

---

# Rule of Law Temptations

THOMAS CAROTHERS

---

In an article I published in *Foreign Affairs* ten years ago, entitled “The Rule of Law Revival,” I called attention to a striking trend—the rise in international policy circles of attention to and concern over strengthening the rule of law in countries around the world.<sup>1</sup> Suddenly, I wrote, it seemed that discussion of the rule of law was everywhere and that its development was being held out as the answer to a multitude of diverse policy challenges, whether it was how Russia could consolidate its shaky transition away from communism, how China could solidify its meteoric economic growth, or how Mexico could resist the capture of its state institutions by narco-traffickers.

I attributed this noteworthy rise to the rule of law appearing to move forward with both halves of the economic and political transition that, in the 1990s, had become the defining framework for changes in much of the developing and post-communist worlds. That is, rule-of-law development would facilitate economic transitions to the market model by helping achieve legal and institutional predictability and efficiency in a variety of areas crucial to the operation of a market economy. It would also help bolster fledgling democratic experiments by undergirding new constitutions, electoral systems, and political and civil rights. Moreover, progress on the rule of law would help alleviate two serious problems—corruption and ordinary crime—whose growing severity in many countries appeared to be the major negative side effects of the many attempted economic and political transitions. In short, I argued, rule-of-law development owed its new prominence in international policy circles to its apparent promise of being “an elixir of transitions.”

---

*Thomas Carothers is vice president for studies at the Carnegie Endowment for International Peace. He is the author or editor of many books and articles on democracy promotion and rule-of-law assistance including, Promoting the Rule of Law Abroad: In Search of Knowledge (Carnegie, 2006). This article is based on a chapter that will appear in James Heckman, Robert L. Nelson, and Lee Cabatingan, eds., Global Perspectives on the Rule of Law (Routledge-Cavendish, forthcoming 2009).*

---

In the intervening ten years, international attention to rule-of-law development has not only continued to increase, but also political leaders worldwide have asserted a commitment to building the rule of law. Officials in donor countries have expressed a determination to help support rule-of-law development worldwide, and the number of organizations and initiatives dedicated to rule-of-law assistance keeps multiplying. The rule-of-law field continues to radiate an almost constant sense of discovery. Policy actors and aid practitioners keep discovering it and become seized with enthusiasm for the rule of law. They are often surprised to learn that what seems to them a vital discovery is in fact a relatively late arrival to a revival that has been going on for quite some time.

*This continued rise of the rule-of-law star reflects the fact that the connections between the rule of law to economic and political development . . . are real.*

They are often surprised to learn that what seems to them a vital discovery is in fact a relatively late arrival to a revival that has been going on for quite some time.

This continued rise of the rule-of-law star reflects the fact that the connections between the rule of law to economic and political development, although perhaps not as straightforward

as some early enthusiasts presumed, are real. In the economic domain, the simplistic idea that the rule of law automatically fosters economic growth has come under useful critical scrutiny.<sup>2</sup> Yet, at least some positive link appears plausible and is enough to animate many aid practitioners.

In the political domain, the problems encountered by many countries with regard to democratization have only strengthened the view of several Western policy experts that the rule of law is a necessary focus. Faced, for example, with the disappointing slide in Russia toward soft authoritarianism, some Western observers conclude that the West's (and Russia's) mistake was insufficient focus on the rule of law early on after the collapse of the Soviet Union. The catastrophic problems in Iraq after the ouster of Saddam Hussein prompted a similar conclusion on the part of some U.S. observers who argued that a greater rule-of-law aid effort should have preceded the democracy-building project. When the Muslim Brotherhood made a surprisingly strong showing in the 2005 parliamentary elections in Egypt, some analysts cautioned that the country should not move ahead with a political opening until it first consolidates the rule of law.

Moreover, the rule of law has gained further impetus in this decade from the continued advance of globalization. By the late 1990s, it was already becoming clear that globalization tends to increase incentives and even pressures for rule-of-law development both within and among countries. Countries seeking a share of the increasing flow of capital and goods

across borders find that weak rule of law can be an obstacle. Weak legal protection for foreign investors, for example, can discourage foreign direct investment. High levels of crime and corruption can have similar effects. The increasing flows of goods and capital create a need for regulating and managing them, which stimulates rule-of-law development.

In this decade, globalization has proven to be less benign and much less a process of spreading Western norms than many U.S. observers believed or hoped it would be ten years ago. Nevertheless, its intensification continues to bolster the need for rule-of-law development in many countries. For many Americans, globalization has come in this decade to be associated with challenges or even threats to the United States, whether it is the rise of new economic powers or the unsettling use of the tools of global communications by al Qaeda and other terrorist groups. Yet even as globalization changes in character, almost every element of it—be it the remarkable increase in flows of information via the Internet, the diversification of transnational civil society, or the heightened movement of service industries across borders—implies some sort of rule-of-law development as either a facilitator or a counterweight.

In this context of ever-increasing interest and often enthusiasm for rule-of-law development among Western policymakers and aid practitioners, a tendency exists toward uncritical and sometimes wishful thinking about the subject. Some of these lines of thought represent what can be described as temptations, to believe certain things about the rule of law and its place on the international stage that are misleading and sometimes unhelpful. At least four such temptations—concerning consensus, reductionism, sequencing, and ease—are identifiable and deserve attention.

### CONSENSUS

The degree of apparent international consensus on the value and importance of the rule of law is striking. Almost all other parts of the Western donor consensus concerning what is good for other countries are hotly debated. For example, the desirability of “the Washington consensus” as an economic prescription for developing countries is argued about constantly in both developed and developing countries. What is informally termed a “consensus” is in fact a constant source of controversy. On the political front, although liberal democracy appeared for a time to be gaining nearly universal normative acceptance, it is questioned these days by practitioners of “authoritarian capitalism,” Bolivarian democracy, Islamic revolutionary democracy, or other alternative political systems. In

contrast, almost no leader anywhere is openly against the rule of law or will publicly mount an argument that the rule of law is a bad idea for his or her society. And ordinary citizens almost everywhere will respond very positively to commitments by politicians to strengthen the rule of law.

This wide consensus concerning the rule of law is impressive. Yet one must be careful about attributing too much significance to it. In the first place, affirmations by powerholders of their commitment to advancing the rule of law often do not translate into real action. Many leaders in developing or post-communist countries are elected these days on the basis of promises to reduce corruption, restore law and order, and other elements of a rule-of-law agenda. In fact, anticorruption has become one of the key issues in electoral campaigns in many countries, developed or developing. Yet these stern promises tend to melt in the heat encountered when new leaders confront the entrenched, countervailing interests that undergird the existing patterns of corruption. And dispiritingly often, the new leaders end up reproducing the old forms of corruption, or inventing their own. Hugo Chávez came to power decrying Venezuela's endemic corruption, yet his rule has come to be marked by as much or even greater corruption. Relatively few citizens of countries in the former Soviet Union, South America, sub-Saharan Africa, South Asia, and elsewhere would say that the apparent global consensus on the importance of the rule of law has translated into actual marked improvement of the state of law in their societies.

Second, even to the extent that the many stated commitments by politicians, donor representatives, and others to the rule of law are real, the concept is so capacious that it is open to significantly different interpretations and operational emphases. Sometimes the differences are rooted in ideology. Conservatives often embrace the rule of law as a desirable developmental objective because they find in it things they especially value, such as property rights, fair treatment of foreign investors, strong police, and a general emphasis on law and order. Persons on the left, however, read the concept differently. They see in it a focus on rights and on fair and equal treatment for all, a focus that will help boost disadvantaged people and empower citizens generally. Meanwhile, centrists are drawn to the rule of law as a technocratic ideal, one that encompasses key elements contributing to good governance, such as governmental accountability, transparency, and anticorruption.

These ideological differences exist both among donor actors supporting rule-of-law development and among persons within the society in question. In Colombia, for example, rule-of-law reform has been intensely politicized for many years. This is true among the various U.S.

actors engaged in the subject, which range from the Department of Justice and the U.S. Agency for International Development to various human rights groups. It is similarly true within Colombian society itself where the contending political forces have often disagreed about the best approach to rule-of-law reform.

Differences over the meaning of rule-of-law development are not necessarily always ideologically based. Sometimes they simply reflect varied professional perspectives. When asked to contribute to rule-of-law reform, for example, judges will tend to emphasize the importance of judicial reform. Police will argue for the need to supplement resources for law enforcement. Lawyers will highlight the potentially valuable role of bar associations. Mediation specialists will note the value of increased emphasis on arbitration and mediation, and so forth. Furthermore, different aid organizations that support rule-of-law development also have their own specialties and preferences within the diverse corpus of rule-of-law development activities. Within one country context, different organizations will tend to push for their own varied areas of specialization.<sup>3</sup>

As a result, when diverse national and international actors gather and agree that they are all committed to helping build the rule of law in a particular country or context, they usually agree on much less than it initially appears.

.....  
*When diverse national  
 and international actors  
 . . . agree that they are all  
 committed to helping build  
 the rule of law . . . they  
 usually agree on much less  
 than it initially appears.*  
 .....

They may all proceed with a putatively common rule-of-law agenda but in practice pursue quite different preoccupations, either in relative isolation from one another or sometimes at cross purposes.

**REDUCTIONISM**

As international attention to rule-of-law development increased during the 1980s and 1990s, the definition of rule of law became more inclusive. Early on, some rule-of-law aid actors, particularly those who came to their work primarily out of a concern for economic development, inclined toward a relatively formalist or proceduralist conception of the rule of law. Such a conception stresses procedural fairness and institutional inefficiency. It leans in the direction of rule *by* law as much as rule of law. Over these two decades, however, supporters of a broader conception of the rule

of law gained ground in international development circles. This broader conception holds that the rule of law is about substantive outcomes, not just procedural norms. It views basic political and civil rights as essential to ensuring justice and an integral part of the rule of law.

The growing inclusiveness helped tie the rule-of-law agenda together with the democratization agenda. Promoting rule-of-law development entailed supporting the institutionalization of core democratic rights. And supporting democracy helps bolster basic elements of rule-of-law development. Some organizations engaged in rule-of-law support, such as the World Bank, maintained an official neutrality regarding political development. In practice, however, the broadening of their work on the rule of law made it increasingly compatible with and sometimes similar to rule-of-law work carried out by organizations that expressly incorporated a pro-democracy rationale.

In this decade that process of inclusion has met a counter-trend. As more authoritarian and semi-authoritarian governments publicly embrace a rule-of-law agenda, they tend to prefer the more reductive, proceduralist

.....  
*As more authoritarian  
 and semi-authoritarian  
 governments publicly embrace  
 a rule-of-law agenda, they  
 tend to prefer the more  
 reductive, proceduralist  
 conception of it.*  
 .....

conception of it. They promise citizens fairness and efficiency but steer clear of the rights element of the rule of law. Thus they seek to break the tie between advancing the rule of law and building democracy. This is evident with the two largest challengers of the Western democratic line, the current governments of Russia and China. Vladimir Putin came to office in Russia promising a rule-of-law presidency and he held to that line (at least rhetorically)

even as he moved the country away from its earlier democratic experiment. Russia's new president, Dmitri Medvedev, has struck a similar note, emphasizing his commitment to rule-of-law reform, even as he continues the pattern of limited political openness. China's rulers have responded to rising citizen anger and unrest over corruption and poor local governance by carrying out some rule-of-law reforms, yet they continue to restrict political contestation and political freedom. In all these countries, strong-hand rulers have found that the rule of law works well as an alternative objective to democratization, not one that complements it but rather one that will help preserve authoritarian or semi-authoritarian rule. Thus in this decade, the continued growth of international attention to the rule of

law in some countries involves greater reductionism rather than inclusion. The growing attention is thus as much about the fraying of an international consensus on political values as it is about a growing political convergence. Western policy actors, often eager to find signs of positive change or at least positive intent from those governments, salute their rule-of-law promises, overlooking the damage that the reductionism may cause to the health of the broader rule-of-law agenda.

**SEQUENCING**

Another unhelpful temptation concerning the rule of law that has gained ground in international policy circles in this decade is that of sequencing—the idea that transitional countries should not pursue rule-of-law development and democratization together but rather in sequence, first building the rule of law and only after that turning to democratization. The thinking is that until a country is a well-functioning state that enjoys a reasonable level of economic development and the rule of law, it is not ready for democracy. The growing reach of this idea connects to the tendency toward reductionist thinking about the rule of law—seeing rule-of-law development and democratization as distinct processes rests on a narrow, proceduralist conception of the rule of law.

The new enthusiasm for sequencing on the part of some influential Western scholars and policy experts reflects their concerns over what they see as the high risks involved when countries with weak states and weak rule of law, and little experience with political pluralism, attempt rapid processes of democratization.<sup>4</sup> Such risks include the emergence of illiberal democracies and the outbreak of civil or interstate conflict. The cases of genocide in Rwanda and Burundi in the early 1990s are cited as examples. So too are the cases of conflict among the former Yugoslav republics in the 1990s. Sequentialists believe that by first developing the rule of law, traditionally authoritarian societies will create the necessary mechanisms and habits of control and restraint to ensure that potentially chaotic or unpredictable processes of mass political participation do not get out of hand. They buttress their arguments in favor of sequentialism for transitional countries with the argument that this was the pattern followed in the 18th and 19th

.....  
*Sequentialism is indeed appealing not only to scholars and policy experts concerned about economic and political transitions going awry.*  
 .....

centuries by what are now the well-established democracies of Europe and North America.

Sequentialism is indeed appealing not only to scholars and policy experts concerned about economic and political transitions going awry. Authoritarian and semi-authoritarian power-holders also readily embrace the idea. Chinese officials are fond of stressing the need for China to modernize its state and achieve progress in the rule of law before democratizing. Arab autocrats like Egyptian President Hosni Mubarak make the same argument; it gives these leaders a principled justification for blocking or avoiding democratization. In the sequentialist paradigm, putting off democratization, which usually means imposing and maintaining repressive political control, becomes not an authoritarian maneuver but actually the correct path toward eventual democratization.

Sequentialism is indeed an appealing idea. It promises to bring order and rationality to what might otherwise be uncertain, dangerous processes of sociopolitical change. Unfortunately, however, it is a flawed idea.<sup>5</sup> Societies need a certain basic level of order and the presence of basic institutions of a state before they should attempt the establishment of political pluralism and active political contestation. Yet the idea that societies should live with authoritarianism until they develop full-fledged rule of law and a well-functioning state is also mistaken.

The core flaw in these ideas is the notion that authoritarian leaders will in fact take their societies along the road to the rule of law. The image of the austere, wise autocrat who slowly but systematically builds the rule of law may be attractive, but it is much more the exception than the norm. The developing world is crowded with countries that have suffered punishing abuses and developmental failures under authoritarian leaders who promised to advance the law and build the state as a foundation for eventual democratization. The chronic weakness of the state and of the rule of law in almost all of Latin America, for example, is the consequence of generations of authoritarian rule there, rule that often claimed to be seeking the strengthening of the state and of law. The same is true in sub-Saharan Africa. Only a few autocratic leaders of developing countries have in fact delivered on such pledges, primarily in a small set of Asian countries that are exceptional in various ways. In general, describing continued authoritarianism as a cure for what is in fact a characteristic weakness of authoritarian rule—haphazard state building and low respect for the rule of law—is a curious idea.

Although autocrats' strong emphasis on order and control may seem a natural lead-in to rule-of-law development, authoritarian leaders have



strong structural reasons to abridge and avoid true rule-of-law development. They may like to use law as an instrument of state control. But cardinal features of the rule of law—establishing a truly independent judiciary, subordinating government officials to the law, treating all citizens in accordance with basic principles of legal fairness, and respecting political and civil rights—threaten the power and hold of authoritarians. As a result, they usually resist and undermine reforms that would take their country closer to such practices, no matter how lofty their promises of commitment to the rule of law. The arc from gilded promise to open failure on rule-of-law development is all too familiar in the developing world.

The rule of law is by no means easy or automatic for democracies. Fledgling democratic governments certainly struggle with rule-of-law development. New political elites .....  
 often fall into corruption. Democratic governments may focus only on short-term survival rather than longer-term institutional reform. Popular pressures on such governments for anticrime measures may lead more to abridg-

*The rule of law is by no means easy or automatic for democracies.*

ments of rights rather than genuine rule-of-law reforms. Even established democracies can fall short on the rule of law. Italy has been a democracy for generations, yet it suffers from some chronic deficiencies in this regard. The United States in recent years has been the subject of withering criticism from other countries for its abuses of the rule of law at counterterrorism detention facilities in different parts of the world.

Nevertheless, unlike autocratic governments, democratic governments do not face any intrinsic or structural clash between the rule of law and their hold on power. Creating alternative centers of power, treating citizens evenhandedly, and respecting rights are all integral not just to building the rule of law but also to deepening democracy. Moreover, certain elements of democracy actively help foster the rule of law. Alternation of power, for example, helps break up established concentrations of influence and control within state institutions, thereby reducing corruption and increasing accountability. Freedom of the press, which rarely exists under authoritarianism but often under democracy, is a powerful mechanism for bringing attention to legal abuses by power-holders and helping to build the rule of law.

A related flaw in the sequentialist outlook is the notion that democratization can simply be put off for some extended period of time while the rule of law is achieved. This idea ignores the fact that over the last

two decades the norm of democratic participation has spread widely in the world. When authoritarian governments lose their grip and collapse, as in Indonesia in the late 1990s, citizens usually push for elections, no matter how ill-prepared the country may be for democracy according to classic “preconditions analysis.” Some authoritarian governments are able to put off citizen pressures for greater participation through successful economic performance. In most cases, these are oil-rich states benefiting from revenue bonanzas, although China and Vietnam have managed to do so through impressive economic growth generated through manufacturing export-driven growth.

Finally, the idea that sequentialism is the formula that produced successful, stable democracies in the West is at best an oversimplification and largely a myth. Take the United States as one example. The young United States did not first achieve a well-functioning rule of law and then gradually add democratization bit by bit on top of that foundation. The rule of law and democracy developed in a complex, interactive process

.....  
*It was only in the twentieth century that both a relatively well-functioning rule of law as well as a relatively well-functioning democracy came to define the American national experience.*  
 .....

in which both moved ahead by fits and starts. During the nineteenth century, the United States fell short in significant ways in both the rule of law (frontier justice in the American West hardly represented a well-functioning rule of law) and in democratization (slavery being the most egregious but hardly the only violation of democratic principles). It was only in the twentieth century that both a relatively well-functioning rule of law as well as a rela-

tively well-functioning democracy came to define the American national experience. Sheri Berman argues that the same pattern of complex interweaving of rule-of-law development and democratization also characterized Europe’s path in the modern era.<sup>6</sup>

#### EASE

As attention to the promotion of the rule of law as an element of international assistance has continued expanding in this decade, this agenda has moved well beyond the circle of development and democracy specialists into the broader foreign policy community. Diplomats, military officials, law enforcement agents, policy pundits, politicians, and others

now regularly join the international conversation about rule-of-law development, offering advice and opinions. As the conversation widens, one hears more references that imply that the task of rule-of-law building is relatively straightforward and even quick, at least compared to democracy building. Thus, for example, the laments in Western policy circles that a better outcome in Russia would have occurred if Western governments had focused more on rule-of-law development immediately after 1991 imply that the rule of law could have come about more easily and expeditiously than democracy.

The notion that one can, with relative ease, help another country foster the rule of law is a familiar idea, one that existed within the aid community in the 1960s, at the start of the first wave of rule-of-law aid programs, the Law and Development Movement, and in the 1980s during the early years of the current generation of rule-of-law programs. It was rooted in the tendency (common among U.S. rule-of-law enthusiasts) to see rule-of-law development as either a naturalistic process that will unfold organically once the correct ideas are injected into the target country or a technocratic process that can proceed almost by logic alone. In both cases, however, the difficult experience of trying to convert noble donor ambitions into successful accomplishments chastened practitioners. They learned that rule-of-law assistance is, like almost all forms of external aid, at best, a modest helping hand and that processes of rule-of-law development almost always encounter formidable obstacles. Although practitioners have not given up in the face of the chastening that they have experienced, they have largely recalibrated their expectations about what can be accomplished and in what time frame, ratcheting them downward to more realistic levels.

In contrast, the wider circle of people coming into the arena of rule-of-law development in the past ten years lack this experience and often appear determined to repeat the same cycle of overly optimistic starting assumptions and eventual chastening experience. It is enough to read the accounts of the simplistic sorts of rule-of-law building programs that the U.S. military put in place in Iraq after the ouster of Saddam Hussein—sending over groups of U.S. judicial experts with no experience in the Arab world and no grounding in the Iraqi legal culture to advise on a rapid rebuilding of the Iraqi judicial system—to see this pattern at its worst.

What Western policymakers, diplomats, military officials, political observers, and others are overlooking in their enthusiasm for the rule of law as a response to troubled transitions is that achieving the rule of law involves far more than getting judges trained, putting modern police equipment in place, and reprinting and distributing legal texts. It is a transformative

process that changes how power is both exercised and distributed in a society and thus a process inherently threatening to existing power-holders. It also involves basic changes in how citizens relate to state authority and also to one another.

Arguably, achieving the rule of law is a more complex and deep-reaching challenge than democratization. In its barebones forms, democratization is primarily a process of organized political contestation that can leave many

..... other societal structures relatively intact. In contrast, law cuts through almost every part of the political, economic, and social domains. Elites in many societies have demonstrated the ability to accommodate democratization without either losing their privileged place in society or changing their ways very much. Yet they have often resisted or evaded key rule-of-law reforms, like subordinating power to law, as being too threatening.

*Arguably, achieving the rule of law is a more complex and deep-reaching challenge than democratization.*

## CONCLUSIONS

The rule-of-law agenda has tremendous potential value and importance on many fronts. It is an area that was relatively neglected for many years in the existing development paradigms, both those focused on economic development and those on political development. It can serve as a vital connective tissue linking many elements of concern in societies emerging from authoritarian rule in today's globalizing world. It has a usefully non-ideological appeal in an international climate of heightened sensitivity about ideological imposition. It is precisely because of these qualities, however, that it is easily the object of the various temptations described herein. These include overestimation of the level of consensus about what rule-of-law building means in practice, a tendency toward reductionistic views that narrow the rule of law to rule by law, the false promise of sequentialism, and underestimation of the difficulty of the task.

These temptations do not represent potentially fatal threats to the agenda or grave dangers to the countries involved. They do, however, risk sending rule-of-law promoters down wrong paths that can result in wasted efforts and bad policy decisions. These temptations are a result of a complicated and sometimes clashing mix of factors. To some extent they are the product of enthusiasm—the enthusiasm of many rule-of-law assistance providers who believe fervently in the centrality and naturalness of

the rule-of-law agenda. Yet they are also in part a result of cynicism, the cynicism of powerholders in unfree or partly free societies who use the rule-of-law banner to legitimate their own anti-democratic actions. They are also almost inevitable products of an international context in which a driving overall force—globalization—both points countries all over toward a common set of rule-of-law concerns, yet also entails fissiparous tendencies of division and fragmentation in many specific domains, such as identity and ideology.

Moving ahead, it is essential to keep a sober eye on the uses and abuses of the rule-of-law theme, in order to ward off unrealistic expectations, simplistic formulas, and other similar traps. As with other parts of the world of international policy and assistance that seek to do good on many fronts at once, a healthy dose of analytic as well as practical restraint is likely to increase the longevity of key themes and priorities relating to the rule of law in the years ahead. ■

#### ENDNOTES

- 1 Thomas Carothers, "The Rule of Law Revival," *Foreign Affairs*, March/April 1998, 95-106.
- 2 See for example, Stephan Haggard, Andrew MacIntyre, and Lydia Tiede, "The Rule of Law and Economic Development," *Annual Review of Political Science*, vol. 11, 2008, 205-34.
- 3 On the diversity of agendas in rule-of-law reform and assistance, see Thomas Carothers, "The Many Agendas of Rule-of-Law Reform in Latin America," in *Rule of Law in Latin America: The International Promotion of Judicial Reform*, Pilar Domingo and Rachel Sieder, eds (London: Institute of Latin American Studies, 2001), 4-16.
- 4 See for example, Edward D. Mansfield and Jack Snyder, *Electing to Fight: Why Emerging Democracies Go to War* (Cambridge: MIT Press, 2005) and Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: Norton, 2003).
- 5 For a broader critique of sequencing, see Thomas Carothers, "The 'Sequencing' Fallacy," *Journal of Democracy*, vol. 18, no. 1, January 2007, 12-27. For replies to this critique see, "The Debate on Sequencing," *Journal of Democracy*, vol. 18, no. 3, July 2007, 5-22.
- 6 Sheri Berman, "Lessons from Europe," *Journal of Democracy*, vol. 18, no. 1, January 2007, 28-41.