

Extending Rule of Law Promotion beyond Criminal Justice: Rule of Law and Public Administration in Conflict, Post-conflict and Fragile States

Richard Zajac-Sannerholm
Folke Bernadotte Academy

Abstract

In countries struggling to overcome conflict, organised criminal violence and widespread poverty, administrative agencies have a critical part to play. Studies show that where administrative agencies are weak, subject to cronyism and corruption, and serving elite interests rather than the common good, states are vulnerable to fragility and conflict. Administrative agencies are the main interfaces between the state and the citizens and it is important to enhance the capacity of central state agencies while at the same time ensuring that their performance accord with human rights standards and rule of law principles. Thus far the international community has approached public administration reform and rule of law promotion as two separate projects. Reform of police forces, judiciaries, prosecutorial offices, and prisons are often undertaken on the basis of qualitative standards while public administration reform focuses on quantitative matters such as modernisation, organisational restructuring, and human resource matters.

There is today a growing interest and momentum in the area of rule of law and public administration and it is critical that emerging standard-setting and innovating approaches are supported by international the international community at the global level.

Keywords: rule of law – public administration – administrative agencies – self-assessment – analytical tool – measuring – monitoring – administrative justice – manuals – standard-setting

Importance of rule of law in public administration

Public administration agencies are the principal interfaces between the state and the individual and deal with matters of relevance for fundamental human rights. A rule of law deficit in public administration is troubling because administrative authorities can effectively determine the conditions for justice, peace, and security. For instance, it is the processes of civil registration (issuing of birth, death, marriage, citizenship certificates, etc.) that determine whether people are to be regarded citizens, and thus should have the right to education, healthcare, vote, etc. Conversely, land administration agencies can have a direct impact on the successful return of refugees and internally displaced persons.

Several studies show that “quality” problems in public administration seriously challenge the ability of states to implement policies or programmes on economic development or support national and international investments. The fledgling state and public administration cannot play a constructive role in the coordination and implementation of international assistance and humanitarian relief if it acts arbitrarily, is corrupt, or systematically violates human rights standards. In addition, for post-conflict states that may relapse into conflict dissensions increase when the administration fails to meet legitimate demands, or when it enforces discriminatory policies.

In this sense, governments and international organisations have reason to regard enhancing the rule of law in public administration as a preventive aspect determining the ability of the system to defuse and deflect civil strife, unrest and conflict. Governments and administrative agencies need to know what are the rule of law challenges that confront the administration, and how to improve access and accountability. Citizens similarly need to know what they – in their capacity as rights-holders - can legally claim of the state and administrative agencies.

Challenges

For the UN and the international community at large the rule of law has emerged as a central element in the maintenance of peace and security. Justice and the rule of law are together, with security and democracy, seen to be mutually reinforcing imperatives in fragile post-conflict, peace, and state-building processes. The UN Secretary-General has defined the rule of law in broad terms as ‘a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws’. The definition also lays down that laws should be publicly promulgated, equally enforced and independently adjudicated, and be consistent with international human rights standards.¹ In the latest EU policy for justice missions under the Common Security and Defence Policy the UN’s definition is adopted as a guiding concept.² While rule of law policy from leading organisations is broad enough to include public administration there is in practice a “sectorisation” of rule of law assistance.

The international community’s rule of law assistance has varied over time but a dominant pattern is one where justice chain institutions receive a chief part of the attention (e.g. judiciary, law enforcement and detentions and corrections). For instance, the Folke Bernadotte Academy’s (FBA) mapping of UN rule of law efforts in Africa through peacekeeping and peace building missions between 1989 and 2010 shows that rule of law and public administration receives only marginal and scattered support over time.³

In many peacekeeping, peace-building and fragile state environments, public administration reform and rule of law reform are promoted as separate projects, underpinned by different paradigms: public administration reform is geared to making the administration more effective and efficient, while rule of law reform focuses on introducing and strengthening qualitative standards and human rights principles.

As a result, there is a rule of law deficit in the public administration and in the international efforts being made to reform it. The reasons for this division include lack of knowledge among international and national policy-makers concerning the relevance of the rule of law for public administration, vague and conflicting mandates and objectives involved and differences in topical orientation and “culture” among the international actors concerned. One of the most important observations in the FBA study, *‘Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development’*, is that many international and national policy-makers and implementers are not aware of the rule of law dimensions of public administration reform, and would need some kind of “yardstick” for what constitutes rule of law in public administration and how to effectively implement it.⁴

Important developments

I. Standard-setting and practical guidance

There is a growing awareness in the international community that the current situation is unsatisfactory and that the traditional concept of public administration reform needs to be broadened to include dimensions above and beyond efficiency and effectiveness. As early as in 1995, the UN General Assembly report *The Legal and Regulatory Framework of Public Administration* pointed out that efficiency in the administration is pointless and potentially dangerous without an appropriate rule of law framework. Recent statements by the UN Secretary General and others underline the centrality of the rule of law in UN peace operations and peace building.

The Council of Europe has developed several standard-setting recommendations on rule of law in public administration.⁵ Among the standards in the Council of Europe’s recommendations are that public authorities shall act in accordance with the principles of legality, equality, impartiality, proportionality, legal certainty, and transparency. Public authorities shall also act and perform their duties within a reasonable time. Furthermore public authorities shall provide private persons with the opportunity to participate in the preparation and implementation of administrative decisions which affect their rights or interests, and respect the right to privacy,

particularly when processing personal data. On the issue of appeal, it is stated that private persons shall be entitled to seek, directly or by way of exception, a judicial review of an administrative decision which directly affects their rights and interests.

The Organization for Economic Co-operation and Development joint initiative Support for Improvement in Governance and Management (SIGMA) gives equal status to “effective administration” and “the respect for the rights and interests of citizens” in its programmes to support transition. The concept “effective administration” is understood to mean that each department, agency, local authority, or other public body exercises its powers in accordance with the purposes and standards defined by law in an economical and efficient manner. The “rights and interests of citizens” means that people who are affected by the actions and decisions of administrative institutions should be treated properly and fairly - that is, benefit from the protection normally associated with the rule of law. Outside a European context, legal qualitative aspects of public administration have also made their way into important frameworks, such as the African Peer Review Mechanism.

II. Practical guidance and manuals

Beyond the emerging standard-setting there is also a need for practical manuals and guidance for rule of law and public administrative reformers. The field of rule of law reform today offers a multitude of “how-to” manuals on judicial reform, vetting of police forces, and criminal law reform but there is scarce guidance on how to approach rule of law problems in administrative agencies.

The FBA, together with international partners, have developed a set of tools for rule of law and public administration reform. One is a self-assessment tool for measuring rule of law at national and local government agencies, developed together with the UNDP. The second is a handbook on monitoring administrative justice, developed together with the ODHIR.

The self-assessment tool for measuring rule of law in public administration helps governments identify, better understand, and more effectively address rule of law problems in administrative agencies and processes in post-crisis, developing and transition countries. A novelty and important contribution of the tool to the range of existing assessment instruments is the emphasis on the “demand-side” of public administration – that is, the services that individuals themselves consider essential, and the aspects they consider problematic.

Furthermore, the assessment effort is nationally and locally owned, with the targeted agencies and their “users” in lead of the process. The tool examines rule of law according to six commonly accepted principles - *legality, accessibility, right to be heard, right to appeal, transparency and accountability* - and categorises the findings into structural, institutional and access-related problems. The tool provides concrete and actionable data on how a particular administrative agency performs in terms of rule of law, and how citizens (e.g. the “users”) perceive the agency. Furthermore, the tool is adaptable in focus, structure, and methodology to accommodate for various assessment needs and contexts.

The handbook on monitoring administrative justice focuses on administrative acts appealed to a court, tribunal or other judicial body established by law. The handbook serves as a resource for policy-makers and practitioners working on a range of issues relating to trial monitoring, human rights promotion, rule of law, good governance and public administrative reform. The handbook builds upon and complements established practices and methodologies in trial monitoring in other justice fields.

Ways ahead

There is a need for concerted efforts at the global level to address the issue of what constitutes rule of law in public administration. The urgent need in conflict, post-conflict and fragile states to ensure that administrative agencies act in the interest of the individual, and not vice versa, makes it an important international task to develop and elucidate concepts or principles of rule of law in public administration.

An international concept enshrining commonly accepted rule of law concepts could be a “yardstick” against which to measure the quality of procedures and services, and thus help individuals demand high quality services and hold the administration accountable. This “yardstick” should be based upon the emerging standard-setting in the area of rule of law and public administration, for instance the Council of Europe, African Peer Review Mechanisms and other regional initiatives.

The codification of certain fundamental principles of administrative law in a specific UN instrument, for example a recommendation of the General Assembly or a supplementary human rights covenant, should be considered. Such an instrument may outline, inter alia: the right to a fair hearing before any decision is taken affecting the rights of the person; the right to participate in administrative procedure on the basis of widely defined *locus standi*; the rights to judicial review of administrative decisions; the right to access official documents subject to conditions and exceptions provided by the law; the obligation for the administration to provide relevant information to citizens; and the liability of public administration in case of harm caused by its activities.

While a strongly normative document may be difficult to promote within the UN system at present a first step could be to first build a broad-based consensus and political opinion among UN agencies and member states around something that is explanatory and functions as a guide that could eventually lead to norms and principles.

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Endnotes

¹ UN Secretary-General, *Rule of Law and Transitional Justice in Conflict and Post-conflict Societies*, UN Doc. S/2004/616 (2004) p. 4.

² EU CSDP.

³ Richard Zajac-Sannerholm, Frida Möller, Kristina Simion, Hanna Hallonsten, *UN Peace Operations and Rule of Law Assistance in Africa 1989-2010: Data, Patterns and Questions for the Future*, Folke Bernadotte Academy (forthcoming 2012).

⁴ Per Bergling, Lars Bejstam, Jenny Ederlöv, Erik Wennerström, & Richard Zajac-Sannerholm, *Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development*, Folke Bernadotte Academy Publications (2008).

⁵ See, for example, Council of Europe, *Eur. Consult., Recommendation of the Committee of Ministers to Member States on the Execution of Administrative and Judicial Decisions in the Field of Administrative Law*, CM/Rec(2003)16 (September 2003) and *Eur. Consult., Recommendation of the Committee of Ministers to Member States on Good Administration*, CM/Rec7 (June 2007).