Reflections on the Rule of Law and Law Reform in the Arab Region

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Abstract

This article offers some preliminary thoughts on the issue of international development actors in the promotion of law in the Arab region. Specifically, it reflects on the rule of law concept as a universalizing notion, touted by international organizations and governments alike as a panacea for social ills. The article discusses the act of intervention and the use and promotion of law to achieve a rule of law order in post-conflict or fragile states. It argues that the use and promotion of law by international development actors (and the donors that fund them) – a proxy for building the rule of law – is by no means new to the region. It has also been the central focus of authoritarian and colonial rulers alike. Although they are by no means similar, the three actors are strikingly similar in that they use and promote law under the aegis of building the rule of law, to the general detriment of the masses

Keywords: rule of law, law reform, colonialism, authoritarianism, international development.

> *The symbolic power of the law gives it the illusion of stability while its very nature is unstable, capable of easy manipulation by elite actors, both domestic and foreign, state and nonstate. Thus, law has considerable psychic power not only for state actors who use it as the driving force behind their authority, but also for nonstate actors who use it to shake the foundation upon which that authority rests. Law has the same allure as religion. Law punishes and it saves.*[1]

The aim of this brief article is to offer some observations with regard to law and legal reform in the Arab region. Specifically, it raises some issues relating to the role played by external actors in law reform. These activities are becoming increasingly normalized and have removed much of the functions that have traditionally been a domestic matter. I acknowledge that there are obstacles within the region and the degree to which the governmental branches are able (and in some cases willing) to initiate public policy, particularly in relation to 'substantive laws' consistent with human rights norms.

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1 M.F. Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, Cambridge; Cambridge University Press, 2013, p. 223.

doi: 10.5553/EJLR/138723702020022002003

Notwithstanding several issues inherent in the international assistance of law reform in post-conflict settings, there are deeper problems that seep into the use and promotion of laws under the rule of law banner. My purpose here is to introduce some nuances to the discourse of international democratization efforts in the Arab region; that is, the act of intervention in the name of achieving a rule of law order. The focus here is not on *how* international development actors are involved in post-conflict settings and the means and methods used to assist the state with law reform. Rather, the focus is on the *involvement itself* and the use and promotion of law to achieve a rule of law order in post-conflict or fragile states.

Attempting to generalize the region's various legal and political structures in relation to law and legal reform would be a gross oversimplification. Arab Middle Eastern legal systems are often categorized by legal scholars as inherently similar in terms of legal and judicial culture. States within the region are said to reveal 'strong trans-religious legal patterns'.[2] To a certain degree, there is a certain interconnected legal heritage that deserves attention. However, there are also important national differences across the Arab countries and these extend to their legal systems.[3] Some legal systems, for example, include civil continental law, or a sort of hybrid with common law elements. 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. Exploring law reform in relation to international development actors in each and every country is beyond the scope of this article. Instead, I focus on the use of law as a proxy for building the rule of law by three different actors: colonial, authoritarian and, more recently, international development actors. These three illustrate that the use of the rule of law is by no means new to the region. Although they may morally differ with regard to what they hope to achieve with the law, they nonetheless share a similarity in that they use and promote law under the aegis of building the rule of law.[4]

A Law as an Instrument

Law cannot be de-historicized. The ritualized use and promotion of law is by no means absent in Arab societies. It is deeply embedded in the social and political

2 C. Mallat, *Introduction to Middle Eastern Law,* Oxford University Press, 2007, p. 23.

3 The legal systems in the Arab region can be categorized into four judicial 'families', which helps to explain their diversity. *See* S.S. Razai, *The Role and Significance of Judges in the Arab Middle East: An Interdisciplinary and Empirical Study* (Doctoral thesis (PhD), UCL (University College London)), 2019.

4 For a detailed account of how the three actors have operated in the context of Sudan see M.F. Massoud, *Law's Fragile State: Colonial, Authoritarian, and Humanitarian Legacies in Sudan*, Cambridge, Cambridge University Press, 2013.

European Journal of Law Reform 2020 (22) 2
doi: 10.5553/EJLR/138723702020022002003

histories of countries in the region.[5] The construction, re- and deconstruction of legal orders by various state and nonstate actors have used the law – its tools and practices as well as the institutional arrangements and resources it creates – as a means of achieving social, political and economic aims. In addition, the normative character of the law is not necessarily inherent; it is the actors who insert their own distinct moral predilections into the law to achieve their aims.[6] To arrive at the normative qualities of the law involves a broader investigation into the actors that are using it, what their goals are and how they aim to implement it.[7] From this premise, law and legal institutions are understood as cogs in the political apparatus.[8] The law, being a 'subspecies' of politics, is an instrument and a product of the creation and pursuit of a moral community.[9]

The practice and promotion of law, also known as 'legal politics'[10] or 'lawfare'[11] is an evolving and layered set of activities where those with a high degree of power use different aspects of the law and the legal order to meet certain goals. Legal politics, Massoud writes, is at its core a political process that reveals the legal tools, personnel and the arrangements of the state.[12] These are found in the state's constitution and legislation as well as in its legal and judicial community. For state actors, the law may be used to commit acts of political coercion and sense of order by means of violence rendered legal and legitimized by the state's sovereign word.[13] State actors in authoritarian regimes use the law to *rule by law*. The law equips the government with a legal toolkit to ensure an unfettered exercise of their political power, the very antithesis of the *rule of law*.[14] However, placing the rule of law and rule by law on opposite ends of a continuum fails to realize that the rule of law concept, despite being considered as a goal that ought to be striven for in any given society, is far from clear. In addition, the ideological abuse of the rule of law by colonial, authoritarian and - more recently development

5 Sultany, for example, uses the judge, the mediating agency of the law, to show that they cannot be regarded as de-historicized figures of authority, especially "when the rule of law is infused with rival visions of social relations". N. Sultany, *Law and Revolution: Legitimacy and Constitutionalism after the Arab Spring,* 1st ed., Oxford University Press, 2017, p. 152.

6 Massoud, 2013.

7 *Ibid*.

8 Judges' functions and outputs, for example, are of importance as they directly or indirectly participate in the political sphere, because law is a product of politics, and judges are its governors. *See* Razai, 2019.

9 B.Z. Tamanaha, 'The Several Meanings of "Politics" in Judicial Politics Studies: Why "Ideological Influence" Is Not "Partisanship"', *Emory Law Journal*, Vol. 61, No. 4, 2012, p. 759, *See also* M. Shapiro, 'Morality and the Politics of Judging', *Tulane Law Review*, Vol. 63, 1988, p. 1558.

10 Massoud, 2013.

11 J.L. Comaroff & J. Comaroff, 'Law and Disorder in the Post-Colony: An Introduction,' *in* J.L. Comaroff & J. Comaroff (eds.), *Law and Disorder in the Post-Colony*, Chicago, University of Chicago Press, 2006.

12 Massoud, 2013.

13 Comaroff & Comaroff, 2006.

14 *See* T. Ginsburg & T. Moustafa (eds.), *Rule by Law: The Politics of Courts in Authoritarian Regimes*, New York, Cambridge University Press, 2008.

actors - raises questions about the degree to which legitimacy of the rule of law is a dominant social ideal in Arab societies.

B The Rule of Law: Past and Present

Improving the rule of law has been touted as the aim of international post-conflict reform efforts. And yet, much like the proverbial blind men's elephant, it means different things for different actors.[15] In legal and philosophical circles, the rule of law consists of a set of normative ideals or goals that ought to be strived for in a society.[16] Scholars have traditionally directed most of their research efforts to the normative properties of the rule of law. The rule of law is understood as a working political ideal or a set of normative standards used as a benchmark to evaluate political and legal systems. A society that possesses the rule of law instantiates these standards and are the reason why the rule of law is valued. What these standards ought to enumerate however, are of considerable debate. Some scholars[17] confine them to formal and procedural aspects of governance, without regard to the content of the policies implemented. Others argue that the rule of law additionally demands that the content of policies implemented should be substantively just.[18] What is less discussed is how the rule of law concept has been used by primarily two actors: colonial and authoritarian.[19]

Contrary to Shklar's dismissal of the utility in analysing rule of law as a 'ruling class chatter',[20] the use and promotion of the rule of law is central to Arab legal and political discourses. The region's experience with the concept has been chaotic: it has been "built up, torn apart, promoted by new actors and then abused and manipulated for political profit".[21] Deeply embedded in the region's historical legal experiences, efforts to create new legal orders by foreign and indigenous actors alike have used the rule of law concept to confer a modicum of legitimacy to achieve political, economic and moral aims.

15 *See* R.K. Belton, 'Competing Definitions of the Rule of Law', Carneige Papers, 55, 2005; T. Carothers, 'The Rule-of-Law Revival', *Foreign Affairs*, Vol. 77, 1998, pp. 95-106.

16 Belton, 2005.

17 *See* J. Raz, 'The Rule of Law and Its Virtue', *in* The Authority of Law, Oxford, Oxford University Press, 1979.

18 *See* T. Bingham, *The Rule of Law*, London, Allen Lane, 2010.

19 Another issue that arises out of the Rule of Law concept which is beyond the scope of this paper is that these normative standards are historically determined and varies greatly by context, culture, and era, they have been retrospectively labelled as rule of law ideals with strong undertones of liberal thought. For instance, using the law as a shield against governmental tyranny and unaccountable exercise of power long predates liberalism and the modern use of the rule of law concept. Similarly, *Isonomia* or the equality of laws to all manner of persons was to the Greeks, a virtue higher than democratia

20 J.N. Shklar, 'Political Theory and the Rule of Law', *in* A.C. Hutchinson & P. Monahan (eds.), *The Rule of Law: Ideal or Ideology*, Toronto, Carswell, 1987, p. 16.

21 Massoud, 2013, p. 23.

As elsewhere, across Africa, Latin America and East and South Asia, the rule of law was part of the colonial toolkit to consolidate power. Using the rule of law by colonial authorities was neither monolithic nor confined to the attainment of economic or political ends only; it was instrumental as it allowed true purposes to be hidden behind moral ideals. In other words, applying the rule of law was not only an ideological bolster for colonial rule but also a practical tool to govern diverse colonies. Legal history shows how the rule of law was considered by colonialists as a moral obligation, "a compulsory gospel which admits of no dissent and no disobedience".[22] Practices of British colonial rule illuminates how the law – and, more specifically, the rule of law – was used in order to end 'oriental despotism'. In parallel with the development of unequal economic, political and legal systems, the law was an instrument used for bringing 'enlightenment to the masses'.[23] In the late 19th century and early 20th century the colonial legal reforms were claimed to elevate the Egyptians to the status of humans, liberating them from the 'inhuman conditions' that had been prescribed by their native rulers.[24] Esmeir writes that the association between humanity and the law proved to be the cornerstone of Egypt's colonization. The legal system instituted in 1883, she writes, began to interpellate Egyptians and attempted to recruit them into the position of the human: "In this interpellation, the law allocated to itself the power to make decisions as to the presence or absence of the human."[25]

The contradiction between rule of law ideals and true purposes has been further heightened by post-independence Arab governments. Instead of dismantling the colonial legal legacies, post-independence regimes built upon them, all under a rule of law banner.[26] In post-independence Tunisia, for example, hegemony was replaced in name. The executive grip held by both Bourguiba and Ben Ali on state and society left little room for competing visions and alternative political or identity projects.[27] This exercise of political control through law was also visible in Mubarak's Egypt, where it was used as a tool to co-opt and sideline political opponents through the political parties' law, the law on civil associations, laws governing professional syndicates and a web of regulations imposed on media.[28]

22 Judge James Fitzjames Stephen remarked before the Viceroy's council, in 1870, that establishing a system of law constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which rendered it possible. It exercises an influence over the minds of the people in many ways comparable to that of a new religion [...] our law is in fact the sum and substance of what we have to teach them. It is, so to speak, a compulsory gospel which admits of no dissent and no disobedience (W.W. Hunter, *Life of Mayo*, Vol. 2, pp. 168-169 Smith, Elder & Co., London, 1876)

23 K.D. McBride, *Mr. Mothercountry: The Man Who Made the Rule of Law,* New York, Oxford University Press, 2016, p. 33.

24 S. Esmeir, *Juridical Humanity: A Colonial History,* Stanford University Press, 2012, p. 4.

25 *Ibid.*, p. 3.

26 Comaroff & Comaroff, 2006, p. 58.

27 *See* L. Sadiki, 'Popular Uprisings and Arab Democratization', *International Journal of Middle Eastern Studies*, Vol. 32, 2000, pp. 71-95.

28 T. Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt*, New York, Cambridge University Press, 2007, p. 283.

Colonial and authoritarian actors, although historically distinct, have used a similar process of using the law; that is, their use of legal politics is the same in that they consider legal resources as instrumental for rupture or to maintain continuity against the threat of rupture.[29] However, the use of law as an instrument is not unique to state actors alone. It can also be bottom-up, involving grassroots mobilization in which actors use substantive legal concepts such as human rights, the rule of law and democracy to create change.

I International Development Actors

Notwithstanding its contested properties in academic circles, the rule of law is internationally endorsed as a panacea for the economic and political ills of states. Rule of law promotion is now a standard item on the foreign and development policy menu of Western states and international organizations. At present, the rule of law concept is said to have stretched itself beyond its purported normative force as an appropriate standard by which to judge (systems of) laws to strongly prescriptive territories.[30] The post-cold war development strategies shifted from the Washington-based consensus to a 'Western rule of law consensus', where issues of domestic governance in less 'developed' states were to be redeveloped under a set of optimal political arrangements and universal rules and principles.[31] Today, the rule of law is considered a universal value and features prominently in international development. It is promoted by Western governments and backed by international organizations and disseminated across the globe. To (partially) fulfil a rule of law order requires 'necessary' laws, a 'well-functioning' judiciary and a 'good' law enforcement apparatus. International development actors engaged in law reform processes have taken on several forms. Laws may be drafted by international actors with varying degrees of participation by state actors and the wider public. They may be drafted by domestic authorities with the assistance of international actors facilitating or participating in legislative working groups or commenting on draft legislation.[32] More broadly, however, international actors have been involved in the process of law reform in different ways.[33] International involvement ranges from mentoring, advising or providing training, financial or other support to groups participating in development of legislation to collecting and identifying legislation or using their influence at political levels.[34]

The increasing involvement of international actors in the development of state law has generated criticisms from several quarters. International development

29 Massoud, 2013, p. 25.

30 M.J. Trebilcock & R.J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress,* Edward Elgar, 2008, p. 16.

31 *Ibid.*, p. 14.

32 N. Berkowitz, 'Legislative Reform in Post-Conflict Settings A Practitioner's View', *European Journal of Law Reform*, Vol. 21, No. 1, 2019, p. 62.

33 *Ibid.*

34 *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 Action,* Cambridge, Cambridge University Press, 2011.

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doi: 10.5553/EJLR/138723702020022002003

actors – from external funders to implementing partners – tend to rely on a 'one size fits all' rule-of- law template. Such templates are often based on what rule of law promoters are familiar with – idealized Western legal tools, practices, arrangements and resources.[35] Notwithstanding the ambiguity of the rule of law as a concept, international development actors tend to favour a rule of law definition that highlights the institutional attributes believed necessary to actuate a rule of law-abiding state. International development actors – from external funders to implementing partners – tend to rely on standardized, rule of law templates for law reform with little regard to the recipient country's specific political, social and cultural realities. Rather than being tailor-made and context specific, capacity programmes have simply been offered as 'off-the-peg choices'.[36] Such templates are promoted as universal but, in reality, build on idealized blueprints of Western laws and institutions, which, according to Bicchi, appear to be a stable pattern of rule of law promotion. She suggests that EU external policy is an unreflexive behaviour that mirrors a deeply ingrained belief that Europe's history is a lesson for everybody.[37] There is also a tendency to overstate the impact of law reform. In developing state laws, international development actors are focusing on the legal and technical dimensions of their work, erroneously assuming that new laws alone will automatically shift behaviours. Berkowitz, for example, writes that the criticisms made often target the belief that a reform of formal state law only will result in change.[38]

C The Lure of Law and Law Reform in the Arab Region

International development actors operate under the assumption that there is not enough 'good law' in Arab countries. It is often the case that the region is characterized as more or less similar in terms of being politically and/or democratically volatile. The region is routinely singled out as impervious to democratization, a 'democratic outlier'.[39] Although the causes are manifold, they are often perceived as rooted in weak political opposition and specific electoral and constitutional arrangements. One variable that is said to be common across the region especially is the limited role of parliaments; they provide little insight into political life apart from the confirmation that they act as instruments of authoritarian upgrading. By way of illustration, Tamer writes that the region is witnessing resounding decline of democracy. Assuming that democracy is an end point which all nations are inching towards would be erroneous: "the Arab world today gives

35 F. Schimmelfennig, 'A Comparison of the Rule of Law Promotion Policies of Major Western Powers', *in* M. Zurn, A. Nollkaemper & R. Peerenboom (Eds.), *Rule of Law Dynamics,* Cambridge, Cambridge University Press, 2012.

36 *See* Norton, of Louth, 'Effective Capacity Building: The Capacity to Do What?', *Parliamentary Affairs*, Vol. 65, No. 3, July 2012, pp. 520-528.

37 F. Bicchi, '"Our Size Fits All": Normative Power Europe and the Mediterranean', *Journal of European Public Policy*, Vol. 13, No. 2, 2006, p. 286.

38 Berkowitz, 2019.

39 V. Langohr, 'Too Much Civil Society, Too Little Politics: Egypt and Liberalizing Arab Regimes', *Comparative Politics*, Vol. 36, No. 2, Jan. 2004, p. 181.

us more cause to think that inching toward Hobbesian state of nature than toward a decent government."[40]

The start of the Arab uprisings in 2011 provided for a new impetus for rule of law building in post-conflict states. Data obtained from the International Aid Transparency Initiative shows that between 2010 and 2018, 763 projects on legal and judicial development have been carried out across the Arab region.[41] Twenty-one of these were wholly initiated and funded by the UK as part of the government's long-term vision for the region to become a "prosperous, stable region based on open, democratic societies with greater social, economic and political participation of its people".[42] However, the activities of international development actors are not confined to post-Arab Spring only. Since the 1990s' shift of development strategies to focus on issues of domestic governance, they have become pervasive in the region as a whole.

International development actors arrive with the goal of promoting the construction of legal institutions and the legal empowerment of the poor.[43] These activities are predominantly top-down intergovernmental socialization policies focusing on projects of institutional capacity building and of training public officials. Although the list of assumptions with regard to law and legal reform across the region is non-exhaustive, there are at least three interrelated assumptions of why there is a rule of law deficit in a country which development actors rely on.[44] The first is the lack of will among political elites. Political actors are thought of as taking decisions based on an instrumentalist logic. They will introduce law reforms only if the benefits in doing so outweigh the costs. Linked with this is the assumption that the role of political actors is to compete not for power (which is largely held by the executive) but for patronage. While elections do take place, the citizenry is aware that parties do not hold real power and have very little influence in policymaking. What makes parties and their elected officials appealing is their access to state resources which may satisfy the needs of specific constituencies.

The second assumption relates more broadly to the question of capacity. Even if there is, to a certain degree, a willingness to introduce legislative reforms, political actors are unable to so because of non-existent or constrained capacity. The final assumption is the most problematic, which relates to a lack of knowledge,

40 T. Masoud, 'Has the Door Closed on Arab Democracy?', *Journal of Democracy*, Vol. 26, 2015, pp. 74, 79.

41 IATA. Internally, most practitioner organizations rarely use the words 'rule of law reform' and instead discuss legal reform, judicial reform and police (or law enforcement) reform. *See* Belton, 2005; Carothers, 1998, p. 16.

42 DFID Operational Plan 2011-2016, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/389277/MENAD-Regional.pdf (last accessed 21 May 2020).

43 Massoud, 2013, p. 19.

44 M. Zurn, A. Nollkaemper, & R. Peerenboom (Eds.), *Rule of Law Dynamics: In an Era of International and Transnational Governance*, Cambridge, Cambridge University Press, 2012, p. 132.

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doi: 10.5553/EJLR/138723702020022002003

either in the political sphere or, more broadly, in the whole populace. There is a limited belief in the value of the rule of law, human rights and democracy. Heupel explains that states with weak rule of law records often lack the capacity to systematically gather information themselves and learn from the experience of others: "they are therefore dependent on external actors that transfer the experience of other states to them."[45] This is further reflected in a quotation from an interview made by the head of a Western democracy-promotion organizer who asserted that one of the key reasons for the lack of democratization in Jordan was the scarcity of Jordanian partners able to think in a European or Western way:

> Of course, it would be helpful if I spoke Arabic fluently – no doubt. But I would still not know the language of the people here. [...] I always need a language professional. And I am not talking about the interpreter.[46]

D Concluding Remarks

The brief overview of the use of law in the region – in order to build a rule of law order – by three actors raises some questions that ought to be reflected on more closely. In light of this, I would like to offer three concluding observations. The first relates to the actual legitimacy of the rule of law concept in the region. The legacy of colonialism in the Arab Middle East created a contradiction between the stated and the true purposes of the rule of law. This discontinuity between the rational, legalistic values preached by European administrators and resource extraction and police rule early on encouraged a conflict between local and global law.[47] Similarly, authoritarian rules have not shied away from the concept but have made it central to their rule which leads to the uneasy question of whether the rule of law as an ideal may exist alongside repressive rule. The historical associations of the rule of law with colonial and postcolonial involvement in the region has to a degree delegitimized it. According to Mednicoff, efforts at reforming the rule of law using Western models may not necessarily be associated with political openness within Arab societies:

> It is easy for Arabs to view the rule of law in the West [...] as primarily an ideology of political control not as a possible check on political abuse or a guarantee of individual rights.[48]

45 *Ibid.*, p. 135.

46 Quoted in B. Schuetze, 'Marketing Parliament: The Constitutive Effects of External Attempts at Parliamentary Strengthening', *Jordan Cooperation and Conflict*, Vol. 53, No. 2, 2018, pp. 237-258. According to Schuetze, examples such as these have "the ability to powerfully reproduce highly Orientalist discourses. These assumptions of 'difference' coupled with the ever-increasing number of legal reforms in the region require closer scrutiny of the interveners themselves."

47 D.M. Mednicoff, 'The Rule of Law and Arab Political Liberalization: Three Models for Change', *Harvard Journal of Middle Eastern Politics and Policy*, Vol. 1, Spring 2012, p. 55.

48 *Ibid.*

If there is indeed a degree of suspicion of what the rule of law actually means in practice, how confident are we that the myriad of legal reform taking place will actually make a difference?

The second is the instrumental use of the rule of law with a strategic objective in mind. For international development actors, particularly Western governments, there is a political and economic benefit in strengthening the rule of law. A legal environment that mirrors the donor state is in its best interest. Aligning the recipient state with its own legal environment reduces adaptation and information costs and gives them a potential advantage over other actors.[49] What this gives rise to is an 'externalisation of domestic solution', which, according to Schimmelfennig, has become a dominant pattern in rule of law strengthening: "Countries tend to export and advocate their own legal modes and laws where everybody's pushing their own system."[50] This is illustrated by the German Ministry of Justice:

> In the age of globalisation, law has also become the subject of competition. Nowadays Anglo-American common law and Continental European codified law compete with one another. Germany must seek to play a more active role in this competition, as the spreading of our system of law represents much more than a scientific and cultural exchange. It also facilitates international activities of German companies, offers German law-firms new perspectives and increases foreign companies' willingness to invest in a country with a familiar legal system [...] The players involved aim to work together to spread German Law abroad.[51]

Finally, under the rule of law banner, development law reform activities with backed funding from Western states are increasingly becoming harder to justify *democratically*. Such practices provide for an important counterweight to charged theories of sovereignty and, more importantly, self-determination. It is taken for granted that the international community's work on law reform in Arab countries is consistent with the country's self-determination. Although done in good faith, law reform and democratization are, first and foremost, matters for each country. What is considered as good law or good institutions, including how it ought to work in practice, should be left to each community to experience on its own terms and within its local context.[52]

49 Zurn et al., 2012, p. 115.

50 *Ibid.*

51 German Minister of Justice, Quoted in Zurn et al., 2012, p. 116.

52 A.A. An-Na'im, 'Editorial Note: From the Neocolonial "Transitional" to Indigenous Formations of Justice', *The International Journal of Transitional Justice*, Vol. 7, 2013, p. 199.

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doi: 10.5553/EJLR/138723702020022002003