

Judicial Institutions in a Post-Conflict Society: Gaining Legitimacy through a Holistic Reform

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Abstract—This paper focuses on how judiciaries in post-conflict societies can gain legitimacy through reformation. Legitimacy plays a pivotal role in shaping people's behavior to submit to the law and verifies the rightfulness of an organ for taking binding decisions. Among various dynamics, judicial independence, access to justice and behavioral changes of the judicial officials broadly contribute to legitimation of judiciary in general, and the courts in particular. Increasing independence of judiciary through reform limits, inter alia, government interference in judicial issues and protects basic rights of the citizens. Judicial independence does not only matter in institutional terms, individual independence also influences the impartiality and integrity of judges, which can be increased through education and better administration of justice. Finally, access to justice as an intertwined concept both at the legal and moral spectrum of judicial reform avails justice to the citizens and increases the level of public trust and confidence. Efficient legal decisions on fostering such elements through holistic reform create a rule of law atmosphere. Citizens neither accept an illegitimate judiciary nor do they trust its decisions. Lack of such tolerance and confidence deters the rule of law and thus, undermines the democratic development of a society.

Keywords—Legitimacy, judicial reform, judicial independence, access to justice, legal training, informal justice, rule of law.

I. INTRODUCTION

A well functioning judiciary tends to safeguard fundamental rights of citizens [16], [18], [19]. Yet in some post-conflict environments it suffers from political interference, corruption and weak administration of justice, which discourage access to justice and legitimacy [31]. As a matter of fact, it morally and legally dilutes judicial authorities from producing legally binding decisions. To avoid such an environment, major changes ought to be applied both at the individual and institutional levels. However, this proposition strongly suggests that any comprehensive reform potentially allows the judiciary to gain legitimacy, while relevant reform programs have been merely focusing on envisioning unpolished yardsticks, such as market economy development, democratization, globalization, peace and security [15], [34], [37], and have disregarded technicality, overshadowing the functionality and legitimacy of a court. Indeed, as mentioned by Richard Sannerhom, rule of law reforms represent urgent measures to assure peace and stability in war effected environments [38], not necessarily a sustainable solution for institutionalizing justice. The benchmarks, which have been

set out by rule of law reformers, reflect political and in some cases even military orientations, while judicial reform needs a legal and judicial mindset. It is about reviving the institutions, so that they could produce reliable results. The reader may ask, why foster legitimacy through reform? It is because legitimacy irrefragably corrects people's attitudes and drives them toward more tolerant compliance¹ [23], [55]. As a binding quality it provokes the level of acceptance and encourages citizens for further cooperation [6]. Robert Grafstein argues, "Legitimacy, in effect, is a highly efficient way to secure obedience and thus is conducive to stability [12]." Legitimate institutions' decisions do not require any kinds of incentives, such as reward and force, because the right actor takes the decision based on the appropriate procedures [50].

Institutions, which are thought to be illegitimate, appear weak in their essence, and weak institutions are considered to be major causes of instability. Governments, which are in deficit of legitimacy, need to allocate extra resources to establish their rule. This is perhaps more difficult for war-torn societies, due to the fact that they already struggle with scarcity of resources and this, in turn, causes disadvantages to install order and stability. Thus, in reform context legitimacy holds undisputed significance in shifting people's behavior toward obeying the law and establishes a stable society, where citizens are morally self-regulating [2], [25], [46], [50]. Legitimacy is a quarrelsome notion and does not easily lend itself to a definition in a single oriented structure. Jean Philippe Vergne defines legitimacy as, "the generalized perception of social acceptance [24]." Some authors on the other hand perceive legitimacy based on the strict legal mandates [40]. David Beetham articulates that citizens confer to legitimacy of an institution, not because they adhere to the good behavior of the officials, because the corresponding institution rather acts based on the pre-defined legal norms [2], [6], [8], [28]. For him legitimacy is the notion of obeying the authority as long as that authority is acting within the proper boundaries. This conceptualization is close to Max Weber's understanding of 'legitimate authority', where he considers it as the 'law abiding' character of modern states. On the other hand, Beetham and other critics like Richard R. Fallon do not share the point with Weber that legitimacy is the belief in legitimacy, that is something justified rather by their beliefs²

¹ Potentially judicial institutions are more capable of creating voluntary compliance among the people in comparison to the executive and legislative branches. The latter two, due to the politicized nature face obstacles to get people's acceptance in some occasions.

² Some post-modern critics distinguish among three criteria for legitimacy based on moral, normative and sociological accounts [28]. When we talk

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[22], [18], [28]. Beetham in his book *'The Legitimation of the Power [6]'* sets out the criteria for legitimacy among lawyers and shows how they differ from those of social scientists. Lawyers, particularly in the field of constitutionalism, strongly equate legitimacy with legal validity while social scientists that he assumes follow Weber's point of view, further extend the same criteria within the moral and normative accounts for all cases. The criticism directed to the lawyers, preserves the view that in some cases legal validity does not imply legitimacy. Perhaps a legally valid action is perceived as illegitimate and, therefore, Beetham finds citizens' beliefs as the justifying parameter, where acting upon it invokes general consent. Mark Suchman offers a more inclusive explanation of the above perception. He defines legitimacy as, being "a generalized perception or assumption that the action of an entity is desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and definitions [34]." In addition, modern analyses identify dramatic shifts in perceiving legitimacy; scholars believe that legitimacy is assessed today not only through input/output orientations [21], [23], [27], [30], [46], [51], but also the impact of obtainable service delivery [6]. Indeed, in this paradigm public prospects of judicial performances and the boundaries a government sets for its performances configure the level of legitimacy [14].

Keeping in mind the incontestable significance of legitimacy in legal and judicial developments, this paper tries to conceptualize the pragmatic issue of judicial reform and highlights the reform aspects contributing in legitimation of a judiciary, assuming that the discussion will be useful in strengthening the academic debates in this field. The next section will explore the multi-angled relationship of the key concepts of rule of law, judicial reform and legitimacy and their eminent and potent impacts on each other, followed by the question of increasing the legitimacy through reform. Later sections concentrate on evaluating specific reform demands increasing the degree of legitimacy, namely, judicial independence, behavioral prospects and access to justice. These variables will be studied in a post-conflict framework.

II. ENVISIONING JUDICIAL REFORM TO GAIN LEGITIMACY

Before studying dynamics of increasing legitimacy through reform it is imperative to analyze the rule of law, because rule of law is a crucial denominator of judicial reform, which serves as an umbrella of contemporary reform programs and a

about legal legitimacy, we suppose to measure it with the legal norms; however, even legal legitimacy depends on sociological criteria. Sociological legitimacy is perceived as, for example, the legal claim of an institution is legitimate as far as it deserves the acceptance and obedience of public. And morally a claim is legitimate, when it inherits moral justifications. David Beetham sees this categorization differently, though holding the same nature. For Beetham legitimacy holds three important criteria, namely, (1) the claim has legal bases; (2) the legal foundation has been justified by general belief; and (3) implementation of such a claim wins the consent of recipients. Deficits in any of the criteria undermine the whole idea of legitimacy while it seems that Fallon accepts the differences, and each of the criteria could be evaluated context independent. For instance, a claim might be legally legitimate, though, morally discrepant. James L Gibson [22] put his ideas at the same direction as Fallon that at least people have an agreement on when we claim for legitimacy, we accord that something is right, moral and legal.

benchmark to be achieved by judiciaries. Sometimes it may be even challenging to draw the line between rule of law and judicial reform in particular. For instance, in 2003 the reform initiatives in Iraq have started under the banner of rule of law, but later on they were labeled as judicial reform with little or no changes [3]. As a pivotal benchmark it requires everyone to be accountable before the law, which is publicly promulgated and adjudicated by an independent body [9], [29], [10], [53]. The rule of law is also closely intertwined with the concept of legitimacy. A rule of law atmosphere, with particularly effective reform approaches revives legitimacy and confidence of national justice institutions. Violation of the rule of law not only damages legitimacy, but also contradicts self-justifiability of the courts [45]. Rule of law principles, indeed, constitute the paramount requirements of legitimacy. For instance, when an unclear and invalid law is adopted and enforcement agencies insist on implementation of such a law, gross legitimacy deficits appear, because the process in which the law is produced lacks fairness [27]. Likewise, if an un-public law (a law which is not known for the citizens) is being enforced, it does not gain the support of local authorities, since it misses the properties for public consultation and locally required knowledge.

The rule of law is a contested notion [26] and it is not easy to reach a unified approach in defining it, even though different entities and individuals have long been engaged in exploring the term. As a result, different descriptions, such as 'thick', 'thin', structural or 'functional', etc., have emerged so far [16], [26], [29], [34], [49]. Analyzing all definitions on the historical basis needs a separate and broader platform while the aim of this paper is limited to finding out the verifying importance of rule of law in legitimization processes within a reform context. Among many accounts the United Nations (UN) succeeded to present an optimal insight. The UN Secretary General in a report, *'the Rule of Law and Transitional Justice in Post-conflict Societies'* defines the concept as:

Rule of law refers to principles 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 also requires 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 [43], [52], [54].

The grounding principles described by the Secretary General within the framework of the above definition were endorsed by the convention of the 2005 UN Summit. On the same date the heads of the member states of the UN made a commitment, which is reflected in the outcome documents of the Summit, to adhere to the implementation of rule of law at the national and international levels [15], [34], [48]. This has been a major step so far in promoting the rule of law, albeit in an abstract sense. Promotion of rule of law in which context

and what does it confer? Countries dramatically differ in terms of understanding rule of law, to the extent that in some post-conflict societies rule of law is even culturally and traditional disregarded [39]. A context dependent approach is missing to justify the appropriateness of rule of law, championed in relatively alien environments. For instance, there is no consensus in a broader sense of what constitutes judicial reform. The general definitions of reform refer to ‘changes for the betterment [42],’ which remains vague and unclear. Among others, Linn A. Hamnergren has tried to develop a definition closer to the optimum level, “programs that attempt to improve the performance and impact of courts or sector operations [31].” Nonetheless, some vitally demanded properties, such as independence of judiciary, access to justice, judicial functionality, legitimacy, and etc., have not been considered.

Judicial reform according to some authors, such as Boaventura de Sousa Santos followed two distinct approaches: (1) Southern European countries adopted a comprehensive reform by reintegrating legal culture and indigenous democratic traditions into their judicial systems, which have been successful up to greater extents; and (2) the other approach that has involved foreign factors and external dynamics [35]. Santos believes that Latin America, Asia and Eastern Europe follow the second approach, as have they largely reformed their judicial system based on external pressure and economic assistance³ [15], [29], [34]-[35], [38], [44]. Nevertheless, this approach has rarely had optimistic results so far, due to the lack of knowledge and technical understanding. The U.N. Secretary General admits the fact that “no rule of law reform, justice reconstruction or transitional initiative imposed from the outside can hope to be successful or sustainable [54].”

From a political point of view in fragile situations, especially in post-war democratization, reforms happen for reasons of political survival, and are used as a tool to increase the political legitimacy of the government [28], [35], [49]. Political reform occurs to get approval for the status quo and increase governmental power through rational strategic models. For instance, the 1994 reform in Mexico marred with a strong political nature. Changes and initiatives were

introduced to control constitutional bodies. Although to larger extents the programs were successful in terms of mobilizing support, they resulted in limited organizational independence and professional autonomy [44]. Judicial reform should aim at reconstructing the courts to protect fundamental rights in the most sustainable way. Irving R. Kaufman proposes three essential objectives for judicial reform: (1) streamline the litigation process; (2) increase the efficiency of the court; and (3) encourage out of court settlement where possible [17]. Irving’s analogy has the potential to push forward and formulate a morally and normatively trustworthy judiciary. Looking at the issue through Irving’s glasses, the reform might have the potential to cause major structural and substantive changes in terms of increasing the trust and confidence in formal litigation. Sustainable ‘rule of law’ reform by way of crafting judicial features requires an increase in cooperation among nations, since reform in post-conflict societies most probably involves an external element. The United Nations Secretary General in his report on *The Rule of Law and Transitional Justice in Post-conflict Societies* emphasizes, “more is required to increase levels of national ownership, promote donor coordination and foster political will [53].” Enhancing such an ownership, as a matter fact, is raising the levels of legitimacy.

To increase judicial legitimacy and make it more acceptable in eyes of the public, reform should integrate optimal local cultural and traditional legal values into the legal systems [55]. This calls for a consensus among all actors involved; in other words, lawyers and policy makers both on the national and international stages are required to develop corresponding judicial norms based on local realities. As a result the corresponding motions would be grounded in the society itself, and coherence could be established among the local value systems, societal structures and formal justice systems. In addition, some authors claim that an institution, created by legitimate authorities through a fair process, is legitimate [20]. The first element requires an assessment of legitimacy both from the national and international arenas, in particular, the rightfulness of international organizations as well national governments, and such a right process is foreseeable as it implies a comprehensive reform initiative [55]. A major concern in this regard is that in most post-conflict cases, where international aid organizations are involved, rule of law programs are roughly considered state building in their nature [11] and state building in turn is a technical task. Actors involved in the process rely only on the universal aspects of knowledge delivery and tend to ignore local subtleties, which necessarily have to be taken into consideration. Judicial reform should not be seen as merely training the judges and renewing the legal texts but, rather, enabling the courts to interact with the citizens in the most appropriate ways [39], by providing sustainable judicial services while maintaining individual and organic independence. The following parts of the paper aim to discuss comprehensive reform approaches for the purpose of above goals, specifically, elaborating the concepts affecting the extent of legitimacy.

³ In the second approach legal experts have been playing a major role, due to the high intensity of globalization and deliver the expertise obtained from their own legal environments. The expertise they provide predominantly represents a common law mentality of a legal system. Experiences show that such an abstract reform mindset does not fit to the local socio-cultural dynamics and results inefficiency and failure. The core objectives of such involvement could be anticipated as shaping the worlds legal systems to respond to expansionist needs of the new development models based on the neo-liberal consensus and free market economy as the new paradigms of political economy. For example, it is enough to remind the reader about the US 2004 intervention in Iraq. The U.S. military advisors with little or no knowledge of the legal culture in Iraq started reforming the judiciary, but the results have been one of the worst experiences of disenchanting consequences of any reform. Moreover, at the country level this trend is called the externalization of the domestic paradigm. Actors advocate their own legal systems, codes and models. A vivid instance is the reform occurred in Georgia, the USAID representative to Georgia has stated, “everyone is pushing for his or her legal systems.” Models included from continental Europe’s civil law to the US jury system and British common law.

A. Judicial Independence

Independence of a judiciary is one of the essential requirements for a healthy democracy. An independent judiciary keeps an eye on the actions of executive and legislative and plays a constructive role in stabilizing democratic rules and protecting the fundamental rights of the citizens [35], [39]. Defending the fundamental rights of the citizens obviously increases legitimacy of a court to a greater extent [4], [19]. Indeed, independence has two preemptive functions, limiting political actions of governments from interfering in judicial issues and enabling the court to protect the basic rights of the citizen against arbitrary actions [3], [15], [26], [35]. This characterization also increases the significance of the judiciary among other institutions and earns social and political support among the people [15]. The advantage of establishing an independent judiciary is that it subordinates all governmental officials to the law and treats everyone according to the fair legal principles. On the other hand ignoring judicial independence undermines the institutional and individual legitimacy of the court [35], [53]. Judicial independence has been considered by some as a founding paradigm for the promotion of the rule of law. Moreover, the adoption of *'The United Nations Basic Principles on the Independence of Judiciary'*, 1985 represents an important step in efforts toward judicial independence as an instrument for realization of respect for basic human rights. [56]. Paragraphs 1 to 7 offer appropriate guarantees for judicial independence. There has been a strong emphasis on safeguarding against political interference and unwarranted threats in judicial matters. Such guarantees are to be enshrined within the national constitutions, which obviously reflect an attempt at the United Nations level to enable national justice systems to ensure that judicial proceedings are conducted fairly, so that the fundamental rights of the citizens are properly respected, protected and fulfilled.

Judicial independence can be assessed both at the individual and institutional levels, although it remains a complex task to assess independence of judiciary within a reform framework, because it has been identified as a rather vague and dependent variable [10]. The most realistic way would be to look at legal and constitutional guarantees and independence in practices [39]. From the individual and practical viewpoint, judicial independence accounts for the amount of salary, pensions, personal security of the judges and judicial officials. Such factors influence the integrity of the justice officials [9], [15], because a moral dimension is often attached to the individual independence. The way judges behave indicates public trust and confidence. Therefore, standards must be established to draw the line between what is acceptable and what is unacceptable and install a code of conduct both at the institutional and individual levels [9]. Having a code of conduct justifies not only individual integrity of the judges, but also maintains the accountability of courts.

Appointment of the judges deserves a serious consideration, which individually also matters. In some countries there is a judicial commission operating at the policy spectrum while dealing with individual apparatuses of appointing judges and

judicial officials. In Italy and Spain [41] such a body has left a great legacy of judicialization of courts routines, though in most post-conflict societies it has been proven dysfunctional due to the deep political rivalry and divisions. For instance, in December 2001 after the US intervention in Afghanistan, article II, 2 provision of the *'Agreement on Provision on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions'*, or the *'Bonn Agreement'* [1], authorized the Afghan Interim Administration to establish a similar body (Afghan Judicial Commission) for the purpose of building the domestic justice system, but it has turned out to be largely ineffective. There have been criticisms that the Commission was dragged into political infighting. It failed to acquire the required neutrality and was strongly influenced by nepotism and other political factors [13]. In addition, judges, who do not adjudicate under the biased shadow of a third party, seemed to gain more trust and confidence of the citizens, because people would trust officials, who produce fair and unbiased decisions. Many believe that the decisions of an independent judiciary are well respected and enforced [9]. The executive will not subject the integrity of an independent judiciary to political manipulation and the legislative would also provide public support. Moreover, a conjunct relationship of judiciary with other governmental institutions can also influence the level of independence. An open judiciary is ideal in terms of sharing information with the line institutions and creating the incentives for future cooperation, and even gathering support at the political level. It has to be noted that balance, which keeps a healthy conjunction is integral to maintaining openness as well as institutional independence. Extreme openness perhaps makes the institution vulnerable to political manipulation and governmental interference. An optimal solution might be to equip the judiciary with legal and constitutional circumstances backed by practical assurance. The benefit at the political and technical levels can be that it keeps the flow of information for speeding up the adjudication process on one hand and gains support of the elites on the other.

Among different elements, judicial corruption seriously undermines the principle of independence and adversely affects integrity and legitimacy of the judges [9]. Shortcomings in terms of job security, political interference, economic instability and lack of moral commitments are major causes fostering corruption [15]. Dakolios emphasizes that to fight judicial corruption the focus should be on: (1) training and education of the judges and judicial officials; (2) appointment, promotion and salaries; (3) evaluation and discipline; (4) transparency in procedures and decision-making; and (5) participation of civil society organizations [15], [30]. Seeding moral commitments, financial support and watchdog mechanisms, when used in a comprehensive manner strengthen judicial independence. The following section analyzes how such a moral commitment can prevail.

B. Behavioral Perspectives

What makes a judicial decision right always depends on the expertise of the decision-makers. Therefore, judges and judicial officials must be subject to compulsory and systematic education to enable them to take fair and efficient decisions. In some countries, such as Japan, France and Germany, judges are civil servants. People with proper legal education and training can be appointed as judges [17]. It needs to be mentioned that judicial decision-making is regarded as a very sensitive and delicate matter. Judges ought to weigh the social and personal benefits of the litigants. Making decisions based on guesses does not improve efficiency, but most probably raises conflict among disputants.

Experiences show that most 'rule of law' programs designed for judicial institutions focus on judicial training [38]. This is certainly helpful in the short term, but changes to judicial thinking have a lasting benefit when applied through educational programs. It is meant to shape a new mindset at the legal and judicial system, enhancing the capacity of not only lawyers and judges, but also judicial officials, with strong influences on the speeding up of the adjudication processes. Robert Laver suggests that educational programs not only aim at increasing knowledge of the judges, but also change their attitudes [39]. An improvement in attitude increases the public trust in the judiciary. As a matter of fact, judges are seen as the guardians of the public trust. Well-behaved officials always represent trustworthy institutions, and in turn trust and public confidence affirm the degree of legitimacy and efficacy [9]-[10]. Hence, the proper training of judges and judicial officials has to be part of a continuous process integrated into the layered cycles of the courts administrative procedures. Behavioral changes do not happen in isolation, it is a content-dependent phenomenon, relying on overall rule of law policy in the recipient country [9]. For instance, a weak judicial training causes delays in adjudications and decision-making [54]. Delays as mentioned above are the first cause of egression from justice. Therefore, a good strategy, even efficient legal basis is required to harmonize training programs in order to foster access to justice. Furthermore, judges need to be given specific training in alternative dispute resolution, because skillful judges are often more trusted [15]. This is crucial in post-conflict societies, with strong legal pluralism and informal trends. Indeed, having skills and knowledge in such fields increases access to justice. The next section is dedicated to discuss access to justice as an integral demand in judicial reform and a pre-requisite for legitimacy.

C. Access to Justice

Access to justice as a fundamental human right has been lobbied by various governmental and non-governmental organizations [55]. Maria Dakolias outlines that access to justice can be discussed in three distinct areas: (1) Improving access to existing services; (2) Expanding access to justice facilitates and encourages the use of dispute resolution mechanism by non-traditional users; and (3) creating new legal standing to advance the interests of classes of individuals [9]. Absence of access to justice is marked by excessive costs,

corruption and undemocratic societal biases during the decision-making [53]. These factors in turn result in dilatory adjudication and denial of fair treatment. Whenever justice does not prevail in a fair manner, citizens lose trust and confidence in judicial institutions and tend to seek alternative solutions.⁴ Some scholars suggest that an effective administration of justice reduces the aforementioned problems to a minimal level and fortifies access to justice [38]. It is imperative to improve the quality of decision-making and decrease judicial costs, which lead to excessive delays and unfair adjudication [17]- [18]. Access to justice appeared within the World Bank's reform agenda for the first time in the Ecuadorian reform projects of 1996 [39]. Later on countries such as Bangladesh, Kazakhstan, Guatemala, Mongolia and Honduras were introduced to such an approach. The main goal of the projects has been to increase the efficiency of the courts.

Access to justice does not only matter within the formal establishments, but informal instruments also encourage access to justice. Donna Shestowsky insists on the responsibilities of formal and informal institutions in translating social preferences into the public policies [7]. Informal judicial mechanism is a context dependent phenomenon. Expositing a unified definition of informal institutions is often questionable. However, a common perception demonstrates bodies and institutions falling outside the realm of formal justice system. The United Kingdom Department for International Development (UKaid) is one of the first organizations, which realized the undeniable role of informal means in plural societies. As defined by UKaid "Informal justice systems are used when referring to dispute resolution mechanisms falling outside the scope of the formal justice system [55]."

Informal justice systems enjoy a greater level of legitimacy among the local authorities. This characterization is much stronger in pluralistic societies. Some authors even believe that ignoring informal justice may deprive a large sector of the society of access to justice [29]. Citizens submit to informal mechanisms, when formal institutions are unable or unwilling to provide access to the court and appear as instruments for control and coerce [37], [53]. In deep legal pluralist societies it is claimed that 80 % of the cases are referred to the informal mechanisms [55]. For instance, in Afghanistan government officials confessed on many occasions that only 10 % of disputes were submitted to the state judicial institutions [29], [47]. Yet less courtesy has been afforded to the importance and direct impact of the informal mechanisms on functionality of the formal institutions. Laura Grenfell believes that the primary reason for this negligence lies in the establishment of rule of law reform based on the Weberian sense of legitimate authority, where the rule of law prevails in an environment of

⁴ In Somalia, for example, due to the biases and weak functionality of the justice system customary law and Islamic Sharia law have emerged and since then it has been seen as a strong normative framework in Somali land, because the formal justice institutions apply only in the urban areas.

a strong state, which possesses total monopoly⁵ [29]. Be that as it may, recent years revealed a dramatic tendency toward informal mechanisms.

The year 2007 marked a shifting trend toward recognition of legal pluralism in general and informal mechanisms in particular. With the convention of the UN General Assembly on the adoption of the “*United Nations Declaration on the Right of the Indigenous People [57]*” informal mechanisms have gained unprecedented momentum. Article 34 of the Declaration underlines that “Indigenous people have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.” It is worth noting that the term ‘*indigenous*’ in the Declaration gives reference to the local inhabitants, living in different parts of the world regardless of any historical and modern colonial contexts. Likewise, the UN Secretary General in his 2011 report highlighted a need for promotion of informal justice [53]. Today stakeholders and international Organizations emphasize on building a linkage between the formal and informal justice [5], [29], [53]. Yet, an ambiguity exists in this regard, and the primary question is what this linkage implies? The term needs clear definition, because, although a strong interaction between the formal and informal institutions in many societies, people suffer from the lack of both distributive and procedural justice. This shift in international mindset has changed rule of law reform dramatically in some cases. For example, the United Nations Development Program in its report, “*The Afghanistan Human Development Report*” in 2007 even blurred the line between formal and informal justice mechanisms. The report defines rule of law from the Afghan perspective as “referring to all those state and non-state institutions that promote justice and human development through application of public rules that are deemed fair, applied independently, enforce equally, and consistent with the human rights principles [36].” Such attempts demonstrate rather a blind acceptance of legal realms at the bottom of traditional societies like Afghanistan and ignore a strategic look at the nature of such instruments for finding out the right solutions for workable reunification, which results in a legitimate institution with total monopoly. Moreover, despite the fact that informal justice is cheap and accessible, especially to the poor, it has been often criticized for violating human rights standards and being biased against marginalized groups such as women, children and the disabled [29], [34]. This characterization often creates discrepancies

⁵ The theory of legitimate authority falls into three distinct categories, namely, legal, traditional and charismatic authority. For Weber the ideal type is, legal authority. It is founded on the formal legal ratio, which is consistent, universal and holds the possibility for appeal. The traditional type of authority is based on personal loyalty and operates on the traditional common sense. Weber finds traditional authority arbitrary, nepotistic and particularistic. The charismatic type of authority he believes is neither based on the formal legal ratio nor on the bases of personal loyalty. This type undermines the political and economic development of a society. As a matter of fact, this view up to a larger extent has influenced the Law and Development Movement (LDM) and later rule of law reform programs movements. This in turn has limited the space for informal mechanisms and its parallel co-existence.

between the rule of law values, with adherence to due process principles and informal justice, based on a number of coherent local values [32]. This study notes the way informal mechanisms acquire legitimacy as an alarming trend. There is no monopoly of authority [33]. It means that the legitimacy of informal mechanisms does not come from a unified source, but arises from the differentiation of interests and knowledge among the decision-makers, and causes conflict and disputes on the ground hindering security and public order.

The overall impact of the access to justice can be summarized in terms of the willingness of the citizen submitting their cases to the judicial institutions [9]. Such willingness can be deterred by different causes, decreasing access to justice to a minimal point. These causes include but not limited to: (1) weak internalization of the international human rights norms; (2) lack of political will or discrepancies in the existing determination among the authorities at the national and local levels; (3) lack of access to information and language barriers, especially in legal and judicial fields; (4) Poor administration of justice; (5) existence of conflict among different formal and informal justice institutions and absence of trust among these fractions and, etc. [55].

Lack of knowledge and information about judicial bodies and corresponding procedures is one of the biggest threats to access to justice, especially in deeply plural societies, where people can easily divert to the parallel structures [37]. Indeed, if people do not know of the judicial institutions and how they operate, intimidation may lead them to feel unable to engage with the judiciary⁶ [53]. As a solution effective legal aid programs have the potential to solve the problem to some extent, but based on the experiences of war-affected countries, sometimes more is required to heal the wounds that have resulted from the existence of mistrust. Perhaps it is better to use local authorities as binding actors, which could build a trustworthy environment for interaction and submission to the courts’ procedures. It is not only about hiring a translator or a public lawyer to explain the legal and judicial procedures, but also winning the confidence and satisfaction for the period of involvement with the court.

III. CONCLUSION

In the view of the discussions in this paper, it is perhaps the right time to stress the importance of legitimacy as a benchmark for rule of law reform in the first place other than maintaining merely formalistic approaches developed through the traditional conceptualization of legal systems. Legitimacy is inherently related to the rule of law and judicial essence in a reform context. Indeed, violation of any principles of the rule of law or any manipulations in judicial issues damages legitimacy. Moreover, legitimacy has the potential to change people’s behavior and lead to stability. In effect the court can easily protect citizens’ fundamental rights in a stable society.

⁶ A similar factor, which leads to weak judicial consequences and mistrust, is the language barriers. Citizens need to know language of the court to communicate their cases. Only participation of the proceeding is not implying effective access to the court. The participant shall know language of the court and understand the adjudication.

This is especially vital for post-conflict situation, where social and political interactions are often interrupted by instability and in some cases, even violence.

Comprehensive rule of law reform has a strong potential to increase legitimacy. Integrating traditional social judicial value chains into the formal legal and judicial system is one of the solutions. However, before taking any steps, it is crucial to get a consensus at the local as well as national levels. The bold consequences of such an approach steer toward trust and confidences. This is an undeniable requirement for legitimation, because for an institution to be considered legitimate trusted actors must create it through appropriate processes. To be more specific, reform should focus on decreasing the possibility of political interference and corrupt actions. It limits the undue manipulation in judicial issues and institutionalizes the enjoyment of fundamental rights. Moreover, to decrease corrupt actions, judges and judicial official should be morally and normatively committed to a judicial code of conduct. Continuous education should be provided, not only in formal judicial system, but also for informal mechanisms. This serves as a bridge for establishing trust and public confidence in judicial organs, easing proper and fair access to justice. Access to justice is significant in creating meaningful linkages between citizens and judiciary. It does not mean a linkage in a vacuum, but rather equipped with fair instruments of adjudication. In conclusion, it is possible to establish a legitimate court, when rule of law reform does not only rely on state-building apparatuses benefiting solitarily from universal knowledge spectrums, but also the local value systems.

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