; and

6 The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General, 23 August 2004, S/2004/616. Available at: https://www.un.org/ruleoflaw/files/2004%20report.pdf (last accessed 6 April 2018).

7 T. Carothers, 'Promoting the Rule of Law Abroad, the Problem of Knowledge', *Carnegie Endowment Working Papers*, No. 34, January 2003, p. 8.

8 K. Boon, 'Legislative Reform in Post-conflict Zones: Jus Post Bellum and the Contemporary Occupant's Law-Making Powers', *McGill Law Journal*, Vol. 50, 2005, pp. 285-326, at 293.

9 *Ibid.*, p. 293.

10 V. O'Connor, *Defining the Rule of Law and Related Concepts*, International Network to Promote the Rule of Law Practitioners Guide, February 2015, pp. 7-10. Available at: https://www.inprol.org/publications/14549/defining-the-rule-of-law-and-related-concepts (last accessed 13 May 2018).

11 Boon, 2005.

NGOs. Often employees work under specific mandate and agreement with local authorities in post-conflict settings, within the context of a programme-planning document and under pressure to show 'results' for the monies used.[12]

International assistance to the law reform process may take many different forms. Laws may (as, for example, during the UNMIK times) be drafted by internationals with varying degrees of participation, or consultation, with the domestic authorities and the public; where there is an international administration, they may also be adopted by internationals. Alternatively, they may be drafted by domestic authorities with the assistance of international actors, whether, for example, facilitating or participating in legislative working groups or commenting on draft legislation. More broadly, international actors may support the process in many different ways, for example, mentoring, advising or providing training, financial or other support to groups participating in the development of legislation or support to the collection and identification of legislation or using influence at political levels.[13]

Not everyone has had a positive view of this work. In 2011 UNODC, focusing on criminal law reform, itemized failure to ensure compliance with international human rights standards, improper drafting, lack of consultation, inappropriate use of legal transplants, ad hoc efforts and failure to coordinate resulting in conflicting and overlapping laws and failure to prepare for implementation.[14] Others have criticized international actors for inaccurately perceiving a 'legal vacuum' in post-conflict settings,[15] for a mechanistic approach to reform or a failure to understand or engage with unfamiliar forms of law.[16] Isser, for example, criticizes "the widely held tendency to see justice reform as a technical exercise of drafting laws and building institutions, to be done by international legal professionals" who rarely have the background, skills or access needed to understand and take

12 P. Leroux-Martin & V. O'Connor, *Systems Thinking for Peacebuilding and Rule of Law,* Peaceworks, United States Institute of Peace, October 2017, pp. 12-13. *See also* R. Sannerholm, *In Search of a User Manual: Promoting the Rule of Law in Unruly Lands,* December 2007. Available at: https://ssrn.com/abstract=1068781 or http://dx.doi.org/10.2139/ssrn.1068781 (last accessed 12 November 2018).

13 For discussion of various forms of international involvement in legislative reform in Afghanistan *see* M.E. Hartmann & A. Klonowiecka-Milart, 'Lost in Translation, Legal Transplants without Consensus-based Adaptation', *in* W. Mason (Ed.), *The Rule of Law in Afghanistan, Missing in Inaction,* Cambridge University Press, 2011.

14 UNODC with United States Institute of Peace. 'Criminal Justice Reform in Post-Conflict States; A Guide for Practitioners', United Nations New York, 2011, pp. 61-62.

15 M. Grasten, 'Whose Legality? Rule of Law Missions and the Case of Kosovo, *in* N.M. Rajkovic, T.E. Aalberts & T. Gammeltoft-Hansen (Eds.), *The Power of Legality, Practices of International Law and Their Politics*, Cambridge, Cambridge University Press, 2016.

16 Carothers, 2003, p. 8: "They do not have much interest in non-Western forms of law, in traditional systems of justice, or, in the case of some American rule-of-law experts, even in civil law. .... Aid providers know what endpoint they would like to help countries achieve – the Western-style, rule oriented systems they know from their own countries." *See also* with regard to Afghanistan: Hartmann & Klonowiecka-Milart, 2011.

doi: 10.5553/EJLR/138723702019021001006

account of customary law.[17] Others remark that a mistaken belief that law and legislative reform are technical and apolitical, or simply a lack of knowledge,[18] has resulted in failures to take account of political, social or other practical realities.[19] Still others suggest that the developing state laws is a 'top down' approach and that the rule of law would be better served by engaging from the 'bottom up', working with local populations on legal issues most meaningful to them.[20] More broadly, O'Connor remarks that those leading rule-of-law programmes focus on the legal and technical dimensions of their work and fail to think sufficiently about change and how it occurs. As a result, they move from perceived problem straight to proposed solution – thus a new law may be introduced on the basis of the flawed assumption that new laws automatically create new behaviours.[21] In short, many of the criticisms made relate to a, sometimes hurried, focus on production and approval of individual written formal state laws and to the belief that reform of formal state law, without more, will result in change.

IV Legislative Experts

Most, if not all, legislative experts consider it obvious that legislation or other rules do not necessarily in and of themselves change behaviour. For example, Seidman, Seidman and Abeysekere suggest that in order to develop laws that contribute to change, those drafting the law should adopt a problem-solving approach. This includes identifying the problem and thinking about why people behave in certain ways and what might lead them to change their behaviour.[22] Others, such as Xanthaki and Evans, situate the drafting and amendment of legislation as only one part of a larger governmental process aiming to achieve a par-

17 Isser , 2011, p. 3. *See also* N. Johnstone, 'What Context Matters? Rule of Law Programming in the Midst of Post-Conflict Insecurity', *Hague Journal on the Rule of Law*, Vol. 9, No. 3, 2017, pp. 337-371.

18 R. Sannerholm, S. Quinn & A. Rabus, *Responsive and Responsible, Politically Smart Rule of Law Reform in Conflict and Fragile States*, Stockholm, Folke Bernadotte Academy, 2016, pp. 36-39.

19 Grasten, 2016; Johnstone, 2017, p. 343.

20 Johnstone, 2017.

21 V. O'Connor, *A Guide to Change and Change Management for Rule of Law Practitioners*, International Network to Promote the Rule of Law, January 2015, p. 4. Available at: https://www.inprol.org/publications/14477/guide-to-change-and-change-management-for-rule-of-law-practitioners (last accessed 13 May 2018).

22 A. Seidman, R.B. Seidman & N. Abeysekere, *Legislative Drafting for Democratic Social Change, A Manual for Drafters*, Kluwer Law International, 2001, pp. 14-17 and 85-123.

ticular result.[23] For Xanthaki, "[e]fficacy is at the heart of all legislative efforts."[24] She defines efficacy as "the ability to produce a desired or intended result". In other words, can the policy, resource and multiple other choices made during legislative reform process achieve that result; does the overall legislative reform project achieve what it aimed to? Responsibility for efficacy does not only rest with the person(s) writing the law but everyone involved, including policymakers, budget holders or enforcers. For those writing legislation, the quest in her view for effectiveness – that is to draft legislation that gives effect to the choices made, including through drafting with clarity precision and using appropriate language for the audience.[25] Far from taking a mechanistic approach, legislative experts understand effective reform as intimately linked to the society in which it takes place and to political processes. They advise of a need to ensure that legislation is practical and capable of enforcement and recommend steps that can be taken to achieve this.[26]

At the most basic, in order to contribute to this larger process, those involved in legislative reform need to ask and find the answers to simple questions. Key questions include: what is the law (and practical situation) now; what do 'we' want the law (and practical situation) to be; and what are the options, constraints and procedures for achieving change. If the goal is to change people's behaviour in some way, then, as Seidman and others recommend, questions should be asked about why people currently act as they do and what might change this. While the questions are simple, in post-conflict settings difficulties may arise in relation to each one of them.

B What Is the Law?

A common initial challenge in many post-conflict settings is simply identifying what the law is. This is true both of the overall legal framework and also in rela-

23 A. Evans, *Implementing Criminal Codes and Other Legislation in Postconflict and Developing Countries,* International Network to Promote the Rule of Law, June 2016. Available at: https://www.inprol.org/publications/15565/implementing-criminal-codes-and-other-legislation-in-postconflict-and-developing (last accessed 25 May 2018). See also H. Xanthaki, *Thornton's Legislative Drafting*, 5th edition, Bloomsbury Professional Ltd, 2013, p. 141: "the drafting process needs to be seen in a wider context if it is to be understood fully. It is just one part of the legislative process, which begins when an idea or concept concerning the social framework of society becomes government policy, is transformed to legislative shape by means of the drafting process, and eventually passes through the legislative machinery to reach the statute book as law. It may even be argued that the legislative process extends to enforcement of legislation and to its judicial application."

24 H. Xanthaki, 'On Transferability of Legislative Solutions: The Functionality Test', *in* C. Stefanou & H. Xanthaki (Eds.), *Drafting Legislation, A Modern Approach*, Farnham, Ashgate Publishing, 2008, p. 16.

25 *Ibid. See also* H. Xanthaki, *Drafting Legislation, Art and Technology of Rules for Regulation*, Oxford, Hart Publishing, 2014, Kindle edition at location 6010; *see in particular* Chapter 10, Comparative Legislative Drafting, and Chapter 1, Legislation as a Means of Regulation: Effectiveness in Legislative Drafting.

26 Xanthaki, 2013, p. 156 and 199-201.

doi: 10.5553/EJLR/138723702019021001006

tion to individual areas of law – such as criminal law or judicial sector laws. In post-conflict settings, there may have been successive different forms of government, each introducing their own constitutions, legal regimes and systems of governance and, at least sometimes, governing through emergency decrees or other measures in times of conflict. Discovering what is the formal law of the state can seem like a form of 'legal archaeology', digging through layers of these successive legal regimes to identify the status of different documents that purport to be, or have been, law. As the Cambodian judges found, it can be complicated.

This causes obvious difficulties for those seeking to assess whether the existing law is sufficient or whether legislative reform is necessary, as well as for those seeking to draft legislation. Without clarity on what laws exist and currently apply, they cannot assess what, if anything, needs to be drafted, what amended and what repealed. Perhaps as a result of difficulties in identifying applicable law, legislative drafters in Kosovo tended to use general repeal provisions such as "As of the entry into force of this Law any normative act contrary to its provisions shall be repealed."[27] Rather than contributing to legal certainty, such provisions shunted the task of identifying what law applied onto the users. Similarly, without knowledge of the overall legal framework, drafters cannot ensure consistency or harmonization of newly drafted laws with those that currently exist.[28] The result can be conflicting and confusing norms and can contribute to failure to implement.

Even finding copies of the laws may be challenging. In Afghanistan, for example, the Ministry of Justice's set of official legal journals was mostly destroyed during the conflict. In Liberia, 3 years after the end of the conflict, no one had a full set of the laws of the country.[29] While in some post-conflict settings online databases of law exist, they are not always comprehensive, up to date or easily searchable. Finding the formal laws may involve chance, or deliberate, meetings with the few people who have carefully kept copies of old laws during the years of conflict. Even where these old documents emerge, their legal validity may be unclear or questioned.[30] Lawyers without appropriate language skills or adequate

27 US Agency for International Development Kosovo Justice Support Program, National Center for State Courts, *Legislative Drafting Manual, A Practitioner's Guide to Drafting Laws in Kosovo*, p. 32. Available at: www.drejtesia-ks.org/repository/docs/Legislative%20Drafting%20Manual.pdf (last accessed 12 May 2018).

28 S. Lortie, 'Providing Technical Assistance on Law Drafting', *Statute Law Review*, Vol. 31, No. 1, 2010, pp. 1-31.

29 V. O'Connor, *Mapping the Justice System and Legal Framework in a Conflict-Affected Country*, International Network to Promote the Rule of Law, August 2015, p. 26. For a description of similar difficulties in locating laws in East Timor *see* M. Corrigan, *Law and Development: Applicable Law in Transitional Contexts – Is There a Role for Model Criminal Legislation?* Available at: www.hiidunia.com/2012/07/law-and-development-applicable-law-in-transitional-contexts-is-there-a-role-for-model-criminal-legislation (last accessed 12 May 2018).

30 Author's personal experience.

translation facilities are likely to face additional hurdles in identifying the appropriate laws.[31]

In the immediate post-conflict stage, at least where there is a change of governing authority, the initial approach to clarifying the overall legal framework is generally to use what Sannerholm calls an 'internal legal transplant'.[32] This internal transplant law generally provides that the pre-conflict law remains in effect often subject to exceptions, compliance with international human rights and laws brought into force by the interim or new administration. This approach was used, for example, by the UN in Somalia, Kosovo and East Timor and also by the Coalition Provisional Authority in Iraq.[33] Using an 'internal legal transplant' may provide the necessary legal basis for international/domestic administration to operate, but at least in some cases it has also contributed to further problems and confusion around the applicable legal frameworks.

To illustrate, according to Corrigan, in East Timor the UN required a domestic legal framework within which its powers could be exercised. That first step came in the form of Regulation 1999/1, which provided that, until replaced, the applicable law would be the law that applied prior to 25 October 1999 insofar as it did not conflict with international human rights standards, the UNTAET mandate, or any subsequent regulation or directive issued by the Transitional Administrator. This approach provided the UN authorities with the legal framework they required to deal with the immediate situation. However, for legal professionals, the result was uncertainty.[34] Similarly, in Kosovo the very first UNMIK regulation provided that the laws in place *prior* to NATO's intervention on 24 March 1999 were applicable provided that they did not conflict with international human rights or non-discrimination standards and subject to UNMIK's mandate and regulations.[35] This regulation was disputed by Kosovan Albanian legal professionals. They argued that the laws that should be in force were those applicable before the revocation of Kosovo's status as an autonomous province in 1989.[36]

31 For example, in Kosovo (a multilingual country) translation has been a recurring difficulty. Grasten states that during the UNMIK period, UNMIK did translate the existing legislation into English, but the translations were often very poor. UNMIK regulations, were drafted in English and then translated into Serbian and Albanian — again, sometimes so poorly that their meaning was different in different languages; and some regulations were not even translated. Grasten, 2016.

32 R.Z. Sannerholm, '"Cut and Paste'?" Rule of Law Promotion and Legal Transplants in War to Peace Transitions', *in* A. Bakardjieva Engelbrekt & J. Nergelius (Eds.), *New Directions in Comparative Law,* Edward Elgar Publishing, 2009, pp. 56-77, at 63. *See also* R. Sannerholm, 2007, pp. 7-8.

33 Sannerholm, 2009, pp. 63-64; Sannerholm, 2007, p. 7.

34 M. Corrigan, *Law and Development: Applicable Law in Transitional Contexts – Is There a Role for Model Criminal Legislation?*, p. 1-6.

35 UNMIK Regulation No. 1999/1 of 25 July 1999 on the Authority of the Interim Administration in Kosovo. Available at: www.unmikonline.org/regulations/1999/re99_01.pdf (last accessed 30 March 2018). Section 3: "The laws applicable in the territory of Kosovo prior to 24 March 1999 shall continue to apply in Kosovo insofar as they do not conflict with standards referred to in section 2, the fulfilment of the mandate given to UNMIK under United Nations Security Council resolution 1244 (1999), or the present or any other regulation issued by UNMIK."

36 *See* W.S. Betts, S.N Carlson & G. Grisvold, 'The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law', *Michigan Journal of International Law,* Vol. 22, 2001, pp. 371-389, at 373-375. Grasten, 2016.

doi: 10.5553/EJLR/138723702019021001006

Five months later a new regulation on the applicable law was promulgated. It provided that the laws applicable in Kosovo were: (1) UNMIK regulations and subsidiary legislation, (2) the law in force in Kosovo on 22 March 1989 (in case of conflict, UNMIK regulations would take precedence); and (3) where neither of these laws covered a specific situation, the applicable law would be other law in force in Kosovo *after* 22 March 1989 provided that it was non-discriminatory and human rights compliant. Finally, all persons holding public office or undertaking public duties would be bound by "internationally recognised human rights standards".[37]

Clearly, this provision made identifying what law would apply extremely complicated.

I Parallel Legal Systems and Non-state Laws

Another factor complicating identification of the law may be the existence of multiple legal systems operating in parallel. These include both parallel systems of formal state law and non-state customary or religious legal systems. Kosovo is a particular example; even as UNMIK and later the Government of Kosovo developed laws for Kosovo, Serbian parallel courts continued to operate in Kosovo and

37 UNMIK Regulation No. 1999/24 of 12 December 1999 on the Law Applicable in Kosovo. Available online at: www.unmikonline.org/regulations/1999/re99_24.pdf (last accessed 30 March 2018).

Section 1, Applicable Law:

1.1 The law applicable in Kosovo shall be:

a The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and

b The law in force in Kosovo on 22 March 1989.

In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.

1.2 If a court of competent jurisdiction or a body or person required to implement a provision of the law determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law.

1.3 In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in:

a The Universal Declaration on Human Rights of 10 December 1948;

b The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;

c The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto;

d The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;

e The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;

f The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979;

g The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and

h The International Convention on the Rights of the Child of 20 December 1989.

doi: 10.5553/EJLR/138723702019021001006

apply Serbian law.[38] In Nepal a system of justice created by Maoist rebels continued to operate after the end of the conflict.[39] In many post-conflict settings, customary or religious law is important.[40] Indeed, its use may have increased during periods of conflict. In Iraq, for example, the use of tribal customary law increased following the overthrow of Saddam Hussein in 2003 and the collapse of the state criminal justice system. By 2008, sheikhs in al Anbar Province claimed to be resolving hundreds of disputes each month.[41]

Some have criticized the international community for failing to take account, or adequate account, of these systems.[42] For example, in respect of Somalia, Thorne remarked that

> there seems to be a preconception that the conflict left a justice vacuum that now has to be filled. The Centre's research in Somalia especially demonstrates most pointedly that no such vacuum exists, even when the state structures have collapsed completely. People will always need ways of settling their disputes and if there is no more formal way of doing so, they resort to other means. In Somalia, not only did the *xeer* system continue to exist up until and after the collapse, *sharia* courts as well as civil society initiatives and so-called warlord justice were also resorted to in this sense.[43]

Writing in 2005, Le Sage describes Somali customary justice as having primacy over formal justice throughout Somalia and opined that, given Somalia's history under colonialism and under the Siad Barre regime, drafting of formal legal codes for the whole of Somalia was not a purely technical legal task, but "a major project of social engineering".[44] Speaking about the process of creating the 2012 Provisional Constitution of the Federal Republic of Somalia, the IDLO country director

38 E.A. Baylis, 'Parallel Courts in Post-Conflict Kosovo', *Yale Journal of International Law,* Vol. 32, No. 1, 2007, pp. 1-59.
39 O'Connor, August 2015, pp. 27-28.
40 Isser, 2011.
41 P. Asfura-Heim, 'Tribal Customary Law and Legal Pluralism in al Anbar, Iraq', *in* D.H. Isser (Ed.), *Customary Justice and the Rule of Law in War-Torn Societies*, Washington, DC, United States Institute of Peace Press, 2011 pp. 239-283, at 239.
42 For example, *see* Johnstone, 2017, pp. 337-371 and Isser, 2011.
43 K. Thorne, *Rule of Law through Imperfect Bodies? The Informal Justice Systems of Burundi and Somalia*, Centre for Humanitarian Dialogue, November 2005. Available at: https://www.files.ethz.ch/isn/26973/SummaryConclusionsRecommendations.pdf (last accessed 6 April 2018).
44 A. Le Sage, *Stateless Justice in Somalia, Formal and Informal Rule of Law Initiatives*, Centre for Human Dialogue, July 2005, pp. 8-9. *See also* Mosley who remarks that "for many Somalis, a legacy of the pre-1991 state under Mohamed Siad Barre has been persisting distrust in an overbearing centralized government." J. Mosley, *Somalia's Federal Future, Layered Agendas, Risks and Opportunities*, Chatham House Research Paper, September 2015, p. 5.

doi: 10.5553/EJLR/138723702019021001006

expressed surprise that the Somalis had been able to overcome years of conflict to reach agreement and remarked that it set a strong foundation for the future.[45]

The existence of such multiple forms of law may raise challenges for those developing legislation. Yet multiple forms of law, or persuasive authority, exist in many states. Legislative experts are accustomed, for example, to taking account of international and regional law, domestic statute law, jurisprudence and expert commentary. At least in theory there seems no reason why they should not also be able (with assistance from experts as necessary) to take customary and religious law into account.[46] Grenfell describes legal pluralism as playing a major role in British colonies – with customary law continuing, although subservient to imported law or being codified as for example, in Natal.[47]

Where non-state law plays an important role in a post-conflict state, failure to take into account what the population perceives as norms seems likely to undermine the legitimacy and use of new laws developed. Somalia's 2012 Provisional Constitution, in fact, provides that Shariah law is paramount.[48] Thus, awareness of and sensitivity to non-state forms of law, where they exist, may be important for legislative reform (to what extent and how being a question to be decided). Formal state law and non-state forms of law are not necessarily exclusive. Isser, for example, recommends the promotion of linkages between formal state and customary law.[49] For example, Asfura-Heim found that Iraqi state law allowed for the use of customary law in some circumstances, for example in respect of conciliation proceedings before verdict in criminal trials, and that, while officially the role of customary law in the legal system was very limited, some judges and defence lawyers did consult tribal law experts.[50]

C Huge Quantity of Legislation – System Overload

Pressure to draft and/or amend a large quantity of legislation is often an issue in post-conflict settings. This can include large and complex laws such as criminal codes and criminal procedure codes. The impetus may come from many sources –

45 "I have to admit that I was amazed to see Somalis meet their own six-month deadline for drafting of the Provisional Constitution. We are an argumentative lot – we've just had 20-odd years of conflict. I wasn't sure we could do it. There were heated arguments, people stormed out of discussions ... But most importantly, they came back and reached agreement. This was largely down to Somali people's capacity to sort things out between themselves, but also to the leadership of the constitutional process, with its unmatched appetite for compromise. I believe that was a true achievement for the country, and sets a strong foundation for the future." *See Rule of Law in Somalia: Behind the Headlines, Progress*, 2 September 2015. Available at: www.idlo.int/news/highlights/rule-law-somalia-behind-headlines-progress (last accessed 7 April 2018).

46 Xanthaki refers to the ability of a legislative drafter as being able to see "legislative proposals against the background of the whole structure and panoply of the law" – Xanthaki, 2013, p. 152.

47 L. Grenfell, *Promoting the Rule of Law in Post-Conflict States*, Cambridge, Cambridge University Press, 2013, pp. 15-16.

48 Art. 4 Provisional Constitution of the Federal Republic of Somalia 2012: "After Shari'ah, the Constitution of the Federal Republic of Somalia is the supreme law of the country."

49 Isser, 2011, pp. 358-363.

50 Asfura-Heim, 2011, pp. 269-271.

both domestic and international. Multiple factors may be at work, including the real, or perceived, existence of a legal vacuum. New constitutions may require that laws be drafted;[51] existing laws may require amendment to conform with a new constitution; a new administration may wish to replace laws of the past or may face new challenges or want to join international/regional bodies. They, and/or their international donors, may want a clear legal basis for the multiple ongoing transitions.

At the same time, state structures, legislative processes and procedures may be in formation and weak. As previously outlined, resources (financial and skills) may be limited, and distrust, disputes and power struggles ongoing. The state institutions that exist may be dealing with multiple issues, including, in some cases, still ongoing military action.

Kosovo during the UNMIK period (1999-2008) provides one example of this push to draft legislation. Between 1999 and 2004 216 regulations (primary legislation) were approved, about half of them supplemented by secondary legislation. The topics covered were wide ranging: basic competences, security, repeal of discriminatory law, the justice system, economic reform, taxation and elections.[52]

Critical of the process, Grasten paints a picture of UNMIK regulations often drafted quickly by international lawyers, with little concern for coherence of the overall legal framework and limited in-depth discussion of the new institutions being created.[53] Describing the process, Boon says:

> UN legal counsel typically drafted laws, sent them to independent experts such as the Council of Europe for comments, and then forwarded them on to UN headquarters in New York for approval. This exclusive method of drafting resulted in many legal instruments containing aspirational standards that were not grounded in practice. In some instances, these standards were not present in the national laws of even the most liberal democracies. In Kosovo, only the most important laws – such as the draft constitution – became a matter of public debate, despite other laws that had a very concrete impact on daily life.[54]

While, in theory, local input and ownership were provided and UNMIK established the Joint Advisory Council on Legislative Matters (comprising 20 Kosovar law professors and seven international members) Grasten opines that, in practice, this body was sidelined, with its input seen as more political than legal. Critics observed that there were

> [c]ompeting legal regimes, conflicting legal mandates, a general absence of legislative direction in key policy areas, confusion regarding controlling

51 For example, the Provisional Constitution of the Federal Republic of Somalia 2012 sets out a long schedule of priority laws to be enacted in the first term of the Federal Parliament.

52 Boon, 2005, p. 321.

53 Grasten, 2016.

54 Boon, 2005, p. 321.

doi: 10.5553/EJLR/138723702019021001006

> authority and the lack of harmony within the overall legal structure of the country.[55]

A SIGMA assessment, published in May 2008, shortly after the first post-conflict Government of Kosovo assumed legislative responsibilities (independence in February 2008), stated that the multiple layers of law had resulted in an incoherent legal system and noted that:

> In addition, new regulations show some degree of incoherence, most likely due to inadequate co-ordination between experts and donors and to weak capacities of local institutions and the local administration to oppose the international community and present their own solutions adapted to their own legal traditions.
>
> The large number of laws, although impressive for the volume of work accomplished, raises some concern, as rushing to adopt laws without a proper discussion, consultation and co-ordination process has meant neglecting in some cases the quality and "hidden" consequences of those laws. This process is most likely to lead in the near future to a review of most of the laws.[56]

The prediction that the laws would be reviewed proved correct. Following a declaration of independence on 17 February 2008, the Government of Kosovo assumed legislative responsibilities after almost 10 years, during which that function had been exercised by UNMIK. During the ensuing years, the volume of legislative work continued to be high, with the added desire to 'domesticize', rewrite and replace many UNMIK laws. Between the end of March 2011 and June 2013 (*i.e.* just a little more than 2 years) the Assembly of Kosovo approved 164 laws, most being completely new laws rather than amendments.[57] Among the work undertaken was the complete rewriting of the criminal and criminal procedure codes, which had only just come into force in 2004 after 3 years of drafting under UNMIK.[58] On 1 January 2013 a new criminal code and criminal procedure code came into effect.

D Is Reform Necessary and What Do We Want to Achieve?

Thornton's Legislative Drafting advises that the first task for anyone drafting legislation is "to know what they are about"[59] – to understand what is to be achieved. There can be little doubt that immediately following conflict, those admin-

55 2006 USAID manual 'A Practitioners Guide to Drafting Laws in Kosovo", quoted in Garsten, 2016.

56 SIGMA Kosovo Public Service and the Administrative Framework, Assessment May 2008. Available at: www.oecd.org/countries/serbia/47081121.pdf (last accessed 2 April 2018).

57 K. Kasemets, 'Policy Making Review Kosovo', *SIGMA Papers*, No. 52, OECD Publishing, Paris, 2015, p. 11. Available at: http://dx.doi.org/10.1787/5js7nr4np0d8-en (last accessed 12 November 2018).

58 Garsten, 2016.

59 Xanthaki, 2013, p. 151.

doi: 10.5553/EJLR/138723702019021001006

istrating the country need a clear legal basis on which to act.[60] Where international actors are running the country, or even where they are providing assistance or training, they need to know that the bodies that they are establishing, training or supporting have lawful authority and can be held to account for their actions, including any human rights violations.[61] Where residents use state law to regulate their daily lives, they too may be concerned about what law applies in the new setting. Even in countries where non-state law is used by many people, governments may wish to join international or regional bodies or participate in international agreements; this is likely to require legislation.[62]

In 2004, the UN Secretary General's Report on the rule of law and transitional justice in conflict and post-conflict societies stated that in "post-conflict settings, legislative frameworks often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards".[63] Clearly, to comply with the UN definition of the rule of law, such legislation would require reform. It is doubtful, however, that simply replacing such provisions with human rights compliant norms in and of itself enhances the rule of law. For example, Banks recounts that Iraqi judges and police resisted using legislative amendments introduced by the Coalition Provisional Authority with the aim of introducing due process rights into criminal procedures. She considers that insufficient thought was given to the process of reform.[64] Describing the work of the European Union mission in Iraq (2005-2013), Christova opined that there was still a need to review outdated Iraqi legislation to ensure fundamental human rights guarantees but warned that this was a long-term endeavour.[65]

The experience of Kosovo bears this out. For example, since the end of the conflict, Kosovo has twice rewritten its entire criminal and criminal procedure codes. Despite multiple workshops, drafting conferences and training sessions, international actors still express concerns about the codes. For example, in its 2018 report, the European Commission commented that the efficiency of the judiciary is seriously hampered by shortcomings in criminal legislation since

60 Boon argues that occupants and multilateral interim administrations do require some law-making capabilities to prevent chaos and prevent the public from harm. However, there is a dilemma between (1) the need to rebuild core state capacities such as functioning legal systems in order to ensure peace and stability and (2) over expansive international involvement in reconstruction of legal system risks violating the fundamental premises of international law that people have the right to determine their own legal institutions and political path. Boon, 2005, p. 322.

61 Boon, 2005, p. 304.

62 L.M. Trzcinski & F.K. Upham, 'Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia', *Asian Journal of Law and Society*, Vol. 1, 2014, pp. 55-78, at 71-72.

63 UN Doc S/2004/616 (23 August 2004), *Report of the Secretary General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, p. 10.

64 C. Banks, 'Reconstructing Justice in Iraq: Promoting the Rule of Law in a Post-Conflict State', *Hague Journal on the Rule of Law*, Vol 2, 2010, pp. 155-170. Banks recounts that, for example, court orders for the release of detainees were simply ignored. In her view, it seemed that American lawyers saw their task as "simply overhauling inappropriate laws", and little thought had been given to the complexities of introducing change in a society accustomed to autocratic rule.

65 A. Christova, 'Seven Years of EUJUST LEX: The Challenge of Rule of Law in Iraq', *Journal of Contemporary European Research*, Vol. 9, No. 3, pp. 424-439.

European Journal of Law Reform 2019 (21) 1
doi: 10.5553/EJLR/138723702019021001006

codes do not permit robust investigations and prosecutions,[66] and, in 2016, the OSCE considered legal professionals required further training in order to understand their roles in the new procedures.[67]

To determine whether reform, and what reform, is necessary – whether in relation to the overall legal framework or specific laws – requires analysis of what already exists (including parallel legal structures) and thinking and decisions about what *we* want now But in post-conflict settings 'we' may be difficult owing to the many ongoing disputes, lack of trust, communication or cooperation between different groups. Different groups may be jostling for power, money or position, and important stakeholders may be excluded or may exclude themselves. Stakeholder engagement may be challenging.[68] Even at the government level 'we' may be difficult – relevant ministries or government authorities may be reluctant to work together or may compete for responsibility or power.[69] Describing the lengthy process of land reform in Cambodia, Trzcinski and Upham describe two relevant ministries (the Ministry of Justice and the Land Ministry) as "like separate fortified islands", which did not work with or talk to each other even where their responsibilities overlapped. The differences between the two ministries were not simply ideological; in determining what sort of land ownership process would apply, money and power of the respective ministries were at stake.[70] Developing legislation in such circumstances is fraught with challenges. Such issues apply not just at the central government level. In Somalia the formation of the basic federal state structures and the distribution of power between

66 European Commission, *Commission Staff Working Document – Kosovo 2018 Report,* SWD (2018) 156 final, accompanying the document Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions, *2018 Communication on EU Enlargement Policy*, COM (2018) 450 final, 17 April 2018.

67 In 2016, OSCE reported that "critical new procedures" were not being applied properly or at all and recommended that judges, prosecutors and lawyers needed further training to understand their roles in the new criminal procedures introduced. OSCE Mission in Kosovo, *Review of the Implementation of the New Criminal Procedure Code of Kosovo*, June 2016. Available at: https://www.osce.org/kosovo/243976 (last accessed 4 April 2018).

68 Evans states, in relation to consultation on implementation of legislation, that in a post-conflict country "stakeholder engagement may enhance the possibility of tensions escalating, and as such can be a challenging process. Stakeholder engagement might lead to solutions that are chosen, not because they make the most sense in terms of sound policy, but because they are solutions on which all the stakeholders can agree. Stakeholder engagement adds complexity and time to the implementation process because of the difficulty of balancing inconsistent views. Yet the benefits of high-quality stakeholder engagement far outweigh the costs." Evans, 2016, p. 48.

69 In contrast, SIGMA found, in 2008, that in Kosovo there did seem to be recognition that ministries needed to consult each other. However, "these consultations are often not performed in sufficient depth or do not include all concerned interests." SIGMA, *Kosovo Policy-Making and Co-ordination Assessment*, May 2008, p. 2. Available at: www.oecd.org/countries/serbia/41637613.pdf (last accessed 26 May 2018).

70 L.M. Trzcinski & F.K. Upham, 'Creating Law from the Ground Up: Land Law in Post-Conflict Cambodia', *Asian Journal of Law and Society*, Vol. 1, 2014, pp. 55-78.

regional states and the federal government are subjects of political dispute.[71] The existence of multiple bodies involved in coastal defence at both the federal and the regional state levels affected the development of legislation establishing institutional responsibility for coastal defence.[72] The absence of agreement or cooperation and coordination between different ministries, or parts of ministries (or regional governments), may result in laws that conflict with each other or legislative reform becoming a lengthy battle between different stakeholders.[73]

As Channell points out,

> effective policy making – which results in law-making is normally based on some form of social discourse between the government and numerous interest groups, which leads to selection of appropriate tools to accomplish the agreed changes. Simply reforming the tools, absent underlying policy dialogues and processes, is insufficient.[74]

But in post-conflict settings, if coordination, cooperation and policy leadership at the governmental level is difficult, consultation with the public or relevant external stakeholders may be weaker. For example, in 2008 SIGMA found that the new Kosovo government's Rules of Procedure paid "surprisingly little attention to the need to consult the public on the development of policy and legislation", and the new Kosovan government did not appear to appreciate the need to consult.[75] In light of criticisms regarding the lack of consultation by UNMIK, perhaps little had been done during that time to transfer good practice.[76]

An international judge who participated in legislative drafting working groups in Kosovo is quoted as saying:

71 United Nations Security Council, *Report of the Secretary-General on Somalia*, S/2017/1109, 26 December 2017, pp. 1-5. *See also* J. Mosley, *Somalia's Federal Future, Layered Agendas, Risks and Opportunities*, Chatham House Research Paper, September 2015, *See also*, for example *Somalia: Federal States Suspend Constitutional Reviews*, Garowe Online, 11 October 2017. Available at: https://www.garoweonline.com/en/news/somalia/somalia-federal-states-suspend-constitutional-reviews (last accessed 9 April 2018).

72 For one opinion *see* J. Bridger, *Searching for a Somali Coastguard*, Center for International Maritime Security, 8 October 2013. Available at: http://cimsec.org/searching-somali-coastguard/7776 (last accessed 26 May 2018). On 5 September 2017 the UN Secretary General for Somalia reported that "The National Maritime Coordination Committee met on 28 June to align the maritime domain with the national security architecture agreement and submitted a proposal to place the coast guard under the Ministry of Internal Security." *See Report of the Secretary-General on Somalia*, UN Security Council S/2017/751, 5 September 2017.

73 For discussion of lengthy legislative battles on land reform in Cambodia, *see* Trzcinski & Upham, 2014.

74 W. Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Post-Communist Countries*, Carnegie Papers, No. 57, May 2005.

75 SIGMA, *Kosovo Policy-Making and Co-ordination Assessment*, May 2008, p. 6. Available at: www.oecd.org/countries/serbia/41637613.pdf (last accessed 26 May 2018).

76 Arguably, the method of developing law used did little to pass on good practices to domestic authorities developing legislation in the future.

doi: 10.5553/EJLR/138723702019021001006

> As normally happens in any law that has been introduced by the international community is that you end up with a compromise. So you start up with what might actually be quite a good idea. Then it goes through various different working groups, different people end up getting involved and stuff. They want to contribute something and then, in order to kind of end up with a final product, you invariably have to compromise. And so you often end up with not the best product but something you have reached by way of compromise. And that to me is not a good way of making law.[77]

Since different groups may have different views as to what 'best product' would be, legislative reform may involve compromises. If the door to consultation is opened only at the final drafting stage, multiple views about what that reform should be should perhaps be expected at that time. Taking into account different views at an earlier stage and greater clarity from government sponsors of legislation about what was to be achieved and how[78] might have lessened the extent to which drafting the law became a scenario of dispute.

Commenting on international drafting assistance projects to developing states, Lortie remarked, "there is an almost universal tendency to concentrate on the production of a legislative draft without giving adequate consideration to the measures that it should reflect." In his view "many of the problems that appear to be drafting issues can be seen to be in fact ones of policy development". In his view recipient governments may more urgently need assistance with policy development than with legislative drafting.[79]

In concentrating on producing a draft, post-conflict authorities may give insufficient prior thought to basic questions: what we want to achieve, how we can do it, whether this will change behaviours in the way we want, whether there are any legal or other limitations or practical issues we need to think about, whether we have the money or resources we need, what the different people and government bodies affected think about this, whether we have asked and/or involved them, and even whether it is useful to develop new legislation at this time or at all.[80] Unless care is taken, in focusing on producing individual laws,the linkages between, and the impact of change on, different laws and existing insti-

77 Quoted in Grasten, 2016, p. 341.

78 In 2008, SIGMA found that there were significant weaknesses in the policy development, that legal-drafting capacities in ministries were generally unable to prepare concept papers, to conduct impact assessment and to draft legislation at an acceptable level of quality, and that the consultation process, both interministerial and with civil society, needed to be improved. SIGMA, May 2008, p. 7.

79 S. Lortie, 'Providing Technical Assistance on Law Drafting', *State Law Review*, Vol. 31, No. 1, 2010, p. 1-23, at 7-8.

80 Xanthaki, in Thornton's Legislative Drafting, strongly advises that a drafter should consider whether new legislation is necessary: "Unnecessary legislation is not only useless, it is actively damaging. It adds to the statute book thus adding to the complexity of legislation and rendering its understanding, and subsequent application doubtful. .... And it creates the false [fraudulent?] impression that the government has dealt with a social issue, whereas it clearly has not." Xanthaki, 2013, p. 157.

doi: 10.5553/EJLR/138723702019021001006

tutions may be overlooked. As a result different laws may conflict rather than, as needed - if the reform is to be successful, working together.[81]

Where international actors focus on production of individual laws, there may be the opportunity for knowledge transfer, but systemic weaknesses in legislative reform may be obscured. Often recruited as subject matter experts on short-term contracts, international lawyers working on an individual law may be able to provide much needed advice on practices and law in different countries and/or internationally, but it may be outside their remit, or sometimes expertise, to know about the practicality of proposed legislation in the particular post-conflict setting, or to advise on more systemic issues such as consultation, policymaking, harmonization with other laws (whether state or non-state) or legislative procedures. Where individual laws are not linked to broader coordinated reform strategy, the chances of lack of harmonization with other reforms may be still higher and the chance of enactment lower. In some post-conflict settings 'draft laws' or bills are produced but may never be enacted. The challenges in respect of what 'we' want may apply not only to domestic stakeholders, but also to international actors, who may have different and conflicting ideas about what should be achieved and how.[82]

E How Do We Do It – Legislative Processes and Procedures

O'Connor convincingly argues that the UN definition of the rule of law requires that the procedures for legislative reform be clear and transparent. At a minimum, the public should, in her view, know which body is responsible for developing new laws, any formal process by which proposed legislation is circulated to others before being passed, and any formal process by which citizens may comment. In many post-conflict settings, she observes:

> the concept of procedural transparency is routinely breached by governments rushing to introduce new laws without adequately attending to the procedural elements of law-making, unfortunately much in the same way the prior regime or dictatorship did.[83]

Some post-conflict countries have clear processes and procedures for legislative reform (including determining legislative priorities and procedures in the executive and legislature); however, in others they may be non-existent, in development or weak. Providing examples from Afghanistan, Lortie observes that countries struggling with dramatic sociocultural problems are unlikely to have firmly established or well-functioning processes. Even if a system for developing laws exists, it may be ineffective.[84] For example, the new Kosovo government had pro-

81 For discussion of development of conflicting laws in Aghanistan *see* Hartmann & Klonowiecka-Milart, 2011.

82 *See*, for example, in Cambodia: Trzcinski & Upham, 2014.

83 O'Connor, February 2015, p. 9.

84 Lortie, 2010, pp. 8-9.

European Journal of Law Reform 2019 (21) 1
doi: 10.5553/EJLR/138723702019021001006

cedures for the development and drafting of primary and secondary legislation. As SIGMA noted, they contained “some very good features”. However, in practice, some of the procedures were observed, if at all, rather formulaically.[85]

Where institutions have been established or nominated to perform legislative reform, they may be nascent and weak, their role disputed or little known. For example, an evaluation of a USAID project design for Bosnia commented that while an objective was for the Ministry of Justice to take the lead in legislative drafting, other ministries disputed this role.[86] Thus, the development of adequate and functioning legislative reform procedures may be part of the resolution of power struggles that occur in post-conflict settings. Leroux-Martin and O'Connor suggest that, in the initial post-conflict stage, focusing on building relationships, rather than procedural rules, could be more productive.[87]

F Implementation

Just putting a new law ‘on the books’ does not mean that it functions in practice. If all persons are to be accountable to laws and legal certainty achieved, surely laws need generally to function and be applied. However, as Evans points out, despite the resources devoted to developing laws, many reform processes in post-conflict settings fail to result in laws that are implemented or that achieve intended results. She reports that governing authorities fail to think about or plan for making the law work in practice. There may be systemic reasons for this, but many practitioners simply report that they do not have enough time.[88]

Evans identifies a wide range of barriers to implementation, some of which have previously been discussed. These include financial, legal and social constraints.[89] Financial resources needed to establish new institutions, publish newly written legislation, train those who will implement or enforce it[90] or even pay those who write it may be limited or uncertain, sometimes depending on donor assistance. Time too may be in short supply both in relation to the large volume of work and where those involved are working on contracts of limited duration.

Legal and technical issues may also be a barrier. For example, Evans highlights the use of foreign transplants[91] that are overly complex for the environ-

85 SIGMA, May 2008.

86 C.E. Costello, F.L. Bremson & R.H. Langan II, *Mid-term Evaluation of the Justice Sector Development Project (JSDP)* 2006 quoted in Lortie, 2010, p. 9.

87 P. Leroux-Martin & V. O'Connor, *Systems Thinking for Peacebuilding and Rule of Law*, Peaceworks, United States Institute of Peace, October 2017.

88 Evans, 2016, p. 3.

89 Evans, 2016, pp. 16-21.

90 *See*, for example, with respect to Kosovo's Criminal Codes: OSCE Mission in Kosovo, June 2016.

91 For more on the use of legal transplants in post-conflict settings, *see* J. Jupp, *Legal Transplants: Appropriate Tools for the Reform of Afghanistan's Criminal Law Framework? An Evaluation of the Interim Criminal Procedure Code 2004 and the Counter Narcotics Law 2005* (University of Sussex DPhil Thesis), July 2011. Available at: http://sro.sussex.ac.uk/39232; J. Jupp, ‘Legal Transplants as Tools for Post Conflict Criminal Law Reform: Justification and Evaluation’, *Cambridge Journal of International and Comparative Law*, Vol. 3, 2014, pp. 381-407. Available at: https://ssrn.com/abstract=2938655 and Hartmann & Klonowiecka-Milart, 2011.

ment, do not fit well with the overall legal framework of the country, or refer to legal concepts or bodies that do not exist or simply are not well understood by those responsible for implementation. Other technical drafting failures can also be a barrier to implementation. Skills, experience and time may be in short supply. In some post-conflict settings, those writing the law (whether international or local) may have little, or no, background or training in drafting laws.[92] Whether owing to haste, lack of knowledge or experience, they simply may not consider things like writing a delayed commencement provision (*vacatio legis*) to allow time for training or the creation of necessary infrastructure to take place before the law comes into force. They may not consider the potential effect on legal transparency and certainty if important details are left to secondary legislation, which is difficult for the public to access, or never written.[93] Even where corruption is endemic and undermines the rule of law, no thought may be given to whether the procedures and language chosen militate against it.[94] In haste, they may omit the "tedious necessity" of checking numbering or consistent use of language so that the law is clear.[95] In multilingual settings this extends to checking that the meaning of the law is identical in all languages.[96]

Social barriers to implementation such as opposition to the goals or changes introduced by the law may result in lack of enforcement or contribute to resourcing barriers (*e.g.* inadequate funding). Lack of trust or relationships may impede necessary practical coordination between stakeholders and, as highlighted by Leroux-Martin and others, may take years to establish. Failure to take account of the realities of different parts of the country, for example, rural areas, may lead to laws that cannot be, or are not being, implemented in some areas.[97]

92 UNODC, 2011, p. 61. Training does not offer a complete sustainable solution in situations where there is a high turnover of legislative staff.

93 *See*, for example, OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, *Implementation of Kosovo Assembly Laws Report II, Review Period: Laws Promulgated in 2004*, December 2005, p. 31. Available at: https://www.osce.org/kosovo/17563?download=true (last accessed 25 May 2018). "Free and easy access to information by the public is still a serious issue. In the process of compiling this report when the respective AIs were not available on the internet, the OSCE had to request copies directly from the ministry. Often these Ministries would not have copies at hand. Moreover, many of these ministries had to be contacted several times (in one case six times) before they eventually complied with the request. In three cases the recovery of information proved to be particularly complicated, requiring an assistant of the OSCE to download the respective AIs on an USB memory stick. This clearly highlights the difficulties a resident is facing when it comes to accessing subsidiary acts."

94 Seidman *et al.*, 2001, pp. 341-375.

95 Xanthaki, 2013, p. 200.

96 In 2012 the OSCE reported that challenges in developing multilingual legislation with limited resources in Kosovo led to draft legislation having completely different meanings in different languages – for example: Article 3, draft Law against Terrorism, the Albanian version of this provision provided a definition of a *criminal* offence, while the Serbian version qualified the same act as a *minor* offence. *See* OSCE Mission in Kosovo, *Multilingual Legislation in Kosovo and Its Challenges*, February 2012. Available at: https://www.osce.org/kosovo/87704?download=true (last accessed 12 November 2018).

97 Evans, 2016, p. 20.

European Journal of Law Reform 2019 (21) 1
doi: 10.5553/EJLR/138723702019021001006

G Other Challenges

Multiple additional challenges may exist in developing or implementing legislation in post-conflict settings. These may include practical challenges such as ensuring the safety of participants in policy or drafting groups or finding neutral locations where they are all willing to meet. Each setting may raise different issues. Donor-driven reforms (as opposed to reforms undertaken by international administrations) may also face difficulties where the governments or institutions they seek to support in undertaking legislative reform simply have other priorities[98] or, for whatever reason, little enthusiasm for effective reform.[99]

H What Does This Mean for the Rule of Law

The laws are good, but they are just not implemented is an often-heard refrain. Perhaps, as suggested by O'Connor, the UN rule of law definition is best understood as aspirational. As she says, it is unrealistic to expect societies torn apart by conflict to realize the rule of law "in two, ten, or even twenty years. Transformation takes time".[100] If laws developed in post-conflict settings are to contribute to the rule of law as defined by the UN, then the factors set out in that definition, such as adherence to human rights standards, equality before and accountability to the law, legal certainty and avoidance of arbitrariness, all need to be considered laws and procedures developed. However, it can be questioned as to the extent to which a law that adheres to human rights, or other relevant international standards, but cannot or is not applied in practice moves a society in the direction of achieving the aspiration of the rule of law. Human rights compliance may be achieved, at least on paper, but what about legal certainty, transparency or, at least potentially, the supremacy of or accountability to the law? Where legislation does not 'work', people will find other ways of regulating their lives and resolving their problems.

I Change and Progress

Change does occur in time. As an example, outlining change in Cambodian land reform between the early 1990s and 2011, Trzcinski and Upham describe the foreign-led legislative reform in Cambodia that led to the 2001 Land Act as "the epitome of top-down social engineering with the added dimension that it was based on foreign models and designed by foreign experts with reference to global best

98 *See*, with reference to capacity building, T. Edmunds, *Maritime Capacity Building in the Horn of Africa: States of Somalia*, EU-CIVCAP, 2017.

99 Apparent lack of 'political will' may mask very real political (or other) problems. University of Bristol, *Evaluating International Efforts on Local Capacity Building*, EU-CIVCAP, 25 May 2017, p. 50. Available at: https://eucivcap.files.wordpress.com/2017/05/eu-civcap_deliverable_6-1.pdf (last accessed 27 May 2018).

100 O'Connor, 2015, p. 5.

doi: 10.5553/EJLR/138723702019021001006

practices, but with virtually no knowledge of Cambodian society".[101] However, over 10 to 15 years, there was a real increase in the capacity of Cambodian authorities to lead their own legislative processes.[102] Kosovo's legislative processes similarly have evolved with new procedures including minimum standards for public consultation and an online facility for public consultation.[103]

Change occurs not only in the post-conflict settings themselves but also in the interventions of international actors. Reflecting on their own experiences and "recurring failures" in legislative reform, Leroux-Martin and O'Connor concluded that they had failed to fully understand and work with the complexity and chaos of post-conflict settings or to understand them as systems in which changes in one part affect other parts - in which relationships between different parts of the overall system are important.[104] Further, they failed to understand the impact their interventions had on the "positions, interests and emotions of people competing for power in the aftermath of armed conflict". These mistakes "led to reforms that either failed before being adopted or were neutralized by local actors soon after we left".[105]

Many lessons have been learned by international actors working in legislative reform in post-conflict states. As early as 2004, the UN Secretary General remarked, "no rule of law reform imposed from outside can hope to be successful or sustainable. The role of the United Nations and the international community should be solidarity, not substitution."[106] Other international actors, for example the European Union, similarly stress the importance of local ownership of post-conflict reform processes,[107] and Isser remarks that increasingly donors show interest and activity in relation to customary justice systems.[108] Despite the changes, as Leroux-Martin and O'Connor remark, there can remain a tension between the desire of funders to achieve a 'result' and the sometimes slow and challenging work of adequate reform.[109]

101 Trzcinski & Upham, 2014, p. 60.
102 *Ibid.*, pp. 62-63.
103 *See* Government of Kosovo, Ministry of European Integration. Available at: http://mei-ks.net/en/legal-framework-for-approximation- and Regulation (Grk) No.05/2016 on Minimum Standards for Public Consultation Process.
104 *Ibid.*, p. 19.
105 *Ibid.*, p. 11.
106 UN Doc S/2004/616, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, 23 August 2004, p. 7. *See also* the guiding principles set out in the *Guidance Note of the Secretary-General: UN Approach to Rule of Law Assistance, April 2008*: (1) Base assistance on international norms and standards, (2) Take account of the political context, (3) Base assistance on the unique country context, (4) Advance human rights and gender justice, (5) Ensure national ownership, (6) Support national reform constituencies, (7) Ensure a coherent and comprehensive strategic approach and (8) Engage in effective coordination and partnerships.
107 However, a 2017 evaluation of European Union capacity building projects found that, despite the stated commitment to local ownership, at least in some settings, especially Somalia, local partners saw the projects as donor driven. *See* EU-CIVCAP *Evaluating International Efforts on Local Capacity Building*, Version 1.8, 25 May 2017, pp. 40-44.
108 Isser, 2011, pp. 342-343.
109 Leroux-Martin & O'Connor, 2017, p. 15.

doi: 10.5553/EJLR/138723702019021001006

J Conclusion

Leroux-Martin and O'Connor ask what if we were to understand and manage post-conflict reform processes as "messy journeys requiring many adjustments"?[110] Since the international post-conflict administrations of the 1990s and early 2000s, there has been change. The rule of law community is developing new ways of thinking about interventions in post-conflict settings, including in relation to legislative reform. As it does so, it might find it useful to consider the experience of legislative experts and to focus not just on legislation as a completed product but also on the steps along the way to developing and implementing legislation which is effective law.

110 *Ibid.*, p. 8.

doi: 10.5553/EJLR/138723702019021001006