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Rule of Law

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Many nations, principally in Eastern Europe and Latin America, have in the last two decades undergone democratization and market reforms. The difficulties these nations face in implementing the rule of law, however, have undermined these reforms. The rule of law, therefore, has moved to the center of an intellectual debate concerning how best to engineer the transformations needed for political and economic development to occur. As Thomas Carothers notes, the “concept [of the rule of law] is suddenly everywhere—a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization” (1998: 951).

Oddly, it has not been lawyers but principally social scientists who have made the rule of law an important topic in development studies. The economist Hernando de Soto, for example, argues persuasively that without a functioning legal system, markets and consequently economic development are impossible. Political scientists Fareed Zakaria and Guillermo O'Donnell argue that democracy in the developing world is unlikely to endure without effective rules that cabin political behavior.

Contours of the Rule of Law

The advent of democracies lacking the rule of law not only remade the political map of the world but also transformed research agendas as scholars concerned with developing countries sought to define the rule of law and argued over how best to implement it. Perhaps not surprisingly given the importance and the antiquity of the topic, there is little agreement as to the precise contours of the rule of law. Nevertheless, the concept has a historical core that plays an important role in the Western legal tradition. The rule of law means that government can act only through legal rules and that law checks the power of government. [p. 1330 ↓] Translated into modern terms, the two key components of the rule of law are due process of law and constitutional judicial review.

Due process provides a procedural check on government and is the oldest component of the rule of law. The ideal of due process is that government cannot act against individuals without affording a hearing before a neutral magistrate who applies rules that in principle dispose of other, similar disputes. Due process contributes to the legitimacy

and longevity of government for two reasons. First, all societies are honeycombed with disputes and require, therefore, legitimate mechanisms to resolve disagreements. It is no accident that almost every society throughout history has used a third person to settle disputes. Whether we are talking about a village elder or the judge of the modern state, the “basic political legitimacy of courts” stems from this “overwhelming appeal to common sense” (Shapiro 1981: 1). Second, courts facilitate the social trust and consent that governments need to function well. Courts resolve disputes in a very different manner than do other political actors. The legitimacy of elected officials flows ultimately from the ballot box while the legitimacy of judges rests on the reasons that they provide for their actions. Elected officials are accountable to the electorate; judges are answerable for the explanations they give for their decisions.

Constitutional judicial review provides a substantive and normative check on government and is the newest component of the rule of law. The new democracies of Eastern Europe and Latin America, having recently escaped from the evils of dictatorship, understandably established or sought to strengthen courts with the power to effectuate constitutional guarantees. The mechanisms used to provide constitutional judicial review are extremely varied as they are the complex result of legal borrowing and political compromise. There is a common core to these mechanisms, however, as they rest on an independent constitutional or supreme court with the power to interpret and effectuate written constitutions.

The Un-Rule of Law

Contemporary understandings of the rule of law that emphasize the importance of due process and constitutional judicial review flow from an account of “best practices” among the world's democracies. This understanding is dangerously incomplete, however, for it fails to take into account the difficulties faced by new democracies in implementing the rule of law. Unearthing what the absence of the rule of law, or the un-rule of law, looks like is the key to understanding the rule of law. The un-rule of law is not a passing aberration or pathology but the norm in most of the nations of the world. To uncover what the un-rule of law means, this essay will discuss how comparative lawyers, political scientists, and economists analyze how law operates in the developing world.

Ugo Mattei uses the traditional tool of comparative law—legal taxonomy—to differentiate the legal systems of the West from those of developing nations. Mattei argues that the traditional classification of the world's legal systems into families based on history is of little relevance to problems facing developing nations. He proposes, instead, a classification based on the presence or absence of the rule of law.

Mattei characterizes the Western legal tradition as one with the rule of professional law in which law is separate from politics and other forms of social control such as religion. Consequently, law is autonomous from politics. Developing nations, on the other hand, “enjoy” the rule of political law where politics trumps law. The key features of the political rule of law or the un-rule of law are “weak courts;... high level of instability of existing democratic structures, if any; high level of political involvement in the activity of the judiciary; high levels of police coercion;... continuous attempts at major legal reform; legal culture heavily influenced by foreign models and usually marginalized by the political power; scarcity of legally trained personnel; and a highly bureaucratized public decision making process” (Mattei 1997: 30). Nations with the un-rule of law, therefore, have highly malleable legal systems as political exigencies trump rules.

The impact of the un-rule of law on politics is also profound. In a constitutional democracy, elected leaders are accountable both vertically to the electorate and horizontally to other political institutions. Guillermo O'Donnell argues that democracy in the developing world, on the other hand, is not constitutional but [p. 1331 ↓] delegative democracy because horizontal accountability is lacking. Delegative democracies “rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office” (1994: 59). The un-rule of law manifests itself politically in frequent recourse to the state of siege, since presidents deal with crises by suspending the normal workings of the legal system. They routinely use emergencies as an excuse to trump constitutional guarantees.

This concentration of power, however, undermines rather than facilitates development. In a constitutional democracy, policy making is typically “slow and incremental and sometimes prone to gridlock” (O'Donnell 1994: 62). Mistakes tend to be small and easily reversed. Incremental decision making is less prone to irreversible mistakes and more legitimate as it requires the input of a large number of political actors. In

delegative democracies, on the other hand, leaders can and do make major decisions without support from other political actors. This sort of decision making is attractive to developing democracies because of the manifold ills that they face. Repeated crises, not long-term reforms, however, are the typical outcome of providing elected leaders with so much power. They pursue short-term policies that reward supporters rather than reforms that provide a longterm payoff. Presidents in delegative democracies, in short, lack incentives to strengthen the myriad institutions needed to implement the rule of law.

The Economy and Political System

The impact of the un-rule of law is as profound on economic development as it is on democratic stability. Courts are as marginalized in resolving economic disputes as they are in resolving political disputes. Bureaucrats rather than judges typically handle economic disputes, which are resolved in a manner that will enhance the power of the political leadership rather than according to rules. There are two important consequences to the marginalization of courts.

First, markets are inefficient. Businesses swap political support for rules that favor their interests, which in turn reduces the impact of competition on economic behavior. Second, a bureaucracy accustomed to doling out political favors for political elites is a poor substitute for the rules needed to make markets work. Markets work well when the law facilitates socially desirable behavior. Individuals can contract with others knowing that the legal system will enforce those agreements. If the legal system is a failure, however, individuals will choose to bargain and make deals with only those they know personally and trust. Thus, the very specialization that is a prerequisite for economic growth simply cannot occur without a legal means to protect contract and property rights. Without the trust generated by a working legal system, markets cannot function.

Given the enormous political and economic costs imposed by the un-rule of law, the issue of why national leaders in developing countries have not implemented the rule of law is an enduring mystery. Nations became democratic and adopted economic liberalization packages almost overnight, yet the rule of law has proven difficult to construct. Although this essay does not purport to provide an answer to this problem, it argues that any solution requires that we revisit and reinterpret the core concepts that

underpin the notion of the rule of law—due process and constitutional judicial review—to see how they play out in nations undergoing a series of difficult transitions.

Due Process

The conventional view of due process is that neutral magistrates must make decisions based on general principles or rules. The conventional view, therefore, emphasizes how judges make decisions, rather than how they are implemented. The problem with this view is that it ignores that courts are political as well as legal institutions. As political institutions, courts lack the power of the sword or the purse. The ability of courts to function ultimately hinges on the actions of other actors who are willing to implement those policies.

In developing nations, on the other hand, the linkages between law and politics are problematic. Courts were marginalized from the process of nation building and thus could be ignored by elites with impunity. Law cannot function unless there is a network of other [p. 1332 ↓] actors who are willing to use such decisions as a resource in what is ultimately a political struggle as much as it is a legal one. Margaret Radin makes this point when she concludes: “Rules are created and continue to exist not only because a legislature says so, but also by virtue of their being embedded in [society]. A judge's decision in response to a rule responds necessarily to the community as a whole and not just [to] what the legislature has said (1989: 808–9). Due process of law means that judges must fashion socially relevant rules that provide a payoff to the citizenry.

The ability of judges to play a creative role in constituting the rule of law is influenced by society's legal ideology. Common law judges have important advantages over civil law ones in that the common law has long acknowledged a creative role for judges while the civil law ideal is that judges should be subservient to the other branches in interpreting rules. Jennifer Widner, for example, provides a fine study of how judges in Africa consciously played a creative role in creating a constituency for the “rule of law in common law Africa” (2001: 24). In the developed world, the state makes the law available by publishing decisions, and various interest groups then seek out those decisions to use as resources in achieving their aims. This linkage is lacking in the underdeveloped world. The problem was acute in common law Africa where customary

law was an important component of the legal landscape. The solution was to build “legal literacy” by educating the public about the law and by creating decisions that would be relevant to those who would otherwise resort to customary law to settle disputes. Constructing the rule of law is a long-term process that hinges on courts producing outcomes that consumers can use and on societal attitudes shifting in favor of the law as citizens realize it favors their interests.

Constitutional Judicial Review

It is not only due process that needs to be revisited and reinterpreted for us to understand the rule of law but also the concept of constitutional judicial review. In particular, we need to plumb the depths of a myth that lies deep in the Western consciousness of what constitutes the rule of law. The hero in this myth is Justice John Marshall in *Marbury v. Madison*, 5 U.S. 137 (1803), who is deemed to have single-handedly established judicial review. Marshall contrasted the rule of law with the rule of men or the un-rule of law. He almost offhandedly concluded that the solution to the un-rule of law was “too plain to be contested” as a written constitution “controls” any political act “repugnant” to it.

The problem with Marshall's view is that if written constitutions and independent supreme courts with the power to interpret those documents were the sole prerequisites for establishing the rule of law, it would be impossible to understand why developing nations failed to limit political power by means of constitutional review. Constitutional judicial review plays a role in consolidating democracy not because judges are independent, but because they are not completely independent. This balance facilitates the long-term development of the judiciary as both a countervailing and accountable institution.

The price for the power granted the judiciary to review the constitutionality of legislation is that the political branches retain important checks on the judiciary, such as the power to name judges, to control judicial jurisdiction, and to enforce judicial decisions. Because of these political checks on judicial power, the judiciary must be strategic in making decisions and take into account the interests of other political actors and the citizenry. Constitutional judicial review was not created in one fell swoop when

Marbury v. Madison was decided, but was the long-term consequence of a judiciary that was “flexible and nondogmatic” and responsive to the “drift of public opinion and the distribution of power in the American Republic” (McCloskey 2000: 208).

Conclusion

In short, scholars will be unable to understand the rule of law if they simply view it through the lens of the best practices in well-developed democracies. Conventional accounts of the rule of law focus on the twin requirements that government must act through and under the law. Due process of law and constitutional judicial review are necessary in recently democratized nations [p. 1333 ↓] to sustain political and economic development. The problems that these nations face in building the rule of law, however, demonstrate that the rule of law faces in two directions, one legal, the other political.

The two key components of the rule of law rest on political processes. Due process of law means that judges must articulate reasons for their decisions so that other actors can use those decisions as resources to advance their interests. A society that lacks due process of law is one where the law has no social relevancy because the linkages between law and society are broken. Constitutional judicial review means that the judiciary is somewhat but not too independent so that it can be a countervailing and accountable force in politics. The rule of law does not rest on negating politics but on designing the proper linkages between courts and other political actors.

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See also

- [Administrative Law and Agency Accountability](#)
- [Authoritarian Regimes and Courts](#)
- [Comparative Legal Systems](#)
- [Constitutional Courts](#)
- [Constitutional Law, Doctrinal Issues in](#)

- [Constitutional Law, Politics of](#)
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