

**Local Actors in Donor-Funded Rule of Law Assistance in Indonesia:  
Owners, Partners, Agents?**

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**Abstract**

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An overriding premise of development assistance is that it cannot succeed without an effective partnership between international and local actors. Meta-level regulatory instruments directed at the aid industry reflect this (e.g., *Paris Declaration on Aid Effectiveness*), and issue a further challenge, namely the aspiration of ‘local ownership’ of the donor-assisted aid. Emphasis on these and related norms are carried forward from development aid discourse into the realm of Rule of Law (RoL) assistance, broadly conceived here as donor-assisted aid directed at laws, legal institutions and/or capacity-building in support of the legal sector – also referred to as ‘justice sector reforms,’ ‘legal technical assistance’ and ‘rule of law promotion.’ The relevance of partnership and local ownership are arguably amplified in RoL assistance because laws and rules governing societal behavior – whether formal or informal – are particularly

embedded in local settings. Despite overall agreement on the importance of these principles, RoL assistance literature has long critiqued the lack of local ownership over donor-assisted legal reforms (e.g., the use of ‘standardized tool kits’ for reform), and the many resulting unintended consequences that flow from them. The importance of local-international relationship dynamics and their ability to shape aid outcomes has been studied in development, generally, but not in the field of RoL assistance.

This study has thus sought to contribute to a gap in understanding of the dynamics of the design and implementation of RoL assistance on the ground, by analyzing empirical data about how all the local actors who are engaged in these interventions view the process and outcomes of their legal reform projects. Based on interviews with local actors working at the site of RoL assistance delivery, as well as four case study RoL projects and accompanying documentation, this study analyzed the meanings of ownership and partnership in theory and in practice, and found that definitions at the international level remain abstracted from reality. And yet, local actors – who have not yet had a consolidated voice in the literature – assign real meanings to these principles, and strive to achieve them as part of their professional practice. Using insights and framing from principal-agent theory, critical development theory and socio-legal theory, this study shows that local actors are hampered in their pursuit of local ownership and partnership by structural constraints placed upon them by a system in place to deliver RoL assistance that prioritizes Western ideas and players. This is true even though local actors are best positioned to understand the environments in which they work, and shape the direction and outcomes of the assistance. This study makes the normative argument that greater focus by RoL assistance donors on local ownership

and partnership principles – as understood by local actors and contained herein – has the potential to lead to more appropriately tailored RoL assistance, and greater local ownership over the reforms they support.

**Key words:** Law and development; international development; foreign aid; legal technical assistance; rule of law; Indonesia

## **Chapter 1: Local Actors in Donor-Funded Rule of Law Assistance in Indonesia: Owners, Partners, Agents?**

I.	Introduction.....	1
a.	Ownership and partnership in discourse and practice.....	5
i.	Ownership and partnership according to the <i>Paris Declaration on Aid Effectiveness</i> and other international regulatory instruments .....	6
ii.	Ownership and partnership in rule of law assistance practice.....	13
II.	Current state of knowledge and significance of this research.....	17
a.	Development economics.....	17
b.	Development anthropology and ethnographies of aid.....	19
c.	Rule of law assistance.....	21
d.	Significance of this study: Filling an empirical gap.....	23
III.	Structure of the study, definitions.....	26
a.	Definitions.....	26
b.	Choice of Indonesia.....	28
c.	Research questions.....	30
d.	Chapter outline.....	31
i.	Chapter 5: Structural constraints to ownership and partnership.....	33
ii.	Chapter 6: Mapping of the parties, relationships and roles.....	34
iii.	Chapter 7: Ownership and partnership meanings in theory and practice.....	35
iv.	Chapter 8: Local actor strategies for directing and shaping RoL assistance.....	38
IV.	Conclusion.....	40

## **Chapter 2: Methodology and Theoretical Framing**

I.	Research questions, definitions.....	43
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a.	Table 1 – research questions.....	44
II.	Qualitative methodology.....	46
a.	Selection of Indonesia as case study location.....	50
b.	Selection of case study projects.....	53
c.	Validity and reliability.....	55
III.	Theoretical framework and structure of this study.....	57
a.	Principal-agent theory.....	58
b.	Critical development theory.....	60
c.	Recursivity .....	62
IV.	Conclusion.....	65

### **Chapter 3: Rule of Law Assistance: Shifting Approaches from the 1960s to the Present Day**

I.	Introduction.....	67
a.	Brief historical overview of development assistance.....	68
b.	Relevant features and trends of development assistance.....	72
II.	Rule of law (RoL) assistance as a field.....	77
a.	RoL assistance – definitions, terms.....	77
b.	‘Rule of law’ as a label for reforms.....	85
c.	The chronological intellectual history of RoL assistance as a field.....	89
i.	Economic underpinnings of RoL assistance.....	91
ii.	Critiques and calls of ‘failure’.....	96
iii.	Responses to critiques – current trends in RoL assistance.....	100
iv.	RoL ‘dynamics’ and this study.....	105
III.	Conclusion.....	108

### **Chapter 4: The Local Context of Rule of Assistance in Indonesia**

I.	Introduction.....	109
II.	Indonesia as a case study location.....	110

a.	Indonesian justice sector challenges.....	115
b.	Relevant Indonesian history.....	121
i.	Colonial times and their impact on post-Independence Indonesia.....	121
ii.	Legal reforms under the Old Order and New Order.....	126
iii.	The Asian Financial Crisis and Indonesia’s transition to democracy.....	128
c.	History of relevant donor involvement in Indonesia.....	133
d.	Donor-Indonesia relationship dynamics during RoL assistance in Indonesia.....	139
III.	The case studies.....	141
a.	Case study project / program profiles.....	142
i.	Table 1: Basic Information .....	143
ii.	Table 2: Contractors, sub-contractors and local partners.....	146
b.	Profiles of local actors involved in case studies.....	149
i.	Chart 1: Professional involvement in case studies by informants.....	150
ii.	Chart 2: Informants’ years of professional RoL assistance experience.....	151
IV.	Conclusion.....	152

**Chapter 5: Structural Features of Rule of Law Assistance as Lived in  
Indonesia**

I.	Introduction.....	155
	Chart 1: ‘What else is important?’.....	156
II.	Choice of implementers in RoL assistance.....	158
a.	Indonesian RoL assistance – use of foreign for-profit and non-profit implementing contractors.....	161
III.	Procurement Process for RoL assistance delivery.....	164
a.	Procurement process for RoL assistance in Indonesia.....	166

i.	E2J: Reported changes from assessment through implementation.....	167
ii.	Time lag caused by procurement, and need for implementer 'tweaks'.....	171
IV.	Structure of aid relationships.....	173
a.	Detailed work plans (and 'tick box' aid).....	174
b.	Hierarchy of decision-making power.....	177
c.	Engagement with CSOs and their members.....	178
V.	Problems with RoL assistance industry incentives and practices.....	180
a.	Incentives (and disincentives) for sharing important information.....	180
b.	Diffused responsibility.....	182
c.	Staffing practices.....	183
d.	Under-skilled international consultant.....	184
VI.	Structural interference with local ownership and partnership.....	185
VII.	Concluding argument.....	187

**Chapter 6: The Anatomy of (Indonesian) Rule of Law Assistance according to the Principal-Agent Theory**

I.	Introduction.....	191
II.	Principal-agent theory.....	192
	Figure 1: Murrell's principal-agent relationships in development assistance.....	196
	Figure 2: As applied to sample Indonesian case study (USAID's C4J) in theory.....	197
	Figure 3: As applied to same Indonesian case study (C4J) in practice.....	198
	Figure 4: As applied to different Indonesian case study (AusAID's AIPJ) in practice.....	198
a.	Indonesia-specific local partners: Bappenas, reform teams .....	200

i.	Bappenas (Indonesia’s National Development Planning Agency).....	200
	Chart 1: Roles ascribed to Bappenas.....	203
ii.	Reform teams of the Supreme Court and Attorney General’s Office (AGO).....	205
	Chart 2: Roles ascribed to Supreme Court and AGO reform teams.....	209
III.	Principals and agents in Indonesian RoL assistance.....	213
a.	Principal – agent theory applied.....	214
	Chart 3: Employing / affiliate organizations of informants.....	215
b.	Principal-agent problems present in Indonesian RoL assistance.....	216
i.	Adverse selection and moral hazard.....	217
ii.	Broken feedback loops and RoL assistance that is perceived as ‘donor-driven’.....	220
iii.	Macro-level incentive problems.....	224
c.	Mechanisms to address agency problems.....	226
i.	Embeddedness of RoL assistance.....	228
ii.	Interest group influence over RoL assistance.....	232
iii.	Professional associations.....	234
IV.	Concluding argument .....	234

## **Chapter 7: From Discourse to Delivery: Whose Local Ownership and Partnership?**

I.	Introduction.....	241
II.	‘Development’ system favors ‘developed’ – Escobar and others.....	244
III.	Local ownership and partnership according to international discourse.....	251
a.	<i>Paris Declaration on Aid Effectiveness</i> .....	251
b.	<i>Accra Agenda for Action</i> .....	253
c.	<i>Busan Partnership</i> .....	255

d.	Indonesia-specific <i>Jakarta Commitment</i> .....	258
IV.	Document analysis: Ownership and partnership represented in foundational project and strategy documents.....	260
a.	Australia – Indonesia: ‘Subsidiary Arrangement’.....	260
b.	United States - Indonesia: ‘Assistance Agreement’.....	264
c.	Australia and World Bank collaboration on Justice for the Poor (J4P).....	268
d.	Indonesian development plans, ‘Blue Books’.....	269
V.	Interview Analysis: Ownership and partnership according to local actors in Indonesian RoL assistance.....	271
	Chart 1: Familiarity with <i>Paris / Accra / Jakarta</i> .....	274
a.	Ownership ‘defined’.....	275
	Chart 2: Meanings of ownership.....	278
b.	Partnership ‘defined’.....	279
	Chart 3: Meanings of partnership.....	283
c.	Impediment to ownership and partnership as described: Need for capacity building?.....	284
d.	Is the ‘RoL Industry’ creating (and then meeting) its own demand?.....	287
	Chart 4: Could RoL assistance be done with only local staff?.....	290
e.	Whoever paid, decides.....	291
VI.	Concluding argument .....	293

**Chapter 8: Local Actor Dynamics and Exercise of Agency in Rule of Law  
Assistance Delivery in Indonesia**

I.	Introduction.....	297
II.	Theoretical framing: Cycles of mutual, multi-directional influence (recursivity).....	299
a.	How does recursivity occur in practice? The Legal Development Facility (LDF).....	301
b.	Theory of recursivity applied to Indonesian RoL assistance.....	305

	Figure 1: Simplified adaptation of recursivity .....	307
III.	Donor-side actors: Free choice of local actors / how agency is exerted in practice.....	308
	a. Translation and vernacularization of development assistance at the local level.....	309
	b. Socio-cognitive environments (SCEs) for decision-making during development projects.....	311
	c. Strategies of local actors: Donor-side, RoL assistance in Indonesia.....	313
	Chart 1: Donor-side strategies for overcoming challenges during RoL assistance delivery.....	314
	i. Relationship-building / communication / meetings.....	314
	ii. Use of professional networks / involve a third party.....	317
	iii. Go to Indonesian leadership / person of power.....	319
	iv. Money / funding / expertise: ‘take it, or leave it’.....	319
	d. Implications of active choice.....	321
IV.	Indonesian-side actors: Mutual influence is exerted in multiple directions, across multiple levels.....	322
	a. Strategies of Local Partners: Local actors on the Indonesian-side of RoL assistance.....	323
	Chart 2: Local / host country strategies for overcoming challenges in RoL assistance delivery .....	325
	i. Pass / refer to regulation.....	325
	ii. Request flexibility / more input about local needs / change of terms.....	328
	iii. Involve a third party.....	329
	iv. Seek help from donor.....	330
	v. Mediate / communicate / discuss.....	332
	vi. Utilize independent evaluation process.....	333
	b. Implications of mutual, multi-directional, multi-level influence.....	333
V.	International / Global Exerts Influence from afar .....	335

a.	International influence at the site of RoL assistance delivery in Indonesia.....	337
i.	Initial structural decisions.....	338
ii.	Monitoring and reporting.....	339
b.	Implications of internationally mandated ‘tick-box compliance’ ...	341
VI.	Concluding argument.....	342

## **Chapter 9: Local Actors in Rule of Law Assistance in Indonesia:**

### **A Field of Agents and Partners Pursuing Ownership**

I.	Introduction.....	345
a.	Indonesia as research site .....	349
II.	Key findings and implications.....	350
a.	Structural impediments to ownership and partnership.....	351
i.	Practical implication: Structure program to allow for more implementer / ‘on the ground’ discretion .....	353
ii.	Practical implication: Capture knowledge from assessment to implementation.....	353
b.	Principal-agent mapping of parties, relationships and roles: Projects are Dynamic.....	354
i.	Practical implication: Support and utilize local professionals, ‘embedded agents,’ and their CSOs.....	357
ii.	Practical implication: Clarify roles and relationships of local actors involved in the assistance.....	358
c.	Ownership and partnership as defined and operationalized.....	359
i.	Practical implication: Facilitate communication by using an interpreter.....	360
ii.	Practical implication: Increase local authority over hiring.....	361
d.	Local actor strategies for directing and shaping RoL assistance.....	362

i. Practical implication: Revise / lessen reporting requirements, increase independent evaluations .....	363
III. Conclusion.....	366

<b>Bibliography .....</b>	<b>369</b>
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Appendix 1: Table of Research Questions

Appendix 2: Interview Protocols

Appendix 3: Table of Codes (Dedoose qualitative research software)

Appendix 4: Historical Annex to Chapter 7

## Chapter 1 /

### Local Actors in Donor-Funded Rule of Law Assistance in Indonesia:

#### Owners, Partners, Agents?

##### I. Introduction

Jakarta, Indonesia: Consultants hired by an international donor to implement a rule of law assistance project are seated at a conference table in a room of the Supreme Court of Indonesia, with their Indonesian host-country counterparts, who include Indonesian Supreme Court Judges. This is the second such meeting between the donor's implementing agents and the Indonesian Supreme Court regarding the assistance project – the first having been last month's initial meeting of the parties. As today's meeting begins, smiles shared over tea fade quickly as the Indonesian officials learn that activities on the assistance project have already begun, and the process of hiring needed 'experts' is underway.

"What is this?" asks a senior Indonesian official, pointing to the packet of paper placed on the table in front of him by the foreign consultant.

"Bapak,<sup>1</sup> this is the proposal of activities drawn up based on our discussions last month," replies the consultant with an eager smile. "We wanted to keep the ball rolling," he continues. "And these are – of course! – subject to revision. We welcome your comments."

The Indonesian official exchanges disapproving looks with his colleagues before turning back to the consultant, saying: "We haven't made our decisions yet. Last month? We were just talking. According to us, these were just discussions. Why did you come up with activities based on this? There is no agreement!"<sup>2</sup>

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<sup>1</sup> *Bapak* is Indonesian for 'father,' and a term of address that shows respect for older males. *Ibu* is the female equivalent, directly translated as 'mother.' Short forms *Pak* and *Bu* are commonly used. A qualified, well-versed consultant would know that these terms of address are essential signs of respect in Indonesia.

<sup>2</sup> Illustrative anecdote based on a meeting described in an interview with Informant 9. The verbatim account of the meeting on which this is based will be discussed in chapter 8.

Professionals working in international development<sup>3</sup> are no strangers to the ‘consultative meeting’ with local counterparts that morphs into a work program with no affirmative agreement from those counterparts and other local stakeholders. The scenario sketched above is not unique to justice reform; it could have taken place in any development program setting. The potential fall-out from this type of incident can be costly in terms of time, money and effort for development donors as well as local host-country officials and counterparts. What is unusual in this scenario, however, is that the officials voiced their disagreement openly, and immediately. Another possible outcome would have been that the meeting closed with polite but distant smiles, and the foreign consultant was ushered out without any clear understanding of what had happened or *would* happen with respect to the implementation of the project.

It is useful at this point to consider context. What happened before, in the time leading up to that meeting? If one adds project-level context to the above scenario, we see that a troubled relationship between the donor’s implementing agents and Indonesian local partners is predictable. The donor’s procurement process – the process that officially determines the winning bid among possible implementing contractors – involves many steps and many parties. One consequence of this is that the Indonesian officials who were party to the initial assessment meetings with the donor (which informed the macro-level agreement between the donor and Indonesia) are not likely to be the same Indonesian officials who were seated in the Supreme Court

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<sup>3</sup> International development, as used here, refers to donor-funded assistance programs aimed at improving conditions in developing nations. It is also referred to as ‘foreign aid,’ ‘foreign assistance,’ and ‘development assistance.’ See Chapter 3 for more on the history of development assistance, as well as its relationship to the field of Rule of Law (RoL) assistance – the field at issue in this study.

conference room at the time of the project's implementation.<sup>4</sup> Furthermore, Indonesian officials likely had no say about the choice of implementer, and would similarly not be allowed input with regard to which experts would be hired in the course of the project, even though the expertise is ostensibly being sought for the benefit of Indonesia, and with an Indonesian agency or institution as the beneficiary.<sup>5</sup>

We also see that the detailed work plan being followed by the donor's implementing agent was determined between six months to two years earlier, and is therefore now likely out-of-date with respect to Indonesian justice sector needs.<sup>6</sup> It is also very possible that the reform ideas offered by Indonesian officials and other national experts during the initial assessment are not necessarily recognizable in the work plan that the implementing contractor is contractually bound to follow.<sup>7</sup> The implementing agent, typically a foreign contractor, would have played no part in the agreement between Indonesia and the donor, or the initial assessment (indeed, is forbidden from doing so), and, with an implementing staff comprised primarily of Indonesian legal professionals, must work with Indonesian counterparts to either implement the components of the work plan, or be prepared to explain their failed attempts.<sup>8</sup> These 'on-the-ground' implementers also tweak the aid in ways that make

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<sup>4</sup> See chapters 5 (procurement process) and 7 (macro-level agreements between Indonesia and bilateral donors, United States Agency for International Development (USAID) and Australian Agency for International Development (AusAID)).

<sup>5</sup> See chapter 7.

<sup>6</sup> See chapters 5, 7.

<sup>7</sup> See chapters 5 (impact of procurement process on Indonesian ideas), 6 (principal-agent relationships in rule of law (RoL) assistance). That said, adjustments to the work plan are possible through specific mechanisms for getting approval from the donor for doing so, likely involving in-person meetings, phone calls, and/or emails between implementers, Indonesian partners, and donors.

<sup>8</sup> See chapters 5, 6 and 8.

sense given the current situation on the ground – something the foreign consultant in the above scenario would likely explore doing following that meeting.<sup>9</sup>

At issue in all of the above is who determines the content and direction of donor-funded assistance. From the context, we see that the design and implementation of the assistance is ripe for contention – with everyone structurally in possession of at least some claim of authority over the content or direction of the reforms being sought. In the course of ongoing assistance delivery, as we will see in an Indonesian setting, these parties go on to use whatever resources and networks are available to them in order to further their influence and point of view.

‘Local ownership’ and ‘partnership’ are organizing principles that bear directly on decisions affecting the content and direction of foreign assistance. More explicitly, locals taking ‘ownership’ of the donor-sponsored reforms, and genuine ‘partnership’ between donors and recipient / partner / host countries,<sup>10</sup> are considered essential for international development. But instead of embodying these norms in any meaningful sense, the project meeting described above represents a strained relationship between donor agents and host country partners, one that may require some level of (time-consuming) repair.<sup>11</sup> The intended beneficiaries and local partners may also be objecting to a ‘donor-driven’ assistance project, thereby quite possibly lowering their level of enthusiasm for the project’s implementation.

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<sup>9</sup> See chapters 5 and 8.

<sup>10</sup> The terms host, recipient, partner and target country all refer to the same party in the assistance, namely the one receiving, hosting and partnering with a donor, and providing the target location in which the assistance is carried out.

<sup>11</sup> As discussed in chapter 8, the meeting upon which the scenario is based resulted in the Indonesian Supreme Court issuing official *Implementation Directives*, which – as discussed in chapter 6 – lay out clear procedures for donors’ interactions with Supreme Court from that point forward.

Using norms of local ownership and partnership as an analytical tool, this study examines the relationship dynamics between and among international donors and their local counterparts in the course of ongoing rule of law assistance, using Indonesia as a case study. Rule of law (RoL) assistance, defined in more detail below, is broadly any donor-funded assistance intended to increase the ‘rule of law’ in a country, also referred to as “justice sector reforms.”<sup>12</sup> This study posits that discussions surrounding the meaning of ‘local ownership’ and ‘partnership’ provide a fruitful platform for eliciting the experiences and expertise of local stakeholders and other actors participating in day-to-day RoL assistance design and implementation.

*a. Ownership and partnership in discourse and practice*

Local ownership and partnership are declared aspirational norms in many documents that shape the delivery of bilateral and multilateral foreign aid – including macro-level regulatory instruments such as the *Paris Declaration on Aid Effectiveness*, as well as practice-related documents, such as procurement contracts, memoranda of understanding, preambles of donor funding agreements, project design documents, statements of work, work-plans, and designs of formal evaluations of the projects at their mid-point and conclusion. These principles tend not to be defined in either international discourse or project documents in such a way that they could be easily implemented, or even captured as part of whatever project metrics are being tracked. The first section below discusses ownership and partnership as they appear in international discourse. The second section introduces the field of rule of law (RoL)

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<sup>12</sup> See e.g., Linn Hammergren, *Justice Reform and Development: Rethinking Donor Assistance to Developing and Transition Countries* (New York: Cambridge University Press, 2014), 22.

assistance – from which this study’s four case studies are drawn – and the significance of ownership and partnership therein.

i. Ownership and partnership according to the *Paris Declaration on Aid Effectiveness* and other international regulatory instruments

In 2005, the international development community came together in Paris, France, to discuss the state of donor-assisted international development, and how to improve the way it was delivered and managed.<sup>13</sup> This meeting included representatives from over 90 countries – including bilateral donors (e.g., United States, Australia) and recipient or partner countries (e.g., Kenya, Indonesia), 30 multilateral donor organizations (e.g., the World Bank, the Asian Development Bank, the United Nations Development Group, the International Monetary Fund), many civil society organizations (CSOs) (e.g., Bill and Melinda Gates Foundation, EURODAD, Reality of Aid Network), and others. Their endorsement of local ownership and partnership as strategies of international development is embodied in the resulting *Paris Declaration on Aid Effectiveness*.

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<sup>13</sup> This was considered the second such forum of the international development community. The first international development meeting took place in Rome in 2003, and produced the 2½-page *Rome Declaration on Harmonization* – essentially an acknowledgment that there are problems with aid delivery, and the parties are committed to improving. In tracing back the ideas of ownership and partnership, a 2002 meeting of heads of state in Monterrey, Mexico, is also relevant, and produced the 2003 *Monterrey Consensus on Financing for Development*. This study focused on the *Paris Declaration* and *Accra Agenda* because they are the most detailed with regard to the meanings of ownership and partnership. For more on the post-Cold War rise of international conferences to promote international dialogue, see Rosalind Eyben, *International Aid and the Making of a Better World: Reflexive Practice* (New York: Routledge, 2014), 104-05 (referring first to the 1992 *Rio Conference on the Environment*).

The *Paris Declaration* is a 12-page pledge for improvement in five areas, referred to as “Partnership Commitments,” namely: ownership, harmonization, alignment, results, and mutual accountability.<sup>14</sup>

- Ownership of aid by partner countries,<sup>15</sup> among other things, includes partner countries taking the lead in development policies, strategies, and coordination at all levels, and donor countries agreeing to respect and help strengthen partner country capacity to exercise such leadership.<sup>16</sup>
- Alignment refers to ways donors could align their aid to local needs and systems.<sup>17</sup>
- Harmonization calls upon donors to coordinate with each other to avoid duplication and inconsistencies.<sup>18</sup>
- Results – referred to as “Managing for Results” – involves the use of results-based performance assessment frameworks (preferably ones originating from the partner country).<sup>19</sup> Short of that, donors are to “harmonize their monitoring and reporting requirements.”<sup>20</sup>
- Accountability – referred to as “Mutual Accountability” – means a commitment by partner countries to systematically involve a broad range of development actors

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<sup>14</sup> *Paris Declaration on Aid Effectiveness*, Second High Level Forum on Aid Effectiveness, Paris, France (March 2, 2005).

<sup>15</sup> Both *Paris Declaration* and *Rome Declaration* refer to the countries receiving foreign assistance as ‘partner countries.’ *Accra Agenda for Action* (2008), discussed below, uses the term ‘developing country governments.’

<sup>16</sup> *Paris Declaration*, Sections 14 and 15.

<sup>17</sup> *Ibid.*, Sections 16-31.

<sup>18</sup> *Ibid.*, Sections 32-42.

<sup>19</sup> *Ibid.*, Sections 44 and 45.

<sup>20</sup> *Ibid.*, Section 45.

while formulating and assessing national development strategies,<sup>21</sup> while donors commit to “timely, transparent and comprehensive information on aid flows.”<sup>22</sup>

The remaining two sections, “Partnership Commitments” and “Indicators of Progress,” enumerate the various commitments being made under each of the five areas,<sup>23</sup> and set related targets and indicators to be measured and monitored.

Ownership, for example, sets a target of at least 75 percent of partner countries translating their national development strategies into “prioritized results-oriented operational programs,”<sup>24</sup> also referred to as “operational development strategies” resulting in medium-term expenditure frameworks also reflected in annual budgets.<sup>25</sup> Thus, here ownership is directly linked to the partner countries’ national development strategies,<sup>26</sup> which includes a written plan or blueprint for achieving the country’s development goals. Though the *Paris Declaration* is silent as to who writes these plans, the partner countries have committed to exercising leadership in developing and implementing their national strategies into ‘results-oriented’ programs, in addition to coordinating aid at all levels.<sup>27</sup>

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<sup>21</sup> Ibid., Section 48.

<sup>22</sup> Ibid., Section 49.

<sup>23</sup> Each of the five Partnership Commitments contains bulleted commitments, listed according to the party making the commitment – namely the ‘partner country,’ the ‘donor,’ or both committing ‘jointly.’

<sup>24</sup> *Paris Declaration*, Section 14, Indicator 1.

<sup>25</sup> Ibid., Indicators of Progress Table, Indicator 1.

<sup>26</sup> One outcome of the United Nations World Summit in 2005 called upon developing countries to produce national development strategies. For links to policy notes provided by the United Nations to assist developing countries in this task, see <http://esa.un.org/techcoop/policyNotes.asp>.

<sup>27</sup> *Paris Declaration*, Section 14.

The donors' only commitment within the specific category of ownership is to: "[r]espect partner country leadership and help strengthen their capacity to exercise it."<sup>28</sup> Some details on how donors might show this respect are listed under the Partnership Commitment of 'Alignment,' which, in addition to being the longest section, also appears to be the section where donors pledge behavior that most encourages local ownership of the assistance.

Broadly speaking, these commitments involve donors agreeing to use country systems "to the maximum extent possible,"<sup>29</sup> while also acknowledging that the capacity of the partner countries is an issue that will require the attention of both partner countries and donors.<sup>30</sup> Alignment involves targets of at least 90 percent of donors using country procurement systems,<sup>31</sup> and a reduction by two-thirds in the stock of 'parallel project implementation units' (PIUs),<sup>32</sup> which are separate entities set up to manage the implementation of an aid project – entities that are 'parallel' to any existing country systems. Under 'Mutual Accountability' and 'Managing for Results,' we see a call for 'participatory approaches' to strengthen country capacities for results-based management,<sup>33</sup> as well as "when formulating and assessing progress in implementing national development strategies."<sup>34</sup> Notably, perhaps, neither of these commitments involving participatory approaches was assigned any targets or indicators.

The authors saved some of their strongest and most detailed instructions for donors in the second sub-section of *Paris 21*: "*Avoid to the maximum extent possible*

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<sup>28</sup> Ibid., Section 15.

<sup>29</sup> Ibid., Section 21, and Indicator 5.

<sup>30</sup> Ibid., Sections 17, 20, 22, 23, and 24.

<sup>31</sup> Ibid., Indicators of Progress Table, Indicator 5b

<sup>32</sup> Ibid., Indicators of Progress Table, Indicator 6.

<sup>33</sup> Ibid., Section 46.

<sup>34</sup> Ibid., Section 48.

creating dedicated structures for day-to-day management and implementation of aid-financed projects and programs” (emphasis added).<sup>35</sup> And yet, as we see in Indonesia and elsewhere, day-to-day management and implementation of the assistance remains in the hands of foreign implementing contractors, instead of using existing country systems. The PIUs discouraged by the target above – reduction by two-thirds – are also arguable descriptions of what is taking place in Indonesian RoL assistance, namely typically western implementing contractors who ‘put up shop’ in Jakarta, renting office space in a sky scraper, and hiring primarily local staff to implement the projects. While they do employ Indonesians, this structure nonetheless inserts a ‘middle-man’ above local partners, and does not simply make use of existing country systems, which here might include, for example, Indonesian NGOs, think-tanks, academic institutions, and government agencies.

In 2008, the international development community re-convened in Accra, Ghana. The principles of ‘ownership’ and ‘partnership’ feature even more prominently in the resulting document, known as the *Accra Agenda for Action*,<sup>36</sup> in which ownership, partnership and accountability for results were determined to be the three over-arching challenges that needed to be addressed in order to “accelerate progress on aid effectiveness.”<sup>37</sup> As discussed in more detail in chapter 7, the ten sections covering ownership and partnership include broad, conclusory prescriptions, which are much easier to list than bring into being. For example, to strengthen country ownership, *Accra*

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<sup>35</sup> Ibid., Section 21 and Indicator 6. Elsewhere, the language includes phrases like “mutually agreed,” “where feasible,” “where appropriate,” or simply “avoid” or “progressively rely on.”

<sup>36</sup> Discussion of ownership and partnership comprises more than 50 percent of the seven-page document. *Accra Agenda for Action*, Third High Level Forum on Aid Effectiveness, Accra, Ghana (September 4, 2008).

<sup>37</sup> *Accra Agenda*, Sections 7-11 (quotation from Section 7).

13 calls on developing countries to “work more closely” with and “support efforts to increase the capacity of” parliaments, local authorities, and CSOs in order to “broaden country-level policy dialogue on development.”<sup>38</sup> Some recommendations are nonetheless a bit more straightforward in terms of what would be required, including *Accra 14 (b)*, regarding capacity development, which states:

Donors’ support for capacity development will be demand-driven and designed to support country ownership. To this end, developing countries and donors will

- i) jointly select and manage technical co-operation, and
- ii) promote the provision of technical co-operation by local and regional resources, including through South-South co-operation.<sup>39</sup>

And yet, ‘demand-driven,’ and ‘joint selection and management of technical cooperation’ by both donors and developing countries are not accurate descriptions of the empirical reality of capacity building efforts in the Indonesian justice sector studied here, in which donors remained firmly in control of the selection of the (typically foreign) implementing contractors.<sup>40</sup>

In 2011, the international development community met in Busan, South Korea, to continue the discussion on aid effectiveness – this time, with more specific focus on incorporating the many diverse development actors taking part in international development (including South-South development cooperation), as well as addressing specific challenges that require joint efforts (including climate change, and international

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<sup>38</sup> *Accra Agenda*, Section 13.

<sup>39</sup> *Accra Agenda*, Section 13 (b).

<sup>40</sup> See chapter 7, analysis of bilateral agreements underlying three case studies. That said, it is not uncommon for foreign implementing contractors to sub-contract discrete portions of the programming out to local Indonesian civil society organizations (CSOs); but again, this means that a foreign middle-man has been inserted between donors and locals.

engagement in “conflict-affected and fragile states”).<sup>41</sup> As with earlier international declarations, the resulting *Busan Partnership for Effective Development Co-operation* features the principles of ‘ownership’ and ‘partnership’ alongside ‘results’ and ‘transparency and accountability.’<sup>42</sup> Also in line with the *Paris Declaration* and *Accra Agenda*, the *Busan Partnership* also re-commits to increasing aid delivered through country systems, which according to Section 19, should be the “default approach” for development cooperation.<sup>43</sup> And yet, as we see in the case of Indonesian RoL assistance, the default approach appears to instead include the use of foreign implementing contractors.

What all 3 of these international instruments suggest is that ownership and partnership definitions found in international discourse are aspirational in substance, and not particularly helpful to the daily work taking place at the micro-level of ongoing assistance delivery.<sup>44</sup> Nonetheless, this study finds that, in practice, local actors who are responsible for the design and implementation of the assistance readily ascribe their

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<sup>41</sup> *Busan Partnership for Effective Development Co-operation*, 4<sup>th</sup> High Level Forum on Aid Effectiveness, Busan, South Korea (December 1, 2011), Sections I – IV. See also, *A New Deal for Engagement in Fragile States*, 4<sup>th</sup> High Level Forum on Aid Effectiveness, Busan, South Korea (November 30, 2011) (the *New Deal* is one of several ‘building blocks’ to come out of working groups at the Busan High Level Forum that focus on specific development challenges – here, conflict-affected and fragile states). See also Development Assistance Committee (DAC) Secretariat, “Busan and Beyond,” *DACnews: Ideas on Aid*, December 2011 (reporting on outcomes of the summit in Busan, including the *New Deal*, as well as the *Busan Joint Action Plan on Gender Equality and Development*, the *Busan Action Plan for Statistics*, *A New Consensus on Effective Institutions and Policies*, and “A Joint Statement on Public Private Co-operation for Broad-Based, Inclusive and Sustainable Growth.”)

<sup>42</sup> *Busan Partnership*, Section 11 (a) – (d) (“Shared principles to achieve common goals” – namely: “Ownership of development priorities by developing countries”; “Focus on results”; “Inclusive development partnerships”; and “Transparency and accountability to each other.”)

<sup>43</sup> *Busan Partnership*, Section 19 (“The use and strengthening of developing countries’ systems remains central to our efforts to build effective institutions ...”).

<sup>44</sup> This argument is taken up in chapter 7.

own meanings to ownership and partnership, ones that exist independently of the international discourse. Furthermore, as we see in chapter 8, they are also willing to use whatever means and resources are available to them in pursuit of their vision of the content or direction the assistance project or program should proceed.

## ii. Ownership and partnership in rule of law (RoL) assistance practice

The data for this study originates from a field now widely termed ‘rule of law assistance’, or ‘rule of law promotion.’ Rule of law (RoL) assistance can broadly be described as donor-funded justice sector reforms, or assistance directed at laws, legal institutions, access to justice, and capacity building in support of the justice sector in a host / partner / recipient country.<sup>45</sup> Discussed in depth in chapter 3, we can think of RoL assistance as a sub-set of international development<sup>46</sup> from a donor standpoint, in that donors engaging in RoL assistance utilize the same financing and organizational infrastructure to manage and deliver the assistance.<sup>47</sup> Some examples of RoL assistance include legal and regulatory drafting; capacity-building training programs for judges, prosecutors and their staff; study trips to and from other countries for judges and other officials; implementation of anti-corruption measures; and case-management reforms to reduce backlog and increase ease of access to case documents.

Partnership and local ownership matter particularly for RoL assistance because legal norms and rules governing societal behavior (whether formal or informal, state or

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<sup>45</sup> As above, these terms are interchangeable, and describe the same party to the assistance. See footnote 10.

<sup>46</sup> As above, international development refers to donor-funded assistance programs aimed at improving conditions in developing nations. It is also called ‘foreign aid,’ ‘foreign assistance,’ and ‘development assistance.’ Its origins as a field are discussed in chapter 3.

<sup>47</sup> See chapter 3, Section II (a).

non-state) are embedded in local settings. To be effective as a form of social ordering, legal norms generally need to be perceived as legitimate, enjoy widespread support, and reflect values that are locally relevant. This continues to matter even in a globalized world in which the origin or agents of those norms might be located outside a local community or its national jurisdiction – as may be the case for donor-supported development projects.

As with donor aid in general, the conventional wisdom for promoting effective RoL assistance is that local recipients and stakeholders should be involved in the reforms at the earliest stage possible, so that the resources provided will match local needs, and so that the design and the new norms being introduced will be validated by local champions and woven into local discourses about norms.<sup>48</sup> Thomas McInerney, for example, champions ‘participatory’ local ownership in RoL programming through what he calls a ‘deliberative democratic’ approach – in which local partners are free to determine program and project priority areas, shape the design of the aid, and make decisions about staff for the project or program that enable smooth transfers of knowledge and technical competence from international to local actors.<sup>49</sup>

Yet, in practice, RoL assistance does not appear to embody substantive partnership and local ownership as a routine feature of its design and delivery. Much of the RoL assistance literature critiques the *lack* of local ownership and insufficient

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<sup>48</sup> Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-operation* (Antwerpen and Oxford: Intersentia, 2006), 206; Bivitri Susanti, Ph.D. dissertation in progress, University of Washington School of Law.

<sup>49</sup> Thomas F. McInerney, "Law and Development as Democratic Practice," *Voices of Development Jurists* I, no. 1 (2004): 43. See also chapter 2's discussion of the 'resilience' of participation, as a trend of development thinking. See Katy Gardner and David Lewis, *Anthropology and Development: Challenges for the Twenty-First Century* (London: Pluto Press, 2015), 162-63.

tailoring of the assistance to the local setting.<sup>50</sup> The consequences and costs of this approach are also identified by numerous scholars. These include a significant slippage between law-on-the-books versus law-in-practice;<sup>51</sup> the problem of managing expectations and performance within RoL projects when these are seldom implemented as designed; and the problem of RoL hubris – programming that over-promises and cannot deliver on its multiple objectives when based largely on foreign priorities and expertise.<sup>52</sup>

Similarly, in Indonesia, what passes for ‘ownership’ and ‘partnership’ during day-to-day RoL assistance delivery does not often live up to the ideals. Speaking based on RoL assistance experience in Indonesia, one member of an implementing team put it this way:

The term, local ownership, is thrown around a lot. It becomes symbolical. You have a short, brief call to an Indonesian partner and that supposedly means ownership.<sup>53</sup>

What should ownership look like instead of this short, brief call? According to an international academic with over 20 years of RoL experience, ownership occurs when a

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<sup>50</sup> See e.g., Randy Peerenboom, “The Future of Rule of Law: Challenges and Prospects for the Field,” *Hague Journal on the Rule of Law* 1, no.1 (2009): 9-10; Thomas F. McInerney, “Law and Development as Democratic Practice,” *Voices of Development Jurists* 1, no.1 (2004): 31; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, “The Transplant Effect,” *American Journal of Comparative Law* 51 (2003): 171 & 189.

<sup>51</sup> See e.g., David Linnan, “The New, New Legal Development Model” in *Legitimacy, Legal Development & Change: Law & Modernization Reconsidered* (2011), 22-23; Terence C. Halliday and Bruce G. Carruthers, “The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes,” *American Journal of Sociology* 112, no. 4 (2007): 1135-1202. Halliday and Carruthers discuss the cyclical dynamic tension between law on the books and law in action – a process that is further elaborated in the theoretical framework section of chapter 2, and more fully in chapter 8.

<sup>52</sup> See e.g., Benjamin van Rooij and Penelope Nicholson, “Inflationary Trends in Law and Development,” *Duke Journal of Comparative and International Law* 24 (2013).

<sup>53</sup> Informant 40 (interview with author, September 20, 2012).

“local partner is encouraged and strengthened to the point of true hand off.”<sup>54</sup> One example of how donors might support local ownership comes from an Indonesian RoL professional with over 14 years of experience working both with donors and independently on Indonesian justice sector reforms. Ideal ownership, according to the Indonesian reformer, would require Indonesians to ‘sit together’ to devise their own solutions.<sup>55</sup>

We define ourselves what we should do ... our goals, ideal values. And then with that work plan, we make a proposal (or many proposals) to funding sources. We design and know the risks, partners and goals [that] we are going to achieve.

We have ownership of the project. Donors are just partners with expertise, funding, whatever.<sup>56</sup>

Such a version of ownership – with donors contributing to reforms planned and executed by locals – is not what typically happens in practice. Instead, local actors working as part of implementing teams report that they feel forced to subordinate doing what (they already know) needs to be done in support of local ownership and genuine partnership (e.g., taking the time to listen to and connect substantively with local partners) to other programming priorities, such as accountability to the funder, meeting onerous reporting requirements, and efficiency. Both international and local partners have reservations about subordinating partnership and ownership in this way.<sup>57</sup>

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<sup>54</sup> Informant 34 (interview with author, September 19, 2012).

<sup>55</sup> Informant 29 (interview with author, September 5, 2012).

<sup>56</sup> Ibid.

<sup>57</sup> See chapters 5 and 8.

## II. Current state of knowledge and the significance of this research

RoL assistance can be viewed as a sub-field of international development, or official development assistance (ODA), the origins of which are discussed in chapter 3. Many of the structural features of how development assistance is financed and delivered are also present in the field of RoL assistance, examined in chapter 5 as they exist within the Indonesian context. This research, therefore, draws upon existing studies of development aid structures.

### *a. Development economics*

Economists and political scientists who study the political economy of aid describe the dynamism of relationships within aid projects as a principal-agent problem: citizens in donor countries have difficulty directing their elected representatives to effectively steer and monitor bilateral aid agencies, while citizens in recipient or host countries have difficulty controlling their political representatives in ways that ensure the assistance is directed toward genuine national needs and actually passes through the many hands of bureaucratic elites to reach the citizens, or intended beneficiaries.<sup>58</sup> Bertin Martens and others, applying principal-agent theory to foreign aid, describe the broken feedback loop between the funders of aid (taxpayers in donor countries) and the intended beneficiaries. The result is that the funding for donors' budgets is not linked to performance (as observed by the intended beneficiaries).<sup>59</sup>

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<sup>58</sup> See e.g., Clark Gibson, Krister Andersson, Elinor Ostrom, and Sujai Shivakumar, *The Samaritan's Dilemma: The Political Economy of Development Aid*, (New York: Oxford University Press, 2005); Bertin Martens, Uwe Mummert, Peter Murrell and Paul Seabright, *The Institutional Economics of Foreign Aid* (New York: Cambridge University Press, 2002).

<sup>59</sup> Martens, "Introduction," in *Institutional Economics of Foreign Aid*, 14-15.

These informational problems are further magnified in international development settings – where great distances and communication difficulties often separate principals and agents. The hierarchical nature of the organizations involved in aid delivery combined with problems of incomplete information between principals and agents can also lead to situations in which an agent might act in his or her own interest, instead of the agreed-upon principal's interest.<sup>60</sup> An example from Indonesian RoL assistance involves an Indonesian member of an implementing team who spent less hours in the project offices per week than agreed upon at the outset of his/her employment. As we will see in chapter 6, some local actors play multiple professional roles simultaneously, whose duties and loyalties at times bump up against each other. Notably, and contrary to what one might expect, this is not necessarily to the detriment of the RoL assistance being implemented, particularly when these actors exercise their agency in a way that takes advantage of the many resources and strategies available to them, discussed further in chapter 8.

Furthermore, the number of donors, implementers, and state and non-state actors engaged in RoL assistance delivery in local host-country settings creates a bewildering network of principals, agents, quasi-agents and other special affiliations, who are ultimately responsible for the day-to-day design and implementation of RoL assistance. These are demonstrated in chapter 6's mapping of the actors involved in RoL assistance in Indonesia, according to the principal-agent theory. Economist Peter Murrell discusses the relationship among donors, contractors and recipients in aid for institutional reform. He notes that the "embeddedness" of the institutions being reformed in their socio-economic environment means that a project supervisor in a donor agency

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<sup>60</sup> Gibson, et al., *The Samaritan's Dilemma*, 42-43; Martens, "Introduction," 8.

cannot know whether the output of the reform is appropriate for that setting.<sup>61</sup> A practical implication, according to Murrell, is that important project implementation decisions will be made by the implementers working on the ground, rather than those in a foreign head office.<sup>62</sup>

What we see in Indonesian RoL assistance is that implementing supervisors do face challenges in determining what is appropriate for the local Indonesian setting; and, as part of day-to-day project implementation, they make decisions that have the potential to impact the nature and extent of whatever ‘local tailoring’ of the reforms is taking place. And yet informants report that design and procurement decisions made elsewhere also sometimes have the effect of creating a rigid structure for implementation, leaving on-the-ground implementers frustrated in the course of day-to-day implementation. They are taxed by onerous reporting requirements, and by having to execute (or account for having failed to execute) the many detailed activities and outcomes. These issues are discussed in more detail in chapters 5, 6 and 8.

*b. Development anthropology and ethnographies of aid*

Ethnographic studies by development anthropologists Mosse and by Crewe and Harrison also show that the ‘agents’ at the micro level – the professionals who actually staff projects – are responsible for the transformation of project goals and outcomes.<sup>63</sup>

The authors demonstrate that project-level decisions and knowledge of local context (or

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<sup>61</sup> Peter Murrell, “The Interaction of Donors, Contractors, and Recipients in Implementing Aid for Institutional Reform,” in *The Institutional Economics of Foreign Aid* (New York: Cambridge University Press, 2002), 73-74.

<sup>62</sup> Ibid.

<sup>63</sup> David Mosse, *Cultivating Development: An Ethnography of Aid Policy and Practice* (London, New York: Pluto Press, 2005); Emma Crewe and Elizabeth Harrison, *Whose Development? An Ethnography of Aid* (London and New York: Zed Books, 1998).

lack thereof) by international technical assistance ‘experts’ can result in outcomes that diverge across target countries and that fall well short of the intended outcomes of the project or program. The agency of local actors again seems to be a decisive factor in what actually gets built or reformed, and who gets trained or enhanced through donor funding. For example, the authors report unexpected motivations for participating in a fish-farming intervention designed to provide a sustainable food source and income-generating activity. Yet, beneficiaries did not necessarily utilize the aid as intended, instead making calculated different choices on how they would participate. Some beneficiaries gave away all the fish to family and friends, thereby gaining prestige and influence. Others, in deciding where to dig the pond, used it to assert control over land or a property boundary.<sup>64</sup> In these actions, we see that logic ultimately steered the local actors away from embracing the intended logic and outcomes of the aid project. Thus, the donor likely failed to adequately understand the needs and motivations of its beneficiaries at the outset.

In Indonesian RoL assistance, too, local partners shape and transform the assistance according to their own versions of the best way to proceed. One example, from chapter 6, involves a team member choosing to work at his/her CSO (large, air-conditioned) office instead of his/her project’s assigned (tiny, interior) office – even though this arguably violated contractual obligations regarding hours spent at the project office. From the local partner’s standpoint, however, the involvement of an entire Indonesian civil society organization – with its library, research assistance, and colleagues with which to brainstorm, and ask questions of – was vastly more productive and beneficial to the project, and Indonesian justice sector reform overall.

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<sup>64</sup> Crewe and Harrison, *Whose Development?*, 8-11 and 119-125.

An example from chapter 8 involves a local partner's willingness to call upon professional networks in order to gain traction with a project that had reached a standstill with then Indonesian Supreme Court leadership. The informant and his colleagues attended a 'breaking-of-the-fast' gathering with the former Supreme Court chief justice at *Idul Fitri*.<sup>65</sup> After this meeting, which included a frank discussion the Supreme Court's reform needs with the former chief justice, the current leadership found time to meet, and gave stronger than expected commitment to the proposed reforms, as illustrated by their choice in leadership for the reforms. These included people considered by the informant and his colleagues to be "champions of reform."<sup>66</sup> What both of these examples illustrate are the ability and willingness of local partners to shape and influence the RoL assistance in ways that are perhaps not known or contemplated by the donor.

*c. Rule of law (RoL) assistance*

Within the field of RoL assistance, Nicholson and Pitt, using Vietnam as a case study, describe the way that bilateral donors' rule of law assistance goals are 'translated' by the host government so that different donors, with ostensibly different goals, end up funding projects that have convergent modes of delivery and have been nudged toward the host government's preferred national priorities.<sup>67</sup> Similarly, Bergling has described the capacity of even mid and low-level recipient agencies to thwart law reforms that are

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<sup>65</sup> *Idul Fitri* is a Muslim religious holiday, observing the feast that marks the end of the month of Ramadan, and its daily fasts. *Idul Fitri* is commonly referred to as *Lebaran* in Indonesia, and is a multiple-day national holiday.

<sup>66</sup> Informant 37 (interview with the author, September 19, 2012).

<sup>67</sup> Pip Nicholson and Simon Pitt, "Vietnamese Legal Reform: the Discourses of Aid?" in *Rule of Law Promotion: Global Perspectives, Local Applications*, eds. Per Bergling, Jenny Ederlöf and Veronica Taylor (Uppsala: Iustus Förlag, 2009).

counter to their interests by “introducing internally inconsistent implementation instructions.”<sup>68</sup> So too, in Indonesian RoL assistance we hear of donor-side implementers experiencing difficulty in negotiating their preferred form of new Indonesian regulations, possibly because of the personal involvement of their government counterpart, with whom their relations have become strained.<sup>69</sup>

Nicholson and Low have followed Nicholson’s earlier Vietnam work with an empirical study comparing local actors’ perceptions of RoL assistance projects focused on court reform in Vietnam and Cambodia that explores how local actors perceive such projects.<sup>70</sup> One finding of their study was that donors and locals do not actually share a vision with regard to court reform in Cambodia and Vietnam.<sup>71</sup> They further found that in both locations, one donor – the Japanese International Cooperation Agency (JICA) – stood out among others for its aid delivery style, which involved less advocacy for particular reforms and more use of longer-term expert teams that offer comparative technical advice to local decision-makers.<sup>72</sup> Broadly speaking, the authors suggest that it was JICA’s commitment to allowing local ownership of the aid (and not openly calling for politically controversial reforms) that was key to it being endorsed by local counterparts.<sup>73</sup>

In the Indonesian setting, one donor’s past program also stood out with a reputation among local Indonesian partners for its flexibility and responsiveness to

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<sup>68</sup> Bergling, *Rule of Law on the International Agenda*, 79.

<sup>69</sup> Informants 24 (interview with the author, September 11, 2012), 25 (interview with the author, September 18, 2012).

<sup>70</sup> Pip Nicholson and Sally Low, “Local Accounts of Rule of Law Aid: Implications for Donors,” *Hague Journal on the Rule of Law* 5, no. 1 (March 2013).

<sup>71</sup> Nicholson and Low, “Local Accounts,” 5.

<sup>72</sup> *Ibid.*, 27-30.

<sup>73</sup> *Ibid.*, 38, 42-43.

Indonesian needs, namely Legal Development Facility (LDF), which ran from 2004 – 2010, and was funded by the Australian Agency for International Development (AusAID).<sup>74</sup> From a local perspective, LDF was favored for the way it was structured and managed because local implementers were left in control of the content and direction of the assistance. Four foreign technical experts visited several times per year, during which time the implementers could seek guidance and ask technical questions. LDF therefore offers one empirical example of an arrangement that arguably constitutes ownership from a local perspective. LDF and the subsequent transition to the Australian Indonesia Partnership for Justice (AIPJ) program are discussed further in chapter 8.<sup>75</sup>

*d. Significance of this study: Filling an empirical gap*

All of the above studies, including this dissertation, suggest that the current view of donor-funded RoL projects as static designs that can be implemented to plan, and whose outcomes can then be measured in quantifiable terms,<sup>76</sup> significantly misunderstands the reality of project dynamics. Assistance projects and programs<sup>77</sup> are

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<sup>74</sup> AusAID was shut down by Australia's liberal government 2013/14 and subsumed within Department of Foreign Affairs and Trade (DFAT). See e.g., Robin Davis, "Felled Before 40: The Once and Future AusAID," *Development Policy Blog* of the Development Policy Center at Australian National University, available at: <http://devpolicy.org/felled-before-forty-the-once-and-future-ausaid/>.

<sup>75</sup> LDF's popularity notwithstanding, AusAID made significant changes to the structure of the follow-on project, Australia Indonesia Partnership for Justice (AIPJ), rendering it very different from LDF. See chapter 8.

<sup>76</sup> See e.g., Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury, eds., *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015).

<sup>77</sup> Rule of law assistance takes both forms. Projects typically denote one piece of a larger program or strategy; and programs signify a broader effort with individual components.

intrinsically fluid and dynamic, not least because of the many diverse stakeholders involved, and their influence on one another.

While ethnographic research on development generally has noted the relationship between international and local actors as an important constitutive element in aid project delivery,<sup>78</sup> detailed empirical accounts of how international and local actors actually interact to shape projects within sub-fields such as rule of law assistance projects are lacking.<sup>79</sup> Even donors' own evaluations of their programs concede that this is an important and understudied dimension in aid projects.<sup>80</sup> Nicholson and Low point out that the literature on RoL assistance "frequently remains abstracted from the reality of its implementation, particularly by bilateral donors."<sup>81</sup> The authors go on to suggest that "[t]he failure to listen to local stakeholders means law-focused aid remains ethnocentric, self-referential, neo-colonial and possibly destructive."<sup>82</sup> John Gillespie, too, argues that international donors "need to rethink their approach to understanding RoL promotion," which includes the recognition (and accommodation) of the fact that recipients will reinterpret whatever ideas are underlying the assistance, and re-assign

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<sup>78</sup> See e.g., Crewe and Harrison, *Whose Development?*. Describing their intention in the book, Crewe and Harrison write: "Rather than homing in on the perspective of one set of stakeholders in development (the developers or the beneficiaries, for example), it is more useful to look at the relationships surrounding intervention practices as they actually take place." Ibid, 19.

<sup>79</sup> Nicholson & Low, "Local Accounts," 4 & 5; Nicholson and Pitt, "Vietnamese Legal Reform: the Discourses of Aid?", 292; Thomas Carothers, "The Problem of Knowledge" in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers (Washington, D.C.: Carnegie Endowment, 2006), 15-28; Veronica L. Taylor, "Frequently Asked Questions About Rule of Law Assistance (And Why Better Answers Matter)," *Hague Journal on the Rule of Law* 1, no.1 (2009): 52.

<sup>80</sup> See Lage Bergstrom, "Development of Institutions is Created from the Inside: Lessons Learned from Consultants' Experiences of Supporting Formal and Informal Rules," *Sida Studies in Evaluation* 05/04 (2005): 43-47.

<sup>81</sup> See Nicholson & Low, "Local Accounts," 4.

<sup>82</sup> Ibid.

them a context-specific relevance.<sup>83</sup> This, in turn, requires donors to “recalibrate their projects to accommodate the factors that motivate recipients” with respect to RoL assistance.<sup>84</sup>

What is missing is an understanding of the more human side of ongoing assistance, particularly on the receiving end, which in turn feeds into the dynamic relationships required for ongoing RoL assistance design and implementation, including those between and among donors, their agents and their local counterparts and partners. According to Zürn, Nollkaemper and Peerenboom, much more comprehensive analysis is needed in order to understand the ‘rule of law dynamics,’ which involves three processes: 1) RoL promotion, or the promoter (or donor) perspective; 2) RoL conversion, or the recipient perspective; and 3) diffusion perspective, which includes the mechanisms and processes which link the first two.<sup>85</sup> While this study uncovered empirical data regarding all three processes, the analysis in the coming chapters pays particular attention to the processes of conversion (recipient perspective) and diffusion (mechanisms that link recipient and promoter perspectives). Indeed, one explicit aim of this study at the outset was to give voice to local stakeholders and partners, whose views and expertise regarding design and implementation have not yet been widely accessed or acknowledged – particularly within the field of RoL assistance.

### **III. Structure of the study, definitions**

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<sup>83</sup> See John Gillespie, “Developing a Theoretical Framework for Evaluating Rule of Law Promotion in Developing Countries,” in Michael Zürn, André Nollkaemper, and Randall Peerenboom, eds., *Rule of Law Dynamics: In an Era of International and Transnational Governance* (New York: Cambridge University Press, 2012), 233.

<sup>84</sup> Gillespie, “Developing a Theoretical Framework,” at 233.

<sup>85</sup> See Zürn, Nollkaemper, and Peerenboom, “Introduction,” in *Rule of Law Dynamics*, 4 and 323.

This study is a systematic inquiry into the experiences and perspectives of local actors at the site of RoL assistance delivery. By *local actors*, I mean all participants in RoL assistance who work at the site of the project delivery, handling day-to-day details of project design and implementation for both the donor of the assistance and for Indonesia, as the host country. This study focuses on local actors for three reasons: 1) they are in the best position to know what is actually happening ‘on the ground,’ and to analyze why RoL assistance projects and programs commonly run into ownership and partnership problems; 2) within RoL scholarship, we lack detailed empirical accounts from the perspective of local actors,<sup>86</sup> making them a significant untapped resource for information and expertise; and 3) local actors are not simply passive recipients of RoL assistance. Their choices to engage (or not) have the potential to radically reshape projects and affect their outcomes.<sup>87</sup>

#### *a) Definitions*

The primary sources of data for this study are interviews from a target group of ‘local actors’ and ‘local partners’ working in RoL assistance in the capital city of Indonesia, Jakarta.<sup>88</sup> As above, the term *local actors* includes all participants in RoL assistance who work at the site of the project delivery, handling day-to-day details of

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<sup>86</sup> See e.g., Carothers, “The Problem of Knowledge” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, 15-28; Veronica L. Taylor, “Frequently Asked Questions About Rule of Law Assistance (And Why Better Answers Matter),” *Hague Journal on the Rule of Law* 1, no.1 (2009): 52. Taylor writes: “[W]e simply do not know ... what local interlocutors really think about particular donors and their projects.”

<sup>87</sup> See generally, Crewe and Harrison, *Whose Development?*. Specifically for Rule of Law projects, see Camille Cameron and Sally Low, “Aid-effectiveness and Donor Coordination from Paris to Busan: A Cambodian Case Study,” *The Law and Development Review* 5, no. 2, Art. 8 (2012), 166 – 93.

<sup>88</sup> See chapter 2 for methodological details on the interviews with 38 informants. See chapter 4 for detailed profiles of the informants.

project implementation for both the donor of the assistance and for Indonesia, the partner country. Local actors in Indonesia are both Indonesian and international. They include parties to the assistance project who are members of partner institutions such as the Indonesian Supreme Court and the Attorney General's Office, government agencies, non-governmental organizations (NGOs), civil society organizations (CSOs), and intermediary professional groups, including lawyers (Indonesian national and international) in the host country and hired national experts. Also considered local actors are: donors and their direct employees who are stationed 'in-country,' residing in Jakarta, in addition to similarly situated for-profit and non-profit managing contractors hired to implement RoL assistance; and international professionals flown in to Jakarta in order to consult with other local actors, in-person. In sum, local actors in this study are people (whether foreign / international or Indonesian / national) who 1) have professional connections to ongoing RoL assistance projects; and 2) conduct their work in Jakarta, at the site of RoL assistance delivery.

Where this study discusses *local partners*, however, it refers only to the subset of local actors from the Indonesian, or partner-country side. All local partners are thus, by definition, local actors, but local partners are all Indonesian nationals. Local partners are a diverse group of Indonesian professionals including government officials; consultants hired by donors or an implementing contractor; members of NGOs and legal think tanks; members of the judiciary; and academics.<sup>89</sup> I single out these RoL assistance professionals and consider them as a separate group for study because, as Indonesians, they are in a position to be part of whatever 'ownership' may, or may not,

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<sup>89</sup> See chapter 6 for a discussion of the many diverse actors (with multiple roles) involved in the case study projects.

take place in connection with a RoL assistance project, and they are the Indonesian partners involved in its design and implementation.

*b) Choice of Indonesia*

The research questions in this study, enumerated below, could be applied to any site of donor-funded RoL assistance. The geographic spread of project interventions globally in 2015 is vast and encompasses high, middle and low-income countries as well as fragile states, conflict-affected states and regions, and proto-states. This study uses Indonesia as the research site, a context explored thoroughly in chapter 4. Though there is an understandable focus on fragile states within international development,<sup>90</sup> and within RoL assistance to countries such as Iraq, Afghanistan, Somalia and South Sudan,<sup>91</sup> stable middle income countries such as Indonesia, are fruitful research sites precisely because they *are* stable and permit access to projects and players that have been engaged over the course of decades, rather than months. RoL assistance to middle income countries is often concerned with reforming established institutions, rather than building them, and therefore studying the dynamics of international – local actor interaction is easier where there is continuity of individual actors, projects, donors, and institutions.

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<sup>90</sup> See e.g., *A New Deal for Engagement in Fragile States*, 4<sup>th</sup> High Level Forum on Aid Effectiveness, International Dialogue on Peacebuilding and Statebuilding, Busan, South Korea (November 30, 2011).

<sup>91</sup> See e.g., Zürn, Nollkaemper, and Peerenboom, *Rule of Law Dynamics*; Mark Massoud, *Law's Fragile State* (New York: Cambridge University Press, 2013).

In 1998, Indonesia began the transition to democracy, known as *Reformasi*, from the highly authoritarian and corrupt regime of General Suharto.<sup>92</sup> Existing Indonesian legal institutions began undergoing significant reform efforts, while new institutions of representative democracy have been put in place in the years since.<sup>93</sup> And though the power of the military has been checked for the time being, and a few prominent figures have been punished for gross abuses of power, “corruption is still rampant” even after a good amount of donor-assisted legal reform.<sup>94</sup> This assistance has nonetheless contributed to the emergence of an Indonesian network of sophisticated aid participants and organizations<sup>95</sup> – including educated legal professionals who are the primary sources of data for this study.

Indonesia’s well-established network of legal professionals is an important reason for choosing it as a fieldwork location. The country’s long history with donors, which combined with a growing, educated middle class and professional legal elites – has led to a core constituency from which donors can draw to staff their rule of law assistance projects.<sup>96</sup> Indonesia’s internal capacity and thick layer of implementation expertise make it an ideal location to study the perceptions of local participants in the delivery of rule of law assistance projects. Chapter 4 discusses the Indonesian context in further

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<sup>92</sup> Suharto topped a list by Transparency International (TI) of corrupt leaders in terms of dollars embezzled, at \$15-35B in estimated funds embezzled, according to TI’s 2004 special report on political corruption. TI, *Global Corruption Report 2004* (March 25, 2004), Table 1.1, 13.

<sup>93</sup> Bivitri Susanti, “The Republic of Indonesia,” in *Rule of Law for Human Rights in the ASEAN Region: A Base-Line Study* (Human Rights Resource Centre, 2011), 87-118.

<sup>94</sup> Howard Dick, “Why Law Reform Fails: Indonesia’s Anti-Corruption Reforms,” in Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (London and New York: Routledge, 2007), 43.

<sup>95</sup> See e.g., Yves Dezalay and Bryant G. Garth, *Asian Legal Revivals: Lawyers in the Shadows of Empire*, (Chicago: University of Chicago Press, 2010).

<sup>96</sup> Daniel Lev, “State and Law Reform in Indonesia” in *Law Reform in Developing and Transitional States*, 261.

detail, and, in the process, offers additional reasons why Indonesia is a suitable place to study RoL assistance in the 21<sup>st</sup> century.

*c) Research questions*

This study asks three higher-order questions:

- 1) How are the principles of 'local ownership' and 'partnership' understood and operationalized, if at all, during ongoing rule of law assistance?
- 2) What impedes the realization of the goals of local ownership and partnership during the design and implementation phases of rule of law assistance projects?
- 3) How are the norms of local ownership and partnership negotiated between and among local actors during the design and implementation phases of rule of law assistance?

These questions have multiple sub-parts, or lower-order questions, which are articulated and addressed in the study's chapters, as outlined below.

In less technical language, this study asks how the norms of local ownership and partnership are understood by the people charged with the design and implementation of RoL assistance projects – those 'on the ground' at the site of aid delivery. How important are these norms in comparison with other programming priorities? Do the meanings ascribed to 'local ownership' and 'partnership' converge or diverge among the different actors? If they do, does it matter? Do local ownership and partnership occur in practice according to the way they are defined in the ideal – either by international discourse or by local actors? Why or why not? What impedes the realization of ownership and partnership? What are local actor strategies for dealing with these and other impediments in the course of ongoing RoL assistance? What else is going on that

might shed light on RoL assistance delivery and the challenges faced during implementation?

*d) Chapter outline*

A few foundational topics are covered in the study's early chapters. Chapter 2 offers a detailed methodology and theoretical framing for the study.<sup>97</sup> Chapter 3 examines the field of rule of law (RoL) assistance – including definitions of its underlying concepts (including 'rule of law'), how these are used, the field's intellectual history, as well as analysis of RoL assistance as a field of practice by scholar-practitioners, most of whom write based on experience working for donors or their implementing contractors. What they describe is a field that continues to use standardized, 'off-the-shelf' toolkits for its assistance – even though mountains of evidence indicate that these reforms rarely lead to their intended consequences. Instead, responses and outcomes depend very much upon the local context, and the local actors who are responsible for its design and implementation.

Chapter 4 examines the local context for this study – namely Indonesia, which is the location in which the RoL assistance case studies take place. As described above, two reasons that Indonesia is a good choice for this research are because of its political stability, and the educated and experienced cohort of professionals who staff Indonesia's RoL assistance. Chapter 4 first provides Indonesia's political, economic and legal context in some historical detail, followed by detailed profiles of the informants,

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<sup>97</sup> In the manuscript version of this study, chapter 2 will become an Appendix to chapter 1.

and more formal introductions to the RoL assistance case study projects and programs for which these local actors work.<sup>98</sup>

The four case studies that inform this project include: two United States Agency for International Development (USAID)-funded projects – *Changes for Justice (C4J)*, implemented by United States-based for-profit contractor, Chemonics; and *Educating and Equipping Tomorrow's Justice Reformers (E2J)*, implemented by U.S.-based non-profit organization, The Asia Foundation (TAF);<sup>99</sup> the *Australia Indonesian Partnership for Justice, or AIPJ*, an Australian Agency for International Development (AusAID)<sup>100</sup> program implemented by Australian for-profit contractor Cardno; and the World Bank's *Justice for the Poor (J4P)*, implemented by the World Bank and its partners.<sup>101</sup> Details about these case studies, including comparative tables, are provided in chapter 4.

Having laid the theoretical and contextual foundations in chapters 2 through 4, chapters 5 through 8 offer an analysis of the empirical answers to the study's research questions. The above three higher-order research questions are answered through several lower-order questions, described below.

#### i. Structural constraints to ownership and partnership

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<sup>98</sup> See chapter 2, II (a), on the selection of case study projects; see chapter 4, Section III, for substantive details on all four case studies.

<sup>99</sup> It is important to mention that the University of Washington School of Law – and specifically my employer from 2007 – 2013: the Asian Law Center (ALC) – was an implementing partner with TAF on E2J. As a then-employee of the ALC, I had access to local partners in Jakarta. That said, I obtained permission from the Chiefs of Party (COP) of all four case studies prior to contacting any team members for interviews related to this study.

<sup>100</sup> AusAID has since been subsumed within Department of Foreign Affairs and Trade (DFAT). See above, footnote 79.

<sup>101</sup> How these case studies were chosen is discussed in Chapter 2, Section II (b).

Chapter 5 offers an introduction to what is most on the minds of local actors working in RoL assistance. The first question addressed in chapter 5 is: What else – other than ownership and partnership – is important to ongoing RoL assistance design and delivery?<sup>102</sup> The answers evince a concern with structural limitations placed upon the assistance, many of which themselves carry ownership and partnership implications. At the same time, these answers also provide local actor reports about the challenges and impediments being faced during RoL assistance design and implementation, which include donor-driven structural constraints, as well as the current local conditions and will to reform in partner countries.

Chapter 5 also addresses the following lower-order question: To what extent are the goals of local ownership and partnership structurally enabled or embodied during the design and implementation of RoL assistance projects? In the process, chapter 5 provides empirical examples of how structural features common to all rule RoL assistance are experienced in a local Indonesian setting. As argued in chapter 5, structural features of RoL assistance – including problematic industry incentives, the procurement process, choice of contractor, and the aid’s pre-determined structure and hierarchy during implementation – not only fail to *enable* ownership and partnership in practice, they also interfere with efforts toward local ownership of the assistance through genuine partnership, and better aid, in general.

At the same time, chapter 5 also begins to answer another lower-order question, namely: To what degree has the field of RoL assistance shifted from international

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<sup>102</sup> Referred to as the ‘what else?’ question, this question is meant to capture the “if at all” phrase of research question 1 – *How are the meta-level principles of local ownership and partnership understood and operationalized, if at all, in the field of rule of law assistance?* It is also intended to provide an empirical counter-balance to the study’s explicit focus on ownership and partnership principles in practice.

delivery to a fully built-out local capacity? We see that international delivery is still the preferred method for donors – who routinely employ implementing contractors through a procurement process, rather than partnering directly with Indonesian counterparts and partner organizations. The second part of the question, regarding local capacity for implementing this assistance, is picked up in chapters 6, 7, and 8.

## ii. Mapping of the parties, relationships and roles

Using the principal-agent theory as a theoretical framing, chapter 6 lays out the various actors and parties to the assistance, as well as their respective relationships to each other. We find that what is already a complicated web of parties, with incomplete information and competing motivations – according to Peter Murrell and others, who apply principal-agent theory to development aid – becomes even more complex when mapped in the Indonesian RoL assistance setting. Here we see the addition of institutions that are specific to Indonesia, including Indonesia's National Development Planning Agency, known as Bappenas, as well as the Supreme Court and the Attorney General's Office 'reform teams,' which consist of groups of legal professionals who act as advisers to Indonesian institutions on matters of reform. In mapping these many actors, their motivations, and their relationships to each other, we observe that ownership and partnership principles are again placed at issue.

Chapter 6 offers the first responses to the study's third higher-order research question, namely: How are ownership and partnership negotiated between and among local actors in RoL assistance? Through an examination of the parties and their respective motivations, we learn that differing perceptions of the roles of the many actors involved in RoL assistance can contribute to actual or perceived mismatch

between donor priorities and local needs. This in turn, offers another reported impediment to the realization of ownership and partnership principles in practice.

From the perspective of members of the reform teams, for example, partnership principles are understood as violated when donors' agents fail to involve them in the reforms to the extent dictated by official Indonesian policy. From the perspective of those same donors' agents, however, bypassing the reform team is perhaps necessary in order to assure ownership by the institutions themselves (Supreme Court or Attorney General's Office). In other words, the donors' agents do not trust that the reform teams can credibly speak for the true needs of the institutions they serve, and thus, question the capacity of the reform teams to do the job they have been assigned. Members of the reform team, who are educated legal professionals dedicated to Indonesian justice sector reform, do not appreciate being left out in this way.

### iii. Ownership and partnership meanings in theory and practice

Chapter 7 addresses the heart of research question 1, namely: How are the principles of local ownership understood and operationalized in the field of RoL assistance? Using insights from critical development theory, chapter 7 examines both the discourse and practice of local ownership and partnership principles within RoL assistance projects in Indonesia.

First, as foreshadowed above, we see that the definitions of ownership and partnership provided at the international level of discourse – as offered by the *Paris Declaration* and the *Accra Agenda* – are more aspirational than relevant to day-to-day RoL assistance. This is because the international development community emphasizes the use of partner country systems in its definitions, but RoL assistance projects in

Indonesia, as elsewhere, are primarily implemented by contractors, who often originate from donor countries instead of the partner or recipient country. The same is true for at least three of the four case studies – as represented by relevant macro-level agreements between Indonesia and bilateral donors, Australia and the United States. Chapter 7's analysis of these agreements shows that ownership and partnership face macro-level, structural impediments to their realization in practice. One result of this is that a significant percentage of the funding publicly earmarked as 'foreign aid' actually ends up back in the donor countries, often through the salaries paid to 'development consultants.'<sup>103</sup>

Next, what do the terms 'local ownership' and 'partnership' mean at a practical level, according to local actors who work on the design and implementation of RoL assistance? Chapter 7 offers an analysis of the meanings offered. We see a convergence of different local actors' understandings about ownership as being related to local involvement in planning and implementation; and partnership as hinging upon communication. At the same time, we observe that the behaviors encompassing these more 'ideal' ownership and partnership definitions given by local actors are notably absent from many descriptions of day-to-day RoL assistance design and implementation.

This data suggests support for early critics of international development, including – among others – Arturo Escobar. According to Escobar, the discourse of development is tilted in favor of those from the 'developed' world, who have much to

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<sup>103</sup> See e.g, Alexander Borda-Rodriguez and Hazel Johnson, "Development on My Terms: Development Consultants and Knowledge for Development," *Public Administration and Development*, Vol. 33 (2013): 343; Anis Chowdhury and Iman Sugema, "How Significant and Effective Has Foreign Aid to Indonesia Been?" *ASEAN Economic Bulletin* 22, no. 2 (2005): 203 (writing specifically about Indonesia).

gain, financially and otherwise, by participating in international development.<sup>104</sup> We see this illustrated in the Indonesian setting when local partners discuss the hiring decisions made for RoL assistance projects – for example, when a foreign ‘expert’ is hired who knows nothing about Indonesia or is not qualified as an expert in the subject matter called for by the project.<sup>105</sup> Escobar further refers to a ‘subjective sense’ inculcated by the discourse, namely, a sense by which people come to see themselves (and others) as ‘developed’ or not.<sup>106</sup> We see this illustrated in the observation by local actors that some Indonesian government officials are more likely to follow the advice of an international professional than they would if hearing the same advice from an Indonesian.<sup>107</sup>

Chapter 7 therefore argues that there is evidence to support the idea that Indonesian RoL assistance is shaped by and is part of a larger (donor-dominated) system and discourse. Local actors further report that servicing this system, e.g., in the form of meeting voluminous donor reporting requirements, cuts heavily into the time local actors report they would rather be using to pursue meaningful partnerships toward reaching local ownership of the RoL assistance. In other words, ownership and partnership are being crowded out at the practical level by what can be described as a donor-dominated ‘industry.’

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<sup>104</sup> Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, 1995).

<sup>105</sup> See e.g., Informant 16 (interview with author, April 23, 2012).

<sup>106</sup> Escobar, “Power and Visibility: Development and the Invention and Management of the Third World,” *Cultural Anthropology*, Vol. 3, No. 4 (1988), p. 430-31; Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, 1995), p. 10.

<sup>107</sup> See e.g., Informant 40 (interview with author, September 20, 2012).

#### iv. Local actor strategies for directing and shaping RoL assistance

Chapter 8 addresses the following lower-order questions:<sup>108</sup> How do local actors shape and influence RoL assistance projects and programs? What actions do they take in response to the inevitable challenges faced in the course of RoL assistance design and implementation? Using a socio-legal framing suggested by Terence Halliday and Bruce Carruthers, what we find is that local actors are not afraid to exercise their agency in the course of executing their duties, and their (often intentionally strategic) actions result in a cyclical mutual influence, back and forth, between and among the many parties to the assistance. In examining this cyclical process, we are able to better understand the choices being made at the individual level, and how these affect the overall content and direction of the RoL assistance.

For example, on the local partner (Indonesian national) side, we see the language of ownership justifying the creation of added layers of bureaucracy through 1) more regulations governing donor interactions with partner institutions, and 2) through the delegation of gate-keepers, who, by design, change the way the donor-host partnership unfolds in the course of the project. The composition of the teams being assembled by donors' implementing contractors – with primarily Indonesian nationals – is a further indication that the many repeat players in RoL assistance in Indonesia, and their willingness to call upon their own professional networks and information, are influencing and changing how RoL assistance is carried out. Even so, positions commanding final decision-making authority remain in the hands of international

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<sup>108</sup> The higher-order question being addressed is number 3: How are the meta-level norms of local ownership and partnership negotiated between and among local partners in RoL assistance?

consultants and donor agents, calling into question the equality on which these partnerships are based.

International forces, too, shape what is happening at the site of RoL assistance delivery from afar. RoL assistance in Indonesia is subject to the same donor oversight and scrutiny seen elsewhere in development, often abbreviated as ‘monitoring and evaluation.’ What we see illustrated in the Indonesian setting is that the quantitative focus on results that can be measured (through, e.g., ‘ticking boxes’) is particularly challenging in a justice sector setting, where the change being sought is behavioral, and takes more time than the typical 4-5 year assistance project. Furthermore, particularly in RoL assistance, the importance of responding to momentum and political will cannot be overstated. One consequence of the focus on technocratic, ‘measurable’ results, is the creation of the need for a (likely foreign) consultant with scrivener skills, capable of keeping up with the bureaucratic reporting requirements that accompany donor-funded RoL assistance. Another implication is the difficulty of creating procedural and substantive space for the definition and negotiation of ‘local ownership’ and ‘partnership’, beyond the formalist, contractual and documentary processes that donors demand of development actors.

#### **IV. Conclusion**

One finding of this study is that the meta-level goals of local ownership and partnership recognized in the *Paris Declaration* and follow-on international documents are indeed perceived as important by actors at the local site of RoL assistance project

delivery.<sup>109</sup> This is regardless of whether the actors are themselves aware of the discourse at the international level. Another related finding, foreshadowed above, is that, in practice, these principles have meanings ascribed to them by local partners that exist independently of the more technocratic international discourse. These meanings do converge, in which ‘local ownership’ equates to some form of ‘early and often’ involvement by locals; and ‘partnership’ involves some aspect of ‘communication,’ with common language forming an obvious foundation.

On its face, this dissertation might well be vulnerable to the charge that it shows us what we already know, because we intuitively understand that locals *should* be involved early and often in RoL assistance; and donors *should* actively seek to provide assistance that is locally demanded, and not simply what donor implementers are capable of. What makes this research significant, however, are the informants – RoL professionals who have not yet had a consolidated voice within the sub-field of RoL assistance.

Through these local actors’ perspectives, a dynamic and human component of ongoing RoL assistance is presented. These local actors reveal that despite scholarly and practitioner support for substantive local ownership and genuine partnering, Indonesian donor-assisted RoL assistance continues to be perceived as donor-driven and disproportionately benefitting actors from donor countries. We also learn that despite the many structural constraints placed upon them, local actors nonetheless have means and resources available that enable them to shape and influence the content and direction of ongoing RoL assistance delivery.

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<sup>109</sup> See chapter 7.

This chapter began in a conference room in Jakarta for the purpose of illustrating the types and predictability of problems being faced during RoL assistance delivery, particularly those concerning the struggle over the determination of its content and direction. But are these problems inevitable? In the course of answering the above research questions, practical implications became evident, often in the form of recommended adjustments to the way RoL assistance is carried out. These, along with theoretical implications of the study, are enumerated in the study's conclusion, chapter 9. The recommendations for adjustments to RoL assistance – including more use of interpreters and translators, and allowing partner countries more authority with regard to hiring decisions – flow from the overall argument that a heavier focus by donors and their agents on ownership and partnership principles within ongoing RoL assistance delivery could contribute to the laudable goal of locally tailored and demanded reforms, embraced by locals.



## Chapter 2 /

### Methodology and Theoretical Framing

#### I. Research questions, definitions

This study posits that the principles and language surrounding ‘local ownership’ and ‘partnership’ provide a fruitful platform for eliciting the experiences and expertise of local stakeholders and other actors participating in day-to-day RoL assistance design and delivery. This study asks three higher-order questions:

- 1) How are the principles of ‘local ownership’ and ‘partnership’ understood and operationalized, if at all, during ongoing rule of law assistance?
- 2) What impedes the realization of the goals of local ownership and partnership during the design and implementation phases of rule of law assistance projects?
- 3) How are the meta-level norms of local ownership and partnership negotiated between and among local partners during the design and implementation phases of rule of law assistance?

In *Table 1*, I set out the specific questions asked and answered by this research.<sup>1</sup>

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<sup>1</sup> See Appendix 1 for full table of higher- and lower-order questions, including an additional column of sub-questions. For how these questions were translated into interview questions, see Appendix 2, the Interview Protocols used during fieldwork.

Table 1.

Higher-order questions	Lower-order questions
<p>How are the principles of local ownership and partnership understood and operationalized, if at all, in the field of rule of law (RoL) assistance?</p>	<p>How are local ownership and partnership defined in international discourse? [ch 1 and 7]</p>
	<p>What do local ownership and partnership mean in a practical sense, locally in Indonesia? [ch 7]</p>
	<p>To what extent are the goals of local ownership and partnership structurally enabled or embodied during the <i>design</i> and <i>implementation</i> of RoL assistance projects? [ch 5, 6 and 7]</p>
	<p>To what degree has the field of rule of law assistance shifted from international delivery to a fully built-out local capacity? (Accra 14, 15, 16) [ch 5, 6 and 7]</p>
	<p>What else, other than ownership and partnership, is important to ongoing RoL assistance design and delivery? [ch 5]</p>
<p>What impedes the realization of the meta-level goals of local ownership and partnership during the design and implementation phases of rule of law assistance projects?</p>	<p>What do local partners report as the challenges to local ownership? [ch 5,6, and 7]</p>
	<p>What do local partners report as the challenges to partnership? [ch 5 and 7]</p>
	<p>What do donors and their agents report as the challenges to local ownership and partnership? [ch 5, 7]</p>
<p>How are the meta-level norms of local ownership and partnership negotiated between and among local actors in rule of law assistance?</p>	<p>Does the meta-level dialogue filter down to the local actors in the field? [ch 7]</p>
	<p>How, if at all, do donor-principals shape ongoing RoL assistance from afar? [ch 8]</p>
	<p>How do local actors understand and ‘translate’<sup>2</sup> or ‘foil’<sup>3</sup> the RoL assistance projects and programs? What actions do they take in response to the challenges they face? [ch 6, 8]</p>

In lay language, this study asks how the norms of local ownership and partnership are understood by the people charged with the design and implementation of RoL assistance projects – those ‘on the ground’ at the site of aid delivery. How important are these norms in comparison with other programming priorities? Do the meanings

<sup>2</sup> See Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle,” *American Anthropologist* 108 (2006): 41-43.

<sup>3</sup> See Halliday and Carruthers, “Foiling,” in *Bankrupt* (Stanford, California: Stanford University Press), 337-62.

ascribed to 'local ownership' and 'partnership' converge or diverge among the different actors? If they do, does it matter? Do local ownership and partnership occur in practice according to the way they are defined in the ideal – either by international discourse or by local actors? Why or why not? What impedes the realization of ownership and partnership? What are local actor strategies for dealing with these impediments? What else is going on that might shed light on RoL assistance delivery and the challenges faced during design and implementation?

The primary sources of data for this study are interviews from a target group of 'local actors' and 'local partners' working in RoL assistance in the capital city of Indonesia, Jakarta. As we saw in chapter 1, the term *local actors* includes all participants in RoL assistance who work at the site of the project delivery, handling day-to-day details of project implementation for both the donor of the assistance and for Indonesia, the host / partner / recipient country. Local actors in Indonesia are both Indonesian and international. They include parties to the aid project who are members of host country's partner institutions, such as the Indonesian Supreme Court and the Attorney General's Office, government agencies, non-governmental organizations (NGOs), civil society organizations (CSOs), and intermediary professional groups, including lawyers (Indonesian and international) in the host country and hired national experts. Also considered local actors are donors and their direct employees who are stationed 'in-country,' residing in Jakarta, in addition to similarly situated for-profit and non-profit managing contractors hired to implement RoL assistance.

In sum, local actors in this study are people (whether foreign / international or Indonesian / national), who 1) have professional connections to ongoing RoL assistance projects; and 2) reside in Jakarta, at the site of RoL assistance delivery.<sup>4</sup>

Where this dissertation discusses *local partners*, however, this refers only to the subset of local actors from the Indonesian, host-country side. All local partners are thus, by definition, local actors, but local partners are all Indonesian. Local partners are a diverse group of Indonesian professionals including government officials; consultants hired by donors or an implementing contractor; members of NGOs and legal think tanks; members of the judiciary; and academics. I single out these RoL assistance professionals and consider them as a separate group for study because, as Indonesians, they are in a position to be part of whatever ‘ownership’ may, or may not, take place in connection with a RoL assistance project, and they are the Indonesian partners involved in its design and implementation.

## **II. Qualitative methodology**

In order to best capture the perceptions and experiences of local actors in rule of law (RoL) assistance, this study employed qualitative research methods. Qualitative research seeks context-dependent knowledge, and does “not attempt to simplify what cannot be simplified, ... or to eliminate what cannot be discounted.”<sup>5</sup> Qualitative researchers engage in what is referred to as ‘thick analysis,’ in which the researcher immerses in the details of cases in order to build concepts, variables and a causal

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<sup>4</sup> For more details about the informants’ profiles, see chapter 4, Section III (b).

<sup>5</sup> Sharan B. Merriam, *Qualitative Research: A Guide to Design and Implementation* (San Francisco: Jossey-Bass, 2009), 52 (citing a paper presented by C.M. Shields at the 2007 Annual Meeting of the American Educational Research Association), and 53.

understanding of the cases.<sup>6</sup> This type of research plays an important role in advancing a field's knowledge base, where the phenomenon being studied is not yet fully understood, and theories are still being built.<sup>7</sup> This is certainly the case regarding local actor dynamics and experiences in donor-funded RoL assistance at the local (project) level.

The core data source for this dissertation study is a set of 38 qualitative interviews, primarily conducted in Jakarta and nearby areas in 2011-12, as well as a few (three) by telephone or Skype when travel schedules did not permit a meeting in Jakarta. During three visits to Jakarta, I interviewed 43 RoL assistance professionals, or local actors, broadly defined at first to include anyone involved in the implementation of past or present (preferably ongoing) RoL assistance in Indonesia. Subsequent trips focused on meeting with professionals on both the Indonesian and donor side who were involved in the four case study projects chosen for inclusion in the study, all of which were ongoing in 2011-12. Thirty-eight of these interviews resulted in data that was subsequently analyzed (field notes, transcripts).

The interviews combined open and closed questions and prompts; the interview protocol is attached as Appendix 2. The point of data collection was the 'natural setting' in which the informants actually experience the phenomenon being studied.<sup>8</sup> Here, the natural setting was the city of Jakarta, capital of Indonesia, which was where ongoing or recently concluded RoL assistance projects promoting capacity building in support of

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<sup>6</sup> David Collier, Henry E. Brady and Jason Seawright, "Sources of Leverage in Causal Inference: Toward an Alternative View of Methodology," in *Rethinking Social Inquiry: Diverse Tools, Shared Standards*, ed. Henry E. Brady and David Collier (Lanham: Rowman & Littlefield, 2004), 248-49.

<sup>7</sup> Merriam, *Qualitative Research*, 51 and 53.

<sup>8</sup> John W. Cresswell, *Research Design: Qualitative, Quantitative, and Mixed Methods Approaches* (Los Angeles: Sage Publications, 2009), 174-76.

Indonesia's legal sector were located. When possible, interviews took place in the respondent's office or work-space to enable observations of the physical space associated with the project and actors.<sup>9</sup> These qualitative characteristics used the 'researcher as key instrument,' and were supplemented with other sources of data,<sup>10</sup> including public and non-public documents of donor-funded legal reform projects in Indonesia, their websites, as well as national and international regulatory instruments relating to international development assistance, described below, and throughout the dissertation where relevant. As the primary researcher for my dissertation, the methods included interviews conducted by me, my recorded observations, and documents collected, coded and analyzed by me.

Because qualitative research is inductive – involving ideas, patterns and themes found in the data upon which theories may be built – it can have an emergent design, which is modified as needed based on the data being collected from the field.<sup>11</sup> As I began my data collection, I used a case study method from which I expected to generate rich descriptions of four different RoL projects, all dealing with capacity building in support of the legal sector in Indonesia – involving two bilateral donors (United States Agency for International Development (USAID) and Australian Agency for International Development (AusAID)), one multi-lateral donor (the World Bank), as well as for-profit, non-profit, and in-house implementers. Specifically, the four RoL

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<sup>9</sup> I have followed Human Subject Division procedures in gaining the required consent prior to the interview of my sources. Part of the process included allowing the interviewee to choose the location that was most comfortable and/or convenient for him or her – including e.g., his or her office or work space, a nearby coffee shop, or if more anonymity is desired, the Salemba or Deepok campuses of the Law Faculty of the University of Indonesia – where I had an affiliation as a Visiting Scholar.

<sup>10</sup> Merriam, *Qualitative Procedures*, 175.

<sup>11</sup> Cresswell, *Research Design*, 175-76.

assistance case studies informing this dissertation include: two United States Agency for International Development (USAID)-funded projects – *Changes for Justice (C4J)*, implemented by United States for-profit contractor Chemonics; and *Educating and Equipping Tomorrow's Justice Reformers (E2J)*, implemented by non-profit organization The Asia Foundation (TAF);<sup>12</sup> the *Australia Indonesian Partnership for Justice, or AIPJ*, an Australian Agency for International Development (AusAID) program implemented by Australian for-profit contractor Cardno; and the World Bank's *Justice for the Poor (J4P)*, a program implemented by World Bank and its partners.<sup>13</sup> But as interviews progressed over three visits to Jakarta during a 15-month period, the anonymity and confidentiality requests of study participants made a strictly side-by-side comparison of projects impossible. This meant that it was difficult to isolate variables that could be directly compared across the four case studies, as I had originally intended to do. For that reason, the focus of my project shifted from the case studies to the local actors themselves, many of whom, I discovered in the course of this work played substantive roles in more than one of the four case study projects and/or other ongoing donor-assisted RoL projects.

Thus, in analyzing the profiles of the local actors and their self-understandings of their roles and organizations as they relate to RoL promotion, I have instead borrowed from grounded theory methodology by identifying and analyzing themes that emerge from the interviews conducted, including for example the significance of donor-side

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<sup>12</sup> In the interest of full disclosure, the University of Washington School of Law – and specifically the Asian Law Center (ALC) – my employer from 2007 – 2013 – was an implementing partner with TAF on E2J. As a then-employee of the ALC, I had access to local partners in Jakarta.

<sup>13</sup> Details about these RoL assistance projects, including comparative tables and their Indonesian context, are provided in chapter 4. How these case studies were chosen is discussed below.

hiring practices, meanings of 'local ownership' and 'partnership' according to local actors, as well as their strategies for dealing with perceived problems. The data have been grouped by these themes – outlined in detail in the theoretical framework below – instead of by case study project. However, some comparative information about individual projects was still possible and is explored in chapter 4.

With regard to the systematic analysis of the data, I used qualitative research software (Dedoose) to help identify themes in the data through the process of electronic coding. I refined the codes themselves as more interview data was added to the database. Attached as Appendix 3 is a spreadsheet list of the codes applied to interview excerpts, including the 'child codes' that were nested under broader coding categories. Broad categories include, for example: ownership definitions, partnership definitions, hiring practices (examples of child codes: use of experts / non-experts, pay differential, international actor value-add), host country strategies for dealing with perceived problems (examples of child codes: pass regulations, involve a third party, request flexibility of the donor), donor/implementing contractor responses to perceived problems (examples of child codes: relationship-building, 'take it or leave it,' go to Indonesian leadership). In a few instances, an additional level of coding took place on paper – specifically using printed documents comprised of the text excerpts grouped according to a particular code from the list in Appendix 3. Ownership and partnership definitions are two categories that were examined and analyzed in this way.

*a. Selection of Indonesia as case study location*

The research questions in this study could be applied to any site of donor-funded RoL assistance. The geographic spread of project interventions globally in 2015 is vast

and encompasses high, middle and low-income countries as well as fragile states, conflict-affected states and regions, and proto-states. This study uses Indonesia as the research site. Though there is an understandable focus on fragile states within international development,<sup>14</sup> and within RoL assistance to countries such as Iraq, Afghanistan, Somalia and South Sudan,<sup>15</sup> stable middle income countries such as Indonesia, are fruitful research sites precisely because they *are* stable and permit access to projects and players that have been engaged over the course of decades, rather than months. RoL assistance to middle income countries is often concerned with reforming established institutions, rather than building them, and therefore studying the dynamics of interactions among local actors is easier where there is continuity of individual actors, projects, donors, and institutions.

In 1998, Indonesia began the transition to democracy, known as *Reformasi*, from the highly authoritarian and corrupt regime of General Suharto.<sup>16</sup> Existing Indonesian legal institutions began undergoing significant reform efforts, while new institutions of representative democracy have been put in place in the years since.<sup>17</sup> And though the power of the military has been checked for the time being, and a few prominent figures have been punished for gross abuses of power, “corruption is still rampant” even after a

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<sup>14</sup> See e.g., *A New Deal for Engagement in Fragile States*, 4<sup>th</sup> High Level Forum on Aid Effectiveness, Busan, South Korea (November 30, 2011) (the *New Deal* is one of several ‘building blocks’ to come out of working groups at the Busan High Level Forum that focus on specific development challenges – here, conflict-affected and fragile states).

<sup>15</sup> See e.g., Zürn, Nollkaemper, and Peerenboom, *Rule of Law Dynamics*; Massoud, *Law’s Fragile State*.

<sup>16</sup> Suharto topped a list by Transparency International (TI) of corrupt leaders in terms of dollars embezzled, at \$15-35B in estimated funds embezzled, according to TI’s 2004 special report on political corruption. TI, *Global Corruption Report 2004* (March 25, 2004), Table 1.1, 13.

<sup>17</sup> Bivitri Susanti, “The Republic of Indonesia,” in *Rule of Law for Human Rights in the ASEAN Region: A Base-Line Study* (Human Rights Resource Centre, 2011), 87-118.

good amount of donor-assisted legal reform.<sup>18</sup> This assistance has nonetheless contributed to the emergence of an Indonesian network of sophisticated aid participants and organizations<sup>19</sup> – including educated legal professionals who are the primary sources of data for this study.

Indonesia’s well-established network of legal professionals is an important reason for choosing it as a fieldwork location. The country’s long history with donors, which combined with a growing, educated middle class and professional legal elites – has led to a core constituency from which donors can draw to staff their rule of law assistance projects.<sup>20</sup> Indonesia’s internal capacity and thick layer of implementation expertise make it an ideal location to study the perceptions of local participants in the delivery rule of law assistance projects. Chapter 4 discusses the Indonesian context in further detail, and, in the process, offers additional reasons why Indonesia is an interesting and valuable place to study RoL assistance in the 21<sup>st</sup> century.

Practical considerations guided the choice of Indonesia, as well. The Asian Law Center of the UW School of Law and its affiliate professors have close ties with many people in Indonesia who have offered support in facilitating this research.<sup>21</sup> The network includes Indonesian government officials, judges, civil servants, members of academia, development practitioners, and members of non-governmental organizations (NGOs)

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<sup>18</sup> Howard Dick, “Why Law Reform Fails: Indonesia’s Anti-Corruption Reforms,” in *Law Reform in Developing and Transitional States*, ed. Tim Lindsey (London: Routledge Taylor and Francis Group, 2007), 43.

<sup>19</sup> See e.g., Yves Dezalay and Bryant G. Garth, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (Chicago: The University of Chicago Press, 2010), 120-25.

<sup>20</sup> See Lev, “State and Law Reform in Indonesia,” in *Law Reform in Developing and Transitional States*, 261.

<sup>21</sup> Prior to fieldwork, I had been granted affiliations with the University of Indonesia Faculty of Law, and the Indonesian Center of Law and Policies Studies (in Indonesian, *Pusat Studi Hukum dan Kebijakan Indonesia*, known as PSHK).

and quasi-governmental bodies involved in coordinating between donors and government agencies. Given the reliance of this project on candid information from Indonesians, being part of a network such as this was crucial to collecting the data.

In order to prepare for fieldwork in Jakarta, I sought and received Foreign Language Area Studies (FLAS) Fellowships, which included one academic year of graduate-level courses relevant to Indonesia and Southeast Asia, and intensive Indonesian language study over the 2010-11 academic year, and summer of 2011. By the time of fieldwork, I had completed the equivalent of two academic years of Indonesian language study at the University of Washington, and was able to understand, at a basic level, the Indonesian spoken around me. This was particularly useful during interviews (conducted in English) that were attended by more than one Indonesian national, who would at times speak in Indonesian to each other, often in search of an English word to convey a certain Indonesian word or meaning.

#### *b. Selection of case study projects*

The population of possible case study projects for this dissertation included all donor-assisted RoL assistance projects (broadly construed) taking place in Indonesia during 2011-2014. My original intention was to identify and study RoL assistance projects in Indonesia that would be as similar as possible, in order to ensure comparability of their component parts, such as local partners and project focus. In practice, I found that, though there is abundant RoL assistance programming in Jakarta,

there was no set of projects that was identical in content, scope and structure.<sup>22</sup> Another strategy would have been to select projects using a ‘most different’ hypothesis,<sup>23</sup> and compare RoL assistance projects sponsored by, for example, the United States, Japan, Australia, the Netherlands and one or more multilateral donors. In practice it proved difficult to capture that range of projects in a way that aligned the available fieldwork time with the real-time cycle of those donors’ projects.

Consequently, I modified my research design to focus on a sample of four donor-funded projects that: (a) were ongoing and in mid-project delivery at the time of the fieldwork – thus allowing me to interview participants in ‘real-time’; (b) were primarily focused on justice sector reform, albeit on different parts of the Indonesian justice system (Supreme Court, Attorney General’s Office, law schools / universities); (c) allowed me to systematically gather information about the relevant (independent) variables such as attitudes toward, and practices embodying, partnership and local ownership. Common to each of the four projects is the inclusion of capacity-building components that aim to support justice and/or the legal sector of Indonesia.

The four case study projects selected are representative of donors that have been active in justice sector reform in Indonesia for decades, and more visibly since its democracy reforms of 1998. They also represent a ‘convenience sample’ in the sense that these were projects that permitted me unrestricted access to project participants

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<sup>22</sup> My pilot trip to Jakarta in June 2011 made this fact quite clear. Whether this is the result of donor coordination or reflects Indonesia’s maturity as a project location are open questions.

<sup>23</sup> See Jeroen van der Heijden, “Selecting Cases and Inferential Types in Comparative Public Policy Research,” in *Comparative Policy Studies: Conceptual and Methodological Challenges*, ed., Isabelle Engeli and Christine Rothmayr Allison (New York: Palgrave Macmillan, 2014), 37-39.

and local partners.<sup>24</sup> Finally, they also demonstrate different types of implementers found in RoL assistance – namely for-profit contractors / consultants, non-profit CSOs, and in-house teams directly assembled by donors. Again, the four projects studied here are: two USAID-funded projects – *Changes for Justice (C4J)*, implemented by United States for-profit contractor Chemonics; and *Educating and Equipping Tomorrow’s Justice Reformers (E2J)*, implemented by non-profit organization The Asia Foundation (TAF);<sup>25</sup> the *Australia Indonesian Partnership for Justice, or AIPJ*, an AusAID project implemented by Australian for-profit contractor Cardno; and the World Bank’s *Justice for the Poor (J4P)*, implemented by World Bank. Details about these RoL assistance projects, including comparative tables, are provided in chapter 4.

### *c. Validity and reliability*

In common with the accepted approach in qualitative research that seeks to generate thick descriptions of under-studied phenomena, this study focuses on *within-case* accuracy and consistency.<sup>26</sup> My hope is that these case studies of RoL assistance in Indonesia will yield insights about how the ‘rule of law dynamics’<sup>27</sup> operate at the

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<sup>24</sup> I sought and received approval from all four Chiefs of Party (COPs) before contacting any implementing team members and staff for interviews. Implementing team members and staff were told by their superiors (and me) that they were free, but not obligated, to speak with me.

<sup>25</sup> It is important to mention that the University of Washington School of Law – and specifically my employer from 2007 – 2013: the Asian Law Center (ALC) – was an implementing partner with TAF on E2J. As a then-employee of the ALC, I had access to local partners in Jakarta.

<sup>26</sup> Cresswell, *Research Design*, 190-92. See also Todd D. Jick, “Mixing Qualitative and Quantitative Methods: Triangulation in Action,” *Administrative Science Quarterly*, Vol. 24 (1979): 602-04.

<sup>27</sup> Michael Zürn, André Nollkaemper, and Randall Peerenboom, *Rule of Law Dynamics: In an Era of International and Transnational Governance* (New York: Cambridge

project level. To enhance the qualitative validity and accuracy of the findings, I used the strategies of member-checking and triangulation.<sup>28</sup>

‘Member-checking,’ much like it sounds, involves taking preliminary findings and analysis back to the sources of data to further follow-up, refine or check whether the researcher’s assessment involves an accurate portrayal of the source’s information.<sup>29</sup> Here, I maintained email correspondence with study informants for follow-up questions and clarifications. Additionally, every quotation pulled from the data involved checking with the person being quoted to confirm that 1) s/he said what my notes indicate s/he said; and 2) the quote is still an accurate representation of that person’s views in light of the quote’s context in the dissertation. Many substantive edits and clarifications resulted from this step, bolstering the study’s overall accuracy in presenting its findings.

This study employed within-method triangulation by confirming and denying as much of the data as was possible.<sup>30</sup> For example, when study participants referred to regulations, I sought and located those regulations in order to 1) confirm that they exist; 2) learn their substance; and 3) when relevant, compare the actual substance with what was told to me. Also, when study participants spoke of meetings involving other study participants, I sought out those persons’ perceptions of the same meeting whenever

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University Press, 2012). See chapter 1, Section II (d) for discussion of RoL dynamics as defined by Zürn et al.

<sup>28</sup> Ibid; Cresswell, *Research Design*. Qualitative reliability refers to the consistent application of the methods across case studies and/or researchers, and can also be addressed using triangulation and systematic codes to keep track of the collected data.

<sup>29</sup> Cresswell, *Research Design*, 191.

<sup>30</sup> Triangulation is a strategy that refers to examining and finding different data sources to justify the emergence of themes. As illustrated by its origins in navigation, triangulation is the process of using “multiple reference points to locate an object’s exact position.” Jick, “Triangulation,” 602. In the social sciences, this means achieving greater accuracy by collecting multiple viewpoints, or different kinds of data on the same phenomenon.

possible. With respect to perceptions and subjective meanings attached to project experiences, cross-checking is not as straight-forward, but not impossible. Instead of learning the ‘truth’ of the information, what becomes important is trying to understand why those particular meanings have been ascribed by local actors.

By using these sources and strategies, I aimed to achieve a “holistic account”<sup>31</sup> of what the meta-level goals of local ownership and partnership subjectively mean to the local participants in donor-funded rule of law assistance projects in Indonesia. More importantly, the prevailing underlying framework is to learn from the participants – in this case, local actors participating in contemporary donor-funded RoL assistance in Indonesia. What are their day-to-day experiences? What challenges do they face when designing and implementing RoL assistance? What do they do about those challenges?

### **III. Theoretical framework and structure of this study**

A number of key themes emerge from the responses to the interview questions posed as part of this study. When asked about the meaning of local ownership and partnership in Indonesian RoL assistance, informants identify, for example, the significance of a donor’s hiring practices (including pay rates and funding structures); the choice (and arguable over-use) of foreign ‘experts’ and consultants; and strategies on all sides for exerting influence and asserting power in the course of implementation. These themes connect with the theoretical framework for the dissertation, below, and feature in the structure for the chapters that follow.

In a nutshell, what we observe in the sub-field of RoL assistance in a setting such as Indonesia, is a field crowded with individuals and their organizations, all of

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<sup>31</sup> Merriam, *Qualitative Procedures*, 175-76.

whom are designing, negotiating and pressing for institutional reform. This reform often seeks the adoption of new norms and behavioral changes that rely on and affect people – from legal elites through to citizens on the periphery. While the development rhetoric of RoL projects may emphasize ‘justice for the poor’ or ‘changes for justice’ or ‘equipping tomorrow’s justice reformers,’<sup>32</sup> the lived reality of RoL promotion actors in Indonesia is that concerns about technocratic efficiency often trump the quality of results. As argued in chapter 5, structural features of RoL assistance – including problematic industry incentives, the procurement process, choice of contractor, and the aid’s pre-determined structure and hierarchy during implementation– interfere with efficient efforts toward local ownership of the assistance through genuine partnership, and better aid, in general. Furthermore, meeting donor reporting requirements cuts heavily into the time local partners report they would rather be using to pursue meaningful partnership toward reaching genuine ownership of the RoL assistance.<sup>33</sup>

The theoretical framing of this study draws on three distinct theoretical literatures: principal-agent theory, critical development theory, and the socio-legal theories of recursivity, intermediation and foiling.

*a. Principal-agent theory*

Chapter 6 outlines ‘The Anatomy of Indonesian RoL Assistance,’ described with reference to the principal-agent problem that institutional economists regard as being emblematic of international development assistance. At the heart of the principal-agent

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<sup>32</sup> These phrases correspond to the names of the RoL assistance case studies that are examined in this study: USAID’s *Changes for Justice* (C4J), USAID’s *Equipping Tomorrow’s Justice Reformers* (E2J), World Bank’s *Justice for the Poor* (J4P). See chapter 4 for details on the case studies.

<sup>33</sup> See chapter 7.

problem is a lack of information – the principal does not know what the agent is doing. The lack of information combined with a lack of understanding about the incentives of the various principals and agents puts at issue even the best-laid plans and intentions for an aid project and its outcomes. As Elinor Ostrom and others discovered in their study of the Swedish International Development Agency (SIDA), the web of aid relationships compounded by actors with unclear, misunderstood, and/or shifting roles makes the delivery of aid extremely complicated.<sup>34</sup> As argued in chapter 6, the same holds true for the sub-field of RoL assistance. The sheer number of participants to the assistance, and their various, often misunderstood, sometimes disputed, roles amounts to a complex and dynamic environment in which the RoL assistance takes place.

Chapter 6 details the various parties to the case study RoL assistance projects – namely the people who represent donors (USAID, AusAid, World Bank), their contractors (Chemonics, Cardno, The Asia Foundation (TAF)), and local Indonesian partners, including the Indonesian Supreme Court, the Attorney General’s Office (AGO), Bappenas (the Indonesian government’s national development planning agency), CSOs, universities, and Indonesia-specific entities: reform teams – Judicial Reform Team Office (JRTO) housed within the Supreme Court, and the reform team (*Tim Asistensi*) at the Attorney General’s Office.

In examining these many parties and how they perceive themselves and others, we notice different and at times competing views of their roles. For example, the reform teams for the Supreme Court and AGO are staffed with members of Indonesia’s legal reform NGO sector – an educated group of attorneys who have experience working with

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<sup>34</sup> Clark Gibson, Krister Andersson, Elinor Ostrom, and Sujai Shivakumar, *The Samaritan’s Dilemma: The Political Economy of Development Aid*, (New York: Oxford University Press, 2005).

donors, and are not themselves judges or prosecutors. Some implementing contractors did not want to work closely with the reform teams, preferring instead to go directly to judges or prosecutors themselves for the implementation of their projects.<sup>35</sup> Not surprisingly, circumventions like these were not viewed kindly by members of the reform team, and can cause observable tension during the implementation of the projects. A second example involves competing views of expert consultants – including whether foreign experts need context-specific knowledge (in this case, knowledge about Indonesia, its legal system and reform needs), in addition to their substantive technical expertise. Thus, we see in chapter 6 that the differing perceptions of the roles of the many participants involved in the projects can contribute to actual and/or perceived mismatch between donor priorities and local needs.

*b. Critical development theory*

The rise of the meta-level goals of partnership and local ownership within the development community requires interrogation in light of the work of Arturo Escobar, who was early to point out that ‘development’ is a discourse, which often obscures and facilitates embedded power relationships.<sup>36</sup> Chapter 7 of this study uses insights from Escobar to illuminate both the discourse and practice of local ownership and partnership within RoL assistance projects in Indonesia as it appears in the data.

First, as foreshadowed in chapter 1, we see that the definitions of ownership and partnership provided at the international level of discourse – as offered by the *Paris*

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<sup>35</sup> See e.g., Informants 2 (interview with author, April 26, 2012), 19 (interview with author, September 11, 2012).

<sup>36</sup> See Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton, N.J: Princeton University Press, 1995).

*Declaration, Accra Agenda* and *Busan Partnership* – are more aspirational than relevant to day-to-day RoL assistance. This is because the international development community emphasizes the use of partner country systems, but RoL assistance projects in Indonesia, as elsewhere, are primarily implemented by contractors, who often originate from donor countries instead of the partner country. One result of this is that a significant percentage of the funding publicly earmarked as ‘foreign aid’ actually ends up back in the donor countries, often through the salaries paid to ‘development consultants.’<sup>37</sup>

Next, what do the terms ‘local ownership’ and ‘partnership’ actually mean to those who are working in the design and implementation of RoL assistance? Chapter 7 offers an analysis of the answers given by local actors working in RoL assistance in Indonesia, and in so doing, offers empirical insight into what ownership and partnership mean on a practical level, as well as local actors’ versions of their ideals. We see a convergence of different local actors’ understandings about ownership as requiring local involvement in planning and implementation; and partnership as hinging upon communication. At the same time, we observe that the behaviors encompassing these more ‘ideal’ ownership and partnership definitions given by local actors are notably absent from their descriptions of day-to-day RoL assistance design and delivery. Thus, the behavior of these actors (and/or the decision-makers to whom they answer) is at times incongruent with the language they are using.

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<sup>37</sup> See e.g, Alexander Borda-Rodriguez and Hazel Johnson, “Development on My Terms: Development Consultants and Knowledge for Development,” *Public Administration and Development* 33 (2013): 343; Anis Chowdhury and Iman Sugema, “How Significant and Effective Has Foreign Aid to Indonesia Been?” *ASEAN Economic Bulletin* 22, no. 2 (2005): 203 (writing specifically about Indonesia).

This data also suggests support for early critics of international development, including – among others – Arturo Escobar. According to Escobar, the discourse of development is tilted in favor of those from the ‘developed’ world, who have much to gain, financially and otherwise, by participating in the development apparatus.<sup>38</sup> We see this illustrated in this study when local partners discuss the hiring decisions made for RoL assistance projects, for example when a foreign ‘expert’ is hired who knows nothing about Indonesia or is not qualified as an expert in the subject matter called for by the project.<sup>39</sup> Escobar further refers to a ‘subjective sense’ inculcated by the discourse, namely, a sense by which people come to see themselves (and others) as “developed or underdeveloped.”<sup>40</sup> We see this illustrated in the observation by local actors that some Indonesian government officials are more likely to follow the advice of an international professional than they would if hearing the same advice from an Indonesian.<sup>41</sup> Chapter 7 suggests that there is evidence to support the idea that Indonesian RoL assistance is shaped by and is part of a larger, donor-dominated system and discourse.

### *c. Recursivity*

The socio-legal work of Terence Halliday and Bruce Carruthers argues that donor-assisted legal reform involves a multi-level and multi-directional negotiation of

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<sup>38</sup> Escobar, *Encountering Development*, 10.

<sup>39</sup> See e.g., Informant 16 (interview with author, April 23, 2012).

<sup>40</sup> Escobar, “Power and Visibility: Development and the Invention and Management of the Third World,” *Cultural Anthropology* 3, no. 4 (1988): 430-31; Escobar, *Encountering Development*, 10.

<sup>41</sup> See e.g., Informant 40 (interview with author, September 20, 2012).

influence, including host country use of ‘foiling’ – or strategies of resistance.<sup>42</sup> Chapter 8 adopts a framework of analysis used by Halliday and Carruthers, informed by earlier work by legal anthropologist Sally Engle Merry, to interrogate the strategies employed by local actors at the site of RoL assistance design and implementation.

Socio-legal theorists such as Halliday and Carruthers and legal anthropologists, such as Merry, argue that internationally promulgated legal norms are not simply received into domestic legal systems unchanged. On the contrary, intermediate actors at the national, provincial and local level are necessary to translate these norms. In the face of prospective legal reform, these intermediaries mobilize to resist, reshape or absorb the externally generated norm. Those domestic responses are then fed upwards to the transnational or international level, having an impact on the meta-level norm negotiation – resulting in the existence of a dynamic transnational space of mutual influence between and among local and international actors. The authors refer to this cyclical process as “recursivity,” and it is more fully defined in chapter 8. Sally Engle Merry also describes the intermediation between global and local norms, and global and local actors, in terms of what she calls the “translators” – the people in the middle who “translate up and down,” turning transnational ideas into local terms.<sup>43</sup>

It is inside the dynamic transnational space that local actor dynamics in RoL assistance takes place, and it is from here that this study collects data. This study’s informants can also be viewed as Merry’s ‘translators’ – actors in the middle, negotiating multiple worlds and roles, though as will be shown, ‘translating’ is just the beginning of what these local actors do. This socio-legal framework is particularly useful for revealing

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<sup>42</sup> Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009).

<sup>43</sup> See Merry, “Mapping the Middle,” 40-43.

the back and forth, cyclical nature of local actor behavior and strategies. Actions and strategies are thus presented within their relational context, according to the local actors engaging in RoL assistance design and implementation.

Chapter 8 thus addresses the question: how do local actors behave and shape the direction (and subsequently outcomes) of ongoing RoL assistance? What actions do they take in response to the inevitable challenges faced in the course of RoL assistance design and implementation? On the local partner / Indonesian national side, we see the language of ownership justifying the creation of added layers of bureaucracy: through more regulations governing donor interactions with partner institutions; and through the delegation of gate-keepers, who, by design, change the way the donor-host partnership unfolds in the course of the project. The composition of the implementer teams is a further indication that the many repeat players in RoL assistance in Indonesia, and their willingness to call upon their own personal networks and information, are influencing and changing how RoL assistance is carried out. Even so, positions commanding final decision-making authority remain in the hands of international consultants and donor agents, calling into question the equality on which these partnerships are based.

International forces, too, shape from afar what is happening at the site of RoL assistance delivery. We see that RoL assistance in Indonesia is subject to the same donor oversight and scrutiny seen elsewhere in international development. Andrew Natsios has been critical of how new public management ideas have transformed the conceptualization and delivery of development aid within USAID, pointing out that “accountability should not be confused with developmental effectiveness.”<sup>44</sup> Yet the 21<sup>st</sup>

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<sup>44</sup> Andrew Natsios, “The Clash of the Counter-bureaucracy and Development,” *Center for Global Development Essay* (July 2010): 60.

century system of foreign aid funding and delivery is predicated on post-industrial regulatory values such as transparency, efficiency, and technocratic modes of risk management and accountability. These values are reflected in the procedural forms and structures taken by the assistance to partner countries, and in the way the oversight of projects is carried out – the latter often abbreviated as ‘monitoring and evaluation’ (or ‘M&E’).

What we see illustrated in the Indonesian setting is that M&E’s quantitative focus on results that can be measured (through e.g., ‘ticking boxes’) is particularly challenging in a justice sector setting, where the change being sought is behavioral, and takes more time than the typical 4-5 year assistance project. Furthermore, particularly in RoL assistance, the importance of responding to momentum and political will cannot be overstated. One consequence of this technocratic turn observed in international development in general, and RoL assistance in Indonesia, in particular, is the creation of the need for a (likely foreign) manager with scrivener skills, capable of keeping up with the bureaucratic reporting requirements that accompany donor-funded RoL assistance. Another implication is the difficulty of creating procedural and substantive space for the definition and negotiation of ‘local ownership’ and ‘partnership’, beyond the formalist, contractual and documentary processes that donors demand of development actors.

#### **IV. Conclusion**

This chapter presented methodological details and justification for this study. Before analyzing empirical accounts of ongoing RoL assistance in Indonesia in chapters 5 through 8, we turn in chapter 3 to providing necessary foundational context, including

an explanation of the field of rule of law (RoL) assistance. In chapter 4, we examine the Indonesian context in detail, including why it is a particularly good location for studying present-day RoL assistance. Chapter 4 also provides details about the four case studies examined in this study, including profiles of the local actors working therein.

## Chapter 3 /

### Rule Of Law Assistance: Shifting Approaches from the 1960s to the Present Day

#### I. Introduction

Before examining empirical results in the coming chapters, we turn first to an explanation of the field from which the data originates: Rule of Law (RoL) assistance. RoL assistance can be considered a sub-field of the broader framework of development assistance, also referred to as foreign aid, foreign assistance, and international development. Though RoL practitioners themselves might disagree that what they do is ‘development’ per se,<sup>1</sup> it is useful to contextualize RoL assistance within the overarching field of development assistance because the financial and technical transfers required of RoL assistance are processed and facilitated by the infrastructure that is provided by development assistance.

We begin with a brief history of development assistance and trends therein, followed by a closer look at RoL assistance – including definitions of its underlying concepts; how these are used; its intellectual history; as well as the analysis of RoL assistance as a field of practice by scholar-practitioners, most of whom write based on experience working for donors or their implementing contractors. As will be argued in the concluding sections of this chapter, this study differs in that it presents the viewpoints of local actors – namely, those RoL professionals ‘on-the-ground,’ ‘in-country,’ who are responsible for the design and implementation of the assistance.

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<sup>1</sup> See Kristina Simion and Veronica L. Taylor, *Professionalizing Rule of Law: Issues and Directions* (Folke Bernadotte Academy, 2015): 23-30.

Local actors represent those working for both donors and Indonesian counterparts.<sup>2</sup>

One reason their perspectives matter is because they are best positioned to shed light on the challenges and victories (however incremental) occurring during ongoing RoL assistance design and implementation.

*a. Brief historical overview of development assistance*

Development assistance facilitates the transfers of funds and technical knowledge and services from donor countries to recipient, or partner countries. The Marshall Plan announced at the end of World War II provides an early, and arguably the most inspiring, example of development assistance in the form of bilateral aid – or country to country, in this case, between the United States (U.S.) and countries of Western Europe. In a widely cited speech in June of 1947, U.S. Secretary of State General George Marshall described the War’s dislocation of the European economy, and its debilitating effect on European farmers and manufacturers, concluding:

The truth of the matter is that Europe's requirements for the next three or four years of foreign food and other essential products - principally from America - are so much greater than her present ability to pay that she must have substantial additional help or face economic, social, and political deterioration of a very grave character.<sup>3</sup>

In this, we see the U.S. government’s proposed ‘substantial additional help’ to the countries of Europe as being a calculated (and compassionate) foreign policy decision.

To this day, foreign policy and political relationships are most determinative of aid

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<sup>2</sup> For a detailed definition of local actors, see Chapter 1, Section III (a). For more about the profiles of the local actors who participated in this study, see chapter 4 (case study details).

<sup>3</sup> See George C. Marshall, “The ‘Marshall Plan’ Speech,” Harvard University, June 5, 1947, available at <http://www.oecd.org/general/themarshallplanspeechatharvarduniversity5june1947.htm>.

flows.<sup>4</sup> In the text that would lead to the 1948 creation of the Organization for European Economic Cooperation (OEEC), precursor to the 1961 Organization for Economic Cooperation and Development (OECD), Marshall went on to observe that it was “already evident” that *before* the U.S. could intervene at all:

[T]here must be some agreement among the countries of Europe as to the requirements of the situation, and the part those countries themselves will take in order to give proper effect to whatever action might be undertaken by this Government.<sup>5</sup>

In Marshall’s next words, he dismissed the notion of unilateral U.S. action, instead underscoring the importance of European-designed and demanded plans:

It would be neither fitting nor efficacious for this Government to undertake to draw up unilaterally a program designed to place Europe on its feet economically. This is the business of the Europeans. The initiative, I think, must come from Europe.<sup>6</sup>

The Marshall Plan, put into action from 1948 – 1952, went on to precisely coincide with the “fastest period of economic growth in European history.”<sup>7</sup> As suggested above, this might be the best example of bilateral aid there is – perhaps in part because of Marshall’s common sense notions about the need for locally demanded and designed plans, which did not (and does not) typically manifest in later incarnations of bilateral assistance.

In addition to the bilateral aid of individual countries, post World War II saw the emergence of multi-lateral development assistance. The 1944 Bretton Woods Conference led to the establishment of major multi-lateral development banks, also

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<sup>4</sup> Steven Radelet, “A Primer on Foreign Aid,” *Center for Global Development, Working Paper*, no. 92 (July 2006): 6.

<sup>5</sup> See Marshall, “The ‘Marshall Plan’ Speech.”

<sup>6</sup> *Ibid.*

<sup>7</sup> See e.g., Katy Gardner and David Lewis, *Anthropology and Development: Challenges for the Twenty-First Century* (London: Pluto Press, 2015), 14-16 (quote at 16).

referred to as international financial institutions (IFIs), including in 1944, the International Bank for Reconstruction and Development (IBRD, later to become the World Bank), and the International Monetary Fund (IMF) in 1945. The IMF and the World Bank dispersed multi-lateral aid to countries, leaning heavily on the work of U.S. economists.<sup>8</sup> Additionally, the newly created United Nations (UN)<sup>9</sup> carried out development assistance through various agencies, including for example, the Food and Agriculture Organization (FAO), established in 1945, and the 1949 United Nations Expanded Program of Technical Assistance, which would merge with another program in 1965 to become the United Nations Development Program (UNDP).

In the years that followed, newly independent former colonies, first in Asia, then Africa, faced the challenge of taking on the administration of key institutions and structures previously managed by colonial authorities.<sup>10</sup> Again, guided in large part by foreign policy decisions, the United States, the United Kingdom, Australia, and other European countries established new or evolving bilateral aid relationships with their former colonies and other developing countries where the choice of country and intervention supported the donors' "political and commercial objectives."<sup>11</sup> Practically speaking, the development assistance generally took the form of 'technical assistance,'

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<sup>8</sup> Ibid., 15-16.

<sup>9</sup> The United Nations formally came into existence on October 24, 1945, when the Security Council (United States, China, the United Kingdom, France, the Soviet Union) and a majority of the 50 signatories had ratified the United Nations Charter, signed by representatives of 50 states on June 26, 1945, in San Francisco. See United Nations, "History of the United Nations," available at: <http://www.un.org/en/aboutun/history/>.

<sup>10</sup> See Myles A. Wickstead, *Aid and Development: A Brief Introduction* (New York: Oxford University Press, 2015), 165 (referring to the administration of judicial, civil service, education and health systems).

<sup>11</sup> See Wickstead, *Aid and Development*, 23 (quoting a UK policy document about aid). Furthermore, "U.S. development assistance remained closely tied to ensuring that aid resources benefited U.S. companies as much as possible." Ibid.

referring to the provision of expertise, advice or personnel in support of development objectives.<sup>12</sup> The beneficiaries of this assistance typically were the “governing classes who had largely inherited (or seized) power from the former colonial powers.”<sup>13</sup> In seeking the loyalties of developing countries as part of the Cold War, western countries sometimes found themselves in aid relationships with authoritarian dictators with terrible human rights’ records. Indonesia is one such example, and the details of General Suharto’s relationship with the West are discussed in chapter 4. To this day, bilateral aid, in particular, remains designed “at least partially to help support the economic interests of certain firms or sectors in the donor country.”<sup>14</sup> The RoL industry’s preference for western ideas and actors is discussed more fully in chapter 7.

The end of the Cold War led to a marked shift in development assistance in the 1990s. Generally speaking, notions of East and West gave way to distinctions of North and South, and an added motivation of poverty reduction became universal by the late 1990s.<sup>15</sup> Economics once again was at the forefront of development policy. How these economic underpinnings have influenced RoL assistance, in particular, is discussed in detail below. Since the global financial crisis of 2007/8 (beginning with the U.S. housing sector collapse), North-South distinctions have made less sense. Historical recipients of

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<sup>12</sup> See Wickstead, *Aid and Development*, 165-67 (section titled “Technical Assistance (Technical Cooperation)”).

<sup>13</sup> See Wickstead, *Aid and Development*, 18-20 (quote at 20).

<sup>14</sup> See Radelet, “A Primer on Foreign Aid,” 6-7.

<sup>15</sup> See Wickstead, *Aid and Development*, 33-38. See also, 2000 *Millennium Development Declaration*, UN General Assembly Resolution 55/2 (New York, 2000); leading to the Millennium Development Goals (MDGs), the first of which was to halve poverty from 1990 levels by 2015. MDGs, available at <http://www.unmillenniumproject.org/goals/gti.htm>. Other goals include universal primary school, gender equality, reduced infant mortality, increased maternal health; and the final goal, number eight, to “develop a global partnership for development,” intended to obligate the donors through their official development assistance and trade policies.

aid are becoming donors in their own right.<sup>16</sup> Most notable is the rise of China as a donor, but Chinese aid comes with efforts, “(often successful),” to gain access to natural resources.<sup>17</sup> At the same time, however, unlike western donors, the Chinese approach to aid – in the form of grants, concessional loans, mixed credits and commercial financing – does not attach any human rights or policy demands of its recipients.<sup>18</sup> This feeds concerns that non-DAC donors, in particular BRIC countries (Brazil, Russia, India, China), will undermine the consensus on aid effectiveness and poverty reduction as goals of development assistance.<sup>19</sup> Indonesia, too, has begun acting as a donor in its own right, discussed further in chapter 4. The upshot is that developing countries have more options to fund their development.<sup>20</sup> Included among these options are new forms of development, including ‘corporate social responsibility,’ celebrity philanthropy, and concerted action around environmental issues.<sup>21</sup>

*b. Relevant features and trends of development assistance*

Exacerbated by large distances, distribution of development assistance incurs significant coordination problems, including asymmetric information and poorly aligned incentives<sup>22</sup> – topics discussed in detail in chapters 5 and 6. Donor agencies typically

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<sup>16</sup> See Wickstead, *Aid and Development*, 90; see also, Richard Manning, “Will ‘Emerging Donors’ Change the Face of International Co-operation?” *Development Policy Review* 24, no. 4 (2006).

<sup>17</sup> Wickstead, 60.

<sup>18</sup> Ibid.

<sup>19</sup> Manning, “Emerging Donors,” 377-85.

<sup>20</sup> Ibid.

<sup>21</sup> See Gardner and Lewis, *Anthropology and Development*, 180.

<sup>22</sup> See Bertin Martens, Uwe Mummert, Peter Murrell and Paul Seabright, *The Institutional Economics of Foreign Aid* (New York: Cambridge University Press, 2002); Clark C. Gibson, Krister Andersson, Elinor Ostrom, and Sujai Shivakumar, *The Samaritan’s Dilemma: The Political Economy of Development Aid* (New York: Oxford

control and manage the assistance through discrete projects, and in the process, end up “not giving aid to others,” but in effect hold onto it “for as long as possible.”<sup>23</sup> One consequence of this way of practicing development assistance is that the bulk of aid funds go directly to implementing contractors, who in turn are charged with delivering the assistance, as agreed upon with the donor. It is therefore problematic for aid recipients and partners that their voices are not typically part of the feedback loop to the aid’s funders. As a result (along with other factors), even ineffective aid has a tendency to perpetuate itself, discussed further in chapter 5.

Development assistance has been subject to political fashions in the form of ideas and trends that permeate the field.<sup>24</sup> One recent dominant focus has been on quick and tangible results, sometimes referred to in aid-speak as ‘quick wins.’<sup>25</sup> It is too soon to tell whether this will be a trend with staying power, particularly in light of the historical fact that most development assistance of the last 70 years has involved longer time-horizons, with programs before the 1990s typically being 10 years in length,<sup>26</sup> as compared with the typical 4- to 5-year projects found in RoL assistance today. As we see below and in chapter 5, rule of law (RoL) assistance is particularly ill-suited to results-based, short timeframes in light of the transformative changes – in mindset or behavior – being sought by the assistance. And yet, as we see in chapter 7, what is being measured is whether a statute was drafted; a training was held (and how many

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University Press, 2005). Both of these sources are discussed briefly in chapter 1, and more in depth in chapter 6.

<sup>23</sup> See Roger C. Ridell, “Does Foreign Aid Really Work? An Updated Assessment,” Discussion Paper 33 (March 2014), at 38 (updating his comprehensive 2008 book of the same name): 31.

<sup>24</sup> See Ridell, “An Updated Assessment,” 38.

<sup>25</sup> Ibid., 38-39.

<sup>26</sup> Ibid., 39.

judges / clerks / staff attended); or a pamphlet on legal rights was written, translated and produced. What is clearly lacking is a focus on the *quality*, and levels of local ownership over these outputs, as well as the knowledge they are meant to produce or transfer.<sup>27</sup>

‘Participation’ is an example of a development trend that has “proven remarkably resilient to development’s fickle appetite for new ideas and methods.”<sup>28</sup> One strand of participation’s roots in development discourse originates with early 1990s arguments for research methodologies within development practice that prioritized local knowledge and viewpoints.<sup>29</sup> Common sense, of course, underscores the point that more local participation should lead to better assistance, and indeed, these ideas have proven to have a staying power that other ‘buzzwords’ and policies have not.<sup>30</sup> Ownership and partnership, as introduced in chapter 1, are further examples of principles that have been (and continue to be) embraced by the international development community; and given their emphasis on meaningful involvement and leadership by locals, ownership and partnership are conceptually linked to participation.<sup>31</sup> The rallying cry of

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<sup>27</sup> ‘Knowledge production,’ used here follows Borda-Rodriguez and Johnson, and refers to a process in which social relations and communication between actors play a central role in the knowledge production. This is viewed as preferable to ‘knowledge transfer,’ which conceives of the exercise more as a product or good that can be transferred. Alexander Borda-Rodriguez and Hazel Johnson, “Development on My Terms: Development Consultants and Knowledge for Development,” *Public Administration and Development* 33 (2013): 345.

<sup>28</sup> Gardner and Lewis, *Anthropology and Development*, 162.

<sup>29</sup> Ibid., 163 (citing Robert Chambers, “Rural Appraisal: Rapid, Relaxed and Participatory,” *IDS Discussion Paper* 311 (Brighton: Institute of Development Studies, 1992).

<sup>30</sup> Gardner and Lewis, *Anthropology and Development*, 162 (contrasting participation to “gender” – referred to by the authors as “a dead word?”).

<sup>31</sup> See e.g., Thomas Carothers and Saskia Brechenmacher, *Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?* (Carnegie Endowment for International Peace, October 2014)(observing that in the past decade, “the aid community has increasingly emphasized the importance of expanding *recipient country ownership* over development processes *through* greater donor accountability,

'partnership,' for example, was made popular in the late 1990s following its use by the OECD in 1996 to signal the aim to "'rebalance relations' so that donors no longer imposed what they wanted on recipient governments."<sup>32</sup> What we see is that these issues are not new, but longstanding problems that have yet to be solved. This study suggests support for the idea that these principles, including participation, ownership and partnership, offer guidance toward possible solutions.

Even so, a word of caution is advised. In practice, these ideas and principles themselves have, at times, become co-opted by the forces they were supposed to protect against – as was the case with 'participation,' which by the early 2000s had become a set of standardized methodological tools. These 'toolkits' that were derived in pursuit of participation, including for example, 'participatory rural appraisals,' led not to the desired bottom-up participation, but instead provided a mouthpiece for the already powerful, whose views then became incorporated into the project along with an international donor-approved participatory veneer, instead of genuine inclusion of views, and notably including the less powerful in society.<sup>33</sup> The kits also proved faulty in their assumption that local knowledge could always be acquired through participatory methods.<sup>34</sup> To date, donor toolkits toward ownership and partnership do not appear to be in use, but as principles, they are nonetheless also vulnerable to co-option. Using an

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transparency, and *multi-stakeholder engagement*" (emphasis added), 4; with 'multi-stakeholder engagement as a stand-in for 'participation,' which is used by the authors elsewhere).

<sup>32</sup> See Rosalind Eyben, *International Aid and the Making of a Better World: Reflexive Practice* (New York: Routledge, 2014), 104.

<sup>33</sup> See Gardner and Lewis, *Anthropology and Development*, Chapter Five, "When Good Ideas Turn Bad: The Dominant Discourse Bites Back," 164-65.

<sup>34</sup> Ibid., 164 (citing also David Mosse, *Cultivating Development: An Ethnography of Aid Policy and Practice* (New York: Pluto Press, 2005)).

Indonesian CSO as a case study,<sup>35</sup> Gordon Crawford argued in 2003 that “the rhetoric of ‘partnership’” accords donors greater legitimacy in pursuing their own reform agendas.<sup>36</sup> It is not difficult to understand how such donor co-option occurs, particularly given how aspirational and disjointed the concepts of ownership and partnership are within international development discourse, as laid out in chapter 1, and more fully in chapter 7.

Nonetheless, as argued below and throughout this study, ownership and partnership are potentially useful focal points for understanding what is taking place at the empirical level; and further, for signaling what needs to be done in order to make donor-assisted reforms more locally tailored and demanded by local partners and citizens in recipient countries.

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<sup>35</sup> *Kemitraan*, or the Partnership for Governance Reform. *Kemitraan* is also an implementing sub-contractor for the case study, USAID’s *E2J*. See chapter 4, Section III for more details about the case studies.

<sup>36</sup> Gordon Crawford, “Partnership or Power? Deconstructing the ‘Partnership for Governance Reform’ in Indonesia,” *Third World Quarterly* 24, no. 1 (2003): 155-57 (discussed further in Chapter 7, Section II).

## II. Rule of law (RoL) assistance as a field

### a. RoL assistance – definitions, terms

Rule of law (RoL) assistance has emerged as a prominent domain of development assistance since the early 1990s.<sup>37</sup> The field of RoL assistance, also referred to as ‘RoL promotion,’ has roots in the U.S. ‘Law and Development’ movement of the 1960s and 70s, further described below. For many scholars, and legal scholars in particular, ‘law and development’ has remained a term of choice for describing the academic field devoted to the study of RoL.<sup>38</sup> RoL assistance has been studied from the vantage point of a range of academic disciplines, including law, economics, political science, anthropology, governance, law and society, comparative law, international law, Asian Law, and others.<sup>39</sup>

For purposes of this study, RoL assistance refers to all donor-funded interventions intended, at least in part, to increase the level of ‘rule of law’ in a target or

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<sup>37</sup> See e.g., David M. Trubek, “The ‘Rule of Law’ in Development Assistance: Past, Present and Future,” in *The New Law and Economic Development: A Critical Appraisal*, ed. David M. Trubek and Alvaro Santos (New York: Cambridge University Press, 2006), 74 and 82-83. See also, Alvaro Santos, “The World Bank’s Uses of the ‘Rule of Law’ Promise in Economic Development,” in *The New Law and Economic Development*, 253 (“Enthusiasm for law reform as a development strategy boomed during the 1990s and resources for reforming legal systems soared everywhere.”)

<sup>38</sup> See e.g., David M. Trubek and Alvaro Santos, “Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice,” in *The New Law and Economic Development*, 1; David Kennedy, “‘Laws and Development’: ‘Rule of law’ As Development,” in *Law and Development: Facing Complexity in the 21<sup>st</sup> Century*, ed. John Hatchard and Amanda Perry-Kessaris (Portland, Oregon: Cavendish Publishing Limited, 2003); Benjamin van Rooij and Pip Nicholson, “Inflationary Trends in Law and Development,” *Duke Journal of Comparative and International Law* 24 (2013): 297-348.

<sup>39</sup> See e.g., Terrence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009); Bertin Martens, Uwe Mummert, Peter Murrell and Paul Seabright, *The Institutional Economics of Foreign Aid* (New York: Cambridge University Press, 2002); Tim Lindsey, ed., *Indonesia: Law and Society*, 2<sup>nd</sup> ed. (Annandale: The Federation Press, 2008).

partner country. Given the way ‘rule of law’ has been woven into many forms of development programming concerned with governance reform,<sup>40</sup> RoL assistance so defined encompasses a vast range of reforms. As described in chapter 1, these include donor-funded interventions directed at laws, legal institutions, access to justice and/or capacity-building in support of the justice sector in the target country. Some examples of RoL assistance include legal and regulatory drafting; capacity-building training programs for judges, prosecutors and their staff; study trips to / from other countries for judges and other officials; implementation of anti-corruption measures; and case-management reforms to reduce backlog and increase ease of access to case documents.

RoL assistance of this kind is what scholar-practitioner Linn Hammergren calls ‘justice sector’ reforms, which are broadly conceived as donor-assisted reforms in pursuit of judicial independence, improving performance (and capacity), increased access to justice, and extra-sector impacts – including, e.g., increased economic development or human rights through reformed justice sectors.<sup>41</sup> In this study, I use ‘RoL assistance’ in order to signal the breadth of those interventions and the prevalence of technical assistance as a mode of donor activity, within an industry that designs and

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<sup>40</sup> See e.g., Franz von Benda Beckman, Keebet von Benda-Beckman, and Julia Eckert, “Rules of Law and Laws of Ruling: Law and Governance between Past and Future” in *Rules of Law and Laws of Ruling: On the Governance of Law*, ed. Franz von Benda Beckman, Keebet von Benda-Beckman, and Julia Eckert (Ashgate, 2009), 6 (“Rule of law has become the linchpin of legitimate governance.”)

<sup>41</sup> Lynn Hammergren, *Justice Reform and Development: Rethinking Donor Assistance to Developing and Transition Countries* (New York: Routledge, 2014), 1-2, 22-23, 34-36, and 39-41.

delivers this and other types of development assistance.<sup>42</sup> The RoL industry, and its preference for Western interests and players, is discussed further in chapters 5 and 7.

In monetary terms, donors spend billions of dollars annually on RoL assistance in countries around the world. In 2013, the World Bank spent 22 percent of \$31.5 billion (or \$6.93 billion) on Public Administration, Law and Justice.<sup>43</sup> In 2012, 12.3 percent of all bilateral official development assistance (ODA) by Development Assistance Committee (DAC) member states of the Organization for Economic Co-operation and Development (OECD) (or \$15.6 billion) was spent on ‘Social and Administrative Infrastructure’ for the specific purpose of ‘Government and Civil Society.’<sup>44</sup> And these categories do not necessarily capture all of the many possible arenas in which there is a justice or ‘rule of law’ component. The website for the World Bank’s work in ‘Law, Justice and Development,’ for example, lists seven related ‘topics’ in which the Bank works, including Insolvency and Creditor Rights, Governance and Anticorruption, Justice for the Poor, Law and Justice Institutions, Climate Change and Clean Energy, and Public Private Partnerships in Infrastructure Resource Center.<sup>45</sup> The World Bank reports that since the early 1990s, it has conducted more than 30 major loan projects (valued at \$850 million) “dedicated specifically to assisting developing countries in establishing efficient and effective justice systems,” with hundreds more “smaller justice

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<sup>42</sup> See e.g., David Marshall, “Introduction” in *The International Rule of Law Movement: A Crisis of Legitimacy and the Way Forward*, ed. David Marshall (Cambridge, MA: Human Rights Program at Harvard Law School, 2014), xiii.

<sup>43</sup> World Bank, *Annual Report 2013*, Figure 16: Lending by Sector, 51.

<sup>44</sup> Statistical Annex A, Table A.9, 406 and Table A.7, 404. OECD DAC countries are 29 bilateral donors from primarily western countries with a mandate to promote development. They include United States, United Kingdom, Australia, and much of Europe. <http://www.oecd.org/dac/developmentassistancecommittee/dac.htm>.

<sup>45</sup> “Law and Development,” World Bank, available at: <http://go.worldbank.org/YPVITK98J1>. The final topic was World Bank Safeguard Policies.

improvement activities” built in as components of projects from many other sectors.<sup>46</sup>

This policy focus is likely to continue given the elevation of ‘justice’ to one of seventeen sustainable development goals announced in September 2015 by the UN – specifically goal 16: “Peace, Justice and Strong Institutions: Promote just, peaceful and inclusive societies.”<sup>47</sup> From this, we can understand that RoL assistance, as here defined, is likely on the rise.

In order to better understand the field’s intellectual history and trends, as well as the complexities involved in the design and implementation phases of RoL assistance, we must first define ‘rule of law.’ The term rule of law (RoL) is itself conceptually ambiguous; and it means different things to different scholars, donors, government actors and policy makers. A.V. Dicey, a British jurist, is credited with popularizing the phrase with his 1886 treatise, *Law of the Constitution*.<sup>48</sup> Dicey’s three-pronged definition of the “supremacy or rule of law” included an absence of arbitrary power on the part of the government;<sup>49</sup> legal equality with men of all rank being subject to ordinary laws administered by ordinary tribunals;<sup>50</sup> and that the source of rule of law is in fact the rights of individuals (and not the Constitution itself), expressed through court decisions.<sup>51</sup> Dicey elaborates the applications of the rule of law, including the rights of personal freedom, discussion/expression, and public meeting;<sup>52</sup> as well as how the

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<sup>46</sup> World Bank, *Law and Justice Institutions*, “About the World Bank in Justice Reforms,” <http://go.worldbank.org/LE354RG990>.

<sup>47</sup> United Nations, *Sustainable Development Goals*, “Peace, Justice and Strong Institutions,” available at: <http://www.un.org/sustainabledevelopment/peace-justice/>.

<sup>48</sup> Albert Venn (A.V.) Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (London: MacMillan and Co., 1886). The publication had 10 editions.

<sup>49</sup> Dicey, *Law of the Constitution*, 174.

<sup>50</sup> *Ibid.*, 79-80.

<sup>51</sup> *Ibid.*, 210 and 218.

<sup>52</sup> *Ibid.*, 219-296.

supremacy of law over the Executive impacts martial law, the army, the collecting and expending of revenue, and the work of Ministers.<sup>53</sup>

Dicey's definition focused on observations of Great Britain in the 19<sup>th</sup> Century.<sup>54</sup> U.S. legal scholar Brian Tamanaha has traced the theoretical foundation and evolution of various meanings of 'rule of law,' over time and around the world. In his 2005 book *On the Rule of Law*, Tamanaha identified three themes for rule of law: 1) government limited by law,<sup>55</sup> 2) formal legality, which includes Hayek's understanding of rule of law as including predictability, making it "possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge,"<sup>56</sup> and 3) rule of law, not man – contrasting laws as being reason, with man as passion.<sup>57</sup> Tamanaha further observed that all recorded meanings could be seen on a continuum – from the 'thinnest,' more of a rule 'by' law, with law as an instrument of government action (used to describe China and other Asian countries), to 'thicker,' with added notions of clarity, certainty and consent, and democracy contributing to legality.<sup>58</sup> Beyond this formalist strand, Tamanaha also identified a substantive version of the continuum – with thinner versions including individual rights, such as property, contract, and privacy, and thicker versions, including

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<sup>53</sup> Ibid., 296-335.

<sup>54</sup> Often in contrast with France and/or others on "the Continent."

<sup>55</sup> Brian Tamanaha, *On the Rule of Law* (New York: Cambridge University Press, 2004), 114-19.

<sup>56</sup> Tamanaha, *On the Rule of Law*, 119 (quoting Friedrich A. Hayek, *The Road to Serfdom* (Chicago: Chicago University Press, 1944), 80), and 65-67 (section titled "Hayek elaborates"). In his conclusions, Tamanaha cautions that formal legality, though offering important advantages particularly in urban areas around the world, is "counter-productive in situations that require discretion, judgment, compromise or context-specific adjustments." Tamanaha, *On the Rule of Law*, 140.

<sup>57</sup> Tamanaha, *On the Rule of Law*, 122-26.

<sup>58</sup> Ibid., 91 (see figure).

substantive notions of dignity, justice, social welfare and substantive equality.<sup>59</sup> Those formulations, in turn, have been critiqued as being overly deterministic, and over-emphasizing the importance of institutional forms, as opposed to the function of rule of law, which is to curb arbitrary excess of power.<sup>60</sup>

The many parties conducting RoL assistance (on behalf of both the donor and recipient / host countries) subscribe to different definitions and typologies of 'rule of law,' among the many available and in use.<sup>61</sup> As an example, a 2010 guidance document by the United States Agency for International Development (USAID)<sup>62</sup> observed that no definition of the rule of law had been settled on by scholars and practitioners, but the term "usually refers to a state in which citizens, corporations, and the state itself obey the law, and the laws are derived from a democratic consensus."<sup>63</sup> The document then cites to a 2004 United Nations' definition for further elaboration:

The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are

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<sup>59</sup> Ibid. Similarly, in a 2006 study of how the World Bank uses "rule of law" in its development programming, Alvaro Santos divides RoL conceptions into "institutional" (focus on the application of the laws with no regard to what the laws are) and "substantive" (includes an added element of requiring certain values enshrined in the laws); and "instrumental" (takes the view that RoL is a "mechanism to achieve whatever goals a society has set for itself") versus "intrinsic" (considers RoL as a goal in and of itself). Alvaro Santos, "World Bank's Uses of 'Rule of Law' Promise," in *The New Law and Economic Development*, 258-59.

<sup>60</sup> See Martin Krygier, "The Rule of Law: Legality, Teleology, Sociology," in *Relocating the Rule of Law*, ed. Gianluigi Palombella and Neil Walker (Oxford: Hart Publishing, 2009) 45-69.

<sup>61</sup> See e.g., Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-operation* (Oxford, Intersentia, 2006), 14-19; see Randy Peerenboom, "The Future of Rule of Law: Challenges and Prospects for the Field," *Hague Journal on the Rule of Law* 1, no. 1 (2009): 6-8.

<sup>62</sup> USAID is an agency that conducts bilateral development assistance for the United States government, receiving its foreign policy guidance from U.S. Secretary of State.

<sup>63</sup> USAID, *Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework* (2010), 6.

accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.<sup>64</sup>

The Government of Indonesia's definition – as laid out by its National Development Medium-Term Plan 2010-2014 – is as follows:

Realizing a democratic society based on the rule of law, that is the consolidation of stronger democratic institutions; strengthens the role of the civil society; strengthens the quality of decentralization and regional autonomy; assures the growth of the media and freedom of the media in the communication of the public interest; and reforms the structure of the law and enhances the law of culture and enforces the law in a just, consistent and in a non-discriminative way.<sup>65</sup>

While noting the differences in these definitions – such as Indonesia's specific mention of the role of civil society – commonalities are also apparent, such as just enforcement of the law, and references to democratic notions of equality, and freedom.

A further layer of complexity, compounded by diverse definitions, is that advancement toward RoL is not easily measured, and nor is it static. In describing the production of or advancement toward RoL through development assistance, scholar practitioner Jensen observed that RoL “has many gradations as it episodically develops across countries.”<sup>66</sup> The lack of standard evaluative criteria for the field, as well as recent indicators purporting to measure ‘rule of law,’ are discussed further below.

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<sup>64</sup> United Nations, *Report of the Security Council*, “The rule of law and transitional justice in conflict and post-conflict countries,” S/2005/616, no. 6, (23 August, 2004), 4. USAID quoted only a portion of the UN's definition in its guide, leaving out the following: “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.” Ibid.

<sup>65</sup> President of the Republic of Indonesia, *National Medium-Term Development Plan 2010-2014* (official English version), Book I National Priorities, 22. Some of USAID's omissions could be attributed to those rights already being enshrined in the U.S. Constitution's Bill of Rights, e.g., freedom of the press.

<sup>66</sup> Erik G. Jensen, “Postscript: An Immodest Reflection,” in *The International Rule of Law Movement*, 298.

Current struggles in the U.S. justice system – with an entire segment of the citizenry fearing victimization by the very law enforcement officers charged with keeping ‘rule of law’ in place<sup>67</sup> – illustrate the point that RoL is “an ideal imperfectly realized everywhere.”<sup>68</sup>

And yet, despite the complexity surrounding RoL – as seen in its differing definitions, continuums, and challenges – there is overall agreement that living amid or under ‘rule of law’ is better than not, and something for all countries to aspire to, or at the very least, make a show of pursuing.<sup>69</sup> This also holds true for the parties involved in the case studies for this dissertation. Namely, the government of Indonesia as well as the donors involved – USAID, AusAID, and the World Bank – all espouse the virtues of rule of law,<sup>70</sup> and actively aspire to bring Indonesia closer to (their version of) its fulfillment.

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<sup>67</sup> Referring here to civil protests and ultimately reforms sparked by the shooting death of an African American teenager at the hand of a white Ferguson Police Officer. See e.g., John Eligon, “Ferguson Approves Federal Plan to Overhaul Police and Courts,” *New York Times*, March 15, 2016; see Editorial Board, “Opinion: Reforms Follow protests in Ferguson,” *New York Times*, September 7, 2015 (detailing reforms completed in the year since Michael Brown’s death, including eliminating traffic offenses as a basis for arrest warrants, and the governor allocating less of the revenue generated by police officers enforcing traffic laws to local budgets).

<sup>68</sup> Randall Peerenboom, Michael Zürn and André Nollkaemper, “Conclusion: From Rule of Law Promotion to Rule of Law Dynamics,” in *Rule of Law Dynamics: In an Era of International and Transnational Governance*, ed. Michael Zürn, André Nollkaemper and Randall Peerenboom (New York: Cambridge University Press, 2012).

<sup>69</sup> See e.g., Tamanaha, *On The Rule of Law*, 141 (“[N]o government in the world today openly rejects the rule of law, while many government leaders pay public homage to it.”)

<sup>70</sup> See e.g., Bappenas (Indonesia’s National Development Planning Agency), Access to Justice Working Group, *National Strategy on Access to Justice* (May 2009) (stating in the first paragraph of the Executive Summary that the “implementation of the rule of law in Indonesia essentially depends on the implementation of access to justice”); USAID, *C4J Scope of Work*, 6 (unpublished, on file with author); USAID *E2J Request for Applications*, 7 (both *C4J* and *E2J* are intended to lead to USAID’s Intermediate Result of “Rule of law and accountability strengthened”); AusAID, “AIPJ Design Doc” (July 2010), 18-19 (“Alignment of AIPJ goals and objective with GOI policies” which includes

b. 'Rule of law' as a label for reforms

By the early 1970s, or 25 years into the Cold War, 'rule of law' was seen by American policy makers as a major feature distinguishing the United States from Communist countries.<sup>71</sup> The end of the Cold War brought a strong revival in the 1990s of the inclusion of legal and justice-sector components in international development assistance.<sup>72</sup> Secure property rights and a justice system capable of enforcing contracts were deemed crucial by economists for working and growing economies.<sup>73</sup> Development assistance focused on delivering these in the form of laws and institutions capable of implementing free-market reforms, often in the name of 'rule of law.'<sup>74</sup>

More recently, Hammergren has observed that donors who adopted the label 'rule of law' for their reforms – including, for example, USAID, which in 2009-10 shifted away from 'court administration' to enhancing the 'rule of law' – had no significant impact on what they fund or do, as the reforms did not themselves change along with

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"entrenchment of the rule of law and enforcement of human rights based on Pancasila and 1945 Constitution"); Justice for the Poor, *Framework for Access to Justice in Indonesia* (World Bank, 2007), 3 ("It is increasingly recognized that the non-adherence to the rule of law is a major impediment to sustainable poverty reduction in Indonesia.")

<sup>71</sup> David Trubek and Marc Galanter, "Scholars in Self Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," *Wisconsin Law Review* (1974): 1085-86.

<sup>72</sup> See e.g., Alvaro Santos, "The World Bank's Uses of the 'Rule of Law,'" in *The New Law and Economic Development*, 253 ("Enthusiasm for law reform as a development strategy boomed during the 1990s and resources for reforming legal systems soared everywhere.")

<sup>73</sup> See discussion of the rise of neo-liberal development economics and the 'Washington Consensus' in international development, below.

<sup>74</sup> David M. Trubek, "The 'Rule of Law' in Development Assistance," in *The New Law and Economic Development*, 81 (arguing that "'Rule of Law' replaces Law and Development"); see Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs*, (March/April, 1998), later reprinted as chapter 1 of Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, D.C.: Carnegie Endowment for International Peace, 2006), 7-8. Carothers describes three types of reforms: 1) laws themselves; 2) legal institutions; and 3) getting the government itself to comply with the law (the most difficult and long-term).

the label.<sup>75</sup> She further observes that the World Bank and other donors adopted an instrumental view of RoL reforms – as "an area of operations, not a specific model [they are] advancing."<sup>76</sup>

Even as the substance or types of interventions remain the same, it is possible that the changing language has had at least some effect. In a study about different uses of 'rule of law' by the World Bank, Santos concluded that slippage between and among differing conceptions of RoL has worked to shield individual World Bank projects from criticism by allowing policy makers to "shift the goal posts,"<sup>77</sup> and "sheds light on why these projects remain largely immune to the critique of assumptions that [uphold] them and ... their disappointing experience."<sup>78</sup> Joel Ngugi also argues persuasively that by conflating the procedural and substantive definitions of 'rule of law,' the World Bank manages to justify more substantive reforms "while maintaining a standard rhetoric of procedural necessity that is easily agreed upon politically."<sup>79</sup> In the process, democracy is subverted because fundamental political questions are cushioned from political debate.<sup>80</sup>

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<sup>75</sup> Hammergren, *Justice Reform and Development*, 210-13. See also, Per Bergling, Jenny Ederlöf, and Veronica L. Taylor, "Introduction" in *Rule of Law Promotion: Global Perspectives, Local Applications*, ed. Per Bergling, Jenny Ederlöf, and Veronica L. Taylor (Uppsala: Iustus Förlag, 2009), 17 (making the related observation that "variations in ideology, identity, etc. between the actors do not produce corresponding variations in how they implement their respective agenda").

<sup>76</sup> Hammergren, *Justice Reform and Development*, 181.

<sup>77</sup> Santos, "World Bank's Uses of 'Rule of Law,'" in *The New Law and Economic Development*, 282.

<sup>78</sup> *Ibid.*, 298.

<sup>79</sup> Joel M. Ngugi, "Policing Neo-Liberal Reforms: The Rule of Law as an Enabling and Restrictive Discourse," *University of Pennsylvania Journal of International Economic Law* 26 (2005), 534.

<sup>80</sup> Ngugi, "Policing Neo-Liberal Reforms," 598-99.

Similarly, Swedish international law scholar-practitioner Per Bergling observed that in the field of RoL assistance, individual project documents tend to “avoid specificity” for practical and political reasons.<sup>81</sup> For example, trying to promote a thicker version of RoL – including individual rights – might threaten or alienate officials on the receiving end of the assistance if it upsets or radically alters the premises on which their system rests – as it would in a Communist setting, for example. Therefore, to engender acceptance of the reforms and avoid resistance to implementation, non-threatening definitions of RoL (or no definition at all) are thus preferred.<sup>82</sup>

Definitional ambiguity aside, the concept’s utility, according to Bergling, rests in its inherent qualities as a political declaration, “because its core elements, however defined, are minimum requirements of any decent society.”<sup>83</sup> We see this observation corroborated in practice by the effusive statement about RoL currently found on the World Bank’s web page on Law, Justice and Development:

The rule of law is a principle of fundamental importance to the World Bank. It lies at the heart of what the Bank is, what it does, and what it aspires to accomplish.<sup>84</sup>

Not all take a positive or even utilitarian view of RoL as an organizing concept, however. For some scholars and practitioners, ‘rule of law’ is an ideological term, with fundamentally flawed assistance flowing from it.<sup>85</sup> Nader and Mattei argue that RoL is used by the U.S. and other nations to “legitimiz[e] plunder” – defined as “often violent

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<sup>81</sup> See Bergling, *Rule of Law on the International Agenda*, 17-18.

<sup>82</sup> *Ibid.*, 17.

<sup>83</sup> *Ibid.*, 19.

<sup>84</sup> World Bank, “Law, Justice and Development,” <http://go.worldbank.org/YAUOR8VO20>.

<sup>85</sup> See e.g., Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, MA: Blackwell Publishing, 2008).

extraction by stronger international political actors victimizing weaker ones.”<sup>86</sup>

Describing the current phase of ‘multinational capitalist development’ as imperial in nature, the authors argue that ‘rule of law’ is used by the U.S. in order “to pave the way for corporate domination.”<sup>87</sup> Stephen Humphreys makes a related argument in *Theatre of Rule of Law*, arguing in less polemical language that the ultimate goal of all RoL assistance is the integration of developing countries into a global economic system.<sup>88</sup> RoL is thus neither a neutral concept nor an operational label, and its use elicits strong views. For these reasons, some scholars and donors appear to avoid tense debates by using other terms to describe the international assistance given in this arena – ‘comparative legal technical assistance,’<sup>89</sup> ‘justice sector reforms,’<sup>90</sup> ‘judicial reforms’ or ‘modernization,’<sup>91</sup> for example.

*c. The chronological intellectual history of RoL assistance as a field*

What we now term ‘rule of law assistance’ has its conceptual roots in the United States’ Law and Development movement of the 1960s and 70s, which in turn has links

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<sup>86</sup> Mattei and Nader, *Plunder*, 1-2.

<sup>87</sup> *Ibid.*, 17.

<sup>88</sup> Stephen Humphreys, *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice* (Cambridge University Press: New York, 2010).

<sup>89</sup> Nicholson and Low, “Local Accounts of Rule of Law Aid: Implications of Donors, *Hague Journal on the Rule of Law*, Vol. 5 (March 2013), 8. “Comparative legal technical assistance” as defined by the authors relevantly “assumes local ownership of the knowledge acquired through comparative technical assistance.” *Ibid.*

<sup>90</sup> Hammergren, *Justice Reform and Development*.

<sup>91</sup> Linn Hammergren, “Rule of Law Challenges in Middle-Income Countries and Donor Approaches to Addressing Them,” in *Rule of Law Dynamics*, at 185 (reporting that the World Bank rarely used “rule of law” – but rather referred to its programs as “judicial reforms” or “modernization”).

to colonial modalities of legal and institutional reform.<sup>92</sup> These 1960s and 70s interventions using law as a tool for development involved U.S. law professors enrolled by government to work in developing countries in Latin America, Asia and Africa, for the purpose of “contributing to freedom, equality, participation, and shared rationality.”<sup>93</sup> Taking place within the context of the Cold War, Law and Development also played a role as “part of the West’s answer to communism, part of the promise, often not fulfilled, that a Western-led economic system could deliver economic growth with freedom.”<sup>94</sup> Instead of the hoped-for expansion of legal assistance to “poorer citizens in Third World societies,”<sup>95</sup> however, what resulted was a growing awareness of the “negative face” of law in which the “formal neutrality” of the legal system could be appropriated by powerful elites to “justify and legitimate arbitrary actions by government rather than to curb or ban such excesses.”<sup>96</sup>

These disheartening experiences caused the earliest providers of this assistance to declare in 1974 that it had failed to prove its own social utility,<sup>97</sup> and to doubt the field’s existential assumption that legal change leads to significant social change.<sup>98</sup>

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<sup>92</sup> See e.g., Yves Dezalay and Bryant G. Garth, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (Chicago: The University of Chicago Press, 2010).

<sup>93</sup> Trubek and Galanter, “Scholars in Self-Estrangement,” 1063-64. Many projects were geared toward legal education reforms, including programs funded by the Ford Foundation, USAID, Rockefeller Foundation and the Peace Corps. *Ibid.*, 1066, note 13. See also, Richard E. Messick, “Judicial Reform and Economic Development: A Survey of the Issues,” *The World Bank Research Observer* 14, no. 1 (February 1999), 125-26.

<sup>94</sup> Trubek, “The ‘Rule of Law’ in Development Assistance,” in *The New Law and Economic Development*, 81-82.

<sup>95</sup> Trubek and Galanter, “Scholars in Self-Estrangement,” 1075.

<sup>96</sup> *Ibid.*, 1083; see also Trubek, “The ‘Rule of Law’ in Development Assistance,” in *The New Law and Economic Development*, 74-81 (offering a concise chronology of the 1960s Law and Development movement rise and fall).

<sup>97</sup> Trubek and Galanter, “Scholars in Self-Estrangement,” 1083.

<sup>98</sup> *Ibid.* See also Kevin E. Davis and Michael J. Trebilcock, “Legal Reforms and Development,” *Third World Quarterly* 22, no. 1 (2001), 25-33. In examining empirical

Then (as now), it was unclear whether improving legal systems leads to economic development.<sup>99</sup>

Some lessons were more obvious. What Trubek and Galanter recognized was that ‘transplants’ of laws from one legal system into another are inherently problematic, and, without significant tailoring to (or demand from) the new local setting, lead to law on the books that is not or cannot be implemented in practice.<sup>100</sup> Similar lessons about transplants, and the inevitable uphill battle for their implementation, are ones that RoL assistance as a field has ‘learned’ again and again.<sup>101</sup>

#### i. Economic underpinnings of RoL assistance

The end of the Cold War brought a resurgence of donor-funded RoL assistance in the early 1990s, this time in order to advance market-oriented strategies for political and institutional reform. Similar to other areas of international development assistance, RoL assistance was dominated throughout the 1990s by economic theories, calling for

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evidence regarding the relationship between legal reforms and development, the authors conclude that the effectiveness of legal institutions “is contingent upon the effectiveness of a number of other institutions.” *Ibid.*, 33.

<sup>99</sup> See e.g., Elliot M. Burg, “Law and Development: A Review of the Literature and a Critique of ‘Scholars in Self-Estrangement,’” *American Journal of Comparative Law* 25 (1977) 499-500; Trubek, “The ‘Rule of Law’ in Development Assistance,” in *The New Law and Economic Development*, 74-81; Michael J. Trebilcock and Ron Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Northampton: Edward Elgar Publishing, 2008).

<sup>100</sup> See e.g., Messick, “Judicial Reform and Economic Development,” 126; Trubek, “The ‘Rule of Law’ in Development Assistance,” 78-79.

<sup>101</sup> See e.g., Richard A. Posner, “Creating a Legal Framework for Economic Development,” *World Bank Research Observer* 13, no. 1 (February 1998), 6; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, “The Transplant Effect,” *The American Journal of Comparative Law* 51, no. 1 (Winter, 2003); Trubek, “The ‘Rule of Law’ in Development Assistance,” 90 (“All the problems of transplantation discovered decades ago have belatedly been recognized”); Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (New York: Routledge, 2007) (especially chapters 12, 13 and 15).

clear property rights, and a justice sector capable of protecting those rights, and enforcing contracts.<sup>102</sup> These ideas gained momentum and detail through debate about, and later augmentation of, the ‘Washington Consensus’ – economist John Williamson’s 1989 list of suggested reforms (specific to Latin America) that were considered agreed-upon by Washington, D.C., economists – and which quickly morphed into a widely cited (if incomplete), reform agenda for development around the world.<sup>103</sup> The original Washington Consensus included tax reform, privatization of state enterprises, deregulation to remove barriers to competition, and provision of secure property rights.<sup>104</sup> RoL assistance interventions were used to advance Washington Consensus approaches.<sup>105</sup> What this meant for RoL assistance in the Indonesian context, particularly in the wake of the Asian Financial Crisis, is discussed in chapter 4.

These ideas, as well as those that evolved into an ‘Augmented Washington Consensus’ (which, among other prescriptions, added anti-corruption and social safety nets<sup>106</sup>), were not without critics. Economist Dani Rodrik, for example, drew attention to

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<sup>102</sup> See e.g., Posner, “Creating a Legal Framework,” 1-2, 9.

<sup>103</sup> John Williamson, “The Strange History of the Washington Consensus,” *Journal of Post Keynesian Economics* 27, no. 2 (Winter, 2004-05), 95-99. The term “Washington Consensus” was coined by John Williamson, who later pointed out that the ideas were not meant to be an exhaustive list, but rather, were a collection of those policies that Williamson believed “would win general acceptance in Washington.” John Williamson, “The Washington Consensus and Beyond,” *Economic and Political Weekly* 38, no. 15 (April 12 – 18, 2003), 1475-76. Missing in the original list, according to Williamson, was a concern for income distribution and rapid growth. *Ibid.*, 1476.

<sup>104</sup> See Williamson, “WA Consensus and Beyond,” 1476; Williamson, “Strange History,” 196.

<sup>105</sup> See e.g., Michael J. Trebilcock and Mariana Mota Prado, *What Makes Poor Countries Poor? Institutional Determinants of Development* (Northampton: Edward Elgar, 2011), 10-11 and 80-81.

<sup>106</sup> Adding a further ten principles, including anti-corruption, corporate governance, flexible labor markets, WTO Agreements, and a social safety net. See Dani Rodrik, “After Neo-Liberalism, What?” Table 1 (paper presented at the Alternatives to

disappointing results in countries where the Washington Consensus principles had been pursued, contrasted with the cases of China, Vietnam, and India – whose impressive economic growth was achieved without incorporating many of the same prescriptions.<sup>107</sup>

A further 1990s influence on RoL assistance from the field of economics stemmed from the growing understanding that institutions play a crucial role in the functioning of an economy.<sup>108</sup> Economist Douglass North received the 1993 Nobel Prize for his work on institutions – which he defined as “the rules of the game in a society,” and more formally, “the humanly devised constraints that shape human interaction,” whether formal or informal.<sup>109</sup> North specifically distinguished between institutions (rules) and organizations, which were “groups of individuals bound by some common purpose to achieve objectives,” including political bodies (e.g., political parties, a regulatory agency), economic bodies (e.g., firms, family farms), and educational bodies (e.g., universities).<sup>110</sup> According to North’s theory:

Institutions provide the structure for exchange that (together with the technology employed) determines the cost of transacting and the cost of transformation [production]. How well institutions solve the problems of coordination and production is determined by the motivation of the players (their utility function), the complexity of the environment, and the ability of

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Neoliberalism Conference, sponsored by the New Rules for Global Finance Coalition, May 23-24, 2002), 9.

<sup>107</sup> See Rodrik, “After Neo-Liberalism,” 1; Dani Rodrik, “Goodbye Washington Consensus, Hello Washington Confusion: A Review of the World Bank’s *Economic Growth in the 1990s: Learning from a Decade of Reform*,” *Journal of Economic Literature* (December 2006), 973-87. On the exceptional case of China and other Asian countries, see also Donald C. Clarke, “Economic Development and the Rights Hypothesis: The China Problem,” *American Journal of Comparative Law* 51 (2003); Tom Ginsburg, “Does Law Matter for Economic Development? Evidence from East Asia,” *Law and Society Review* 34, no. 3 (2000).

<sup>108</sup> See Williams, “WA Consensus and Beyond,” 1479.

<sup>109</sup> Douglass C. North, *Institutions, Institutional Change and Economic Performance* (New York: Cambridge University Press, 1990), 3-4.

<sup>110</sup> North, *Institutions*, 5.

the players to decipher and order the environment (measurement and enforcement).<sup>111</sup>

From this explanation, we can see several possible implications for RoL assistance – for example, in helping promulgate institutions themselves, or the formal rules of exchange; in working toward better enforcement of the contracts and property rights necessary for economic exchange and production; and, possibly even toward seeking a better understanding of informal institutions already in place.

North's focus on institutions as being key to development remains relevant to present-day RoL assistance.<sup>112</sup> In concluding his analysis of the difficulty of establishing effective third-party enforcement by the government,<sup>113</sup> North points to the importance of “self-enforcing standards of conduct,” and further cautions that “creating a system of effective enforcement and of moral constraints on behavior is a long, slow process that requires time to develop if it is to evolve.”<sup>114</sup> This lesson is a version of one also suggested by experienced RoL professionals – namely that the types of behavioral change sought by RoL assistance (less corruption among judges or increased professional capacity of justice sector personnel, for example), are ones that require time to take hold, develop and/or manifest.<sup>115</sup> The typical RoL assistance project cycle

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<sup>111</sup> Ibid., 34.

<sup>112</sup> For a current examination of institutional determinants of development and what role law and lawyers should play, see Trebilcock and Prado, *What Makes Poor Countries Poor?*

<sup>113</sup> Per North, the issue is: “How does one get the state to behave like an impartial third party?” See North, *Institutions*, 58.

<sup>114</sup> Ibid., 60. North goes on to point out that this “condition” was “markedly absent in the rapid transformation of Africa from tribal societies to market economies. Ibid.

<sup>115</sup> See e.g., Julio Faundez, “Legal Reform in Developing and Transition Countries: Making Haste Slowly,” paper presented at a World Bank-sponsored conference, June 5-7, 2000; later published in edited volume – Julio Faundez, “Legal Reform in Developing and Transition Countries: Making Haste Slowly,” in *Comprehensive Legal and Judicial Development: Toward an Agenda for a Just and Equitable Society in the 21<sup>st</sup> Century*

of 4-5 years does not lend itself to capturing long-term results like behavioral change, but instead forces a more segmented focus during ongoing implementation on shorter-term goals as determined by project documents.<sup>116</sup> These and related issues are discussed further in chapter 5.

Though the typical measure of development by economists has been linked to the extent of a country's economic growth, a more holistic view of development also came into favor – best illustrated by the work of development economist Amartya Sen. Five years after North, in 1998, Sen received the Nobel Prize in Economic Sciences for his work in welfare economics<sup>117</sup> – and the following year, in *Development as Freedom*, Sen laid out a more 'human' understanding of the economics of development around the world, and the important role that individual freedoms play therein. Sen examined five types of individual freedoms which help advance the 'general capability' of a person, namely: 1) political freedoms; 2) economic facilities; 3) social opportunities; 4) transparency guarantees; and 5) protective security.<sup>118</sup>

Also approaching development from a more bottom-up perspective at the time was economist Hernando de Soto, who championed property rights for the world's poor.<sup>119</sup> De Soto's ideas were understood as promoting individual freedom in a

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ed. Rudolf V. Van Puymbroek (Washington, D.C.: The World Bank, 2001), 369-95. See also, e.g., Informant 20 (interview with author, April 26, 2012).

<sup>116</sup> See e.g., Hammergren, *Justice Reform and Development*, 44. For an examination of how RoL assistance is organized into "projects" and the issues arising therefrom, see Veronica L. Taylor, "The Rule of Law Bazaar," in *Rule of Law Promotion*, 325-58.

<sup>117</sup> "Prize in Economic Sciences 1998 – Press Release," Nobelprize.org, available at: [http://www.nobelprize.org/nobel\\_prizes/economic-sciences/laureates/1998/press.html](http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1998/press.html).

<sup>118</sup> Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000) (originally published in hard cover by Alfred A. Knopf, division of Random House, Inc., in New York in 1999).

<sup>119</sup> See Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (New York: Basic Books / Perseus Book Groups,

Hayekian market-economy sense, which meant a role for the state that was facilitative of individual economic activity. That said, and perhaps not surprisingly, clear property rights as envisaged by economists and lawyers for the World Bank and other development actors have not always delivered their intended economic consequences. For example, through an examination of land registration in Kenya from the 1950s-90s, Joel Ngugi demonstrates that despite being presented as a 'technical process' to map existing legal rights, land registration as conducted in Kenya in fact amounted to a transformation of legal rights, including the extinguishing of some entitlements, and the invention of new ones.<sup>120</sup> Furthermore, the issue of which rights to include in the formal rights being registered had more everyday relevance than the formal establishment of the rights over the property itself. One empirical upshot was that holders of the newly established formal property rights were willing to assert their new titles as against the state, but not against other individuals.<sup>121</sup> For property-related disputes between individuals – with whom “massive and elaborate social norms” were shared – customary norms and systems were instead followed.<sup>122</sup>

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2000). For a thorough examination of land rights reforms through the eyes of the attorneys engaged in the work of Landesa (formerly Rural Development Institute), which has been influenced by de Soto's thinking, see Roy L. Prosterman, Robert Mitchell, and Tim Hanstad, eds., *One Billion Rising: Law, Land and the Alleviation of Global Poverty* (Leiden: Leiden University Press, 2007).

<sup>120</sup> Joel M. Ngugi, “Re-examining the Role of Private Property in Market Democracies: Problematic Ideological Issues Raised by Land Registration,” *Michigan Journal of International Law* 25 (2004), 475-77, and 513.

<sup>121</sup> Ngugi, “Land Registration” 519-23.

<sup>122</sup> Ngugi, “Land Registration,” 502-03, 512, and 522 (quote at 503).

## ii. Critiques and calls of 'failure'

The RoL assistance that flowed from the above prescriptions faced many challenges similar to those just described regarding Kenyan land registration, including that the abstract 'model' economic prescriptions flew in the face of local knowledge from other disciplines, including law. One striking trait of RoL literature beginning in the mid-2000s is its emphasis on what was going wrong in the field. The problematic use of western transplants was (and is) one area of repeated concern for scholars. The literature elucidates other related 'failures' of the field of RoL assistance, including for example, failures to acknowledge the "political nature of law,"<sup>123</sup> to recognize the importance of legal plurality and context, to sufficiently analyze the "recipients' experiences of legal development" within the context of RoL activity; and finally, what could be described as foundational failings of RoL assistance as a field, namely the "failure to deliver economic growth or constraints on arbitrary power."<sup>124</sup>

Part and parcel of these discussions are cautionary tales about the many unintended consequences flowing from RoL assistance.<sup>125</sup> These unintended consequences flow not just from the more abstract, behavioral-change reforms, but also from what might be considered a 'quick win' for RoL assistance in development terms<sup>126</sup> – the building of courthouses. According to one experienced RoL professional with first-

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<sup>123</sup> Frank Upham, "Mythmaking in the Rule of Law Orthodoxy," in *Promoting the Rule of Law Abroad*, 75.

<sup>124</sup> See e.g., Nicholson and Low, "Local Accounts of Rule of Law Aid," 2-3. On the "foundational failing," see also discussion above, beginning of Section II (c), regarding the Law and Development movement's declared failure in 1974.

<sup>125</sup> See e.g., Thomas Carothers, "The Problem of Knowledge," in *Promoting the Rule of Law Abroad*, 23-24; Veronica Taylor, "The Law Reform Olympics: Measuring the Effects of Law Reform in Transitional Economies," in *Law Reform in Developing and Transitional States*, 96-100.

<sup>126</sup> See above, referring to trend in development for results-oriented programming observed by Ridell.

hand knowledge, a courthouse built by donors in Afghanistan had been re-purposed as living quarters for a judge and his extended family.<sup>127</sup> What this and other unintended consequences highlight is that somewhere in the course of its planning, RoL assistance makes faulty assumptions about outcomes and how implementation will proceed, including, for example, how the assistance itself might impact the dynamic relationships of the many actors participating therein, or how invested the local partners are in the reforms being proposed. A more troubling empirical outcome is that, on paper, some of these projects are labeled a success.<sup>128</sup> Courthouse built? Check.<sup>129</sup>

Literature offers clues as to how and why uneven, unexpected, and sometimes unwelcome results are occurring in RoL assistance. Insufficient tailoring of reforms to local settings and a lack of ownership on the part of receiving states are described as enduring problems in RoL assistance implementation.<sup>130</sup> A related ‘persistent problem’ of RoL assistance is that ‘lessons learned’ are not actually learned.<sup>131</sup> As Thomas Carothers commented in a 2003 survey of the field:

[M]ost of the lessons learned presented in [aid institutions’] reports are not especially useful. Often they are too general or obvious, or both. Among the most common lessons learned, for example, are ‘programs must be shaped to fit the local environment’ and ‘law reformers should not simply import laws from other countries.’ The fact that staggeringly obvious

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<sup>127</sup> Informant 33 (interview with author, September 21, 2012). The same informant also observed a hospital built by donors in Cambodia “gutted” within one week; even the doors were missing.

<sup>128</sup> See e.g., informant 33 (interview with author, September 21, 2012).

<sup>129</sup> More on the ‘tick-box’ nature of RoL assistance, including implications, are discussed in chapters 5 and 8.

<sup>130</sup> See e.g., Thomas F. McInerney, “Law and Development as Democratic Practice,” *Voices of Development Jurists* 1, no.1 (2004): 31; Peerenboom, “The Future of Rule of Law,” 9-10; Berkowitz, Pistor and Richard, “The Transplant Effect,” 171 & 189. See also chapter 1.

<sup>131</sup> See e.g., Carothers, “The Problem of Knowledge,” 15-28; Wade Channell, “Lessons Not Learned about Legal Reform,” in *Promoting the Rule of Law Abroad*, 137-59.

lessons of this type are put forward by institutions as lessons learned is an unfortunate commentary on the weakness of many of the aid efforts.<sup>132</sup>

The use of ‘transplants’ in RoL assistance, referred to here by Carothers as “importing laws,” is a much-maligned donor practice, and as it sounds, involves introducing a law or legal regime from one country and ‘transplanting’ it into a new, developing country location. As Taylor pointed out in 2009, diversity of legal cultures across the world is well-documented in a variety of disciplines – comparative law, legal sociology and legal anthropology, to name a few – and yet “rule of law projects are often predicated on standardized interventions, regardless of host country.”<sup>133</sup> Some other examples of standardized toolkits found in RoL assistance (beyond the obvious transplants of western laws), include training packages (with expert instruction and materials included), exchange programs, and case management systems.

The many criticisms essentially paint the picture that even though promoters of RoL might (or should) know better, the:

[O]verall tendency is still ... to rely on generally applicable, and hence overly simple, highly reductive and exceedingly abstract, international best practices and off-the-shelf rule of law toolkits.<sup>134</sup>

Not surprisingly, reforms involving transplants and ‘off-the-shelf’ toolkits face significant hurdles during implementation and enforcement.<sup>135</sup> The best chance for a positive outcome other than simply a ‘law on the books’ arrives when great pains have been taken to ensure that the new law or legal regime is sufficiently altered and adjusted

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<sup>132</sup> Carothers, “The Problem of Knowledge,” 25.

<sup>133</sup> Taylor, “The Rule of Law Bazaar,” 343.

<sup>134</sup> Peerenboom, “The Future of Rule of Law,” 7.

<sup>135</sup> See e.g., Messick, “Judicial Reform and Economic Development,” 126; Tim Lindsey, ed., *Law Reform in Developing and Transitional States* (especially chapters 1, 5, 12, 13 and 14).

according to the local environment.<sup>136</sup> It is rare, but possible, for local partners to ‘reinvent’ what is being introduced in a way that is beneficial to them,<sup>137</sup> but as pointed out by Tim Lindsey and other scholar-practitioners who work in the field, when it does happen, there can be push-back from donors, whose evaluations of these reforms tend “to strongly emphasize the exactitude of replication of foreign models as a key criterion of success.”<sup>138</sup>

### iii. Responses to critiques – current trends in RoL assistance

More recently, scholars have suggested that the repeated calls of ‘failure’ are overblown, and have more to do with unrealistic donor expectations and inadequate means of measurement than outright failure of RoL assistance since its 1990s resurgence.<sup>139</sup> Hammergren observes that the deficient conditions of justice sectors that donors found on arrival in the early 1990s – disorderly (or no) records-keeping systems; lack of human resources management (e.g., ‘ghost employees’ who arrived only to collect a salary; irregular attendance of judges and staff; nepotism); dilapidated and disorganized infrastructure; lack of access to law books or new laws – have largely

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<sup>136</sup> See e.g., Posner, “Creating a Legal Framework,” 6. See also, Tim Lindsey, “Preface,” in *Law Reform in Developing and Transitional States*, xx-xxi; for further case study examples of transplants, see chapters 8 (Mongolia), 12 (Vietnam and Indonesia), 13 (on the introduction of western style labor laws in Namibia), and 15 (Indonesia).

<sup>137</sup> Tim Lindsey, “Preface,” xx-xxi, referring to Stewart Fenwick’s chapter on Mongolian legal education reform. See Stewart Fenwick, “Legal Education Reform – The Forgotten Intervention? Assessing the Legal Retraining Model in Transition Economies,” in *Law Reform in Developing and Transitional States*, 180-95.

<sup>138</sup> Tim Lindsey, “Preface,” xx-xxi; see also, William A. W. Neilson, “Competition Laws for Asian Transitional Economies: Adaption to Local Legal Cultures in Vietnam and Indonesia,” in *Law Reform in Developing and Transitional States*, 291-316.

<sup>139</sup> See e.g., Hammergren, *Justice Reform and Development*, 25.

been alleviated during the last 20 to 30 years of donor involvement.<sup>140</sup> Similarly, Todd Foglesong observes that the field’s “excessive attention to failure” has resulted in a “massive number of minor accomplishments in the rule of law taking place all over the world on a daily basis” being ignored.<sup>141</sup>

This begs the question: What is it that donors expect? In a 2013 survey of the field’s history, Benjamin Van Rooij and Pip Nicholson argue persuasively that the many critiques of failure and lack of impact have actually had the (ironic) effect of donors ratcheting up ambition, and increasing the number of program objectives even further, instead of – as the authors suggest – scaling down to seek more specific and feasible goals.<sup>142</sup> For example, the failure of the top-down paradigms of the 1980 and 90s to address micro-level poverty led to “bottom-up justice” approaches, known by names such as access to justice, legal empowerment, and justice for the poor.<sup>143</sup> Even the top-down ‘rule of law’ paradigm of the 1990s, as described by the authors, saw its own broadening of objectives over time from thinner conceptions of RoL to thicker conceptions of RoL, giving the World Bank a mandate beyond its economic mandate into substantive policy with an emphasis on justice, rather than simply technical improvements to the target legal system.<sup>144</sup>

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<sup>140</sup> Hammergren, *Justice Reform and Development*, 25-30 (offering detailed examples from Latin America). But see, Joel Ngugi, “Lessons from Kenya’s Judiciary Transformation Journey,” Social Justice Tuesday and Global Monday Special Event, UW School of Law (October 20, 2015). Justice Ngugi described the state of the archives at the High Court of Kenya when he arrived in 2011 as being home to snakes, rats and a porcupine. The archives have since been cleaned up and organized.

<sup>141</sup> Todd Foglesong, “The Rule of Law in Ordinary Action: Filing Legal Advice in Lagos State,” in *The International Rule of Law Movement*, 237.

<sup>142</sup> See van Rooij and Nicholson, “Inflationary Trends,” 297-348.

<sup>143</sup> *Ibid.*, 306.

<sup>144</sup> *Ibid.*, 303-06.

Along with the increasing number of objectives, the field of RoL assistance has also experienced a proliferation in the number and type of actors involved, including state, non-state, non-market, transnational, civil society, religious, among others.<sup>145</sup> This point is well-illustrated by the case studies for this dissertation, detailed in the next chapter. A related trend – and one that is particularly relevant to this study – is an observed increasing push-back from the Global South to the ‘business as usual’ of RoL assistance,<sup>146</sup> which employs Western justice models (and with it, their Western experts) as the bases and sources for reform.<sup>147</sup> As will be elaborated in the coming chapters, particularly chapter 7, these criticisms are echoed by the local actors and partners who were the informants for this study.

At the same time, RoL assistance has increased attention to informal norms and networks<sup>148</sup> – though as argued by Haider Ala Hamoudi, the field’s acknowledgement of legal diversity itself requires a deeper internalization and incorporation of the fact that “legal systems that are autonomous of state law will invariably exist.”<sup>149</sup> As we saw in the example of Kenyan land registration, discussed above, the establishment of formal

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<sup>145</sup> See Kerry Rittich, “The Future of Law and Development: Second Generation Reforms and the Incorporation of the Social,” *Michigan Journal of International Law* 26 (2004): 199, 217-19; von Benda-Beckmann, von Benda-Beckman, and Eckert, “Rules of Law and Laws of Ruling,” 1-2 (noting that the chapters in the volume “document the broadening variety of actors involved in governance practices and the widening ranges of regulation and legal structures.”)

<sup>146</sup> See e.g., Thomas Carothers and Saskia Brechenmacher, *Closing Space: Democracy and Human Rights Support Under Fire* (Washington, D.C.: Carnegie Endowment for International Peace, 2014).

<sup>147</sup> See e.g., Stewart Fenwick, “Legal Education Reform – the Forgotten Intervention?” in *Law Reform in Developing and Transitional States*, 183-84 (describing ‘donee fatigue’ at the heavy-handed use of foreign experts); Hammergren, *Justice Reform and Development*, 22 and 203; Taylor, “The Rule of Law Bazaar,” 333.

<sup>148</sup> See e.g., Rittich, “Future of Law and Development,” 219-21; von Benda-Beckman, von Benda-Beckman and Eckert, “Rules of Law and Laws of Ruling,” 3-5, 11-14.

<sup>149</sup> See Haider Ala Hamoudi, “Decolonizing the Centralist Mind: Legal Pluralism and the Rule of Law,” in *The International Rule of Law Movement*, 135-36.

legal titles to property led not to economic growth and a mass social reordering, but a bifurcated system of property rights in which people asserted their newly established titles as against the state, but not each other. In those instances, people preferred to resort to customary norms.<sup>150</sup> One lesson to be drawn is to remain humble, and remember that any intervention or reform being sought is not introduced into a vacuum, but an environment already subject to its own social norms and ordering.

At least in part because of the many criticisms and resulting calls for more accountability, RoL assistance as a field has also seen a growing interest in indicators and evaluative measures<sup>151</sup> – illustrated by new indices like the World Justice Project’s Rule of Law Index, founded in 2006.<sup>152</sup> But unlike the health sector, for example, where improvement can be easily understood and measured, the justice sector has no ‘standard evaluative criteria,’ or universal indicators to assess the state of justice.<sup>153</sup> Hammergren points out that instead of coming up with discrete, realistic indicators – that match funds and time allotted, but may not be easily understood or impressive to non-specialists – reformers working in RoL assistance have instead focused on the macro-level, making ‘large promises,’ thereby avoiding “the measurement of minutiae like reductions in the time to retrieve a document from the judicial archives.”<sup>154</sup>

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<sup>150</sup> Ngugi, “Land Registration,” 502-03, and 522.

<sup>151</sup> See e.g., Veronica L. Taylor, “The Law Reform Olympics,” 83-105; Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury, eds., *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015).

<sup>152</sup> See World Justice Project, <http://worldjusticeproject.org/>; see also René Urueña, “Indicators and the Law: A Case Study of the Rule of Law Index,” in *The Quiet Power of Indicators*, 75-102.

<sup>153</sup> See e.g., Hammergren, *Justice Reform and Development*, 22-23, and 43-46.

<sup>154</sup> *Ibid.*, 43-45.

The above trends were identified by scholar-practitioners who work (largely) on behalf of donors and their implementing contractors. What do these RoL scholar-practitioners see as the way forward? First, we see an argument that the field's focus on failures is misplaced, and instead should be directed toward what *can* be accomplished. Already mentioned above, Hammergren, Foglesong, van Rooij and Nicholson, and others, have made similar arguments that RoL assistance is at its best when focusing on modest, incremental reforms.<sup>155</sup> Hammergren, for example, is a proponent of 'middle-range theory,' which is organized around the functions that justice systems normally perform and works to alleviate identifiable, significant performance issues, while at the same time acknowledging that the changes will be "modest, slow, and inherently incremental."<sup>156</sup>

Indonesian RoL assistance, too, suggests support for an incremental approach. One example is a component of World Bank's Justice for the Poor (J4P) program, which partnered with a community-based NGO, PEKKA.<sup>157</sup> According to J4P's Task Team Leader, PEKKA's focus on helping women with divorce certificates was born of asking

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<sup>155</sup> See e.g., Foglesong, "The Rule of Law in Ordinary Action," 215-40 (arguing that small, idiosyncratically local changes make the best indicators and goals for RoL reform).

<sup>156</sup> Hammergren, *Justice Reform and Development*, 199-200, and 214-36 (quote at 200); see also von Benda-Beckman, von Benda-Beckman and Eckert, "Rules of Law and Laws of Ruling," 1 (observing that the field's concept of "governance" signals a shift to a "functional characterization of governing activities"). Part of middle-range theory as proposed by Hammergren involves a closer look at actual First World justice reforms, which are more relevant and piecemeal than the remedies typically proposed by donors of RoL assistance. Hammergren, *Justice Reform and Development*, 54, 202. See also James A. Goldston, "New Rules for the Rule of Law," in *The International Rule of Law Movement*, 16 and 25 ("Advancing the agenda for rule of law promotion involves breaking down artificial walls between the rule of law at home and abroad, ...").

<sup>157</sup> *Perempuan Kepala Keluarga* (PEKKA), translated as Women Heads of Family. <http://www.pekka.or.id/index.php?lang=en>.

its members about what was needed.<sup>158</sup> Divorce certificates not only established ‘head of household’ for purposes of some Indonesian government services, thereby allowing the women to claim rights, it also had implications in religious courts. The same informant reported that this single-minded focus on one issue – here, the divorce certificates – worked well and enabled PEKKA to “make a difference, and have impact.”<sup>159</sup>

#### iv. RoL ‘dynamics’ and this study

Following Zürn, Nollkaemper and Peerenboom, we are urged to move beyond the perspective of RoL promoters to an understanding of RoL ‘dynamics’ – which involves RoL promotion (promoter perspective), RoL conversion (recipient perspective), and that which links the two (diffusion perspective).<sup>160</sup> The authors conclude that for RoL promotion to be successful, there must be more comprehensive analysis of RoL conversion and diffusion.<sup>161</sup> It is within the realms of conversion and diffusion that this study situates itself. By focusing on the perspectives of local actors, this study aims to voice recipient perspectives, as well as shed empirical light on the relationship dynamics that take place between donor agents and their local counterparts and partners.

This ‘dynamic’ view of development urged by Zürn et. al, also finds support in parallel insights from socio-legal scholarship. Halliday and Shaffer, for example, detail the emergence of ‘transnational legal orders’ (TLOs), or social orders of shared rules

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<sup>158</sup> Informant 20 (interview with author, April 26, 2012).

<sup>159</sup> Informant 20 (interview with author, April 26, 2012).

<sup>160</sup> Zürn, Nollkaemper, and Peerenboom, *Rule of Law Dynamics*, 4-8, and 17.

<sup>161</sup> *Ibid.*, 318-23.

“that orient social expectations, communications and behavior.”<sup>162</sup> TLOs are concerned with the regulation of behavior, and become authoritative when they are “accepted and institutionalized across national jurisdictions.”<sup>163</sup> This builds on earlier work of Halliday and Carruthers, which also identifies a dynamic transnational space, inside which the cyclical process of what they term ‘recursivity’ takes place. Recursivity, according to the authors, is a cyclical process between the ‘politics of enactment’ and the ‘politics of implementation,’ and results in a mutual, responsive and multi-directional influence flowing between and among local actors participating in RoL assistance.<sup>164</sup> Recursivity and the existence of a dynamic transnational space as applied to Indonesian RoL assistance is discussed in detail in chapter 8.

As detailed in chapter 1, ownership and partnership provided the conceptual framework for this study, which, as the coming chapters will show, proved to be a fruitful discussion platform for revealing what is happening during RoL assistance design and implementation. In viewing through the lens of ownership and partnership, we are better able to pinpoint where things go wrong during RoL assistance implementation, or, as one informant put it – the point at which “the wheels come off the rails.”<sup>165</sup> It is only through understanding these moments – often to do with relationship dynamics – that better plans can be made to avoid them.

In 2014, authors Carothers and Brechenmacher examined whether a new development consensus had emerged around four themes – accountability,

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<sup>162</sup> Terence C. Halliday and Gregory Shaffer, eds., *Transnational Legal Orders* (New York: Cambridge University Press, 2015), 7.

<sup>163</sup> *Ibid.*, 7.

<sup>164</sup> Halliday and Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press, 2009).

<sup>165</sup> Informant 1 (interview with author, April 16, 2012).

transparency, participation and inclusion, and conclude that the consensus is a ‘work in progress’ instead of completed transformation.<sup>166</sup> One issue they identify is a ‘donor-recipient divide’ – namely that both sides want the other to embrace the four principles, but reject the other sides’ attempts at promoting them. Namely, recipients see donor attempts to promote these principles as “illegitimate political meddling.”<sup>167</sup> In chapter 7, we see that, on the other side, donors working in Indonesian RoL assistance similarly do not appreciate Indonesian officials demanding ‘transparency’ of salaries paid to international experts.<sup>168</sup> Thus, in action, these principles, including accountability and transparency in particular, tend to meet (perhaps understandable) resistance. Perhaps then, instead of a consensus on accountability, transparency, participation and inclusion, focus should be concentrated on ownership and partnership? Conceptually, these are broad enough to encompass the four other principles, but do so under the less contentious umbrellas of ownership (accountability, participation, and inclusion) and partnership (transparency, participation and inclusion).

In analyzing the data in the following chapters, we see that ownership and partnership embody principles that have the potential to shape and influence RoL assistance into what may be a more productive direction. The work of David Mosse is instructive in light of its compelling emphasis on the significant role played by the actors themselves in influencing aid outcomes.<sup>169</sup> Chapter 8 offers support in the form of empirical examples from Indonesian RoL assistance of the willingness of local actors to

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<sup>166</sup> See e.g., Thomas Carothers and Saskia Brechenmacher, *Accountability, Transparency, Participation, and Inclusion: A New Development Consensus?* (Washington, D.C.: Carnegie Endowment for International Peace, 2014).

<sup>167</sup> Carothers and Brechenmacher, *A New Development Consensus?*, 23.

<sup>168</sup> See chapter 7, Section V (e).

<sup>169</sup> David Mosse, *Cultivating Development: An Ethnography of Aid Policy and Practice* (New York: Pluto Press, 2005).

exert their agency to influence the direction of the assistance, and indeed, their resourcefulness in doing so. Once we understand that local actors are influential in this way, the next question becomes how can they best be engaged to maximize the potential they represent, while minimizing risks and decreasing known or predictable downsides? Ownership and partnership may be useful overarching principles in answering this question, with discrete recommendations offered in chapter 9.

### **III. Conclusion**

This chapter has attempted to present the necessary historical and theoretical foundation for the chapters that follow. We learned that RoL assistance is part of a larger framework of development assistance between donor and recipient countries – though the lines are becoming blurred as historically recipient-side countries of the assistance have begun acting as donors in their own right, including e.g., China and Indonesia. New development actors – e.g., private philanthropists, corporations engaging in corporate social responsibility – have also emerged. Development assistance, in general, and RoL assistance, in particular, have undergone various phases of influence – including the recurring influential expertise of economists, focusing attention on property rights and courts capable of enforcing contracts. And yet, as experience teaches the field again and again, off-the-shelf toolkits rarely lead to their intended consequences, playing out according to a plan. Instead, responses and outcomes are not fully anticipated, and depend very much upon the local context – including, as argued by this study, how the project is received and shaped by the local actors.

As we will see in the coming chapters, ownership and partnership could be valuable vehicles toward certain values and behaviors, or focal points, which make sense given the tasks at hand. Building upon the scholarship outlined here, and the data analyzed in chapters 5 – 8, this study will conclude with implications in the form of recommendations for incremental steps – ones that are made in awareness of the dynamic space in which the RoL assistance is taking place.

Before taking an empirical look at RoL relationship dynamics at the micro-level, we turn in the next chapter to learning more about the local context in which the RoL assistance takes place: Indonesia.

## Chapter 4 /

### The Local Context of Rule of Law Assistance in Indonesia

#### I. Introduction

Before taking a closer look at empirical accounts of the relationship dynamics among local actors in Indonesian rule of law (RoL) assistance in the coming chapters, we must learn more about the location in which they operate: Indonesia. In line with the donor trends in the field of RoL assistance identified in the last chapter, Indonesian RoL assistance also elicits complaints about failure – or at the least, “a deep sense of frustration” by donors and Indonesian reformers regarding an apparent lack of success in reforming the Indonesian justice sector.<sup>1</sup> As an example, an experienced Indonesian justice reformer felt this frustration upon learning that the Indonesian ‘national expert’ hired by a donor was a retired Supreme Court Justice who was widely known in Indonesia to be corrupt.<sup>2</sup> Also present in Indonesian RoL assistance is a proliferation of actors and goals, problems of western-style transplanted ideas, and – as many of this study’s informants will readily relate – increasing dissatisfaction and push-back from Indonesians themselves.

After describing Indonesia’s political, economic and legal context in some historical detail, the chapter then introduces the case studies that inform this project. What we find is a setting well-suited to the study of relationship dynamics of ongoing RoL assistance design and implementation, at a micro and applied level. The

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<sup>1</sup> Daniel S. Lev, “Conceptual Filters and Obfuscation in the Study of Indonesian Politics,” *Asian Studies Review* 29 (December 2005), 351. The Indonesian Attorney General’s Office (AGO), in particular, is known as an organization that is very resistant to change.

<sup>2</sup> Informant 21 (interview with author, April 25, 2012).

informants themselves are the primary reason for this – in that they are experienced and educated RoL professionals, and well-positioned to articulate what is taking place from their perspective at the site of RoL assistance design and implementation. The location, too – a stable, democratizing nation since 1998 – has provided ample opportunity for local partners<sup>3</sup> to experience steady engagement with donor-funded RoL assistance. What follows is an examination of the Indonesian setting in which local actors live and carry out the day-to-day duties of RoL assistance.

## II. Indonesia as a case study location



Indonesia is an archipelago of over 17,500 islands, inhabited by a diverse population who speak more than 300 local languages.<sup>4</sup> At over 250 million people,

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<sup>3</sup> As defined in chapter 1, *local partners* refers to Indonesian nationals who professionally partner in some way with donor-funded RoL assistance in Indonesia – either on behalf of Indonesia or otherwise, e.g., for a donor as a national expert, or as part of a contractor’s implementing team. *Local actors* is the broader category, encompassing all participants – foreign and local – in RoL assistance design and implementation.

<sup>4</sup> Jean Gelman Taylor, *Indonesia: Peoples and Histories* (New Haven: Yale University Press, 2003), 1.

Indonesia is the world's fourth most populous country,<sup>5</sup> and has the largest Muslim population of any country in the world.<sup>6</sup> Indonesia is not governed by *Shari'a*,<sup>7</sup> but instead uses a civil law system inherited from its 350 years as a Dutch colony, within which Islamic law is incorporated.<sup>8</sup> Its status as a former colony is a trait shared with many other locations around the world that are host to donor-funded RoL assistance. The impact of Indonesia's colonial past is still evident in its legal system of today, and by extension, the RoL assistance aimed at bettering it.

With a 2014 estimated annual GDP growth of five percent,<sup>9</sup> Indonesia now ranks 110 of 188 on the United Nations Human Development Index, placing it at the higher-end of the 'medium' human development category, with other countries such as Egypt, Paraguay and the Philippines.<sup>10</sup> This marks a 44.3 percent rise in its Index value since

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<sup>5</sup> See e.g., Central Intelligence Agency (CIA), "Indonesia," *World Factbook*, <https://www.cia.gov/library/publications/the-world-factbook/geos/id.html>.

<sup>6</sup> See e.g., Pew Research Center, "Religious Composition by Country: 2010-2050," April 2, 2015, <http://www.pewforum.org/2015/04/02/religious-projection-table/>. India is projected to have more Muslims than Indonesia in the coming decades, but even then, India will remain a predominantly Hindu nation, whereas Indonesia is overwhelmingly Muslim – over 85 percent based on 2010 numbers.

<sup>7</sup> This is not to say Indonesia does not struggle with issues of Islam's relationship with the law and state. See e.g., Simon Butt, "Polygamy and Mixed Marriage in Indonesia: Islam and the Marriage Law in the Court," in *Indonesia Law and Society, 2d edition*, ed. Tim Lindsey (Annandale: Federation Press, 2008). See also other chapters in the same volume on Islamic inheritance and banking laws in Indonesia.

<sup>8</sup> See Jan Michel Otto, "Sharia and National Law in Indonesia," in *Sharia Incorporated A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present*, ed. Jan Michiel Otto (Leiden: Leiden University Press, 2010), 433-90; Alfitri, *Whose Authority? Interpreting, Imposing, and Complying with Corporate Zakat Obligations in Indonesia* (Dissertation, University Washington School of Law, 2015).

<sup>9</sup> See OECD, *OECD Economic Surveys: Indonesia 2015*, Table 1 (Paris: OECD Publishing, 2015), 15. For more stats, see also, World Bank, "Global Economic Prospects – Forecasts," *Data: Indonesia*, <http://data.worldbank.org/country/indonesia>.

<sup>10</sup> United Nations (UN), "Data: Table 1: Human Development Index and its Components," *Human Development Report 2015*, <http://hdr.undp.org/en/content/table-1-human-development-index-and-its-components>.

1980.<sup>11</sup> Indonesia was recently included in the newly coined “MINT” countries – Mexico, Indonesia, Nigeria and Turkey – suggested by economist Jim O’Neill as being the next ‘economic giants.’<sup>12</sup> Indonesia also outperformed its Association of Southeast Asian Nations (ASEAN) peers, including Malaysia, the Philippines and Singapore, in real GDP growth from 2008 – 2014.<sup>13</sup> This could leave one wondering whether Indonesia needs foreign donors at all. As one experienced Indonesian RoL professional observed, while gesturing to the countless modern skyscrapers in all directions:

Do you think Indonesia needs help? Look at Jakarta! Some countries really need help, but the kind of help Indonesia needs is different. It’s technical.<sup>14</sup>

This sentiment was echoed by a senior RoL adviser with the USAID mission in Indonesia, who stated:

The amount we provide is only a drop in the Government of Indonesia’s budget. It’s what the money is purchasing that matters.<sup>15</sup>

What is being purchased through donor loans and financial transfers? The informant is referring to technical assistance. According to a 2010 diagnostic study commissioned by AusAID, Indonesia’s human resources and procurement regulations hinder the flow and

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<sup>11</sup> United Nations Development Program (UNDP), “Briefing note: Indonesia,” *Human Development Report 2015*, [http://hdr.undp.org/sites/all/themes/hdr\\_theme/country-notes/IDN.pdf](http://hdr.undp.org/sites/all/themes/hdr_theme/country-notes/IDN.pdf).

<sup>12</sup> Jim O’Neill, “The Mint countries: Next economic giants?,” *BBC News Magazine*, January 6, 2014; Jim O’Neill, “Who you calling a BRIC?,” *Bloomberg Opinion*, November 12, 2013. O’Neill, an economist and former chairman of Goldman Sachs Asset Management, in 2001 also coined the BRIC countries (Brazil, Russia, India and China) in 2001.

<sup>13</sup> *OECD Economic Surveys: Indonesia 2015*, 14-16, and Figure 1, 16.

<sup>14</sup> Informant 36 (interview with author, September 18, 2012).

<sup>15</sup> Informant 47 (interview with author, December 20, 2012).

quality of the expert advice directly received by the government.<sup>16</sup> For example, the restrictive nature of Indonesian regulations for tendering “excludes universities and non-profit organizations from competing for contracts for the provision of intellectual services and research to government.”<sup>17</sup> Given such constraints upon domestic accumulation of knowledge, it makes sense that Indonesia would turn to donors, for whom providing technical expertise is an income-generating activity.<sup>18</sup>

Not surprisingly, though, the attempted transfer of knowledge / knowledge production<sup>19</sup> between donors and Indonesians faces obstacles. One of those obstacles is the operational language. As described by an Indonesian justice sector consultant:

It is about capacity – police and prosecutors cannot speak English properly. This is frustrating for them because they want knowledge, but face obstacles because of language. This is a big problem.<sup>20</sup>

Indonesian partners are also increasingly voicing their dissatisfaction with the terms of RoL assistance – e.g., why not conduct trainings in Indonesian? This is in line with the trend observed in RoL assistance of more outspoken pushback by recipients from around the world.<sup>21</sup> discussed in chapter 3. Further sources of contention are donor decisions regarding implementing contractors, discussed in chapter 5, as well as some

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<sup>16</sup> Stephen Sherlock, “Knowledge for Policy: Regulatory Obstacles to the Growth of a Knowledge Market in Indonesia,” diagnostic study commissioned by AusAID’s Tertiary Education and Knowledge Sector Unit, June 2010.

<sup>17</sup> Sherlock, “Knowledge for Policy,” 4.

<sup>18</sup> See Informant 3 (interview with author, September 13, 2012).

<sup>19</sup> ‘Knowledge production,’ as used here follows Borda-Rodriguez and Johnson, and refers to a process in which social relations and communication between actors play a central role in the knowledge production. This is viewed as preferable to ‘knowledge transfer,’ which conceives of the exercise more as a product or good that can be transferred. Alexander Borda-Rodriguez and Hazel Johnson, “Development on My Terms: Development Consultants and Knowledge for Development,” *Public Administration and Development* 33 (2013), 345.

<sup>20</sup> Informant 35 (interview with author, September 19, 2012).

<sup>21</sup> See chapter 3, Section II (c)(iii).

of the hiring choices made by these implementing contractors when hiring ‘experts,’ discussed further in chapter 7.

Indonesia is a good setting for exploring this study’s questions about whether and how local ownership and partnership are operationalized on the ground. As we saw in chapter 1, international aid flows since Indonesia’s 1998 transition to democracy have contributed to the emergence of an Indonesian network of RoL professionals and organizations from which donors draw to staff their RoL assistance projects.<sup>22</sup> Every RoL assistance project around the world has its own versions of intermediaries and translators – a topic discussed in depth in chapter 8.<sup>23</sup> The internationals playing decision-making roles in Indonesia are part of a cadre of professional consultants who travel and work around the world. Additionally, the local interlocutors in Indonesia are well-qualified and experienced, and provide an as-yet untapped valuable resource for shedding light on the empirical reality of ongoing RoL assistance, and the dynamics taking place at the micro-level of RoL assistance design and implementation. Many of these professionals, including participants in this study, have had decades of experience working on Indonesian law and justice sector reform with international donors and as part of their own organizations. Indonesia’s stable political situation has meant that these actors and their donor counterparts have spent less time fearing for their safety – as might be the case in conflict and what we might call ‘pre-post conflict’

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<sup>22</sup> See Daniel Lev, “State and Law Reform in Indonesia” in *Law Reform in Developing and Transitional States*, ed. Tim Lindsey (New York: Routledge, 2007), 261; Yves Dezalay and Bryant G. Garth, *Asian Legal Revivals: Lawyers in the Shadows of Empire*, (Chicago: University of Chicago Press, 2010), 120-25.

<sup>23</sup> See Chapter 8, Section II, and Section III (a); see also Kristina Simion, *Rule of Law Promotion in Myanmar: What Role do Intermediaries Play?* (Dissertation in progress, Australian National University).

zones<sup>24</sup> – and more time conducting the ‘business’ of RoL assistance. Indonesia, again due to its peace and stability, is a location where international consultants who take positions as project managers and chiefs of party (COP) typically take up residence, instead of flying in and flying out.<sup>25</sup>

*a. Indonesian justice sector challenges*

Indonesia’s impressive economic gains and development notwithstanding, its justice system still struggles with the same operational problems also observed in other middle-income countries (MICs). Specifically categorized by the World Bank as a ‘lower’ MIC,<sup>26</sup> Indonesia faces similar operational problems in its justice system as those of other countries with “not entirely functional public sector[s]”— namely “corruption, inefficiency, delays, unequal access and treatment, excessive bureaucratization, and a consequent emphasis on form over substance.”<sup>27</sup> Dan Lev, a world-authority on the

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<sup>24</sup> RoL assistance is a ‘go-to’ tool for donor-assisted nation-building in conflict and post conflict zones. ‘Pre-post conflict’ refers to those locations that are no longer outright war zones, having at least some form of government (however weak) in place; and yet, they cannot yet be described as ‘post conflict’ because they still suffer from many of the same problems as conflict zones.

<sup>25</sup> All four COPs at the time of fieldwork (April through September, 2012) resided in Jakarta. Having said that, short-term international consultants who fly in for just a few weeks remains a typical case for donors’ initial assessments and in preparing the bid in response to donors’ requests for applications and proposals (RFAs / RFPs).

<sup>26</sup> See World Bank, “World Development Indicators,” *Data: Indonesia*, [http://data.worldbank.org/country/indonesia#cp\\_wdi](http://data.worldbank.org/country/indonesia#cp_wdi).

<sup>27</sup> Linn Hammergren, “Rule of Law Challenges in Middle-Income Countries and Donor Approaches to Addressing Them,” in *Rule of Law Dynamics* (2012), 192. Point of clarification: Hammergren makes no specific mention of Indonesia – rather she is addressing MICs as a category.

Indonesian legal and political systems, writing before the 2008-10 period of *Reformasi*,<sup>28</sup> commented:

It is not much of an exaggeration to suggest that an Indonesian state now barely exists. No single political or bureaucratic institution works effectively or adequately.<sup>29</sup>

Corruption in Indonesia, as in other MICs, remains “lively,”<sup>30</sup> as observed by Lev. By 2005, he suggested that corruption in Indonesia had reached a point that it:

[D]efined the essential operating procedures of state agencies, to the extent that some officials (including judges, for one striking example) understood it less as corruption than as an established right, prerogative, or common tariff.<sup>31</sup>

And this, even after a good amount of legal reform.<sup>32</sup> A more recent conspicuous example is the 2013 arrest of former Chief Justice Akil Mochtar of Indonesia’s Constitutional Court for bribery and other charges, leading to a 2014 conviction, and imposition of a life sentence upheld on appeal.<sup>33</sup> Akil was recently back in headlines because those who bribed him are facing trial for crimes stemming from their bribery.<sup>34</sup> High-profile convictions such as these notwithstanding, perceptions about Indonesia

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<sup>28</sup> *Reformasi* (reformation) refers to the time period of Indonesia’s transition to democracy, beginning in 1998 (at the end of General Suharto’s 32-year authoritarian reign).

<sup>29</sup> See Lev, “The State and Law Reform in Indonesia,” 236.

<sup>30</sup> Lev, “Conceptual Filters and Obfuscation,” 351-53 (examining the issue of corruption through the lens of Indonesia’s legal history – noting that it grew increasingly pervasive during the 40 years of Sukarno’s “Guided Democracy” and Suharto’s “New Order.”)

<sup>31</sup> See Lev, “Conceptual Filters and Obfuscation,” 352.

<sup>32</sup> See e.g., Howard Dick, “Why Law Reform Fails: Indonesia’s Anti-Corruption Reforms,” in *Law Reform in Developing and Transitional States*, 43.

<sup>33</sup> See Joe Cochrane, “Top Indonesian Judge Held in Corruption Case,” *New York Times, Asia Pacific*, October 3, 2013. Akil Mochtar was convicted in 2014, and his life sentence upheld on appeal. See Haeril Halim, “Court Upholds Life Sentence for Akil,” *Jakarta Post*, November 26, 2014.

<sup>34</sup> “National Scene: Couple Stands Trial for Bribing Akil,” *Jakarta Post*, September 18, 2015.

continue to be that it is corrupt,<sup>35</sup> as indicated, for example, by Indonesia's measures on Transparency International (TI).<sup>36</sup> Specifically, Indonesia ranks 107 out of 177 countries<sup>37</sup> on TI's Corruption Perception Index, with a score of 32, on a scale of 0 to 100 (100 being 'very clean').<sup>38</sup>

These are not the only problems faced by Indonesia and other MICs. Most notably missing from the above list of basic structural problems are the issues dealing with the highly-charged political side of RoL. These challenges are similar to those also faced by High Income Countries (HICs), and include the level of independence of sector organizations relative to each other (e.g., judiciary, prosecution, police, etc.), and balance of power between the judicial and other branches of government.<sup>39</sup> All of the above challenges underscore the point that 'rule of law' is very much a work-in-progress in Indonesia.

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<sup>35</sup> For a description of post-New Order corruption in the run-up to 2009 presidential election, including banking scandals stemming from bailouts during the 1998 Asian Financial Crisis, see Gerry van Klinken, "Indonesia's Politically Driven Anti-Corruption Agenda and the Post-Election Future," *The Asia-Pacific Journal* 15-2-09 (April 12, 2009).

<sup>36</sup> The limitations of TI's measures are well-known, but their rankings and scores are nonetheless widely used. See e.g., Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury, *The Quiet Power of Indicators: Measuring Governance, Corruption and Rule of Law* (New York: Cambridge University Press, 2015). See also chapter 3, Section II (c) (iii), regarding the trend in RoL assistance toward measurement and indicators. Started in 1993 by former World Bank economist Peter Eigen, Transparency International is an international CSO whose mission is "to stop corruption, and promote transparency, accountability and integrity at all levels and across all sectors of society." See Transparency International (TI), "Our Mission," [https://www.transparency.org/whoweare/organisation/mission\\_vision\\_and\\_values/0/](https://www.transparency.org/whoweare/organisation/mission_vision_and_values/0/).

<sup>37</sup> Denmark was ranked at number 1, and Somalia and North Korea were tied at 174.

<sup>38</sup> TI, "Results," *Corruption Perceptions Index 2014*, <http://www.transparency.org/cpi2014/results>.

<sup>39</sup> See Hammergren, "Rule of Law Challenges in MICs," 193. An Indonesian example of this is that Indonesia's anti-corruption commission, known as KPK, finds itself on turf traditionally ruled by the AGO and the police. KPK is abbreviated from the Indonesian, *Komisi Pemberantasan Korupsi*, and was established in 2002, as part of Indonesia's *Reformasi* period – discussed in the history section below.

The four case studies for this dissertation,<sup>40</sup> detailed in Part II below, were designed to alleviate many of the above-listed operational flaws, including corruption among others, through various project components and activities. The bi-lateral Australian Indonesia Partnership for Justice (AIPJ) program, for example, refers to anti-corruption as “central to the AIPJ” in its design document, and includes the funding for activities that aim to improve the investigation and prosecution of corruption crimes, and to strengthen Indonesian enforcement institutions, such as the Attorney General’s Office (AGO) and KPK, Indonesia’s Corruption Eradication Commission.<sup>41</sup> Specific corresponding activities found in the implementing contractor’s 2011 work-plan include support to:

- 1) Indonesian Supreme Court Reform efforts – including developing administrative standards for the KPK, which falls under the Supreme Court’s administrative purview;<sup>42</sup>
- 2) Selection Committee for KPK commissioner positions – including managing public participation, verifying candidates’ records;<sup>43</sup> and

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<sup>40</sup> The four case studies are: the Australian Agency for International Aid (AusAID)’s *Australia Indonesia Partnership for Justice* (AIPJ), United States Agency for International Development (USAID)’s *Changes for Justice* (C4J), USAID’s *Educating and Equipping Tomorrow’s Justice Reformers* (E2J), and World Bank’s *Justice for the Poor* (J4P). Since the time of field-work (2011-12), AusAID has been subsumed within the Australian government’s Department of Foreign Affairs and Trade (DFAT).

<sup>41</sup> See *Australia Indonesia Partnership for Justice (AIPJ)*, “Design Document,” July 2010, Section 4.6.2, 47 (on file with the author). KPK stands for *Komisi Pemberantasan Korupsi*, and refers to the Indonesian Corruption Eradication Commission.

<sup>42</sup> AIPJ, “2011 Annual Work Plan” (October 2011), Section 4.1.1, 5-6 (“Outcome 1: Improved Judicial Dispute Resolution Systems for Marginalized Groups, Activity 1: Continuing Support for Supreme Court Judicial Reform”)(prepared by AIPJ’s implementing contractor, Cardno)(on file with the author). The Supreme Court’s ‘One-Roof’ policy has consolidated administration of court-related matters at the Supreme Court.

3) AGO's Bureaucratic Reform efforts – including updating the Bureaucratic Reform Proposal Document, conducting workshops, and strengthening organizational structure through assessments and reviews of business processes and standard operating procedures.<sup>44</sup>

The United States, the other bi-lateral donor included in this study, also pledged support to strengthen Indonesian justice sector institutions, including the Supreme Court, the Attorney General's Office, and KPK, as part of its explicit strategy to strengthen the rule of law in Indonesia.<sup>45</sup> The two United States Agency for International Development (USAID) projects included in this study – *Changes for Justice (C4J)* and *Equipping and Educating Tomorrow's Justice Reformers (E2J)* – took a long-view on fighting corruption. C4J, for example, made intentional investments in the younger generation of public servants by focusing its “training efforts on junior judges, prosecutors and court staff,” in explicit recognition that “those who have been in the system for decades, who have benefitted from the current system,” would have “too much at stake to voluntarily modify their practices.”<sup>46</sup> E2J also explicitly invested in the “next generation of justice sector practitioners and reformers” by contributing to the improvement of legal education in Indonesia, which included the establishment of clinical legal programs at universities around Indonesia, as well as support to (and educational linkages with) civil society

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<sup>43</sup> Ibid., Section 4.2.1, 8-9 (“Outcome 2: Prosecutorial Agencies Better Able to Process Corruption Cases, Activity 1: Supporting the Selection Process of KPK Commissioners (2011-2015)”).

<sup>44</sup> Ibid., Section 4.2.2., 9-10 (“Outcome 2: Prosecutorial Agencies Better Able to Process Corruption Cases, Activity 2: Supporting the AGO's Bureaucratic Reform Program”).

<sup>45</sup> USAID, Indonesia Strategy 2009-2014, “A Partnership for Prosperity,” Intermediate Result of ‘Strengthened Rule of Law,’ 37.

<sup>46</sup> USAID, “C4J Scope of Work,” Section IV (a) (2) (22 (“Rationale/Development Hypothesis 2: “Investing in New Generations of Law Reformers”) (on file with author). See also Informant 19 (interview with author, September 11, 2012).

organizations (CSOs).<sup>47</sup> The fourth case study, the World Bank's Justice for the Poor (J4P), employed a grass roots strategy to strengthening justice sector organizations by "forming networks of paralegals at village and sub-district level to provide a first point of contact for villages seeking legal assistance."<sup>48</sup> As detailed in Part II below, the four case studies share at least one goal in common – namely, capacity building in support of Indonesia's justice sector and Indonesia's overall ability to deliver justice to its people.

The challenges and dynamics studied here, through the information generated by these case studies, are not exclusive to Indonesia, though they certainly have an Indonesian quality. Communication is complicated by language differences and a culture of non-confrontation, an unwillingness to voice disagreement, and deferential respect for persons of power and foreigners. These all come into play during RoL assistance, and qualified RoL professionals are aware of, and account for, them.<sup>49</sup> For example, informants reported routinely pretending that a lower-level international staff member was in charge during meetings with certain Indonesian officials, when, in fact, an Indonesian team-member (also present) was actually higher-ranked, and making the decisions.<sup>50</sup> Others reported recruiting international experts or managers to participate

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<sup>47</sup> See USAID Indonesia, "Request for Application (RFA) no. Indonesian 10-013: Educating and Equipping Tomorrow's Justice Reformers (E2J)," (March 29, 2010), 5.

<sup>48</sup> AusAID / World Bank Collaboration, East Asia and the Pacific Justice for the Poor Initiative 2008-2013 (January 2008), Annex A.1 – Indonesia, 43.

<sup>49</sup> Cf. Lev, "Conceptual Filters and Obfuscation," 345-49. Professor Lev urges caution in using filters such as "culture" to "explain nearly everything," because to do so "divert[s] attention from fundamental questions acutely relevant to causal analysis." This may well be, but "Indonesian culture" is conceptually alive in the minds of local actors working in RoL assistance in Indonesia. As used here, several informants brought up Indonesian culture of their own accord, and reported work-arounds they resort to when facing known culturally related issues.

<sup>50</sup> See Informants 40 (interview with author, September 20, 2012), and 37 (interview with author, September 19, 2012).

in certain meetings or deliver certain messages.<sup>51</sup> They do so because the Indonesian officials have shown more receptivity to ideas relayed by foreigners,<sup>52</sup> a not altogether new tendency, as we see below. Other locations hosting RoL assistance will have their own versions of these communication and behavioral patterns, influenced by their own histories.<sup>53</sup>

*b. Relevant Indonesian history*

While RoL assistance in Indonesia in the 2000s is explicitly linked to the globalizing and modernizing agendas of participating donors, it is also clear that Indonesia's history plays a role in how these reforms unfold.

i. Colonial times and their impact on post-independence Indonesia

The Indonesian side of the colonial administration came "laden with the legal instruments and, more subtly, the political assumptions by which Indonesians had been managed in the Netherlands-Indies."<sup>54</sup> According to Lev, Dutch colonial law – "which

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<sup>51</sup> See e.g., Informants 19 (interview with author, September 11, 2012), 10 (interview with author, April 24, 2012). See also David Linnan, "Indonesian Law Reform, or Once More Unto the Breach: A Brief Institutional History," in *Indonesia Law and Society*, 77, n. 22 (observing that "Indonesians are masters at using foreign experts as stalking horses for ideas and positions they do not wish to assert in person").

<sup>52</sup> See e.g., Informants 10 (interview with author, April 24, 2012), 19 (interview with author, September 11, 2012), 37 (interview with author, September 19, 2012), and 40 (interview with author, September 20, 2012).

<sup>53</sup> For a general discussion of the (often ignored) importance of history to development policy, see Michael Woolcock, Simon Szreter, Vijayendra Rao, "How and Why Does History Matter for Development Policy," World Bank Development Research Group, Poverty and Inequality Team, *Policy Research Working Paper 5425* (September 2010).

<sup>54</sup> Daniel S. Lev, "Colonial Law and the Genesis of the Indonesian State," *Indonesia* 40 (Cornell University Southeast Asia Program Publications, October 1985), 69.

established the genetic pattern of the Indonesian state” – was primarily intended to make exploitation efficient by the Dutch.<sup>55</sup>

Distinctly Indonesian accounts of what colonial life was like, including living under the classifications described by Lev, are not easily found in standard history books or newspaper accounts of the times. The fictional works known as the *Buru Quartet* by Pramoedya Ananta Toer are suggested by several historians as filling this void.<sup>56</sup> The four novels were written during the author’s incarceration on Buru Island, which began during Indonesia’s turbulent 1965-67 political unrest,<sup>57</sup> discussed further below, and lasted until his release in 1979. Through the story of Minke, inspired by the real-life writer, journalist and political leader *Raden Mas* Tirta Adhisuryo,<sup>58</sup> Toer paints a picture of life under a colonial regime<sup>59</sup> – including many of the complex tensions felt especially by the Dutch-educated colonized, such as Minke.<sup>60</sup>

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<sup>55</sup> Ibid., 57.

<sup>56</sup> See e.g., Laurie Sears, “The Afterwardsness of Indonesian Studies,” in *Indonesian Studies 2012*, ed. Eric Tagliacozzo (Ithaca: SEAP/Cornell University Press, 2012), 3; Max Lane, *Unfinished Nation: Indonesia Before and After Suharto* (New York: Verson, 2008), 13; Adrien Vickers, *A History of Modern Indonesia* (New York: Cambridge University Press, 2005), 3 (observing that Toer’s stories “link[] the world of politics with everyday life”).

<sup>57</sup> See below, footnote 82, for further details of Suharto’s coming to power.

<sup>58</sup> As explained by Max Lane in the glossary to *Footsteps*, translated in 1990: “*Raden* and *mas* are titles held by the mass of the middle-ranking members of the Javanese aristocracy; *raden mas* is the superior title.” *Footsteps*, 472.

<sup>59</sup> For a synopsis, excerpt, and interview with Toer about the *Buru Quartet*, see <http://www.progressive.org/news/1999/04/3334/pramoedya-ananta-toer-interview>.

<sup>60</sup> See Pramoedya Ananta Toer, *This Earth of Mankind* (Penguin Books, 1975; translated by Max Lane, 1990); Pramoedya Ananta Toer, *Child of All Nations* (Penguin Books, 1975; translated by Max Lane, 1990); Pramoedya Ananta Toer, *Footsteps* (Penguin Books, 1985; translated by Max Lane, 1990).

The protagonist, Minke, embraces much of western thinking and what it means to be 'modern' even though these ideas were introduced to Indonesia by the Dutch.<sup>61</sup> Through his efforts – e.g., starting a daily newspaper written in Malay, followed by several trade magazines and member organizations – Minke tries to fight his people's subjugation, while simultaneously prodding them toward a more just and equitable society, even among their own people. The first three books of the Quartet are told from the perspective of Minke, while the fourth, *The Glass House*,<sup>62</sup> is told by another Dutch-educated Indonesian man, Meneer Pangermann. Pangermann works for the Dutch colonial state – and is given the unique, and conflicted role of studying and monitoring the colonial subjects for signs that they might rebel or become problems for the administration. He is educated, and he is “a Native” – thereby making him uniquely qualified to analyze and better understand what was (or was not) happening in various Indonesian circles and organizations. In working for the colonial apparatus, Pangermann feels conflicted about the work he is asked to do; and sometimes – when he disagrees (e.g., wanting to help Minke instead of hurt him), he does what he can to undermine the colonial government. And yet, he still wants his paycheck, and vacation.

This seeming detour into the lives of fictional characters serves two purposes. First, an Indonesian respect for foreigners, particularly those with 'modern' knowledge – or, what today might be referred to as 'best practices' and comparative knowledge – is still observed in present-day RoL assistance, as noted above. Furthermore, for those

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<sup>61</sup> See also, Sally Engle Merry, “Law, Culture and Cultural Appropriation,” *Yale Journal of Law and the Humanities* 10 (1998), 575-603 (examining the cultural appropriation of law in the case of Hawaii, when from 1825-50, local chiefs incrementally took on an American-Anglo legal system as a form of resistance to political conquest by would-be colonizers).

<sup>62</sup> Pramoedya Ananta Toer, *House of Glass* (Penguin Books, 1988; translated by Max Lane, 1992).

who would argue that RoL assistance is modern colonialism,<sup>63</sup> the Indonesian intermediary RoL professionals / local partners interviewed as part of this study can be viewed as the Pangermanns of the present day, for having taken positions with donors and their foreign implementing contractors. And yet unlike the original Pangermann working for the colonial apparatus, these contemporary local partners do not lose their family or their self-respect by participating in RoL assistance. Instead, they gain white-collar jobs in air-conditioned modern skyscrapers in Jakarta and, for the most part, the donor money they need for their NGOs to pursue (at least) a partial vision for Indonesian justice sector reforms. Or perhaps, more accurately, these Indonesian local partners embody both Pangermann (reaping the benefits) and Minke (fighting the good fight through their NGOs). As we will see in chapters 6, local partners have more than one professional identity. In chapter 8, we will learn that they are willing to use whatever resources and networks these various identities make available to them, in order to shape and influence the RoL assistance in the direction they believe is best for Indonesia.

Indonesia achieved independence following a brief occupation by the Japanese at the end of World War II (1942-45).<sup>64</sup> Colonial law shaped Indonesia's post-colonial legal regime. Describing colonial law's influence on the newly formed Indonesian state, Lev wrote:

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<sup>63</sup> See e.g., Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, MA: Blackwell Publishing, 2008), discussed in Chapter 3, Section II (b).

<sup>64</sup> Indonesia declared independence on August 17, 1945, but it took four years for the Netherlands to cave to both Indonesian rebellion and international pressure to accept Indonesia's independence in December of 1949. For first-hand accounts of the Japanese occupation, see Rudolf Mrázek, *A Certain Age: Colonial Jakarta Through the Memories of Its Intellectuals* (Durham: Duke University Press, 2010), 61-62.

[P]lural law, plurally administered, was predicated on the assignment of quite different functions and prerogatives to, above all, the Dutch and Indonesian communities. The institutions developed to administer the Indonesian side of colonial society carried over into independence, *bearing with them instruments of repression no less useful* to the later than the earlier regimes.<sup>65</sup> (emphasis added)

Lev concludes that “more than traces” of these remain in modern Indonesian legal and political ideology.<sup>66</sup> The debate at the time of independence included Indonesian advocates – private lawyers, most of whom were nationalist, and who practiced law in the courts for Europeans, as well as in the *Landraden*, an Indonesian institution established in colonial times.<sup>67</sup> There were two possibilities for the new state: a liberal state, with one law for all, or an administrative system with plural law, which as described by Lev above, aided the Dutch in making economic exploitation and extraction efficient.<sup>68</sup> The advocates were in a position to know both systems and their vision (obviously influenced by European thought) included “an independent Indonesia where law superseded discretion, personal ability superseded privilege, and society was not superseded by the state.”<sup>69</sup> The advocates’ side lost,<sup>70</sup> and the laws and legal system chosen to govern independent Indonesia were a continuation of the Indonesian side of the colonial apparatus, one vastly inferior in terms of legal rigor and standards of

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<sup>65</sup> Lev, “Colonial Law,” 57. In support of this argument, Lev explores four topics in-depth – namely, plural legal and judicial organization in the Indonesian colony; *adat* law policies; private legal roles; and the existence of colonial legal tradition in the independent Indonesian state.

<sup>66</sup> *Ibid.*, 71.

<sup>67</sup> *Ibid.*, 57-58. See also Lev, “The State and Law Reform in Indonesia,” 237.

<sup>68</sup> Lev, “Colonial Law,” 58.

<sup>69</sup> *Ibid.*, 68-69.

<sup>70</sup> *Ibid.*; see also Mrázek, *A Certain Age*, 65-66 (observing that the time of Independence represented a struggle for power against the Dutch, of course, but also among the anti-colonial Indonesians themselves).

justice found on the European side of the colonial administration.<sup>71</sup> Colonial law's legacy was not the last setback for the advocates and those envisioning a strong and independent judicial system for independent Indonesia.<sup>72</sup>

## ii. Legal reforms under the Old Order and New Order

During the preparatory debates for the 1945 Constitution, the chairman of the constitutional drafting committee argued that the ideological foundations of the Indonesian state viewed the president much "like a traditional patrimonial father" and familial head, responsible for leading and uniting the people.<sup>73</sup> These views, it was argued (successfully), were incompatible with an Indonesian Supreme Court imbued with the power that comes with constitutional review.<sup>74</sup> President Sukarno, arguably assuming the role of patrimonial leader, further undermined the authority of the judicial branch by later dismissing the guarantee of even an independent judiciary and the separation of powers (*trias politika*).<sup>75</sup> This was then made official by a 1964 law that explicitly allowed the president to interfere in judicial process for "national interest."<sup>76</sup> The de-legitimization of law and legal regimes that begun under Sukarno continued

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<sup>71</sup> See e.g., Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca: Southeast Asia Program Publications, 2005), 29-33.

<sup>72</sup> See e.g., Yves Dezalay and Bryant Garth, "Indonesia and South Korea: Marginalizing Legal Elites and Empowering Economists," in *Asian Legal Revivals*, 119-21.

<sup>73</sup> See Pompe, *The Indonesian Supreme Court*, 14-15.

<sup>74</sup> Ibid.

<sup>75</sup> Daniel Lev, *Legal Aid in Indonesia, Working Paper*, no. 44, Monash University Centre of Southeast Asian Studies (1987), 5.

<sup>76</sup> Lev, *Legal Aid in Indonesia*, 6.

under the regime of Indonesia's second president, General Suharto,<sup>77</sup> even as efforts were being made to grow Indonesia's economy.

Whereas his predecessor cut off diplomatic ties with the Netherlands in 1960, and pulled Indonesia from world organizations in mid-1965, including the United Nations, the World Bank and the IMF, Indonesia's second president, General Suharto turned Indonesia back to the West, making Indonesia's loyalties in the Cold War known.<sup>78</sup> In 1966 (the same year he assumed power), Suharto was quick to rejoin the United Nations, and went on to pursue western banks and investment companies in order to rebuild infrastructure, expand public education and the health system.<sup>79</sup> Known as the New Order period (1966-98), Indonesia's development under Suharto reportedly followed the advice of U.S.-trained Indonesian economists<sup>80</sup> – propelling it to become one of the 'Asian Tiger' economies, reaching consistent growth at 8 percent in the early 1990s.<sup>81</sup> Indonesia's impressive economic growth during this period helps explain how Suharto's military dictatorship remained in power for 32 years, despite other major

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<sup>77</sup> See e.g., Stewart Fenwick, "Law and Judicial Review in Indonesia," in *Administrative Law and Governance in Asia: Comparative Perspectives*, ed., Tom Ginsburg and Albert H.Y. Chen (New York: Routledge, 2009), 331-33. See also, Pompe, *The Indonesian Supreme Court* (2005). Several informants consider Pompe's detailed study of the Supreme Court to be 'required reading' for anyone wishing to engage in judicial reform in Indonesia. See e.g., Informant 10 (interview with author, April 24, 2012).

<sup>78</sup> See e.g., Taylor, *Peoples and Histories*, 356-57; Anis Chowdhury and Iman Sugema, "How Significant and Effective Has Foreign Aid been to Indonesia?" *ASEAN Economic Bulletin* 22, no. 2 (2005), 188.

<sup>79</sup> See Taylor, *Peoples and Histories*, 356-57. This is not meant to paint an artificially rosy account of the start of General Suharto's reign. He took power under dubious (and bloody) circumstances, discussed further in note 82.

<sup>80</sup> See e.g., Dezalay and Garth, *Asian Legal Revivals*, 121-25. See also Appendix 4: Historical Annex to Chapter 7.

<sup>81</sup> Tim Lindsey and Mas Achmad Santosa, "The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia," in *Indonesia Law and Society*, 10.

failings leadership style – including a dubious (and bloody) coming to power,<sup>82</sup> notorious corruption,<sup>83</sup> and his willingness to keep suspected Communists incarcerated for decades.<sup>84</sup>

### iii. The Asian Financial Crisis and Indonesia's transition to democracy

The Asian Financial Crisis of 1997-98, however, saw a decline of 13 percent in Indonesia's GDP,<sup>85</sup> and brought Indonesia to a low of 7 percent negative growth.<sup>86</sup> This, combined with mass student-led protests throughout Indonesia, led to the unwinding of Suharto's authoritarian dictatorship in 1998 – thereby beginning Indonesia's democratic transition.<sup>87</sup> As observed by Kawai and Schmiegelow, Indonesia's initial sharp decline in

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<sup>82</sup> General Suharto's coming into power involved a coordinated kidnapping and supposed coup attempt, forcing President Sukarno to cede first governmental control in 1966, and the presidency in 1967. At the same time, from 1965-67, 'killing squads' were rounding up suspected Communists and Communist sympathizers, killing hundreds of thousands of men and women. (Exact numbers are unknown.) Taylor, *Peoples and Histories*, 359. See also John Roosa, *Pretext for Mass Murder: The September 30<sup>th</sup> Movement and Suharto's Coup d'Etat in Indonesia* (Madison: The University of Wisconsin Press, 2006), note 4, 261. A chilling 2012 documentary by Joshua Oppenheimer, *Act of Killing*, interviews and follows admitted killers and participants in the September 30 coup attempt as they describe and reenact their crimes. The *Look of Silence*, its 2015 sequel, follows an ophthalmologist as he confronts the men who brutally murdered his brother during the 1965 killings.

<sup>83</sup> As noted in chapter 1, Suharto topped a list by Transparency International (TI) of corrupt leaders in terms of dollars embezzled, at \$15-35B in estimated funds embezzled, according to TI's 2004 special report on political corruption. TI, *Global Corruption Report 2004* (March 25, 2004), Table 1.1, 13.

<sup>84</sup> A now famous example is Pramoedya Ananta Toer, author of the *Buru Quartet*, written while he was incarcerated on Buru Island from 1969-79. As discussed above, historians credit Toer's *Buru Quartet* as providing a rare – albeit fictionalized – Indonesian perspective of what life was like under Dutch colonial rule.

<sup>85</sup> International Monetary Fund (IMF) Independent Evaluation Office, "The IMF and Recent Capital Account Crises: Indonesia, Korea, Brazil," *Evaluation Report* (IMF 2003), 16.

<sup>86</sup> Lindsey, *Indonesia Law and Society*, 10.

<sup>87</sup> Many of this study's Indonesian informants participated in the 1998 student uprisings that contributed to the end of General Suharto's 32-year authoritarian reign – a source

both RoL indicators and regulatory quality indicators was not surprising, given the enormous challenges facing the country during this transition from Suharto's authoritarian regime to democracy.<sup>88</sup>

During this period, known as *Reformasi*,<sup>89</sup> existing legal institutions underwent significant reform efforts, while new institutions of representative democracy were put in place in the years since.<sup>90</sup> According to historian Max Lane, *reformasi* can be understood as the continued momentum of the *aksi* (or action) period before it – which included, for example, the mass student protests to rid Indonesia of Suharto.<sup>91</sup> The *reformasi* agenda was one to “challenge to anything and everything” – which included repealing the political laws, and ending the dual function of the military, as well as ending collusion, corruption and nepotism, known in Indonesia as *KKN*, short for *Korupsi, Kolusi, Nepotisme*.<sup>92</sup> Among Indonesia's newly formed institutions are the Constitutional Court<sup>93</sup> and *KPK*, Indonesia's Corruption Eradication Commission.<sup>94</sup>

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of great pride and, among them, perhaps even a badge or credential of sorts for being well-suited to aid Indonesia navigate its justice sector reform. See also, Max Lane, *Unfinished Nation*, 173-74 (detailing the gradual exodus of Suharto's inner elite beginning in early May, culminating in the May 19 student sit-in at the Parliament, and the May 20, 1998, protests which reached numbers in the hundreds of thousands in cities all over Indonesia. Suharto resigned the next day).

<sup>88</sup> Masahiro Kawai and Henrik Schmiegelow, “Financial Crisis as a Catalyst for Legal Reforms: The Case of Asia,” *ADB Working Paper Series*, No. 446 (November 2013), 17-19, 29-30, and 33. The likely “transplant effect” of having been a former colony is also cited as contributing explanation for Indonesia's difficulties. *Ibid.*, 33.

<sup>89</sup> *Reformasi* is Indonesian for ‘reformation.’

<sup>90</sup> Bivitri Susanti, “The Republic of Indonesia,” in *Rule of Law for Human Rights in the ASEAN Region: A Base-Line Study* (Human Rights Resource Centre, 2011): 87-118.

<sup>91</sup> Max Lane, *Unfinished Nation*, 174-75.

<sup>92</sup> *Ibid.*, 177-78.

<sup>93</sup> See e.g., Simon Butt, *The Constitutional Court and Democracy in Indonesia* (Boston: Brill Nijhof, 2015), 1. The Constitutional Court was formed in 2003, with important functions including constitutional review of challenged statutes, and resolving electoral disputes. Butt credits the Indonesian Constitutional Court with possibly slowing a

Since 1998, two distinct phases of *reformasi* have been observed: 1) 1998-2003/4 – the more conceptual, creative phase during which the constitution was reformed, legislation was written and institutions were debated and created; and 2) post 2003/4 – the implementation phase, which included the practical challenges of getting the newly established constitutional and legal framework to work.<sup>95</sup>

Early during *reformasi*, the Asian Financial Crisis of 1997-98 acted as a catalyst for legal reform in the region, including Indonesia. These internationally supported legal reform efforts were met with mixed success.<sup>96</sup> An evaluation of IMF's involvement early on in Indonesia's financial crisis management, for example, reported that the IMF "misjudged the extent of ownership at the highest level" – referring to Suharto's willingness to undermine agreed-upon banking sector reforms – and "underestimated the resistance to reform likely to be posed by vested interests."<sup>97</sup> One conclusion from the IMF evaluation was the future necessity for "an effective communication strategy to

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reversion to authoritarianism or democratic regression seen in comparable countries. Ibid., 3.

<sup>94</sup> KPK is abbreviated from the Indonesian, *Komisi Pemberantasan Korupsi*, and is a specialized commission with a mandate that includes corruption prevention, investigation and prosecution, as well as coordination with other agencies also combatting corruption.

<sup>95</sup> Sebastiaan Pompe and Dian Rosita, *Indonesian Legal Sector Analysis* [Excerpts Only], prepared following May 2008 mission to Jakarta for AusAID (final report submitted July 31, 2008), 18-20 (on file with the author).

<sup>96</sup> See e.g., Kawai and Schmiegelow, "Financial Crisis," 3-4, and 17-36 (Korea exhibited clear improvement; Philippines showed clear deterioration. Indonesia got worse before showing improvement); International Monetary Fund (IMF) Independent Evaluation Office, "The IMF and Recent Capital Account Crises: Indonesia, Korea, Brazil," *Evaluation Report* (IMF 2003).

<sup>97</sup> IMF, *Evaluation Report*, 1.

enhance country ownership and credibility” – something not done in Indonesia or any countries studied.<sup>98</sup>

Halliday and Carruthers also included Indonesia in their examination into bankruptcy regimes following the Asian Financial Crisis. Regarding Indonesia, the authors describe “flattering statistics (for example, number of cases coming to court, speed of disposition, extent of assets restructured) but also wide-spread disappointment” following extensive substantive and procedural reforms.<sup>99</sup> Indonesian bankruptcy reforms during this period actually did possess local elements and:

[R]elied substantially on an indigenous vision of legal change that preceded the crisis but also rested fundamentally on indigenous Indonesian law inherited without amendment from the Dutch colonial period.<sup>100</sup>

The diagnosis performed in the case was for the most part well-founded and included input and local knowledge from Indonesian academics and practitioners, in addition to international financial institutions (IFI) theories. And yet the reforms did not take hold: the pre-Crisis practice has returned, despite the post-Crisis reform.<sup>101</sup> Why?

One reason offered is what the authors call ‘actor mismatch’ in which influential actors – the debtor owners of major corporations – were left out of the reform process; and when it came to implement the reforms, they resisted. Furthermore, the designers of the reform misjudged the pervasiveness of corruption; the capacity of unscrupulous

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<sup>98</sup> Ibid., 50. Included in the evaluation were IMF’s November 1997 Program, which after initial positive results, torpedoed after Suharto repealed key elements of the reforms to satisfy his cronies. It was not until the August 1998 program with new president Habibie (following failed January and April 1998 programs with Suharto) that decisive measures were taken with regard to needed banking sector reform. Ibid., 11-16.

<sup>99</sup> Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford: Stanford University Press, 2009), 351.

<sup>100</sup> Halliday and Carruthers, *Bankrupt*, 204.

<sup>101</sup> Ibid., 208.

lawyers – corrupt *and* clever – to doom any pretensions of an effective self-regulating profession in the resolution of bankruptcy proceedings either in court or in the court-alternative established by the reforms (the so-called ‘Jakarta Initiative’); and the capacity of the Supreme Court and the Ministry of Justice to frustrate change.<sup>102</sup> These findings are consistent with Daniel Lev’s observation about the years immediately following the 1998 end of Suharto’s military dictatorship: “If anything is especially remarkable about legal reform in Indonesia over the last four years since the fall of Suharto, it is the effective resistance to it.”<sup>103</sup>

And yet, by 2003/4, Kawai and Schmiegelow note that improvements in Indonesia’s indicators “appear[ed] to reflect the gradual consolidation of democratization and decentralization.”<sup>104</sup> In a 2008 report to AusAID, based on a scoping mission to Jakarta, Sebastiaan Pompe and Dian Rosita observed that during the post 2003/4 implementation phase of *Reformasi*, the institutions themselves were “settling down,” becoming more institutionally solidified, and less open and responsive to reform prompts.<sup>105</sup> This time frame is corroborated by foreign direct investment (FDI) flows from the same time period. According to an Organization for Economic Development (OECD) report on Indonesian regulatory reform, a sharp dip in FDI occurred between 1998 – 2004, but has picked up markedly since then, at least in part due to reforms put in place during that time.<sup>106</sup> But again, as above, institutionalized corruption was cited

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<sup>102</sup> Ibid., 196 and 206.

<sup>103</sup> Lev, “State and Law Reform in Indonesia,” 259.

<sup>104</sup> Kawai and Schmiegelow, “Financial Crisis,” at 33

<sup>105</sup> Pompe and Rosita, *Indonesian Legal Sector Analysis*, 19 (referring to the change of institutional context as being “from fluidity to rigidity”). On file with the author.

<sup>106</sup> See OECD, “Setting Priorities for Reform and Development in Indonesia,” in *OECD Reviews of Regulatory Reform: Indonesia 2012: Strengthening Co-ordination and Connecting Markets* (OECD Publishing, 2012), Figure 1.4, 52.

by the OECD as a problem for Indonesia – seen for example, in the process of business start up, as well as during dispute settlement – arguably made worse by decentralization efforts, which has worked to increase the number of decision-makers across the archipelago of Indonesia.<sup>107</sup>

*c. History of relevant donor involvement in Indonesia*

Foreign donor involvement in Indonesia broadly tracks its economic fortunes. The uptick in foreign financial assistance available to Indonesia in the 1970s marked a turning point in Indonesian legal reform with more players, and increased technical assistance.<sup>108</sup> Of particular relevance to this study is the 1970s work of the International Legal Center (ILC), supported by the Ford Foundation, toward legal education reform, which included placing foreign teaching and research fellows inside Indonesian university law faculties, coinciding with the Indonesian governments' own policy to improve legal training.<sup>109</sup> Other donors, including the World Bank, the Asia Foundation, the Netherlands, Australia, Canada, and the United States in addition the Ford Foundation, were among those who participated in Indonesian legal development assistance.

Consistent with RoL assistance trends discussed in chapter 3, beginning in the 1970s, the early focus of international donor involvement in Indonesia was economic. Given the economic focus, as well as the arguably competing 'development strategies' of financial deregulation on the one hand, and legal institution-building via newly drafted

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<sup>107</sup> See OECD, "Setting Priorities for Reform and Development in Indonesia," 48-49.

<sup>108</sup> Linnan, "Indonesian Law Reform," 77. Also included in these reforms were efforts to document Indonesian law. *Ibid.*, 77-78.

<sup>109</sup> *Ibid*; see also Dezalay and Garth, *Asian Legal Revivals*, 124-25.

economic laws, such as banking and capital markets laws, on the other, the Indonesian agencies and ministries that were the target of legal reforms included what were considered both lawyers' institutions (e.g., Ministry of Justice, the Supreme Court, the Attorney General's Office) and economists' institutions (e.g., Ministry of Finance, the Coordinating Ministry for the Economy, the Ministry of Industry),<sup>110</sup> thereby putting in place a system of donor-assisted RoL promotion that spanned across many institutions and agencies of the vast Indonesian government bureaucracy.

Of particular relevance here, USAID's ELIPS (Economic Law and Improved Procurement Systems) project<sup>111</sup> ran from 1992 – 2001 and included a legal education component, and continued under successor programs including PEG (Partnership for Economic Growth), started in 1999,<sup>112</sup> and ELIPS II (Economic Law and Institutional and Professional Strengthening), which finished in 2004.<sup>113</sup> Additionally, ELIPS II identified and supported 31 Indonesians to attend and complete Masters of Law (LL.M.) degrees at U.S. law schools, including the University of San Francisco, University of Washington (Seattle), American University (Washington, DC), and the University of Wisconsin (Madison).<sup>114</sup> Non-specialists may not see the immediate value of such educational exchanges, and the long-term time horizons required to see change run

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<sup>110</sup> See Linnan, "Indonesian Law Reform," 77-82.

<sup>111</sup> See e.g., Dezalay and Garth, *Asian Legal Revivals*, 223-26.

<sup>112</sup> See e.g., Linnan, "Indonesian Law Reform," 80-81.

<sup>113</sup> ELIPS I, PEG and ELIPS II funded by USAID were implemented by the for-profit contractor Checchi Company and Consulting, Inc. For Checchi's descriptions of the programs, see Checchi Company and Consulting, Inc., "Indonesia: Project Details," [http://www.checchiconsulting.com/index.php?option=com\\_projects&country\\_id=31&Itemid=8](http://www.checchiconsulting.com/index.php?option=com_projects&country_id=31&Itemid=8).

<sup>114</sup> See *Final Report: Contract No. PCE-I-00-98-00016-00 Task Order 821: Indonesia Economic Law, Institutional and Professional Strengthening (ELIPS II) Activity*, prepared by Program Pasca Sarjana Fakultas Hukum, University of Indonesia (October 2004), 7-8, 10-13, and 16. Of note, some of this study's participants earned their LL.M. degrees through ELIPS II.

counter to typical RoL assistance timelines. Yet Lev – specifically offering investment advice to the IMF, World Bank, USAID, AusAID, and others – argues that the:

[M]ost obvious strategic expenditure should be on education – both general and professional – to produce not only lawyers, but also the accountants, engineers, doctors and others most likely eventually to generate pressure groups, inhabit political parties, and set the standards that will make for a better state.<sup>115</sup>

Lev is not alone in recognizing the value of education, and legal education in particular, as being a catalyst for change, however slow.<sup>116</sup> Informants for this study spoke approvingly of the ELIPS projects – some of whom were themselves beneficiaries, and are now participating in Indonesian RoL assistance in some professional capacity.<sup>117</sup>

Other observations about donor involvement in Indonesia are not nearly so positive. In seeking to answer the question: “How significant and effective has foreign aid to Indonesia been?” – economists Anis Chowdhury and Iman Sugema examine possible correlation between donor involvement and economic indicators, including economic growth (as measured by GDP), budget deficits, and development expenditure.<sup>118</sup> In tracing the financial flows through historical events in Indonesia, the authors observe that the Indonesian government routinely turns to donors in order to fill its budget gaps, instead of building Indonesia’s internal revenue generating systems.<sup>119</sup>

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<sup>115</sup> Lev, “Conceptual Filters and Obfuscation in the Study of Indonesian Politics,” 354-55.

<sup>116</sup> See Veronica L. Taylor, “Legal Education as Development,” in *Legal Education in Asia: Globalization, Change and Contexts*, ed. Stacey Steele and Kathryn Taylor (London and New York: Routledge, 2010), 216-40.

<sup>117</sup> See Informants 7 (interview with author, April 19, 2012), and 34 (interview with author, September 19, 2012).

<sup>118</sup> Chowdhury and Sugema, “Foreign Aid to Indonesia,” 186-216.

<sup>119</sup> Chowdhury and Sugema, “Foreign Aid to Indonesia,” 200-02. See also, Iman Sugema and Anis Chowdhury, “Has Aid Made the Government of Indonesia Lazy?” *Asia-Pacific Development Journal* 14 (June 2007), 120 (answering the title question in

Yet in exchange for favorable financial terms with donors, Indonesia has lost some of its independence on policy as a result of “non-financial conditionality” that accompanies donor funding, including “donor-determined procurement, earmarking and policy reform.”<sup>120</sup> The authors also point out that donors have covered as much 80 and 90 percent of development expenditure (in 1988 and 1999, respectively) – percentages more than those at the start of General Suharto’s pursuit of economic development in 1971 (68 percent of development expenditure covered by donors).<sup>121</sup> Writing in 2005, the authors conclude that Indonesia must address its aid dependence with a gradual reduction in aid sought.<sup>122</sup>

In January 2007, under President Susilo Bambang Yudhoyono (SBY), Indonesia disbanded the Consultative Group on Indonesia (CGI), a donor coordination forum, coordinated by the World Bank for all donors / creditors of Indonesia.<sup>123</sup> Originally established in 1967 as the Inter-Governmental Group on Indonesia (IGGI), the group was chaired by the Dutch from 1967 until 1991, when the Indonesian government – then led by General Suharto – determined that the Netherlands had overstepped in its role, using the IGGI as an instrument to intimidate, and using foreign aid to impose its

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the affirmative, and arguing that their findings suggest that “the Government of Indonesia has to reduce its dependence on aid”).

<sup>120</sup> Chowdhury and Sugema, “Foreign Aid to Indonesia,” 201.

<sup>121</sup> *Ibid.*, 191 (Figure 3) and 202.

<sup>122</sup> *Ibid.*, 209.

<sup>123</sup> See Patung, “Consultative Group on Indonesia (CGI),” *Indonesia Matters*, January 27, 2007; see also, International NGO Forum on Indonesian Development (INFID), “Profiles of Indonesian Debts,” *Working Paper* (August 2007), 19-20. Somewhat surprisingly, news archive searches reveal that English-language media did not report on SBY’s disbanding of the CGI at the time, despite high-profile members like the World Bank, the IMF, and USAID.

policies on the government of Indonesia.<sup>124</sup> The CGI was then established under different donor leadership (World Bank, instead of the Netherlands) with the expectation of focusing on aid *per se*, without linking to issues separate from the aid.<sup>125</sup> But in 2007, President SBY made the domestically popular decision that the CGI was no longer necessary; and according to Finance Minister Sri Mulyani, Indonesia's situation had changed such that it preferred to deal one-on-one with its remaining few creditors, including The World Bank, The Asian Development Bank, and Japan.<sup>126</sup> Somewhat surprisingly, English-language news archive searches come up empty about this disbanding, despite high-profile members like the World Bank, the IMF and USAID. Also of note, an OECD anti-corruption task team report on Indonesia indicates that a pared-down donor coordination group may have been revived at the Indonesian government's request in 2009.<sup>127</sup>

According to Organization for Economic Co-operation and Development (OECD) statistics, in 2013, Indonesia received USD \$986.44 million in gross Official Development Assistance (ODA) from all donors (bi-lateral and multi-lateral).<sup>128</sup> This was down from a high, in 2010, of USD \$1.875 billion. Based on 2012-13 averages of gross disbursements in ODA, Indonesia was the top recipient of Australian aid, at USD \$582

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<sup>124</sup> INFID, "Profiles of Indonesia's Foreign Debts," 19 (citing a BAPPENAS study). BAPPENAS is Indonesia's National Development Planning Agency, discussed in detail in chapter 6, Section II (a).

<sup>125</sup> INFID, "Profiles of Indonesia's Foreign Debts," 19.

<sup>126</sup> See Patung, "Consultative Group on Indonesia (CGI);" see also, INFID, "Profiles of Indonesian Debts," 19-20.

<sup>127</sup> OECD Development Assistance Committee (DAC) Network on Governance, Anti-Corruption Task Team, "Working Towards Common Donor Responses to Corruption: Donor Responses to a Government Led Anti-Corruption Program: Indonesia," OECD (March 31, 2009), 2.

<sup>128</sup> OECD Statistics (OECD.*Stat*), using data on ODA gross loans, excerpted from dataset "Aid disbursements to countries and regions (DAC2a)," data extracted September 30, 2015 (on file with the author).

million; fourth on Japan's list of ODA recipients, at USD \$895 million (behind Myanmar, Vietnam and India); and eighth for the Netherlands, receiving USD \$43 million.<sup>129</sup>

Lending from the Asian Development Bank peaked in 2009, at USD \$125.37 million, down to USD \$30.3 million in 2013.<sup>130</sup> World Bank funds (through the International Development Association (IDA)) to Indonesia peaked in 2008, at USD \$493.61 million, to USD \$243.74 million in 2009, dropping to USD \$4 million in 2013.<sup>131</sup> These numbers suggest that Indonesia is becoming increasingly selective about donor involvement taking place within its borders; and/or donors are re-thinking their relationships with Indonesia.

A final, possibly related note is that Indonesia has begun taking on the role of donor itself, reportedly giving over \$40 million in assistance (technical and humanitarian) to other countries from 2002-2012.<sup>132</sup> Indonesia is also one of ten contributing partner countries of the World Bank's South-South Facility, created in 2008 in order to provide funding for the South-South Knowledge Exchange, which facilitates peer-to-peer learning in the Global South.<sup>133</sup> Furthermore, interviews also revealed a

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<sup>129</sup> OECD, "Japan," *Development Cooperation Report 2015: Making Partnerships Effective Coalition for Action*, (Paris: OECD Publishing, 2015), 232; OECD, "Australia," *Development Cooperation Report 2015*, 176. OECD, "The Netherlands," *Development Cooperation Report 2015*, 244.

<sup>130</sup> OECD.*Stat*, using data on ODA gross loans, excerpted from dataset "Aid disbursements to countries and regions (DAC2a)," data extracted September 30, 2015 (on file with the author).

<sup>131</sup> Ibid.

<sup>132</sup> David Hatch, "Indonesia, Emerging Aid Donor," *The Interpreter* (July 25, 2012), available at: <http://www.lowyinterpreter.org/post/2012/07/25/Indonesia-emerging-aid-donor.aspx> (last visited October 10, 2015). (David Hatch – at the time he wrote this – was USAID's Deputy Program Director for Indonesia.)

<sup>133</sup> The World Bank website, *South-South Knowledge Exchange*, "South-South Facility's Background," available at: <http://wbi.worldbank.org/sske/page/south-south-facilitys-background> (last visited October 10, 2015).

desire by at least some Indonesian academics to see Indonesia acting as a donor, in its own right.<sup>134</sup>

*d. Donor-Indonesia relationship dynamics in RoL assistance in Indonesia*

Though there is no academic literature specifically on the point of relationship dynamics between donors and partners in the case of Indonesian RoL assistance, Pompe and Rosita observed in a 2008 internal AusAID report that some donors were too quick to accept what was told to them by their counterpart institution, deeming this to be ‘ownership,’ even if what they were being told was actually counter to the institution’s own reform policy:

In their eagerness to service institutional demands, donors have not always given attention to whether such demands accord with established institutional policies, or perhaps were directed to get away from them. ... In not a few cases donors in their eagerness to please and assist, have found themselves working at cross-purposes with reform policies officially issued by the counterpart institution.<sup>135</sup>

A prominent example of such ‘officially issued’ reform policies is the Indonesian Supreme Court’s 2003 *Blueprint of Reform*, drafted with NGO assistance under the leadership of Chief Justice Bagir Manan,<sup>136</sup> a non-career Supreme Court judge credited by many study informants as being a key individual for Indonesia’s judicial reform efforts.<sup>137</sup> In 2010, the Supreme Court also issued a longer term *Blueprint of Reform of*

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<sup>134</sup> Informants 13, 14.

<sup>135</sup> Pompe and Rosita, *Legal Sector Analysis*, 18.

<sup>136</sup> Pompe and Rosita, *Legal Sector Analysis*, 22-23; see also Pompe, *The Indonesian Supreme Court*.

<sup>137</sup> See e.g., Informants 11 (interview with author, April 25, 2012) and 21 (interview with author, April 25, 2012).

*the Judiciary, 2010-35*.<sup>138</sup> Informants who worked on the 2003 and/or the 2010 *Blueprints* take pride in what was accomplished, at least one of whom who takes some comfort in the fact that no matter who the Chief Judge is, the *Blueprints* already exist as official policy – and thus hold the power of the status quo providing an insurance policy against leadership turnover. Even so, the same informant discussed the *Blueprints* rather critically as being used as a tool for donors – namely, a menu from which they can pick-off piecemeal whatever matches their agendas, without being responsible to overarching priorities or sequencing set by Indonesia.<sup>139</sup>

Another perspective about donor involvement in Indonesia comes from the international development community and its Indonesian partners. In the 2009 *Jakarta Commitment: Aid for Development Effectiveness* – an Indonesia-specific follow-up to the *Paris Declaration* and *Accra Agenda* – the Government of Indonesia and partnering donors described what they see as Indonesia’s role in improving aid effectiveness. The first paragraph of the *Jakarta Commitment* (JC) states:

Given the country's development successes and its position as a large Middle Income Country, Indonesia has a strong contribution to make to efforts aimed at improving the international aid architecture for all recipients including both Low Income Countries (LICs) and Middle Income Countries (MICs).<sup>140</sup>

The JC further observes that it is the *utilization* of development resources, and not only a *lack* of resources, which has been a main constraint keeping Indonesia from achieving

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<sup>138</sup> Supreme Court Justice Takdir Rahmadi, *Reform Programs in the Case Management: the Indonesian Judiciary Experiences*, prepared for ASEAN Law Association workshop, Bali, Indonesia, February 2012, <http://www.aseanlawassociation.org/11GAdocs/workshop2-indo.pdf>.

<sup>139</sup> Informant 10 (interview with author, April 24, 2012).

<sup>140</sup> *Jakarta Commitment*, 2009.

planned development outcomes.<sup>141</sup> Thus, we see an official acknowledgment that there is room for improvement in how development resources are utilized in Indonesia.

### III. The case studies

Having laid out the relevant Indonesian context in detail above, we now turn to the specific data that informs this study – namely the RoL assistance case studies and the profiles of the local actors staffing them. The four RoL assistance case study projects and programs chosen for inclusion in the study, all of which were ongoing in 2011-12, are: AusAID’s AIPJ (*Australia Indonesia Partnership for Justice*), USAID’s C4J (*Changes for Justice*), USAID’s E2J (*Educating and Equipping Tomorrow’s Justice Reformers*), and World Bank’s J4P (*Justice for the Poor*).

One common goal among them is providing support toward capacity building in Indonesia’s justice sector – through improved legal education and clinics (E2J);<sup>142</sup> through training for judges, prosecutors, and upgrades of case management systems (C4J);<sup>143</sup> and through recruiting and training paralegals throughout the Indonesian provinces to increase both access to justice, and awareness of legal rights (J4P).<sup>144</sup> Capacity building is also integral to all five outcomes for AusAID’s AIPJ – including improving prosecutions of corruption cases, increasing access to and use of legal

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<sup>141</sup> *Jakarta Commitment*, Paragraph 4 (emphasis added).

<sup>142</sup> See USAID Indonesia, “RFA: E2J,” 5-6, and 20-21.

<sup>143</sup> USAID, “C4J Scope of Work,” 30 and 34 (target numbers include providing training for 300 judges and 200 prosecutors). On case-management, see e.g., Informant 41 (interview with author, September 20, 2012).

<sup>144</sup> For example, paralegals are trained to know what documents are required (e.g., divorce certificate – as proof of head of household) in order to qualify for government benefits. See e.g., Informant 20 (interview with author, April 26, 2012).

information, increasing capacity of civil society organizations (CSOs), and improving the framework and delivery of the legal aid system.<sup>145</sup>

*a. Case study project / program profiles*

*Table 1* depicts basic information about the four ongoing RoL assistance projects and programs studied for this dissertation, including who the donor is, the project or program name, the time period, topline budget numbers, the contractor(s) hired to implement it, and project or program objectives or parts of the mission that are related to capacity building in support of the justice sector.

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<sup>145</sup> AIPJ, “2011 Annual Work Plan,” 1-2.

Table 1.

DONOR	Project/ Program	Time Period	Budget	Contractors	Mission/Objective
USAID	<b>C4J – Changes for Justice</b>	12 May 2010-May 2014	\$19,071,908 <sup>146</sup>	<i>Chemonics</i> , Universitas Indonesia	“to sustain and deepen reforms in the justice sector to produce a more accountable and higher performing justice system”
USAID	<b>E2J - Educating and Equipping Tomorrow's Justice Reformers</b>	Jan 2010-Jan 2014	\$9,813,573 <sup>147</sup>	<i>TAF Indo</i> , Kemitraan/ Partnership UW Asian Law Center (ALC)	“to develop a generation of lawyers, public servants and scholars who are well-versed in the knowledge and skills needed to sustain justice sector reforms by strengthening capacity of key Indonesian institutions – particularly law schools and CSOs.”
AusAID	<b>AIPJ - Australian Indonesian Partnership for Justice</b>	10 June 2011-31 May 2014	AU \$28 million <sup>148</sup> (~USD 20.58 million <sup>149</sup> )	<i>Cardno</i>	Of 5 priority areas: “2. Improving the capacity of public prosecutors to conduct prosecutions and communicate with the community in relation to corruption-related crimes; ... 5. Supporting the capacity of civil society and human rights commissions to support law and justice sector reform”

<sup>146</sup> USAID Indonesia, “Fact Sheet – Changes for Justice,” June 9, 2010 (on file with author).

<sup>147</sup> USAID, “USAID / Indonesia Award Notification - E2J,” March 20, 2011 (webarchive on file with the author). The E2J grant was awarded to The Asia Foundation (TAF), headquartered in San Francisco, in the amount of \$9,813,573.

<sup>148</sup> Cardno, “Australia-Indonesia Partnership for Justice (AIPJ),” AIPJ (June 17, 2011)(2-page program brochure) (on file with author). AIPJ was continued in 2015, with the same implementing contractor, Cardno, and a reported budget of Aus \$52.7 million. Cardno, “Australia Indonesia Partnership for Justice (AIPJ),” [http://www.cardno.com/en-us/projects/Pages/Projects-Australia\\_Indonesia\\_Partnership\\_for\\_Justice.aspx](http://www.cardno.com/en-us/projects/Pages/Projects-Australia_Indonesia_Partnership_for_Justice.aspx) (visited May 16, 2016). The original agreement between Indonesia and Australia (signed in 2011) listed estimated financial contributions by the Government of Australia in the amount of AU \$50 million. *Subsidiary Arrangement between the Government of Australia and the Government of the Republic of Indonesia related to the Australia Indonesia Partnership for Justice*, Section 11.1, 4 (May 2, 2011).

<sup>149</sup> Calculations based on Australian – U.S. dollar exchange rate of May 16, 2016.

World Bank	<b>J4P – Justice for the Poor (has multiple sub-parts)</b>	2002 – present	Approximately AU \$3.7 million since 2008 <sup>150</sup> (~USD 2.77 million)	None. Local satellite office works with partners, including BAPPENAS, PNPM, PEKKA, PSHK, AusAID, and others.	“supporting increased community demand for better justice services and improved supply of those services by state, non-state and hybrid institutions.” <sup>151</sup>
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At the project level, donors working in Indonesian RoL assistance typically use foreign contractors to manage the implementation and delivery of their projects and programs. The case studies employ two for-profit contractors – Chemonics (U.S.) and Cardno (Australia); one international NGO with a local office in Jakarta, The Asia Foundation (TAF, headquartered in San Francisco, U.S); and lastly, a World Bank-assembled team of local and international RoL professionals and managers, working out of a World Bank satellite office in Jakarta.

It is important to note that *Table 1* represents a snap-shot of the case studies at the time of field work, 2011-12. Not depicted are the dynamic relationships that evolve(d) over time between and among these case studies and the people who staff them. For example, the World Bank’s J4P program receives funding and other support from the Australian Government (acting through its former aid agency, AusAID), as part

<sup>150</sup> J4P budget numbers specific to the Indonesian component of the program proved difficult to pinpoint. This number is from sources in the Australian government, a main contributor to J4P through its collaboration with the World Bank. See e.g., AusAID/World Bank Collaboration, *East Asia and the Pacific Justice for the Poor Initiative (EAP-J4P) 2008-2013*, January 2008.

<sup>151</sup> World Bank, “Justice for the Poor: Indonesia,” <http://go.worldbank.org/U3I9MHA9K1>.

of a regional collaboration between the two donors.<sup>152</sup> By 2016, the programs seem to have merged under the umbrella of AIPJ.<sup>153</sup>

Another example demonstrates how interconnected the RoL assistance professional community in Jakarta is: TAF, in addition to being implementing manager for USAID's E2J project, was also hired as a sub-contractor for specific components of AusAID's AIPJ – otherwise implemented by Cardno. The same can be observed about the many RoL assistance professionals – particularly on the Indonesian side. As discussed further in chapter 6, the same professional might work as a consultant on the assessment or design for one case study, and then be hired as implementing staff for another. Furthermore, government officials and other Indonesian partners routinely work with several different donors who are working in the same area of reforms.

*Table 2*, below, organizes the case studies according to the parties involved – namely, in column 2, the donors, their contractors, staff and experts, and in column 3, the Indonesian partner organizations.<sup>154</sup> The large number of parties depicted in *Table 2* indicates that Indonesia falls in line with the trend discussed in chapter 3 regarding a proliferation of actors in RoL assistance worldwide.

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<sup>152</sup> See e.g., AusAID/World Bank Collaboration, *East Asia and the Pacific Justice for the Poor Initiative (EAP-J4P) 2008-2013*, January 2008.

<sup>153</sup> Cardno, "Australia Indonesia Partnership for Justice (AIPJ)," [http://www.cardno.com/en-us/projects/Pages/Projects-Australia\\_Indonesia\\_Partnership\\_for\\_Justice.aspx](http://www.cardno.com/en-us/projects/Pages/Projects-Australia_Indonesia_Partnership_for_Justice.aspx). (According to the program description: "The World Bank's Justice for the Poor program transitioned to AIPJ in July 2014 and complements AIPJ's objective of fair and accessible justice services through links to the paralegal network and the legal aid work AIPJ has been conducting with partners.")

<sup>154</sup> Information for the diagrams was obtained from official project/program websites and documents, as well as interviews with project/program managers and staff.

Table 2.

Project/Program	Donor / contractors	Indonesian Partners
<p><b>C4J<sup>155</sup></b>  <b>4-year,</b>  <b>\$19,071,908</b>  <b>million project</b></p>	<p>Donor: United States, represented by USAID            → USAID embassy personnel, Jakarta / Senior Rule of Law adviser with Indonesia USAID mission (contract employee).            → Implementing contractor for C4J: American for-profit contractor, Chemonics, Int'l.            → C4J staff of primarily junior Indonesian nationals, many originating from civil society; and a high-level Indonesian deputy director, with 17 years experience at USAID; and an international chief of party (COP).            → substantive experts, as needed</p>	<p>Supreme Court, Attorney General's Office, National Development Planning Agency (BAPPENAS)</p>

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<sup>155</sup> See chapter 7, Section IV, for a detailed discussion of the signed agreements underlying the bilateral partnerships between Indonesia and the United States, and Indonesia and Australia.

<p><b>E2J</b>  <b>4-year</b>  <b>\$9.8 million project</b></p>	<p>Donor Principal: United States, represented by USAID  → USAID embassy personnel, Jakarta / Senior Rule of Law adviser with Indonesia USAID mission (contract employee).  → Implementing contractor: Non-profit The Asia Foundation (TAF) headquartered in San Francisco, U.S., with offices in Jakarta.  → E2J staff of all Indonesian nationals (referred to as CCNs – Cooperating Country Nationals)<sup>156</sup>, with various local affiliations, and an international Chief of Party (COP)  → University of Washington School of Law: sub-contractor for legal education expertise; partner for LL.M. / study abroad components  → <i>Kemitraan</i> / the Partnership (Indonesian hybrid – government / NGO think tank): partner in design, shared personnel</p>	<p>University of Indonesia (Depok),  University of Gajah Mada (Yogyakarta),  University of Airlangga (Surabaya),  University of Hasanuddin (Makassar),  University of Padjajaran (Bandung),  University of Sriwijaya (Palembang),  University of Udayana (Bali),  University of Sumatera Utara (Medan);  19 Indonesian civil society organizations (CSOs), including LBH Jakarta, PUSAKA, KOPEL, WALHI; and Formal Justice Institutions (FJIs), including the Indonesian Attorney General’s Office, Indonesian Supreme Court, and BAPPENAS.</p>
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<sup>156</sup> See USAID, “RFA: E2J,” 49.

<p><b>AIPJ</b>  <b>5-year,</b>  <b>AU \$28 million</b>  <b>program</b></p>	<p>Donor Principal: Australia, represented by AusAID  → AusAID embassy personnel, Jakarta / AusAID AIPJ Program Director  → Implementing contractor: Australian for-profit contractor Cardno, headquartered in Brisbane, Australia.  → AIPJ team of primarily Indonesian nationals managed by international RoL professionals.  → as needed, also employs Indonesian NGOs and individual consultants, and substantive expert consultants (Indonesian and international).  → partners with The Asia Foundation and the World Bank<sup>157</sup> in furtherance of joint goals</p>	<p>Supreme Court, Attorney General's Office, Ministry of Law and Human Rights (BPHN), <i>Kementerian Dalam Negeri RI - Direktorat Jenderal Kependudukan dan Catatan Sipil, Kementrian Agama RI - Direktorat Jenderal Bimbingan Masyarakat Islam</i>, BAPPENAS, The Judicial Commission, The National Commission on Violence Against Women, The Corruption Eradication Commission (KPK), The Prosecutorial Oversight Commission, Women Heads of Household (PEKKA), <i>Pusat Kajian Perlindungan Anak UI</i>, Indonesian Legal Aid Foundation (YLBHI), Mitra Netra, reform teams of the Supreme Court and the Attorney General's Office, and 16 CSOs (managed by donor-partner The Asia Foundation), including Indonesian Corruption Watch (ICW), Lembaga Kajian dan Advokasi untuk Independensi Peradilan (LeIP), Lembaga Bantuan Hukum Jakarta (LBH Jakarta), Masyarakat Pemantau Peradilan Indonesia FH-UI (MaPPI FH UI), and Pusat Studi Hukum dan Kebijakan (PSHK)</p>
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<sup>157</sup> See AusAID/World Bank Collaboration, "EAP-J4P," 5-7, The program is a multi-country collaboration, encompassing Indonesia, Cambodia, Timor-Leste, Solomon Islands, and Vanuatu.

<p><b>J4P</b>  <b>2002 – present</b>  <b>(ongoing program)</b></p> <p><b>~AU \$3.8 million</b>  <b>since 2008<sup>158</sup></b></p>	<p>Donor Principal: World Bank,<sup>159</sup> represented by in-house implementing managers  → World Bank Satellite Office – PNP Support Facility, Jakarta  → WB Senior Counsel managing team of ‘specialists’ – both national (e.g., Social Development Specialist) and international (e.g., Monitoring and Evaluation Adviser)  → partners directly with other local entities working in empowerment, including PEKKA (Female-Headed Household Empowerment Program), PNPM (National Community Empowerment Program), and others.  → partners with AusAID,<sup>160</sup> Van Vollenhoven Institute, Open Society Institute - Jakarta and others</p>	<p>Directorate of Law and Human Rights, National Development Planning Agency (BAPPENAS), Supreme Court, Support for Poor and Disadvantaged Areas Project (SPADA), National Community Empowerment Program (PNPM), Female Headed Household Empowerment Program (PEKKA), Indonesian Centre for Law and Policy Studies (PSHK), Rapid Agrarian Conflict Appraisal (RACA) Institute</p>
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*b. Profiles of local actors involved in case studies*

This section offers basic information about the profiles of the local actors working on the design and implementation of the four case study projects. In order to protect the anonymity of informants, the demographic information of informants is presented in the aggregate, instead of by case study. A further reason for aggregating across the case studies is to avoid double-counting, when, as described above and discussed in more detail in chapter 6, a local actor has a professional relationship with more than one case study project. As we see in *Chart 1*, below – which organizes the 38 informants

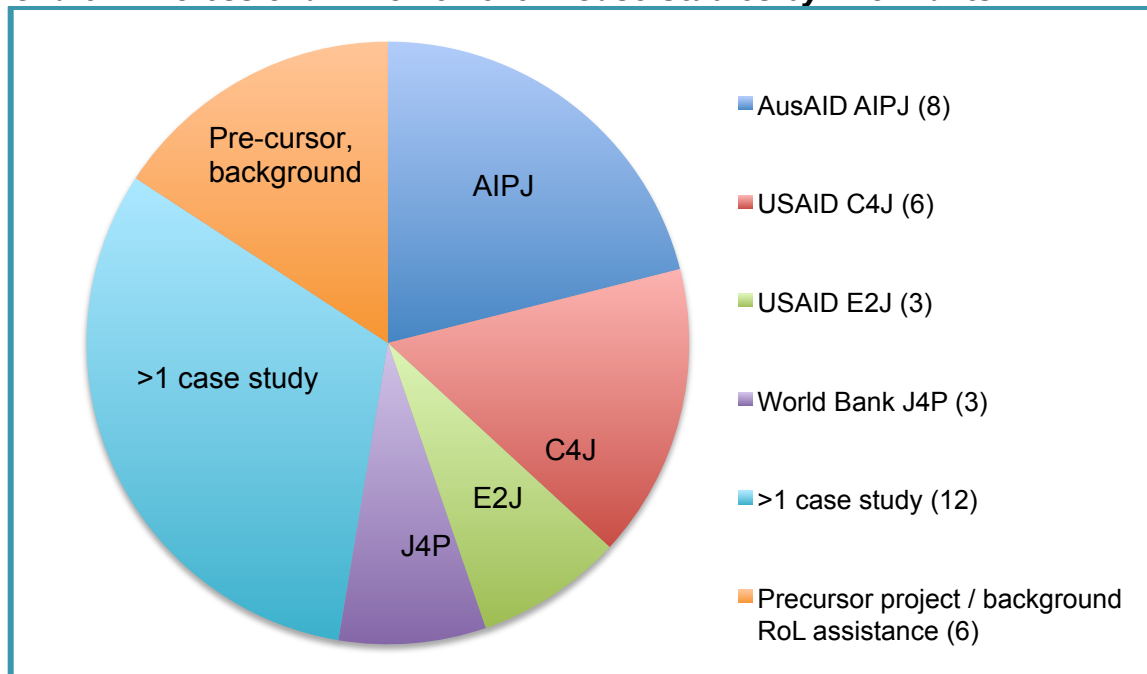
<sup>158</sup> See above, footnote 146.

<sup>159</sup> The program has evolved, and is part of multi-country, multi-donor program.

<sup>160</sup> AusAID/World Bank Collaboration, “EAP-J4P,” 5-7.

according to the case studies with which they had professional involvement – 12 informants reported professional involvement with more than one case study project.

**Chart 1. Professional Involvement in Case Studies by Informants**



Of the 38 informants interviewed for this study,<sup>161</sup> roughly 75 percent are Indonesian national (28), with the remaining 10 international RoL professionals originating from countries including the United States, Australia, and the Netherlands. Slightly more than half (21) were men; 17 were women. Of the 28 Indonesian nationals interviewed, three-fourths (21) had western degrees. Nine out of ten internationals interviewed were living in Jakarta at the time of their professional involvement with the case studies. Only four of those ten reported being fluent in Indonesian – three of whom worked on AIPJ in some capacity,<sup>162</sup> the fourth for J4P. The remaining six reported either ‘no Indonesian language skills,’ ‘pleasantries’ only,’ or as one informant described his own *Indonesian* skills: ‘terrible.’ In addition to locations in Indonesia, the geographic

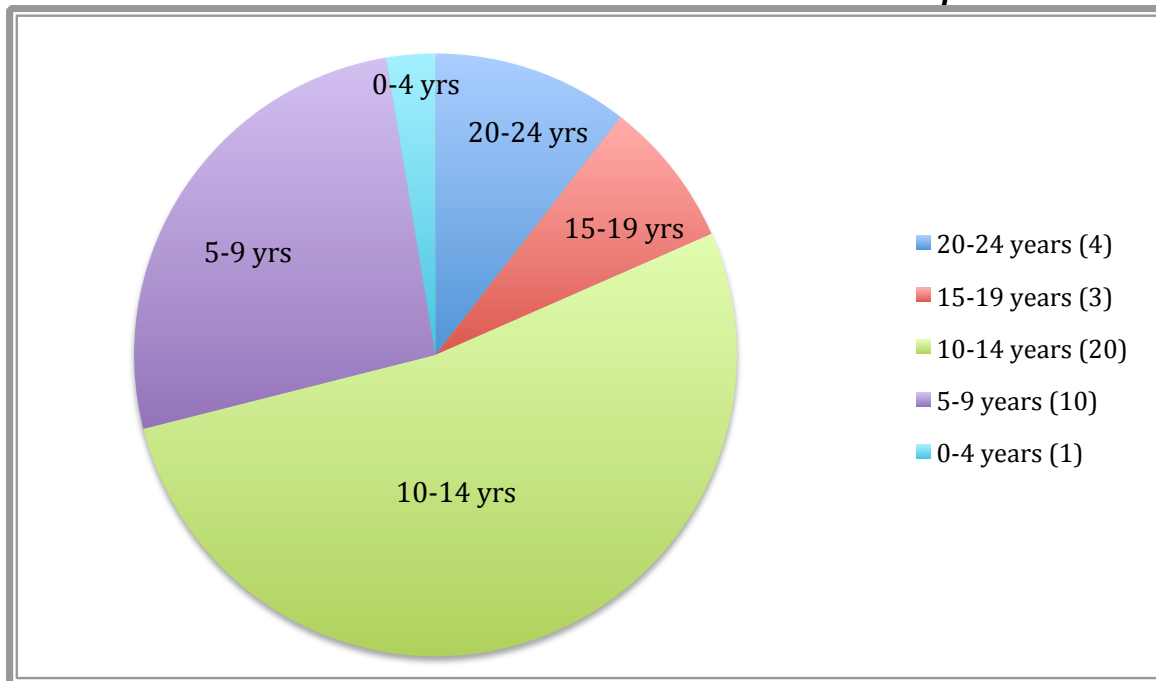
<sup>161</sup> See chapter 2 for details on how informants were chosen for inclusion in the study.

<sup>162</sup> Employed either by the donor, AusAID, or by Cardno, the implementing contractor.

experience of the international informants' includes countries such as Afghanistan, Cambodia, Congo, Iraq, Sudan, Timor-Leste, and Vietnam.

As discussed above, one of the reasons Indonesia is a particularly good location for this study is because it is home to a pool of potential interviewees who possess decades' long experience, and expertise not previously documented. *Chart 2*, below, depicts how many years of RoL assistance experience each of the 38 informants reported.<sup>163</sup> More than half (20) have over a decade experience, with seven more reporting 15 or more years of experience. Only one had less than five years' experience.

**Chart 2. Informants' Years of Professional RoL Assistance Experience**



A final demographic observation about the profiles of implementing teams, that will be revisited in chapters 6 and 7, is that all four case studies have project or program hierarchal structures in which the international RoL professionals inhabit the managerial positions, supervising a team of primarily Indonesian nationals. Specifically, and at the

<sup>163</sup> Verified, whenever possible via academic, donor, or implementing contractor websites, publicly posted CVs, LinkedIn profiles (also self-reported).

time of fieldwork in 2012, the ‘chiefs of party’ (COPs) of all four case studies were international. Three case studies also employed a second-tier managerial position – below COP, but still higher than other team members – which was held by Indonesian nationals. Two of these managers reported wide discretion in their reform efforts, while the third reported that ‘most’ of his/her ideas were ultimately incorporated by higher-level donor agents.<sup>164</sup>

#### **IV. Conclusion**

Indonesia is a compelling location in which to study RoL assistance for many reasons, most notably because of the experienced personnel designing and implementing it there. The pool of RoL professionals from which donors, their implementing contractors, and the Indonesian government hire experts and staff are qualified professionals – as evidenced by 37 of 38 informants having five or more years of experience working in the field, and 21 of 28 Indonesian nationals having western degrees on top of their Indonesian higher education.<sup>165</sup> Their experience and education has a pay-off from which this study benefitted. As we see in the coming chapters, informants are extremely sophisticated with regard to RoL assistance – both in how it works as an industry (discussed in chapters 5 and 7), as well as in regard to their ability to shape and influence the assistance using resources available to them (discussed in chapter 8).

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<sup>164</sup> Informants 23 (interview with author, September 11, 2012), 37 (interview with author, 19, 2012), and 41 (interview with author, September 20, 2012).

<sup>165</sup> As we saw in chapter 2, the only initial criteria for inclusion in the study was professional involvement in ongoing or recently concluded RoL assistance, with subsequent focus on involvement in particular case studies. See chapter 2 for details on methodology, including selection of case studies and informants.

In addition to the local actors themselves, the Indonesian setting in which they conduct RoL assistance is conducive to a study of this kind. Indonesia shares characteristics with other places that are host to RoL assistance around the world – including, for example, dealing with the legal legacy stemming from its status as a former colony, as well as having a majority Muslim and yet ethnically diverse population. Also of significance, and perhaps more unique, Indonesia’s 1998 transition to a stable democracy from the authoritarian reign of General Suharto was sparked by student-led protests in the wake of the Asian Financial Crisis, and remarkably peaceful considering the brutal regime being brought to an end.<sup>166</sup>

Indonesia has emerged as a ‘rising power’ in its own right following its 1998 transition to democracy, and continued economic growth. According to USAID’s 2012 Indonesia Deputy Program Director, David Hatch, Indonesia’s pivot to being a provider of aid in the 2000s<sup>167</sup> has led to some very high hopes, including that Indonesia “act as an interlocutor in the dialogue between the Muslim world and the West,” and “serve as a peace-broker in international conflicts.”<sup>168</sup> Similarly, Vibhanshu Shekhar observes that post 9/11, Indonesia’s reputation as a moderate Muslim democracy has led to its emergence as “darling of the West-driven discourse on engaging Islam.”<sup>169</sup> Shekhar also points out Indonesia’s G-20 membership gives it an “advantageous position” as an

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<sup>166</sup> See Max Lane, *Unfinished Nation*. This is not to say there was no violence – some of the protests resulted in deaths, but considering the wars that have been waged for all manners of regime change, the Indonesian example is mild and encouraging in that a mass movement of people brought a corrupt leader to resign.

<sup>167</sup> Indonesia reports providing approximately USD \$42 million in South-South Cooperation over ten years. David Hatch, “Indonesia, the Emerging Aid Donor,” *The Interpreter*, July 25, 2012.

<sup>168</sup> *Ibid.*

<sup>169</sup> See Vibhanshu Shekhar, *Indonesia’s Rise: Seeking Regional and Global Roles* (New Delhi: Indian Council of World Affairs, 2015), 39.

important leader of the Global South.<sup>170</sup> Whether and how this representation will come to pass remains to be seen. The coordinated terror attacks in Jakarta on January 14, 2016, with ISIS<sup>171</sup> claiming responsibility,<sup>172</sup> highlight the work to be done, and the challenging, globally charged environment in which it will be conducted.

The next chapter looks at how structural features of the field of RoL assistance apply in the Indonesian setting, including the field's problematic incentives, its procurement process, and choices made about how the RoL assistance is structured and who should implement it. What we see is that one reason local ownership and partnership have been devalued in design and implementation of RoL projects is because of the way these RoL assistance projects and programs are structured and come into being.

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<sup>170</sup> Ibid., 39 (observing that Indonesia's membership in the G-20 "has not only accorded Indonesia an important place of prominence in global politics, but also given it a voice in the most important global discourses.")

<sup>171</sup> ISIS refers to the Islamic State of Iraq and al-Sham. The same group is also referred to as the Islamic State of Iraq and Levant (ISIL) and Daesh or Daiish, an acronym for the Arabic spelling of the group's name. I use ISIS to be consistent with the following news citations about the event.

<sup>172</sup> Joe Cochrane and Thomas Fuller, 'Jakarta Attack Raises Fears of ISIS' Spread in Southeast Asia,' *New York Times*, January 13, 2016. See also Samantha Hawley, "Jakarta Terror Attack: Survivor Frank Feulner Tells of Horror at Starbucks Café," ABC Online, January 19, 2016, <http://www.abc.net.au/news/2016-01-20/jakarta-attack-survivor-tells-of-horror/7099906> (the experience of the bombing at the Starbucks, told from the perspective of a German political consultant, who was sitting at the table next to the one chosen by the suicide bomber).

## Chapter 5 /

### Structural Features of Rule of Law Assistance as Lived in Indonesia

#### I. Introduction

This chapter serves as an introduction to the issues that are most on the minds of local actors<sup>1</sup> working in ongoing rule of law (RoL) assistance<sup>2</sup> in Indonesia. During interviews, I referred to the following as the ‘what else?’ question: “What else – besides local ownership and partnership – is important to your day-to-day work in RoL assistance?”<sup>3</sup> Whenever possible, interviews with informants included this question – done so for two reasons: 1) to capture an empirical counter-balance to this study’s intentional focus on ‘ownership’ and ‘partnership’ principles; and, related to that, 2) to protect against undertaking an entire study exploring one topic or area of practice, only to find out later that informants actually believed something else was more important to their day-to-day work. In *Chart 1*, we see categories of responses given by informants.

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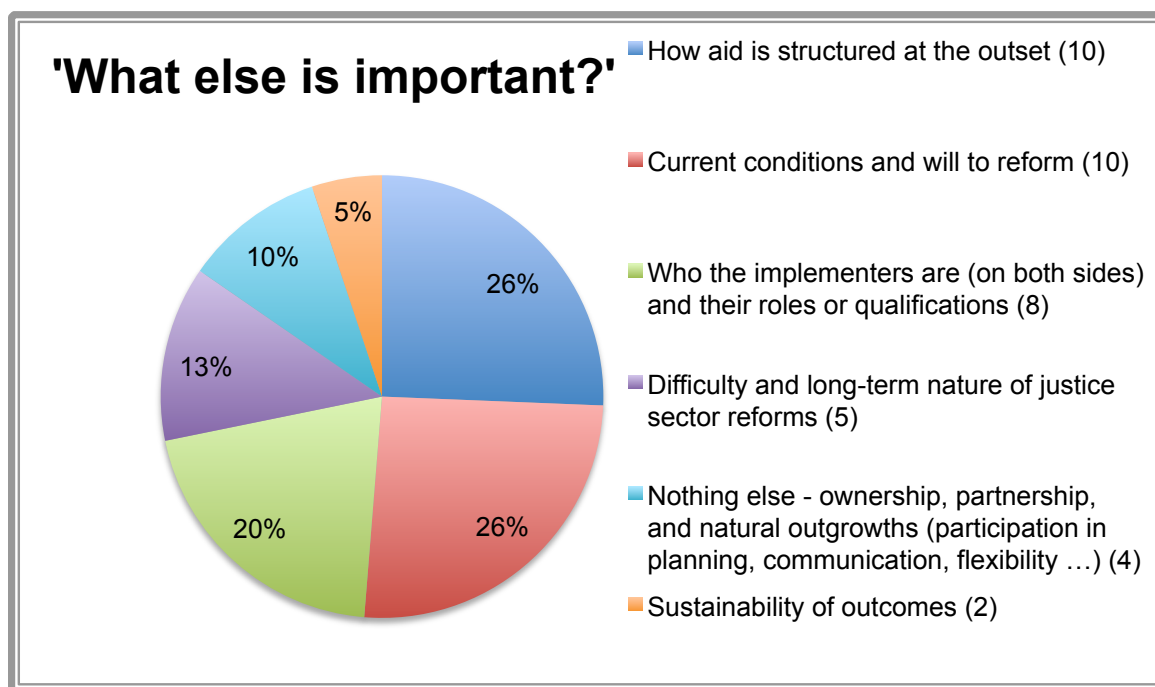
<sup>1</sup> As in chapter 1, the term ‘local actors,’ refers to all participants in the design and implementation of rule of law (RoL) assistance at the site of its delivery, handling day-to-day details of project implementation for both the donor and for the host / recipient / partner country (interchangeable terms) – here, Indonesia. ‘Local partners’ are a subset of local actors, and refer to the Indonesian local actors who professionally partner with the RoL assistance in some way – either on behalf of an Indonesian counterpart agency, or as ‘national expert,’ or part of an implementing team.

<sup>2</sup> Rule of law (RoL) assistance is a broad term referring to all donor-funded programs in support of ‘rule of law’ in the countries that host the programs. It includes legal reform, legislative reform, capacity building of justice sector institutions and their personnel (e.g., Supreme Court and judges, Attorney General’s office and prosecutors), as well as programs increasing access to justice. See chapter 3 for a detailed examination of the underlying meanings of RoL assistance, and how it functions as a sub-field of international development.

<sup>3</sup> Twenty-four of 31 total interviews included this question. Because a few interviews were attended by multiple informants, 26 informants were given the opportunity to speak directly to this question.

Also included in this data-set are informants' spontaneous descriptions of what they believed was most important to their daily work.<sup>4</sup>

Chart 1.



In discussing what local actors believe to be the most important issues facing their work, slightly more than half of the responses (20) depicted in *Chart 1* are either about how the aid was structured at the outset (10) (including how detailed the pre-determined plans were), or about the importance of the current conditions and the local political will to reform (10). Both of these categories carry ownership and partnership implications. For example, detailed pre-set plans that are set in motion during procurement become challenges at the level of implementation because, with regard to ownership, they are often out-of-date, or not in line with local assessments of what is needed. Detailed, pre-set plans are also a challenge to partnership in that they

<sup>4</sup> A few informants gave more than one answer to the 'what else?' question, while others – at some point during their interview – spontaneously offered what they described as the 'most important' or significant issue facing their work.

constrain what funding can be used for, and thus require time-consuming re-negotiation of outcomes or activities when those previously set activities are no longer relevant or needed. With regard to the 10 responses regarding the ‘current condition’ of the local context, including political will to reform, ownership implications are best illustrated by the oft-used companion phrase of “getting local buy-in” for the reforms. Without such ‘buy-in’ as part of the current conditions and political will, local ownership of those reforms will not happen.

Another eight responses (8) were concerned with the identity of the implementers, or what their specific roles, or qualifications would be. Ownership and partnership are again implicated because deciding who implements the assistance also decides the identities of the local actors with the most say over the direction and content of the assistance. Five responses (5) cited the difficulty and long-term nature of justice sector reforms as something that must be acknowledged and incorporated into RoL practice. Four informants (4) responded that local ownership and partnership – or their natural outgrowths, such as participation in planning – were indeed the most important issues facing RoL assistance design and implementation.<sup>5</sup>

At the same time, the issues raised by the local actors, depicted in *Chart 1*, and the contexts in which they arose, also provide answers to another question, namely, what is the lived experience of ongoing rule of law (RoL) assistance, at the project level? Specifically, how do structural features and constraints found in the RoL assistance industry play out ‘on the ground’? RoL assistance ‘industry’ as used here,

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<sup>5</sup> One informant thought it was not enough to talk about local ownership and partnership, and instead, action toward them was needed. Why not make ownership and partnership boxes you have to ‘tick’? Informant 41 (interview with author, September 20, 2012).

refers to the system of organizations in place that provide and deliver RoL assistance. Included in this system are donors, recipient/partner country counterparts (Indonesian agency and ministry officials, judges, prosecutors, local civil society organizations (CSOs), etc.), implementing contractors and sub-contractors – including for-profit, non-profit, and educational institutions (both foreign and local).<sup>6</sup> In other words, these are the organizations at which local actors carry out RoL assistance design and implementation. Many of these organizations are laden with rules and bureaucratic process, which feature in local actor reports of what is constraining their work.

The following sections are organized according to four overarching structural features of RoL assistance – namely, the choice of implementer, the procurement process, the structure of aid relationships, and problematic industry incentives and practices. We first examine each structural feature more generally, followed by a section presenting its empirical application in Indonesian RoL assistance.

## **II. Choice of implementers in RoL assistance**

The choice of implementer in development assistance in general, and RoL assistance specifically, is one that is scrutinized at all levels of international development theory and practice. As we saw in chapter 1, macro-level international agreements, such as the *Paris Declaration* and *Accra Agenda*, push for more use of in-country systems;<sup>7</sup> but in practice, donors are nonetheless still hiring implementing contractors – many of whom originate outside the host country. Through a procurement

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<sup>6</sup> The industry-side of RoL assistance is discussed further in chapter 7, where we find that servicing the industry-side leads to an observable preference for western actors and ideas.

<sup>7</sup> *Paris Declaration on Aid Effectiveness* (March 2, 2005), Section 21; *Accra Agenda for Action* (September 4, 2008), Section 15. Discussed further in chapters 1 and 7.

process, discussed further below, an implementing contractor is chosen to deliver the development assistance programming as designed and envisioned by the donor, and ostensibly (one hopes) in consultation with host-country stakeholders.

In choosing an implementing contractor, donors typically choose between for-profit businesses or non-profit organizations, and/or educational institutions. As part of their bids for the contract, implementing contractors also recruit sub-contractors as needed to handle discrete tasks or components of the bid. In Indonesia, examples of each include U.S. for-profit international development company, Chemonics; international non-profit organization, The Asia Foundation (TAF); local non-profit, *Pusat Studi Hukum dan Kebijakan* (PSHK – Indonesian Center for Law and Policies Studies), University of Washington, and *Universitas Indonesia*.<sup>8</sup> International for-profit contractors present themselves as offering professional, efficient, cost-effective assistance delivery – free from the known corruption found in the country systems of many recipient countries. Both locally based international non-profits and host-country non-profits argue that they are motivated by dedication to the cause of reform, and not profit; and support for them also serves the additional goal of building local capacity. The way donors structure the funding (e.g., grant, contract) dictates the kind of participation in the project delivery chain.<sup>9</sup>

In 2000, Rubén Berríos presented a critical account of the large role of for-profit contractors in U.S. development assistance born of Clinton-era ‘contracting out’ the

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<sup>8</sup> See chapter 4, Table 2 (in Section III (a)), for details of each case study’s implementing contractors, their sub-contractors, and local Indonesian partners.

<sup>9</sup> Informant 47.

business of governing to the private sector.<sup>10</sup> Berrios calls the increasing reliance upon for-profit contractors a ‘wrong turn’ for development aid, making for-profit contractors the true beneficiaries of foreign aid.<sup>11</sup> Former Obama administration top USAID administrator Rajiv Shah agreed, and made headlines for calling out contractors as excessively used, and for seeking to institute procurement reforms,<sup>12</sup> known as ‘USAID Forward.’ An Indonesian local partner’s account of how USAID Forward affected RoL assistance design and delivery was that things became “more rigid” administratively, particularly the procurement process.<sup>13</sup> The informant also observed, approvingly, that USAID Forward brought with it a focus on improving local capacity for implementation.

Not surprisingly, however, reforms seeking to lessen the need for implementing contractors run counter to the *status quo* interests of a powerful lobby. U.S. for-profit contractor Chemonics, the implementing contractor for USAID’s C4J project, topped *Foreign Policy*’s list of Top 10 USAID contractors for FY 2011, receiving \$735,599,989 in obligated program funds.<sup>14</sup> Second on the list, at \$417,726,429, was the contractor Partnership for Supply Chain Management (PFSCM).<sup>15</sup> As John Norris comments regarding the \$3.9 billion received by the ten largest USAID contractors in 2011:

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<sup>10</sup> Rubén Berríos, *Contracting for Development: The Role of For-Profit Contractors in U.S. Foreign Development Assistance* (Westport, Connecticut: Praeger Publishers, 2000), 1-5.

<sup>11</sup> *Ibid.*, *xiii*.

<sup>12</sup> John Norris, “Hired Gun Fight: Obama’s aid chief takes on the development-industrial complex,” *Foreign Policy*, July 18, 2012. Shah has since stepped down. Rajiv Shah, “Statement from USAID Administrator Shah,” USAID Press Office, December 17, 2004; Michael Igoe, “Rajiv Shah to step down as USAID administrator,” *Dev Ex News*, December 17, 2014.

<sup>13</sup> Informant 41 (interview with author, September 20, 2012).

<sup>14</sup> Norris, “Hired Gun Fight.”

<sup>15</sup> *Ibid.*

To put this in perspective, if the for-profit contractor Chemonics were a country it would have been the third-largest recipient of USAID funding in the world in 2011, behind only Afghanistan and Haiti.<sup>16</sup>

The heavy use of for-profit contractors does not only apply to the United States. Australia and the United Kingdom also have their own versions of the U.S.' 'Beltway Bandits' of development consulting companies, including AIPJ's implementing contractor, Cardno Emerging Markets, headquartered in Brisbane, Australia.<sup>17</sup>

*a. Indonesian RoL assistance – use of foreign for-profit and non-profit implementing contractors*

In Indonesian RoL assistance, as elsewhere, we see donors hiring foreign for-profit or non-profit implementing contractors. Though this practice is not particularly liked among local partners, who would prefer technical assistance projects to be formed directly in Indonesia (as suggested by *Paris Declaration* and *Accra Agenda for Action*<sup>18</sup>), they are resigned to it as the usual practice.<sup>19</sup> In this study, procurement processes resulted in the hiring of three managing contractors – two for-profit, one non-profit – by bilateral donors, USAID and AusAID. As we saw in chapter 4, the implementers include Chemonics, a U.S. for-profit contractor (for USAID's C4J project); Cardno, an Australian for-profit contractor (for AusAID's AIPJ project); and The Asia Foundation (TAF), a U.S. international NGO with an established Jakarta office (for USAID's E2J project). The World Bank's J4P program, the fourth case study, assembled its own team of

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<sup>16</sup> See Norris, "Hired Gun Fight."

<sup>17</sup> Also headquartered in Brisbane is GRM International. Other for-profit Australian development contractors include Coffey (headquartered in Sydney), JTA (headquartered in Brisbane), and SMEC (headquartered in Melbourne).

<sup>18</sup> *Paris Declaration*, Section 21; *Accra Agenda*, Section 15. These sections are discussed further in chapter 7, Section III.

<sup>19</sup> Informant 36.

implementers (comprising both international and Indonesian national RoL professionals) that operates out of a satellite World Bank office in Jakarta.

The use of for-profit contractors in Indonesian RoL assistance also drew criticism from informants – particularly among local partners, even those who were themselves hired as staff by for-profit contractors.<sup>20</sup> Several local actors described the difference between working with a for-profit contractor and working directly with an NGO or non-profit as one of style and culture – with the for-profit contractors run more like a corporation with adherence to the ‘bottom line,’ hierarchical management, and reporting requirements, while NGOs and non-profits focused more on ideology and dedication to Indonesian justice sector reform as a long-term cause.<sup>21</sup> Said one member of an Indonesian legal NGO about the difference between NGOs and for-profit “service providers” as implementers:

A ‘service provider’ will finish the job at the deliverables. But PSHK, LeiP, we are here since 1998. It’s us that will be here for a very long time. Donors come and go. It’s us who have been here, and will be for a longer time.<sup>22</sup>

Advantages based on the choice of a non-profit organization were not only reported by local professionals who work for these organizations. An international informant with over 20 years of experience in RoL assistance credited the choice of non-profit organizations as implementers for E2J (TAF and *Kemitraan*) as helping to alleviate its

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<sup>20</sup> Eleven informants mentioned issues surrounding the use of for-profit contractors 21 times during the course of interviews.

<sup>21</sup> See e.g., Informants 10 (interview with author, April 24, 2012), 21 (interview with author, April 25, 2012), 25 (interview with author, September 18, 2012), and 33 (interview with author, September 21, 2012).

<sup>22</sup> Informant 42 (interview with author, September 13, 2012), referring to two Indonesian NGOs with a focus on Indonesian justice sector reform: *Pusat Studi Hukum dan Kebijakan Indonesia* (PSHK), translated as Indonesian Center for Law and Policies Studies; and *Lembaga Kajian dan Advokasi Independensi Peradilan* (LeiP), translated as Institution for Research and Advocacy for Independence of the Judiciary.

problem of being underfunded by USAID.<sup>23</sup> All of these examples from Indonesian RoL assistance suggest empirical support for the proposition that CSOs and their members are more motivated by ideology, and less by profit, than for-profit implementing contractors, as explored further in chapter 6.

What does this study say about the overall question of choosing for-profit versus non-profit implementing contractors? Above observations about motivations notwithstanding, this study did not collect enough data to answer this specific question in any definitive way. Bergling observed about international support to legal and judicial reform that despite the actors' variations in identity, ideas and formal justifications, the activities being sponsored are remarkably the same, namely "needs assessments, expert advice to law makers, topical training, study tours, conferences, resident advisors, acquisition of information technology, production of information materials, etc."<sup>24</sup> The same seemed true in Indonesia when comparing local actor accounts about working in RoL assistance on behalf of for-profit as well as non-profit implementing contractors. What we see is that both are contractually obligated by similar 'Scope of Work' and work-plan documents that are generated during the procurement process, discussed further below.

A preliminary finding, therefore, is that as long as non-profits are forced to compete under the same procurement requirements as for-profits – via Request for Proposals / Applications (RFPs/RFAs), tenders for contract, Terms of Reference (TOR), etc. – then there may be no obvious better choice or demonstrated difference in

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<sup>23</sup> Informant 34.

<sup>24</sup> Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-Operation* (Antwerpen: Intersentia, 2006), 196.

outcomes. Both for-profits and NGOs find themselves constrained by the same donor-decided rules, goals, and objectives required of implementing contractors (as determined during procurement), and are subject to the same reporting requirements and performance standards, discussed further in chapter 6.

Where this study sheds more light is on how the procurement process and resulting aid structures shape ongoing RoL assistance.

### **III. Procurement process for RoL assistance delivery**

The process that chooses the implementer to deliver RoL assistance, known as procurement, also arguably shapes, or forecloses, implementation by local actors. RoL assistance is a services industry<sup>25</sup> that involves big players, not insignificant amounts of money, and voluminous donor and government regulations to follow when applying for and getting a contract / grant from a donor. This is true with regards to bilateral donors, such as the United States, and Australia, as well as in dealing with the World Bank.<sup>26</sup>

According to 2009 policy recommendations for procurement systems by the Organization for Economic Co-operation and Development (OECD), each stage of the procurement process – the pre-tendering phase, the tendering phase and the post-tendering phase – face risks to their integrity, for which precautionary measures should be taken.<sup>27</sup> These measures include, for example, a thorough and independently

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<sup>25</sup> See also chapter 7 for an analysis and critique of the RoL ‘industry.’

<sup>26</sup> See Informants 23 (interview with author, September 11, 2012) (discussing how the World Bank’s inflexible procurement requirements sometimes prevent J4P from working with particular NGOs), and 24 (interview with author, September 11, 2012).

<sup>27</sup> OECD, *OECD Principles for Integrity in Public Procurement*, 2009 (report prepared by Elodie Beth, Innovation and Integrity Division of the Public Governance and Territorial Development Directorate). The three phases are further broken down into stages, nine

validated 'needs assessment' during pre-tendering,<sup>28</sup> transparency and effective communication during the invitation to tender,<sup>29</sup> and close supervision of the contractor's performance and integrity during post-tendering.<sup>30</sup> The big picture that can be gleaned from this document – held out as a checklist of international 'best-practices' –<sup>31</sup> is that procurement involves many stages and parties, all of whom play a part in the level of integrity to be found in the process. The OECD's definition of integrity is "the use of funds, resources, assets and authority, according to the intended official purpose, to be used in line with public interest."<sup>32</sup> But what constitutes the 'public interest' and 'official purpose' in the setting of RoL assistance, when a donor seeks to procure a good or service for the purported benefit of (and taking place within) a recipient or host country?<sup>33</sup> In examining the OECD principles under the heading 'good management,' for example, we can see how the principle of ensuring that the funds are used "according to the purposes intended"<sup>34</sup> begs further questions – such as *whose* intended purposes? And regarding the 'public interest' and 'official purpose' – which public, and which officials? In theory, we understand that if the point of the assistance is context-appropriate reform, then the answer to these questions must be the public and local

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in total. For each stage, the report offers at least three, as many as seven, precautionary measures.

<sup>28</sup> Ibid., 54.

<sup>29</sup> Ibid., 64.

<sup>30</sup> Ibid., 70.

<sup>31</sup> Ibid., 3.

<sup>32</sup> Ibid., 19.

<sup>33</sup> To see an analysis of corruption during the tendering process specific to development assistance, see chapter 7 "Is Corruption Control a Lost Cause?" in Georg Cremer, *Corruption and Development Aid: Confronting the Challenges* (Lynne Rinner Publishers, 2008), 76 (concluding that "the isolated approach" of controlling corruption in technical cooperation by hiring foreign staff to handle implementation is not a good long-term solution because "it does not help to establish more efficient administrative structures in recipient countries").

<sup>34</sup> See OECD, *Principles for Integrity in Public Procurement*, Principle 3, 28-29.

officials of the partner country. In practice, however, donor interests appear to carry more weight as the RoL assistance project makes its way through the stages of the procurement system.

*a. Procurement process for RoL assistance in Indonesia*

Turning to the case of Indonesia, the paperwork involved during RoL assistance procurement is dizzying. By way of example, the Request for Applications (RFA) for USAID's E2J project was 149 pages long. A 2010 draft of AusAID's design document for AIPJ was 95 pages, and included four substantive sections and 11 annexes.<sup>35</sup> In a 36-page single-spaced document, USAID's C4J 'Scope of Work' details the project in depth according to components, including activities, expected results, deliverables and required outcomes.<sup>36</sup>

When we link together the people involved with and impacted by these documents in practice, we see that even well-received initial assessments and plans tend to change, sometimes dramatically, after making their way through the many hands and documents required of the procurement process used to choose the implementing contractor.<sup>37</sup> Breaking it down further, this means that, in practice, as many as four sets of designers are involved in RoL assistance:

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<sup>35</sup> AIPJ, "Design Document," 2010 (on file with the author). AIPJ's 2011 Annual Work Plan (prepared by implementing contractor, Cardno) was 22 single-spaced pages, with between 1 and 3 specific activities decided for each of 5 pre-set outcomes. See Australia Indonesia Partnership for Justice (AIPJ), 2011 "Annual Work Plan," (October 2011) (on file with the author).

<sup>36</sup> USAID, "C4J Scope of Work" (on file with the author).

<sup>37</sup> See e.g., Informants 34 (interview with author, September 19, 2012), 3 (interview with September 13, 2012), 35 (interview with author, September 19, 2012), and 33 (interview with author, September 21, 2012).

- 1) The initial assessors, who draw up initial reports and plans for donors intending to engage in RoL assistance;
- 2) The authors of the request for proposal or application (RFP / RFA) document, which sets the terms required of all applicants for the contract or grant;
- 3) The authors of the design for the winning bidder / implementing contractor; and
- 4) On-the-ground implementers responsible for implementing work plans and activities based upon the agreement made with the funding donor.

Not surprisingly, this multi-stage, multi-party process can lead to fractured and less-than-desired results – particularly from the point of view of host country local partners who were consulted at the outset, only to find their offered ideas virtually unrecognizable in the resulting implemented project/program. One experienced informant summed up the issue this way:

So you have nice careful study that comes up with a decent program, but then it passes through so many hands and gets clouded by additional tasks – tweaks by people who shouldn't be tweaking.<sup>38</sup>

Thus, not only are there 'many hands' through which a program must go, but also some of the 'additional tasks' added by them along the way are reportedly ill-advised or ill-suited for the location.

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<sup>38</sup> Informant 33 (interview with author September 21, 2012).

i. E2J: Reported changes from assessment through implementation

One such example from Indonesia involved USAID's E2J project: *Educating and Equipping Tomorrow's Justice Reformers*.<sup>39</sup> One of the original ideas discussed during USAID's initial assessment involved the establishment of a graduate program for judicial officers that was to take place before becoming a judge or prosecutor.<sup>40</sup> Substantively, the idea was to get to the new crop of judges *before* they were corrupted, and provide training on the substance of the law, its application, ethics, expectations, etc., at the outset. Administratively, this also made sense in order to avoid dealing with heavily bureaucratic Indonesian universities and law departments, which can be excruciatingly slow and difficult to work with. Instead, what the USAID Request for Application (RFA) document reveals is a project in which the very point was to interact with universities (and CSOs), not avoid them. Having identified the problem that Indonesian legal education lacked experiential learning and practical, hands-on application of the law, the RFA required the winning bid for E2J to add clinical programs (at least 5), clinical courses (at least 10), research projects (at least 10),<sup>41</sup> resulting in one rather optimistic (and causally suspect) required indicator of:

At least 20 percent increase in number of candidates to SC/AGO [the Supreme Court and Attorney General's Office] from the top 20 percent of law school graduates from Indonesian law schools receiving assistance under E2J.<sup>42</sup>

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<sup>39</sup> See chapter 4 for detailed descriptions of all four case studies included in this study.

<sup>40</sup> Informant 10 (interview with author April 24, 2012).

<sup>41</sup> USAID, "Request for Application (RFA) no. Indonesian 10-013: Educating and Equipping Tomorrow's Justice Reformers (E2J)," Section C.1,5 (March 29, 2010), 27 ("Required Indicators for Assistance to Indonesian Law Schools").

<sup>42</sup> Ibid.

In these specific prescriptions, we see what one informant referred to as the “cure” being offered by donors – though this same informant did not agree that legal clinical programs were necessarily the cure Indonesia needed.<sup>43</sup>

And what of the idea discussed at the assessment stage: a graduate program for judicial officers? A trace can be found in another particularly ambitious required indicator: “At least three post-graduate and professional development programs in justice sector reform, one of which will be in court reform, established and commenced.”<sup>44</sup> As one experienced RoL professional observed, delivering this one indicator properly would require its own 4-year, 10 million dollar project.<sup>45</sup> Other indicators included planned assistance to CSOs, and collaboration between and among CSOs, law schools, and key Indonesian justice sector institutions.

The main problem for E2J, according to one Indonesian academic and legal CSO attorney who was not officially affiliated with E2J’s implementation, is that the project never fully secured the support and buy-in of the institutions it needed to make the clinical aspect a success – namely the AGO and the Supreme Court.<sup>46</sup> This view is corroborated by a finding in E2J’s 2014 midterm evaluation that networks and relationships among faculty, CSOs and Indonesian Formal Justice Institutions (FJIs) “has been weak.”<sup>47</sup> Instead of shadowing prosecutors and trying low-stakes cases – as is typical in legal clinics found in U.S. law schools – the informant reports that

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<sup>43</sup> Informant 7 (interview with author, April 19, 2012).

<sup>44</sup> USAID, “RFA: E2J,” 27 (“Required Indicators for Assistance to Indonesian Law Schools”).

<sup>45</sup> Informant 33 (interview with author, September 21, 2012).

<sup>46</sup> Informant 10 (interview with author, April 24, 2012).

<sup>47</sup> USAID, *Midterm Performance Evaluation of the Educating and Equipping Tomorrow’s Justice Reformers (E2J) Program*, Finding #8 (April 2014)(report prepared by David Cohen, Michael Miner, Dian Rosita, Melinda MacDonald, Lily Purba and Aviva Nabiban), 3 and 27.

Indonesian law students were simply watching cases at the Supreme Court, not actually engaging in a meaningful way; and that the prosecutors said they were too busy and had issues of confidentiality. Future iterations of this project would need to secure more substantial AGO involvement for it to have the intended effect of creating new bonds, networks, and pathways to becoming a prosecutor. The same might be said of the Supreme Court, though not to the same degree as the AGO. Even so, according to several informants and a mid-term evaluation prepared independently for USAID, E2J has contributed positively to experiential learning in other ways, primarily through the engagement it has fostered between CSOs and law students and faculty.<sup>48</sup>

So as not to give the impression that USAID is alone in facing these issues, AusAID's Australia Indonesia Partnership for Justice (AIPJ) program – which by many accounts embodied a highly successful design process, with substantial Indonesian involvement and input – also underwent changes as a result of the procurement process. One designer observed, after the fact, that some things were “lost in translation” during procurement, also expressing regret at not remaining more involved.<sup>49</sup> Both of these examples illustrate the further point that this disconnect (of both time and place) between the original assessors / designers of the assistance and the on-the-ground implementers can contribute to the challenges faced during implementation.

One suggestion, discussed further in chapter 9, involves the requirement that a member of the design or assessment team be consulted, in person, at the outset of implementation at the site of RoL assistance delivery. To do so would be an attempt to

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<sup>48</sup> USAID, *Mid-term Performance Evaluation of E2J*, 4.

<sup>49</sup> Informant 3 (interview with author, September 13, 2012).

re-capture some of the intrinsic knowledge possessed by these actors, and the partnership ties they have already made. Ideally, both the national and international expert from the design team would meet with the entire implementing team, for at least half a day, or more – systematically going through the assessment itself (speaking out-loud what was between the lines, particularly regarding interactions with local partners), as well as the specific work-plans implementers are bound by.

ii. Time lag caused by procurement, and need for implementer ‘tweaks’

One example of an implementation challenge brought on by the disconnect caused by the procurement process involves the time lag it causes – namely the one between the time of macro-level agreements between the partner country and the donor based on initial assessments, and the subsequent start of any implementation activities.<sup>50</sup> According to most local actors who spoke on this issue, this time lag – anywhere from six months to two years – causes significant problems, particularly with regard to effective partnering with Indonesian local partners.<sup>51</sup> One Bappenas official reported needing to go back to the donor (and not just the managing contractor) in one of the case study projects in order to mediate the situation because Indonesian needs

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<sup>50</sup> Informants 15 (interview with author, September 17, 2012), 36 (interview with author, September 18, 2012).

<sup>51</sup> See e.g., Informants 34 (interview with author, September 19, 2012), 41 (interview with author, September 20, 2012), and 16 (interview with author, April 23, 2012). The time lag between design and implementation was brought up 12 times during discussions of implementation challenges during eight different interviews. To read the issue covered from the standpoint of dealing with USAID procurement processes, see Jennifer Brookland, “In USAID procurement, a game of stop-and-go,” *Devex News*, August 29, 2012.

had changed significantly in the meantime.<sup>52</sup> Experienced implementers agree that particularly in the law and justice sector, where circumstances can change quickly, flexibility is required for successful implementation.<sup>53</sup> A manager for C4J reported that the two-year time lag between the project's design and the start of its implementation meant that much of what was required was "no longer valid."<sup>54</sup> According to the same informant, USAID proved flexible in allowing adjustment to the work-plan according to a set mechanism for doing so – used most obviously in those instances when the activities were already underway, and/or being undertaken by someone else.<sup>55</sup>

The problem of the time lag also illustrates an inevitable need for 'tweaks' to the original work-plans by the implementers, something that experienced implementers report having become very good at doing (out of necessity),<sup>56</sup> discussed further in chapter 7. One experienced informant who was involved in the design of TAF's winning bid for E2J, observed about E2J's implementation:

Post-award, you have a chance to tweak. Their way of implementing is actually quite different from what we designed.<sup>57</sup>

The significance of the implementer was also corroborated by an Indonesian informant with over a decade of experience working in Indonesian justice reform, who reports that a good implementer can "minimize the bad impact" of a faulty or inappropriate design.<sup>58</sup>

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<sup>52</sup> Informant 15 (interview with author, September 17, 2012). Bappenas is Indonesia's National Development Planning Agency. See chapter 6, Section II (a) (i), for more on Bappenas and its role in RoL assistance in Indonesia.

<sup>53</sup> See e.g., Informants 3 (interview with author, September 13, 2012), and 31 (interview with author, September 12, 2012).

<sup>54</sup> Informant 41 (interview with author, September 20, 2012).

<sup>55</sup> Ibid.

<sup>56</sup> See e.g., Informants 33 (interview with author, September 21, 2012), 34 (interview with author, September 19, 2012), and 41 (interview with author, September 20, 2012).

<sup>57</sup> Informant 34 (interview with author, September 19, 2012).

<sup>58</sup> Informant 21 (interview with author, April 25, 2012).

Thus, we see in Indonesian RoL assistance what we learned from the literature discussed in chapter 1, namely that important strategic decisions are made by the implementers, on the ground, during project design and delivery.<sup>59</sup>

What this means in terms of the procurement process and the resulting contracts and agreements between donors and their implementers is that these local actors would much prefer to see less rigid, detailed plans, activities and outcomes set by the donor at the outset, and instead see donors simply setting the direction, or high-level goals, and giving the implementers the authority and resources needed to chart the specific course.<sup>60</sup> Why not give implementers less ‘to tweak,’ and instead allow them the space to work with local partners to develop the most locally appropriate strategy toward a few big picture goals? Recall the example from chapter 3 in which one project manager reported success with a strategy that combined a single-minded focus on providing one specific need (in this case, divorce certificates) that was first identified by asking members of a community-based NGO about what they need.<sup>61</sup> As we see in the next section, however, this type of common-sense strategy is not typically possible because of the way RoL assistance is structured.

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<sup>59</sup> See e.g., Peter Murrell, “The Interaction of Donors, Contractors, and Recipients in Implementing Aid for Institutional Reform,” in *The Institutional Economics of Foreign Aid*, Bertin Martens, Uwe Ummert, Peter Murrell and Paul Seabright (New York: Cambridge University Press, 2002), 73-74; David Mosse, *Cultivating Development: An Ethnography of Aid Policy and Practice* (New York: Pluto Press, 2005); Emma Crewe and Elizabeth Harrison, *Whose Development? An Ethnography of Aid* (New York: Zed Books, 1998).

<sup>60</sup> See e.g., Informants 1 (interview with author, April 16, 2012), 31 (interview with author, September 12, 2012), and 33 (interview with author, September 21, 2012).

<sup>61</sup> See chapter 3, Section II (c) (iii). The case study from which this example is drawn is World Bank’s J4P; and the specific component involved a community-based NGO, PEKKA, as a local partner and implementer.

#### IV. Structure of aid relationships

Choosing an implementing contractor from among possible contenders is just one of many decisions made by donors that shapes the design and implementation of RoL assistance. Choices are also made about the structure of the aid – including how much detail is included in the project’s work-plan, as well as decision-making hierarchies within the many relationships required to bring the RoL assistance into being. These structural decisions are viewed as significant by local actors,<sup>62</sup> and color their perceptions of the RoL assistance that flows from them. What follows in this section are empirical accounts from Indonesia about the significance of these structural choices during ongoing RoL assistance, grouped according to three themes: 1) detailed work plans and ‘tick-box’ aid; 2) the hierarchy of decision-making power within implementing teams; and 3) engagement with local CSOs and their members. The examples in all three categories demonstrate that structural decisions about the aid have the power to shape the day-to-day experience of RoL assistance design and implementation toward better (and worse) partnering and local ownership.

##### *a. Detailed work plans (and ‘tick box’ aid)*

One informant observed feeling pressure from the World Bank toward projects that deliver results in a short time frame.<sup>63</sup> Yet, as observed by the same informant, causation in justice reform is already difficult, and a “short causal chain in justice is

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<sup>62</sup> One example of this significance is detailed in chapter 7, namely the fact that ‘structure of aid’ is its own category of partnership definitions offered by local actors in Indonesian RoL assistance.

<sup>63</sup> Informant 24 (interview with author, September 11, 2012).

ridiculous.”<sup>64</sup> This empirical reality notwithstanding, what we see in RoL assistance in Indonesia are work-plans – the implementing contractor’s ‘marching orders,’ as worked out with the donor – involving very detailed activities and expected outcomes. According to a designer of E2J’s winning bid, E2J’s Request for Proposal (RFP) was distinctive in being “very explicit about numerical outcomes,”<sup>65</sup> including the required 5 clinical programs, 10 clinical courses, etc. Also as noted above, the work-plans of all three bilateral assistance projects – USAID’s E2J and C4J, and AusAID’s AIPJ – were robust in length, and detailed in substance, including specific outcomes and activities, including e.g., the training of 300 judges and court staff, with at least 15 judges receiving training abroad) (USAID’s C4J); three mediation trainings (utilizing a combination of theory and practice) for a total of 90 Religious Courts judges (AusAID’s AIPJ).<sup>66</sup> These documents were physically referenced during interviews with informants – by higher-level managers as well as team-level staff – and were kept (and appeared well-used) in large binders, and as wall-size posters displayed in COP offices and conference rooms.<sup>67</sup>

In the case of AusAID’s AIPJ, the initial designers on both sides – for AusAID and for the Indonesian government, represented by Bappenas – reported a tug-of-war about the details of the structure of AIPJ as between Indonesia and Australia. Indonesian local partners much preferred a ‘facility’ arrangement – much like AIPJ’s predecessor program, Legal Defense Facility (LDF). As covered in more detail in chapter 8, LDF was very popular among Indonesian local partners because it gave the local Indonesian implementers the flexibility and freedom to pursue the reforms they

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<sup>64</sup> Informant 24 (interview with author, September 11, 2012).

<sup>65</sup> Informant 34 (interview with author, September 19, 2012).

<sup>66</sup> AIPJ, “2011 Annual Work Plan,” 8.

<sup>67</sup> See e.g., Informants 33 (interview with author, September 21, 2012), 36 (interview with author, September 18, 2012).

thought necessary, as well as flown-in expert advice, six times per year.<sup>68</sup> LDF did not fare so well in its AusAID-commissioned ‘Independent Completion Report, however. LDF gains were considered more *ad-hoc*, and, causing the most alarm in donor circles, that AusAID had effectively lost strategic control, and its implementers were acting as ‘free agents.’<sup>69</sup> What was ultimately chosen for LDF’s successor program, AIPJ, however, was termed ‘flexible program,’<sup>70</sup> but, in practice, reportedly leaned more heavily to the ‘programmatic’ side – meaning detailed programming decided up front by the donors, in consultation with Indonesian partners.<sup>71</sup> These and similar descriptions were used to describe not just AIPJ, but aspects of all four case studies, and current donor-funded RoL assistance in general.<sup>72</sup>

When one follows this type of detailed, ‘programmatic’ RoL assistance over time, through its implementation and delivery, companion terms appear in descriptions of the assistance – namely ‘tick-box’ or ‘check-box’ aid, referring to assistance in which implementers are expected to ‘tick’ the boxes of planned activities or outputs as part of their reporting requirements.<sup>73</sup> This type of reporting may not be terribly effective in

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<sup>68</sup> Informants 3 (interview with author, September 13, 2012), 16 (interview with author, April 23, 2012), and 37 (interview with author, September 19, 2012). See also AusAID, Indonesia – Australia Legal Development Facility, AidWorks Initiative Number INF 753, *Independent Completion Report* (Final 30 May 2010)(report prepared by John W.S. Mooney and Budi Soedarsono), 7-9.

<sup>69</sup> Informant 3 (interview with author, September 13, 2012); AusAID, *Independent Completion Report*, 47.

<sup>70</sup> Informant 3 (interview with author, September 13, 2012); AIPJ, “Design Document,” Section 3.3.1, 29.

<sup>71</sup> See e.g., Informant 31 (interview with author, September 12, 2012).

<sup>72</sup> See e.g., Informants 3 (interview with author, September 13, 2012), 23 (interview with author, September 11, 2012), 28 (interview with author, July 9, 2012), 29 (interview with author, September 5, 2012), 33 (interview with author, September 21, 2012), and 34 (interview with author, September 19, 2012), and 36 (September 18, 2012).

<sup>73</sup> See e.g., Informant 33 (interview with author, September 21, 2012), 41 (interview with author, September 20, 2012), and 3 (interview with author, September 13, 2012).

achieving an accurate understanding of what is happening because implementers know how to ‘write it up’ in order to ‘tick’ the box.<sup>74</sup> Furthermore, this focus on numbers and checking boxes interferes with the actual partnering implementers need to be fostering in order to achieve local ownership of the RoL assistance. These issues are analyzed in chapter 8. A more effective means of monitoring, at least according to some local partners, are independent evaluations – usually conducted at the mid-term and conclusion of RoL assistance, which informants cited as being a welcome opportunity to voice their concerns about the RoL assistance.<sup>75</sup>

*b. Hierarchy of decision-making power*

In describing implications of the hierarchy typically found in aid delivery organizations, Paul Seabright observes that one option available to donors is the use of an intermediary or manager “to enforce a more credible set of incentives for the agent than the agent would be able to implement alone.”<sup>76</sup> In the case of Indonesia, donors indeed make this choice by utilizing implementing contractors, as discussed above. What this looks like within the implementer teams themselves includes international professionals at ‘the top.’

All four case studies have hierarchical structures in which international RoL professionals inhabit the managerial positions, supervising a team or staff of primarily Indonesian nationals. Specifically, and at the time of fieldwork in 2012, the ‘chiefs of party’ (COPs) of all four case studies were internationals from countries considered the

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<sup>74</sup> See e.g., Informant 33 (interview with author, September 21, 2012).

<sup>75</sup> Informants 15 (interview with author, September 17, 2012), 16 (April 23, 2012) and 42 (September 13, 2012).

<sup>76</sup> Paul Seabright, “Conflicts of Objectives and Task Allocation in Aid Agencies,” in *Institutional Economics of Foreign Aid*, 47.

‘Global North.’ Three case studies had a second-tier managerial position – below COP, but still higher than other team members – that was held by Indonesian nationals. Two of these reported wide discretion in their reform efforts, while the third reported that ‘most’ of his/her ideas were ultimately incorporated by higher-level donor agents.<sup>77</sup> Of note, according to a different member of the team, this third informant was reportedly delegated more decision-making authority by the implementing contractor following an independent mid-term evaluation.<sup>78</sup>

These structures, and the reported discretion given to the second-tier national managers, indicate that donors appear to realize the importance of national experts – and yet they are still unwilling to completely let go of the RoL assistance to Indonesian nationals.<sup>79</sup> Furthermore, as we will see in chapter 7, local actors report that internationals are actually necessary for their comparative knowledge, and to effectively manage and handle the international donors and their requisite bureaucracies.

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<sup>77</sup> Informants 23 (interview with author, September 11, 2012), 37 (interview with author, September 19, 2012), and 41 (September 20, 2012).

<sup>78</sup> Informant 40 (interview with author, September 20, 2012), referring to additional decision-making authority given to an Indonesian colleague following the evaluation. Both the mid-term evaluation and management response to it reveal that structural changes were indeed made, including that the implementing contractor was to take over the responsibilities of a management position for the donor that was being discontinued. See AIPJ, *Independent Progress Review Report* (November 2012) (report prepared by John Dinsdale), 10-12 ; AusAID, Management Reponse: Independent Evaluation of the Australia Indonesia Partnership for Justice (February 6, 2013), 5. No details were given about who or how the implementing contractor would be taking over those duties, though the evaluation did elsewhere identify “an opportunity to better embed the program in the ongoing legal reform dynamic in Indonesia.” AIPJ, *Independent Progress Review*, ix.

<sup>79</sup> See also Roger C. Riddell, “Does Foreign Aid Really Work? Updated Assessment,” Discussion Paper 22 (March 2014)(updating his comprehensive 2008 book of the same name), 31 (observing that by managing development assistance through discrete projects, donors are “not giving aid to others but in effect holding onto it for as long as possible.”)

*c. Engagement with CSOs and their members*

A further, and arguably related, issue involves the structural choice made by donors and their implementing contractors when engaging with local CSOs and their members. Indonesian CSOs have been a reliable source of relevant expertise about Indonesia and its justice sector reform efforts for RoL assistance delivery providers since 1998. One way this expertise is acquired is through the structural choice just discussed, namely, hiring the Indonesian expert as part of the implementing staff. Another possibility – referred to by local partners as ‘organization to organization’ – involves the donor or implementing contractor engaging directly with the CSO itself, as a sub-contractor for the RoL assistance. This second possibility is much preferred by local partners with close professional ties to one or more CSOs, who spoke passionately about the increased challenges faced by their CSOs when donors and implementing contractors hire individual members of the CSO, instead of engaging organization to organization.<sup>80</sup> Reasons why are further discussed in chapter 6, and include the loss of the funding itself, of course, but also the fact that CSOs lose valuable opportunities for learning when individual members (usually more experienced and senior level) are hired away as individual experts, and the CSO itself does not get the further benefit of the institutional learning and experience of working on the RoL assistance.

Explaining the issue from the donor-side, an Indonesian national with 20 years of experience working in donor-funded RoL assistance, responded to what other local

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<sup>80</sup> See e.g., Informants 29 (interview with author, September 5, 2012), 37 (interview with author, September 19, 2012), 42 (interview with author, September 13, 2012), 31 (interview with author, September 12, 2012), and 21 (interview with author, April 25, 2012),

partners described as the disconcerting donor practice of hiring individuals instead of engaging with entire CSOs in the course of RoL assistance design and implementation:

It's not a preference, but depends on what's available and what makes sense. So in some sectors, what's available in the market is more 'individual.' Some sectors have a more institutional layer. So if that's the case [that institutions are available], then we do an RFP instead of [hiring an] individual consultant. The decision is driven by whether we want to compete or not. USAID wants us to compete.<sup>81</sup>

In other words, the procurement process, which is preferred by USAID, would be necessary in order to hire the organization as a whole (as a sub-contractor). Thus, we see that the solution to this one problem identified by local partners – that local CSOs are negatively impacted when donors and implementers hire individuals instead of engaging with CSOs as sub-contractors – necessitates the use of the procurement process, which, in turn, and as described above, is problematic in its own right.

Having pointed this out as an issue of concern to local partners, it is important to also report that 'organization to organization' relationships are indeed taking place in RoL assistance in Indonesia. For example, AusAID's AIPJ sub-contracted with *PSHK*, an Indonesian legal policy institute. World Bank's J4P team also reported heavy engagement with and through its local partners, including the Indonesian Female Headed Household Empowerment Program (*PEKKA*).

Furthermore, members of CSOs have reported a 'work-around' on their end – namely, the individual agrees to treat their contract as 'organization to organization' for purposes of their CSO. This means that the money goes to the CSO, which then pays out the individual, and the individual gets the benefit of CSO resources, including research facilities and other staff members, to help him or her complete the work

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<sup>81</sup> Informant 41 (interview with author, September 20, 2012).

required of the contract.<sup>82</sup> It is not a perfect solution from the standpoint of the CSO, though, because the amount paid to the individual is typically less than would have been paid to the CSO had they been engaged as a sub-contractor.

## **V. Problems with RoL assistance industry incentives and practices**

### *a. Incentives (and disincentives) for sharing important information*

In its present form, the RoL assistance industry suffers from problematic incentives. Not only does the system that delivers RoL assistance *not* incentivize learning from past mistakes, there are actual disincentives in place, which discourage the acknowledgment and incorporation of on-the-ground learning in the design and delivery of RoL assistance. Scholar-practitioner Linn Hammergren gives the following candid account of what is at stake for RoL industry participants, and in the process, sheds some light on why the purported structural problems outlined above continue to shape and impact RoL interventions:

What needs to be done is obvious. Both donors and national counterparts have to become more serious about articulating their strategies, specifying their working hypotheses, and evaluating program results. .... But for those directly engaged in reforms, the disincentives and risks run high. ... Admitting that one's own project is not succeeding, questioning standard processes and assumptions, or suggesting that a court president's pet idea is based on a flawed analysis is tantamount to professional suicide for anyone wanting to remain in the game.<sup>83</sup>

Thus, because practitioners' livelihoods are themselves tied to future decisions made by donors and national counterparts, we see important information being held back that

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<sup>82</sup> See e.g., Informants 42 (interview with author, September 13, 2012), 43 (interview with author, September 13, 2012) and 44 (interview with author, September 13, 2012).

<sup>83</sup> Linn Hammergren, "International Assistance to Latin American Justice Programs" in *Beyond Common Knowledge*, ed. Erik Jensen and Thomas Heller (Stanford University Press, 2003), 321.

could influence these decisions. In the same article, Hammergren describes the phenomenon known as the ‘fireman’s syndrome’ to explain why donors do not comment on or criticize other donors – “don’t step on the hose or you will cut off all the water.”<sup>84</sup>

Similarly, in Indonesia, an international informant with over a decade of experience working in RoL assistance in several different countries described the “biggest problem with development” to be that:

[T]here is a culture of making things that should not have happened or do not belong, look like they should have happened or belong. [It’s a] failure – but it’s written up to be sold. So things self perpetuate themselves. Word rarely gets out ‘this not needed.’ And the same mistakes get completed.<sup>85</sup>

A similar sentiment was echoed by another informant, namely that sometimes there is pressure to continue projects even though local needs have shifted<sup>86</sup> – something particularly salient in the law and justice sector, where long-term change is slow, but circumstances ‘on the ground’ change frequently. As all of the above quotations illustrate, problematic incentives interfere with the free flow of information. In this case, the suppressed information includes insights about donor-sponsored interventions that do not work, or are otherwise unnecessary or inappropriate.

#### *b. Diffused responsibility*

The presence of many donors – as is the experience in many countries that receive RoL assistance, including Indonesia – means that the responsibility for ‘successful’ aid is diffused, and which could lead to negative consequences for public

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<sup>84</sup> Hammergren, “International Assistance to L.A. Justice Programs,” 316.

<sup>85</sup> Informant 33 (interview with author, September 21, 2012).

<sup>86</sup> Informant 24 (interview with author, September 11, 2012).

sector capacity in the recipient country that is host to the assistance.<sup>87</sup> According to development economists Stephen Knack and Aminur Rahman, there are “more insidious and long-lasting” costs of donor proliferation “involving donor practices that tend to undermine the quality of governance or retard the development of public sector capacity.”<sup>88</sup> Examples include providing aid through projects, instead of budgetary support; bypassing governments, and instead hiring parallel implementation units (aka implementing contractors); and relying on international consultants instead of hiring local staff.<sup>89</sup> As we saw above, all of these practices can be found in RoL assistance in Indonesia. That said, it is worth observing that the majority of local implementing staff are actually Indonesian – though, again as above, high-level management positions are held by internationals.

### *c. Staffing practices*

Other hiring practices – such as ‘poaching’ or hiring away talented public agency staff, and ‘topping up’ or paying salary supplements to local staff to help move the donors’ projects along – also disrupt recipient bureaucracies and distort incentives for civil servants.<sup>90</sup> Namely, it creates incentives to:

[P]rotect and extend aid projects from which they benefit, regardless of their merit, and to favor spending aid funds in the form of independent projects rather than in the form of coordinated sector-wide programs or budget support.<sup>91</sup>

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<sup>87</sup> Stephen Knack and Aminur Rahman, “Donor Fragmentation and Bureaucratic Quality in Aid Recipients,” *Journal of Development Economics* 83 (2007): 177-78.

<sup>88</sup> *Ibid.*, 178.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ibid.*, 179.

Unfortunately, even donor attempts at minimizing these distortion of incentives can have negative – or what are perceived as unjust – consequences for local implementers.

Explaining that labor costs for RoL assistance projects tend to be the largest cost item,

Taylor writes:

In many projects expatriate pay and living expenses eat up a significant proportion of the budget. ... At the same time, locally hired staff is paid at rates that may be 10 percent of the expatriate rate, even when the work performed is the same or more complex. The ostensible reason for this is that it avoids a 'parallel economy' where local wages are artificially inflated and talent is leached from local institutions in order to service contractors.<sup>92</sup>

In the Indonesian context, implementers of at least two case studies arguably 'leached' talent from local institutions by hiring more senior members of civil society organizations (CSOs), with the expectation of seeing them at the project offices every day. As will be discussed in chapter 6, however, local partners have their own ways of coping, including sometimes making different choices about the day-to-day, leading to less 'leaching,' and less time at the project offices.

Regarding pay differential, no specific numbers regarding the case studies came to light, though a few Indonesian local partners voiced dissatisfaction in general at Indonesians being paid exponentially less than international counterparts.<sup>93</sup> One international informant, however, also observed that Indonesia is home to at least one world-class local national consultant who can command whatever rate he wants.<sup>94</sup>

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<sup>92</sup> Veronica L. Taylor, "The Rule of Law Bazaar," in *Rule of Law Promotion: Global Perspectives, Local Applications*, ed. Per Bergling, Jenny Ederlöf and Veronica Taylor (Uppsala: Iustus Förlag, 2009), 347.

<sup>93</sup> See e.g., Informants 13 (interview with author, April 24, 2012), 14 (interview with author, April 24, 2012).

<sup>94</sup> Informant 20 (interview with author, April 26, 2012).

#### *d. Under-skilled international consultants*

RoL assistance industry incentives with regard to the pay for international consultants are problematic in their own right – not just in comparison with their Indonesian colleagues. Wade Channell writes that each new RoL project assignment “should require extensive preparation for the new conditions, cultural variations, and demands” on an otherwise qualified specialist hired to implement a project.<sup>95</sup> In practice, however, many of these international experts are only paid for work in the field – not elsewhere, and the unfortunate result is that “much learning is done through mistakes that could have been avoided through preparation based on the wealth of published knowledge.”<sup>96</sup> This is an area of much concern to Indonesian local partners, in particular, who are routinely asked to educate international ‘expert’ consultants about very basic information about Indonesia and its legal system. These accounts are discussed further in chapters 6 and 7.

## **VI. Structural interference with local ownership and partnership**

As discussed in chapter 3, RoL literature describes enduring problems in RoL assistance implementation, including a lack of ownership on the part of the receiving state, and the use of transplants during legal reforms without sufficient adjustment and tailoring to the local settings.<sup>97</sup> This happens even though it has become “painfully clear

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<sup>95</sup> Wade Channell, “Lessons Not Learned about Legal Reform,” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers (Washington, D.C.: Carnegie Endowment for International Peace, 2006), 12.

<sup>96</sup> *Ibid.*

<sup>97</sup> See e.g., Randy Peerenboom, “The Future of Rule of Law: Challenges and Prospects for the Field,” *Hague Journal on the Rule of Law* 1, no.1 (2009): 9-10; Thomas F. McInerney, “Law and Development as Democratic Practice,” *Voices of Development*

on countless occasions that ... simply rewriting another country's laws on the basis of Western models achieves very little."<sup>98</sup> Indonesian RoL assistance also experiences its share of transplants. One informant likened the "copy-paste" aid seen in Indonesian RoL assistance to the Indonesian word for wrench, *kunci Inggris*.<sup>99</sup> Translated as 'English key'<sup>100</sup> – it has seven different sizes, so "it can adjust, but it is still just one wrench."<sup>101</sup> Nicholson and Low observe something similar in Cambodia – namely interviewees who were "particularly critical of 'cut and paste' legislative drafting by foreign experts."<sup>102</sup>

We observe in these examples that local ownership and partnership have been devalued in design and implementation of RoL projects. Why is this? How is it that ill-advised, standardized tool kits still find a home on the shelves of present-day RoL professionals? Why do RoL assistance projects and programs lack local tailoring and ownership? It has been suggested that the field's lack of basis in empirical reality is at least one factor.<sup>103</sup> This study aims to contribute to better understanding about ongoing RoL assistance through the presentation of new empirical data from Indonesia. More attention to local ownership (and the partnering needed to achieve it) would, I argue,

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*Jurists* 1, no.1 (2004): 31; Daniel Berkowitz, Katharina Pistor and Jean-Francois Richard, "The Transplant Effect," *American Journal of Comparative Law* 51: 171 & 189.  
<sup>98</sup> Thomas Carothers, "Promoting the Rule of Law Abroad: The Problem of Knowledge," in *Promoting the Rule of Law Abroad*, 12.

<sup>99</sup> Informant 10 (interview with author, April 24, 2012).

<sup>100</sup> Directly translated: *kunci* ('key') *Inggris* ('English').

<sup>101</sup> Informant 10 (interview with author, April 24, 2012).

<sup>102</sup> Pip Nicholson and Sally Low, "Local Accounts of Rule of Law Aid: Implications for Donors," *Hague Journal on the Rule of Law* 5 (March 2013), 17. Similar to Indonesia, Cambodia has a robust and vocal local NGO community involved in court reform. This is in contrast to Vietnam, where NGOs are not involved in court-oriented legal reform. *Ibid.*, 16 and 19.

<sup>103</sup> *Ibid.*, 4. See also chapter 1, Section II (c).

help ground the RoL assistance in the local empirical reality. This argument is revisited in the coming chapters.

Another contributing factor may be way that the RoL assistance projects and programs are structured, and come into being. Drawing on the above examples from Indonesian RoL assistance, this chapter argues that structural features of RoL assistance are possible contributing factors to these ongoing problems. Specifically, we see how these structural features – including the choice of implementer (typically a foreign contractor), the procurement process (multi-step and multi-party), the resulting hierarchy and aid structure of implementation (including pre-set detailed work plans and ‘tick-box’ aid), as well as problematic industry incentives (particularly regarding pay) – all interfere with local ownership and appropriate tailoring of RoL assistance, which might otherwise be made possible through effective partnership.

## **VII. Concluding argument**

In this chapter, we saw how ideas that were put through the multiple stages of the procurement process morphed into something much different. It can be likened to the child’s game of ‘telephone,’ but instead of children whispering a sentence down a line, here, you have the details of RoL assistance plans being shared in written form from the player of one stage of the procurement process to the next (e.g., assessment, request for proposal (RFP), the tender or bid, the award and resulting work-plan). As with the game ‘telephone,’ the end results in RoL assistance may also bear little resemblance to how the plans began. Further complicating matters is that these players are not necessarily obligated to tell the same version as the stage before; rather, they are motivated by their own interests and concerns. How these competing interests play

out in Indonesian RoL assistance is discussed further in chapter 6; suffice it to say, what is already complicated becomes even more difficult to bring to fruition in the course of implementation in light of the many actors involved, some of whom are in competition with each other to determine the content and direction of the assistance. Furthermore, as we see above from the standpoint of local partners acting on behalf of Indonesia, this disconnect between assessment and implementation (including the time lag it causes) can be particularly frustrating, and does not generate progress toward local ownership of the RoL assistance through effective partnership.

We also saw that structural choices, including how detailed the pre-determined plans are, as well as the composition and hierarchy of implementing teams and sub-contractors, are very much on the minds of local actors. These choices highlight the dynamics of power and control, and ultimately shape how local actors, and local partners in particular, participate in the RoL assistance design and delivery. Because of the structure imposed upon them – ‘Implement the work-plan or account for why it was not possible’ – local actors are spending time re-negotiating a set plan instead of focusing on efforts better poised to generate ownership and partnership. Exactly what ownership and partnership mean to these local actors will be examined in chapter 7. In Chapter 9, I argue that paying closer attention to the local actors’ versions of ownership and partnership while making these structural decisions would mean less pre-determined ‘tick-box’ aid, and allow for deeper engagement and ownership by local partners.

Finally, we also saw the effects of problematic industry incentives and practices, which discourage learning from past mistakes, and include lack of payment for adequate preparation by international consultants before they arrive. Local partners

report tedious meetings with international ‘experts’ with no knowledge of Indonesia or its current justice sector needs. We also observe how features of RoL assistance lead to problems of information being held back that, if shared, could impact future decisions about that project and its follow-on projects. All of these together help begin to explain why the repeated mistakes outlined in chapter 3 – namely, reforms that are easy to do (e.g., transplanting laws; building court houses) and easy to monitor (yes, a law has been written and/or passed; a courthouse has been built) but do not bring about the intended results (law is not implemented or enforced; courthouse is used for purposes other than meeting justice sector needs) – continue to happen with unfortunate regularity.<sup>104</sup>

As discussed in the next chapter, principal-agent literature is helpful to illuminate why problematic incentives and informational asymmetry can be particularly problematic in international development settings – where the sponsors (or donor country taxpayers) are not the same as the beneficiaries, and the beneficiaries have no direct feedback into the system that pays the donors.<sup>105</sup> While true of development assistance in general, this is also true for RoL assistance.

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<sup>104</sup> See e.g., Carothers, “Problem of Knowledge,” 23-25. See also chapter 3, Section II (c)(ii).

<sup>105</sup> Paul Seabright, “Conflicts of Objectives and Task Allocation in Aid Agencies,” 64-65.



## **Chapter 6 /**

# **The Anatomy of (Indonesian) Rule of Law Assistance According to the Principal-Agent Theory**

## **I. Introduction**

In the last chapter, we examined how structural features of rule of law (RoL) assistance as a field – including its ingrained incentives, procurement process, choices about aid structure and what many critics identify as problematic performance issues – apply in the local setting of Indonesia. The present chapter continues to focus at the micro-level, and lays out the anatomy of the four RoL assistance projects and programs that were introduced in chapter 4. The work of political economist Elinor Ostrom and others applying principal-agent theory to development settings is useful in illuminating the relationships and experiences being described by the many parties to RoL assistance – both in general, as a field, and specifically, in Indonesia.

The data presented in this chapter – interview responses, project documents, and publicly available information about Indonesian government agencies – indicate that a multiplicity of parties constitute the RoL field in Indonesia. This includes the usual parties to international development, including donors, partner governments and agencies, implementing contractors and sub-contractors, etc., as well as a few entities that are specific to Indonesian RoL assistance, including Indonesia’s National Development Planning Agency, known as Bappenas, and ‘reform teams’ for the Indonesian Supreme Court and Attorney General’s Office.

When we probe a little deeper using the principal-agent theory, we see that not only are there many participants to the assistance (all with some stake in it), but many of these actors also represent more than one entity. As shown in Section III below, most

local partners<sup>1</sup> interviewed were also professionally affiliated with Indonesian non-governmental organizations (NGOs) or civil society organizations (CSOs) that work on justice sector reforms (widely construed) at the same time as their employment in RoL assistance. One practical implication of this is that a majority of the implementing team members – who are the donors' agents – are themselves embedded locally, through their NGOs and CSOs.

In order to understand the significance and potential of these embedded agents, as well as widespread informational and incentive problems found in international development, in general, and RoL assistance, in particular, we turn to the application of principal-agent theory to development settings by several political economists. This chapter first outlines principal-agent theory, and then applies it to the Indonesian RoL assistance setting. What we find is that not all donors fully appreciate the potential of their local partners, and instead attempt to reign in – through e.g., pre-determined easy-to-monitor activities, reporting requirements – what they do not appear to understand.

## **II. Principal – agent theory**

According to Ostrom and others, in a principal-agent relationship, the principal benefits from outcomes achieved by an agent, who has been offered a contract to take

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<sup>1</sup> *Local partners*, as in chapter 1, refers to the Indonesian nationals who professionally partner in some way with donor-funded RoL assistance in Indonesia – either on behalf of Indonesia (e.g., reform team member, Bappenas official) or a donor and its implementing contractors (e.g., 'national expert' on the donor's design team, implementing team and staff members). '*Local actors*' is the broader category, encompassing all participants – foreign or local – in the design and implementation of RoL assistance.

appropriate actions to achieve these outcomes.<sup>2</sup> Principal-agent theory posits that two problems occur as a result of this delegation: 1) informational problems involving missing or asymmetric information between the principal and agents; and 2) incentive problems in which agents act according to interests other than the contractually agreed-upon interests of the principal.<sup>3</sup> Economists Laffont and Martimort refer to the principal-agent problem as one of “delegating a task to an agent with private information.”<sup>4</sup> This private information can take two forms: 1) hidden action, when an agent takes an action unobserved by the principal, leading to ‘moral hazard;’ or 2) hidden knowledge, when the agent has knowledge related to his valuation that is unknown by the principal, resulting in ‘adverse selection.’<sup>5</sup>

The term *moral hazard* originates from the realm of insurance, and refers to an insured agent’s ability to “affect the probability of insured events.”<sup>6</sup> It has come to be used more generally to refer to hidden action problems,<sup>7</sup> and also applied to other principal-agent relationships, including the ‘manager-worker’ relationships analyzed by

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<sup>2</sup> Clark C. Gibson, Krister Andersson, Elinor Ostrom & Sujai Shivakumar, *The Samaritan’s Dilemma: The Political Economy of Development Aid* (New York: Oxford University Press, 2005), 43-45 (describing the simplest example of principal-agent as being patient/principal and doctor/agent, and the mechanism of professional organizations to reduce the P-A problems of missing information and differing preferences). I use Ostrom et. al, because of their application of the theory to the setting of international development.

<sup>3</sup> Bertin Martens, Uwe Mummert, Peter Murrell and Paul Seabright, *The Institutional Economics of Foreign Aid* (New York: Cambridge University Press, 2002), at 8.

<sup>4</sup> Jean-Jacques Laffont and David Mortimort, *The Theory of Incentives: The Principal-Agent Model* (Princeton: Princeton University Press, 2002), 3.

<sup>5</sup> See e.g., Laffont and Mortimort, *The Theory of Incentives*, 3, 28, and 145.

<sup>6</sup> See e.g., *ibid.*, 18-19 (citing sources as early as 1957 and 1960); Gibson, et.al, *The Samaritan’s Dilemma*, 42 (describing the difficulty of creating effective insurance institutions because “at least some individuals will be more careless” and insurance companies cannot monitor individual behavior).

<sup>7</sup> See e.g., Laffont and Mortimort, *The Theory of Incentives*, 3, 28-31, 145-48, 172-74, 184, and 187-91 (analyzing adverse selection and moral hazard problems of “manager-worker” relationships in significant detail); Gibson, et.al, *The Samaritan’s Dilemma*, 42.

Laffont and Martimort, and those found in RoL assistance, analyzed here. In development assistance settings, moral hazard could lead to a recipient government's delay in implementing reforms because of readily available aid from foreign donors.<sup>8</sup> Or, regarding the 'donor-implementing contractor' relationship found in development assistance, moral hazard could involve implementing agents feeling free to advance their own interests instead of the principal's interest when they are paid in the typical lump sums, and not according to the achievement of targets – particularly relevant in areas like institutional reform and RoL assistance with less tangible outputs.<sup>9</sup> Or, as we see below, 'worker-agents' or implementing team members may make their own decisions about where they will carry out their work – decisions not necessarily in conformity with their contractual obligations.

An example of *adverse selection*, or a hidden knowledge problem, occurs when an agent is chosen by a principal based on (what may be) misrepresentations during negotiations for the initial contract.<sup>10</sup> In Indonesian RoL assistance, we see this come up in the context of hiring staff and 'experts' – who claim or embellish expertise that they do not in fact possess. Further examples are discussed below, in relation to the case study data.

Larger organizations breed both problems of information and incentive, in that they are hierarchically structured, and thus contain one or more chains of principal-agent relationships.<sup>11</sup> This is a paradigmatic problem for development aid organizations,

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<sup>8</sup> See Gibson, et. al., *The Samaritan's Dilemma*, 42-43.

<sup>9</sup> See Martens, "Introduction," in *The Institutional Economics of Foreign Aid*, 22.

<sup>10</sup> See Gibson, et. al., *The Samaritan's Dilemma*, 44-45; Martens, "Introduction," 8-9. See also Kathleen M. Eisenhardt, "Agency Theory: An Assessment and Review," *The Academy of Management Review* 14, no. 1, (Jan 1989), 61.

<sup>11</sup> See Gibson, et. al., *Samaritan's Dilemma*, 43-44; Martens, "Introduction," 8-9.

including those delivering RoL assistance. At each level, a reduced level of information passes to superiors.<sup>12</sup> The incentive for withholding information from principals is magnified when agents favor information that reflects well upon their job performance, and in consideration of their future livelihoods. As discussed in chapter 5, the field of RoL assistance as currently practiced, discourages the sharing of information that upsets the status quo.<sup>13</sup>

To help us make sense of the relationships involved, we turn to Peter Murrell's basic economic analysis of donor, contractor and recipient interactions in the provision of foreign aid,<sup>14</sup> shown in *Figure 1*, below.<sup>15</sup> He diagrams the parties in foreign aid delivery into a U-shaped chart, with the top of the first column designated as the donor principal (e.g., United States, represented by its agency for international development: USAID) and below it, a donor agent (e.g., USAID in-country mission).<sup>16</sup> The second column is headed by the recipient principal (e.g., Indonesian Supreme Court), and below, the recipient agent (e.g., Judicial Reform Team Office for the Indonesian Supreme Court). What connects the bottom of the 'U' is the contractor chosen to implement the project or program, who in turn works with both recipient and donor agents.

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<sup>12</sup> Paul Seabright describes this as the potential for "efficiency loss" at each stage in the chain. Paul Seabright, "Conflicts of Objectives and Task Allocation in Aid Agencies," in *Institutional Economics of Foreign Aid*, 46.

<sup>13</sup> See Chapter 5, Section V (a).

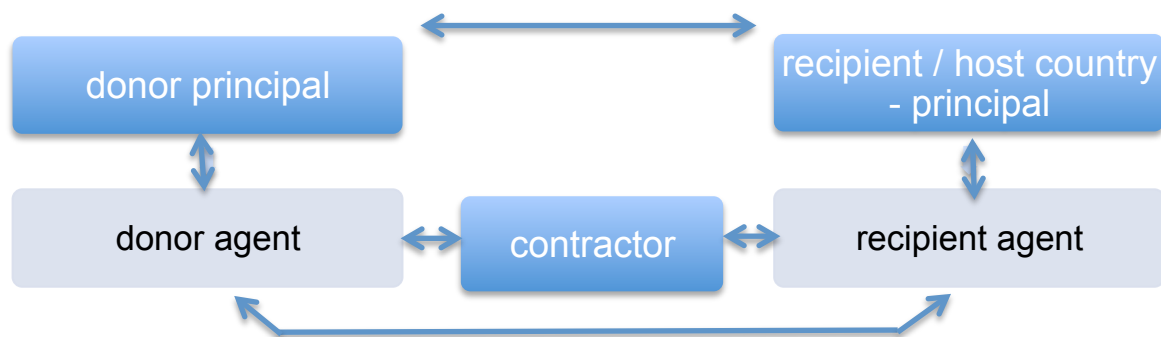
<sup>14</sup> Peter Murrell, "The Interactions of Donors, Contractors, and Recipients in Implementing Aid for Institutional Reform," in *The Institutional Economics of Foreign Aid*, 69-111.

<sup>15</sup> Adapted from Murrell's Figure 3.1 on the actors in institutional reform projects. Peter Murrell, "Interactions of Donors, Contractors, and Recipients," 76.

<sup>16</sup> *Ibid.*, 75-77. The parenthetical examples are mine, and refer to case study parties discussed in detail below.

*Figure 1* is particularly instructive here for the purpose of identifying the parties and their relationships. Without it, we might confuse the term ‘recipient agent’ and assume it to mean that the recipient is the agent of the donor. The diagram makes clear that the donor and recipient are both principals in their respective realms.

*Figure 1.*

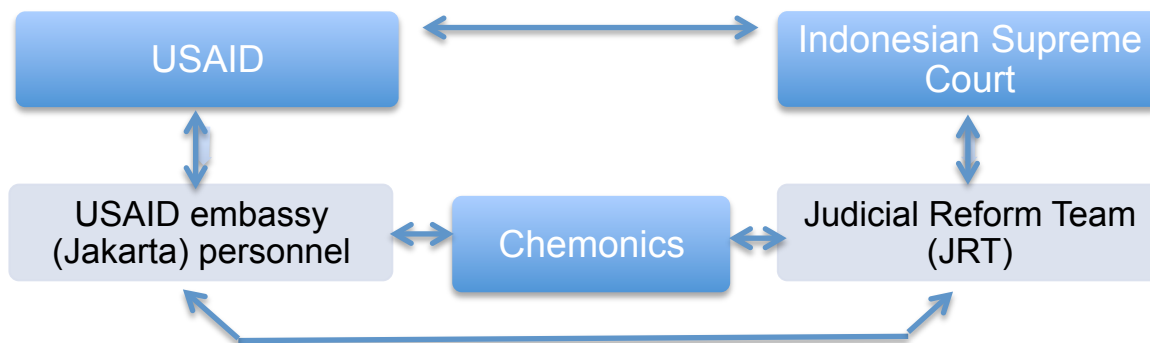


Arrows denote relationships. According to Murrell, the relationship between the contractor and the donor agent is contractual, while the relationship between the contractor and recipient agent is one of bargaining during project implementation. The relationship between donor agents and recipient agents is quasi-contractual – in that it stems from an overarching agreement between donor and recipient principals, but is likely not enforceable in any court.<sup>17</sup>

Before turning to an analysis of the Indonesian RoL assistance context according to principal-agent theory, we use Murrell’s U-shaped chart, adapted in *Figure 2*, to map the parties of one component of one case study, USAID’s C4J, as an example of how the principal-agent relationships occur within this domain in Indonesia.

<sup>17</sup> Ibid, 176-77. The agreements underlying the case study projects are examined in chapter 7.

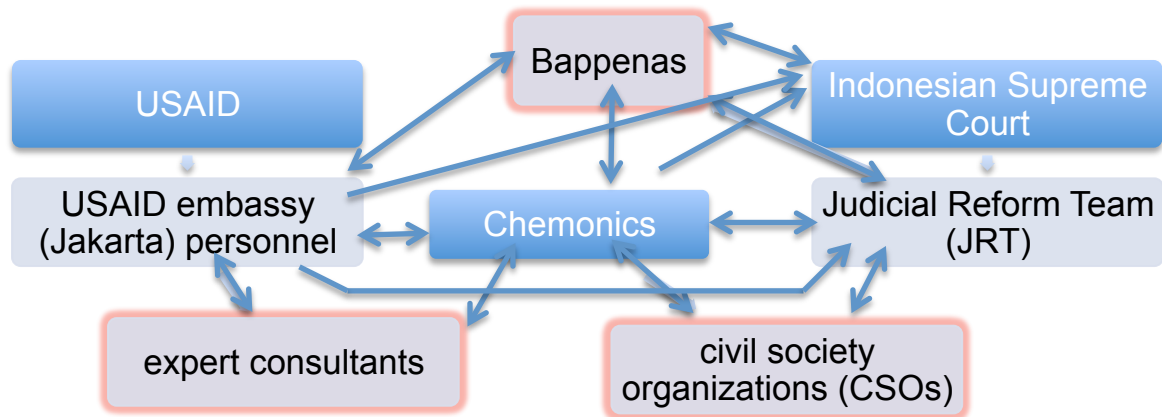
Figure 2: USAID's C4J project



Here, we see Chemonics as the implementing contractor working with USAID, as well as those on the Indonesian side: the Indonesian agent, as well as the Indonesian principal – in this case, judges in leadership at the Supreme Court.

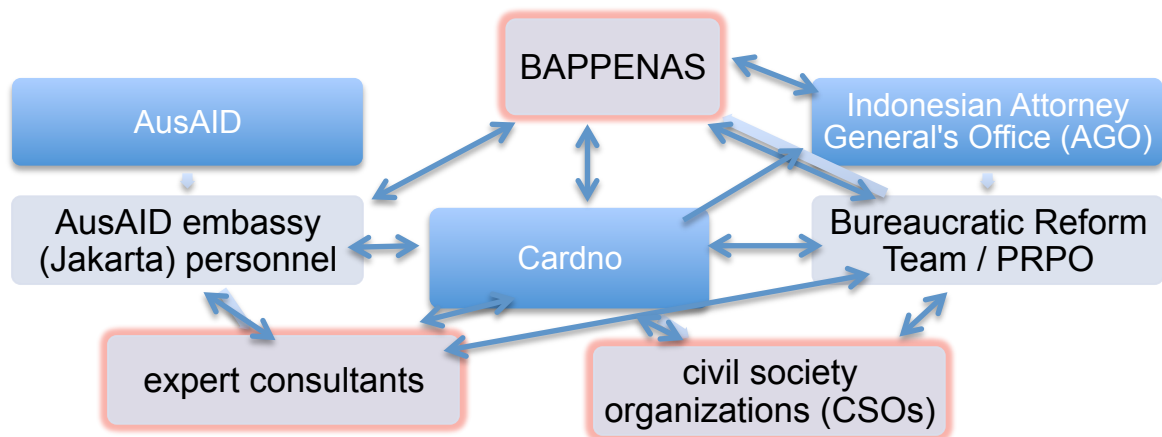
But in practice, things are not so crisp, and require the additions of parties and arrows. In Indonesia – as in other RoL assistance settings – there are other entities involved in RoL assistance that contribute to the ambiguity and fluidity of relationships: Bappenas (Indonesia's National Development Planning Agency) and designated 'reform teams' housed in the Supreme Court and the Attorney General's Office, discussed in detail below. *Figure 3*, below, is a re-configured version of *Figure 2* – with the added actors of Bappenas and the civil society organizations (CSOs), and individual expert consultants who provide staff for the reform teams and for the contractors hired to implement RoL assistance projects and programs. Here, the recipient principal is the Indonesian Supreme Court; the donor is USAID; and the implementing contractor is U.S. for-profit contractor, Chemonics.

Figure 3: USAID's C4J project



To add another example, in *Figure 4*, we see the mapping of a program component where the recipient principal is the Indonesian Attorney General's Office (AGO); the donor principal is AusAID; and the implementing contractor is Australian for-profit contractor, Cardno.

Figure 4: AusAID's AIPJ program



One difference between the two examples illustrated here is that the AGO's reform team, known to those involved in AusAID's AIPJ as the PRPO (Prosecutor Reform

Program Office) plays a large role in implementation, and works with and recommends outside expert consultants as needed.<sup>18</sup>

This chapter builds upon the local actor and local partner definitions offered in chapter 1 by documenting Indonesia-specific examples.<sup>19</sup> *Local actors* refer to all participants involved at the site of RoL assistance implementation and delivery. These include donor officials working in-country, Indonesian government officials, international and Indonesian project staff hired by implementing contractors, academics (national and international) involved as experts, other substantive experts (national and international). As discussed in chapters 1 and 3, this is a group of experienced professionals whose views are underrepresented in existing literature.

*Local partners* are a subset of local actors, namely Indonesian nationals who partner in some professional way with RoL assistance – as project staff for implementing contractors, as national experts, as Indonesian government officials, as members of Indonesian reform teams, etc. In light of their experience working with many donors over many years, these are reliable Indonesian voices on the local experience of donor-funded RoL assistance in Indonesia.<sup>20</sup>

What follows is a mapping of three Indonesia-specific local partners of RoL assistance. As we see in the data below, these entities take on (and are ascribed) many roles in the design and implementation of RoL assistance taking place in Indonesia.

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<sup>18</sup> Informants 25 (interview with author, September 18, 2012), 2 (interview with author, April 26, 2012).

<sup>19</sup> See chapter 1, Section V (a).

<sup>20</sup> If RoL assistance is done well, these ‘local partners’ might become ‘local owners’ – an ideal (perhaps not so unattainable), discussed further in chapter 9.

*a. Indonesia-specific local partners*

In addition to the principal-agent relationships found on the donor side in the case-study projects and programs described above, there also exist less defined, sometimes even disputed, relationships between the donor agents (typically implementing contractors) and their necessary host country counterparts and agents – or local partners, as defined by this study. In the case of Indonesia, three of these include Bappenas (*Badan Perencanaan dan Pembangunan Nasional*, Indonesia’s National Development Planning Agency), and what are referred to as the ‘reform teams’ for the Supreme Court and the Attorney General’s Office. These offices are staffed by educated legal professionals<sup>21</sup> – many of whom have dedicated the better part of their adult lives working for Indonesian law and justice sector reform.

From a documentary and legal standpoint, all three of these entities, Bappenas, JRTO (reform team of the Supreme Court), and *Tim Asistensi* (reform team of the Attorney General’s Office) are legitimate agents on behalf of Indonesia in dealing with foreign donors – though as will be discussed below, donors do not always treat them as such.

*i. Bappenas (Indonesia’s National Development Planning Agency)*

Bappenas, as Indonesia’s National Development Planning Agency, takes on a number of roles with regard to Indonesia’s development, including leading the development of Indonesia’s National Development short-, medium- and long-term plans; managing, coordinating and administering their implementation, including monitoring,

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<sup>21</sup> Many with one or more Western graduate degrees. See chapter 4, Section III (b).

reporting and evaluation; and acting as a ‘think tank’ on matters of development.<sup>22</sup>

Bappenas represents the government of Indonesia, and signed on behalf of Indonesia when establishing the bi-lateral projects/programs with USAID and AusAID, underlying C4J, E2J, and AIPJ.<sup>23</sup> According to the Supreme Court *Implementation Directives*, Bappenas is assigned a coordinating role in the early planning stages of donor-assisted reforms taking place at the Supreme Court, as the designated official recipient of all prospective donors’ required ‘letters of intent.’<sup>24</sup> Also involved in shaping the substance of the agreements (via involvement in the preparation and activity plans required of all prospective donors),<sup>25</sup> Bappenas is then supposed to perform various monitoring tasks, such as participating in implementation ‘pre-kick off’ [sic] meetings,<sup>26</sup> and detailed

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<sup>22</sup> Republic of Indonesia, Law no. 25 of 2004 Regarding the National Development Planning System (October 4, 2004). See also, Bappenas website, <http://www.Bappenas.go.id/profile1/> (English language profile of Bappenas). More detailed information is available on the Indonesian version, at: Bappenas, *Tentang kami* (“about us”), *Tugas Pokok dan Fungsi* (“main duties and functions”), <http://www.Bappenas.go.id/profil-Bappenas/tupoksi/?&kid=1423088559>; Jón R. Blöndal, Ian Hawkesworth and Hyun-Deok Choi, “Budgeting in Indonesia,” *OECD Journal on Budgeting* 9 (2009): 2-3 and 6-7 (including Law no. 25 about National Planning in a list of major laws enacted in the early 2000s (post financial crisis of 1997-98, and during Indonesia’s transition to democracy), which impacted eventual reforms of Indonesia’s budgeting process).

<sup>23</sup> See “Subsidiary Arrangement between the Government of Australia and the Government of the Republic of Indonesia Relating to the Australia Indonesia Partnership for Justice” (“Aus – Indo Sub Arrangement”), signed 2 May, 2011, in Canberra, Australia; and USAID Grant Agreement No. 497-026, “Assistance Agreement Between the Government of the Republic of Indonesia and the United States of America for Democracy and Governance Programs in Indonesia” (“U.S. – Indo Assistance Agreement”), September 30, 2009. These agreements are discussed in detail in chapter 7, Section 4, (a) and (b).

<sup>24</sup> The Supreme Court of Indonesia, *Implementation Directives for Foreign Donors Cooperation in the Supreme Court of the Republic of Indonesia*, Decision no. 143/KMA/SK/VIII/2010 (August 2, 2010), Section I, C (9-10), 14-15.

<sup>25</sup> *Ibid.*, Section I, C (12-17), 15-17.

<sup>26</sup> *Ibid.*, Section II, B (4-5), 23-24.

discussions regarding implementing contractors' required annual work plans,<sup>27</sup> as well as 'closure' activities, including participating in the verification process that deliverables promised – namely 'services (skills) / materials / assets / goods' – have been transferred to the Supreme Court.<sup>28</sup> This is potentially a heavy workload – especially when multiplied by the number of donors, assistance projects and programs, and Indonesian ministries and agencies comprising Indonesia's vast government bureaucracy that are involved in national development planning and the many reforms embarked upon to reach those development goals.<sup>29</sup> To do this and other work, Bappenas reported 865 employees as part of its 'human resources' as of November 20, 2015.<sup>30</sup>

Below, in *Chart 1*, we similarly see a wide range of roles ascribed to Bappenas throughout the course of interviews – including a category where informants expressed confusion about what Bappenas' role is, or should be. Particular roles for Bappenas were mentioned and/or described 52 times during 18 different interviews involving 22 different informants.<sup>31</sup> *Chart 1* contains the categories of those contexts. The answers given were both responses to direct questions about Bappenas; and spontaneous comments that emerged when discussing who-did-what during design and delivery phases, as well as when discussing ownership and partnership meanings and challenges. Note that two of the 18 interviews were with current or former Bappenas

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<sup>27</sup> Ibid., Section II, C (4), 27.

<sup>28</sup> Ibid., Section III, A (1-3), 32-34.

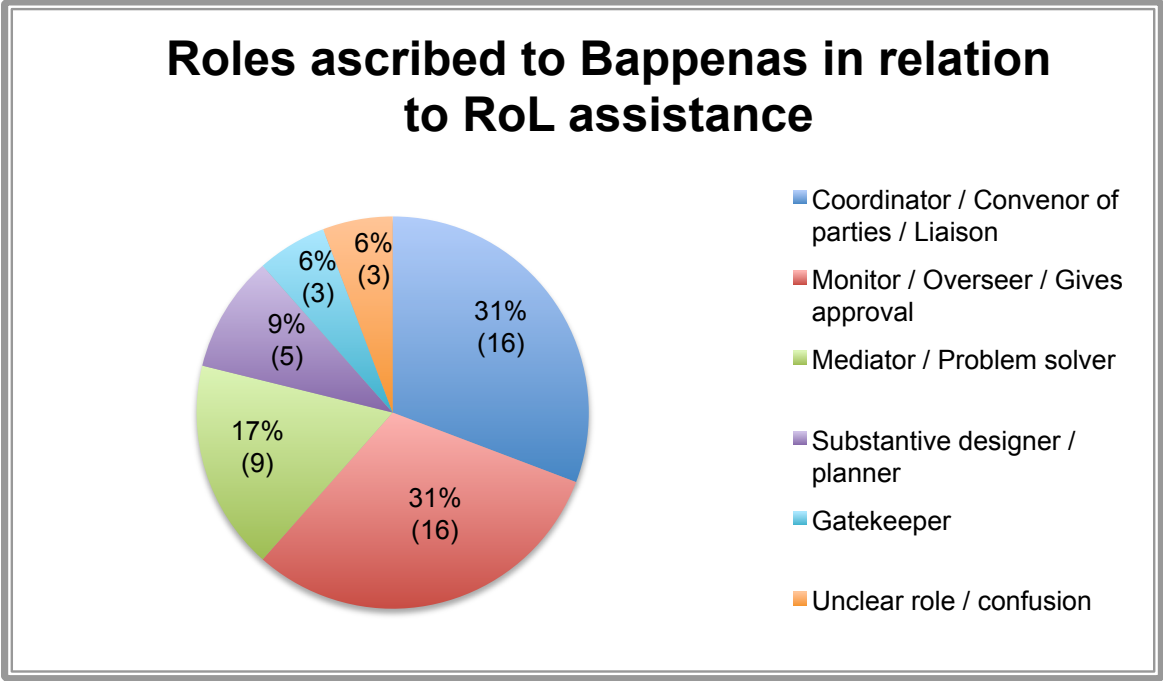
<sup>29</sup> See also Chapter 7, Section IV (d), for a discussion of Indonesia's *Bluebooks* and *Greenbooks* – official publications of projects in need of donor funding, sought by Indonesian ministries and agencies. Bappenas is also responsible for compiling and maintaining these and other related lists.

<sup>30</sup> Bappenas, About us, "Human Resources," <http://www.Bappenas.go.id/id/profil-Bappenas/sumber-daya-manusia1/>.

<sup>31</sup> Two of these interviews were attended by multiple (3) people.

officials, whose interviews included many descriptions of the work that Bappenas did or was trying to do. Therefore, the voices of particular Bappenas officials are perhaps over-represented in the answers, but their views are nonetheless instructive in laying out the many possible roles envisioned for Bappenas.

Chart 1.



Here, as a whole, we see Bappenas as a go-to player, one that acts as a middle-man between and among the parties to the RoL assistance, as well as a problem solver and taker of complaints. It is worth noting that these are not just the views of current or prior Bappenas officials; there are many local actors who view Bappenas as their ally, or at least partner and counterpart, in carrying out the business of Indonesia’s justice sector reform.<sup>32</sup> Substantively, Bappenas has a legally mandated role in driving reform design,

<sup>32</sup> Informants 9 (interview with author, April 23, 2012), 11 (interview with author, April 25, 2012), 16 (interview with author, April 23, 2012), 19 (interview with author, September 11, 2012), 25 (interview with author, September 18, 2012), 36 (interview with author, September 18, 2012). This is not to say Bappenas does not have its detractors. See

coordination,<sup>33</sup> but in practice, seems to be overwhelmed with other mandated tasks, including the ever-important monitoring and oversight,<sup>34</sup> that providing leadership on the substance in the design of the assistance could be more the exception,<sup>35</sup> than the rule – though it does happen at least sometimes, as reported by informants involved in AIPJ’s design.<sup>36</sup> More typically and in general, however, the initial assessment and design phase is the point at which some informants voiced disappointment with Bappenas and others in the Indonesian government for missing opportunities to steer the assistance in a direction best suited for Indonesian justice sector reform.<sup>37</sup> For example, one informant observed that Bappenas seemed “trapped in the procedures of planning,” and does more ‘compiling’ of others’ ideas rather than devising their own plans.<sup>38</sup>

Bappenas thus provides an example of local partner that appears to be doing the best that it can, given its circumstances. Sometimes Bappenas manages to exercise

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e.g., Informants 23 (interview with author, September 11, 2012) and 24 (interview with author, September 11, 2012).

<sup>33</sup> Bappenas was established by presidential decree in 2002. Presidential Decrees No. 4 and 5 describe its organization, working procedures, function and duties. See also RI, Law 25 (2004).

<sup>34</sup> RI Law 25 (2004). Informants 10 (interview with author, April 24, 2012) (having heard from Bappenas officials that they lacked human resources to screen all the projects they were supposed to be monitoring); 15 (interview with author, September 17, 2012), 37 (interview with author, September 19, 2012) (observing that the assigned Bappenas official is very busy, and has limited staff), 40 (interview with author, September 20, 2012).

<sup>35</sup> Participants involved in AIPJ’s design process both on behalf of Australia and Indonesia reported heavy involvement by Bappenas, which included substantive engagement and participation in the planning.

<sup>36</sup> Informants 3 (interview with author, September 13, 2012), 15 (interview with author, September 1, 2012), and 36 (September 18, 2012).

<sup>37</sup> Informant 41 (interview with author, September 20, 2012) (believes Bappenas dropped the ball on Indonesia’s environmental regulations, which had been a clean slate to be written); Informant 33 (interview with author, September 21, 2012) (implementing contractor who did not see Bappenas as an important partner; understood Bappenas as an agency that was fading in terms of power wielded); Informant 40 (interview with author, September 20, 2012).

<sup>38</sup> Informant 41 (September 20, 2012).

leadership, and is indeed capable of it when it feels called upon, but other times, the sheer number of tasks, projects, and ministers requiring triage and attention, means that perhaps the compiling of anything deserves at least some credit. Other locations that are host to RoL assistance will have their own versions of national development planning agencies or entities that perform similar functions.

ii. Reform teams of the Supreme Court and Attorney General's Office

Both the Attorney General's Office and the Supreme Court's own members (prosecutors, judges) are said to be more concerned with handling their cases than taking on the work of bureaucratic reform. Reform teams were established at the Indonesian Supreme Court (2001) and the Attorney General's Office (2006) in order to assist the institutions in planning and executing reforms. According to an Indonesian reformer involved at its formation, the reform team was intended to "coordinate donors and facilitate aid," while also making sure that the donors' support was in fact the "real answer to the needs of the Supreme Court."<sup>39</sup> Reform teams were (and are) primarily staffed by members of a number of civil society organizations (CSOs) working in various areas of Indonesian justice sector reform.

The Judicial Reform Team (JRT), including its supporting office – known as the Judicial Reform Team Office, or JRTO<sup>40</sup> (both housed inside the Supreme Court building) – are assigned specific duties for dealing with donors according to directives

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<sup>39</sup> Informant 11 (interview with author, April 25, 2012).

<sup>40</sup> JRTO is also referred to as *Tim Asistensi* (assistance team) in Indonesia, and is staffed by legal professionals who are not judges. The JRT's leadership team (*Tim Pengarah*) is staffed by judges as well as other officials. See email with Informant 16, dated February 2, 2015 (on file with the author); Indonesian Supreme Court website about judicial reform, <http://www.pembaruanperadilan.net/v2/tentang/>.

issued by the Supreme Court – *The Implementation Directives for Foreign Donors [sic] Cooperation in the Supreme Court of the Republic of Indonesia*.<sup>41</sup> According to these *Implementation Directives*, the JRT plays a crucial role in donor-assisted reform efforts at the Supreme Court for all stages of reform – the planning, implementation, as well as ‘closure’ – or ending the contract and moving responsibilities from donors and their contractors over to the Supreme Court and/or JRT.<sup>42</sup> For example, donors are expected to submit preliminary commitment letters detailing planned activities and funding of a proposed program to the JRT coordinator;<sup>43</sup> following coordination meetings with relevant parties in the Supreme Court, the JRT is to submit a complete set of prioritized programs to be funded by donors to Bappenas;<sup>44</sup> prospective implementing contractors – referred to as ‘bidders’ – are to interview members of the JRT in order to “discover the needs of the Supreme Court,”<sup>45</sup> the ‘Scope of Works’ stated in donors’ tender documents are to be approved by the JRT prior to conducting the tender process for contractor services;<sup>46</sup> and the JRT Coordinator must approve in writing the contractor’s Annual Work Plan – required of all contractors conducting donor programs at the Indonesian Supreme Court.<sup>47</sup>

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<sup>41</sup> The Supreme Court of Indonesia, *The Implementation Directives for Foreign Donors Cooperation in the Supreme Court of the Republic of Indonesia*, Decision Number 143/KMA/SK/VIII/2010 (August 2, 2010)(on file with the author). See *Implementation Directives*, Ch 1, Article 1, Sections 15 and 16 (at 5) for a description of parties. These directives have been translated into English, and printed as a convenient small book, making them easily accessible for donors. Two different informants, both local partners, gave me copies during the course of our interviews.

<sup>42</sup> See *Implementation Directives*, Attachment I, no. I, II and III, 9-36.

<sup>43</sup> *Ibid.*, Attachment I, no. I, B (3), 10.

<sup>44</sup> *Ibid.*, Attachment I, no. I, C (1-4), 12-13.

<sup>45</sup> *Ibid.*, Attachment I, no. II, A, 2(b), 21.

<sup>46</sup> *Ibid.*, Attachment I, no. II, A (3), 21.

<sup>47</sup> *Ibid.*, Attachment I, no. II, C (8), 28.

These directives notwithstanding, some donors and donor agents ignore the stated policy of using the JRTO as the liaison for the Supreme Court<sup>48</sup> and try to meet individual Supreme Court judges personally in the course of RoL assistance delivery.<sup>49</sup> Implementers are aware that this practice provokes frustration among members of the JRTO,<sup>50</sup> and at least one case study reported having ‘pacified’ them by paying the salary for one JRTO member.<sup>51</sup>

In contrast to the English-language *Implementation Directives* found at the Supreme Court, detailed official information is less readily available about the role of the Attorney General Office’s reform team, known since the start of government-wide bureaucratic reform efforts in 2008 as the “assistance team to Bureaucratic Reform Program” or *Tim Asistensi*.<sup>52</sup> The AGO’s website page about bureaucratic reform includes an organizational chart, which situates *Tim Asistensi* in its own box, separate from the top-level *Tim Pengarah* (steering committee) and the four technical divisions managing and implementing bureaucratic reform.<sup>53</sup> *Tim Asistensi*’s duties are listed as:

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<sup>48</sup> This is known as the “One Door’ policy for Donor’s management.” See *Implementation Directives*, Chapter II, Article 3 (4), 6. Interestingly, this paragraph in the directives that coins the phrase “One Door” does not specify which ‘door’ – though the context of the explicit instructions in the Annex indicates that the JRT, and specifically the JRTO, is meant to be the primary point of contact for donors and their implementers. See *Implementation Directives*, Section II, D (5), 30: “Coordination and/or correspondences of daily activities between Donors, Contractors, and/or Consultant during Grant implementation shall be facilitated by the Judicial Reform Team Office (JRTO).”

<sup>49</sup> See e.g., informants 2 (interview with author, April 26, 2012), and 19 (interview with author, September 11, 2012).

<sup>50</sup> Informants 2 (interview with author, April 26, 2012), and 19 (interview with author, September 11, 2012).

<sup>51</sup> Informants 19 (interview with author, September 11, 2012), and 10 (interview with author, April 24, 2012).

<sup>52</sup> Informant 25 (interview with author, September 18, 2012).

<sup>53</sup> Attorney of the Republic Indonesia (*Kejaksaan Republik Indonesia*), “Bureaucratic Reform,” [http://www.kejaksaan.go.id/reformasi\\_birokrasi.php?section=7](http://www.kejaksaan.go.id/reformasi_birokrasi.php?section=7).

assisting with implementation, reporting requirements, monitoring and evaluation; as well as acting as a liaison with donors, which specifically includes contacting those donors able to provide consulting services, comparative studies, and other activities relevant to bureaucratic reforms.<sup>54</sup> According to an official decision by a Deputy A.G. of AGO Bureaucratic Reform's leadership team, *Tim Pengarah*, the duties of *Tim Asistensi* also specifically include assisting all implementation teams from preparation through all activities of bureaucratic reform, as well as writing reports for every meeting and activity associated with the tasks of the implementation teams.<sup>55</sup>

*Chart 2* below shows a graphic representation of roles ascribed to both the Supreme Court and AGO reform teams as described in the interviews. Similar to the discussion of Bappenas above, all interviews were coded so that any mention of what reform teams did or did not do were flagged as excerpts. Included in these excerpts are the views of five current or former reform team members, whose views are admittedly over-represented in the interviews. Specifically, 23 of 40 excerpts originate from local partners who worked at the reform teams at some point since their establishment; yet this should come as no surprise because these study participants would most naturally bring up a reform team perspective in response to interview questions, and would know about what the reform team did or was trying to do. An airing of reform team member

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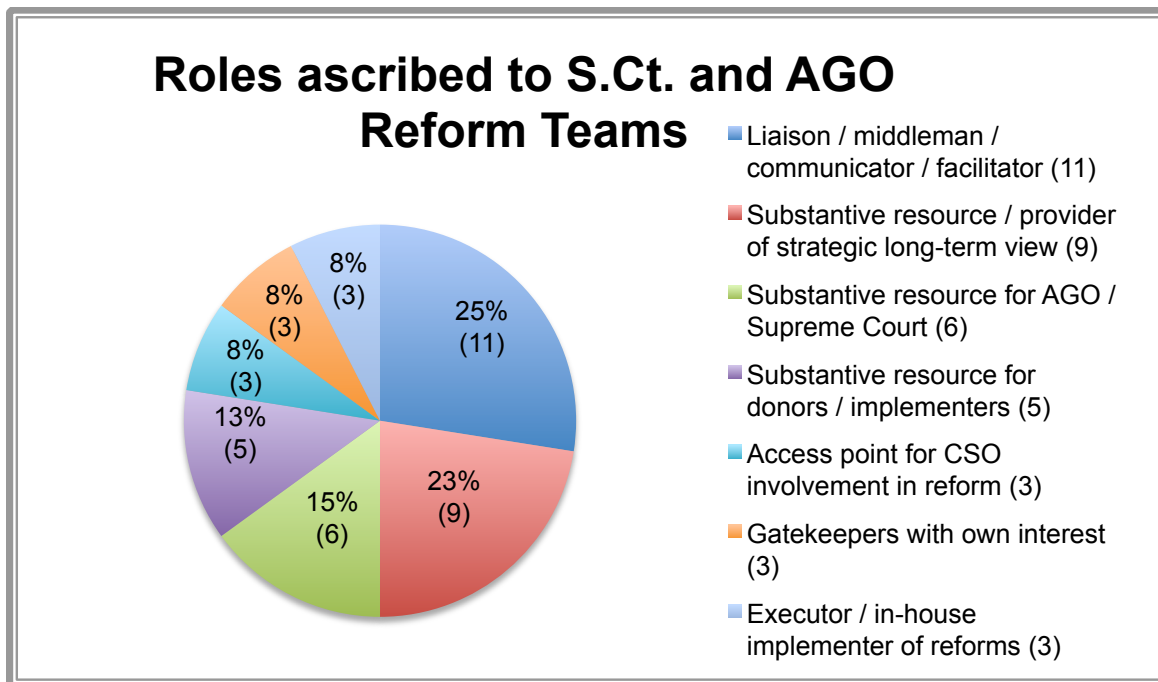
<sup>54</sup> Ibid. Indonesian translation confirmed with Pauli Sandjaja, UW Indonesian instructor on 2/9/15.

<sup>55</sup> Attorney General of the Republic of Indonesia, Decision of the Deputy A.G. (*Keputusan Wakil Jaksa Agung Republik Indonesia*), no. KEP/131/B/WJA/12/2008, September 2008, available at: [http://www.kejaksaan.go.id/uplimg/File/tahappelaksanaan/SK%20RB%207\\_131.PDF](http://www.kejaksaan.go.id/uplimg/File/tahappelaksanaan/SK%20RB%207_131.PDF). This document concerns the role of Tim Asistensi. Interestingly, this document only explicitly mentions donors as being the ones to bear the cost of reform implementation. Indonesian translation confirmed with Pauli Sandjaja, UW Indonesian instructor on 2/9/15.

views about what they believe the reform teams are capable of contributing to RoL assistance is useful because many reform team members have a decade or more experience working in donor-assisted Indonesian RoL assistance, and their views are not typically captured in existing literature.

Thus *Chart 2* is an aggregate picture – and includes both contemplated and offered roles for the reform teams, as well as reform team roles as experienced and described by other local actors. In order to preserve anonymity of informants, this graph also does not differentiate between reform teams of the AGO and the Supreme Court, but it is nonetheless useful in depicting how local actors view the reform teams, in general, as well as providing a list of possible duties and roles to be taken on by entities such as these. Details about the specific teams are discussed below.

*Chart 2.*



From *Chart 2*, we see that while 25 percent of the roles described involved more logistical support as a middleman of sorts, more than half of the descriptions included a

substantive component of offering information and/or more technical and strategic expertise related to reform efforts. Six non-reform team members (other local actors) included substantive components when describing the work of the reform teams.

Reform team members believe they have much to offer during design and implementation of RoL assistance. One team member for the AGO described the reform team role as one of helping decision-makers in the Indonesian institution to “change mindset,” and “work together with technical team” on reform projects / programs, recruiting consultants, and assisting in implementing the program.<sup>56</sup> Another pointed out that before the reform team, there was no long-term planning surrounding reform in the Supreme Court, only case-by-case engagement with donors.<sup>57</sup>

Other non-team members described a negative role in which the reform teams were seen as acting as a gatekeeper, or other barrier to reform.<sup>58</sup> From the perspective of those sympathetic to the reform team and its mission, however, some local partners report that donors and their hired implementers do not maximize support and involvement from the reforms teams, which by design are Indonesian institutions specifically formed to help reforms meet actual Indonesian needs and garner the support and trust of the Supreme Court and AGO. One reform team member reported offering suggestions to an implementing contractor that went unheeded, only to later find out that the contractor ultimately came to the same conclusions after a review

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<sup>56</sup> Informant 25 (interview with author, September 18, 2012). Another informant, 35 (interview with author, September 19, 2012), was one such *konsultan* / consultant, recommended by a *Tim Asistensi* member as having relevant expertise for some aspect of the AGO’s Bureaucratic Reform.

<sup>57</sup> Informant 16 (interview with author, April 23, 2012).

<sup>58</sup> Informants 47 (interview with author, December 20, 2012), 19 (interview with author, September 11, 2012).

(described by the reform team member as “unnecessary wasting” of time and resources).<sup>59</sup>

It is worth noting that during interviews, reform team members presented as engaged, smart professionals who appear to care deeply about Indonesia, and put forth great effort to bring positive reform for Indonesian justice. More than that, they are arguably well-qualified, many with western graduate degrees, and fluent in at least English and Indonesian, enabling them to function in both the donor and the Indonesian worlds. Some local partners also reported working at the reform team offices just 1 – 2 days per week, with careers in full swing elsewhere, e.g., as a researcher or consultant at a legal NGO or CSO, or as implementing staff on a RoL assistance project.<sup>60</sup>

But the donors and their implementers do not seem so sure – particularly in those circumstances when reform team members were not themselves Supreme Court judges or prosecutors, as was the case with the Supreme Court’s JRTO and the AGO’s *Tim Asistensi*. Some donor-hired implementing contractors admitted being unwilling to simply accept what the reform teams said as embodying the intent or posture of their institution, and even took intentional steps to meet with leadership at both the Supreme Court and the AGO to try and confirm that what was being suggested by the reform teams had buy-in from the institutions themselves.<sup>61</sup> The risk cited was that the reform team was simply promoting the interests of particular judges, or did not really know what the upper echelon of the AGO’s office was interested in or would be willing to sign off

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<sup>59</sup> Informant 25 (interview with author, September 18, 2012).

<sup>60</sup> See e.g., informants 37 (interview with author, September 19, 2012); informant 10, 2012).

<sup>61</sup> Informants 2 (interview with author, April 26, 2012), and 19 (interview with author, September 11, 2012).

on.<sup>62</sup> In principal-agent terms, the danger was that either the agent had been captured, or that s/he was unable to accurately represent his/her principal (AGO).

These criticisms notwithstanding, three different study participants offered a similar insight – namely, that the reform teams are useful in that they create a space for CSOs to engage in the reform that is taking place. This does not however mean that they (CSOs and their representatives) automatically play a leading role in the reform. Rather, they are given a seat at the table, and from there, must still prove themselves to the other parties, notably first, their own institutions – the Supreme Court and the Attorney General’s Office. When viewed as such, the reform teams – and particularly the assistance teams (staffed entirely with professionals who are not judges or prosecutors, but legal professionals with backgrounds at CSOs) – could be considered among the important actors involved in the “interim institutional approach” to development suggested by Adler, Sage and Woolcock, which focuses more on the process of reform, and transforming the environments in which they exist, rather than a pre-determined linear and technically driven progression of development.<sup>63</sup>

This approach might also be helpful in shedding light on the vastly different experiences described regarding the reform teams of the Supreme Court versus that in the Attorney General’s Office – with the Supreme Court JRTO being viewed considerably more favorably and successful at reform efforts than that of the *Tim Asistensi* of the AGO. This disparity of results confounds some local partners because as one informant stated: the people who comprise both of these reform teams are from

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<sup>62</sup> Informants 2 (interview with author, April 26, 2012), and 19 (interview with author, September 11, 2012).

<sup>63</sup> Daniel Adler, Caroline Sage, and Michael Woolcock, “Interim Institutions and the Development Process: Opening Spaces for Reform in Cambodia and Indonesia,” *Brooks World Poverty Institution (BWPI) Working Paper* 86 (March 2009), 23-24.

the “same roots”<sup>64</sup> – meaning that they are very often members of the same social and professional networks, originating from the same NGOs and CSOs, with the same qualifications and credentials. Many reasons for this disparity are given, including the hierarchical, militarized nature of the AGO<sup>65</sup> – a holdover from the Suharto era – as compared to the Supreme Court where a culture of reform began at the top, starting in 2001 with then Chief Justice Bagir Manan,<sup>66</sup> who is revered among justice sector reformers in Indonesia for embracing meaningful judicial reform.<sup>67</sup> In these two institutions, we see how the politics of transformation are enmeshed in the cultures of the institutions themselves.

### **III. Principals and agents in Indonesian RoL assistance**

While acknowledging that the chains of information and networks linking principals and agents in Indonesia are more complex than economic models suggest, it is nonetheless worthwhile considering how the principal-agent relationship operates in practice. In this section and the sub-sections that follow, data from this study of Indonesian RoL assistance is viewed through the lens of Principal-Agent theory. The empirical reality is a field crowded with a complex array of actors, many of whom have multiple, and at times, disputed roles. This muddled mix of parties comes together to design and deliver RoL assistance. Though principal-agent relationships are just a

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<sup>64</sup> Informant 31 (interview with author, September 12, 2012).

<sup>65</sup> Indonesian prosecutors still wear military uniforms to work. See photos in the opening pages of the *Annual Report 2013 of Attorney General's Office, Republic of Indonesia* (English version), available at <http://www.kejaksaan.go.id/upldoc/laptah/l2013ef.pdf>.

<sup>66</sup> See Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Ithaca, NY: Cornell University, 2005), 475.

<sup>67</sup> See e.g., Informants 11 (interview with author, April 25, 2012), 16 (interview with author, April 23, 2012), 21 (interview with author, April 25, 2012), 42 (interview with author, September 13, 2012), and 44 (interview with author, September 13, 2012).

fraction of the many relationships present in the planning and delivery of RoL assistance, the theory helps us to focus on and understand the motivational and informational challenges present in ongoing RoL assistance.

*a. Principal-agent theory applied*

Who are the principals, and who are the agents in RoL assistance taking place in Indonesia? As funders, the donors – here, AusAID, USAID and World Bank – play a role as principals because most relevantly, they are the parties doing the hiring. Donors typically hire implementing contractors as their agents, and their agreed-upon obligations include providing something of value for Indonesian beneficiaries – be it the Supreme Court, the Attorney General’s Office, or any number of Indonesian ministries and agencies. But at a macro-level, donors are also the agents of Indonesia, in that donors offer assistance and expertise that Indonesia (through its National Development Planning Agency (*Bappenas*) or other officially designated agents) can ultimately either accept or not.

The implementing contractors are clearly agents. Because donors pay a majority of the project/program’s budget to the implementing contractors / managers to execute the day-to-day delivery of the assistance, the implementing managers are arguably also the first-line and primary beneficiaries of the funding<sup>68</sup> – ahead (at least sequentially) of

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<sup>68</sup> See chapter 7 for more on the ‘tilt’ in favor of the Global North within the RoL assistance ‘industry.’ E.g., funds earmarked as ‘foreign aid’ by bilateral donors, in particular, actually land in the hands of domestic contractors and organizations to use and disperse according to the tender. Anis Chowdhury and Iman Sugema, “How Significant and Effective Has Foreign Aid to Indonesia Been?” *ASEAN Economic Bulletin* 22, no. 2 (2005), 203 (citing a Bappenas study that between 75-80 percent of aid funds return to donor countries in the form of the purchases of goods and services, e.g., consultancies).

named Indonesian beneficiaries. Their position is one that exists in a space between donors and recipients, where the day-to-day implementation of the project is taking place.

*Chart 3* represents the categories of organizations that employed this study's 38 participants at the time that they were delivering RoL assistance in Indonesia and/or at which they reported a close professional affiliation.

*Chart 3.*



As a general matter, these many employing organizations are all possible parties to RoL assistance at the site of delivery. They also begin to depict the layered backgrounds of the individual professionals tasked with conducting RoL assistance projects. The total number depicted in *Figure 6* (56) is more than the 38 study participants whose interviews were analyzed for this study.<sup>69</sup> This is because several study participants

<sup>69</sup> See Chapter 2 for methodological details. During three trips to Jakarta, Indonesia, in 2011-12, I conducted interviews with 43 RoL professionals with ties to current

relayed experiences about RoL project work for more than one employer and/or RoL project, and/or otherwise maintained membership or close ties to another organization at the same time. Practically speaking, this translates to some participants wearing more than one hat while implementing RoL assistance,<sup>70</sup> and thus bearing responsibility for (and loyalty to) more than one entity. In principal-agent terms: some local actors are agents for more than one principal.

As we saw in chapter 4, the informants are roughly seventy-five percent Indonesian nationals (28); and twenty-five percent internationals (10) – most of whom live or have lived in Jakarta. They include government and donor officials, an Indonesian Supreme Court Judge, implementing professionals and staff, reform team members, development consultants (both international and Indonesian national), NGO attorneys, and academics. Seventy-five percent of the 38 informants reported at least 10 – 14 years of development or RoL experience, with a handful of those having over 20 years of experience.

*b. Principal-agent problems present in Indonesian RoL assistance*

Many of the problems of information and incentive described by principal-agent theory outlined above – including adverse selection and moral hazard – were also reported by local actors in their descriptions of day-to-day RoL assistance project

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Indonesian RoL assistance. Thirty-eight of those resulted in interview transcripts analyzed as part of this study.

<sup>70</sup> Indonesia is not alone in this – Nicholson and Low also observed actors “wear[ing] more than one hat” in Cambodia and Vietnam. Pip Nicholson and Sally Low, “Local Accounts of Rule of Law Aid: Implications for Donors,” *Hague Journal on the Rule of Law* 5 (March 2013), 7.

delivery. Furthermore, the details of local actor complaints of ‘donor-driven’ assistance indicate that feedback loops are indeed broken.

i. Adverse selection and moral hazard

Here, *adverse selection* involved the informational problem of agents misrepresenting or embellishing their skills and qualifications at the outset. One example involved an implementing contractor’s creative CV-writing as part of an initial bid.<sup>71</sup> Another type involved multiple reported misrepresentations by short-term hired experts.<sup>72</sup> Not all of these incidents were specifically attributed to case-study projects/programs studied here; some related to donor-assisted RoL assistance in Indonesia, in general.

Despite widespread agreement on the importance of understanding the local context before embarking on legal reform work anywhere in the world, Julio Faundez writes that “in practice, a thorough analysis of local context is rarely carried out.”<sup>73</sup> He suggests that the reasons given for this include a lack of time, resources, or “simply because there is no agreement on how it should be done.”<sup>74</sup> Describing what he calls “the view from the hotel window,” Stephen Golub writes:

Particularly during project development, when the very nature of the project is decided, many agencies rely on visiting consultants rather than in-country staff. This can lead to a superficial analysis of what ails a legal

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<sup>71</sup> Informants 33 (interview with author, September 21, 2012), and 34 (interview with author, September 19, 2012).

<sup>72</sup> See e.g., informant 16 (interview with author, April 23, 2012), 43 (interview with author September 13, 2012).

<sup>73</sup> See e.g., Julio Faundez, “Legal Reform in Developing Countries: Making Haste Slowly,” *Law, Social Justice and Global Development* 1 (2001): 6.

<sup>74</sup> Ibid. See also Wade Channell, “Lessons Not Learned about Legal Reform,” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, ed. Thomas Carothers (Washington, D.C.: Carnegie Endowment for International Peace, 2006), 6.

system and what legal issues confront the disadvantaged. To put the point mildly, a society seen from a hotel is far different from one experienced every day.<sup>75</sup>

Similarly, in the Indonesian context, Indonesian legal reform attorneys and members of the reform teams of the Supreme Court and Attorney General's Office reported what was to them a concerning lack of knowledge by some foreign expert consultants regarding Indonesia, its legal system, and sometimes even, the expertise for which the consultant was hired.<sup>76</sup> Local partners reported becoming disheartened when a hired 'expert' for a RoL project showed up, asking them very basic questions about Indonesia and its legal system. Said one former JRTO member:

I have often found that experts start reading about Indonesia when they arrive in Indonesia. At JRTO, I gave repeated information for many experts. They ask us to brief them on the Indonesian situation. But they are not forthcoming about what they are doing. [They give] only vague answers to our questions.<sup>77</sup>

Thus, not only are some experts perceived as lacking relevant and needed expertise, they also contribute to perceived partnering problems where local partners feel as if they are put in the unequal position of only giving information without receiving anything in return.

Per Bergling points to the consequences of such approaches: "Without [local stakeholder] participation, there will never be good matching of needs and resources, or

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<sup>75</sup> Stephen Golub, "Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative," *Carnegie Endowment for International Peace Working Paper No. 41* (2003): 24.

<sup>76</sup> See e.g., Informants 16 (interview with author, April 23, 2012), 28 (interview with author, July 9, 2012), 29 (interview with author, September 5, 2012), 36 (interview with author, September 18, 2012), 43 (interview with author, September 13, 2012),

<sup>77</sup> Informant 28 (interview with author, July 9, 2012).

alignment with local plans and preferences.”<sup>78</sup> Bergling points out that “too often” local options are bypassed because they are perceived to take too long.<sup>79</sup> What we see in the Indonesian context is that experts hired by donors typically spend from one to four weeks ‘in-country,’ length of time determined at least in part by their status and value – with a practical result being that more experienced (and expensive) consultants spend fewer actual days in the field, on the project. These short time frames for assessments and initial plans pose an informational problem. According to one Indonesian justice-sector reformer with over a decade experience working with donors, it is a ‘mistake’ and ‘a problem’ to take only two weeks to assess and make plans for an unfamiliar country. The informant points out a logistical and ultimately informational problem this poses:

It’s a mistake to do 2 weeks [for a] project in a country you do not know. That’s a problem. How do you know what people to interview? Don’t just check google! If a place has lots of scholars, and papers cited – but this is not yet in Indonesia. So they check with their friends, who just check with others. So you end up with most popular person being consulted, not the most qualified.<sup>80</sup>

By not grounding preparation in authoritative sources (easier to find in places with robust legal scholarship, unlike Indonesia), donors may not be getting the best or most useful information toward meaningful and relevant reforms for Indonesia. As well as posing a potential barrier for local buy-in, this also arguably leaves the door open for donors and their chosen implementers to play more of a driving role in reform interventions.

*Moral hazard* – or the hidden action problem of an agent acting according to

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<sup>78</sup> Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-operation* (Antwerpen and Oxford: Intersentia, 2006), 206.

<sup>79</sup> Ibid, 207.

<sup>80</sup> Informant 21 (interview with author, April 25, 2012).

his/her own interests instead of acting in the agreed-upon, and paid-for interests of the principal – was also reported in Indonesian RoL assistance. According to one high-level manager for an implementing contractor, an Indonesian staff member appeared to be shirking on his contract with the implementing contractor by working far fewer hours at the project offices than stipulated in the contract.<sup>81</sup> The informant expressed discomfort that the donor had no knowledge that this was happening, and was considering reporting it.<sup>82</sup>

ii. Broken feedback loops, and RoL assistance that is perceived as ‘donor-driven’

Bilateral aid agencies like USAID and AusAID, for example, must contend with the incentive problem of multiple principals and objectives, which practically requires incorporating the inconsistent objectives of different interest groups, leading to vaguer missions and weaker performance incentives.<sup>83</sup> Viewing the RoL assistance as ‘donor-driven’ was a complaint made often by local actors (inclusive of all local participants – not just Indonesian nationals) – working in Indonesian RoL assistance.<sup>84</sup> Generally speaking, ‘donor-driven’ RoL assistance refers to assistance for which the priorities have been determined by donor countries. Such ‘donor-driven’ assistance is a known biased outcome of broken feedback loops as well as bi-lateral donors’ needs to satisfy

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<sup>81</sup> Interview notes, on file with the author; informant numbers withheld for added protection of anonymity.

<sup>82</sup> Ibid. This incident is discussed further – from the staff member’s perspective – in the conclusion section below.

<sup>83</sup> Bertin Martens, “Some Policy Conclusions Regarding the Organizations Involved in Foreign Aid,” in *The Institutional Economics of Foreign Aid*, 180-81.

<sup>84</sup> See e.g., Informants 7 (interview with author, April 19, 2012), 9 (interview with author, April 23, 2012), 35 (interview with author, September 19, 2012), and 40 (interview with author, September 20, 2012).

multiple domestic interest groups. The broken feedback loop in international development settings refers to the fact that the normal performance feedback process (between beneficiaries of the aid and the principals who are funding it) is blocked by “geographical and political separation.”<sup>85</sup> This separation between the intended beneficiaries (from recipient countries) and the sponsors of the aid (from donor countries) results in foreign aid decision-making that is “usually a function of preferences of donor-country interest groups, not the preferences of recipient countries and beneficiaries.”<sup>86</sup>

Whether complaints about Indonesian RoL assistance being ‘donor-driven’ specifically stem from broken feedback loops or having to incorporate different interest group objectives remains an open question. There are indications that feedback loops are indeed compromised, if not broken, and not just between recipient beneficiaries and the donor sponsors, but also between implementing contractors and recipient principals and agents. The context for these ‘donor-driven’ complaints include descriptions of ineffective communication by implementing contractors, who were at times slow to grasp existing social and political realities;<sup>87</sup> and unpopular decisions regarding project assets – both at the time of procurement, as well as upon the project’s end.<sup>88</sup> Informants also reported an incident in which an implementing contractor was seen as having greatly offended an Indonesian person of authority by questioning decisions made by that person – decisions that were considered by several local partners to be entirely

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<sup>85</sup> Martens, “Introduction,” 14-15. See also Gibson, et.al, *Samaritan’s Dilemma*, 133.

<sup>86</sup> Martens, “Policy Conclusions,” 181-82.

<sup>87</sup> Informant 39 (interview with author, September 19, 2012).

<sup>88</sup> Informant 14 (interview with author, April 24, 2012)(voicing displeasure that laptops had to be returned at the end of the project), and 13 (interview with author, April 24, 2012).

within the purview of Indonesian authority, and outside the (appropriate) reach of the donor.<sup>89</sup> The offended party nearly ended his/her institution's involvement in the project, but after coaxing from the Indonesian Supreme Court, ultimately agreed to continue the reforms.<sup>90</sup>

Perhaps also contributing to donor-driven complaints, international local actors participating on behalf of donors and their implementing contractors also have ambitious visions of what they bring to the project, including the somewhat surprising answer given by three international informants, each working on different case studies. Namely, these international RoL professionals see it as their role to take international and comparative expertise and bridge or match it to the Indonesian context.<sup>91</sup> Many local actors and partners agree that comparative knowledge and 'best practices' expertise is a worthwhile contribution of international local actors to Indonesian RoL assistance,<sup>92</sup> though some local partners openly would prefer any 'bridging' to be done by Indonesians themselves.

Yet regardless of whether local actors and partners believe the RoL assistance to be overly donor-driven or not, they nonetheless are seeking and accepting donor-side employment opportunities. In contrast to some scholarly critiques of donors' over-

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<sup>89</sup> Informants 7 (interview with author, April 19, 2012), 13 (interview with author, April 24, 2012), and 14 (interview with author, April 24, 2012). The project nearly ended as a result, ultimately requiring 'repair' and some coaxing from the Indonesian Supreme Court.

<sup>90</sup> Informant 7 (interview with author, April 19, 2012), and 13 (interview with author, April 24, 2012).

<sup>91</sup> Informants 3 (interview with author, September 13, 2012), 24 (interview with author, September 11, 2012), and 33 (interview with author, September 21, 2012).

<sup>92</sup> See e.g., Informants 23 (interview with author, September 11, 2012), 29 (interview with author, September 5, 2012), 35 (interview with author, September 19, 2012), and 47 (interview with author, December 20, 2012). Twenty-two informants mentioned comparative knowledge or 'best practices' as a worthwhile potential contribution by international RoL professionals.

reliance on foreign staff,<sup>93</sup> Indonesian legal professionals are often hired as in-country staff and experts for RoL assistance, and comprised the majority of project staff in three of four case-study projects.<sup>94</sup> One upside of this finding might be that even in the unlikely scenario that none of the project/program's specific goals are met, RoL assistance can still be seen as contributing to the making of a professional middle class in Indonesia.<sup>95</sup> The highest-ranking positions in all four projects, however, were held by internationals – all of whom in 2011-12 were stationed (and residing) in Jakarta. One reason for this is that, as we will see in chapters 7 and 8, international local actors are deemed crucial for dealing with donors and their reporting systems.

The reporting systems themselves are also linked to the informational problem of broken feedback loops. Specifically, the informational problem of broken feedback loops means that donors will have a preference for those activities that are easy to monitor – and not necessarily those that are best or most appropriate for the beneficiaries.<sup>96</sup> The way we see this manifest in Indonesian RoL assistance is projects and programs whose required indicators and targets focus on quantity rather than quality. An example from this study can be found in the Scope of Work for USAID's C4J project, which requires the contractor (Chemonics) to train 300 judges and 200 attorneys general as part of its

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<sup>93</sup> See e.g., Stephen Knack and Aminur Rahman, "Donor Fragmentation and Bureaucratic Quality in Aid Recipients," *Journal of Development Economics* 83 (2007): 177-78.

<sup>94</sup> This holds true for AIPJ, C4J, and E2J; and likely also J4P, given its reliance on partnerships with local NGOs for implementation of at least some components of programming, e.g., PEKKA. (I was unable to confirm staff statistics with J4P definitively.)

<sup>95</sup> Discussed further in chapter 8.

<sup>96</sup> Paul Seabright, "Conflicts of Objectives and Task Allocation," 65-66. See also chapter 8 on monitoring and evaluation specific to RoL assistance in Indonesia.

capacity building components for the Supreme Court and Attorney General's Office.<sup>97</sup>

Though the background sections leading up to the required indicators suggest possible ways to ensure the trainings are relevant, what is ultimately monitored and measured are the number of judges and attorneys general trained, and not, for example, that the training adequately addressed the 'Training Needs Assessment' and/or was the result of a joint collaboration with the reform teams of the institutions.<sup>98</sup>

### iii. Macro-level incentive problems

Incentive problems are not limited to principal-agent relationships, but also appear in other development and RoL assistance relationships, including at the macro-level between donors and recipient governments, including counterpart ministries and agencies engaging in and responsible for reform. The game referred to in the title of Ostrom's collaborative effort with Gibson, et al., *Samaritan's Dilemma*, involves 'help' or 'no help' choices for the Samaritan, and 'high effort,' 'low effort' options for the Recipient. What results is not a problem of information, but of motivation. Specifically, distribution of benefits is skewed to the Recipient, with low effort being rewarded because the Samaritan's dominant strategy is to help.<sup>99</sup> This is because Samaritans are better off helping no matter what the Recipient does; and thus Recipients do not need to exert much effort in order to receive the assistance. (They do, however, need to exert effort in order to partner with the donor in a way that leads to locally tailored projects and programs, leading to local ownership of the outcomes – discussed further in chapter 9.) One practical consequence of this incentive problem is that aid funds can encourage

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<sup>97</sup> USAID, "C4J Scope of Work," 30 and 34.

<sup>98</sup> Ibid., 27-35.

<sup>99</sup> See Gibson, et.al, *The Samaritan's Dilemma*, 38-40.

recipient governments to delay reforms “even longer than they would have in the absence of aid.”<sup>100</sup>

Similarly, a 1997 World Bank Policy Research Working Paper described the incentive problems present in the ‘donor-recipient’ relationship, namely that the recipient country has less incentive to improve the welfare of the poor when anticipating the continued aid relationship with the donor.<sup>101</sup> Moreover, Gibson, Ostrom, et.al, explain that a further consequence can result, namely:

[I]f the situation is repeated – as it often is in the development aid process – the donor may be creating a situation where the recipient actually loses skill and motivation over time.<sup>102</sup>

In this study, some study participants similarly noted little motivation for Indonesian government agencies and ministries to include funding of reforms in their budgets because donors have proved ready and willing to provide this support.<sup>103</sup> The argument goes – why allocate finite Indonesian resources to something that donors willingly spend their money on? But the answer is actually not so simple. Not only is this reliance on donors possibly, as suggested by Anita Chowdhury, making Indonesia “lazy,”<sup>104</sup> but also as we see in the next chapter, the RoL assistance ‘industry’ favors creating work and roles for actors from donor countries. This means the assistance comes with a price. It must go through the churning machine that is the procurement

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<sup>100</sup> Ibid., 42-43,

<sup>101</sup> Jakob Svensson, “When is Foreign Aid Policy Credible? Aid Dependence and Conditionality,” *Policy Research Working Paper* 1740 (World Bank, March 1997), 3 and 24. See also Gibson, et. al, *The Samaritan’s Dilemma*, 42-43, on the point that aid funds give recipient governments an incentive to delay reforms.

<sup>102</sup> Gibson, et. al, *Samaritan’s Dilemma*, 39.

<sup>103</sup> See e.g., Informant 40 (interview with author, September 20, 2012).

<sup>104</sup> See Iman Sugema and Anis Chowdhury. “Has Aid Made the Government of Indonesia Lazy?” *Asia Pacific Development Journal* 14 (June 2007): 105-24.

process,<sup>105</sup> which can arguably result in circumstances in which the projects/programs center on what the implementing contractors know, instead of what might be most appropriate for Indonesia. (Thus, we see yet another reason for local partners to complain that the assistance is ‘donor-driven.’)

As to the second, related point noted by Gibson, Ostrom. et.al, regarding the loss of skill by recipients, data from Indonesia did not suggest that recipients or their agents were losing skill as a result of the assistance – though several informants reported ‘missed opportunities’ by the Indonesian government represented by Bappenas (the Indonesian National Development Planning Agency), and others.<sup>106</sup> For example, one local actor observed that Bappenas failed to take advantage of the opportunity to drive the reform agenda for Indonesia’s environmental protection regime, which had been a clean slate to be written.<sup>107</sup> Also, local partners reported much effort put into Indonesia’s National Strategy on Access to Justice (facilitated by United Nations Development Program (UNDP)), but then watched with dismay as it lost relevance when the President failed to endorse it in its entirety – instead making a presidential instruction of only a portion of it.<sup>108</sup>

### *c. Mechanisms to address agency problems*

Having identified these problems, what can be done? According to Bertin Martens and others examining the institutional economics of foreign aid, the agency

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<sup>105</sup> See discussion on procurement processes in chapter 5, Section III.

<sup>106</sup> See Informants 24 (interview with author, September 11, 2012), 36 (September 18, 2012), 40 (September 20, 2012), 41 (September 20, 2012), and 47 (December 20, 2012). To the point of Bappenas’ missed opportunities, see also, above, Section II (a)(i).

<sup>107</sup> See informant 41 (interview with author, September 20, 2012).

<sup>108</sup> Informant 36 (interview with author, September 18, 2012).

approach to organization theory rests on the assumption that a principal can induce cooperative behavior from his/her agents with the correct incentives laid out as part of the initial contract.<sup>109</sup> Because informational problems are magnified in aid settings – where great distances often separate principals and agents – a principal’s need to find the right performance incentives becomes even more pronounced. Furthermore, because various types of aid delivery organizations have their own inherent biases, strengths and weaknesses, Martens suggests that:

Careful selection of the right organization for various types of aid operations may exploit these inherent biases and turn them into a positive contribution to the achievement of the objectives and intentions of the donor or donor agency ....<sup>110</sup>

Martens explains how choice of implementer can leverage known biases through findings of different categories of donors, including multi-lateral agencies, bi-lateral agencies, non-governmental organizations. In other words, biased outcomes – including poorly embedded project outcomes, weak performance incentives, and hard-to-verify project outcomes stemming from the agency problems<sup>111</sup> might be mitigated (though not eliminated) by the contractual set-up, and the choice of contractor.<sup>112</sup>

According to Murrell, the optimal configuration of project implementation, from the donors’ perspective: “depends critically on whether *embeddedness* or *interest group*

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<sup>109</sup> Uwe Mummert, “Embedding externally induced institutional reforms,” in *The Institutional Economics of Foreign Aid*, 116; Martens, “Introduction,” 8-9; see also Peter Murrell, “The Interactions of Donors, Contractors, and Recipients in Implementing Aid for Institutional Reform,” in *The Institutional Economics of Foreign Aid*, 109-110 (finding that contractual details regarding project control matter greatly to the effectiveness of project implementation).

<sup>110</sup> Martens, “Some Policy Conclusions,” 179.

<sup>111</sup> Martens provides a bulleted list of biased outcomes, which includes vaguely specified policies, weak performance incentives, poorly embedded project outcomes, and hard-to-verify project outcomes. *Ibid.*, 182.

<sup>112</sup> *Ibid.*, 181-83; see also Peter Murrell, “Interactions of Donors, Contractors, and Recipients,” 94-95, and 109.

*influence* is particularly important in the project being implemented”<sup>113</sup> (emphasis added). These are taken up in turn below.

i. Embeddedness of RoL assistance

*Embeddedness* refers to ‘the fit’ between the character of the reforms (in Murrell’s example, the passage of a law) and the characteristics or idiosyncrasies of the host or recipient country.<sup>114</sup> Murrell’s data suggests that the best contractual set-up for an embedded project is to facilitate post-contractual adjustment and flexibility, with a recipient agent in control of project decisions.<sup>115</sup> This arrangement would recognize the ‘embeddedness assumption’ that “those not working on the ground have little grasp of the subtleties apparent to those enmeshed in the details of a society’s arrangements.”<sup>116</sup> One Indonesian example comes from USAID’s E2J project, which was found to have a poorly embedded prosecutor clinic because of a lack of AGO engagement.<sup>117</sup> To prosecutors enmeshed in cases, E2J’s clinic came across as incompatible with confidentiality requirements of prosecutors, among other concerns.<sup>118</sup>

Ideal set-up notwithstanding, a more realistic arrangement according to Murrell involves ‘divided control’ between contractor and recipient agent, in which, in embedded cases, the contractor would not have much control over decisions.<sup>119</sup> Also, in order to increase efficiency, donors should choose a contractor familiar with the recipient country,

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<sup>113</sup> Peter Murrell, “Interactions of Donors, Contractors, and Recipients,” 109.

<sup>114</sup> *Ibid.*, 89.

<sup>115</sup> *Ibid.*, 94-95.

<sup>116</sup> *Ibid.*, 79.

<sup>117</sup> See USAID, *Midterm Performance Evaluation of the Educating and Equipping Tomorrow’s Justice Reformers (E2J) Program* (April 2014), Finding #8, 3 and 27.

<sup>118</sup> Informant 10 (interview with author, April 24, 2012). See also discussion in chapter 5, Section III (a)(i).

<sup>119</sup> Murrell, “Interactions of Donors, Contractors, and Recipients,” 94-95.

to increase the likelihood of bargaining to agreement with recipient agents. For example, NGOs with established local ties potentially provide donors with a link to beneficiaries and stakeholders in the recipient country – helping counter problems of embeddedness, as well as broken feedback loops.<sup>120</sup> With this added channel of communication with an NGO's associated networks, assistance stands a better chance of matching local settings and thus being less perceived and received as 'donor-driven.' In contrast to what he calls 'profit-seeking consultants,' Martens also suggests that NGOs may push to achieve goals, "even at the cost of foregoing some or all of the profits on a contract."<sup>121</sup>

Indonesian RoL assistance seems to support the notion that NGOs offer their networks to help embed projects and reforms in the local setting. Said one experienced RoL scholar-practitioner:

The glue that makes it work is personal networks from decades-long commitment to the same country. This is something you get from non-profit institutions and not large-scale contractors who use a rolodex. A big element in the effectiveness of those non-profits is their long-standing relationships.<sup>122</sup>

Several examples of the utility of such networks came up during interviews, and served to also highlight another reason why implementing contractors are hiring Indonesian RoL professionals (with backgrounds at NGOs) to staff their projects.<sup>123</sup> Of note, even international NGOs can build and further these networks, as evidenced by The Asia

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<sup>120</sup> Martens, "Policy Conclusions," 183-85.

<sup>121</sup> Ibid., 183.

<sup>122</sup> Informant 34 (interview with author, September 19, 2012).

<sup>123</sup> Informant 37 (interview with author, September 19, 2012), 34 (interview with author, September 19, 2012).

Foundation (TAF), and its long-term presence in Jakarta, employing what were described as “some of the best qualified, competent local staff.”<sup>124</sup>

As suggested by Martens above, the sentiment that NGOs will push at the cost of foregoing profits also finds support in this study. One informant involved in the design of E2J’s winning bid observed that E2J’s problem of being underfunded by USAID was somewhat alleviated by having non-profit, TAF, as implementing contractor.<sup>125</sup> The belief that NGOs are driven more by passion, and less by profit, was also echoed by study participants who consider themselves members of Indonesia’s self-described ‘law reform community’<sup>126</sup> – or group of educated professionals closely affiliated with at least one of the many CSOs that came into being at the 1998 the fall of authoritarian dictator, General Suharto or during the transition to democracy that followed. Said one Indonesian justice sector reformer:

When you are a consultant, you work for pay. But NGOs are willing to work because of their mission.<sup>127</sup>

In citing further reasons why engagement with NGOs is crucial to effective reform, the reformer also explained:

Before we need donors, we need Indonesian people who have interest and passion to assist reform, and build capacity. Without those people, five years [time of program] is not enough. So it is very good to involve NGOs in the process.<sup>128</sup>

Others agreed, comparing the longitudinal role played by local NGOs to that of the donor-hired implementing contractors:

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<sup>124</sup> Informant 34 (interview with author, September 19, 2012).

<sup>125</sup> Ibid.

<sup>126</sup> See e.g., Informants 11 (interview with author, April 25, 2012), 22 (April 25, 2012), 28 (July 9, 2012), and 29 (September 5, 2012), and 35 (interview with author, September 19, 2012).

<sup>127</sup> Informant 10 (interview with author, April 24, 2012).

<sup>128</sup> Ibid.

A 'service provider' will finish the job at the deliverables. But PSHK, LeiP, we are here since 1998. It's us that will be here for a very long time. Donors come and go. It's us who have been here, and will be for a longer time.<sup>129</sup>

To lessen the possibility of donor overreach (a known biased outcome of lack of embeddedness), several local partners also advocated for a bigger role in RoL assistance for CSOs and the reform teams, and had models in mind based on previous projects, including LDF – the predecessor program to AusAID's AIPJ.<sup>130</sup>

Arguably the most prevalent example of embeddedness embodied in Indonesian RoL assistance are what could be called the 'embedded agents' – namely, the Indonesian implementing staff or team members who also have a close professional affiliation at a local NGO or CSO. As we saw above, most local partners who take positions implementing RoL assistance also have at least one professional connection to a local NGO or CSO. Each of these agents thus represents the potential of their respective organizations and networks. The extent to which these relationships are leveraged (or not) by donors is taken up below.

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<sup>129</sup> Informant 42 (interview with author, September 13, 2012) (referring to two Indonesian NGOs with a focus on Indonesian justice sector reform: *Pusat Studi Hukum dan Kebijakan Indonesia* (PSHK), translated as Indonesian Center for Law and Policies Studies; and *Lembaga Kajian dan Advokasi Independensi Peradilan* (LeiP), translated as Institution for Research and Advocacy for Independence of the Judiciary).

<sup>130</sup> Legal Development Facility (LDF), the predecessor to AusAID's AIPJ, was very popular on the Indonesian side, and gave the reform team of the Supreme Court wide discretion to plan and execute the reform they identified as necessary. That time was also widely seen as a sweet spot for reform in the eyes of the law reform community – when donors approached *them* and asked how they could help and what was needed. See e.g., Informant 35 (interview with author, September 19, 2012), 3 (interview with author, September 13, 2012). On the AusAID side, the program was not as well received, and impacted the eventual structure and organization of its follow-on program, AIPJ. For more on the transition from LDF to AIPJ, see chapter 8, Section II (a).

## ii. Interest group influence over RoL assistance

Another vulnerability in principal-agent relationships is that an agent can exert disproportionate influence on the outcomes by acting as representative not of the principal, but of an interest group. Murrell refers to this as *interest group influence*, which occurs when an agent acts on behalf of an interest group instead of representing the principal's interests.<sup>131</sup> Donors worry about this<sup>132</sup> – and in the case of Indonesian RoL assistance, implementing contractors have gone so far as to circumvent recipient agents and reach out to the recipient principals directly to ensure they have accurate information about the needs of the institution.<sup>133</sup> Also of relevance to the Indonesian context, projects with embedded staff from other organizations or institutions may be particularly vulnerable to interest group influence. Murrell suggests that when an interest group has captured the recipient agent, 'divided control' between recipient agent and the contractor is again a natural arrangement. This time, donors should try to *reduce* post-contractual adjustments (unless the donors' interests are in line with those of the interest group); and to be efficient, choose a contractor unfamiliar to the recipient agent for less likelihood of bargaining to agreement.<sup>134</sup> But if a donors' policy preferences *are* aligned with an interest group, Martens suggests a donor might cut down on monitoring and evaluation costs by delegating control over project implementation to an agent allied with that interest group (domestic or recipient country) whose interests align with the aid agency's policies.<sup>135</sup>

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<sup>131</sup> Peter Murrell, "Interactions of Donors, Contractors, and Recipients," 89.

<sup>132</sup> Ibid. See also, e.g, informants 19 (interview with author, September 11, 2012), and 2 (interview with author, April 26, 2012).

<sup>133</sup> See e.g., Informants 25, 33, 19, 2.

<sup>134</sup> Murrell, "Interactions of Donors, Contractors and Recipients," 94.

<sup>135</sup> Martens, "Policy Conclusions," 184.

As foreshadowed above, one example of possible interest group influence in the Indonesian context involves the reform teams of the Indonesian Supreme Court and Attorney General's Office. Implementing contractors voiced concern that reform teams, in their recommendations, were bowing to the wishes of particular judges or prosecutors, instead of the leadership or institution as a whole.<sup>136</sup> Other scenarios of possible interest group influence in Indonesian RoL assistance would be within those (rather common) 'embedded agent' instances where local partners have more than one professional role involving justice sector reform. For example, one local partner worked 1-2 days per week at the Supreme Court's JRTO, while also employed as project staff for an implementing contractor.<sup>137</sup> This same local partner also remained closely affiliated to at least one CSO involved in justice sector reform. As suggested by Murrell, though, this does not necessarily have to be a problem so long as the implementing contractor agrees with the perspectives of the CSO, and supports its team members in remaining involved at the JRTO. Potentially, this could end up being a benefit to the project. On the other side, however, JRTO leadership would be wise to consider the multiple professional roles taken on by its team members when assessing their recommendations about suggested reforms and various projects and programs.

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<sup>136</sup> Informants 2 (interview with author, April 26, 2012), and 19 (interview with author, September 11, 2012). Having made this point from the perspective of implementing contractors, it is worth noting that no further data collected for this study indicated that the reform teams in 2011-12 were beholden to anything other than their conviction about what is best for Indonesia.

<sup>137</sup> Informant 37 (interview with author, September 19, 2012).

### iii. Professional associations

Finally, other mechanisms of addressing principal-agent problems, according to Ostrom and others, include creating professional associations that “monitor the performance of their own members,” and permitting malpractice lawsuits.<sup>138</sup> What this would look like in RoL assistance is unknown, as there is currently no professional RoL association with any monitoring authority over its members, nor is there any credential or specific education required in order to carry out RoL assistance. These ideas are explored further in work by Simion and Taylor.<sup>139</sup>

## **IV. Concluding Argument**

Having examined the parties to Indonesian RoL assistance through the lens of the principal-agent theory, we see that RoL assistance takes place in a crowded field of local actors and entities, all with at least some legitimate stake in the assistance.

One finding is that the unclear relationships between and among the parties present themselves as a challenge during ongoing RoL assistance implementation. This ambiguity and differing views of roles may help explain tension and conflict that is occurring between local actors in the course of ongoing RoL assistance. As we saw above, Indonesian reform team members have clear ideas of what they can offer – both substantively and as facilitators – to ongoing reform efforts of their institutions. Implementing contractors, however, do not necessarily agree, and in the course of implementing their projects and programs, make decisions that result in the reform team members not playing their desired role in the assistance (running the meetings, acting

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<sup>138</sup> Gibson, et. al, *The Samaritan's Dilemma*, 43.

<sup>139</sup> See See Kristina Simion and Veronica L. Taylor, *Professionalizing Rule of Law: Issues and Directions* (Folke Bernadotte Academy, 2015): 43-51.

as point of contact, etc.). This, in turn, leads to tension or conflict among the parties (sometimes requiring manager attention) to the relationship. Clarifying working relationships at the outset could alleviate some of these problems. Care should be taken to do so in line with local regulations and policies, which, as we saw in the case of the Indonesian Supreme Court, can be very explicit about what is expected of donors wishing to assist reform efforts, and the parties with whom donors are supposed to interact, and how those interactions are to take place (e.g., in writing; at a meeting with certain specified local partners – e.g., Bappenas officials).

Additionally, this study suggests that at least some incidents of adverse selection and moral hazard might be explained by examining the differing and competing views of the various local actors' roles. For example, what is seen as adverse selection (here, misrepresentation of skills) from a local partner perspective, might not be viewed as such by the donors and implementers who are making the hiring decisions. Specifically, local partners find it insulting that donors hire experts to assist in reforming the Indonesian law and justice sector who know nothing about the Indonesian legal system. Said one local partner in response to 'experts' asking:

'What is going on here? What is your legal system?' They ask basic questions. We say, 'Why don't you do your homework?' We prefer experts with certain competency [instead of] asking from scratch what is going on in Indonesia.<sup>140</sup>

But seen from a donor and implementer perspective, the role of this expert may simply be providing technical expertise, not site-specific knowledge. For that, donors prefer to hire national experts.

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<sup>140</sup> Informant 29 (interview with author, September 5, 2012).

With respect to this study's reported incident of moral hazard in the form of 'shirking' – an Indonesian staff member observed by a manager absenting him/herself from project/program offices – competing views of roles again come into play. The staff member, and other local partners who have been similarly situated, report that there is an issue with how implementing contractors structure their employment. During the initial negotiation, though the local partner reports advocating for a bigger role in the project for his/her CSO, the organizing structure chosen by the implementing contractor involved hiring that local partner as an individual 'specialist,' requiring him or her to spend the majority of the work-week at the project office. Despite misgivings, the individual accepted the position; but eventually scaled back his/her hours at the project's office in order to spend more time at his/her CSO. According to that local partner, this arrangement was not to the detriment of the project because s/he was still doing all the necessary work (now in the comfort of his/her own, much nicer office at the CSO<sup>141</sup>), and s/he was able to use other CSO personnel and resources to carry out the tasks required by the project/program.<sup>142</sup> Thus, the disagreement about roles – in this case of the individual Indonesian expert and his/her CSO on the project/program – resulted in one local partner acting according to his/her own interests instead of what was agreed upon with the implementing contractor.

According to several local partners with close affiliations at Indonesian CSOs, much is at stake with respect to this particular dispute of roles – namely that of whether

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<sup>141</sup> The interview for this study took place inside the study participant's CSO office, large enough for an extra table for meetings, and with an ever-coveted air-conditioner. This is in contrast to the local partner's small, interior, office at the project/program offices, which I observed, dark and empty, when interviewing others in neighboring offices.

<sup>142</sup> Interview notes, on file with the author; informant number withheld for added protection of anonymity.

entire CSOs are engaged as organizations, or individual members are hired as specialists. Specifically, local partners argue that capacity building, and indeed capacity *maintaining* within the CSOs is heavily implicated because the organization, as a whole, learns and benefits when engaged in a RoL assistance project. The CSO is in a position to give multiple people experience, and keep the knowledge being accumulated on-site. Similarly, the organization suffers a loss when one of its members is hired away, to work off-site. And typically, it is not just any member that is recruited, but one of its ‘charismatic leaders.’<sup>143</sup> As discussed in chapter 5, local partners have been speaking out against the practice of some donors and contractors to hire individual Indonesian professionals as experts, instead of engaging with the entire CSO in which that individual works.<sup>144</sup>

A further, related finding supported by the principal-agent theory’s application in Indonesian RoL assistance, is that most local partners who take positions on implementing teams could also be seen as ‘embedded agents,’ in light of their multiple professional identities. Not only does this mean they are already embedded in the local setting, but it also provides access to people and resources in their networks. As we see in chapter 8, local partners are indeed willing to call upon their networks and resources in order to shape and direct the RoL assistance they have been hired to implement.

But what about those on the donor side? How do donors and the high-level implementing managers engage with these ‘embedded agents’ on their implementing

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<sup>143</sup> This is not to say that CSOs do not have other, less altruistic interests as well – e.g., increased name recognition and status from working on donor-assisted RoL assistance and of course, the funding itself.

<sup>144</sup> See chapter 5, Section IV (c); Informants 21 (interview with author, April 25, 2012), 29 (interview with author, September 5, 2012), 37 (interview with author, September 19, 2012), 31 (interview with author, September 12, 2012), 42 (interview with author, September 13, 2012).

teams? Instead of harnessing the potential that these agents represent, we see donors attempting to control the course of implementation through work-plan agreements in place with the implementing contractors, which, as demonstrated above, sometimes includes dictating where local partners should sit from 9 – 5, Monday through Friday. Even so, other donors and implementing contractors appear at least somewhat more attuned to the potential of ‘embedded agents.’ As we saw above, some implementing team members spend 1 to 2+ days per week at the offices of other organizations working on Indonesian justice sector reform. Exactly how informed the donors are with regard to the amount of time being spent away from project and program offices is an open question. We also see that donors fill the time of their embedded agents with required reporting on (easy-to-count) indicators – e.g., 300 judges trained. As will be discussed in chapter 8, these voluminous reporting requirements arguably distract implementers from the partnering work necessary to move the RoL assistance forward, and increase the level of local ownership of the reforms being sought.

In light of the multiplicity of actors involved in Indonesian RoL assistance identified in this chapter, we come to realize that these many actors with unique interests and motivators are all potential principals, agents, owners, and partners in RoL assistance delivery. But what does it mean to be an owner or a partner? Gibson, Ostrom and others argue that:

[L]ack of common understanding of the concept of ownership and the resulting lack of clear responsibility for long-term results lies at the heart of the incentive problem in development.<sup>145</sup>

What follows in chapter 7 is an analysis of how the concepts of ownership and partnership are defined and experienced by the many local actors on the ground in RoL

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<sup>145</sup> Gibson, et. al, *The Samaritan's Dilemma*, 13.

assistance delivery in Indonesia. In so doing, one aim is to contribute empirical grounding toward a 'common understanding of the concept of ownership.'



## Chapter 7 /

### From Discourse To Delivery: Whose Local Ownership And Partnership?

#### I. Introduction

As with projects in other areas of international development programming, individual Rule of Law (RoL) assistance projects and programs develop reputations – or ‘labels.’ One Indonesian informant, with over 10 years of experience working on Indonesian judicial reform, observed:

In Indonesia, you have to know how to deal. You make a wrong move, you’ll get a wrong and bad label. People will think: ‘This is a donor project; not our project.’<sup>1</sup>

When a local partner<sup>2</sup> says a project is a ‘donor project,’ and ‘not our project,’ we can reasonably conclude that local ownership of the aid has not been realized – at least as far as that particular actor is concerned. But what would ‘local ownership’ of RoL assistance look like? What would cause local partners to claim a project as their own, and what sort of partnering could help bring that into being? What are some of the ‘wrong moves’ being made by donors from local partner standpoints?

This chapter begins to answer these questions by analyzing local actor definitions of ‘ownership’ and ‘partnership’ in case-study project documents, experiences related by local actors, and meta-level discourse represented by four

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<sup>1</sup> Informant 21 (interview with author, April 25, 2012).

<sup>2</sup> As in chapter 1, ‘local actors’ refer to all participants in RoL assistance, and thus is the encompassing group of which ‘local partners’ make up a significant part. Local actors are people (whether foreign / international or Indonesian / national) who 1) have professional connections to ongoing RoL assistance projects; and 2) conduct their work in Jakarta, at the site of RoL assistance delivery. The term ‘local partners,’ however, refers only to the subset of Indonesian actors, as they are in the position to partner on behalf of Indonesia.

multilateral agreements, the *Paris Declaration*, *Accra Agenda*, *Busan Partnership*, and *Jakarta Commitment*.<sup>3</sup> How, if at all, are local ownership and partnership operationalized in the field at the site of on-going RoL assistance delivery, and what are the impediments to their realization? First, we pick up chapter 1's analysis of international multilateral agreements including *Paris Declaration*, and others, and introduce the local, Indonesia-specific *Jakarta Commitment*, signed and endorsed by the government of Indonesia and its major development partners in 2009. Next, we undertake a document analysis of case study agreements and strategy documents in light of ownership and partnership principles. Finally, we turn to the heart of the study, namely the meanings of local ownership and partnership according to local actors at the site of RoL assistance design and implementation. The chapter finds that despite being abstracted from reality at the level of international development discourse, ownership and partnership principles are nonetheless perceived as deeply relevant to the work of local actors working in ongoing RoL assistance.

The work of Arturo Escobar, an early development critic, provides a useful lens for examining this data. Specifically, Escobar's analysis of development assistance as a system of institutions and professionals shines light on existing embedded power imbalances in favor of the 'developed.' Through this lens, we see that ownership and partnership are discursive tools – namely concepts that are invoked in order to shape or explain the way that a RoL development encounter is experienced, communicated and

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<sup>3</sup> Introduced in chapter 1, Section I (a)(i). *Paris Declaration on Aid Effectiveness*, Second High Level Forum on Aid Effectiveness, Paris, France (March 2, 2005); *Accra Agenda for Action*, Third High Level Forum on Aid Effectiveness, Accra, Ghana (September 4, 2008); *Busan Partnership for Effective Development Co-operation*, 4<sup>th</sup> High Level Forum on Aid Effectiveness, Busan, South Korea (December 1, 2011); and *Jakarta Commitment: Aid for Development Effectiveness*, Jakarta, Indonesia (January 12, 2009).

evaluated. As we see below, roughly two-thirds of responses equated ownership to some form of ‘early and often’ involvement of locals in the planning and design of the assistance. From a local standpoint, this involvement is deemed necessary to ensure that donor-supported priorities can be made to match and reflect true local needs in the form of RoL assistance that locals *want* to ‘own.’ At the same time, local involvement is seen as an antidote to the ‘donor-driven’ labels described above, and in the last chapter. From the perspective of implementing managers, the same issue is approached as a matter of getting ‘buy in’ from local partners across levels of Indonesian actors, which, as detailed below, is pursued through partnership principles – namely striving for ‘collaborative’ and ‘consultative’ partnerships.

Through Escobar’s lens, we also observe RoL assistance as part of a bigger international development system or ‘industry’ – one with an identifiable power imbalance in favor of the donors and Western actors that not only impacts the delivery of the RoL assistance via decision-making power, but also colors local actors’ perceptions of ownership and partnership being embodied by the RoL assistance. These perceptions matter because no matter how subjective they are, they factor into the project’s reputation, and as shown below, also potentially influence the way local actors – and especially local partners – interact with other local actors during ongoing RoL project delivery. These interactions, in turn, shape and influence the content, direction and outcomes of the assistance.

## II. 'Development' system favors 'developed' – Escobar and others

Arturo Escobar, an anthropologist of Colombian descent, was early to critique development aid as a discourse with embedded power dynamics that favor the 'developed' over those being 'developed.' According to Escobar, development as discourse emerged between 1945-55 as a system of *professionalization* – involving the production of seemingly neutral technical knowledge and the (western) experts who possess it; and the related *institutionalization* of development – in which the produced knowledge found a platform for deployment into the 'Third World' via aid organizations, development interventions, and expert conferences.<sup>4</sup> The result was that 'development' had become a “mode of thinking and source of practices,” an “omnipresent reality” in which:

The poor countries became the target of an endless number of programs and interventions that seemed inescapable ... Everything that was important in the social and economic life of these countries (their population, processes of capital accumulation, natural resources, agriculture and trade, administration, cultural values, etc.) ... became the object of explicit calculation by experts formed in new sciences developed for that purpose, and the subject of interventions designed by a vast array of newly formed institutions.<sup>5</sup>

Escobar goes on to detail the classical and neo-classical origins of development economics, which he refers to as the most important of the 'new sciences' shaping development practice. By 1955, the idea had taken hold that poverty could be alleviated by applying economic theories – such as growth theory – to poor countries.

Industrialization was seen as 'key to development'; and from its “privileged place,

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<sup>4</sup> Arturo Escobar, “Power and Visibility: Development and the Invention and Management of the Third World,” *Cultural Anthropology* 3, no. 4 (1988), 430-31; Arturo Escobar, *Encountering Development: The Making and Unmaking of the Third World* (Princeton University Press, 1995), 9-11, 17-20, and 39-47.

<sup>5</sup> Escobar, “Power and Visibility,” 430.

economics was to pervade the entire practice of development.”<sup>6</sup> Though the discourse itself goes through changes – such as choice of technologies or substantive focus – its architecture and space remains the same. Through this, we can observe a succession of development strategies and sub-strategies within the confines of the same discursive space,<sup>7</sup> such as donor coordination, transparency initiatives, and good governance programs. Furthermore, “seemingly opposed options can easily coexist within the same discursive field.”<sup>8</sup> As discussed below, the ownership and partnership ‘commitments’ put forth by the international development community also illustrate this point.

In addition to the professionalization and institutionalization constituting ‘development’ as discourse, Escobar further contemplates a third element: a ‘subjective sense’ through which people come to see themselves as either ‘developed’ or ‘underdeveloped.’<sup>9</sup> Anthropologists Emma Crewe and Elizabeth Harrison describe something similar:

Evolutionary schemata, for example, are sustained by the international political and economic systems that affirm in people’s minds the ‘Third World’ and its populations as backward while the ‘First World’ is advanced.<sup>10</sup>

This subjective sense has the possibility of running deep and influencing behavior in a number of different ways – particularly at the point of the development encounter where so-called ‘First World’ donors interact with counterparts from a ‘less advanced’ host country. One example from Indonesian RoL assistance involved local partners from

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<sup>6</sup> Ibid., 432-33. See also chapter 3 for the economic underpinnings of RoL assistance as a field, Section II (c) (i).

<sup>7</sup> Escobar, *Encountering Development*, 42 and 58.

<sup>8</sup> Ibid, 42.

<sup>9</sup> Escobar, *Encountering Development*, 10 and 24-26.

<sup>10</sup> Emma Crewe and Elizabeth Harrison, *Whose Development? An Ethnography of Aid* (London and New York: Zed Books, 1998), 47.

Indonesian agencies at a meeting with representatives from a donor's managing contractor. The government agency representatives assumed and behaved as if the white male international present was in charge of the meeting. In fact, he was subordinate to his Indonesian colleague also present.<sup>11</sup> Experienced RoL professionals know how and when to use this mindset to their advantage in the course of their partnership and communication with members of those agencies and/or ministries.<sup>12</sup>

Internationals too have their own subjective sense of who is 'developed' and a continuum on which it can be found. A 'less developed request' in the view of one high-level international manager is: "Can we get laptops?' They want things – chairs, tables."<sup>13</sup> The informant went on to explain: "There's a turning point in development when an institution goes from day-to-day survival mentality to a thoughtfulness about the future."<sup>14</sup> The turning point, in this line of thinking, includes recognition of the value that technical assistance can play in a country's justice sector reforms.

If we view Indonesian RoL assistance through Escobar's theoretical framework, a development discourse and discursive space appear to be firmly in place in Jakarta. Professionalization of RoL assistance can be found in the pool of well-educated legal elites – comprised of both Indonesian nationals as well as the international expats living in Jakarta or short-term flown-in consultants – who staff RoL assistance projects in Indonesia.

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<sup>11</sup> Informant 40 (interview with author, September 20, 2012).

<sup>12</sup> Informant 40: "Sometimes Indonesian colleagues say: a potential added-value could be [that] the Indonesian government will listen quicker to international experts than to national experts. They [Indonesian government officials] think an international knows better. Even if it's not true! But if you know how to use it, it could be added value." (Interview with author, September 20, 2012).

<sup>13</sup> Informant 33 (interview with author, September 21, 2012).

<sup>14</sup> Ibid.

Within these groups, lawyers are pivotal. Their role as a bridge for transnational norm diffusion globally is well-documented.<sup>15</sup> In Jakarta, we see Indonesian local partners who are graduates of development interventions, such as USAID's ELIPS (Economic Law and Improved Procurement Systems) project,<sup>16</sup> and ELIPS II (Economic Law and Institutional and Professional Strengthening), which finished in 2004.<sup>17</sup> Some activities of ELIPS II in particular contributed to the professionalization of present-day RoL assistance in Indonesia – including the identification and support of 31 Indonesians to complete Masters of Law (LL.M.) degrees at U.S. law schools.<sup>18</sup> Three-fourths of this study's Indonesian informants hold at least one advanced degree from a Western university<sup>19</sup> (some of whom earned their LL.M.s through ELIPS II). These professionals

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<sup>15</sup> See e.g., Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States* (Chicago: The University of Chicago Press, 2002).

<sup>16</sup> See e.g., Yves Dezalay and Bryant G. Garth, *Asian Legal Revivals: Lawyers in the Shadow of Empire* (Chicago: The University of Chicago Press, 2010), 223-226. ELIPS ran from 1992 – 2001 and included a legal education component, and continued under successor programs including PEG (Partnership for Economic Growth), started in 1999. See e.g., David K. Linnan, "Indonesian Law Reform, or Once More Unto the Breach: A Brief Institutional History," in *Indonesia Law and Society*, 2nd edition, ed. Tim Lindsey (Annandale: Federation Press, 2008), 80-81.

<sup>17</sup> ELIPS I, PEG and ELIPS II funded by USAID were implemented by the for-profit contractor Checchi Company and Consulting, Inc. For Checchi's descriptions of the programs, see Checchi Company and Consulting, Inc., "Indonesia: Project Details," [http://www.checchiconsulting.com/index.php?option=com\\_projects&country\\_id=31&Itemid=8](http://www.checchiconsulting.com/index.php?option=com_projects&country_id=31&Itemid=8).

<sup>18</sup> See *Final Report: Contract No. PCE-I-00-98-00016-00 Task Order 821: Indonesia Economic Law, Institutional and Professional Strengthening (ELIPS II) Activity* (report prepared by Program Pasca Sarjana Fakultas Hukum, University of Indonesia) (October 2004), 7-8, 10-13, and 16. U.S. law schools included the University of San Francisco, University of Washington (Seattle), American University (Washington, D.C.), and the University of Wisconsin (Madison).

<sup>19</sup> See chapter 4, Section III (b): 21 of 28 informants (who were Indonesian nationals) held at least one western degree. It should be noted that informants were not chosen based on their education, but rather by the criteria discussed in chapter 2's methodology section, which can be summed up as close proximity to on-going RoL assistance in Indonesia.

see themselves as key players in the past, present and future of Indonesian legal reform. As will be discussed below, while the kinds of knowledge possessed by these professionals and their international counterparts vary and they sometimes battle for project resources, no one disputes that knowledge and expertise relevant to the development and reform of Indonesia's justice sector actually exists.

Historically, RoL assistance in Indonesia appears to have followed a similar path as 'development' described by Escobar. As discussed in chapter 4, development economics became the lens through which to conduct development operations in Indonesia.<sup>20</sup> Economics was a key part of U.S. aid to the Indonesian military in the 1960s – with Berkeley-trained economists becoming leading technocrats of Suharto's ruling dictatorship.<sup>21</sup> Subsequent decades of international development emphasized economic law reform (including the arguably competing 'development strategies' of financial deregulation on the one hand, and legal institution-building via newly drafted economic laws, such as banking and capital markets laws, on the other). Thus, the Indonesian agencies and ministries that were the target of legal reforms included not only legal institutions (e.g., Ministry of Justice, the Supreme Court, the Attorney General's Office) but also 'economists' institutions' (e.g., Ministry of Finance, the Coordinating Ministry for the Economy, the Ministry of Industry),<sup>22</sup> thereby putting in place a system of donor-assisted RoL promotion that extended across many institutions and agencies of the vast Indonesian government bureaucracy.

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<sup>20</sup> See Linnan, "Indonesian Law Reform," 80-82 and 88-89.

<sup>21</sup> See e.g., John Roosa, *Pretext for Mass Murder: The September 30<sup>th</sup> Movement and Suharto's Coup d'État in Indonesia* (Madison, WI: University of Wisconsin Press, 2006), 186; Tim Lindsey and Mas Achmad Santosa, "The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia," in *Indonesia Law and Society*, 10. For more detail, see Appendix 4: Historical Annex to this chapter.

<sup>22</sup> Linnan, "Indonesian Law Reform," 77-82.

The end of General Suharto's dictatorship, 1998, marked the beginning of another major uptick for international development interventions in Indonesia, with legal reform efforts, aided by RoL assistance, becoming more robust and sophisticated.<sup>23</sup> Known as the period of *Reformasi*, Indonesia's transition from Suharto's authoritarian regime to a representative democracy included significant reform efforts of existing legal institutions, as well as the formation of new legal institutions, including a Constitutional Court, and the KPK, Indonesia's Corruption Eradication Commission.<sup>24</sup> Many legal NGOs were also founded during this time and, particularly in the early post-Suharto years, flourished.<sup>25</sup>

Now in 2015, in addition to the institutions already mentioned, Jakarta remains home to a number of legal NGOs and think tanks, including *Pusat Studi Hukum & Kebijakan Indonesia* (PSHK) or the Indonesian Centre for Law & Policies Studies; *Lembaga Independensi Peradilan* (LeIP) or the Indonesian Institute for Independent Judiciary; among many others. With regard to their place in the 'industry,' these and similar entities often act as resources for donors, as both implementing sub-contractors, or as a place from which to find an individual consultant to hire as a local expert.<sup>26</sup> But

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<sup>23</sup> See chapter 3 for a detailed discussion of the Indonesian context, including relevant history as well as past and current donor involvement.

<sup>24</sup> See e.g., Bivitri Susanti, "The Republic of Indonesia," in *Rule of Law for Human Rights in the ASEAN Region: A Base-Line Study* (Human Rights Resource Centre, 2011): 87-118. KPK is abbreviated from the Indonesian, *Komisi Pemberantasan Korupsi*.

<sup>25</sup> According to some local actors interviewed for this dissertation, the time period immediately after the fall of Suharto to some extent embodied 'local ownership' because donors came to them and asked what was needed. See e.g., Informants 21 (interview with author, April 25, 2012), 29 (interview with author September 5, 2012), and 35 (interview with author, September 19, 2012).

<sup>26</sup> Several sources reported this as a major problem for Indonesian CSOs – namely, that individual experts were being hired instead of the organization as a whole. See also chapter 4, Section IV (c) ("Engagement with CSOs and their members").

at the same time, the professionals staffing these entities are among the most vocal in contesting the levels of ownership and partnership found in the RoL assistance case studies for this dissertation.

In sum, Escobar's development discourse results from a culmination of three facets of 'development' – professionalization, institutionalization, and a subjective sense – all of which are evident in the data for this study. Together, they lead to an encompassing system of interaction between donors and partner country counterparts, or "development business."<sup>27</sup> What Escobar and other development critics find particularly troubling is that this system for delivering international development assistance is tilted in favor of those already on top, at the expense of those being 'helped.'<sup>28</sup> One manifestation of this systemic stacking is suggested by Gordon Crawford's 2003 case study of Indonesia's Partnership for Governance Reform (*Kemitraan*),<sup>29</sup> namely that donors retain decision-making power, and thus have more control (ownership) of the reform agenda. Crawford argues that: "behind the rhetoric of 'partnership' lies the continued exercise of power by international agencies."<sup>30</sup> He further argues that the rhetoric of partnership is a 'myth' and a more palatable way for international agencies to "pursue their own reform agenda more effectively."<sup>31</sup> Crawford writes:

"[T]he rhetoric of 'partnership' is part of a trend by international agencies by which their intervention in political and economic reforms in sovereign

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<sup>27</sup> Escobar, *Encountering Development*, 46-47.

<sup>28</sup> Specific to RoL assistance, see e.g., Ugo Mattei and Laura Nader, *Plunder: When the Rule of Law is Illegal* (Malden, MA: Blackwell Publishing, 2008).

<sup>29</sup> A few study informants work or have worked for *Kemitraan*.

<sup>30</sup> Gordon Crawford, "Partnership or Power? Deconstructing the 'Partnership for Governance Reform' in Indonesia," *Third World Quarterly* 24, no. 1 (2003): 155.

<sup>31</sup> *Ibid.*, 157.

states is disguised and simultaneously accorded greater legitimacy, free of the criticism that conditionality has attracted.”<sup>32</sup>

He goes on to observe the obvious discrepancy between this version of ‘partnership’ and the internationally promulgated rhetoric that encourages the formulation of (and is supposedly subordinate to) locally owned development strategies.<sup>33</sup>

It is within this ‘international rhetoric’ that we locate the oft-used language of ‘local ownership’ and ‘partnership’ – most notably in the international declarations of *Paris*, *Accra* and *Busan*.

### **III. Local ownership and partnership according to international discourse**

#### *a. Paris Declaration on Aid Effectiveness*

As detailed in chapter 1,<sup>34</sup> the international development community’s endorsement of local ownership and partnership as strategies of development is embodied in the 2005 *Paris Declaration on Aid Effectiveness*, which resulted from a meeting of the ministers of donor and recipient governments and the heads of bilateral and multilateral aid agencies regarding the goal of improving the way aid is delivered and managed.<sup>35</sup> In its opening ‘Statement of Resolve,’ *Paris Declaration* signatories relevantly affirm their commitment to “reforming and simplifying donor policies and

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<sup>32</sup> Ibid., 156-57.

<sup>33</sup> Ibid, 157.

<sup>34</sup> See chapter 1, Section I (a) (i).

<sup>35</sup> This was considered the second such forum of the international development community. The first international development meeting took place in Rome in 2003, and produced the 2½-page *Rome Declaration on Harmonization* – essentially an acknowledgment that there are problems with aid delivery, and the parties are committed to improving. In tracing back the ideas of ownership and partnership, a 2002 meeting of heads of state in Monterrey, Mexico, is also relevant, and produced the 2003 *Monterrey Consensus on Financing for Development*. This study focused on the *Paris Declaration* and *Accra Agenda* because they are the most detailed with regard to the meanings of ownership and partnership.

procedures to encourage collaborative behavior and progressive alignment with partner countries' priorities, systems and procedures," and the recognition of "insufficient delegation of authority to donors' field staff, and inadequate attention to incentives for effective development partnerships between donors and partner countries."<sup>36</sup>

*Paris 26*, under the heading 'Strengthen public financial management capacity,' further instructs donors to provide reliable aid over multi-year frameworks, and in the process to "[r]ely to the maximum extent possible on transparent partner government budget and accounting mechanisms."<sup>37</sup> Related to this commitment under the Partnership Commitment of 'Mutual Accountability,' is *Paris 46*, which states that donors commit to:

Provide timely, transparent and comprehensive information on aid flows so as to enable partner authorities to present comprehensive budget reports to their legislatures and citizens.<sup>38</sup>

These rather specific donor commitments are interesting for two reasons – the first is regarding the level of detail they provide, in comparison with the conclusory language without prescription found otherwise throughout the *Paris Declaration*. The second is that despite their level of detail, we see that these commitments are not necessarily followed in RoL assistance as reported by local actors<sup>39</sup> and/or that the donors' view of 'maximum extent possible' still requires extensive donor involvement – namely a hired managing contractor (aka the parallel implementation unit) – instead of reliance on country systems.

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<sup>36</sup> *Paris Declaration*, Section 4 (iii).

<sup>37</sup> *Ibid.*, Section 26, and Indicators 7 and 5.

<sup>38</sup> *Ibid.*, Section 49.

<sup>39</sup> See below, for local partner frustration with donors for violating Paris 26 by not providing transparent budget information on aid flows.

Though the fact of the *Paris Declaration's* existence should be seen as a promising development for aid, it was never clear that aid results would fundamentally change for the better even if all that was promised came into being. Several deficiencies were pointed out by civil society organizations (CSOs) and others – for example, its primary focus on donors and governments, and what was described as the failure to put human rights and true democratic ownership at the heart of development policy.<sup>40</sup>

*b. Accra Agenda for Action*

In 2008, the parties met again – this time in the ‘Global South’ (Accra, Ghana), apparently having absorbed some of the *Paris Declaration's* critique. The resulting *Accra Agenda for Action* recognizes that in order to “accelerate progress on aid effectiveness,” three major challenges need to be addressed:

- 1) Country ownership is key;
- 2) Building more effective and inclusive partnerships;
- 3) Achieving results and openly accounting for them.<sup>41</sup>

The drafters of the *Accra Agenda* devoted ten full sections of the document (amounting to more than 50 percent of the content) to ‘Strengthening Country Ownership over Development’ and ‘Building More Effective and Inclusive Partnership for Development.’<sup>42</sup> But even so, the prescriptions offered – e.g., working with CSOs, increasing capacity of “all development actors,” reducing the fragmentation of aid – are once again conclusory, and much easier to list than they are to actually bring into being.

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<sup>40</sup> Reality of Aid Management Committee, “Political Overview” in *The Reality of Aid 2008* (Quezon City: IBON Books, 2008): 6, 9-10. The authors argue that this failure has led to donor-centric aid effectiveness strategies, and further raise the issues of the impact of ‘behind the scenes’ advisers, consultants and informal pressures from donors on countries’ national development strategies. Ibid., 9-10.

<sup>41</sup> *Accra Agenda*, Sections 7-10.

<sup>42</sup> Ibid., Sections 12-21.

The sheer volume and breadth of suggestions put forth sets the stage for selectivity in prioritization during project design and implementation. It is therefore easy to imagine competing or even conflicting priorities of different actors involved in the same project based on the very same overarching principles of 'local ownership' and 'partnership' found in these kinds of framing documents. Put another way, a project manager might be able to claim progress toward country ownership based on some provisions, while simultaneously violating others.

As with the *Paris Declaration*, the 2008 *Accra Agenda* acknowledges the need for capacity building in developing countries, and the related importance of relying on developing country systems.<sup>43</sup> Donors agree that as part of their support for capacity development, they and the developing countries will “jointly select and manage technical co-operation” and “promote the provision of technical co-operation by local and regional resources ...”<sup>44</sup> Donors further agree “to use country systems as the first option for aid programs in support of activities managed by the public sector,”<sup>45</sup> and that if they choose another option (e.g., parallel project implementation units – aka managing contractors), they will “transparently state the rationale for this and will review their positions at regular intervals.”<sup>46</sup> Donors also agree to:

[I]mmediately start working on and sharing transparent plans ... for using country systems in all forms of development assistance; provide staff guidance on how these systems can be used; and ensure that internal incentives encourage their use.<sup>47</sup>

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<sup>43</sup> Ibid., Sections 14 and 15.

<sup>44</sup> Ibid., Section 14 (b).

<sup>45</sup> Ibid., Section 15 (a).

<sup>46</sup> Ibid., Section 15 (c).

<sup>47</sup> Ibid., Section 15 (d).

In these rather detailed provisions, we see the drafters' response to post-*Paris Declaration* evidence that “even when there are good-quality country systems, donors often do not use them.”<sup>48</sup> Furthermore, because of its emphasis on the use of host-country systems, ownership as laid out on a macro-level is not particularly helpful for day-to-day implementation in situations such as Indonesian RoL assistance – where instead of using country systems, donors are hiring foreign contractors to manage and implement the technical assistance.

*c. Busan Partnership, and supporting international agreements*

In 2011, the international development community continued the discussion on aid effectiveness in Busan, South Korea – this time, with more specific focus on incorporating the many diverse development actors taking part in international development (including South-South development cooperation), as well as addressing specific challenges that require joint efforts (including climate change, gender equality, and international engagement in conflict-affected and fragile states).<sup>49</sup> As with earlier international declarations, the resulting *Busan Partnership for Effective Development Co-operation* features the principles of ‘ownership’ and ‘partnership’ alongside ‘results’

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<sup>48</sup> Ibid., Section 15.

<sup>49</sup> *Busan Partnership for Effective Development Co-operation*, 4<sup>th</sup> High Level Forum on Aid Effectiveness, Busan, South Korea (December 1, 2011), Sections I – IV. See also Development Assistance Committee (DAC) Secretariat, “Busan and Beyond,” *DACnews: Ideas on Aid*, December 2011 (reporting on outcomes of the summit in Busan, including several ‘building blocks’ that resulted from working groups, including the *New Deal for Engagement in Fragile States*, the *Busan Joint Action Plan on Gender Equality and Development*, the *Busan Action Plan for Statistics*, *A New Consensus on Effective Institutions and Policies*, and “A Joint Statement on Public Private Co-operation for Broad-Based, Inclusive and Sustainable Growth.”)

and ‘transparency and accountability.’<sup>50</sup> Also in line with the *Paris Declaration* and *Accra Agenda*, the *Busan Partnership* also re-commits to increasing aid delivered through country systems, which according to Section 19, should be the “default approach” for development cooperation.<sup>51</sup> And yet, as we see in the case of Indonesian RoL assistance, the default approach appears to instead include the utilization of foreign implementing contractors. The *Busan Partnership* also reiterates the requirement introduced in the *Accra Agenda* that donors “state the reasons for non-use, and will discuss with government what would be required to move towards full use.”<sup>52</sup>

These same themes can be found within more issue-specific agreements also endorsed by members of the international development community during the forum in Busan, including *A New Deal for Engagement in Fragile States*, issued by the International Dialogue on Peacebuilding and Statebuilding (comprised of the g7+ group of 19 fragile and conflict-affected countries, development partners and international organizations).<sup>53</sup> The resulting, concise (and jargon-filled) *New Deal for Engagement in Fragile States* begins with what it calls “the facts,” including something all experienced RoL professionals also know, which is that “basic governance transformations may take

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<sup>50</sup> *Busan Partnership*, Section 11 (a) – (d) (“Shared principles to achieve common goals” – namely: “Ownership of development priorities by developing countries”; “Focus on results”; “Inclusive development partnerships”; and “Transparency and accountability to each other.”)

<sup>51</sup> *Busan Partnership*, Section 19 (“The use and strengthening of developing countries’ systems remains central to our efforts to build effective institutions ...”).

<sup>52</sup> *Ibid.*, Section 19 (b).

<sup>53</sup> *A New Deal for Engagement in Fragile States*, 4<sup>th</sup> High Level Forum on Aid Effectiveness, Busan, South Korea (November 30, 2011) (the *New Deal* is one of several ‘building blocks’ to come out of working groups at the Busan High Level Forum that focus on specific development challenges – here, conflict-affected and fragile states); see also, DAC Secretariat, “Busan and Beyond.”

20-40 years.”<sup>54</sup> Using the mnemonic device, FOCUS, the *New Deal* commits to five principles to support “country-owned and -led pathways out of fragility.”<sup>55</sup> The second mnemonic, TRUST, outlines the parties’ commitments “for results,”<sup>56</sup> while working to “build mutual trust by providing aid and managing resources more effectively and aligning these resources for results.”<sup>57</sup> In these provisions, the *New Deal* also commits to increasing foreign aid that is delivered through the use of country systems.<sup>58</sup> Furthermore, and of particular relevance to the field of RoL assistance, the “S” of TRUST – strengthening capacities – also includes a pledge to “target the use of external technical assistance, *ensuring they report through to the relevant national authority*” (emphasis added).<sup>59</sup> But again, what we see in the case of Indonesia – notably *not* a conflict-affected or fragile state and thus arguably well-positioned to exercise that authority – is that donors remain in control of decisions about ‘external technical assistance.’ As we see below, the tight control held by donors over hiring decisions for technical assistance remains a sharp point of contention among local actors in Indonesian RoL assistance.

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<sup>54</sup> *New Deal*, “The Facts,” bullet 3. The *New Deal* is a four-page document. See also, e.g., Informants 20 (interview with author, April 26, 2012) and 34 (interview with author, September 19, 2012).

<sup>55</sup> FOCUS is F: Fragility assessment; O: One vision, one plan; C: Compact; U: Use Peace-building and State-building Goals (PSGs); and S: Support political dialogue and leadership. *New Deal*, Section II.

<sup>56</sup> TRUST is T: Transparency; R: Risk-sharing; U: Use and strengthen country systems; S: Strengthen capacities; and T: Timely and predictable aid. *New Deal*, Part III.

<sup>57</sup> *New Deal*, Section III.

<sup>58</sup> Specifically, the “U” in TRUST, is “Use and strengthen country systems,” and includes that international partners “will increase the percentage of aid delivered through country systems on the basis of measures and targets jointly agreed at the country level.” *Ibid.*, Section III (U). Telling, perhaps, is the caveat found in the footnote for this sentence, which reads: “As permitted by donors’ respective applicable legal provisions.”

<sup>59</sup> *New Deal*, Section III (S).

#### *d. Indonesia-specific Jakarta Commitment*

The Indonesia-specific follow-up to *Paris* and *Accra* was the *Jakarta Commitment: Aid for Development Effectiveness*, signed in 2009 by the Government of Indonesia and its donors.<sup>60</sup> After a brief introduction to Indonesia and its development challenges, the *Jakarta Commitment* takes its headings from the *Accra Agenda* and lists at least two aspirations or actions under each of *Accra Agenda*'s three pillars:

Strengthening Country Ownership;  
Building More Effective and Inclusive Partnerships for Development; and  
Delivering and Accounting for Development Results.<sup>61</sup>

Under 'Strengthening Country Ownership,' the *Jakarta Commitment* promises the strengthening of Indonesian capacity, better alignment of donors with Indonesian systems, and the strengthening of South-South cooperation.<sup>62</sup> Under the Partnership section, development partners commit to providing assistance "based on country demands"; to facilitate knowledge transfer in addition to financial transfer; and to place more priority on program-based approaches and supporting government programs.<sup>63</sup> The inclusion of new actors is also contemplated under Partnership, as is a "regular dialogue mechanism" at which the Government and its development partners can discuss Indonesia's development agenda.<sup>64</sup>

As with the other international declarations, most of the language is aspirational and offered without plan. For example, capacity building is cited as necessary under

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<sup>60</sup> *Jakarta Commitment*. Twenty-two multi- and bilateral donors initially signed along with the Government of Indonesia, including the donors of this dissertation's four case study projects: World Bank, USAID, and the Government of Australia. Additional donors have since adopted the *Jakarta Commitment*.

<sup>61</sup> *Jakarta Commitment*, Sections I, II and III.

<sup>62</sup> *Ibid.*, Section I (a) and (b).

<sup>63</sup> *Ibid.*, Section II (a) and (b).

<sup>64</sup> *Ibid.*, Section II (c).

Strengthening Country Ownership, but the *Jakarta Commitment* only sets forth the future promise that “the Government will articulate, and development partners will support the achievement of, capacity development objectives ...”<sup>65</sup> This includes the proposal “to make capacity development a results area within different sectors to ensure adequate attention and follow-up.”<sup>66</sup>

The *Jakarta Commitment* could thus be described as a ‘Government will’ list of promises – the Government of Indonesia “will articulate,” “will issue clear-cut guidelines,” “will diversify,” “will propose,” “will establish.”<sup>67</sup> Donors – referred to in the *Jakarta Commitment* as ‘development partners’ – also make commitments in the future tense. The commitment most frequently honored in the breach seems to be: “Development partners will align themselves more fully with the Government programs and systems.”<sup>68</sup> Here development partners agree to align their programming cycles with those of the Indonesian government, to use the “government format” for reporting their assistance, and “increasingly use the Government’s financial management and procurement systems.”<sup>69</sup> And when they do not do these things:

[D]evelopment partners will transparently state their rationale for not using government systems and indicate how they will work with the Government (including through capacity development) to align in the future.<sup>70</sup>

Analysis of state-level agreements between Indonesia and Australia, and Indonesia and the United States suggests that even those donors openly trying to promote local

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<sup>65</sup> Ibid., Section I (a).

<sup>66</sup> Ibid., Section I (a).

<sup>67</sup> Ibid., Sections I – III.

<sup>68</sup> Ibid., Section I (a). Example of breach – several Indonesian informants reported multiple donors refusing to turn over budget details, including the salaries paid to their international expats, and short-term consultants. This is discussed below, Section V (e).

<sup>69</sup> *Jakarta Commitment*, Section I (a).

<sup>70</sup> Ibid., Section I (a).

ownership and effective partnerships ultimately abide by their own rules instead, and could otherwise be described as ‘slippery’ in meeting these commitments.

#### **IV. Document analysis: Ownership and partnership represented in foundational project and strategy documents**

Three of this study’s four case projects are underpinned by two agreements between 1) the Government of Indonesia (Gol) and the Government of Australia, and 2) the Gol and United States Agency for International Development (USAID) on behalf of the United States Government.<sup>71</sup>

##### *a. Australia – Indonesia: ‘Subsidiary Arrangement’*

Of the two, the “Subsidiary Arrangement between the Government of Australia and the Government of the Republic of Indonesia Relating to the Australia Indonesia Partnership for Justice” most neatly maps to the international rhetoric of ownership and partnership, evidenced first by its title.<sup>72</sup> The words ‘partnership’ or ‘partner’ are directly mentioned six times – three times as part of the program’s title, *Australia Indonesia Partnership for Justice* (AIPJ); twice referencing a ‘Partnership Board’ of representatives from Bappenas, AusAID, respective line Ministries and CSOs (on rotation), formed to provide high level strategic advice; and once as a list of key partners, including the

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<sup>71</sup> USAID’s E2J and C4J projects, and AusAID’s AIPJ program. See chapter 4 for full background of the projects and parties. Though I was unable to obtain a copy of the actual J4P Memorandum of Understanding (MOU) between Gol and World Bank (Bappenas did not have, and WB requests went unanswered), I was able to find some surrounding documents, discussed further below in Section IV (c).

<sup>72</sup> See “Subsidiary Arrangement between the Government of Australia and the Government of the Republic of Indonesia Relating to the Australia Indonesia Partnership for Justice” (“Aus – Indo Sub Arrangement”), signed 2 May, 2011, in Canberra, Australia.

Supreme Court, Attorney General's Office, Bappenas, and KPK. Though the term 'ownership' did not appear in the "Subsidiary Arrangement," it does cite *Paris Declaration, Accra Agenda, and Jakarta Commitment* for guiding principles.<sup>73</sup> Furthermore, the "Subsidiary Arrangement" refers to Indonesia's own National Development plans, and a list of priorities identified by Indonesia as being of critical importance to the law and justice sector.<sup>74</sup>

While these references to ownership and partnership are encouraging, two other sections of the "Subsidiary Arrangement" arguably most impact the day-to-day implementation and delivery of AIPJ. The first is Section 4.2, which reads:

As a result of discussions between Bappenas and AusAID, AusAID will engage a Managing Contractor to carry out part of its commitments under this Subsidiary Arrangement.<sup>75</sup>

Taken in the context of Australia's *Paris Declaration, Accra Agenda, and Busan Partnership* commitments to use country systems as a first option,<sup>76</sup> it is certainly possible that Australia "transparently stated" its rationale for not using country systems for implementation during the above-mentioned discussions between Bappenas and AusAID or otherwise. (This study did not uncover any information regarding those discussions.) What *is* known is that instead of using country systems, or a locally based NGO – as pledged in *Paris Declaration* (Section 21), *Accra Agenda* (Section 15), and *Busan Partnership* (Section 19) – the Australian Government chose Australian-based, for-profit, multi-national development contractor, Cardno, to conduct and manage the implementation of AIPJ. The Australian Government nods at its *Paris / Accra / Jakarta*

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<sup>73</sup> Ibid, Section 1.2.

<sup>74</sup> Ibid, Section 7.1 – 7.3.

<sup>75</sup> Ibid, Section 4.2.

<sup>76</sup> Specifically, *Paris Declaration*, Section 21; *Accra Agenda*, Section 15; and *Busan Partnership*, Section 19.

obligations in Section 9.1 by promising that as part of its funding and support to the Managing Contractor, AIPJ will “use a range of assistance modes to address individual, institutional and systematic approaches to capacity building and the implementation of activities.”<sup>77</sup>

These capacity building promises notwithstanding, some local partners in general look very unfavorably upon donor use of for-profit contractors for project implementation, much preferring locally based NGOs – which they argue not only harness inside knowledge about and passion for the sector, but also serve the goal of supporting and strengthening local civil society. Nevertheless, interviews also revealed a genuine commitment to the principles of local ownership and partnership by many Cardno implementing professionals and staff, some of whom originate from, and maintain close ties, with local NGOs. AIPJ professionals were given a chance to demonstrate their partnership skills as they attempted to comply with Section 9.2 of the “Subsidiary Arrangement,” in which the Government of Indonesia agreed to “together with the GOA and Managing Contractor,” develop “work plans for the implementation of activities” and contribute to the achievement of activity outcomes.”<sup>78</sup> Several professionals working on AIPJ reported extensive communication with Indonesian counterparts, including face-to-face meetings, which was corroborated by those on the Indonesian side.<sup>79</sup>

A second, closely related section of the “Subsidiary Arrangement” most ‘felt’ on the ground is Section 10, regarding Program Personnel, which encapsulates the

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<sup>77</sup> “Aus – Indo Sub Arrangement,” Section 9.1 (a). For capacity-building efforts as they reportedly occurred in practice, see below, Section V (c).

<sup>78</sup> Ibid., Section 9.2. See e.g., Informant 2 (interview with author, April 26, 2012), Informant 15 (interview with author, September 17, 2012).

<sup>79</sup> Informant 1 (interview with author, April 16, 2012), 15 (interview with author, September 17, 2012), and 36 (interview with author, September 18, 2012).

Government of Australia’s promise to pay for all costs associated with the personnel assigned to the program, including staff of the Program Director and Deputy Program Director.<sup>80</sup> Section 10.2 continues:

*Australia will advise of additional personnel who will form part of the managing contractor team. (emphasis added)*<sup>81</sup>

Here, we see a version of ‘donor pays, donor decides’ that leaves Australia in the driving seat for implementation and delivery – including, as here, the responsibility only to “advise of additional personnel” – notably *not* ‘consult regarding,’ or ‘seek Indonesian input regarding’ ... only a notification requirement.<sup>82</sup> Thus, Australia has control of the final say regarding who staffs the program, and which experts are hired.<sup>83</sup> As interviews reveal below, hiring choices in general are an area of much concern among local actors in RoL assistance, particularly for some local partners who are “not impressed” by the overall quality of foreign consultants.<sup>84</sup> Here we see Escobar’s development system and the RoL assistance as ‘industry’ in action – namely, the imbalance of decision-making power when it comes to hiring, one that Indonesia agreed to when it signed the Arrangement with Australia.

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<sup>80</sup> “Aus-Indo Sub Arrangement,” Section 10.1.

<sup>81</sup> *Ibid.*, Section 10.2. In line with the spirit of the word ‘arrangement,’ the Subsidiary Arrangement explicitly does not create any legal rights or obligations.

<sup>82</sup> It is worth pointing out that this does not mean Australia cannot go beyond the Arrangement, and include more Indonesian input in hiring decisions – simply that Australia does not have to.

<sup>83</sup> For how this plays out in practice, see below, Section V (d), regarding the hiring of ‘experts.’

<sup>84</sup> See e.g., Informant 43 (interview with author, September 13, 2012).

*b. United States - Indonesia: 'Assistance Agreement'*

Unlike the Australian 'arrangement,' which explicitly serves "only as a record of the Parties' intentions,"<sup>85</sup> the agreement between the United States and Indonesia intentionally creates a binding agreement between the countries,<sup>86</sup> as represented by USAID and Bappenas. The U.S. agreement with Indonesia, "The Assistance Agreement between the Government of the Republic of Indonesia and the United States of America for Democracy and Governance Programs in Indonesia" appears primarily written for a domestic U.S. audience (suggesting that it began in draft as boilerplate); and refers to Indonesia not as the Government of Indonesia (Gol), or Bappenas (the agency representing the Gol), but as "the Grantee." Perhaps not surprisingly then, partnership and ownership as contemplated by *Paris / Accra / Jakarta* are not prominently featured in this 31-page 'assistance' agreement.<sup>87</sup>

Instead, we see "functional objectives and program areas" that have been articulated by the Government of the United States, without reference to any details of Indonesia's development plans. The closest instances of 'partnership' to be found are 1) in Article 2, Section 2.1 of the "Assistance Agreement," when "the Parties hereto agree

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<sup>85</sup> "Aus - Indo Sub Arrangement," Section 14.1.

<sup>86</sup> USAID Grant Agreement No. 497-026, "Assistance Agreement Between the Government of the Republic of Indonesia and the United States of America for Democracy and Governance Programs in Indonesia" ("U.S. – Indo Assistance Agreement"), September 30, 2009, Article 5. Prior to the first disbursement, Indonesia must satisfy the condition precedent by furnishing an opinion of counsel and a signed statement that Indonesia also considers the agreement to be legally binding. *Ibid*, Section 5.1 (a) and (b).

<sup>87</sup> The Aus-Indo Sub Arrangement was a succinct 6½ pages, leaving the details to forthcoming Exchange(s) of Letters, and in reference to a treaty on development cooperation between Australia and Indonesia. By contrast, the U.S. – Indo Assistance Agreement, including relevant annexes, is 31 pages – 6½ pages of agreement, plus two annexes consisting of 9 pages of an "Amplified Description" (Annex 1) of the program, and 12½ pages of "Standard Provisions" (Annex 2). The U.S. Assistance Agreement also contemplates Implementation Letters.

to work together” toward the (U.S. - designated) Program Areas (of which ‘Rule of Law and Human Rights’ is one); and 2) Section VII ‘Roles and Responsibilities of the Parties’ in the Amplified Description, stating that both “The Grantee” and USAID will “work cooperatively and collaboratively” with each other, as well as all contractors, implementing partners, organizations and entities “which support the implementation of activities under this Agreement to ensure the complete and timely achievement of all activities hereunder.”<sup>88</sup>

Though the “Assistance Agreement” contemplates synchronizing with other donor projects “to ensure coordination and reduce duplication of effort,”<sup>89</sup> it makes no mention of a similar exercise of synchronizing with Indonesian priorities, or even of Indonesian plans at all – other than to point out in the Indonesian background section that: “Assistance in the area of democratic governance is needed in order to achieve the objectives of Indonesia’s Medium-term and Long-term Development Plans.”<sup>90</sup> The more context-specific part of the agreement – ‘Annex 1: Amplified Description’ – begins with a scant two-page background on Indonesia and its challenges, and uses U.S. jargon to lay out Program Areas, Elements and Sub-Elements, Cross-Cutting Objectives and Intermediate Results expected of the programs born of this agreement. Here, the case-study projects of E2J and C4J projects fall neatly under the justice sector reform program of the Intermediate Result, ‘Rule of law and accountability strengthened,’ which lists technical assistance and training to universities to improve legal education and policy-oriented research (E2J), and technical assistance and training “to the Supreme

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<sup>88</sup> “U.S. – Indo Assistance Agreement,” Annex 1, Section VII (A) and (B).

<sup>89</sup> Ibid., Annex 1, Section IV.

<sup>90</sup> Ibid., Annex 1, Section II.

Court and the AGO (within permissible parameters) to assist with their institutional reform and/or capacity building” (C4J).<sup>91</sup>

As with the Australian Arrangement, the U.S. – Indo Agreement expressly reserves decision-making regarding implementation and the hiring of contractors to USAID.<sup>92</sup> With regard to the E2J and C4J case study projects, USAID hired U.S. for-profit, multi-national implementing contractor, Chemonics, for the delivery of C4J,<sup>93</sup> and U.S.- headquartered international NGO, The Asia Foundation (TAF), for E2J.<sup>94</sup> When, as here, the bulk of implementation money is being paid to contractors originating from the bilateral donors’ countries,<sup>95</sup> it is not hard to see the argument of development critics that the system is rigged, with money publicly earmarked for Indonesian RoL assistance simply being funneled back to the donor’s own countries. In fact, a 2005 *Congressional Report for Congress* indicates this is indeed one intended effect of the ‘assistance.’ The first sentence under the heading ‘How Much of Foreign Aid Dollars Are Spent on U.S. Goods?’ reads:

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<sup>91</sup> Ibid., Annex 1, Section IV “Planned Activities and Illustrative Indicators,” (A)(1).

<sup>92</sup> “U.S.-Indo Assistance Agreement,” Section 6.1 (“Subobligations”); *ibid.*, Annex 1, Section VI “Implementation of Activities Under this Agreement”; *ibid.*, Annex 2, Section C.3 (c).

<sup>93</sup> See Chemonics website: Chemonics, “Our Projects,” Indonesia: *Changes for Justice* (C4J) project page (“Partnering with Indonesia’s Justice System to Promote Reform”), <http://www.chemonics.com/OurWork/OurProjects/Pages/Changes%20for%20Justice.aspx>.

<sup>94</sup> See 2-page E2J project summary by TAF. TAF, *Educating and Equipping Tomorrow’s Justice Reformers in Indonesia* (E2J), <http://asiafoundation.org/resources/pdfs/E2JENGLISHFINAL.pdf>

<sup>95</sup> To be fair, TAF has an established local office in Jakarta, and has been involved in Indonesian justice sector reform for more than 40 years. Even so, international consultants were nonetheless brought in to design and manage E2J.

Most U.S. foreign aid is used for procurement of U.S. goods and services, although amounts of aid coming back to the United States differ by program.<sup>96</sup>

Further, as summarized by John Norris in *Foreign Policy* magazine about the \$3.9 billion received by the ten largest USAID contractors in 2011, had Chemonics been a country, it would have been USAID's third largest funding recipient, behind Afghanistan and Haiti.<sup>97</sup> The U.S. is by no means alone in this, however. Citing a Bappenas estimate for Indonesia, economists Anis Chowdhury and Iman Sugema write that almost 75 percent of aid – closer to 80 percent on average for bilateral donors – goes back to donors “in the form of purchases of goods and services (consultancy).”<sup>98</sup>

The U.S. - Indonesia “Assistance Agreement” described above makes no mention of ownership, and only oblique references to partnership. However, in December of 2009, USAID publicly put forth its “USAID Indonesia Strategy 2009-2014: A Partnership for Prosperity,” which generously employs the terms ‘ownership’ and ‘partnership’ as strategies of development.<sup>99</sup> The part of the document relevant to RoL

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<sup>96</sup> Congressional Research Service (CRS), “Foreign Aid: An Introductory Overview of U.S. Programs and Policy,” *Report for Congress* (prepared by Curt Tarnoff and Larry Nowels of Foreign Affairs and National Defense) (January 19, 2005), 20. The report also highlights that foreign aid was less than one percent (.9 percent) of all U.S. budget outlays in FY2004. Ibid. See also Ruben Berrios, *Contracting for Development: The Role of For-Profit Contractors in U.S. Foreign Development Assistance* (Westport: Praeger, 2000) (arguing that private firms are the primary recipients of U.S. foreign aid). In 2012, then USAID administrator, Rajiv Shah, made headlines for his efforts to reform procurement, and lessen reliance on large U.S. for-profit contractors. See John Norris, “Hired Gun Fight: Obama’s aid chief takes on the development-industrial complex,” *Foreign Policy* (July 18, 2012).

<sup>97</sup> See Norris, “Hired Gun Fight.”

<sup>98</sup> Anis Chowdhury and Iman Sugema, “How Significant and Effective Has Foreign Aid to Indonesia Been?” *ASEAN Economic Bulletin* 22, no. 2 (2005), 203. See also International NGO Forum on Indonesian Development, “Profiles of Indonesia’s Foreign Debts,” *Working Paper*, no. 6, (2007), 12.

<sup>99</sup> USAID, “USAID Indonesia Strategy 2009-2014: A Partnership for Prosperity” (December 15, 2009).

assistance (“AO: Democratic Governance Strengthened (Making Democratic Governance Deliver)”) is well-researched and written – including an insightful list of ‘problematic legacies’ of Suharto’s dictatorship,<sup>100</sup> and the acknowledgement that reform of the justice sector requires “Indonesian leadership and ownership.”<sup>101</sup> Nonetheless, a comparison of this development-friendly strategy with the actual legal agreement between Indonesia and the United States suggests that internationally approved rhetoric in a public strategy document is one thing, while binding legal agreements are another.

*c. AusAID and World Bank collaboration on Justice for the Poor (J4P)*

Though I was unable to obtain a copy of the Memorandum of Understanding (MOU) between the World Bank and Indonesia underlying the 2002 start of the World Bank’s Justice for the Poor (J4P), other more recent surrounding documents indicate an interesting evolution of the program. In 2008, AusAID and the World Bank together launched a regional initiative, East Asia and the Pacific Justice for the Poor Initiative 2008-2013 (EAP-J4P), to build upon the experience of the J4P program to date, “while also drawing on AusAID’s vast experience in Justice Sector Reform in the region.”<sup>102</sup> The fact that this is regional means that at its highest level, this initiative is an agreement between donors.

In the section detailing the program’s management, it states that ‘Country Programs’ of the individual countries – of which Indonesia is one – “will be led by field

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<sup>100</sup> Ibid., 34.

<sup>101</sup> Ibid., 35.

<sup>102</sup> AusAID/World Bank Collaboration, *East Asia and the Pacific Justice for the Poor Initiative 2008-2013* (January 2008), 5.

based team leaders” who receive technical and managerial support from the program secretariat, and “substantive input and support” from local multi-stakeholder working groups convened by the program.<sup>103</sup> Additionally, access to “senior expertise and attention” is provided via the formation of a Regional Steering Committee comprised of “managerial staff from both the Bank and AusAID,” with its primary responsibility being “to review annual work plans and provide substantive and strategic input.”<sup>104</sup>

*d. Indonesian development plans, ‘Blue Books’*

Documentary analysis of ownership and partnership for the case study projects/programs would not be complete without also reviewing the Indonesian National Medium-Term Development Plan (RPJMN) 2010-2014,<sup>105</sup> mentioned in the *Jakarta Commitment* and its accompanying proposed and planned project lists. Here, all four case studies hold up quite well, in that they – at least on paper – contribute within Indonesia’s own vision for its development. Additionally, the U.S. and Australian bilateral projects are listed in the third book of the ‘List of Medium-Term Planned External Loans and Grants’ (DRPHLN-JM) 2011-2014,<sup>106</sup> also referred to as the ‘Blue Book.’ The precise details of this process are unclear from the documents, though according to its Preface: “DRPHLN-JM 2011-2014 contains development project

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<sup>103</sup> Ibid, Section 6.1 Management, 34-35.

<sup>104</sup> Ibid, 35.

<sup>105</sup> Republic of Indonesia, *Rencana Pembangunan Jangka Menengah Nasional* (RPJMN) (National Medium-Term Development Plan), Presidential Regulation, no. 5 (2010).

<sup>106</sup> Ministry of National Development Planning / National Development Planning Agency, *Daftar Rencana Pinjaman dan/atau Hibah Luar Negeri Jangka Menengah* (DRPHLN-JM), List of Medium-Term Planned External Loans and Grants (DRPHLN-JM) 2011-2014, 3<sup>rd</sup> Book. Also referred to as the ‘Blue Book.’

proposals to be financed through external loan and/or grants.”<sup>107</sup> Further, it states that these proposals “have been through feasibility assessment for external loans and/or grants financing” and “are prepared in line with the development goals of the National Medium-Term Development Plan” or RPJMN 2010-2014.<sup>108</sup> Thus, one is led to believe that projects listed herein are local and ‘Indonesian’ – bearing the Blue Book’s stamp of approval as being both locally demanded by their executing and implementing Indonesian agencies / ministries, and appropriately tailored to contribute toward Indonesia’s own development goals.

Interestingly, the development partners who plan to fund the external loans and/or grants covering the project proposals listed in the Blue Book are themselves not named in the proposals (though they do appear later in the ‘Green Book’ of “planned priority external loans and grants”).<sup>109</sup> It is not clear why transparency at this stage is not complete, as it could certainly aid donor coordination and harmonization, among other potential benefits. Even so, locating the proposals funded by USAID (for C4J and E2J) and AusAID (for AIPJ) was not difficult, even without the donors’ names on the pages. The language describing the programs was easily recognizable and either paraphrased or lifted directly from the AusAID or USAID agreements with Indonesia underlying the programs. Specifically, a Blue Book proposal titled ‘Partnership for Justice’ includes the same five outputs as listed in Section 7.3 of the Australia – Indo Arrangement.<sup>110</sup> The

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<sup>107</sup> DRPHLN-JM, 1<sup>st</sup> Book, “Preface,” i.

<sup>108</sup> Ibid.

<sup>109</sup> Green Books consist of ‘priority’ projects, contained in the DRPHLN-JM that are “eligible for being funded by external loans and/or grants,” having met “most of the readiness criteria,” and an indication of funding source. Ministry of National Development Planning / National Development Planning Agency, *List of Planned Priority External Loans and Grants* (DRPPHLN), “Forward,” (2011), i.

<sup>110</sup> DRPHLN-JM, 3<sup>rd</sup> Book, 427-28; “Aus-Indo Sub Arrangement,” Section 7.3.

USAID program can be found on pages 398-400 of the Blue Book, under the Project Title ‘Democratic Governance,’ with a three-sentence description of the Indonesian justice sector taken verbatim from the U.S. – Indo Agreement.<sup>111</sup> Other borrowings of development jargon include the output of ‘Strengthened Accountability of Rule of Law in Governance Administration.’<sup>112</sup>

What this demonstrates is that donors (at least sometimes) draft the proposals that end up in the Blue Book, which is expressly reserved for those projects deemed feasible for external grant/loan, and in line with the National Development Plan. Thus, perhaps the Blue Book represents not locally grown programs and solutions to Indonesian development challenges but donor plans for Indonesia that an Indonesian ministry has agreed to. This does not mean they are bad plans, just that they are not necessarily local. This also suggests the possibility that the Blue Book – despite its self-portrayal as being home-grown – is itself part of the RoL industry and development system in Indonesia, and a tool used by more than one master.

## **V. Interview analysis: Ownership and partnership according to local actors in Indonesian RoL assistance**

Having identified the slippage between the macro-level notions of ownership and partnership and what is actually dictated or captured by project documents, we now turn to professionals within the RoL assistance domain. Despite the somewhat tortured definitions presented above, both international and local actors have a clear sense of

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<sup>111</sup> DRPHLN-JM, 3<sup>rd</sup> Book, 398; “U.S.-Indo Assistance Agreement,” Annex 1, Section II.

<sup>112</sup> DRPHLN-JM, 3<sup>rd</sup> Book, 400. “U.S.-Indo Assistance Agreement,” Annex 1, Sections III and IV.

what ownership and partnership mean within an ongoing project, at the level of individual professional performance.

Unlike the documentary evidence presented above – which relates primarily to bilateral donors, the U.S. and Australia – the interviews discussed below were not limited in topic to only the case study projects, although the projects were certainly discussed at length when relevant. Instead, via open-ended questions and unprompted responses, the interviews and their subsequent analysis has been an attempt to capture the expertise and experiences of on-the-ground RoL assistance professionals.

As detailed in chapter 4, the study participants are roughly three-fourths Indonesian nationals (28), and one-quarter internationals (10) – most of whom live or have lived in Jakarta – and include government and donor officials, an Indonesian Supreme Court Judge, implementing professionals and staff, reform team members, development consultants (both international and Indonesian national), NGO attorneys, and academics. Three-quarters of the 38 informants reported at least 10 – 14 years of development or RoL assistance experience, with a handful of those having over 20 years of experience.

A preliminary question – useful for providing proper context for the responses given regarding the meanings of ownership and partnership – is whether RoL assistance professionals charged with project delivery and implementation are familiar with the *Paris Declaration* and the international agreements that followed, including the *Accra Agenda for Action* and the Indonesia-specific *Jakarta Commitment*?<sup>113</sup> And, a

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<sup>113</sup> Not wishing to overwhelm interviewees on the point of international discourse, my interview questions did not specifically include the 2011 *Busan Partnership*.

related follow-up question: Do these international agreements have any day-to-day relevance to their work?

As depicted in *Chart 1* below, approximately half of those informants who spoke to the issue reported at least some familiarity with *Paris Declaration*, *Accra Agenda* and *Jakarta Commitment*. Another 28 percent reported having heard of the international instruments, but dismissed them as irrelevant to their day-to-day work. About 16 percent of informants reported being familiar with only one or two of the instruments about which they were asked, and acknowledged not knowing anything about another. For example, one informant had heard of the Indonesia-specific *Jakarta Commitment*, but did not know anything about *Paris* or *Accra*.<sup>114</sup> Notably, one of the four Chiefs of Party (COPs) of the case study projects – all four of whom are internationals with at least a decade of development or RoL assistance experience – reported having heard of *Paris* and *Accra*, but not the Indonesia-specific *Jakarta Commitment*. Another COP, unfamiliar with the *Paris Declaration*, had heard of *Jakarta*, but did not know its content.<sup>115</sup> Lastly, only one informant reported no familiarity whatsoever with any of the instruments.<sup>116</sup>

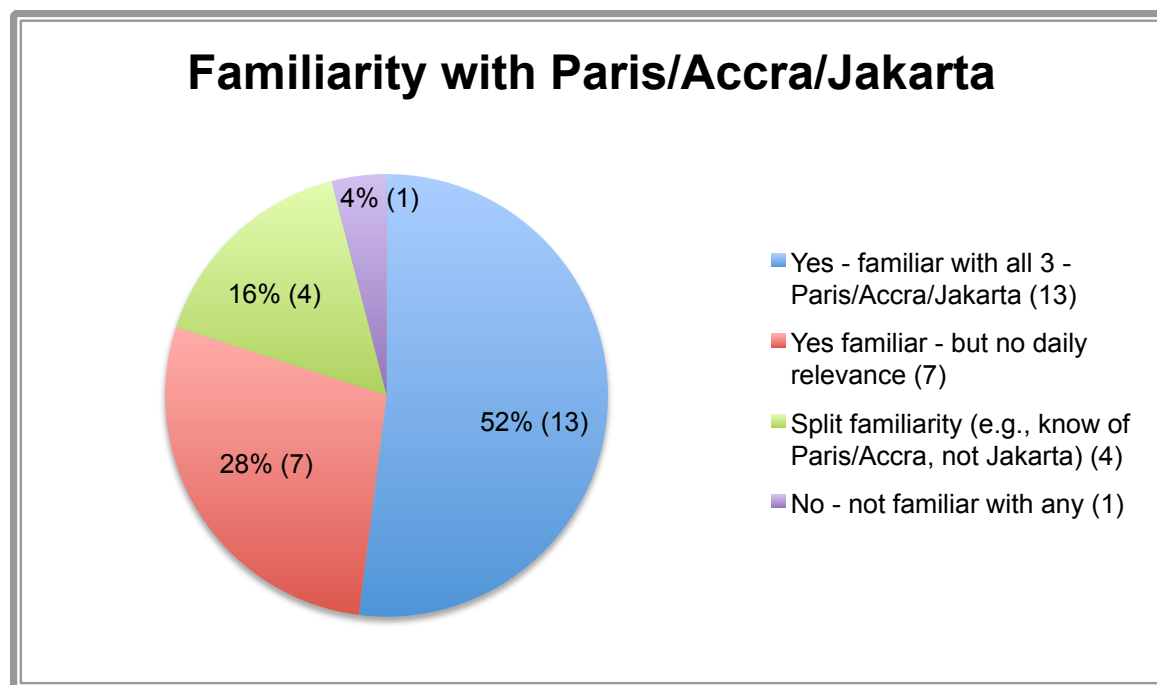
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<sup>114</sup> Informant 33 (interview with author, September 21, 2012).

<sup>115</sup> Informants 19 (interview with author, September 11, 2012), and 33 (interview with author, September 21, 2012).

<sup>116</sup> Informant 7 (interview with author, April 19, 2012).

Chart 1.



Two experienced international RoL professionals – both of whom reported detailed knowledge of *Paris / Accra* and *Jakarta* – pointed out that they prefer to simply *act on* the principles of local ownership and partnership because they make sense, rather than refer to the meta-level dialogue in the course of their daily work.<sup>117</sup>

But what would acting on principles of ‘local ownership’ and ‘partnership’ look like in the course of RoL assistance delivery? Quite separate from these instruments, asking local actors directly about their understanding of the concepts of ‘local ownership’ and ‘partnership’ brought strong responses as to their importance and relevance to effective aid. This was true across the board – even for those with limited understanding of *Paris Declaration, Accra Agenda, or Jakarta Commitment*. Local actors also discussed impediments to their realization, as well as opportunities and ideas for improvement.

Themes emerged across the definitions of ownership and partnership, including the

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<sup>117</sup> Informants 3 (interview with author, September 13, 2012), 34 (interview with author, September 19, 2012).

importance of hiring good people, the need for Indonesian capacity building, and evidence of a RoL industry and development system at work, influencing project design and implementation. These thematic concerns are addressed in turn below.

*a. Ownership 'defined'*

When asked what 'local ownership' means, or should mean in an ideal sense, more than two-thirds of the responses referred to **involvement by Indonesians in the planning or design process** of the RoL project as being key to capturing local ownership of the aid. (See *Chart 2*, below.) The importance of local involvement in the design phase (as early as possible) was mentioned at least 25 times by study participants. The need to secure local 'buy-in' featured prominently in the reasons why, as did aiming to meet actual local needs.<sup>118</sup> This category of ownership was discussed alongside the importance of staffing decisions, including, for example, choosing the right experts – both international and national – for the initial assessment and design. A result of this approach to local ownership, according to those who believed in it, is that the aid itself, typically in the form of technical assistance, would more effectively match and address Indonesian needs than RoL assistance designed without it.

The importance of local involvement from the outset was not lost on implementing managers. Two international consultants, each with over a decade of international development experience, said:

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<sup>118</sup> As one Indonesian national with over 20 years development experience described it: "Local ownership ... has to be built or developed based on real discussions with locals, with a real needs assessment. What's the local world? ... Proper consultations are needed so that [there is] local buy-in." Informant 31 (interview with author, September 12, 2012).

But you also can't just parachute in. It must be collaborative, consultative – on both the planning and the implementation.<sup>119</sup>

Ideally, you want the Partner involved in the design; consultation at the highest level; broad consultation – not just horizontally but vertically.<sup>120</sup>

Reaching vertical buy-in (through involvement) was viewed as necessary (both to getting the reform done and to the sustainability of its outcomes) because though the person at the top may be on-board with the reform, others in the institution might have little to no interest in any changes to the *status quo*. Interviewees reported that in Indonesia, as other places:

[A]t lower levels there is limited buy in, or none at all. ... Reform culture is not embedded in institutions. One or two people per institution is open to reform.<sup>121</sup>

This matters very much to RoL assistance delivery because coaxing involvement out of those who do not want to be involved (and even some who do) is a daunting task requiring immense time and effort. Furthermore, it sometimes requires the calling upon of networks – e.g., of mid-level implementing staff, hired at least in part for their contacts and access.<sup>122</sup>

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<sup>119</sup> Informant 1 (interview with author, April 16, 2012).

<sup>120</sup> Informant 2 (interview with author, April 26, 2012).

<sup>121</sup> Ibid. Other informants agree with this point. See e.g., Informant 19 (interview with author, September 11, 2012). Escobar might ask why it is assumed here that all those opposed to reform are in the wrong, and that reform culture *should* be embedded in institutions? Perhaps those one or two people are themselves a part of the development system – benefitting themselves and their families with perks of development, like 'study trips' with 'per diems' overseas? My response to Escobar would be – it's a fair question. But the technical assistance also has the potential to be more than that, and when done well, at least some RoL assistance reforms being suggested could bring positive changes – however incremental – for Indonesian justice.

<sup>122</sup> See e.g., Informant 37 (interview with author, September 19, 2012).

The importance of **sustainability** – defined as the outcomes of a RoL project/program still being present or maintained after a donor leaves – was highlighted in 22 percent (8) of the responses about the meaning of local ownership.<sup>123</sup> Again, the importance of hiring decisions and the related need for capacity building among Indonesians figured prominently in the context of these answers, as did matching the assistance to local demands, because in order to be maintained, RoL assistance outcomes needed Indonesians who were both capable and willing to see them through. One international Chief of Party (COP) defined ownership to be:

It means self-sustainability. Trying to institute something so that when you leave, it continues. Working toward local ownership throughout the life of project, so by the time you leave, locals are running it on their own.<sup>124</sup>

Three-fourths of those who included ‘sustainability’ in their definition of local ownership were Indonesian nationals.

Finally, for a few Indonesian nationals, local ownership meant that the **Indonesian partner contributed to the funding** of the project.<sup>125</sup> These local partners wanted more responsibility for Indonesians and thus more stake in the outcome. An international consultant with over 15 years’ development experience agreed, and in answer to the ‘what else is important?’ question, suggested that having Indonesians chip in 10 – 20 percent of the budget and co-develop the projects, if done correctly, would improve the buy-in, quality and sophistication of the projects.<sup>126</sup>

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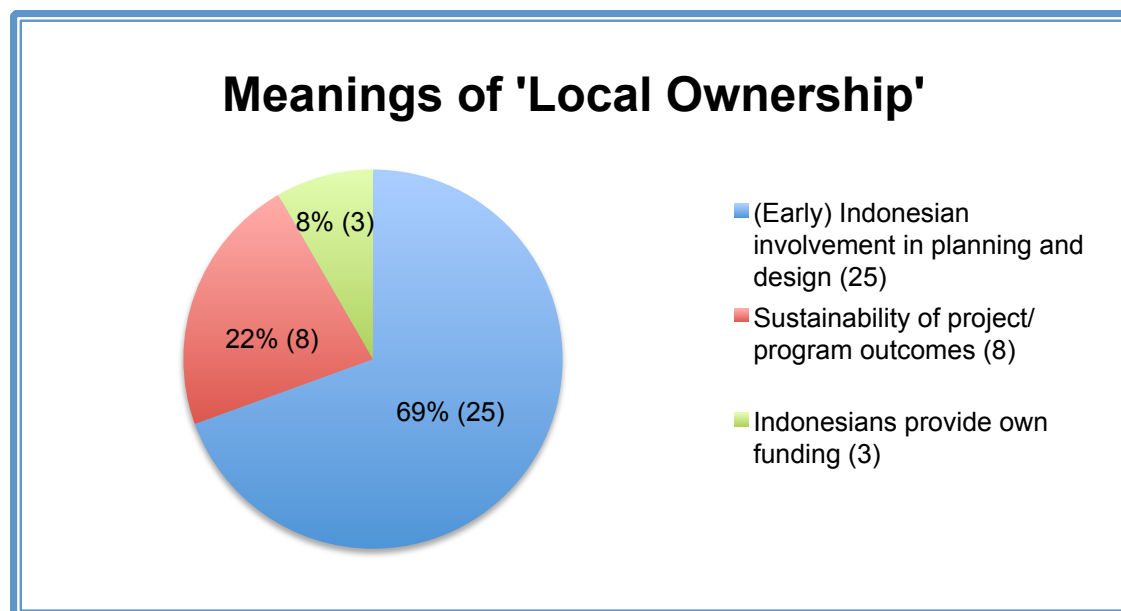
<sup>123</sup> Though it was raised eight times as part of ‘local ownership’ definitions, sustainability was also raised quite often during other parts of the interviews.

<sup>124</sup> Informant 33 (interview with author, September 21, 2012).

<sup>125</sup> Informants 7 (interview with author, April 19, 2012), 28 (interview with author, July 9, 2012), 41 (interview with author, September 20, 2012).

<sup>126</sup> Informant 33 (interview with author, September 21, 2012).

Chart 2.



These ideal versions of ownership at the project level of RoL assistance notwithstanding, experiences related by local actors show that reality is more complicated. Even a program that reported very high levels of early Indonesian input and joint decision-making in the design phase<sup>127</sup> faced problems during implementation – something one designer attributed to the procurement process that followed the design’s completion, noting that “[s]ome of the nuances of the design got lost” as it changed to request for tender and contract.<sup>128</sup> Similarly, another case study project reportedly underwent a large shift between initial assessment and design and the eventual contract and project formed out of the winning bid.<sup>129</sup>

<sup>127</sup> AusAID’s AIPJ design phase was described by one involved local partner as meeting “best practices,” and inspiring the hope that other donors would follow suit. Informant 36 (interview with author, September 18, 2012).

<sup>128</sup> See Informant 3 (interview with author, September 13, 2012). Also: “I personally regret not being more involved in that. We were exhausted! Stepped back. Now I’m learning that a bit got lost in translation.” Ibid.

<sup>129</sup> USAID’s E2J, discussed in the context of the procurement process, chapter 5, Section III (a)(i).

A different, but related phenomenon can be observed with regard to the category of sustainability as ownership. What is particularly interesting here is that few local actors seem to contemplate ‘life after donor’ in a serious fashion.<sup>130</sup> Instead, we find Indonesian RoL assistance as Escobar describes ‘development’ – with a professional and institutional apparatus in place, ready and, at times, literally waiting to deliver RoL assistance. Successor programs – when a donor follows a previous program that is finishing with a continuing commitment via a new program that is intended to build on the previous program – seem to be viewed favorably by local partners.<sup>131</sup> Even more than that, some local partners come to rely on these programs, and take (negative) note when donors do not follow through as promised or as quickly.<sup>132</sup> Thus, despite stated and apparently sincere calls for sustainability post-donor, incentives for those local actors working within the RoL assistance ‘industry’ are to keep the system in place, and continue working within it, project after project.

*b. Partnership ‘defined’*

Observing that “[p]lanning is the root of everything that happens,” an Indonesian national with 14 years of development experience linked the extent of local voice in the assistance to the quality of the plan.<sup>133</sup> In other words, the more local voice, the better

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<sup>130</sup> The sense that ‘life after donor’ remains a nebulous, far-off situation, is illustrated in one informant’s comment: “Eventually, all of this will or should move away from the donor, but how and when is the question.” Informant 1 (interview with author, April 16, 2012).

<sup>131</sup> See e.g., informant 10 (interview with author, April 24, 2012).

<sup>132</sup> Informant 16 (interview with author, April 23, 2012)(“People were waiting” – regarding the time lag in the implementation of USAID’s C4J project).

<sup>133</sup> Ibid.

the plan.<sup>134</sup> Yet this begs the question: who speaks for the locals?<sup>135</sup> As discussed in chapter 6, the actors involved in RoL assistance in Indonesia are numerous, and their roles are anything but clearly laid out and understood by everyone involved. Instead, what we have are local ‘Indonesian’ voices represented by Bappenas, officials from the partner institutions (e.g., Supreme Court, Attorney General’s Office, Ministry of Justice), reform teams (established for the Supreme Court and the Attorney General’s Office and staffed by members of the legal NGO community), as well as the national experts and consultants hired directly by donors and their managing contractors. Clearly, this collection of voices cannot (and does not) share just one opinion about the justice sector needs of Indonesia. The more confusing reality we are left with is that the site of RoL assistance delivery is occupied by many individuals with an arguable and valid claim to speak ‘for’ Indonesia. One challenge for RoL delivery, thus, inevitably involves effective partnering – effective both in the *choice* of partners, as well as how the partnership is carried out and experienced in day-to-day delivery of the project.

Chart 3, below, depicts the categories of ‘partnership definitions’ identified during interviews. The **importance of communication** that facilitates input by both sides was brought up 17 times (37 percent of the total) during partnership definitions. The closely related category – **same goals / finding agreement** – takes communication one step further. Here, not only are both sides given a meaningful chance for input, but emphasis is placed upon reaching agreement and making joint decisions. The importance of face-

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<sup>134</sup> One repeated suggestion was starting with Indonesia’s own development and reform plans, where they exist and building out a project from there. See e.g., informant 41 (interview with author, September 20, 2012).

<sup>135</sup> Informant 3 (interview with author, September 13, 2012): “Short of a meeting between heads of state, ... In an area where everyone has different views, who speaks on behalf of Indonesia? This is one of the biggest challenges to partnership.”

to-face meetings – a significant challenge at times, given Jakarta’s notorious traffic jams – and vigilant communication between and among partners are deemed essential for effective partnering and the types of relationships that could lead to local ownership of the RoL assistance. Said one experienced international consultant:

If you don’t have a good relationship with partners, the program suffers. Because that’s the only way to find out what’s going on. ... If they like you, they will help. When there’s a problem, they will have your back.<sup>136</sup>

Similar sentiments were echoed by others.<sup>137</sup>

The next category of partnership – **equality / trust / mutual respect** – involves less tangible elements of relationship dynamics that were brought up eight times, primarily in order to note their absence. One case study project reportedly nearly lost the cooperation of an important local partner when that partner perceived the Chief of Party as mistrusting decisions seen as within the domain of that local partner.<sup>138</sup> One informant involved in the matter described how that local partner’s institution preferred to keep its distance after that – one aftermath of what was described as a “bad experience.”<sup>139</sup> With regards to how this impacted the local partners themselves, the informant reported that enthusiasm for the project waned considerably – as evidenced, for example, by fewer ideas being generated by the local partners from that institution at project meetings. What this example demonstrates is the impact that less tangible elements of partnership – such as a perceived lack of trust or respect – can have on

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<sup>136</sup> Informant 1 (interview with author, April 16, 2012).

<sup>137</sup> See e.g., Informant 19 (interview with author, September 11, 2012),

<sup>138</sup> Informant 7 (interview with author, April 19, 2012). Here, the informant is referring to an implementing contractor’s questioning of an Indonesian dean’s admission decisions to a program for judges at a local university. Having said that, the curriculum process for this same project went smoothly in terms of partnership, with academics designing the curriculum, and bridging the gap between the Supreme Court and donors. Ibid.

<sup>139</sup> Informant 7 (interview with author, April 19, 2012).

local partners, which can include decreased engagement in and enthusiasm for RoL assistance projects, and the projects' accompanying reforms. Perhaps not surprisingly, the contexts for several responses in this category included descriptions of perceived donor overreaches, or other perceived power imbalances.

A fourth category of partnership refers to the **structure of the aid**, meaning how the project or program is structured. Here, informants referred to one of two basic possibilities: 1) a 'programmatic' approach in which the donor determines programming, sets targets, indicators, evaluations, etc.; 2) a more flexible approach in which the partner is given discretion and leeway to carry out programming according to the needs at the time of implementation. AIPJ designers referred to a debate between calling the assistance a 'targeted facility' (what local partners / Indonesians wanted) and 'flexible program' (what Australia wanted, ... and got).<sup>140</sup> The described existence of these two structural alternatives should not be mistaken for their endorsement (on either side), however. Instead, both international and Indonesian local actors who spoke on this issue openly favored a hybrid middle path – in which big picture goals and direction are noted by the donor at the outset (ideally reflecting actual Indonesian needs and input), leaving the details to be decided and carried out by implementers based on current conditions.<sup>141</sup>

The final category, **linking to local ownership** responses (13 percent of all partnership definitions; 6 responses), refers to crossover answers – wherein informants

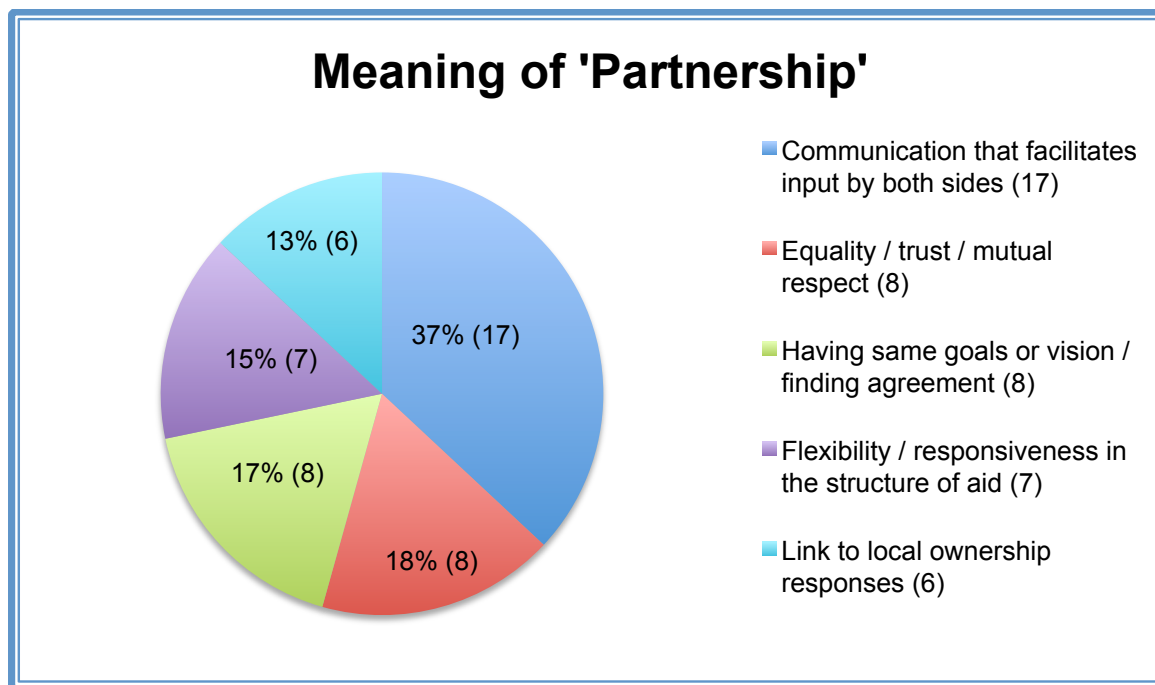
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<sup>140</sup> The precursor to AIPJ, AusAID's Legal Development Facility (LDF) program, which ran from April 2004 to January 2010, was cited by Indonesian local partners as an example of true local ownership. See e.g., informant 16 (interview with author, April 23, 2012). For more on LDF, see chapter 8, section II (a).

<sup>141</sup> See e.g., Informants 1 (interview with author, April 16, 2012), and 31 (interview with author, September 12, 2012).

referred back to their local ownership answers. This suggests the rather obvious point that the two are closely related – with effective partnering leading to ownership of the RoL assistance, and the converse – that if ownership is present, we can expect good partnerships among the local actors – also true. The principles are seen as correlated.

Chart 3.



Within the first three categories – which together comprise 72 percent of all answers regarding partnership – language and basic understanding inevitably come into play, with one highly regarded example of partnership being reported in the simple act of translating project design documents from English into Indonesian for comments.<sup>142</sup> But at the same time, we hear of other instances where Indonesian government officials simply nod during meetings with donors and implementers – unwilling to admit their English skills are lacking, leading to misunderstandings.<sup>143</sup> Here again, we see the ‘tilt’ of the development apparatus in the choice of English as the language of the RoL

<sup>142</sup> Referring to AusAID’s AIPJ. Informant 3 (interview with author, September 13, 2012).

<sup>143</sup> Informant 10 (interview with author, April 24, 2012).

assistance. With the exception of two AusAID RoL professionals who were fluent in Indonesian, the top implementing managers of all four case study projects reported ‘limited’ to ‘terrible’ Indonesian language skills.<sup>144</sup>

The preference for English also leads to arguably absurd situations – including a reported example of an Indonesian prosecutor whose English skills were not advanced enough in order to take advantage of a capacity-building training being offered as part of a technical assistance project in the Indonesian AGO.<sup>145</sup> In other words, this means that Indonesians would need capacity building (in the form of English lessons) to even *qualify* for donor-funded capacity building. This does leave one wondering, because many seemingly reasonable alternatives come to mind. Why not offer the training in Indonesian? Or include a top-notch translator? Or have the materials translated into Indonesian? Or have English speaking technical experts work with fluent-in-English Indonesian professors and/or reform team members to come up with a program that is locally appropriate, and based on the best comparative knowledge available? Is the reason, as is sometimes suggested, a matter of capacity? Or could it be that the business and ‘industry’ side of RoL assistance is maximizing profit by simplifying delivery?

*c. Impediment to ownership and partnership as described: Need for capacity building?*

It was often mentioned by both Indonesians and internationals that a major challenge – the “biggest problem” according to some – to both partnership and

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<sup>144</sup> Informants 2 (interview with author, April 26, 2012), 19 (interview with author, September 11, 2012), 20 (interview with author, April 26, 2012), and 34 (interview with author, September 19, 2012).

<sup>145</sup> Informant 35 (interview with author, September 19, 2012).

ownership was working with partner institutions in the Indonesian government who themselves do not know what they need.<sup>146</sup> An Indonesian national with over a decade of international development experience suggested:

[I]t has to come from both sides. Recipient has to be clear to tell donor what they want to do and how they want to do it. But because of my experience (again, see Pompe book – collapsed institution), they don't have the capacity. They don't know what they have to do or how.<sup>147</sup>

How should a donor help an institution that doesn't know what it needs? And how can that institution possibly 'own' the reform when it has offered – or is given – little say in the reform's design and formulation?

In the *Paris Declaration*, and follow-on international documents, we see an emphasis placed upon using partner country systems and developing the capacity of the partner country to reform itself, as discussed in detail above. Even though all four case study projects use 'parallel implementation units' to manage and deliver the RoL assistance instead of Indonesian systems,<sup>148</sup> one would nonetheless expect to see priority being placed on building the capacity of Indonesian RoL assistance implementers, particularly in the case studies chosen – which contain an explicit focus on capacity building in support of the Indonesian justice sector. While most managers in

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<sup>146</sup> See e.g., Informant 35 (interview with author, September 19, 2012).

<sup>147</sup> Informant 10 (interview with author, April 24, 2012). This informant referred throughout the interview to Sebastiaan Pompe's 2005 book on the Indonesian Supreme Court, *A Study of Institutional Collapse*, and suggested (only partly joking) that it should be required reading for all RoL professionals who wish to take part in RoL assistance with the Supreme Court. Sebastiaan Pompe, *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell Southeast Asia Studies, 2005).

<sup>148</sup> See above discussion on agreements between Indonesia and bi-lateral donors, AusAID and USAID, and their use of foreign managing contractors, Section IV (b). World Bank, too, manages J4P with its own staff, at a World Bank office in Jakarta. Again, it should be noted that TAF (managing contractor for USAID's E2J), as an international NGO, is well-regarded among both Indonesian and international RoL professionals for having a long-established presence in Indonesian justice reform.

charge of project/program implementation stated this as an important goal, few had actual and specific means of making this happen beyond the job/work itself, and informal 'mentoring.'<sup>149</sup>

Case study projects had different ways of handling capacity building. In the design phase of AIPJ, AusAID engaged directly with CSOs instead of individual consultants by commissioning studies on anti-corruption and sub-national legislation, thereby supporting the institutions as well.<sup>150</sup> During implementation, AusAID reportedly delayed a capacity building component by not allocating any funds toward it.<sup>151</sup> Managers tried to compensate by allowing team members to give presentations on topics of their choice, attend trainings (of a few days or less).<sup>152</sup> Others, regarding both USAID projects and WB J4P, for example, adamantly described the work itself as building capacity, e.g., E2J, with its emphasis on legal education, and building linkages between CSOs and law schools; and World Bank's J4P, which recruits and trains paralegals in outlying areas to increase women's access to justice. Additionally, the make-up of all of the implementing teams was heavily national (by design).<sup>153</sup>

Yet, with just a few exceptions, the Indonesian nationals tended to be the 'junior' staff, answering to more senior internationals. And the question needs to be asked: Does the experience and training from working at an international donor or implementing contractor make someone better at reform or simply better at working with donors delivering assistance? Perhaps the answer is not important because, as we saw

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<sup>149</sup> Having said that, the jobs done by implementing staff are not to be minimized, and involve carefully navigating two very different large and complicated bureaucracies: Donor and Indonesian.

<sup>150</sup> Informant 3 (interview with author, September 13, 2012).

<sup>151</sup> Informant 2 (interview with author, April 26, 2012).

<sup>152</sup> Ibid.

<sup>153</sup> Informant 47 (interview with author, December 20, 2012).

in chapter 6, local partners are doing both simultaneously – working for implementing contractors while also maintaining close ties to their NGOs and CSOs also working in justice sector reforms.

*d. Is the 'RoL Industry' creating (and then meeting) its own demand?*

One possible negative outcome of the presence of the RoL Industry is that donors sometimes offer what they (or their contractors) know, and not necessarily what is best or most appropriate for Indonesia. Some local partners voiced disappointment with USAID's E2J project for its primary focus on establishing clinical legal programs in Indonesian law schools as the 'cure' for the identified problems of poorly trained judges and prosecutors, and top Indonesian law graduates deciding against careers in prosecution or the judiciary.<sup>154</sup> It was suggested that other interventions – e.g., establishing a training program for judges and prosecutors about to enter their professions – would have been a better fit for Indonesia than the U.S. model of legal clinics that resulted from the tender process.<sup>155</sup>

Another frustration voiced loudly by many Indonesian local partners was a lack of input in the hiring decisions. Recall from above that bilateral donors, Australia and the U.S., were explicit in keeping power over the hiring decisions for the RoL assistance programs.<sup>156</sup> It is the lack of input by Indonesians that ends up being contested by local

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<sup>154</sup> See e.g., Informants 7 (interview with author, April 19, 2012), 10 (interview with author, April 24, 2012); Also Informant 36 (interview with author, September 18, 2012), describing how C4J was received by local partners: "Have we got a program for you!"

<sup>155</sup> See e.g., Informant 10 (interview with author, April 24, 2012).

<sup>156</sup> See discussion on U.S. – Indo Assistance Agreement and Aus – Indo Sub Arrangement, above. More recent surrounding documents of J4P indicate that it is still led and managed by a World Bank appointed team, albeit one with a different name, "PNPM Support Facility." PNPM Support Facility (PSF) Joint Management Meeting,

partners at the site of RoL assistance delivery. As one Indonesian Supreme Court Judge who is involved in donor-supported Supreme Court reforms, stated:

It's ok to have a foreign expert. But Indonesians should have a say on who. Not a unilateral decision by the donor. We have something to say about the expert. We want to see the CV. ... But the giver is higher than the recipient.<sup>157</sup>

In other words, Indonesians feel forced into accepting the uneven decision-making power in this instance because the donor is the one holding the purse strings.

One reason that donors' hiring practices are widely discussed – especially among Indonesian local partners – is that there is a wide disparity in the skill and knowledge level of the people being hired, or at least a perception that this is the case.

Said an Indonesian justice reformer in reference to one case study project:

When in the process of recruiting national consultant, we recommended someone really good – who really knows. We couldn't understand why the hiring choice was made. They chose a junior one without experience. ... This person can only manage. [Implementing contractor] made a choice, and the relationship went downhill from there.<sup>158</sup>

Thus, in addition to the perceived loss of knowledge caused by an arguably poor hiring choice, soured relationships are another possible outcome. Furthermore, the matter of substance being sacrificed for technocratic 'management skills' was brought up referring to a number of RoL assistance projects<sup>159</sup> as further evidence that resource

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"Minutes of Meeting," July 12, 2003, available at: <http://pnpm-support.org/sites/default/files/Minutes%20of%20Meeting%20-%20JMC%20Meeting%20July%202012,%202013.pdf>.

<sup>157</sup> Informant 9 (interview with author, April 23, 2012).

<sup>158</sup> Informant 25 (interview with author, September 18, 2012). See also Informants 16 (interview with author, April 23, 2012), and 20 (interview with author, April 26, 2012). "Budget cuts" were reportedly included in the explanations discussed regarding the expert hires.

<sup>159</sup> See e.g., Informant 43 (interview with author, September 13, 2012), who described foreign consultants as "mechanistic."

allocation decisions are still favoring and prioritizing western players. Said another Indonesian justice reformer about USAID's C4J project (but could be referring to any number of donors working in RoL assistance):

They only outsource very limited support, which they do not find selves capable.<sup>160</sup>

The flip side of this, from a C4J perspective, is that Chemonics is finding local Indonesians whom they believe are capable to staff the project.<sup>161</sup> Even so, Chemonics (with USAID oversight) makes the hiring decisions, and an international 'chief of party' (COP) remains in charge of project implementation.

Others also reported ill-conceived choices on the part of donors, such as hiring a retired judge, known in Indonesia as corrupt, to be the national expert,<sup>162</sup> or the hiring of inexperienced 'specialists' by donors and implementers to provide advice to the Indonesian partners "on something they just newly learned."<sup>163</sup>

Yet all of this begs the question: Could these (and other) RoL projects be done with only local staff? Having described the *Paris / Accra / Jakarta* meta-level goal of Indonesian country systems in charge of delivering development assistance, we now turn to what local actors reported as possible in the Indonesian RoL context. In Chart 4, we see the responses given by local actors.

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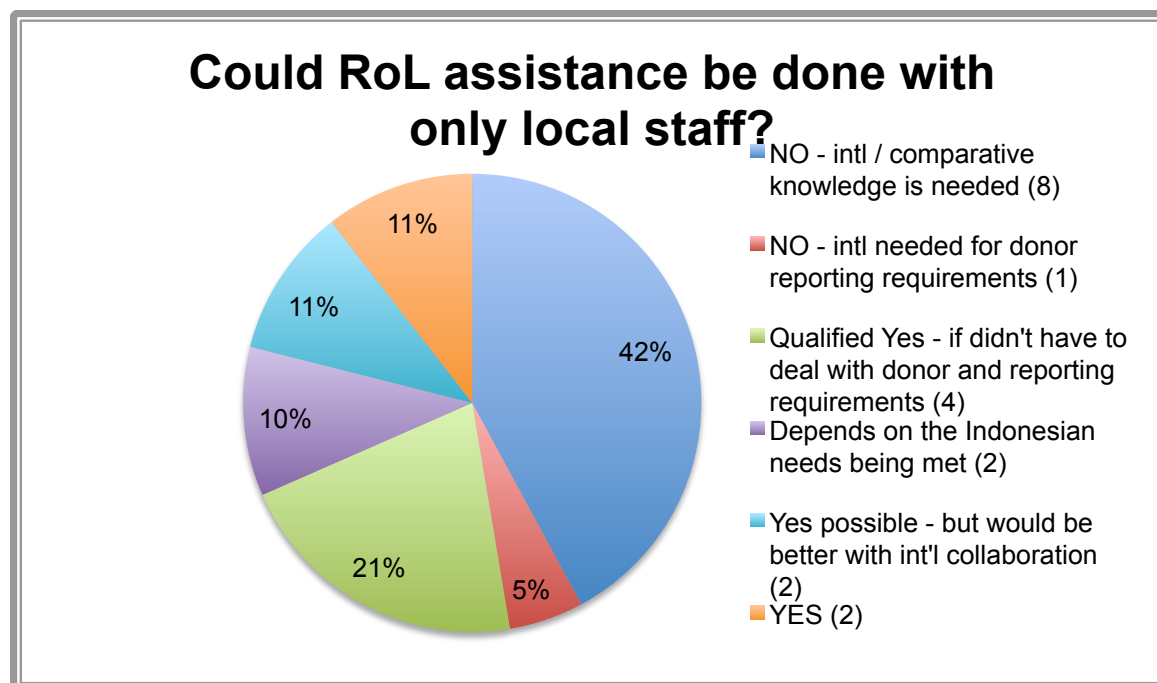
<sup>160</sup> Informant 21 (interview with author, April 25, 2012).

<sup>161</sup> Informants 19 (interview with author, September 11, 2012), and 41 (interview with author, September 20, 2012).

<sup>162</sup> Informant 21 (interview with author, April 25, 2012).

<sup>163</sup> Informant 36 (interview with author, September 18, 2012).

Chart 4.



When asked whether the RoL assistance they were involved in could be conducted with only local, in this case Indonesian, staff, nearly half of those who spoke to the issue (8 of 19) said no, because the assistance required comparative knowledge and international expertise not found in Indonesia. One-quarter of the answers gave a qualified yes – speaking to the competence of Indonesian staff, but observing that dealing with the donor and its requisite reporting would require the skills of an international professional. The remaining respondents voiced confidence that Indonesians were capable of carrying out RoL assistance – with two referring specifically to the projects they were working on, and the other two noting that it would depend on the specific Indonesian needs being addressed by the assistance.

These answers suggest that local capacity in the form of competence to engage in justice sector reforms was not the issue – but instead that the international demands

being made as conditions of the assistance were what required the attention of internationals.

*e. Whoever paid, decides*

Crewe and Harrison have observed: “The idea that money automatically confers power on people is apparently reflected in the control that aid donors have over aid recipients.”<sup>164</sup> Experiences related by Indonesian local actors indicate that decision-making – particularly as it relates to hiring and the allocation of resources – rests with the donors. The phrase: ‘Take it or leave it’ or versions thereof<sup>165</sup> were brought up in response to situations where this ‘final say’-type power imbalance favored the donors. This power imbalance is undeniably present in hiring decisions. A related issue is the money that is paid to consultants and experts. Local partners described what they see as an inappropriate discrepancy in pay between Indonesian and international / expatriate experts and staff of RoL assistance<sup>166</sup> – particularly when, as described above, some of these ‘experts’ arguably lack the expertise required for the project. These situations breed what are described as “suspicious feelings” for Indonesian local partners<sup>167</sup> that the foreign consultants are being arguably overpaid in relation to their contribution to the program or program.

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<sup>164</sup> Crewe and Harrison, *Whose Development?*, 47.

<sup>165</sup> See e.g., informant 36 (interview with author, September 18, 2012): “But again – it’s a grant – what do you want? It’s a present.” See also, Informant 35 (interview with author, September 19, 2012): “Foreign aid is always ... There is no free lunch.”

<sup>166</sup> Informants 13 (interview with author, April 24, 2012), 14 (interview with author, April 24, 2012). Some local partners believed the difference to be exponential – e.g., 10,000 for Indonesian national v. 100,000 for international consultant. No data was uncovered to confirm or deny such figures, though the belief itself obviously colored these local actors’ perceptions regarding donor projects and programs.

<sup>167</sup> Informant 9 (interview with author, April 23, 2012).

A further example of the power imbalance involves what appears to be an intentional lack of transparency on the part of donors. Specifically, Indonesian government officials from Bappenas and the Supreme Court reported that many donors denied specific requests for budget details of the RoL assistance (needed for their reports to the Indonesian Ministry of Finance) – an arguable violation of Paris 46, in which donors agreed to provide “transparent and comprehensive” information on aid flows.<sup>168</sup> Said a Bappenas official of the interaction with donors:

You support us to have transparency but you don't have transparency!<sup>169</sup>

This double standard on transparency renders Indonesians unable to verify their ‘suspicious feelings’ regarding differences in pay.<sup>170</sup> When asked about this issue, a consultant hired as a specialist by USAID suggested one reason for not giving a detailed breakdown of the budget is that the numbers could be misinterpreted or construed, stating that:

Foreign labor would cost far more than labor in Indonesia costs.<sup>171</sup>

But is that not the point? Some local partners want to know exactly where the money is going, suspecting (correctly<sup>172</sup>) that money funnels back to donor and western countries.

As discussed in chapter 5, the high cost of RoL foreign labor costs is a structural feature

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<sup>168</sup> *Paris Declaration*, Section 46: “Provide timely, transparent and comprehensive information on aid flows so as to enable partner authorities to present comprehensive budget reports ...” See also, discussion above on the *Paris Declaration*, Section III (a).

<sup>169</sup> Informant 15 (interview with author, September 17, 2012).

<sup>170</sup> Informant 9 (interview with author, April 23, 2012).

<sup>171</sup> Informant 47 (interview with author, December 20, 2012).

<sup>172</sup> As discussed above in Section IV (b). See also chapter 5, Section II (on money paid to for-profit contractors).

interfering with partnership. Here we see them raised as problematic issues by local partners.

## **VI. Concluding argument**

This chapter has examined data regarding how local ownership and partnership are defined and ultimately operationalized and manifested in the field. As in chapter 1, we see that international regulatory instruments including the *Paris Declaration* and its follow-on documents, remain fairly abstracted from reality. This is perhaps best illustrated in Indonesian RoL assistance by the fact that two of four Chiefs of Party (COPs) of the case study projects and programs – each with excellent credentials and more than a decade of experience – were unfamiliar with the Indonesia-specific, *Jakarta Commitment*. This is also in spite of the fact that all case study donors were signatories to the *Jakarta Commitment*.

Despite a significant discrepancy between meta-level definitions of ownership and partnership and the range of agreements and arrangements between Indonesia and bilateral donors U.S. and Australia, interviews with local actors working in RoL assistance revealed that contextualizing ownership and partnership proved fruitful as a platform for airing and better describing what is happening on the ground in RoL assistance. In the process, ownership and partnership were revealed as discursive tools – not always invoked by name, but instead via the substance of local actor complaints: ‘we were not included in the initial planning’; ‘we had no say in their choice for expert and the one they chose was terrible’; it was ‘not our project.’

Discussions of ownership and partnership also brought out a tension felt on the donor side – namely:

To what extent can we provide input without diluting ownership?<sup>173</sup>

As the discussion above reveals, this donor tension remains an ongoing issue, with many local actors still identifying most RoL assistance as donor driven.<sup>174</sup> One possible justification offered for the continued driving of aid by the donors is a lack of capacity on the Indonesian side. But upon closer inspection, we see that at least some of these missing skills – English language and reporting / managerial skills – are ones for servicing the RoL assistance Industry through reporting, rather than the skills needed for design and delivery in the host country.

One finding of this chapter is that this ‘industry’ side of RoL assistance (the discourse and “business” of development described by Escobar) favors donors, and in so doing skews the dynamics and choices away from simply providing the best possible aid instead and toward ‘feeding the beast’ – seen, for example, in hiring and design choices. Donors, as the primary funders, remain in control of the largest allocation of resources, including the hiring of the contractor – who in turn, is in control of hiring the staff for the project. Despite language to the contrary in *Paris / Accra / Jakarta* promising the use of country systems,<sup>175</sup> donors working in RoL assistance routinely employ implementing contractors. And this translates to money being funneled back to donor countries.<sup>176</sup>

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<sup>173</sup> Informant 2 (interview with author, April 26, 2012).

<sup>174</sup> See e.g., Informants 35 (interview with author, September 19, 2012), 40 (interview with author, September 20, 2012).

<sup>175</sup> See e.g., *Paris Declaration*, Section 21; *Accra Agenda*, Section 15; and *Busan Partnership*, Section 19.

<sup>176</sup> This is slightly less of an issue with multilaterals/WB, though their technical experts still mostly originate from ‘advanced’ countries of the ‘Global North.’

A further finding is that effective partnerships do matter. Data supports some consensus about what effective partnership is – but these relationships take place within an apparatus that is designed or tilted at the outset to privilege the donor. What this chapter suggests is that there is a consequence to this tilting, which is that it affects the way local actors react to certain projects and people. Partnership gets crowded out by the system, as well as by voluminous reporting requirements (discussed in chapter 8). All while the local partners are more capable and competent, and ready to get the job done.

But of course the story does not end there, with capable local partners and other local actors caving in under the weight of the RoL ‘industry.’ Instead, as discussed in the next chapter, we see strategies and ‘work-arounds’ on both sides resulting at times in a mutual influence between the international / foreign donor and the local partners of Indonesia, and other times with one side completely unaware of what the other is up to (and vice versa). The present chapter has argued that ownership and partnership should not only be viewed as the lofty (perhaps unattainable) ideals espoused at the macro-level. To the contrary, ownership and partnership are assigned relevant meanings at the level of individual professional performance in RoL assistance that should be considered worthy of pursuit during RoL assistance delivery. One reason for doing so is that the professionals on the ground deem them to be important, and report aspiring to include ownership and partnership ideals in their own professional practice. Another reason for doing so is that the data underlying this chapter suggests that local ownership and partnership have the potential to be hallmarks of successful within-project relationships. This, in turn, may also lead to more locally appropriate project outcomes.



## **Chapter 8 /**

### **Local Actor Dynamics and Exercise of Agency in Rule of Law Assistance Delivery in Indonesia**

#### **I. Introduction**

Having examined the many local actors involved in rule of law (RoL) assistance in Indonesia in chapter 6, and how they conceptualize and experience the principles of ‘ownership’ and ‘partnership’ in chapter 7, we now turn to what these local actors actually do, and how they behave in the course of project implementation. What are local actors’ strategies for keeping donor-assisted RoL assistance projects moving in their preferred direction? How do they cope with the challenges that emerge during implementation? In these strategies, we see local actors pursuing more equal partnership, and increased local ownership of the RoL assistance, including control over the content and direction of the assistance.

This chapter explores a recurring theme of this dissertation – that local actors are not passive, but dynamic actors within a larger system that delivers RoL assistance.<sup>1</sup> Part of what we see in principal-agent terms as informational asymmetry is, in lived terms, a relational dynamism where local actors have choices, and freely act on them. The many local actors represented in this study include agents (e.g., implementers / contractors / scholar practitioners) and local Indonesian partners (e.g., Indonesian government officials, a Supreme Court judge, members of Indonesian NGOs,

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<sup>1</sup> See chapters 5 and 7 for a discussion of the RoL ‘industry’ and system in place to service and deliver RoL assistance.

academics).<sup>2</sup> These actors have more locally relevant information and relational networks than donor officials at headquarters or those who are in country, but sitting within an embassy compound. Whether consciously or not, these local actors, and particularly local partners,<sup>3</sup> use their information, knowledge and networks to modify the project in a number of ways – to benefit the project, or to benefit the agent, principal, or both.

In order to present specific information about what local actors and partners in RoL assistance *do*, including their self-reported strategies and coping mechanisms, this chapter is organized into three parts. Each section focuses on a particular grouping of actors involved in RoL assistance:

- 1) Donor-side local actors and partners (Section III);
- 2) Indonesian-side local partners (Section IV); and
- 3) Global / international-based actors (Section V).

Examining the actors in this order helps demonstrate the back and forth, cyclical nature of RoL assistance delivery. In the first instance, donor-side actors engage in designing and delivering RoL assistance as agents of the donor – building relationships, and acting as they see as necessary to deliver the RoL assistance. Indonesian-side partners act within their own realms as required, and freely respond to the agents of the donor

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<sup>2</sup> A more detailed break-down of the profiles of the informants can be found in chapter 4, Section III (b), as well as chapter 6, Section III (a) (table of employing and affiliate organizations for all local actors).

<sup>3</sup> *Local partners*, as in chapter 1, refers to the Indonesian nationals who professionally partner in some way with donor-funded RoL assistance in Indonesia – either on behalf of Indonesia (e.g., reform team member, Bappenas official) or a donor and its implementing contractors (e.g., ‘national expert’ on the donor’s design team, implementing team and staff members). *Local actors* is the broader category, encompassing all participants – foreign or local – in the design and implementation of RoL assistance. See chapter 1, Section III (a).

among the options presented to them, resulting in influence going in multiple directions, and across multiple levels. International actors exert influence over the site of implementation through hiring and structural choices,<sup>4</sup> and through the reporting requirements demanded of on-the-ground implementers.<sup>5</sup>

What this chapter shows is that no matter how RoL assistance is designed, or staffed out, a certain amount of dynamic agency is involved. Local actors have free choice, and more options than donors typically know about. Their exercise of this choice sets off a cycle of actions and responses – mutual influence across multiple levels and in multiple directions. These cycles of mutual, multi-directional influence provide a useful lens through which to view the data collected from Indonesian RoL assistance, and are discussed further in Section II, below. Understanding these processes and cycles of behavior matters because they impact the design, implementation and outcomes of RoL assistance, as well as the levels of local ownership and partnership achieved by the assistance, according to those actors present during implementation.

## **II. Theoretical framing: Cycles of mutual, multi-directional influence (recursivity)**

This chapter uses a theoretical framing suggested by Terence Halliday and Bruce Carruthers to analyze the dynamic, back and forth nature of RoL assistance. In a study of three Asian countries – Indonesia, Korea, and China – Halliday and Carruthers examined international development community efforts to prevent a worsening of the Asian Financial Crisis, which included developing bankruptcy or corporate restructuring regimes to deal with failed firms in an orderly way. What the Halliday and Carruthers

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<sup>4</sup> See chapter 5.

<sup>5</sup> See Section V, below.

study shows quite effectively is the existence of a dynamic transnational space in which the institutional processes of norm formation are occurring, with influences running in multiple directions, up and down the multi-level structure.

The authors identify a cyclical process present in legal reform – what they term “recursivity of law” – which recognizes that implementation is problematic, complicated, and can result in significant difference and mutual tension between law-on-the-books and law-in-action.<sup>6</sup> *Recursivity*, according to the authors, involves a cyclical process between the politics of enactment – wherein the rules and terms are set – and the politics of implementation – wherein those actors charged with executing the terms or implementing the law, or intermediaries, find space for self-determination.<sup>7</sup> What results is mutual, responsive, multi-directional influence flowing between and among local actors participating in the RoL assistance.

This dynamic space of cyclical, multi-directional influence also exists in Indonesian RoL assistance, wherein local actors interact, deploying whatever means available that they choose to further their cause. What this chapter seeks to explore in more detail, however, are the incentives, values and mindsets of the individual actors who populate the local level of transnational RoL projects that seek to shape norms and procedures in the host country. Whereas Halliday and Carruthers observed local actors thwarting implementation of Indonesia’s bankruptcy system,<sup>8</sup> this study observed local

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<sup>6</sup> Terence C. Halliday and Bruce G. Carruthers, *Bankrupt: Global Lawmaking and Systemic Financial Crisis* (Stanford University Press: 2009), xvi and 15-16.

<sup>7</sup> Halliday and Carruthers, *Bankrupt*, 363.

<sup>8</sup> As identified by the authors, these were the “mismatched” actors, or actors left out during the design of the system – in this case, the debtors (members of Indonesia’s business community). *Ibid.*, 196 and 206. See also chapter 4, Section II (b) (iii) (regarding Indonesian reforms following the Asian Financial Crisis according to Halliday and Carruthers, and others).

actors at times strategizing above and beyond project terms for the betterment of the RoL assistance and the dynamic relationships it generates. To better understand what these actors are doing, we move beyond the principal agent theory of chapter 6 to use insight from legal anthropology (Merry) and development studies (Morrison) to illuminate choices made at the individual level and how these affect the shape and impact of projects.

*a. How does recursivity occur in practice? The Legal Development Facility (LDF)*

In order to illustrate how local actors exercise multi-directional influence, or recursivity, in practice, we look at the Legal Development Facility (LDF), a program of Australian Agency for International Development (AusAID), which ran from 2004 – 2010, and was a precursor program to AusAID's *Australia Indonesia Partnership for Justice* (AIPJ), which began in 2010, and is one of the four case studies examined in this study.<sup>9</sup>

LDF was set up as a 'facility' – intentionally flexible to meet local needs as they emerged, in other words, to be demand-driven.<sup>10</sup> A team of international 'Lead Advisers' – one for each of four themes: Judicial Reform, Human Rights, Anti-Corruption, and Prosecution and Transnational Crime – visited Indonesia approximately six times per year to meet with the many locally hired or funded partners, including eight government agencies, more than nine civil society organizations (CSOs), and LDF in-country staff.<sup>11</sup>

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<sup>9</sup> See chapter 4 for detailed information about the case studies – all of which include components of capacity building in support of the legal sector.

<sup>10</sup> AusAID, Indonesia – Australia Legal Development Facility, AidWorks Initiative Number INF 753, *Independent Completion Report* (Final 30 May 2010)(report prepared by John W.S. Mooney and Budi Soedarsono), 42.

<sup>11</sup> *Ibid.*, 7-9.

This ‘facility’ arrangement was extremely popular on the Indonesian side.<sup>12</sup> One Indonesian partner, who appreciated LDF for its level of communication and engagement, reported that local partners in the Supreme Court were given a great deal of discretion to carry out their work. In his words: “Australians put their trust in us,”<sup>13</sup> allowing them to respond to and work for Indonesian needs, while at the same time enhancing the capacity of Indonesian RoL professionals as “workers and partners.”<sup>14</sup> The local partner also appreciated LDF recognition of the fact that what they were trying to accomplish was behavioral change. In his words: “I was not pushed to make a deliverable. It was not just ‘check boxes.’ Instead, I had to make a change in attitude.”<sup>15</sup>

Not all actors shared a wholly positive view of LDF, however, particularly those examining the program on behalf of AusAID. After recognizing several of LDF’s successful and impressive (if *ad hoc*) outcomes, an independent evaluator reported in LDF’s completion report that for the second half of the project, the contractors / team of advisers were not under direct management “as to the content and programming of their work,” becoming ‘free agents’ working with Indonesian agencies and partners. The report concluded that this arrangement was ‘too loose’ both from an “activity coherence perspective, for effective communication and coordination with AusAID,”<sup>16</sup> and for AusAID to be reassured about the program’s ‘value for money.’<sup>17</sup>

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<sup>12</sup> Informants 3 (interview with author, September 13, 2012), 16 (interview with author, April 23, 2012), and 37 (interview with author, September 19, 2012).

<sup>13</sup> Informant 16 (interview with author, April 23, 2012).

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> AusAID, *Independent Completion Report*, 47.

<sup>17</sup> ‘Value for Money’ (VfM) is a development term meant to capture three measures – that of economy, efficiency, and effectiveness (and some would argue to add a fourth: equality). VfM was also incorporated into Australia’s Comprehensive Aid Policy Framework (CAPF) in 2012. Australian Council for International Development (ACFID),

What happened next involved strategic choices by AusAID regarding the implementation and structure of LDF's follow-on project, AIPJ. In responding to the details of this completion report, we see an international actor attempting to rectify its informational disadvantage, and act upon the new information. One change involved hiring a different implementing contractor.<sup>18</sup> The same informant who hailed LDF as an ideal, described AIPJ as being more 'U.S.-like' – including that now “they do everything themselves, and have a big staff.”<sup>19</sup> Another described AIPJ as AusAID “trying to introduce a ‘programmatically approach’” – by setting an outcome arrived at through consultations with Indonesian counterparts at the outset; or, as the same informant later described AIPJ's approach in its first year, namely, as the ‘antithesis’ of LDF's approach.<sup>20</sup>

From a local partner and Indonesian perspective, LDF was a smash hit – particularly in ownership and partnership terms, because LDF was extremely flexible in its approach, based entirely upon then-current Indonesian needs, and executed with a supportive and responsive donor-partner, the LDF team of international advisers. Indeed, from a local partner standpoint: the ownership and partnership achieved by LDF

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“ACFID and Value for Money,” *Discussion Paper* (September 2012) (prepared by Dr. Thomas W. D. Davis for ACFID). See also, Julie Bishop, Foreign Affairs Minister, Australia, ‘The New Aid Paradigm,’ Policy Speech, June 18, 2014 (calling for increased “rigor around performance management to ensure ... better ‘value for money’” in Australian's aid programming).

<sup>18</sup> LDF was implemented by Melbourne University Private Ltd. (later Gunn Rural Management (GRM) International). See AusAID, *Independent Completion Report*, iii. AIPJ was implemented by Australian for-profit, multi-national development contractor, Cardno. See chapter 4, Section III (a) (ii).

<sup>19</sup> Informant 16 (interview with author, April 23, 2012). From the informant's tone and the context of this quote, it is safe to conclude that the term ‘U.S.-like’ was not meant in a positive light.

<sup>20</sup> Informant 37 (interview with author, April 26, 2012).

suffered from the changes made by AusAID in structuring its follow-on program.<sup>21</sup> One local partner reported that ‘big picture planning’ appeared lost after LDF, at the commencement of AIPJ, citing as an example the ability to get AIPJ support only for individual trainings, instead of those geared toward increasing the capacity of the training center itself.<sup>22</sup>

As the LDF example also illustrates, even though donors seek local actors and partners at least in part for their networks and information, donors would rather that these actors network more ‘on command’ than as autonomously as they do. This might help explain why the program that followed the ‘free agents’ of LDF involved a different implementing contractor with a different style of management, and a staff of primarily Indonesian local partners as employees (and agents) – making them part of one, directly managed team.

Escobar might say – do you not see how the international is subordinating the national through the development ‘industry’<sup>23</sup> – one that here forced the submission of national local partners by converting them into agents with less authority than their international managers and ‘bosses’? But this reading of the situation is not complete. Instead what we see in this example is also what Halliday and Carruthers conceptualize as a dynamic space for norm creation, in which a whole range and series of behaviors by many actors is taking place, influencing each other and the outcomes of the assistance. In this example, LDF’s local partners asserted strong control over its content and direction, and AusAID’s response was to change the structure and implementing

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<sup>21</sup> This is not to say LDF was viewed as perfect. According to the Mooney ICR, some government agencies wanted more input on design than they were given. At 46.

<sup>22</sup> Informant 28 (interview with author, July 9, 2012). This allegation was not triangulated – reported only.

<sup>23</sup> See chapter 7.

contractor to allow AusAID more strategic control and oversight of the follow-on, AIPJ. More generally speaking, we can see that the RoL assistance itself – as lived through its design and implementation – becomes an arena inside which the different local actors interact, and ultimately compete for control over the content and direction of the reforms.

*b. Theory of recursivity applied to Indonesian RoL assistance*

In viewing Indonesian RoL assistance through a lens of recursivity, we easily identify possible triggers for recursive cycles, including one referred to by Halliday and Carruthers as “actor mismatch” – or an existing mismatch between the lawmaking actors and the parties in practice, resulting in a field of contestation during implementation.<sup>24</sup> The several instances of this found in Indonesian RoL assistance could perhaps be better described as ‘actor asymmetry’ than strict ‘actor mismatch,’ as in the example from chapter 5, in which USAID’s Equipping Tomorrow’s Justice Reformers (E2J) project was officially partnered with the Attorney General’s Office (AGO) but nonetheless failed to secure meaningful engagement from the AGO during implementation.<sup>25</sup> Here the missing actors are the prosecutors, without whose active involvement the project’s ability to run an effective prosecutor clinic becomes severely compromised.

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<sup>24</sup> Halliday and Carruthers, *Bankrupt*, 383-84. In addition to actor mismatch, other ‘mechanisms’ for recursive episodes include indeterminacy of law, contradictions, diagnostic struggles. *Ibid.*, Figure 1.1, 17.

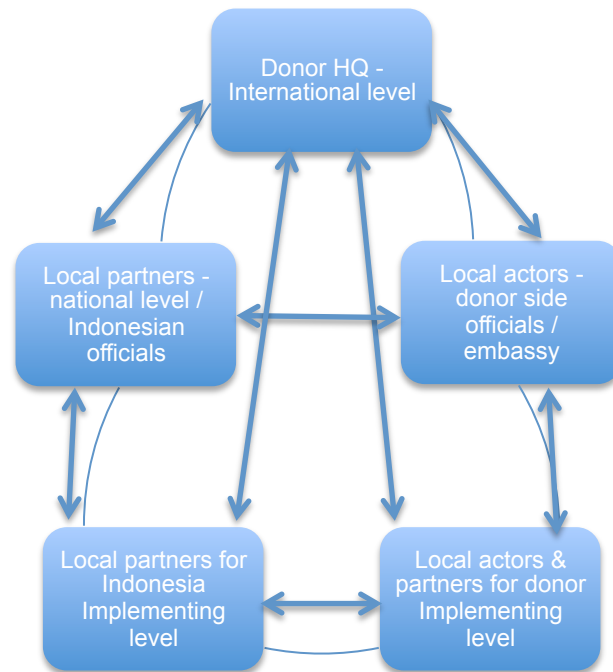
<sup>25</sup> Informant 10 (interview with author, April 24, 2012). See also USAID, *Midterm Performance Evaluation of the Educating and Equipping Tomorrow’s Justice Reformers (E2J) Program*, Finding #8 (April 2014)(report prepared by David Cohen, Michael Miner, Dian Rosita, Melinda MacDonald, Lily Purba and Aviva Nabiban), 3 and 27.

What this, and other examples like it, point to is an increased likelihood of a subsequent attempt by an interested party to alter the terms or direction of the assistance. In RoL assistance in Indonesia, we therefore see the ‘lawmaking’ and the ‘implementation’ phases continue as simultaneous, ongoing processes throughout the life of the project or program, influencing each other as they go. Here, actors in the politics of implementation include the implementing staff for implementing contractors of donor projects and programs (discussed in Section III below), as well as those actors capable of ‘foiling’ at the level of implementation – those who represent the receiving nation (discussed in Section IV below). Here, this means Indonesian officials from Bappenas, the reform teams, the Supreme Court, the Attorney General’s Office, and others.

But these actors also manage to participate in the politics of enactment; for example, when terms of the assistance are revisited and adjusted, often at the demand or request of these Indonesian officials, based on what is reported to them by implementing-level Indonesian partners. At the highest level, and also a part of the politics of enactment, we see the international donor managing to affect the day-to-day operations of a project from afar, through the initial hiring decisions made, and again throughout the life of the project, in the reporting and monitoring requirements set forth by signed project documents. This reporting required as part of monitoring and evaluation (M&E) components is an example of donor headquarters (lawmaking actors) reaching into the domain of the implementation or practice side. As will be discussed in Section V below, several informants noted the hefty drain on their time caused by meeting the voluminous reporting requirements required by donors.

Figure 1, below shows a simplified adaptation of recursivity – or the idea of mutual, multidirectional influence to the Indonesian RoL assistance setting – according to the groups of actors and levels exerting influence. Arrows denote attempted influence being exerted toward another group of actors.

Figure 1.



Section III looks at the right-side group of local actors on the donor side (both official / embassy and implementing levels), which notably also includes local partners, or Indonesian RoL professionals who have been hired as implementing staff for case study projects or programs. Section IV examines the viewpoints and strategies of the local Indonesian partners on the left side (again, both implementing and national level). Section V considers the strategies of the international donor at the top (and from afar) to impact the day-to-day, particularly through reporting required of on-the-ground implementers.

### **III. Donor-side actors: Free choice of local actors and how agency is exerted in practice**

From chapter 6, we know that there are a multitude of local actors who are hired to implement RoL assistance projects and programs. Many of these local actors perform multiple roles. In the Indonesian RoL assistance setting, those with multiple and simultaneous professional identities are typically Indonesian nationals, who report a close affiliation or working relationship with a legal non-governmental organization (NGO), policy institute and/or academic institution. These same local actors are then hired by donors to conduct needs assessments, or as national experts on a project's design or implementation, or by implementing contractors to staff the donors' projects. Indeed, the make-up of three (possibly all four) case-study teams in this study was primarily Indonesian nationals.<sup>26</sup> Local actors hired by implementing contractors also include international RoL consultants, stationed in Jakarta, who are typically – but not always – hired for manager, and 'monitoring and evaluation' positions. Finally, local actors also include the experts that are flown in to consult in-person with the implementing teams or local partners.

Together, these are the local actors who interact with Indonesian partners on behalf of the implementing contractor, itself an agent of the donor. This section is about how these local actors view and construct their own roles, and what they *do* with their free choice in the course of RoL assistance delivery. How do these local actors exert their agency? What strategies do they employ to re-shape a project or move the RoL assistance along in their preferred direction?

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<sup>26</sup> The fourth, World Bank's J4P, may be (exact numbers were not available), but of the three team members who participated in the study – two were international, and one was an Indonesian national.

a) *Translation and vernacularization of development assistance at the local level*

The literature is clear that these intermediary actors play a very important role in shaping the design, delivery and outcomes of development assistance and reforms.<sup>27</sup> Sally Engle Merry identifies what she calls the ‘translators’ of the global to the local as ‘knowledge brokers’ who “translate up and down” – having to speak the language preferred by the international donor, while also “present[ing] their initiatives in cultural terms that will be acceptable to at least some of the local community.”<sup>28</sup> “Translators are both powerful and vulnerable” in that they are “able to manipulate others who have less knowledge than they do” but are still themselves “subject to exploitation by those who installed them.”<sup>29</sup> In the case of Indonesia, the local partners interviewed for this study are these intermediaries, or the ‘translators,’ per Merry. As we will see below, these local partners do much more than the name ‘translator’ suggests.

In a related process that Merry calls ‘vernacularization,’ transnational models and norms are imported, along a continuum, into the partner country. At one end is ‘replication’ – wherein the international model or idea is the same, but “local cultural understandings shape the way the work is carried out.”<sup>30</sup> At the other lies ‘hybridity’ – a more interactive form of vernacularization, wherein the ideas and organizational forms

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<sup>27</sup> See e.g., Per Bergling, *Rule of Law on the International Agenda: International Support to Legal and Judicial Reform in International Administration, Transition and Development Co-Operation* (Antwerpen: Intersentia, 2006), 79; Crew and Harrison, *Whose Development?;* see also discussion of the significance of local actors in chapter 1, Section II.

<sup>28</sup> Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle,” *American Anthropologist* 108 (2006), 42.

<sup>29</sup> *Ibid.*, 40.

<sup>30</sup> *Ibid.*, 44-46.

generated in one locality merge with those of others to produce new, hybrid institutions.<sup>31</sup> In all instances, the translators are key to this process.

In this study, USAID's E2J project arguably fits Merry's definition of 'replication' – wherein the basic idea of U.S.-based legal clinical programs was introduced into eight different Indonesian universities, with modifications as required by university officials and bureaucrats to get a clinical program in place (e.g., lasting just one semester instead of the whole year, worth only 3 credits, etc.). At least one component of USAID's C4J project provides an example toward the 'hybridization' side of the continuum. Namely, C4J funded pilots of case study management system in nine courts across Indonesia. Other Indonesian courts went on to do the same, using their own funding.<sup>32</sup> How similar these pilots were to those of C4J is unknown, but it does appear that C4J sparked something that took on a life of its own, embraced by local partners. How did C4J achieve this? A high-level manager, who was responsible for getting 'buy-in' from Indonesian public institutions, credits C4J's emphasis on having local partners come to their *own* decisions about which case study system to implement as being key to the achieved levels of ownership of this component of C4J's reforms.<sup>33</sup> The fact that local partners chose the case study system that C4J was already in position to implement<sup>34</sup> obviously worked out very well for the project.

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<sup>31</sup> Ibid., 46-48.

<sup>32</sup> Informant 41 (interview with author, September 20, 2012).

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

*b) Socio-cognitive environments (SCEs) for decision-making during development projects*

What do we know about how local partners make these decisions, and the environments in which they exercise their free choice? In order to better understand the environments in which decisions are made in the course of ongoing RoL assistance, we turn to an ethnographic study by Jenny Knowles Morrison examining the agency of local mid-level staff in an administrative decentralization support program in Cambodia. Morrison identifies five socio-cognitive environments (SCEs) in which these actors make their decisions, including macro-level historical influences, macro-level cultural influences, (international) constructions of participatory development, project-level orientations, and the broader international development efforts in which the assistance project exists.<sup>35</sup> Morrison describes macro- cultural associations reported by Cambodian interviewees to include: trusting anyone outside your immediate family is dangerous; there is 'safety in silence;' it is improper for women to speak out during meetings; leaders are not to be questioned.<sup>36</sup> Because these associations stand at odds with international constructions of 'participatory development,'<sup>37</sup> and likely also project-level orientations, we can see that these 'sensemaking environments' create the "potential for a high degree of cognitive dissonance by local staff if such interactions are not understood and mediated by micro-programmatic efforts."<sup>38</sup> With a mandate and operating principles that blended "traditional Cambodian cultural orientations with

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<sup>35</sup> Jenny Knowles Morrison, "From Global Paradigms to Grounded Policies: Local Socio-Cognitive Constructions of International Development Policies and Implications for Development Management," *Public Administration and Development* 30 (2010), 166-70.

<sup>36</sup> *Ibid.*, 167.

<sup>37</sup> See chapter 3, Section I (b), for discussion of development trends, including participation.

<sup>38</sup> Morrison, "Global Paradigms to Grounded Policies," 170.

international donor structures and processes,” Morrison’s case study created an “alternative ‘counter-culture’ that supported cognitive alignment in unique and productive ways.”<sup>39</sup> Morrison concludes by arguing for reframing the principal-agent relationship:

[S]o that more attention is paid to envisioning local stakeholders as valuable and active agents capable of implementing participatory programming, even when proposed ways forward do not necessarily fit other external actors’ conceptualization of programming.<sup>40</sup>

Implications of such an approach would include structuring future policy interventions to include “strategies for appropriately engaging local staff in ways that could make the mandate more accessible to local beneficiaries, and thus more sustainable.”<sup>41</sup>

Multiple sensemaking environments are also observable in Indonesian RoL assistance, and as we see below, local partners find ways to creatively navigate possible dissonance for their Indonesian local partners. Furthermore, this study supports Morrison’s argument for envisioning local stakeholders as valuable and active agents, capable of implementing participatory programming – even when their proposed ways forward do not match external actors’ conceptualizations of programming.<sup>42</sup>

### *c. Strategies of local actors – Donor-side, RoL assistance in Indonesia*

In chapters 5 and 6, we discussed the many problems of information and incentive facing development assistance, in general, and RoL assistance, in particular. These problems include, among others, the incentive problem caused by a donor practice of not typically paying consultants for preparation (e.g., desk research) that is

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<sup>39</sup> Ibid., 170-71.

<sup>40</sup> Ibid., 170.

<sup>41</sup> Ibid., 171.

<sup>42</sup> Ibid., 170.

conducted *before* arriving ‘in the field,’ at the location of the assistance. Another commonly reported problem is local partners perceiving RoL assistance as being overly ‘driven’ by the donors and their implementing contractors, which as we saw in chapter 6, is a known biased outcome of the broken feedback loop, or informational problem, between funders and beneficiaries of the assistance.

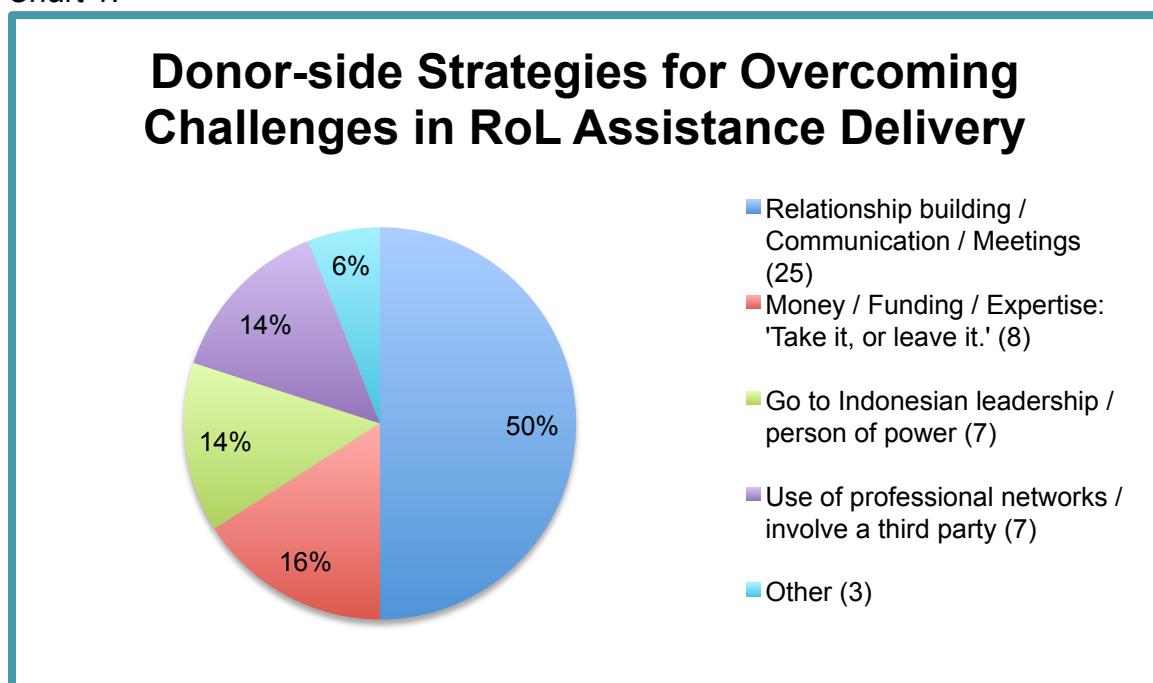
When these problems arise, they create challenges to the ongoing implementation of the RoL assistance. For example, the common informational problem of donor agents not knowing or fully understanding the local climate in which RoL assistance is taking place can result in situations where key local partners disengage after becoming offended over a cultural misstep or misunderstanding or perceived donor overreach, and cause a delay in project or program activities.<sup>43</sup> *Chart 1* depicts what local actors representing donors or implementing contractors report doing in the course of design and implementation of RoL assistance – day-to-day, and in response to implementation problems, such as these, as they arise.

It should be clarified that the strategies depicted in *Chart 1* are not presented as a list of recommended strategies that necessarily work, but rather, an empirical mapping of the strategies chosen by donor-side local actors during ongoing RoL assistance delivery in Indonesia. Indeed, data also shows that some of these strategies were met with mixed results.

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<sup>43</sup> Informants 7 (interview with author, April 19, 2012), 9 (interview with author, April 23, 2012).

Chart 1.



#### i. Relationship-building / Communication / Meetings

On the donor and implementing contractor side, the most talked about strategy was communication or other relationship-building gesture – making up exactly half of the total responses (25 of 50). These responses make sense not only in response to implementation problems as they arise, but also in a preventative sense: if partners are kept apprised and involved, then there is less likely to be a concern unknown to the implementer that could derail the project. There is also the informational gain that the more contact, the more information, and better understanding of the issues that matter to the local partners.

When one senior RoL adviser with the Indonesia USAID mission was asked how he carried out his assigned task of ensuring that three different USAID projects were 'technically' being run well, he responded with a list:

Meeting constantly with government and institutional partners, email, telephone, visiting sites of project implementation - all in order to get their view of how the project is being carried out.<sup>44</sup>

Another experienced RoL assistance professional commented:

The amount of time that goes into relationships is monumentally time-consuming, but so very worthwhile.<sup>45</sup>

Here we see instrumental relationships being formed – wherein the relationships are used professionally to get the work accomplished. Another implementing team member reported spending 1-2 days per week working at the Supreme Court reform team’s offices (JRTO) in order to facilitate smooth communication with the project’s partners.<sup>46</sup>

It is also worth acknowledging that professional relationships can certainly become more, giving rise to friendships, or even feelings of reciprocity and moral obligation, or in Indonesian, *hutang budi*.<sup>47</sup> The possibility of creating feelings of mutual obligation is not lost on local actors employing this strategy.<sup>48</sup>

These relationship-building efforts are corroborated by counterparts on the Indonesian side, as evidenced by a Bappenas official’s report about what they saw as a problem with the connection between AIPJ’s objectives and its “End of Project Outcomes / Indicators” (EOPOs). This resulted in a planned meeting for the following

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<sup>44</sup> Informant 47 (interview with author, December 20, 2012).

<sup>45</sup> Informant 1 (interview with author, April 16, 2012).

<sup>46</sup> Informant 37 (interview with author, September 19, 2012).

<sup>47</sup> *Hutang budi* is a widely held social belief in Indonesia, wherein one party does a (rather large) favor for another party, and the receiving party is indebted to the giver, expected to return the favor at some later, undetermined point in the future. (Meaning confirmed with Pauli Sandjaja, UW Indonesian instructor, via emails dated May 10, 2015, and May 11, 2015).

<sup>48</sup> See e.g., informant 37 (interview with author, September 19, 2012).

week with an AusAID embassy official, who according to this Bappenas official agreed that AIPJ needed “improvements.”<sup>49</sup>

The official continued: “We are going to discuss next week to find a solution, [and] to define EOPO.”<sup>50</sup> Here, not only do you see the donor-side in action, building relationships, having meetings<sup>51</sup> – you also see the local, Indonesian side bringing the terms of the RoL assistance back into play – ‘define EOPO’ (the law-making / enactment side, per Halliday and Carruthers). Specifically, the official will push for changes in the EOPO definitions that are in better alignment with what s/he sees as Indonesian needs. Quite possibly, this will also involve revising or changing planned activities. AIPJ is not alone in experiencing renegotiations of the specific terms of RoL assistance. C4J, for example, similarly required after-the-fact re-working of planned activities, given two years’ delay after the plan had been written until implementation, and the resulting change in Indonesian needs.<sup>52</sup> Meetings and requests/demands for flexibility, such as these, appear common strategies for Indonesian local partners, and we discuss these further below.

#### ii. Use of professional networks / involve a third party

When communication fails to achieve the desired result, however, another strategy employed is calling upon professional networks and involving a third party.<sup>53</sup> In one particular case, after implementers had been unable for 6 months to get a meeting

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<sup>49</sup> Informant 15 (interview with author, September 19, 2012).

<sup>50</sup> Ibid.

<sup>51</sup> And doing quite well. The same official reported that the relationship with AusAID was “smooth” and supportive. Ibid.

<sup>52</sup> Informants 15 (interview with author, September 19, 2012) and 47 (interview with author, December 20, 2012).

<sup>53</sup> Brought up 8 times (16 percent of answers).

in order to have an open/genuine talk about the status, continuation, and future of the reform with the Chief Justice of the Supreme Court, the Indonesian implementers and local partners on the team resorted to a new tactic – namely, calling upon professional networks and contacts.<sup>54</sup> This involved attending a gathering with the former Chief Justice at a ‘breaking of the fast’ at *Idul Fitri*.<sup>55</sup> The informant, and others from various local CSOs, told the Chief Justice of their troubles with the current leadership, and were ‘children’ asking him, “as our father, friend to serve as our additional advocate to keep reminding of need for reform.”<sup>56</sup> In so doing, local partners also gave the retired judge an opportunity to tend to the continuation of his legacy, and the reforms that were in process as he retired. Without knowing what, if anything, transpired between the former and current chief justices, the end result, according to this informant, was even better than they had hoped. Here, we again see local partners using their understanding of Indonesian officials and local context (or macro-cultural influences, per Morrison) to move things along. Specifically, the local partners understood that the status of the messenger, in this case another judge, was more likely to sway the current leadership toward the necessary reforms.<sup>57</sup>

After this meeting, the current leadership found time to meet, and gave stronger than expected commitment to the proposed reforms, as illustrated by their choice in

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<sup>54</sup> Informant 37 (interview with author, September 19, 2012).

<sup>55</sup> *Idul Fitri* is a Muslim religious holiday, observing the feast that marks the end of the month of Ramadan, and its daily fasts. *Idul Fitri* is commonly referred to as *Lebaran* in Indonesia, and is a multiple-day national holiday.

<sup>56</sup> Informant 37 (interview with author, September 19, 2012).

<sup>57</sup> Informant 37 (interview with author, September 19, 2012): “You may have heard the expression in almost all legal systems that ‘Judges hear other judges more.’”

leadership for the reforms, which included people considered by the informant and his colleagues to be 'champions of reform.'<sup>58</sup> The informant said:

We did that as a team of reformers. It was *not* me as from the donor, but with others from CSOs. If we are divided by that, our room is limited. We build that kind of network, to achieve what we build.<sup>59</sup>

This example also illustrates the way in which local actors purposively deploy their multiple identities or affiliations on behalf of the reforms (and the RoL projects in place to deliver them). It also illustrates that CSOs are willing to deploy their members when it serves to further their missions.

Another instance of involving a third party is a further strategy devised based on local actors' understandings of their Indonesian partners. Specifically, implementing staff reported choosing an international 'messenger' instead of the more logically placed Indonesian because the Indonesian partners were more likely to listen to and believe what was said.<sup>60</sup> These instances included staff members pretending that a lower-level international staff was their superior, and in charge of a meeting with Indonesian officials, when in fact, the Indonesian also present outranked the international colleague.

### iii. Go to Indonesian leadership / person of power

Bypassing lower-level agents, and going to current Indonesian leadership was also reported as a strategy of high-level (usually international) team members. As discussed in chapter 6, some implementing contractors and donor-agents did not

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<sup>58</sup> Ibid.

<sup>59</sup> Ibid.

<sup>60</sup> See Informants 37 (interview with author, September 19, 2012), 19 (interview with author, September 11, 2012), and 40 (September 20, 2012). See also, chapter 4, Section II (a) and (b)(ii) (on the Indonesian context and cultural influences).

recognize the Judicial Reform Team Office (JRTO) as the agent or officially designated liaison for the Supreme Court, going instead directly to the leadership of the Supreme Court, as soon as practicable.

This strategy – of donor-side actors going to Indonesian leadership – had some cross-over with the ‘money / funding’ category of responses in that it was reported that donors used the power of the purse to help ‘repair’ the perceived foul.

#### iv. Money / Funding / Expertise: ‘Take it or Leave It’

Specifically, at least one implementing contractor reported offering funding for an expert in order to smooth things over with the reform teams of the Supreme Court and Attorney General’s Office – for having gone over the heads of those reform team members (the above strategy).<sup>61</sup> Another informant reported implementing contractors agreeing to pay for an overseas study trip for four judges – in order to enlist their engagement in implementing the donor’s project/program.<sup>62</sup> This would have been without the approval or recommendation of the implementer’s own local staff. Still other examples of strategic use of money by implementing contractors were reported by Indonesian local partners underscoring a power imbalance – resulting in and creating a

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<sup>61</sup> Informant 19 (interview with author, September 11, 2012). This same informant reported this strategy did not work for the purpose of forging a collaborative relationship with the Supreme Court’s reform team (JRTO); but after shifting approaches, the project ultimately conducted “hugely successful” work – “all with the JRTO’s full support.” Informant 19 (email to author, May 1, 2016). See also discussion of Indonesian reform teams, chapter 6 (a)(ii).

<sup>62</sup> Informant 10 (interview with author, April 24, 2012). The informant did not identify the implementing contractor; thus, it is unknown whether this was regarding one of the four case studies.

feeling of ‘take it, or leave it’ on the Indonesian side.<sup>63</sup> Most often, these included instances where the Indonesian local partner disapproved of the hiring choices of donors or their implementing contractors.

International donor-side actors are not the only ones who occasionally employ a ‘take it or leave it’ attitude. One local partner hired by an implementing contractor to facilitate training similarly took on this stance when his/her request to add 20 additional people to the training was denied:

This training would be beneficial not just to judges but also trainers and possible users [of the information] – for example, scholars, NGOs, media. A big demand side is not there. People are not accessing the information. So I asked to include others beyond the judges. The donor said ‘we do not have the budget’ [*said in disbelief*]. We are talking about 20 people! So I said if you don’t agree, I won’t do the training.<sup>64</sup>

For this local partner, the price of the contract was not worth compromising his beliefs with regard to Indonesian RoL assistance needs. Absent more information from the implementing contractor, however, we do not know all the factors at play for why the training was only intended for judges. What we do know is that that the informant’s professional identity as a member of Indonesia’s ‘law reform community’<sup>65</sup> shaped his/her refusal to accept the implementing contractor’s denial of the request to open up the training.

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<sup>63</sup> See also discussion in chapter 7, Section V (e) – regarding ‘take it or leave it’ power imbalance.

<sup>64</sup> Informant 21 (interview with author, April 25, 2012).

<sup>65</sup> This is a term used by several informants to describe a professional cohort – namely, legally trained Indonesian professionals who work for a number of legal NGOs, think tanks, quasi-governmental agencies, among others, who are professionally dedicated to reforming Indonesia’s law and justice sector. These are also the cadre of professional legal elites that donors and their implementing contractors tap in order to staff their projects and programs.

#### *d. Implications of active choice*

This section has outlined various strategies employed by donor-side local actors at the site of RoL assistance delivery in Indonesia. What we see are local actors who leverage what they see as their own additional assets and opportunities, regardless of whether they are expressly authorized to do so by the donor and their superiors.<sup>66</sup>

It further suggests that donors cannot or should not assume that the actions of local actors and specifically local partners, are misguided or inaccurate simply because they were not part of the original plan. Donor-side local actors have their own ideas of how to build the relationships needed to move the reforms forward, including sometimes working inside the offices of their local partners, or requesting a donor to open a training event up to wider audience. How their chosen strategies play out depends, at least in part, on how they are received by other actors participating in the assistance.

#### **IV. Indonesian-side actors: Mutual influence is exerted in multiple directions, across multiple levels**

In this section, we examine how local partners on the Indonesian side react to the day-to-day challenges of RoL assistance implementation and delivery. The donor-side local actor strategies reported above do not occur within a vacuum, but are received in some sense by other actors, who in turn respond. These responses are therefore, sometimes reactions to being on the receiving end of the communication and relationship-building attempts of the donor-side agents, described above. In these strategies, we also see local partners reacting to the perceived donor-driven nature of

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<sup>66</sup> Recall also, from chapter 6, the local partner who worked at his/her CSO office instead of the project office against the wishes of his/her manager. Chapter 6, Section III (a)(i), and Section IV.

RoL assistance, discussed in chapter 6, as a known principal-agency problem present in international development settings, and in chapter 7, as a natural consequence of the RoL assistance industry's tilting in favor of the donor and western actors.

As we know from many other settings, recipient actors and partners in development assistance are not weak.<sup>67</sup> In Halliday and Carruther's study of international community efforts to stave off a worsening of the 1997-98 Asian Financial Crisis, the authors observed the following 'weapons of the weak' – or tactics of receiving nation-states of the assistance:

- avoid or reject conditional foreign capital and aid;
- accept recommendations selectively;
- fragment international influence;
- invoke cultural incompatibilities;
- comply symbolically (e.g., enact, but implement partially);
- defer compliance / stalling;
- segment reforms;
- substitute a solution;
- construct exclusions and escape routes.<sup>68</sup>

These were the ways receiving nation-states 'managed' the reforms, and deflected those that they found unpalatable, a process also referred to as 'foiling' by the authors.

In Indonesian RoL assistance, study informants related several examples of actions they took to shape or control RoL assistance funding. It is worth noting that these tactical approaches by local partners to RoL assistance can occur along a

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<sup>67</sup> James Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance*, (New Haven, CT: Yale University Press, 1985).

<sup>68</sup> Halliday and Carruthers, *Bankrupt*, 342-51.

spectrum of local actor activity. On one end, there is corrupt activity – with people illicitly appropriating proceeds and benefits from project / program delivery. No such activity was uncovered during this study (nor was it designed to bring activity of this type to light). At the other end, there is firm control exerted by local partners that can enhance the RoL assistance, and make it more than what was originally designed by the foreign donor. There is, of course, much activity in-between, as we observe in the case study data below.

*a. Strategies of Local Partners – local actors on the Indonesian side of RoL assistance*

This section presents empirical data from Indonesian RoL assistance regarding the following questions: How do local partners on the Indonesian side of RoL assistance exert influence, and deal with implementation issues that arise? In what ways do local partners assert ownership of the RoL assistance, and seek better partnership with other local actors?

The local partners included here include two groups/levels:

1. Higher-level / mid-level government officials and decision makers; and
2. On-the-ground implementing staff at local NGOs and academic institutions, individually hired ‘expert consultants’ from NGOs.

These local actors also have the same free choice and networks as the local actors described above. In fact, some are the very same local partners, acting on different sides of different projects and programs, amassing knowledge and experience. For example, one local partner had been hired as part of an implementation team for one case study project, having previously participated in the design of another of this study’s

four case study projects, but this time on behalf of Indonesia, while working for Bappenas, Indonesia's National Development Planning Agency.

Ironically, while this local partner was working for Bappenas, s/he requested of his/her superiors that s/he not be made to work on designing the very same project s/he later took a job to implement.<sup>69</sup> It was not an easy choice. According to the informant s/he met with a mentor and friend, to ask what he thought of going to work for the project/program:

When I went to enter [project/program], first thing I ask [mentor in legal reform] is: "what do you think?" He said: "It's a challenge. You have to make something that looks very bad look better. It's a challenge, [informant's name]!" So I dared to do it.<sup>70</sup>

Here, we see part of an individual's motivations for participating professionally in RoL assistance, hoping to shape the outcome and the assistance. Along with it, came a professional decision to traverse across to the donor side, and work on a project/program team for an implementing contractor.

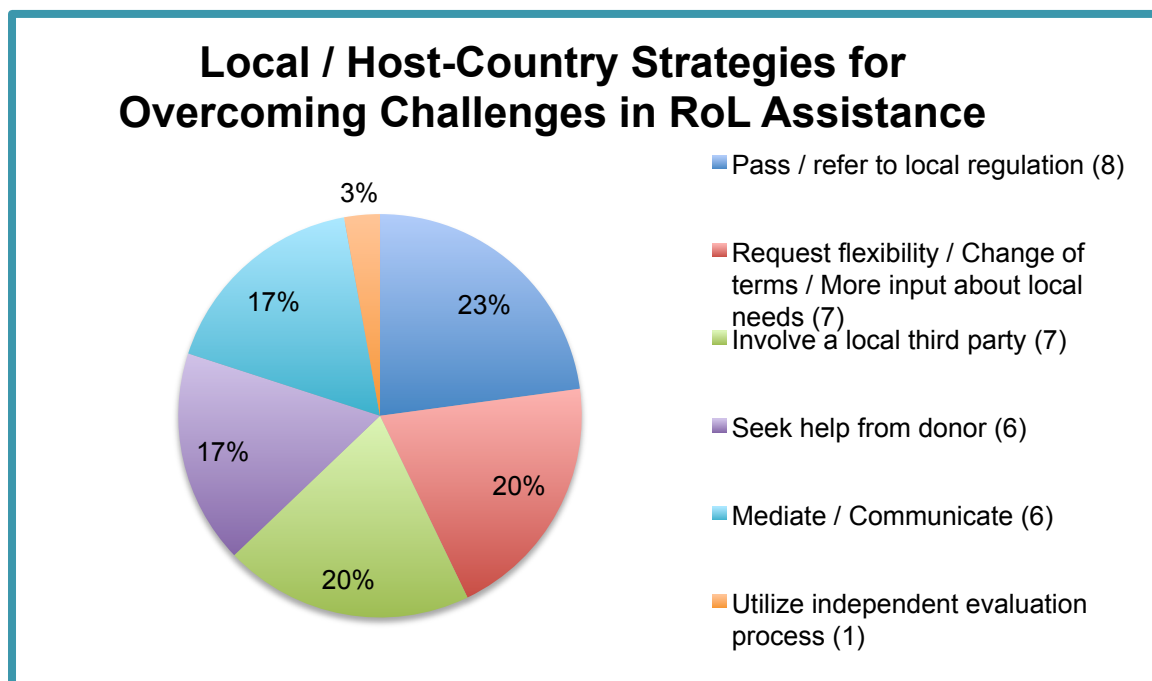
*Chart 2*, below, shows the self-reported actions and strategies of these local partners for overcoming implementation challenges. As we saw with the importance of relationship-building above on the donor side, here the strategies of 'communication,' 'involving others,' and 'seeking help' encompass more than half of all coded responses.

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<sup>69</sup> Informant 36 (interview with author, September 18, 2012).

<sup>70</sup> Ibid.

Chart 2.



i. Pass / Refer to regulation

The reported strategy of ‘pass / refer to regulation’ includes instances in which local partners go through the process of implementing a new regulation, or refer to an existing one, in an attempt to exert some control with respect to the partnership with donors. In other words, “We can’t do x, because it is contrary to law or a regulation prevents this.” Or, “You need to do this, because it is the law.”

An example of this approach was the regulation issued in response to a failed meeting between members of the Indonesian judiciary and a donor’s implementing contractor, described at the beginning of chapter 1. In that case, the contractor arrived with a write-up of activities that had begun, despite the fact that the Indonesian partners did not believe they had agreed to these activities. Said an Indonesian Supreme Court judge:

[W]e have a meeting. For us, this is brainstorming. But the donor started activities based on the last meeting even though Indonesians did not agree.

We thought we were just talking! ... So now we have rules for USAID, AusAID, all. Now every meeting has to be followed by minutes that are approved by both sides.<sup>71</sup>

Frustrated with donor-driven RoL assistance based on brainstorming sessions, Indonesian-side local partners at the Supreme Court drafted and issued *The Implementation Directives for Foreign Donors Cooperation in the Supreme Court of the Republic of Indonesia*,<sup>72</sup> which lay out clear procedures for interacting with and providing assistance to the Indonesian Supreme Court.<sup>73</sup> The *Implementation Directives* can also be seen as an attempt by a rather powerful local partner (the Supreme Court) to control partnership while asserting ownership over the assistance. In the words of the same Supreme Court Judge, the Supreme Court established these guidelines for donors because they do not want to be used or exploited, and want the help that is “in our needs.”<sup>74</sup>

Local partners also refer to these and other existing regulations<sup>75</sup> as a way of coaxing donors and implementing contractors into making changes to their

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<sup>71</sup> Informant 9 (interview with author, April 23, 2012).

<sup>72</sup> The Supreme Court of Indonesia, *The Implementation Directives for Foreign Donors Cooperation in the Supreme Court of the Republic of Indonesia*, Decision Number 143/KMA/SK/VIII/2010 (2010).

<sup>73</sup> See chapter 6, Section II (a) for details on how the *Implementation Directives* delegate to other Indonesian actors, Bappenas and the Supreme Court reform team.

<sup>74</sup> Informant 9 (interview with author, April 23, 2012).

<sup>75</sup> Several informants mentioned a ‘1-gate’ or ‘1-door’ policy – referring both to Bappenas, as a point of contact for all line ministries, and for the Judicial Reform Team Office (JRTO) of the Supreme Court as point of contact for donors. See e.g., Informants 15 (interview with author, September 17, 2012), 16 (interview with author, April 23, 2012), and 36 (interview with author, September 18, 2012).

programming,<sup>76</sup> or providing certain information that the donor is unwilling to turn over – namely, detailed budgets of the RoL assistance, including salary information.<sup>77</sup> Local partners did not report resounding success using this strategy – as we saw in chapter 6, where implementing contractors ignored the ‘1-door / 1-gate’ rules<sup>78</sup> and went directly to Indonesian officials in positions of leadership once those ties were established. In at least one instance, however, it did lead to the funding of an extra staff person for the Supreme Court’s Judicial Reform Team Office (JRTO).<sup>79</sup>

I would argue that – particularly in RoL assistance – the strategy of passing regulations, etc., *should* be met with success. A donor’s starting position should be that if local partners have jumped through the necessary procedural hoops to get something passed or issued – regulations, laws, directives, etc. – then, out of the respect for the rule of law they are promoting, donors and their agents should follow them. Having said that, it is important to acknowledge that sometimes passing a regulation is actually a foiling strategy. World Bank’s Justice for the Poor (J4P) program team members reported facing challenges posed by implementing regulations for a legal aid law that had the potential to seriously undermine their work.<sup>80</sup>

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<sup>76</sup> Informant 16 (interview with author, April 23, 2012).

<sup>77</sup> Informants 9 (interview with author, April 23, 2012), and 15 (September 17, 2012). See chapter 7, Section V (e), for further discussion of donor’s lack of transparency on this issue, and the ‘suspicious feelings’ on the Indonesian side that it gives rise to.

<sup>78</sup> One-door policy with respect to JRTO was issued by the Supreme Court in the Implementation Directives. It is unclear whether 1-gate for Bappenas was codified in some way.

<sup>79</sup> See e.g., Informant 19 (interview with author, September 11, 2012).

<sup>80</sup> Informants 23 (interview with author, September 11, 2012), and 24 (interview with author, September 11, 2012).

## ii. Request flexibility / change of terms / more input about local needs

We see recursivity in action, with the politics of enactment being called back into play by Indonesian partners when implementation is not going in the direction that they prefer. In what kinds of instances? Regarding C4J, informants reported time delays (as long as two years),<sup>81</sup> resulting in outdated work-plans at the point where the implementing contractor was in place and ready to begin implementing. This resulted in meetings and discussions about revising the terms of project in light of current needs. Regarding AIPJ, one Bappenas official reported communication issues, not involving Bappenas enough in the planning, and a planned meeting with Australian Post / Embassy officials to redefine the End of Project Outcomes (EOPOs).<sup>82</sup> In other words, Indonesians were unhappy with the EOPOs (the program's overall goals as defined by AusAID and implementers of AIPJ), and called a meeting to rewrite them.

## iii. Involve a Third Party

Strategies involving a third party include instances of borrowing credentials as needed to sway local partners toward accepting the reform. For example, one former reform team member explained that because members of NGOs sometimes lack credibility with judges, the reform team members (comprised of NGO attorneys) established a connection with an Australian court.<sup>83</sup> This arrangement involving

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<sup>81</sup> Informants 41 (interview with author, September 20, 2012), 15 (interview with author, September 17, 2012).

<sup>82</sup> Informant 15 (interview with author, September 17, 2012).

<sup>83</sup> Informant 10 (interview with author, April 24, 2012).

Australian judges reportedly went over very well with the Indonesian judges, who “talk the same language.”<sup>84</sup> Said another member of the law reform community:

As much as we want to claim we have expertise, it’s actually not true because we don’t have experience with decision makers. They see us as young, inexperienced. *Sometimes we need to borrow the authority of international experts to convince decision makers about the need for reform* [italics added].<sup>85</sup>

Another example involved a local partner at a quasi-government agency, who told his/her connections in government leadership positions when the project s/he was contracting on were going well.<sup>86</sup> When things were not moving well with the implementing contractor, however, the informant told friends in civil society to criticize the project. More than one informant also mentioned turning to or complaining to Bappenas when an implementing contractor’s choice of expert was not the person the informant wanted hired,<sup>87</sup> or regarding a donors’ unwillingness to turn over documentation required by Indonesia’s Ministry of Finance,<sup>88</sup> or regarding perceived inequality when learning of the salary discrepancy between Indonesian consultants and their international colleagues.<sup>89</sup>

In these examples, we see the ability of local actors to enroll third parties in shaping a discourse of success or failure around RoL projects, and also open up avenues of appeal or political pressure as ways of shaping project implementation or outcomes.

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<sup>84</sup> Ibid.

<sup>85</sup> Informant 29 (interview with author, September 5, 2012).

<sup>86</sup> Informant 31 (interview with author, September 12, 2012).

<sup>87</sup> Informant 16 (interview with author, April 23, 2012).

<sup>88</sup> Informants 9 (interview with author, April 23, 2012), and 15 (interview with author, September 17, 2012).

<sup>89</sup> Informants 13 (interview with author, April 24, 2012), and 14 (interview with author, April 24, 2012).

#### iv. Seek help from donor

Local partners readily point to a need on the Indonesian side for international assistance – in particular, technical expertise and comparative experience.<sup>90</sup> Yet local partners also see a strict limit to what is actually helpful. Said one local partner with multiple affiliations (academic, NGO, and Supreme Court reform team) and over a decade of experience working with donors on justice sector reforms:

It is not possible to implement without international staff. There is a need for international exposure, but it has to be accompanied by an Indonesian expert who can adjust the international knowledge into local knowledge and language, as well.

... The international as a trainer is OK, but as implementer? No. But as speaker in training, it is very welcome.<sup>91</sup>

An interesting counterpoint to this perspective came from three international local actors with varying levels of experience in RoL assistance, who believe that one of their roles as an international team member (or leader) is to bring an international or comparative perspective and ‘match’ or ‘translate’ it to the local context.<sup>92</sup> As above, though, some local Indonesian partners would prefer Indonesian experts to be the ones matching and tailoring the RoL assistance for the local context.

One important role for internationals on which both Indonesians and internationals do agree, however, is that of messenger for ideas that would not be well-

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<sup>90</sup> Informants 10 (interview with author, April 24, 2012), 13 (interview with author, April 24, 2012), 14 (interview with author, April 24, 2012), and 17 (interview with author, April 23, 2012).

<sup>91</sup> Informant 10 (interview with author, April 24, 2012).

<sup>92</sup> Informants 3 (interview with author, September 13, 2012), 24 (interview with author, September 11, 2012) and 33 (interview with author, September 21, 2012).

received from a fellow Indonesian.<sup>93</sup> According to one international team leader, for example, members of the implementing team regularly requested his presence at various meetings with Indonesian officials in order to address certain issues that had become sticking points to the project.<sup>94</sup> Another example includes the pairing of Indonesian officials (judges, registrars, prosecutors, etc.) with foreign counterparts (judges, registrars, etc.) from a donor country. Similar to the ‘involve a third party’ category above, this strategy was reportedly successful at effectively conveying solutions to known problems, and spurring reforms.<sup>95</sup>

A final consideration relevant to this category that was mentioned by several donor-side local actors is to beware of local partners who use their involvement with donors to send a political message to domestic constituents that is not in fact true.

Commented one implementing team member with a decade of RoL experience:

Donor support becomes cover for Indonesian officials as well. “I work with this donor so now I’m open-minded, progressive and reformist.” ... Even if, [they are] not really.<sup>96</sup>

The danger of this, from the perspective of donor-side agents, is that the RoL assistance is foiled by disingenuous local partners. While commenting on the levels of ownership achieved by AIPJ partner institutions, one experienced Indonesian team member reported:

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<sup>93</sup> Informants 2 (interview with author, April 26, 2012), 19 (interview with author, September 11, 2012), 10 (interview with author, April 24, 2012), and 40 (interview with author, September 20, 2012). See also David Linnan, “Indonesian Law Reform, or Once More Unto the Breach: A Brief Institutional History,” in *Indonesia Law and Society*, 2d edition, ed. Tim Lindsey (Annandale: Federation Press, 2008), 77, n. 22 (observing that “Indonesians are masters at using foreign experts as stalking horses for ideas and positions they do not wish to assert in person”).

<sup>94</sup> Informant 19 (interview with author, September 11, 2012).

<sup>95</sup> Informant 10 (interview with author, April 24, 2012).

<sup>96</sup> Informant 40 (interview with author, September 20, 2012).

I don't think the AGO has taken ownership of program. They just use branding to show the public that they go in a 'reform direction.' So we have to know when to stay, and when to leave, because the danger is: If there's no commitment, then we will not see the value of the money and aid given. Then, the aid just becomes an 'ATM' for the institution.<sup>97</sup>

Thus, gauging the honest commitment of local partners and institutions who participate in donor-funded RoL assistance becomes a necessary skill for donor-side local actors.

#### v. Mediate / Communicate / Discuss

Here we see a strategy with the same roots as those seen on the donor side, namely communication attempts in order to move the RoL assistance forward in some manner. These are examples of partnership in action, including a Bappenas official reaching out to officials at the Embassy levels for both bi-lateral donors.

#### vi. Utilize Independent Evaluation Process

An interesting viewpoint emerged from one influential local partner – namely that s/he considered the evaluation process to provide a valid vehicle for oversight, and a 'benefit' to those on the recipient side.

Q: Do you have adequate oversight?

Oh yes. Donors have mid-term evaluations and independent evaluations of donor programs. For AIPJ, we are going to meet with independent evaluators for these evaluations. This is a benefit to us.<sup>98</sup>

In this case, the benefit appears to be that this is a neutral avenue or space in which the local actors can 'tell their story.' As discussed further below and in chapter 9, increased

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<sup>97</sup> Informant 38 (interview with author, September 19, 2012).

<sup>98</sup> Informant 15 (interview with author, September 17, 2012).

dependence on evaluations by independent evaluators such as these could potentially be paired with less onerous ongoing reporting requirements by the donor.

*b. Implications of mutual, multi-directional, multi-level influence*

In development studies, agency of local actors as discussed here has been examined,<sup>99</sup> but this is not the case in RoL assistance. Having identified these strategies, how do we understand them? Yes, they can be seen as weapons of the weak, but it is also possible to see these behaviors as being tactical uses of different forms of personal and political capital. These local actors have informed ideas of what to do, and therefore, it is useful to view through the lens of recursivity – here, a stacked battle of norm creation and people using whatever assets and networks they have to further their point of view. Once we look through this lens, we understand the behaviors themselves as vernacularization. They become more predictable, and allow for more informed project designs and structures that might better foster the kinds of partnerships that lead to local ownership of the reforms.

In the Indonesian RoL context, we see local partners who take action to regulate partnerships with other local actors, in hopes of ultimately shaping the project itself. We also see local partners calling upon their networks – which includes international actors when viewed necessary – to keep reforms moving, and to optimize RoL assistance at the site of its delivery in ways that make sense to them. What many of these strategies have in common is that they can be seen as attempts to claim more ownership of the

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<sup>99</sup> See e.g., Emma Crewe and Elizabeth Harrison, *Whose Development? An Ethnography of Aid* (New York: Zed Books, 1998); David Mosse, *Cultivating Development: An Ethnography of Aid Policy and Practice* (New York: Pluto Press, 2005); David Mosse, ed., *Adventures in Aidland: The Anthropology of Professionals in International Development* (New York: Berghahn Books, 2013).

assistance, and/or to change the terms of the partnership within what is often perceived as donor-driven RoL assistance. What results is a cyclical mutual influence between the global and the local – with intermediaries, from both the donor and Indonesian side, acting as the translators in the middle. As shown above, these intermediaries have many strategies to call upon during the course of ongoing RoL assistance, and as we saw in chapter 4, Indonesian local partners in particular are well-equipped (with education and decades of experience) for a back-and-forth interaction with international donors and their agents.

At the same time, at least one local partner voiced a concern that members of Indonesian CSOs may have lost their strategic focus and self-motivated initiative, and instead simply follow the money, and pick among the donor projects that come to them<sup>100</sup> – thus providing evidence of an even further cycle of recursivity. Several informants also report that members of CSOs have developed a strategy for dealing with the donor practice of hiring an individual from their CSO – namely, treat the contract for the individual as if it were for the organization, in terms of personnel who work on the project, and how the money is handled once received.<sup>101</sup>

A further point of moderation regarding local partners, particularly those in partner country agencies, is to draw attention to the fact that, as discussed above, sometimes local partners simply ‘go along’ with donor-sponsored reforms without genuine engagement, or any intention of implementing the reforms. They might do so for a number of reasons – e.g., to be seen as ‘pro reform,’ or for access to the funding.

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<sup>100</sup> Informant 29 (interview with author, September 5, 2012).

<sup>101</sup> See e.g., Informants 42 (interview with author, September 13, 2012), 43 (interview with author, September 13, 2012).

Donor worries about these and other behaviors by local actors, bring us to the discussion of another contributing factor in to the dynamics at the site of RoL assistance delivery – namely the influence felt from the international level. This includes on-the-ground implications of international attempts to rein in the agency of local actors.

## **V. International / global exerts influence from afar**

Since the 2005 *Paris Declaration*, there has been a greater call for accountability and aid results within the international development community. This relies on, and is propelled by, the increase in monitoring and evaluation, and the ‘indicator culture’ that has taken root in the aid industry.<sup>102</sup> Knack, et. al., attempt to rank donors and *quantify* the quality of overall aid according to monitoring data of the *Paris Declaration*.<sup>103</sup> However this turn to measuring aid-program results typically pays little attention to the *quality* of the interventions – either the quality of the inputs or the quality of the outcomes. Knack et. al., concede, for example, that their index did not capture the ‘knowledge dimension’ of aid.<sup>104</sup>

Formal evaluations tend to focus on whether the terms of the project design were fulfilled and whether the promised outcomes were delivered on time and within budget. In rule of law (RoL) assistance, this means that evaluations measure whether, for example, a statute was drafted; trainings were held and how many attended; whether a

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<sup>102</sup> See e.g., Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury, eds., *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015).

<sup>103</sup> Stephen Knack, F. Halsey Rogers, and Nicholas Eubank, “Aid Quality and Donor Rankings,” *World Development* 39, no. 11 (2011): 1907-1917.

<sup>104</sup> *Ibid.* “Other hard-to-quantify areas of donor performance go beyond the content of the Paris Declaration, including the knowledge dimension of aid. Ideally, we would have included measures of the quantity, quality, and transparency of each donor’s impact evaluations, its research, and its country analysis.” *Ibid.*, 1915.

pamphlet on legal rights was written, translated and produced; etc. These formal evaluations are routinely positive, involving just ‘ticking the boxes.’<sup>105</sup> Experienced RoL professionals know how to ‘write it up in roses’<sup>106</sup> – reportedly making even projects with dubious outcomes sound worthwhile and completed according to what was dictated at the outset. Said one experienced RoL professional:

I know how to write it up, but I’d rather reshape it to make it useful. There is a culture of writing everything up in roses because otherwise you failed to deliver. This is a fear of [implementing contractor] and the people in [donor].<sup>107</sup>

A fear of failure to deliver makes sense in light of the current climate of the need for validated results through the project or program’s monitoring and evaluation (M&E).

Describing what he called a clash between the ‘counter-bureaucracy’ or the compliance side of aid programs, and the programmatic, technical sides within USAID, Andrew Natsios describes in a 2010 essay how the obsessive need to count had crowded out other, harder to measure types of assistance.<sup>108</sup> This harder to measure assistance – such as the building of local self-sustaining institutions, and policy dialogue and reform – had actually proven to be more transformative in the long-term.<sup>109</sup>

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<sup>105</sup> The phrase ‘tick-box aid’ was referred to by several informants, and is discussed further in chapter 5, Section IV (a).

<sup>106</sup> Phrase by Informant 33 (interview with author, September 21, 2012).

<sup>107</sup> Informant 33 (interview with author, September 21, 2012).

<sup>108</sup> Andrew Natsios, “Essay: The Clash of the Counter-bureaucracy and Development” (2010), 4-6.

<sup>109</sup> Ibid. See also Elin Cohen, Kevin Fandl, Amanda Perry-Kessaris, and Veronica L. Taylor, “Truth and Consequences in Rule of Law: Inferences, Attribution and Evaluation,” *Hague Journal on the Rule of Law* 3 (March 2011): 106-29.

*a. International influence at the site of RoL assistance delivery in Indonesia*

In the Indonesian RoL assistance setting, we observe international actors gain direct access to what is happening on-the-ground in two primary ways:

- 1) Initial structural decisions – the most impactful of which seem to be the structure of how the assistance is administered; as well as the choice of implementer, and the hiring choices that flow from this;<sup>110</sup> and
- 2) Monitoring and reporting tasks required of implementing staff.

i. Initial structural decisions

Seventeen informants brought up the structure of the assistance at some point during their interviews – generally described as one of three options:

- 1) more ‘programmatic’ RoL assistance and choice of implementer;
- 2) facility / giving full discretion to the implementer, *ad hoc*; or
- 3) a hybrid approach of the two.

Programmatic structures include a lot of detail, with predetermined activities and outputs – often perceived as too donor-driven. The second approach, giving full discretion to the implementer to respond as needed during implementation, runs the risk of achieving only *ad hoc* gains, lacking vision.<sup>111</sup> The third, hybrid approach was therefore most favored by local actors,<sup>112</sup> with one experienced local partner suggesting that the ‘Call for Proposal’ for the implementer be:

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<sup>110</sup> See chapter 5 for more on initial structural decisions, including the choice of implementer, the procurement process, and aid hierarchy and structure.

<sup>111</sup> This was a primary critique of AusAID’s LDF.

<sup>112</sup> Informants 1 (interview with author, April 16, 2012), 2 (interview with author, April 26, 2012), 3 (interview with author, September 13, 2012), 23 (interview with author,

Not too detailed. But clearly [stated] in the call for proposal: 'Creativity wanted. Give us a strategy on how to get to three to four main goals.'<sup>113</sup>

The hybrid approach also best accounted for the dynamic realities of RoL assistance.

According to one RoL professional with nearly a decade of experience:

My personal view is that in Law and Justice, it's hard to plan. There is a role of responding to momentum. This needs to be acknowledged – versus building bridges and roads. Not to say there's no role for planning.<sup>114</sup>

The need for flexibility was a common refrain among local actors implementing RoL assistance because the situational context in which RoL assistance operates is always changing. RoL assistance is influenced by politics and political considerations taking place in both Indonesia, as well as in donor countries (bilateral, in particular), and those who implement the assistance must contend with time delays, rotating officials, and other game-changing contextual shifts.

## ii. Monitoring and reporting

Referring to bureaucracies and administrative burdens, one local actor commented: "We spend at least 50 percent of our time and effort on this."<sup>115</sup> According to the same informant:

Roughly I have a sense – if you give money to qualified Indonesians, and run the program without administrative requirements, you could get a great program that adheres to the *Paris* principles. Have trust in a group of people and it would lead to a good result.

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September 11, 2012), 31 (interview with author, September 12, 2012), and 37 (interview with author, September 19, 2012).

<sup>113</sup> Informant 31 (interview with author, September 12, 2012).

<sup>114</sup> Informant 3 (interview with author, September 13, 2012).

<sup>115</sup> Informant 40 (interview with author, September 20, 2012).

But because people can't guarantee it, you get all these requirements – M&E, administrative, monitoring, reporting. These requirements are supposed to make things more effective, but it takes 50 percent of the job. It actually hinders.<sup>116</sup>

The situation described by this implementing team member is not unique to his/her program, as informants working on all four case studies spoke to the onerous burden placed on them by donor reporting requirements. But by commandeering their implementing agents' time to satisfy upward reporting requirements, donors are pursuing a self-defeating strategy, because time is finite. All time spent toward reporting is time *not* spent performing the work they were hired to do, which is to implement RoL assistance intended to build capacity of the Indonesian law and justice sector and the many diverse actors who take part in it.

Not only that, but as highlighted above, the reporting is not capturing what is happening because local actors have learned to 'write up everything in roses.' Offering some explanatory context, one senior RoL professional with experience in several countries, observed:

The biggest problem with development is that there is a culture of making things that should not have happened or do not belong, look like they should have happened or belong.<sup>117</sup>

Thus, the reporting cannot be trusted as an accurate representation of what is happening because it actually serves a different function – that of justifying the assistance after the fact.

Finally, we also observe the international 'obsession with counting' – as described by Natsios, and Sally Engle Merry, and others.<sup>118</sup> Here, even though the

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<sup>116</sup> Ibid.

<sup>117</sup> Informant 33 (interview with author, September 21, 2012).

assistance falls into the more transformative types of assistance (institution building – and specifically, capacity building), numbers still interfere by crowding out more transformative ideas within capacity-building. As an example, one former Supreme Court reform team member lamented that it was easier for donors to assess whether 300 judges were trained on case management, rather than provide assistance that would build the capacity of the training center itself.<sup>119</sup> Case study work-plan documents, analyzed in chapter 5, also indicate a preference toward numerical outcomes, including e.g., required outcomes of 5 clinical programs, 10 clinical courses, and three mediation trainings for 90 Religious Court Judges.<sup>120</sup>

*b. Implications of internationally mandated ‘tick-box compliance’*

The ‘tick-box compliance’ we see in Indonesian RoL assistance keeps people at their desk to do compliance, instead of out focused on the challenging work of capacity building and legal reforms that ultimately seek a behavioral change of some kind. In terms of hiring, tick-box compliance privileges technocratic managers – people with scrivener skills rather than people who are transaction advisors or community justice advisors or some other substantively relevant expertise. So we are left with a state of affairs in which RoL assistance professionals do not need to know about Indonesia, or matters of substantive justice – but instead spread sheets, log frames, and program management. The

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<sup>118</sup> Natos, “Essay,” 4-6; Sally Engle Merry, Kevin E. Davis, and Benedict Kingsbury, eds., *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law* (New York: Cambridge University Press, 2015).

<sup>119</sup> Informant 28 (interview with author, July 9, 2012).

<sup>120</sup> See chapter 5, Section IV (a). The first two outcomes listed were for USAID’s E2J project, while the mediation trainings were a component of AusAID’s AIPJ.

implications of these structural choices include ensuring limited opportunities for local partners to be management level – though USAID’s C4J project is a notable exception to this, with an Indonesian Deputy Director, and having been purposely designed to transition to Indonesian leadership and execution. According to a senior RoL adviser with the USAID mission in Indonesia:

A tremendous amount of work – the bulk – of C4J is carried out by Indonesian staff. There were three expat personnel when I started. When I left, only one. The program is specifically designed to transfer knowledge and technical capacity to Indonesian personnel. The project, C4J, had 50 staff at any given time.<sup>121</sup>

It is too soon to comment on long-term outcomes and sustainability, but here C4J provides a potential example of capacity building that is grounded in the local setting.

In this regard, C4J is a possible exception to the usual practice described above of relying solely on international technocratic managers, and the subsequent need for hiring consultants to provide the substantive expertise required of the RoL assistance. Implications of these hiring decisions are many, and informants had much to say about them (donors hire unqualified ‘experts;’ exponential salary discrepancies exist between international and national consultants (perceived as unequal and unfair); etc.).<sup>122</sup> As discussed further in chapter 9, giving local partners more of a voice in these hiring decisions could go a long way toward bettering partnerships, and possibly also increasing the level of local ownership of the RoL assistance.

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<sup>121</sup> Informant 47 (interview with author, December 20, 2012).

<sup>122</sup> These are discussed further in Chapter 6.

## VI. Concluding argument

In the sections above, we see three phenomena: donor-side local actors exercising agency in practice; mutual influence from the exercise of agency on the local Indonesian side; and an international attempt to control from abroad. The cycles continue – one action, a reaction and push back; another action and response; push back, leading to a constant interplay between and among international, national and local actors on behalf of the many organizations they represent – which as we saw in chapter 6, could be more than one for each individual. All of this is complicated by the number of actors involved in bringing the project to life – whether mandated by the donors (e.g., when choosing a foreign implementing contractor instead of using ‘partner country systems’) or host country (by designating local gatekeepers – e.g., Indonesian reform teams, and Bappenas).

One positive result that has emerged from this interplay in Indonesian RoL assistance is the supply of white-collar jobs for Indonesian legal professionals who are willing to work with donors and their implementing contractors. These jobs are well-paid by Indonesian standards, and involve working toward Indonesian justice sector reform – something most of these professionals are already doing through local NGOs and CSOs, and have been for some time. Donors and their implementing contractors need these local professionals as implementing staff in part because the principles of ownership and partnership have permeated RoL practice, and ownership dictates local involvement. This remains true even though employing local professionals as staff does not rise the level portrayed in the *Paris Declaration*, et al., of using only partner-country systems. But it represents a donor-local partnership nonetheless – one with great potential to impact the content and direction of the assistance.

From this chapter, we again observe that ownership and partnership are useful principles in capturing what is happening on the ground as reported by local actors. These are concepts that the actors themselves acknowledge as important, either directly or implicitly. We see local actors responding in ways that attempt to better or further the ownership or partnership of the RoL assistance and its intended reforms. There is a practical or utilitarian side to this, as well. Local actors will invoke ownership, partnership, or whatever else, if it resonates and works to move their position forward. Not only are these actors not weak or passive, they are leveraging their knowledge and whatever assets and opportunities they can think of in the course of executing their duties for RoL assistance. International donors recognize that they have informational disadvantages, and attempt to exert control through monitoring and evaluating requirements. International donors likely also sense that something is going on, perhaps because they know that the local partners they are hiring to staff their projects are self-motivated and connected.

One problem with the way that donors or principals view the dynamism of local actors is their assumption that what the agent is choosing to do is misguided because it does not necessarily fit with the donor or principals' stated interests and planned course of action. In fact, what we see, at least sometimes, are Indonesian agents acting in ways to move the reform forward that perhaps the donor had not contemplated. Does this not constitute ownership of the assistance? The answer is of course yes – but here we again see how ownership and partnership principles lose the battle to static designs and reporting conventions that are typical to RoL assistance.

Another problem is the onerous time burden placed on local actors by monitoring and reporting requirements. This is arguably not 'partnership,' but a distraction that

disincentivizes types of behaviors that would lead to better project outcomes – e.g., relationship building, and working toward effective partnering with Indonesian local partners that might result in their necessary buy-in and ownership. Therefore, again, what we find is that donors may not be fully appreciating the behavior of local actors, in part because these behaviors do not fit neatly in the donors' plans. Furthermore, donors' attempts at controlling the assistance through monitoring and reporting are proving counter productive at the site of RoL assistance delivery, potentially having a negative impact on reported levels of local ownership and partnership achieved. This happens within a system of RoL assistance that tends to deliver what is easy to measure, instead of what might provide the transformative change being sought.

As laid out in the next chapter more fully, it seems possible to make reasonable adjustments to RoL assistance delivery that would intentionally steer toward partnerships more capable of delivering technical assistance tailored to local needs, and local ownership over donor-supported reforms – even if only incrementally so. One potential solution is to grant more discretion to local actors, and include local partners in hiring decisions. Another might be more use of independent, midterm evaluations to assess the project, as these have already been well received and contain useful information to inform the way forward. A further enhancement would be to eliminate as much of the reporting as possible so staff time can be used for relationship-building etc. Though these suggestions assume more risk within the project, they also allows for higher potential gains from increased levels of local ownership and partnership within the RoL assistance.

## Chapter 9 /

### Local Actors in Rule of Law Assistance in Indonesia:

#### In Pursuit of Ownership

##### I. Introduction

Cameron and Low observe, in relation to rule of law assistance in Cambodia, that donors need to cede the driver's seat to host-country governments, and be able to tolerate the risk that comes from deeper local ownership of justice reforms:

Ownership in areas as sensitive as justice reform may best be achieved if donors only respond to requests for assistance from developing country governments rather than trying to initiate programs based on their own understanding of formal policy and their own vision for Cambodian development.

Those that do decide, as *Busan* encourages, to manage rather than avoid risk, would also do well to make a long-term commitment, be prepared to accept a realistic [slow] rate of progress and understand that international standards of good practice may not emerge within the course of a ten-year program, if at all.<sup>1</sup>

The same might be said of the Indonesian RoL assistance studied here. The data uncovered in this study suggest that donors who indeed wish to 'manage rather than avoid' risk, and allow for greater local ownership of donor-supported reforms,<sup>2</sup> must first pay greater attention to the patterns of international and local interactions taking place during ongoing RoL assistance, as well as the contextual reasons these patterns have for coming into being.

Chapter 1 introduced some of the common challenges facing practitioners of present-day rule of law (RoL) assistance, which include a tendency by donors to ignore, or

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<sup>1</sup> Camille Cameron and Sally Low, "Aid Effectiveness and Donor Coordination: A Cambodian Case Study," *The Law and Development Review* 5 (2012), 189.

<sup>2</sup> See e.g., Izumi Ohno, ed., *True Ownership and Policy Autonomy, Managing Donors and Owning Policies* (National Graduate Institute for Policy Studies, GRIPS Development Forum, 2005)(especially Figure 1, Typologies of Development Management, 5).

inadequately incorporate, local input and priorities when determining the design and implementation of the assistance. Put another way, donors do not typically establish the kinds of partnership likely to generate local ownership of the assistance. This is despite the fact that superficial approaches to establishing partnership and local ownership around rule of law projects are identified as longstanding weaknesses in Western aid programming in the literature, and the ‘lessons’ that remain unlearned for the field of RoL assistance.<sup>3</sup>

At the same time, donors have also been criticized for their lack of understanding of empirical realities.<sup>4</sup> Ramifications of this, and the failure to listen to local partners, include law-focused aid that remains “ethnocentric, self-referential, neo-colonial and possibly destructive.”<sup>5</sup> Donors have thus been encouraged to “rethink their approach to understanding RoL promotion,” which includes understanding and incorporating the fact that recipient partners will reinterpret whatever ideas underlie the assistance, and re-assign them a context specific relevance.<sup>6</sup>

This study systematically inquired into the perspectives and experiences of local actors<sup>7</sup> participating in ongoing RoL assistance delivery. Despite the fact that these local actors are best positioned to understand and shape the policy intent of interventions and the way in which

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<sup>3</sup> See chapter 3, Section II (c).

<sup>4</sup> See chapter 1, Section II (d).

<sup>5</sup> Pip Nicholson and Sally Low, “Local Accounts of Rule of Law Aid: Implications for Donors,” *Hague Journal on the Rule of Law* 5 (March 2013), 4.

<sup>6</sup> John Gillespie, “Developing a Theoretical Framework for Evaluating Rule of Law Promotion in Developing Countries,” in *Rule of Law Dynamics: In an Era of International and Transnational Governance*, ed., Michael Zürn, André Nollkaemper, and Randall Peerenboom (New York: Cambridge University Press, 2012), 233.

<sup>7</sup> As in chapter 1, the term ‘local actors,’ refers to all participants in the design and implementation of rule of law (RoL) assistance at the site of its delivery, handling day-to-day details of project implementation for both the donor and for the host / recipient / partner country (interchangeable terms) – here, Indonesia. ‘Local partners’ are a sub-set of local actors, and refer to the Indonesian local actors who professionally partner with the RoL assistance in some way – either on behalf of an Indonesian counterpart agency, or as ‘national expert,’ or part of an implementing team.

legal reform is designed and delivered, these actors have not had a consolidated voice in existing literature.<sup>8</sup> This study has attempted to directly capture and analyze their experiences and perspectives, including the way they narrate their own roles in shaping RoL projects and programs – and with what effect. This study has thus sought to contribute to the gap in understanding of the dynamics of the design and implementation of RoL assistance on the ground, by analyzing empirical data about how all the local actors who are engaged in these interventions view the process and outcomes of their legal reform projects.

This study posited that the principles of ownership and partnership – while understood in different ways by the many various actors participating in RoL assistance – is an understudied and yet salient element in RoL assistance projects that helps explain why some projects are embraced enthusiastically at a local level and whose reforms seem to take on a life of their own, while others attract ambivalence and seem to carry only limited scope for impact. During interviews with local actors in Indonesia, the concepts of local ownership and partnership were used as analytical tools to draw out the relationship dynamics taking place.

This study has asked and answered three questions:

- 1) How are local ownership and partnership understood and operationalized at the site of RoL assistance design and implementation?
- 2) What impedes the realization of ownership and partnership in ongoing RoL assistance?
- 3) How are ownership and partnership negotiated between and among local actors in ongoing RoL assistance?

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<sup>8</sup> See e.g., Carothers, “The Problem of Knowledge” in *Promoting the Rule of Law Abroad: In Search of Knowledge*, 15-28; Veronica L. Taylor, “Frequently Asked Questions About Rule of Law Assistance (And Why Better Answers Matter),” *Hague Journal on the Rule of Law* 1, no.1 (2009): 52.

The answers to these research questions, analyzed in chapters 5, 6, 7 and 8 and summarized into 'key findings and implications' below, reveal that there is a disconnect between the theory of 'ownership' and 'partnership' revealed in development literature and policy documents (including, e.g., *Paris Declaration on Aid Effectiveness*), and its actual practice – tested here in Indonesia. That there is such a gap is not surprising – this would be true of most policy discourses, designs and their implementation, and is certainly reported on extensively in both the development studies and RoL literature, as we saw in chapter 3. It is also consistent with the kind of transformation that occurs in policy discourse and norms as part of the transnational legal ordering described by Halliday and Shaffer.<sup>9</sup>

Three theoretical frameworks, detailed below, were used to analyze the data:

1) principal-agent theory applied in development settings, 2) critical development theory of Arturo Escobar, and 3) Halliday and Carruthers' socio-legal theory of recursivity. All three were chosen in order to offer different views and analyses of the same data, because no one framing captured the full story being told. Principal-agent theory offered a way to make sense of the myriad actors involved at the scene of ongoing RoL design and delivery, and how they conceptualize their own and others' roles. Escobar's 'development as discourse' theory echoed the historical and situational context found in Indonesia, including the existence of a RoL 'industry,' which – according to local partners, in particular – noticeably favors ideas and actors from donor countries. Halliday and Carruthers' theory of recursivity concerning cyclical, multi-level, multi-directional processes offered the ability to better capture and contextualize the back and forth, mutual nature of the relationship dynamics being discussed.

Why should we care about the meanings of local ownership and partnership, in either theory or in practice? We know that the domain of development assistance is crowded with

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<sup>9</sup> Halliday and Shaffer, *Transnational Legal Orders*, 7.

different kinds of actors and criss-crossed with principal-agent relationships. The assumption underpinning this study is that these actors conceptualize, design and deliver RoL assistance worldwide – and in Indonesia in particular – through dynamic, multidirectional processes that are not completely captured in descriptions of principal-agent relations. In particular, the discourse of ownership and partnership that has characterized development assistance since the late 1990s has influenced how local actors see themselves, and the ways they choose to navigate government and donor bureaucracies and the relationship dynamics required of those participating in RoL assistance.

The data from this study shows that local actors readily ascribe their own meanings to the principles of ownership and partnership – meanings that they earnestly believe in and strive for, but do not typically see actualized in RoL practice. Instead, structural features of RoL assistance as an industry, as well as international donor attempts to control the assistance through detailed pre-determined outcomes and voluminous reporting requirements, reportedly impede the realization of ownership and partnership principles in any meaningful sense. The normative argument that is threaded throughout this study is that ownership and partnership principles should be prioritized and negotiated more explicitly during RoL assistance design and implementation. Doing so would help to focus attention on ways of collaborating that could lead to less contentious, and more productive RoL interventions by donors and their agents.

#### *a. Indonesia as research site*

This study used Indonesia as a research site because it permitted access to projects and players that have been engaged in RoL assistance over the course of decades, rather

than months.<sup>10</sup> Indonesia represents a relatively stable middle-income country that, while receiving diminished aid flows (in dollar amounts) in recent years, still relies on international donors in order to provide access to necessary technical assistance for economic and social policy transformation.<sup>11</sup> In this sense, Indonesia is unlike the fragile and conflict-affected locations in which RoL assistance has been delivered as part of international interventions since 2001.<sup>12</sup> Therefore, this study does not purport to offer findings that would be applicable in more impoverished or unstable settings.

Nonetheless, this study does offer an analysis of the dynamics taking place within ongoing RoL assistance programming after decades of local and international investment and professional cohort-building.<sup>13</sup> In the process, this study sheds light on the way local actors attempt to solve implementation problems within the confines of an ever-evolving donor-dominated international system of aid delivery. From these Indonesian examples, perhaps a more general message can be heard about the state of the overall system.

## **II. Key findings and implications**

This study's primary contribution is the presentation of perspectives and experiences of local actors who participate at the site of RoL assistance delivery, including those on the receiving end of the assistance.<sup>14</sup> Recipient views about ongoing RoL assistance and

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<sup>10</sup> As is seen in conflict-affected and fragile states, including for example, Afghanistan, Iraq.

<sup>11</sup> See chapter 4, Section II.

<sup>12</sup> See e.g., Eddy, Jon. "Lessons from Afghanistan: Some Suggested Ethical Imperatives for Rule of Law Programs." *Ohio Northern University Law Review* 39 (2013): 901-41.

<sup>13</sup> See chapter 4, Section II (c). Indonesian RoL assistance is delivered by an educated cohort of legal professionals, most with more than a decade of experience designing or implementing such programs. Chapter 4, Chart 2.

<sup>14</sup> This study shines light on the recipient perspective, referred to as 'conversion' by Zürn, Nollkaemper, and Peerenboom, as well as the 'diffusion' perspective – or the mechanisms and processes that link the recipient and the 'promoter' (or donor) perspectives.

information about relationship dynamics therein have been identified as empirically lacking, but needed.<sup>15</sup>

What have we learned from local actors working in Indonesian RoL assistance? The following sections summarize the findings from each chapter, including practical implications and recommendations, where relevant. In the process, this study advocates for improved local ownership and partnership within RoL programming that appears empirically possible, but is not happening as usual practice.

*a) Structural impediments to ownership and partnership*

Chapter 5 introduced what was most on the minds of local actors participating in ongoing rule of law assistance in Indonesia.<sup>16</sup> ‘Current local conditions and will to reform’ were most often cited, along with ‘how the aid is structured at the outset.’ Several local actors spoke out against the more ‘programmatic’ approach taken by most implementing contractors – lots of pre-determined programming and targets. Indicators being tracked include, for example, number of trainings, and number of judges present for trainings – but notably not what the content or quality of the training was, or whether the judges benefitted from it.

Chapter 5 also argues that structural features common to RoL assistance, and development projects in general, interfere with common-sense notions of ownership and partnership principles. These structural features include the choice of implementer – typically foreign; the structure of the aid, including how detailed the pre-determined plans are, and who makes the content decisions; and finally, widespread problematic incentives particularly regarding pay. The implication derived from Chapter 5’s empirical mapping of how these

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<sup>15</sup> See chapter 1, Section II (d) and chapter 3, Section II (c) (iv).

<sup>16</sup> Referred to as the ‘What else?’ question – “what, other than local ownership and partnership, are important to daily RoL assistance work?” See Chapter 5, Section I, Chart 1.

structural features play out in Indonesia, is that RoL assistance remains viewed as donor-driven, numerically focused, and, for the most part, disjointed from local reform efforts.

One tangible example of the perceived ‘disconnect’ between the assistance and the local environment stems from the time-lag caused by donors’ procurement processes. Plans are initially made with local input, followed by a 6-month to 2-year delay, which renders much of the planned design irrelevant to current needs. Donors also seem to be making things harder for everyone by, for example, not incentivizing the right behavior from their agents – e.g., not paying expert consultants for the time to conduct and review the wealth of available desk research *prior* to arriving ‘in-country,’ and using a system of assistance delivery that encourages keeping quiet about interventions that are not working, and therefore perpetuating the use of designs that are known to be ‘bad’ or inappropriate.

This study argues that paying closer attention to local actors’ versions of ownership and partnership would mean structural decisions with less pre-determined ‘tick-box’ aid, and that allow for deeper engagement and ownership by local partners. Donors should also consider strategies that mitigate the disconnect reported by local actors, and encourage knowledge sharing at each stage of RoL assistance design and implementation. An obvious first step would be to pay experts for desk research before arriving in the field.

i) Practical implication: Structure program to allow for more implementer / ‘on-the-ground’ discretion

The overly detailed and numeric work-plans and ‘scope of work’ documents seen in this study were sometimes met with eye-rolls from experienced local actors (international and national alike). Project-level activities should not be decided at donor headquarters, during the drafting of the Request for Proposal. Instead, as suggested by many experienced

implementers, donors should set high-level goals, and then give the implementers enough discretion and resources to chart the specific course. This was referred to as a 'hybrid approach' between more programmatic RoL assistance (with lots of predetermined activities and numerical targets, and boxes to 'tick') – and facility / ad hoc approach (giving implementers full reign to respond to current justice sector needs). Because the facility / ad hoc approach had also been identified as running the risk of lacking strategic vision, the hybrid approach solves this by allowing the donors to set the strategic vision in consultation with partner governments, while leaving the details of how to reach that vision to the implementers on the ground.

ii) Practical implication: Capture knowledge from assessment to implementation

In pursuit of better continuity throughout the multi-stage, multi-party procurement process, donors should utilize the knowledge already accumulated (and paid for) by requiring someone from the assessment team to also consult face-to-face with the implementing team. As we saw in chapter 5, the disconnect between assessment or initial design and the subsequent implementation causes significant challenges for on-the-ground implementers.<sup>17</sup>

One possible solution is to require at least one member of the original assessment team to spend time, in-person, with the implementing team. At a minimum, this should include a thorough debrief of the assessment or design document as well as a step-by-step discussion of the implementing contractors work-plan. The aim is to recapture some of the tacit knowledge of the assessment team, in addition to learning what was happening 'between the lines' of the various documents – particularly in relationships with Indonesian local partners. In cases where a member of the assessment team had a particularly good relationship with an

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<sup>17</sup> See chapter 5, Section III (a)(i).

important local partner, a meeting should be organized to facilitate an in-person introduction of that local partner by the known member of the assessment team to the leadership of the implementing team.

The idea for requiring an assessment / implementation cross-over was the result of the disappointment voiced by several local partners when a well-respected international member of an assessment team for one of the case studies was not later hired on as part of the implementation. Local partners viewed this as a great loss to the project, particularly because of the expert's existing relationships with Indonesian partners, as well as his knowledge of Indonesian justice sector reform. The donor side of this story was that 'budget cuts' prevented them from paying the international expert's hourly rate.

*b) Principal-agent mapping of parties, relationships and roles: Projects are dynamic*

Chapter 6 used the principal-agent theory to demonstrate the complexity of the coordination required to carry out development assistance, in general, and rule of law assistance in Indonesia, in particular. Principal-agent theory's attention to each party in the chain of delegation casts light on the myriad of players already involved in the assistance. From this, we find that RoL projects are dynamic. These projects are implemented by people who are embedded in local contexts, dealing with local officials, and local ways of interacting. Regardless of how the projects are structured, local actors will take ownership in one way or another. Attempts by donors at avoiding this are ineffective. As we saw with the member of a civil society organization (CSO) who was hired as an individual specialist on a project, contractual obligations did not prevent him/her from working at the CSO offices – where colleagues, resources and support were in place, already working for Indonesian justice sector reform – instead of his/her small, interior office at the project offices. A better way forward

would be to negotiate the ownership and partnership more explicitly at the outset, while also allowing enough flexibility in the design (and partnership) for local ownership to take hold and adapt over time.

Furthermore, the principal-agent theory's focus on problems of information and incentive are particularly relevant here, in a study on local actors and the dynamics in which they operate.<sup>18</sup> Problems of information are evident in RoL assistance, and include broken feedback loops between funders of aid and the beneficiaries, leading to donor-driven complaints about the assistance stemming from donors' use of easy-to-monitor indicators. Problems of 'hidden information,' also referred to as adverse selection, occur in Indonesian RoL assistance – with some experts reportedly being hired without needed qualifications. Local partners report tedious meetings with donor 'experts' who have no knowledge of Indonesia or its legal system. Donors perhaps see these experts as offering substantive or technical expertise – and not local-based knowledge or understanding (for which donors will hire Indonesians.) Even so, more attention to how 'experts' are hired, as well as clarity surrounding the contributing roles of individuals could help alleviate some of these problems in the future.

If we again focus on the actors themselves, we find that many Indonesian local partners play multiple roles, and have multiple simultaneous professional affiliations and identities. Another finding made possible by the principal-agent framing, therefore, is that the local partners who are hired as part of implementing teams are also a donor's 'embedded agents.' This means that a donor has hired these local partners to be agents on implementing teams, and these agents therefore bring with them all of their pre-existing networks and close affiliations with local NGOs, government agencies, and CSOs.

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<sup>18</sup> See chapter 6, Section II and III (b).

How do donors subsequently engage with their ‘embedded agents’ in practice? Data shows that not all donors take advantage of the potential these local partners and their respective networks represent. Instead, it is typical for implementers to be bogged down by forced strict adherence to work-plans and onerous reporting requirements. In this, we observe donors, who fear ‘capture’ in their agents, trying to control what happens during implementation with detailed work-plans with predetermined activities, and voluminous reporting requirements to ensure the project is on track. But the real ‘capture’ is being done by donors, who keep their agents hostage to reporting and work-plans. In the process, donors arguably pay twice for the administrative work they demand of local actors – first, through the salaries paid to their agents, and second, through the opportunity cost of their local agents’ time and energy.

Even in spite of these time constraints, some embedded agents have worked out ways to maximize donor support for their affiliate organizations. One way they report doing this is by spending 1-2 days per week at their ‘other’ office – be it an NGO, CSO, or the Supreme Court reform team’s office (the JRTO).<sup>19</sup> How much the donors know of these arrangements is unknown, though at least one local partner was unapologetic about spending 1-2 days per week at their ‘other’ office. Referring to his/her employer, the implementing contractor, that local actors says, “They hired me because of the networks I have”<sup>20</sup> – thus he takes, what to him/her seems like the logical and professional step of servicing those networks and relationships, even while being employed full-time by the implementing contractor.

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<sup>19</sup> See chapter 6, Section III (c) (ii).

<sup>20</sup> Informant 37 (interview with author, September 19, 2012).

i) Practical implication: Support and utilize local professionals, embedded agents, and local CSOs and NGOs

It would follow from the international developmental discourse on local ownership and partnership that projects should, whenever possible, hire and utilize local professionals. This study shows that among RoL professionals in Indonesia, there are a high proportion of local actors who are invested in the long-term institutional health of the justice system. Projects have reported success in making these actors top-tier management with decision-making power. USAID's C4J, for example, appears to have done fairly well in this, as well as transferring the implementation to local partners.<sup>21</sup>

Furthermore, the data in this study suggests that donors should be more strategic in the choice and utilization of their 'embedded agents.' Doing so well requires recognition of the finding that multiple professional identities are common to local partners, and that these local partners' involvement in Indonesian justice sector reforms often runs deeper and longer than most of their international implementing managers. More authority should be given to these 'embedded agents.' As we saw in chapter 5, local actors working on AusAID's AIPJ reported that management came to a similar decision following an independent evaluation, namely that an Indonesian team member should be given more authority over management-level decisions during implementation.<sup>22</sup>

Also in line with international development discourse, capacity building within local partners' CSOs and NGOs should be seen as a contribution to the overall aim of RoL assistance. Therefore, whenever possible, donors and their implementers should engage at

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<sup>21</sup> See Chapter 7 for a description by a senior RoL adviser to USAID of C4J's gradual decrease of the number of internationals involved in the project. Informant 47 (interview with author, December 20, 2012).

<sup>22</sup> See chapter 5, Section IV (b); chapter 5, footnote 82.

the level of the organization, instead of hiring away one of a local organization's senior members. Engaging with Indonesian implementers instead of foreign-based implementing contractors would be a cost-cutting way for donors to be more supportive of local ownership of the assistance. Even *Paris Declaration* Section 39 supports not distorting local salaries.<sup>23</sup> Hiring local implementers might assume greater risk or uncertainty, but as reported by local partners in Indonesia, the potential gain is high.

ii) Practical implication: Clarify roles and relationships of local actors involved in the assistance

As we saw in chapter 6, a practice of donor agents to disregard locally promulgated directives regarding donor-Supreme Court interactions (and assigned 'gatekeepers') caused tension and conflict in partnerships that were necessary to the assistance itself. The principles of both ownership and partnership would dictate that donors should follow official local policies and directives on donor interactions with local entities. Doing so stems from a respect for the rule of law – particularly when one recognizes that Indonesian officials have gone through legal procedural hoops in order to pass the regulations.<sup>24</sup> Furthermore, in the course of being more explicit about who is in charge of what, ownership and partnership principles would suggest that locals should have the principal voice with regard to content and direction of the assistance.

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<sup>23</sup> Donors commit to, among others: "Avoid activities that undermine national institution building, such as bypassing national budget processes or *setting high salaries for local staff.*" (Emphasis added.) *Paris Declaration on Aid Effectiveness* (March 2, 2005), Section 39.

<sup>24</sup> See Chapter 8, Section IV (a) (i).

*c) Ownership and partnership as defined and operationalized*

The heart of the study's research questions about the meanings of ownership and partnership principles, and whether (and how) they are applied in the field, are addressed in chapter 7. Using a framing suggested by Arturo Escobar, we examined critically the power dynamics (using decision-making authority over hiring as an example), and agree that there is an undeniable tilt in favor of developed and Western countries and actors. Implementing contractors were all foreign-based contractors (both profit and non-profit), and international local actors held the highest positions across the board in the four case studies. Through a document analysis of two agreements that underpinned three of the case studies, we learned that ownership and partnership did not prevail as principles that were operationalized by the terms of the agreements.<sup>25</sup> To the contrary, both bilateral donors, USAID and AusAID, notably kept firm control where it matters most – namely, hiring decisions.

At the same time, however, the RoL 'industry' as studied in Jakarta, Indonesia, provides a steady stream of short- to medium-term, well-paying jobs for actors who have specialized knowledge or expertise relevant to these projects, thereby contributing to a professional middle class in Indonesia. This includes not just the international consultants who fly in to write the design, but also many local Indonesian RoL professionals who 1) are the national experts on design or assessment teams, or 2) are hired as part of implementing teams for the project.<sup>26</sup> This means that even in the unlikely event that the RoL assistance achieves none of its stated objectives, it still performs a function of providing a middle-class livelihood for a cohort of Indonesian RoL professionals.

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<sup>25</sup> See chapter 7, Section IV.

<sup>26</sup> This is not without issue, however, as some CSOs report lending (losing?) some of their more senior members to positions on implementing staff.

Viewed through the lens of international discourse, ownership and partnership as defined by the *Paris Declaration on Aid Effectiveness* and its follow-on instruments including the Indonesia-specific *Jakarta Commitment*, did not appear overly relevant to day-to-day RoL assistance in Indonesia. This is because the ‘use of country systems’ is central to international discourse on ownership, and this runs contrary to the common use of foreign implementing contractors in RoL assistance in Indonesia, and elsewhere.

And yet, the interview analysis in chapter 7 shows that ownership and partnership have very real meanings at the local level of RoL assistance design and implementation – meanings that are completely separate from the international discourse. For example, for more than two-thirds of the informants, ownership means early Indonesian involvement in the planning and design of the assistance.<sup>27</sup> Nearly all partnership definitions hinged upon the ability to effectively communicate and be understood.<sup>28</sup> These are versions of ownership and partnership worth pursuing. What follows are practical examples of donor practices that could contribute to improved ownership and partnership relations.

i) Practical implication: Facilitate communication by using an interpreter

The scene described in chapter 7 of judges nodding but not understanding<sup>29</sup> – is both unacceptable and avoidable. Therefore, RoL assistance practice should routinely include the use of interpreters in all instances when donor-side agents do not speak the local language.<sup>30</sup> Speaking English should not be a barrier to receiving the technical assistance. During all meetings that contribute to a written deliverable of any kind to which both sides are held

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<sup>27</sup> See chapter 7, Section V (a) and Chart 2.

<sup>28</sup> See chapter 7, Section V (b) and Chart 3.

<sup>29</sup> See chapter 7, Section V (b).

<sup>30</sup> On the issue of language, informants employed by AusAID stood out among their international peers for having fluent Indonesian language skills.

accountable, a translator should be present in addition to an interpreter (as these are different professions). When paperwork is necessary, as it most certainly will be, translate all documents that require signatures into the national language of the host or partner country. In order to fully 'own' whatever is being proposed, local partners must be allowed to review in their own language. As we saw in chapter 7, comments by local partners were extensive and detailed on documents (using 'track changes') that had been translated into Indonesian. In contrast, on English-language documents, local partner comments were reduced to one or two sentences.

#### ii) Practical implication: Increase local authority over hiring

Hiring choices really do matter. To foster good partnership, donors should include local partners in the decision of which experts to hire. After all, they are the ones in need of the expertise. As we saw in chapter 7, donors keep full control of hiring decisions as part of their agreements with partner countries. Partnership principles, however, indicate that locals will work better with whom they *want* to work. If possible, donors should cede authority to locals to choose who they want to work with to the maximum extent possible. Of course, donors can and should vet candidates' credentials and set parameters, but if at all possible, allow the locally preferred experts. If the aim is indeed capacity building, and knowledge transfer or even better, knowledge production,<sup>31</sup> then these are the partnerships with the most potential to have impact.

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<sup>31</sup> 'Knowledge production,' used here, follows Borda-Rodriguez and Johnson, and refers to a process in which social relations and communication between actors play a central role in the knowledge production. This is viewed as preferable to 'knowledge transfer,' which conceives of the exercise more as a product or good that can be transferred. Alexander Borda-Rodriguez and Hazel Johnson, "Development on My Terms: Development Consultants and Knowledge for Development," *Public Administration and Development*, Vol. 33 (2013), at 345.

If the donor response is that these experts are too expensive, then donors can consider one very easy way to cut costs, namely to engage with Indonesian implementers instead of foreign-based implementing contractors. As above, *Paris Declaration* 39 even supports not distorting local salaries.<sup>32</sup> Yes to do so – hiring Indonesian implementers – might assume greater risk or uncertainty, but it is both cost-cutting and more supportive of local ownership of the assistance.

*d) Local actor strategies for directing and shaping RoL assistance*

As we saw above, chapter 7's focus on Escobar's Western-dominated development discourse of Escobar revealed an observable power differential between donors and recipient partners, most explicitly seen in authority over hiring. Chapter 8 takes the inquiry further, however, by exploring the individual agency of the local actors themselves.

Using the socio-legal framing of Halliday and Carruthers, we identified the dynamic transnational space in which rule of law assistance takes place. Within this space, we observed the many strategies and resources available to local actors, and local partners (Indonesian sub-set of local actors) in particular, in Indonesian RoL assistance. They freely call on these resources, especially their networks of mentors and colleagues who can provide influence in some way. Once we understand that local actors are influential in this way, the next question becomes, how can these actors best be engaged in order to maximize the potential they represent, while minimizing risks? In Indonesian RoL assistance, we see that this is a balance that has yet to be struck. Ownership and partnership principles are useful starting points.

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<sup>32</sup> *Paris Declaration*, Section 39. See above, footnote 20.

At the same time, however, we see that ownership and partnership are again being crowded out by reporting requirements – forcing local actors to attend to ‘paper’ (primarily in the forms of conformity to work-plans and reporting requirements) instead of the people – namely, the Indonesian local partners who could (and should) be taking ownership of the RoL assistance. And yet despite the daunting numerical focus of work-plans described in chapter 5, it should come as little surprise that local actors are well-versed in satisfying their many reporting requirements on paper.<sup>33</sup> Anti-corruption training held? Check. X number of judges present? Check. Written materials distributed to all in attendance? Check. Therefore, we see once again that donors’ attempts at controlling implementation from afar are ineffective. Local actors will ‘write it up’ in the way that it needs to be (in order to satisfy the donor), and in the process, lose valuable time that could have been spent working on something more beneficial to the assistance.

i) Practical implication: Revise / lessen reporting requirements, increase independent evaluations

For all the reasons listed above, onerous reporting requirements should be lessened. As we learn from local actors, the reporting itself does not accurately measure what is happening on the ground, and furthermore, the indicators being tracked appear to be focusing on the wrong things – e.g., quantity, not quality. As an alternative, local actors reported success with the use of independent evaluations at a project’s mid-term as a way to give relevant feedback to donors.<sup>34</sup> Donors could consider adding more.

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<sup>33</sup> See chapter 8, Section V.

<sup>34</sup> See chapter 8, Section IV (vi) and Chapter 5, Section IV (a).

### III. Conclusion

One high-level international implementing manager expressed a donor-side tension (first described in chapter 7) this way:

But we want to be able to say [to our Indonesian partners]: maybe you should consider this? There needs to be that partnership there. Sometimes we find pushback. On ownership, they say, 'We should own this, and do it the way we want.'<sup>35</sup>

The manager, an experienced consultant, continued with what I believe is an important question for donors and their implementers to be asking – namely: “To what extent can we provide input without diluting ownership?” Ownership and partnership principles – as idealized by local actors themselves, and outlined throughout this study – provide a promising starting point for engendering the relational dynamics needed to strike the right balance.

What might this mean in practice? All of the practical implications outlined above are options, as are those implications flowing from this study’s finding that donors cannot accurately assume that local actors’ actions are misguided simply because they do not fit donors’ pre-determined plans.<sup>36</sup> Instead of allowing ownership and partnership principles to get crowded out by the static designs and reporting conventions that are typical to RoL assistance, this study argues that intentionally pursuing ownership and partnership principles, as defined by these local actors, is the most promising way forward for RoL assistance. This necessarily includes ways of relating in which communication is key, and all tools available to aid in communication are utilized and deployed. Furthermore, locals must be involved early, often, and significantly, in determining the content and direction of the assistance.

As we saw in chapter 8, USAID’s C4J project reported success when several Indonesian courts that were not already involved in C4J’s case management component

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<sup>35</sup> Informant 2 (interview with author, April 26, 2012).

<sup>36</sup> Chapter 8, Section VI.

decided to self-fund (from court budgets) pilots using C4J's case management system.<sup>37</sup> This development is consistent with Sally Engle Merry's idea of 'hybridity,' which occurs when the ideas and organizational forms generated from outside merge through an interactive process with those of another to produce new, hybrid versions.<sup>38</sup> C4J's manager responsible for getting 'buy-in' from Indonesian local partners – an Indonesian RoL professional with 20 years of experience – credited an early emphasis on having all courts make their *own* choice about which case management system to use as being critically important to the high levels of ownership subsequently reported.<sup>39</sup>

Furthermore, big promises like “Justice for the Poor” and “Educating and Equipping Tomorrow's Justice Reformers” notwithstanding,<sup>40</sup> more attention should arguably be paid to the small, incremental gains being achieved by RoL assistance every day. This is in line with trends in RoL literature, which include a scholarly focus on incremental gains and 'middle range theory,' which is organized around alleviating significant, identifiable performance issues in normal justice system functions.<sup>41</sup> An incremental approach also found support in Indonesia, as we saw with the World Bank's J4P project's reported success from single-mindedly pursuing divorce certificates through its local partner, PEKKA, a community-based NGO

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<sup>37</sup> See chapter 8, Section III (a).

<sup>38</sup> This is in contrast to 'replication' – wherein the international model is the same, but local cultural understandings shape the way the work is carried out. See Sally Engle Merry, “Transnational Human Rights and Local Activism: Mapping the Middle,” *American Anthropologist* 108 (2006), 40-48. Merry refers to the process through which transnational models and norms are imported into a partner country as “vernacularization.” Ibid.

<sup>39</sup> Informant 41 (interview with author, September 20, 2012).

<sup>40</sup> These are two of the case study project/program names studied here. The other two are equally ambitious, if more vague: “Changes for Justice,” and “Australia-Indonesia Partnership for Justice.” See also, Benjamin van Rooij and Penelope Nicholson, “Inflationary Trends in Law and Development,” *Duke Journal of Comparative and International Law* 24 (2013).

<sup>41</sup> See chapter 3, Section II (c) (iii). See e.g., Linn Hammergren, *Justice Reform and Development: Rethinking Donor Assistance to Developing and Transition Countries* (New York: Routledge, 2014).

(translated as ‘Women- Headed Families’) with offices throughout Indonesia. Beneficiaries themselves had specifically identified the need for the divorce certificates, which enabled them to assert and access their legal rights, privileges and services from the government, as well as in religious courts.<sup>42</sup> In this example, we see rather ‘ideal’ partnership principles exemplified and rewarded: good communication led to assistance that was tailored to beneficiaries’ specific requests for help. This in turn led to reported positive ‘impact,’ as well as ownership of the assistance and its outcomes.<sup>43</sup>

Positive impacts such as these are not the only reason RoL assistance policy makers should prioritize ownership and partnership as presented here. Indeed, the costs of proceeding without a targeted focus on ownership and partnership include financial waste (at best), and being vulnerable to the charge that Western donors are indeed the modern-day successors to colonialists – enriching Western professionals and development companies in the name of ‘foreign aid,’ all while meddling inappropriately in partner country justice systems.

The title of this study poses the question: “Local actors in donor-assisted RoL assistance in Indonesia: owners, partners, agents?” The answer, of course, is all three – with many local actors vying for control over the content and direction of RoL assistance and its accompanying reforms. Through evidence from the field regarding local-international relationship dynamics, this study has argued that increased focus by donors on the principles of ownership and partnership as enumerated here presents an opportunity to better fulfill the promise of RoL assistance that is locally tailored and demanded. This study’s recommendations, grounded in the data, also potentially represent a manageable path for donors to embark upon in that they do not demand a wholesale change of everything (though

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<sup>42</sup> See chapter 3, Section II (c) (iii).

<sup>43</sup> Informant 20 (interview with author, April 26, 2012). See chapter 3, Section II (c) (iii).

an overhaul of procurement would certainly be warranted), but instead suggest a framework for thinking about the relationship dynamics already taking place in RoL assistance, and adjusting the practice to be more in line with ownership and partnership principles as laid out here.

Trends and data discussed herein indicate that local ownership (and the necessary partnership to reach it) are concepts with staying power, and seem to be on the rise. Given the new development actors on the scene, traditional donors from the Global North might simply lose those host countries – like Indonesia – who have more options than ever before when seeking RoL assistance. The matter could thus be quite simple. If donors are not willing to cede ownership to the countries that are engaging in RoL reforms, then donors should simply not bother with the money, or the technical assistance at all. In the words of one informant (referring to an Indonesian saying): “If you give the money, give it because you want to. If you have reservations, don’t give it.”<sup>44</sup>

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<sup>44</sup> Informant 40 (interview with author, September 20, 2012), referring to the Indonesian phrase, *Tulus dan ikhlas*, meaning ‘genuine and sincere.’



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