

The Rule of Law as an International Norm

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The United Nations Millennium Declaration declares, in Article 24, that “we will spare no effort to . . . strengthen the rule of law.” This could be interpreted as promotion of the rule of law in domestic polities; Noah Bialostotzky, for example suggests that the Millennium Declaration uses rule of law “as a fundamental indicator of judicial development and the protection of human rights.” (Bialostotzky, 2007:99). The Millennium Declaration makes clear, however, in Article 9(1) the resolve of its signatories “to strengthen respect for the rule of law in international as in national affairs.” The Millennium Declaration embraces rule of law as an international norm.

Rule of law clearly is emerging as an aspirational international norm in a variety of venues (Chesterman, 2008). This aspiration appears not only in the Millennium Declaration but also in the foundational documents of other international organizations and in the statements of international leaders. The introductory clauses to the Maastricht Treaty, for example, proclaim the European Union’s “attachment to the principle[] of . . . the rule of law,” while the second goal enumerated in the foundational document of the Association of Southeast Asian Nations is “to promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region.”

World leaders also aspire to international rule of law. Former President of the United States Jimmy Carter, in accepting the Nobel Peace Prize, identified himself as “a citizen of a troubled world who finds hope in a growing consensus that the generally accepted goals of society [include] the rule of law.”¹ Former Prime Minister of Japan Abe Shinzō similarly commented on the desirability of the spread “by the great powers of Asia” of “the rule of law”.²

Social scientists and philosophers have studied rule of law for centuries. Their discussions have yielded a general consensus as to the nature of the rule of law. The definition described in that general consensus, however, is incomplete: it fails to capture a very important aspect of the rule of law. Includ-

¹ The entire speech is reprinted in www.Nobelprize.org.

² Reported on page 3 of *The Weekly Standard*, October 1, 2007.

ing that aspect of rule of law could have very serious ramifications with respect to the viability of the rule of law as an international norm.

OBJECTIVES

The research described in this paper has four objectives, each building on the previous. First, this research must discover any consensus regarding the definition of the rule of law. Second, this research examines polities acknowledged to enjoy the rule of law, for purposes of verifying the agreed upon definition. Third, this research applies any aspects of the rule of law found in the second stage to the concept of rule of law as an international norm. Finally, the research attempts to find insights into the effectuation of the rule of law as an international norm.

BRIEF STATEMENT OF METHODS

The author reviewed literature on the rule of law to parse the generally agreed upon components of the rule of law. The author applied that definition to countries acknowledged to enjoy the rule of law in order to verify that definition, and to discover any elements missing from the agreed upon definition.

SUMMARY OF RESULTS

1. The Definition of the Rule of Law

Western market-oriented democracies do not possess a monopoly on discussion of the rule of law. Karl Marx, for example, devoted considerable time and thought to law: “if one accepts Karl Marx’s strictures on what he called political emancipation, of which the ideal of the rule of law is a component, and his recommendation instead of human emancipation, for which the ideal is considered relevant but insufficient, it is difficult, perhaps impossible, to justify an unqualified avowal of the ideal within the Marxist tradition.” (Taiwo, 1999:151) Although contemporary Marxists may value the rule of law as “an unqualified human good” (Thompson, 1975:266), doctrinal Marxist scholarship acknowledged rule of law but did not explore its nature in depth. Similarly, Kǒng Fūzǐ emphasized *li* (values) over *fa* (rules), and suggested that law is not necessary in a society in which all persons piously adhere to their positions, watched over by a virtuous leader (Ruskola, 1994:2532). Because of the emphasis on values, although contemporary Confucian scholars can relate Confucian concepts to the rule of law, doctrinal Confucian

scholarship did not explore in depth the nature of the rule of law (Hahm, 2003). Thus, although western market-oriented democracies do not have a monopoly on discussion of rule of law, it is in the literature of the West that one finds the most extensive discussions of rule of law.

A basic condition for rule of law is the existence of something recognizable as law. A plethora of theories explain the difference between law and other social artifacts: at their heart these theories require some agreed upon social process that produces rules in an accepted and regularized manner (Veitch, Christodoulidis, and Farmer, 2007). The existence of law alone does not, however, suffice. The law must also work and must be procedurally equitable. Lon Fuller described the seven factors that he believed necessary to render law functional and equitable: availability of public knowledge of the rules, prospective orientation of the rules, clarity of the rules, consistency of the rules, performability of the rules, stability of the rules, and congruity of the rules (Fuller, 1969:39). In the broader review of rule of law, Fuller's seven characteristics must be appreciated as illustrative rather than definitive; the point is that rule of law at a minimum requires functioning and procedurally equitable law.

A second, and very old, theoretical component rule of law encompasses a theory of governance – in particular of the relationship between the governed and the governing. Under the rule of law, according to this theory, the law applies to all persons equally (Radin, 1987).³ Put conversely “no one is above the law;” all persons must comply with the rules of the particular state (Kahn, 1997:167). Indeed, much of the writing of A.V. Dicey, one of the earliest scholars to explicate the rule of law, has to do with equality under the law (for example, Dicey, 1885).

The third aspect of the rule of law is found in more recent literature, and is a reaction to the fact that oppressive and cruel regimes could satisfy the definitional requirements of the rule of law. One does not have to create a hypothetical regime; instead scholars often turn to Germany in the period leading up to the Third Reich (for example, Adams, 1993:302). The laws leading up to the Third Reich were enacted by a freely elected legislature; the laws were clear, publicly available, publicly administered, and procedurally equitable. The laws applied to all persons, no officer was above the law. Law fulfilled the definitional requirements of rule of law. That law, however, was savage and oppressive and constituted the

³ The United States Supreme Court has taken note of this aspect of the rule of law, commenting that “the rule of law implies equality and justice in its application.” *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972).

beginning of a system that annihilated people and cultures. The law tyrannized rather than supported society.

Eric Orts distinguishes this instrumental use as “rule by law” rather than “rule of law.” (Orts, 2001:93) Orts, and others, add a third requirement in order for a system to qualify as rule of law: the law must also adhere to an exogenous standard (Orts, 2001:99). Law must be “good,” or at least must not be “bad.”

This paper summarizes the definition of rule of law in broad terms because no precise definition exists. The lack of a precise definition, however, has not deterred the development community from recognizing rule of law as a critical ingredient for economic and social development. While the Millennium Declaration extols rule of law as an aspiration of the global community, the development community has worked to install the rule of law locally; indeed, fostering rule of law has become a cornerstone of development programs (Haggard, MacIntyre, and Tiede, 2008). A predictable system that ensures property and contract rights, prevents arbitrary and capricious exercise of power, and guarantees equality of access and opportunity should contribute to economic and social growth. Empirical analysis of the results of rule of law implementation programs, however, have been unclear at best, and certainly have not supported the theoretical arguments.⁴

The study of “social capital” may cast light on this failure. Although the term “social capital” has been in the academy for decades, the comprehensive study – and even definitional scholarship – of social capital is in its infancy. In broadest terms, social capital is “the ability of actors to gain benefits by virtue of membership in social networks or other social structures” (Portes, 1998:4).

One of the clearest insights to emerge from the study of social capital is that generalized trust is an important component of social and economic growth (Fukuyama, 1995; Whitley, 1997). Trust, again loosely defined, is confidence that a particular outcome will accrue in conditions of risk or uncertainty (Cook, 2005). Personal trust, the type of trust with which most people are familiar, involves discrete interpersonal relationships. To say that Person A trusts Person B is to say that Person A is confident that Person B will act in particular ways in certain situations of risk or uncertainty.

⁴ A very useful summary can be found in *The Economist*, March 15, 2008, summarizing economic research and including commentary by applied economists regarding their own thoughts on the failure of rule of law implementation to yield predicted results.

Generalized trust does not involve discrete relationships. Rather, generalized trust is trust in “the system,” in social structures and society in general (Coleman, 1988). To say that Person C possesses high levels of generalized trust is to say that Person C is confident that the processes of society usually produce the correct result, and is confident that the people who make up the society will usually behave in particular ways in conditions of uncertainty.

Generalized trust contributes to economic and social development in at least three ways. First, generalized trust reduces transaction costs. Because persons trust public institutions to perform correctly, they do not need to create private institutions when they enter into relationships. Second, generalized trust reduces the overall burden on people and organizations. Persons and organizations trust that tasks undertaken by the system, such as education, contract enforcement, infrastructure creation, will be performed in the correct manner. Thus, when generalized trust prevails persons and organizations can forego those tasks and can instead use their resources to engender growth. Finally, generalized trust contributes to a sense of community, a sense of belonging, and thus engenders cooperation and support for initiatives that contribute to growth.

When examining general trust, one must draw a distinction between trust, trustworthy, and trusted. Trust is the general phenomenon. Trustworthy refers to the inherent condition of the institution. Trusted means that people actually trust the institution. It is worth noting that the benefits of generalized trust do not occur simply because the system is trustworthy; the benefits only occur when people actually trust the system.

With respect to the rule of law, implementation usually refers to trustworthy. The development community has devoted considerable resources to fostering rule of law, through the drafting of workable and equitable laws, the creation of comprehensive codes, the education of judges and prosecutors, the funding of rule of law centers. The development community has contributed to the creation of very solid, very trustworthy legal systems. Trustworthy, however, is different than trusted.

Markus Freitag’s (2003) thorough synthesis of existing research into the creation of generalized trust reveals two factors that may have an effect on the rule of law. Generalized trust flows from repeated successful interactions with public institutions and with strangers; generalized trust also reflects conformity with social norms, values and expectation. Trusted systems, in other words, consistently produce outcomes that are to some extent influenced by social norms.

2 Mediation of Law through Social Norms

The general discussion of the rule of law has evolved to require that law comply with exogenous standards, such as human rights, but does not include a requirement that law be mediated through social norms. Nonetheless, a review of those polities acknowledged to enjoy the rule of law indicates that such mediation not only occurs but is a vital aspect of the rule of law.

A law in the abstract is nothing more than a collection of words. There are numerous means through which society mediates the words of law. These techniques go far beyond the simple process of determining the meaning of words. A police officer, for example, might choose to warn rather than arrest, a prosecuting attorney or magistrate might choose to charge a lesser crime or even dismiss charges, a judge might order a lesser sentence. If these powers were used to garner bribes or for other forms of personal enrichment the actions would constitute corruption; if the powers were exercised in an arbitrary or capricious manner the actions might constitute tyranny. When, however, these acts are exercised in accordance with the norms of society they are accepted as discretion, a normal and indeed necessary part of a criminal justice system (Caves, 2008).

Because discretion must reflect societal norms, it is highly localized. An example of discretion from the United States both illustrates the nature of prosecutorial discretion and demonstrates its localized nature. This example is taken from conversations with defense attorneys in a medium sized city surrounded by rural area, in a Northeastern state; although hypothetical it reflects those attorneys' descriptions of the criminal justice system without revealing confidences. This state criminalizes the lighting of fires in public parks (outside of designated fire pits) as well as the burning of public property. Nonetheless, at the end of the school year, students from the local high school (secondary school) went to a park outside of town and lit a bonfire using (among other things) park barricades for fuel. The police arrested some of the students and brought them before a judge. The judge and the defense attorney had a conversation that, in paraphrase, consisted of "these are good kids, headed to university, it does not do anyone any good if they are sent to jail instead of becoming productive members of society, nor is it fair to doom them to lives as convicted felons," to which the judge responded " that sounds about right, but I am going to give them a very stern warning and if I see them again they are going to be in a lot of trouble." During that same year, a vagrant was found in the park burning park signs; he was convicted and spent thirty days in jail.

The differing treatment did not arise from any social position of the students (who represented a variety of social statuses) nor was there an illicit payment to a judge; either of those circumstances would soon have been discovered and would have provoked fierce public outcry. The difference arose simply from a social attitude toward youth and the waste of social potential, and under these circumstances no one in the courthouse, no one in the system, and certainly no one in the city took serious note of the discrepancy in sentence, and no one found an injustice. On the other hand, even the suggestion that the students should have spent time in jail would probably evoke a strong negative reaction from most people in the city.

A person from another society might read this illustration and react with indignation or puzzlement. The illustration might even call into question whether the city described in the illustration has the rule of law. There is little question, however, that the law “works” in that city, that its inhabitants find the law to yield correct results, that they trust the law and feel comfortable building their lives around predictions about that law. Moreover, a reader from a society other than that described will, with a small amount of reasonable effort, arrive upon an example from his or her own society in which law is mediated through social norms.

Although not linked by legal scholarship to theories on the rule of law, it appears that social mediation is inherent to legal systems that garner respect and trust from those who operate within those systems (see generally Mertz, 1994:1246). While it is “sociologically useful” to “analytically separate” law and society, legal scholars have long recognized that “the two are really inseparable, intertwined, faces of the same coin.”⁵ (Friedman, 1989:1583) Social mediation must be considered a requisite of the rule of law. Law must conform to the norms and expectations of a society if it is to be trusted.

3. The Viability of Rule of Law as an International Norm

Evaluation of the potential of rule of law as an international norm requires evaluation of each of the four requirements identified in this paper.

International law satisfies the most basic requirement: that law exists and that it is procedurally equitable. International law exists. As a means of ordering relationships among nations, it has existed for

⁵ Dan Ostas notes that the opposite is also true, that “It is difficult to talk about a businessperson's social duties without referencing law.” (Ostas, 2004:561) The impossibility of separating one from another reinforces the fact that social mediation contributes to acceptable outcomes.

several centuries, as a means of supporting relationships among parties – particularly businesses – it has existed for even longer. Notably, as a means of controlling and regulating the behaviors of individual parties, international law has over the last couple of decades become a stronger and more important source of rules and even enforcement.

International law is, arguably, functional and procedurally equitable. This aspect of international law merits greater attention; on its face international law is publicly available and possesses a degree of consistency and congruity.

Rule of law as a theory of political governance raises questions. Indeed, political scientists might argue that the rule of law cannot exist as a transnational phenomenon because it cannot satisfy the requisite conditions of the theory of governance: that law applies equally to the governors and the governed. Within the international or transnational community there are none who govern nor are there governed, therefore no opportunity exists for international law to satisfy this criterion. This prologism, however, misses the point. The aphorism that law must apply to the governors as well as the governed arose only as a description of an underlying principle: that all persons regardless of position or station are bound by law (and protected by law) in equal measure.

Even this principle would have had little effect under traditional idealizations of international law: a corpus of law that facilitated relationships among nations (Waldron, 2005:136-137). International law, however, now reaches beyond nations. Myriad acts and relationships now potentially fall within the rubric of international law: certain criminal acts, trade, finance, commercial relationships, environmental issues, human rights, and more (see Knox, 2008). The lack of governing institutions identical to those found in states hardly proves that international law does not possess power; international law directly touches many individuals.⁶ If it does so in an evenhanded manner, then it probably satisfies the criterion of rule of law related to governance.

International law also probably satisfies the third requirement, regarding adherence to an exogenous normative standard. One of the most salient aspects of international law since the end of the Second World War is its preoccupation with human rights and the taking within its ambit of the relation-

⁶ The enforcement mechanisms and powers of international law have generated extensive literature among legal scholars; interesting examples include Danner, 2003; Gowlland-Debbas, 1994; and Orentlicher, 1991.

ship among the governing and the governed (Roberts, 2001:189). Although one can certainly criticize the sources of these normative standards, few persons consider international law to be morally reprehensible.

It is the fourth requirement, the requirement outlined in this paper, which raises the most serious questions regarding the viability of rule of law as an international norm. Rule of law requires social mediation. At least two aspects of social mediation may undermine the legitimacy of rule of law as an aspirational social norm.

First, mediation of law by social norms and values requires a society capable of forming and embracing norms and values. There is little doubt that a sizable number of persons identify with transnational community. Modernists such as Anthony Giddens and Roland Robertson argue out that changes in attitude and changes in technology have changed individual understandings of what is local and how relationships are formed (Giddens, 1990; Robertson, 1995). As Thomas Dunfee and Thomas Donaldson point out in their influential study of social contract, however, persons belong to multiple communities with varying degrees of commitment and expression (Donaldson and Dunfee, 1999). The fact that some people may be able to form relationships and community with little regard to physical distance and political borders does not itself prove the existence of a global community cohesive enough to generate the sorts of norms necessary to mediate the words of law. Indeed, Gunther Teubner has called for new paradigms to understand the relationship between international law and a global society that he considers completely fragmented rather than cohesive (Teubner, 1997).

A second question regards the mechanisms for social mediation. Michael Walzer famously argues in the context of justice that identification with differing societies can be either “thick” or “thin.” (Walzer, 2006) The concept of “thick” and “thin” social constructs has made its way into legal scholarship in contexts other than rule of law, but provides insights into this question. Identification with a legal service community may, for example, be considered thick or thin, depending on factors such as feedback, degree of concern, amount of perceived control and so on (Mah, 2005:1753-54). Social discussions determining and defining legal justice may be thick or thin (Ball, 2000:492), while the process for determining a just outcome may be thin – nothing more than procedural – or thick – heavily mediated by social norms (Harvey, 2001:173). Linda Bosniak notes that all of law may be affected by the degree of social and civic engagement by those who operate within a system of law (Bosniak, 2003).

Even if, therefore, a global society capable of forming norms exists, one may legitimately question the existence of mechanisms capable of mediating law. If identification with global society is thin, if the deliberations that occur within global society are thin, if the degree of engagement within global society is thin, then the norms and values of global society may not exert sufficient influence on international law. In a “thick” society numerous direct and indirect avenues exist for society to influence law and for law to influence society. To the extent that global society exists it may not have access to these avenues; it may have recourse to only a very small number of very direct avenues for social mediation and may completely lack the numerous natural or indirect means of social mediation.

CONCLUSIONS

The scope and authority of international law is expanding. As the scope and authority expand, particularly with reference to the control of individuals, the potential for international law to be perceived as illegitimate increases. Objectives such as justice and equality, which underlie the rule of law, could counter this perception. Unfortunately, close examination of actual rule of law reveals a significant problem: rule of law requires social mediation that might not be available to the international legal system. Those who seek to implement a norm of international rule of law must have a fulsome understanding of rule of law rather than simply relying on platitudes and hoping for the best.

The difficulties described in this paper should not militate against the rule of law as an international norm. Rule of law is not an end, it is a means: a means to justice, equality, freedom and economic and social growth. These should be included among the goals when any social system is structured, and to the extent that the rule of law can contribute to effectuating these goals then it is a worthy tool.

The difficulties described in this paper, however, should serve as a caution to those who undertake the task of implementing international rule of law. One lesson to be drawn from a more fulsome understanding of the rule of law is that local mediating institutions will play a significant role. The more that international law can be administered through local courts, for example, the more effectively international law will be mediated according to the norms of that society. Those who monitor international law should understand that administration through local courts, and therefore mediation through local social norms, could yield marginally different results in different jurisdictions. This does not support any notion of “cultural relativism.” Values, captured in the third requirement of rule of law – compliance with ex-

ogenous standards – are reflected in international agreements and standards. Rather, marginally different outcomes reflect mediation of those shared values. As Thomas Donaldson points out, different expressions of shared values only indicates that the means of expression differ and does not detract from the fact that the values are shared (Donaldson, 1989).

A second insight is that the connection between rule of law and development may be less direct than the connection empirical economists seek to find. The growing study of “social capital” is young and somewhat unorganized; one strand that seems to run through the entirety of the field of study is that a general sense of trust that institutions will produce the “correct” result is connected in a positive way to economic growth. Legal systems that do not reflect local norms will not consistently yield results perceived as “correct,” and thus will not engender that type of trust. Authentic rule of law, on the other hand, is likely to engender trust in the outcome of the legal process because the outcome is mediated by social norms. Thus, accrual of the benefits of the rule of law may depend on social mediation.

Finally, those who aspire to an international norm of rule of law must take great care that their efforts do not produce instead a rule *by* law. A failure to recognize of the importance of local mediation risks the very benefits sought through rule of law. A vibrant global society, justice, equality, opportunity and access are worthy goals, and rule of law could contribute to the accomplishment of those goals. Law is important. Sterile application of the words of the law, however, without the mediation of social norms can be just as repressive as arbitrary application of laws.

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