

What is the Rule of Law?

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“Economic growth, political modernization, the protection of human rights, and other worthy objectives are all believed to hinge, at least in part, on ‘the rule of law.’”

--World Bank, The Rule of Law as a Goal of Development Policy

I. Introduction to the Rule of Law

Politicians, lawyers, economists and policy-makers often use the term “rule of law” to characterize a certain type of legal-political regime. As the pace of globalization has increased in the past two decades, many developing countries have prioritized their policy agendas to promote the rule of law. This FAQ provides an introductory explanation of the concept of the rule of law and how it relates to development. It concludes with a brief description of some of the criticisms that have been made about the concept of the rule of law.

II. What is the Rule of Law?

The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Generally, however, it can be understood as a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. In the most basic sense, the rule of law is a system that attempts to protect the rights of citizens from arbitrary and abusive use of government power.

A. Elements of the Rule of Law

In his book *The Morality of Law*, American legal scholar Lon Fuller identified eight elements of law which have been recognized as necessary for a society aspiring to institute the rule of law. Fuller stated the following:

1. Laws must exist and those laws should be obeyed by all, including government officials.
2. Laws must be published.

3. Laws must be prospective in nature so that the effect of the law may only take place after the law has been passed. For example, the court cannot convict a person of a crime committed before a criminal statute prohibiting the conduct was passed.
4. Laws should be written with reasonable clarity to avoid unfair enforcement.
5. Law must avoid contradictions.
6. Law must not command the impossible.
7. Law must stay constant through time to allow the formalization of rules; however, law also must allow for timely revision when the underlying social and political circumstances have changed.
8. Official action should be consistent with the declared rule.

Standing alone, these eight elements may seem clear and understandable. But they are actually difficult to implement in the real world because governments are often compelled to prioritize one goal over another to resolve conflicts in a way that reflects society's political choices. For example, making too many laws that are too detailed and specific may make the legal system too rigid. Inflexibility could cause the courts of a country (judiciary) to neglect the human element of each particular case. Additionally, instead of only applying prospectively, some laws are meant to apply retroactively, or to past conduct, because they were passed with the specific intent of correcting the conduct in question. Fuller recognized these conflicts and suggested that societies should prepare to balance the different objectives listed above.

B. Beyond Fuller's Elements

Fuller's criteria is helpful in understanding the rule of law because it outlines the types of rules, or formal constraints, that societies should develop in order to approach legal problems in a way that minimizes the abuse of the legal process and political power. The rule of law, however, extends beyond mere regulations and is also shaped by the so-called "institutional constraints" on government implied in Fuller's elements. One such institutional constraint is the existence of an independent judiciary; another is developing ways of promoting "transparent governance." Informal constraints, such as local culture or traditions that may encourage citizens to organize their behavior around the law, also help constrain the government, promote liberty and, therefore, define the rule of law. Although still seemingly vague, the rule of law may be most concretely defined as a theory of governance relying upon a series of legal and social constraints designed to encourage order and to prevent arbitrary and unreasonable exercise of government power.

III. The Rule of Law and Development

Multilateral institutions such as the World Bank and many policymakers throughout the world believe the rule of law promotes economic development.

A. Theory

Modern economic development often comes with the introduction of a market economy, or an economy based on private enterprise that does not rely on government-planned production. Max Weber, a famous sociologist and economist, has commented that the capitalistic order upon which a market economy is based is organized upon a rational, law-bound state. The market economy brings buyers and sellers to the market for complex transactions and the international sale of goods. In the age of globalization, players in the market economy can come from many different parts of the world.

Law is important to the market economy because it is the common basis on which parties can make agreements; it provides parties with confidence that disputes can be resolved efficiently and fairly. For this reason, the predictability and order that the rule of law promotes in substantive laws is viewed as the stabilizing force behind much economic development. The rule of law helps set the “rules of the game” in critical areas such as investments, property, and contracts.

The rule of law also serves as an important assurance of social rights and government accountability. Governmental restraint is especially critical for many transitioning economies where a previously planned economy is to be transformed into one that is market-based. When the government is no longer the sole owner of land, capital, and labor, the rule of law guarantees that the crucial elements of the economy will be free from arbitrary governmental actions. The rule of law thus assures market participants that the government will adopt a hands-off approach to investments and production, allowing those participants to fully exercise their rights in relation to land, labor and capital.

B. Important Components of Rule-of-Law Reforms

i. Court Reforms

The efficiency of the courts is an important component in rule-of-law reforms as the existence of a judiciary is a fundamental aspect of the rule of law. For the newly independent states established after the downfall of the U.S.S.R., for example, providing an efficient means of dispute resolution was crucial to

meeting the demands of an increasingly privatized economy. At the most basic level, this simply meant that courts needed to be available to adjudicate disputes and enforce resolutions. For countries that are further along in the reform process, more complex structural reforms that strengthen court capacity (i.e., training judges), independence, and transparency are needed.

To increase accountability and transparency, information technology systems may be installed to provide greater public access. To increase independence of the courts, the government can provide them with funding that will allow them to make their own financial and administrative decisions. Furthermore, for countries that have already established these structural reforms, to encourage the adoption of the rule of law, court performance should be evaluated on a periodic basis. Independence, accountability, efficiency, access, affordability, alternative dispute resolution mechanisms, and the quality of professionals are some of the characteristics that may provide an accurate measurement of the system's success.

An example of success in this area of rule-of-law reform is the Arbitrazh courts in Russia. Established to hear solely economic disputes, the Arbitrazh courts underwent legislative reforms in 1991, 1992, and 1995. Those reforms led to personnel and procedural safeguards, as well as the establishment of a higher-level appellate court. The immediate result of the reforms was an increase in the number of cases filed in the Arbitrazh court system. Moreover, research has shown that despite Russia's corruption and localism problems, foreign litigants are treated fairly. Although there are exceptions in some local regions, statistics indicate progress in court reforms and the ability of the Arbitrazh courts to resolve basic commercial disputes in a timely manner. .

ii. Legal Rules

Another important rule-of-law reform goal is to build the legal rules. As Fuller stated, "laws must exist." Economic reforms have generated a large number of new economic laws in developing countries. Between 1990 and 1995, 45 developing and former socialist countries enacted new investment laws or codes covering a wide range of areas. Many of these investment laws were passed to liberalize the existing investment regime in the developing country by offering clear and broad legal protection for all types of investments. In China, for example, overall national legislative activities have seen continuous growth. This

growth is evidenced by the fact that the total number of laws, resolutions, and amended laws rose to 306 in 1993-1998 from only 60 between 1978 and 1983, the period during which economic reform began.

C. Institutional Encouragement on the Global Level

To encourage additional country-specific development, in the early 1990s the World Bank and the International Monetary Fund (IMF) began conditioning financial assistance on the implementation of the rule of law in recipient countries. These organizations provided aid to support initiatives in legislative drafting, legal information, public and legal education, and judicial reforms, including alternative dispute resolution. By conditioning funds on the establishment of the rule of law, the World Bank and the IMF also hope to reduce corruption, which undermines economic development by scaring away investors and preventing the free flow of goods and capital.

Currently, in its Millennium Development Goals (MDG), the United Nations (UN) also champions the rule of law as a vehicle to bring about more sustainable environmental practices. The MDGs are eight goals that the UN hopes to achieve by 2015 in an effort to respond to the world's greatest development challenges. The MDGs call on nations to make laws in areas such as international environmental and energy law, and also call on nations to encourage their citizenry to abide by those rules through changes in custom. The UN explicitly acknowledges that achievement of the MDGs rests heavily on the development of the rule of law, among other factors.

IV. Criticisms of the Rule of Law

A. Law as the Ruling Standard

The very term "rule of law" suggests that the law itself is the sovereign, or the ruler, in a society. As an ideal, the rule of law stands for the proposition that no person or particular branch of government may rise above rules made by elected political officials. These laws reflect the morals of a society, and in a Western democracy they are supposed to be pre-established, formalized, neutral, and objective. Everyone is subject to their dictates in the same way. The rule of law, therefore, is supposed to promote equality under the law.

Critics of the rule of law, however, have noted that this system creates a ruling elite that has the power to manipulate through the law. As Harvard law professor and leader of the critical legal studies movement, Morton J. Horwitz, suggested, "By promoting procedural justice [the rule of law] enables the

shrewd, the calculating, and the wealthy to manipulate its forms to their own advantage.” Scholars who agree with this statement see the law as “indeterminate,” meaning that the law has no clear or objective meaning. Consequently, the law cannot possibly serve as an effective barrier to the government’s abuse of power because power structures in society, not the law itself, determine the outcome of legal issues and problems.

Because judicial interpretation and enforcement of the law is influenced by the ruling elite, the rule of law does nothing more than legitimize already existing legal relationships and power structures. The absence of predetermined outcomes coupled with the possible influence of the ruling elite means that the obligations of equality and predictability that the rule of law imposes are impossible to achieve. Although the rule of law appears to be “objective,” meaning that it is fairly applied to all people, it is actually subjective and unfairly applied. The rule of law theory has therefore gained an undeserved legitimacy in the modern world.

Partly responding to the criticism outlined above, some scholars have commented that part of the problem with the rule of law is its narrow conception. Instead of viewing the rule of law solely as a judicially focused book of rules, scholars should focus more on the informal and institutional constraints that restrict governments. For example, the moral and tradition-based restraints that societies impose on the government should be given greater consideration in reforms and the overall conception of the rule of law. These aspects of the rule of law are not subject to the same type of manipulation. This broader conception may help avoid situations in which the legal elite manipulate laws because by its definition the rule of law is not solely dependent on the judiciary, which often reflects the power of the elite, for its power.

B. Additional Limits of the Rule of Law

Laws are often incapable of providing definitive standards of behavior because of their complex structures and unavoidable ambiguities in language. As mentioned previously, this often leads to the unpredictable application of the law. Critics of the rule of law claim that due to the indeterminacy in the rules, at no time is a person fully protected within a sphere of individual freedoms. Consequently, one can never be sure that their actions are legitimate or their freedom justified. Furthermore, the rule of law may not be tied to general notions of justice or fairness. The rule of law is therefore sometimes criticized for tolerating extraordinarily unjust rules, rules that undercut the theoretical justification of the rule of law, the promotion of liberty and restrained government.

C. Law & Development: Legal Transplantation

The term “legal transplantation” describes the phenomenon of borrowing legal rules from other countries. Academic debates often center on the moral and practical implications of legal transplantation and, by extension, the imposition of the rule of law. Many developing countries, including China, Russia, Turkey and Japan, since the early 1900s, had varying legal traditions of their own. When developing countries such as these adopt laws from other countries, the rules borrowed may not fit the underlying tradition, culture, and social context of the developing country. For example, Western democracies tend to focus on individual liberties, which many people associate with capitalism. Consequently, the Western notion of what constitutes the rule of law reflects this world-view. Other legal structures, however, may emphasize communitarian duties and responsibilities. Additionally, in the West, legal development occurred simultaneously with social, political and economic development, while in countries such as China, the creation of the rule of law has been driven in large part by the need to contend and interact with more developed countries. Therefore, transplanted laws may often be at odds with cultural, political and social norms since they were not simultaneously created.

Legal transplantation is especially common in economic laws such as competition (antitrust), consumer protection, intellectual property rights, and securities and exchange regulations. In economic law, legal transplantation usually creates less controversy than in other areas of laws such as constitutional, administrative or family law. Seemingly, this is because economic law includes concepts such as efficiency, stability, and predictability in the marketplace, whereas non-economic laws may cut more deeply into a society’s culture. The transplantation of economic laws is still often criticized, however, as being a form of subtle blackmail. Because Western societies generally control access to the global market, to some extent, developing nations must adopt the developed nations’ laws and understandings of the rule of law in order to engage effectively in global economic activity.

V. Conclusion

As evidenced by the failure to arrive at a precise definition, the rule of law is a complicated theory. As much as it embodies politics and the ideals of democracy, an in-depth understanding of the theory must include the law’s interaction with language, history, social structure, and culture. Importantly, the rule of law is

more than just a set of rules and their judicial application. As a much-advocated theory in development studies, the rule of law is also a matter of policymaking, institutional development, and international politics.

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