

## *The Rule-of-Law Revival*

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ONE CANNOT GET through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles. How can U.S. policy on China cut through the conundrum of balancing human rights against economic interests? Promoting the rule of law, some observers argue, advances both principles and profits. What will it take for Russia to move beyond Wild West capitalism to more orderly market economics? Developing the rule of law, many insist, is the key. How can Mexico negotiate its treacherous economic, political, and social transitions? Inside and outside Mexico, many answer: establish once and for all the rule of law. Indeed, whether it is Bosnia, Rwanda, Haiti, or elsewhere, the cure is the rule of law, of course.

The concept is suddenly everywhere—a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization. Unquestionably, it is important to life in peaceful, free, and prosperous societies. Yet its sudden elevation as a panacea for the ills of countries in transition from dictatorships or statist economies should make both patients and prescribers wary. The rule-of-law promises to move countries past the first, relatively easy phase of political and economic liberalization to a deeper level of reform. But that promise is proving difficult to fulfill. A multitude of countries in Asia, the former Soviet Union, Eastern Europe, Latin America, sub-Saharan Africa, and the Middle East are engaged in a wide range of rule-of-law

reform initiatives. Rewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow. Judges, lawyers, and bureaucrats must be retrained, and fixtures like court systems, police forces, and prisons must be restructured. Citizens must be brought into the process if conceptions of law and justice are to be truly transformed.

The primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law. Respect for the law will not easily take root in systems rife with corruption and cynicism, since entrenched elites cede their traditional impunity and vested interests only under great pressure. Even the new generation of politicians arising out of the political transitions of recent years are reluctant to support reforms that create competing centers of authority beyond their control.

Western nations and private donors have poured hundreds of millions of dollars into rule-of-law reform, but outside aid is no substitute for the will to reform, which must come from within. Countries in transition to democracy must first want to reform and must then be thorough and patient in their legal makeovers. Meanwhile, donors must learn to spend their reform dollars where they will do the most good—and expect few miracles and little leverage in return.

### **Legal Bedrock**

The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.

The relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign

authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it. Basic elements of a modern market economy such as property rights and contracts are founded on the law and require competent third-party enforcement. Without the rule of law, major economic institutions such as corporations, banks, and labor unions would not function, and the government's many involvements in the economy—regulatory mechanisms, tax systems, customs structures, monetary policy, and the like—would be unfair, inefficient, and opaque.

The rule of law can be conceived broadly or narrowly. Some American jurists invest it with attributes specific to their own system, such as trial by jury, a constitution that is rarely amended, an expansive view of defendants' rights, and a sharp separation of powers. This alienates those from other societies who enjoy the rule of law but do not happen to follow the American approach in its many unusual particulars. Some Asian politicians focus on the regular, efficient application of law but do not stress the necessity of government subordination to it. In their view, the law exists not to limit the state but to serve its power. More accurately characterized as rule by law rather than rule of law, this narrow conception is built into what has become known as Asian-style democracy.

### **Transition Trauma**

The rule of law is scarcely a new idea. It is receiving so much attention now because of its centrality to both democracy and the market economy in an era marked by a wave of transitions to both. Western observers say that enhancing the rule of law will allow states to move beyond the first stage of political and economic reform to consolidate both democracy and market economics.

Since the early 1980s dozens of countries in different regions have experienced political openings, held reasonably free and fair elections, and established the basic institutions of democracy. Some, however, particularly in Latin America and parts of the former Soviet Union, Eastern Europe, and Asia, are struggling with poorly performing institutions, citizens' low regard for governments, and the challenge of going beyond mere democratic processes to genuinely democratic values and practices. Other countries, in sub-Saharan Africa, Central Asia, and elsewhere, are not just stagnating but slipping backward as newly elected leaders fall into old authoritarian habits. For states grappling

with democratic consolidation, fortifying usually weak rule of law appears to be a way of pushing patronage-ridden government institutions to better performance, reining in elected but still only haphazardly law-abiding politicians, and curbing the continued violation of human rights that has characterized many new democracies. For backsliding systems, strengthening the rule of law seems an appealing bulwark against creeping authoritarianism and the ever-present threat of a sabotage of constitutional order.

Many attempted economic transitions are at a similar dip in the road. Reform-oriented governments that have made it through the initial phase of economic liberalization and fiscal stabilization are now pausing before the second, deeper transitional phase, licking their political wounds and hoping for patience on the part of often unpersuaded citizens. As Moisés Naím has pointed out, the first phase of market reform turns on large-scale policy decisions by a small band of top officials. The second phase involves building institutions, such as tax agencies, customs services, and antitrust agencies, and the general amelioration of governance. Strengthening the rule of law is integral to this phase.

The challenges of the second phase are felt not only in Latin America and the former communist states, but also in Asian countries that have made considerable economic progress without the benefit of a strong rule of law. As Asia's recent financial woes highlight, if countries such as Indonesia, Thailand, and Malaysia are to move beyond their impressive first generation of economic progress, they will require better bank regulation and greater government accountability. More generally, economic globalization is feeding the rule-of-law imperative by putting pressure on governments to offer the stability, transparency, and accountability that international investors demand.

Shoring up the rule of law also helps temper two severe problems—corruption and crime—that are common to many transitional countries, embittering citizens and clouding reform efforts. Debate continues over whether corruption in government has actually increased in transitional societies or whether greater openness, especially in the media, has merely exposed what was already there. Skyrocketing street crime and civil violence are another unfortunate hallmark of many democratizing societies, from Russia to South Africa to Guatemala. Crime erodes public support for democracy and hurts the economy by scaring off foreign investors and interfering with the flow of ideas, goods, and people. Reform-oriented governments around the world are now adding crime and

corruption reduction to their agenda for deepening reform. Rule-of-law development is an obvious place to begin.

For these reasons—political, economic, and social—Western policy makers and commentators have seized on the rule-of-law as an elixir for countries in transition. It promises to remove all the chief obstacles on the path to democracy and market economics. Its universal quality adds to its appeal. Despite the close ties of the rule of law to democracy and capitalism, it stands apart as a nonideological, even technical, solution. In many countries, people still argue over the appropriateness of various models of democracy or capitalism. But hardly anyone these days will admit to being against the idea of law.

### **The Reform Menu**

Although its wonderworking abilities have been exaggerated, the desirability of the rule of law is clear. The question is where to start. The usual way of categorizing rule-of-law reforms is by subject matter—commercial law, criminal law, administrative law, and the like. An alternate method focuses on the depth of reform, with three basic categories. Type one reform concentrates on the laws themselves: revising laws or whole codes to weed out antiquated provisions. Often the economic domain is the focus, with the drafting or redrafting of laws on bankruptcy, corporate governance, taxation, intellectual property, and financial markets. Another focus is criminal law, including expanding the protection of basic rights in criminal procedure codes, modifying criminal statutes to cover new problems such as money laundering and electronic-transfer fraud, and revising the regulation of police.

Type two reform is the strengthening of law-related institutions, usually to make them more competent, efficient, and accountable. Training and salaries for judges and court staff are increased, and the dissemination of judicial decisions improved. Reform efforts target the police, prosecutors, public defenders, and prisons. Efforts to toughen ethics codes and professional standards for lawyers, revitalize legal education, broaden access to courts, and establish alternative dispute resolution mechanisms figure in many reform packages. Other common reforms include strengthening legislatures, tax administrations, and local governments.

Type three reforms aim at the deeper goal of increasing government's compliance with law. A key step is achieving genuine judicial independence. Some of the above measures foster this goal, especially better salaries and revised selection procedures for judges. But the most

crucial changes lie elsewhere. Above all, government officials must refrain from interfering with judicial decision making and accept the judiciary as an independent authority. They must give up the habit of placing themselves above the law. Institutional reforms can help by clarifying regulations, making public service more of a meritocracy, and mandating transparency and other means of increasing accountability. The success of type three reform, however, depends less on technical or institutional measures than on enlightened leadership and sweeping changes in the values and attitudes of those in power. Although much of the impetus must come from the top, nonstate activities such as citizen-driven human rights and anticorruption campaigns can do much to help.

### **The Global Picture**

Probably the most active region for rule-of-law reform has been Eastern Europe. Since 1989, most Eastern European societies have taken significant steps to de-Sovietize and broadly reform their legal systems. They have rewritten constitutions and laws and initiated key changes in their legal institutions. Many government officials have begun accepting the law's authority and respecting judicial independence. The Czech Republic, for example, has made major progress on judicial independence, and Hungary has recently launched a comprehensive judicial reform package. Thorough institutional reforms, however, are taking longer than many hoped, and some countries are falling short. The leaders of Croatia and Serbia continue to trample basic rights, and Slovak government institutions show contempt for the Constitutional Court's rulings. Nonetheless, the overall picture in the region has encouraging elements.

Latin America also presents a positive, if mixed, profile. Since the early 1980s constitutionally based, elected governments have been established almost everywhere in the region. Most Latin American governments have acknowledged the need for rule-of-law reform and are taking steps toward it, or at least proclaiming that they will. But judicial and police reform has run into walls of bureaucratic indifference and entrenched interests. A few countries, notably Chile and Costa Rica, have made progress, while others, such as El Salvador and Guatemala, may only now be getting serious about it. The will to reform has been lacking, however, in Argentina and Mexico, which have the necessary human and technical resources but whose political and economic development are being hampered by their weak rule of law.

Many Asian governments have begun to modify laws and legal institutions, primarily related to commercial affairs. This is the project of countries seeking to consolidate and advance economic progress, such as Malaysia, Taiwan, South Korea, and even China, as well as those hoping to get on the train, such as Vietnam. These reforms generally stop short of subordinating government's power to the law and are better understood as efforts to achieve rule by law than the rule of law. South Korea is almost alone in taking these efforts beyond the commercial domain and seriously attacking government impunity and corruption, as evidenced by the recent conviction of former South Korean Presidents Chun Doo-hwan and Roh Tae-woo on corruption charges. The Asian financial crisis highlighted the failure of the region's various rule-of-law reforms to bring transparency and accountability to the dealings of the ingrown circles of privileged bankers, businessmen, and politicians. Pressure for more reform, both from within Asia and from the international financial community, is growing.

The situation in the former Soviet Union is discouraging. Although the Baltic states have made major strides in depoliticizing and revitalizing their judicial systems, few other post-Soviet states have achieved much beyond limited reforms in narrow areas of commercial law. Their legal institutions have shed few of their Soviet habits and remain ineffective, politically subordinated, and corrupt. Russia's difficulties in achieving the rule of law are the weakest link in the postcommunist transformation of Russian society. The government has attempted a number of reform initiatives, including the drafting of new civil and criminal codes. These have been neutralized, however, by the ruling elite's tendency to act extralegally and by the new private sector's troubling lawlessness.

Although more than thirty sub-Saharan African countries have attempted political and economic transitions since 1990, rule-of-law reform is still scarce on the continent. The issue is coming to the fore in both those countries attempting to move halting transitions along and those hoping that "transitional justice" mechanisms such as truth commissions and war crimes tribunals can help overcome the bitter legacy of the past. By far the most positive case is South Africa, where a far-reaching program to transform the administration of justice is under way. In at least a few other countries, including Botswana, Tanzania, and Uganda, less dramatic but still important progress has been made toward the reform of laws and law-related institutions, including the modernization of some

commercial laws and stronger support for the judiciary. But in many countries of the region, the legal systems remain captive of the powers that be.

The Middle East shows the least legal reform activity of any region. Some Arab countries, among them Jordan, Lebanon, and Kuwait, are at least attempting reform in the commercial domain, such as in the mechanisms necessary to establish stock markets or otherwise attract foreign investment. Institutional change is more sporadic, ranging from the surprisingly bold reform plans announced by the government of Oman to Egypt's judicial reforms, whose seriousness is still unclear.

Rule-of-law reform is at least a stated goal of many countries. Globally there has been a great deal of legal reform related to economic modernization and a moderate amount of law-related institutional reform, but little deep reform of the higher levels of government. Around the world, the movement toward rule of law is broad but shallow.

### **Legal Aid**

Most governments attempting rule-of-law reform are not doing so on their own. Assistance in this field has mushroomed in recent years, becoming a major category of international aid. With a mix of altruism and self-interest, many Western countries have rushed to help governments in Eastern Europe and the former Soviet Union carry out legal and institutional reforms. Russia's legal and judicial reforms, for example, have been supported by a variety of U.S. assistance projects, extensive German aid, a \$58 million World Bank loan, and numerous smaller World Bank and European Bank for Reconstruction and Development initiatives, as well as many efforts sponsored by Great Britain, the Netherlands, Denmark, and the European Union. Asia and Latin America are also major recipients of rule-of-law aid, with a focus on commercial law in Asia and on criminal and commercial law in Latin America. Africa and the Middle East have received less attention, reflecting the smaller degree of reform that countries there have undertaken.

A host of U.S. agencies underwrite such aid, including the U.S. Agency for International Development, the Justice and Commerce Departments, and the Securities and Exchange Commission. Coordination is poor and turf battles are common. The rapid expansion of U.S. rule-of-law aid exemplifies the only partially successful U.S. response to the challenges of the post-Cold War era. Many programs have sprung up to address these emerging issues, but officials have done far too little to ensure that they are well designed, consistent, and coherent.



Almost every major bilateral donor, a wide range of multilateral organizations—especially development banks—and countless foundations, universities, and human rights groups are getting into the act. In most countries, U.S. rule-of-law assistance is a small part of the aid pool, although Americans frequently assume it is of paramount importance. They mistakenly believe that rule-of-law promotion is their special province, although they are not alone in that. German and French jurists also tend to view their country as the keeper of the flame of civil code reform. British lawyers and judges point to the distinguished history of the British approach. Transitional countries are bombarded with fervent but contradictory advice on judicial and legal reform.

Donors sometimes determine rule-of-law reform priorities. Enormous amounts of aid are granted for writing or rewriting laws, especially commercial laws. Hordes of Western consultants descend on transitional societies with Western legal models in their briefcases. Judicial training courses run by Western groups have become a cottage industry, as have seminars on conflict resolution. Aid providers are expanding their rule-of-law efforts to reach parliaments, executive branch agencies, and local governments. Assistance also extends to civic groups that use law to advance particular interests and nongovernmental organizations that push for reform.

### **The Net Effect**

The effects of this burgeoning rule-of-law aid are generally positive, though usually modest. After more than ten years and hundreds of millions of dollars in aid, many judicial systems in Latin America still function poorly. Russia is probably the single largest recipient of such aid, but is not even clearly moving in the right direction. The numerous rule-of-law programs carried out in Cambodia after the 1993 elections failed to create values or structures strong enough to prevent last year's coup. Aid providers have helped rewrite laws around the globe, but they have discovered that the mere enactment of laws accomplishes little without considerable investment in changing the conditions for implementation and enforcement. Many Western advisers involved in rule-of-law assistance are new to the foreign aid world and have not learned that aid must support domestically rooted processes of change, not attempt to artificially reproduce preselected results.

Efforts to strengthen basic legal institutions have proven slow and difficult. Training for judges, technical consultancies, and other transfers

of expert knowledge make sense on paper but often have only minor impact. The desirability of embracing such values as efficiency, transparency, accountability, and honesty seems self-evident to Western aid providers, but for those targeted by training programs, such changes may signal the loss of perquisites and security. Major U.S. judicial reform efforts in Russia, El Salvador, Guatemala, and elsewhere have foundered on the assumption that external aid can substitute for the internal will to reform.

Rule-of-law aid has been concentrated on more easily attained type one and type two reforms. Thus it has affected the most important elements of the problem least. Helping transitional countries achieve type three reform that brings real change in government obedience to law is the hardest, slowest kind of assistance. It demands powerful tools that aid providers are only beginning to develop, especially activities that help bring pressure on the legal system from the citizenry and support whatever pockets of reform may exist within an otherwise self-interested ruling system. It requires a level of interventionism, political attention, and visibility that many donor governments and organizations cannot or do not wish to apply. Above all, it calls for patient, sustained attention, as breaking down entrenched political interests, transforming values, and generating enlightened, consistent leadership will take generations.

The experience to date with rule-of-law aid suggests that it is best to proceed with caution. The widespread embrace of the rule-of-law imperative is heartening, but it represents only the first step for most transitional countries on what will be a long and rocky road. Although the United States and other Western countries can and should foster the rule of law, even large amounts of aid will not bring rapid or decisive results. Thus, it is good that President Ernesto Zedillo of Mexico has made rule-of-law development one of the central goals of his presidency, but the pursuit of that goal is certain to be slow and difficult, as highlighted by the recent massacre in the south of the country. Judging from the experience of other Latin American countries, U.S. efforts to lighten Mexico's burden will at best be of secondary importance. Similarly, Wild West capitalism in Russia should not be thought of as a brief transitional phase. The deep shortcomings of the rule of law in Russia will take decades to fix. The Asian financial crisis has shown observers that without the rule of law the Asian miracle economies are unstable. Although that realization was abrupt, remedying the situation will be a long-term enterprise.

These lessons are of particular importance concerning China, where some U.S. policy makers and commentators have begun pinning hope on the idea that promoting the rule of law will allow the United States to support positive economic and political change without taking a confrontational approach on human rights issues. But China's own efforts to reform its law are almost twenty years old and have moved slowly, especially outside the economic domain. Statements by U.S. officials and increased flows of rule-of-law assistance are unlikely to speed up the process, judging from the rule-of-law programs that have been operating in China for years. Rule-of-law promotion should be part of U.S. policy toward China, but it will not increase U.S. influence over that country. Nor will it miraculously eliminate the hard choices between ideals and interests that have plagued America's foreign policy for more than two centuries.

**Note**

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