THE RULE OF LAW: A PRIMER AND A PROPOSAL

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I. Introduction

Since the attacks of 11 September 2001 and the realization that weakened states and dictatorships serve as potential sources of terrorist violence and other threats to national security, U.S. foreign policy has shifted to incorporate state-building as a means to build democracy and eliminate potential threats.[1] A key focus of this new strategy is the development of the rule of law abroad.[2]

Today in Iraq, according to the Department of State Office of the Inspector General, there are at least nineteen entities engaged in what have been termed "rule-of-law activities."[3] In discussing such activities,

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1 *See* Peter Margulies, *Making "Regime Change" Multilateral: The War on Terror and Transitions to Democracy*, 32 DENV. J. INTL L. & POL'Y 389 (2004) (noting, "Since September 11, American policy at home and abroad has centered on engineering transitions from political contexts that spawn hatred and violence to those that promote peace and the rule of law.").

2 *See* President George W. Bush, State of the Union Address, 31 Jan. 2006, *available at* http://www.cspan.org/executive/transcript.asp?cat=current_event&code=bush_admin&year=2006.

> Our offensive against terror involves more than military action. Ultimately, the only way to defeat the terrorists is to defeat their dark vision of hatred and fear by offering the hopeful alternative of political freedom and peaceful change. So the United States of America supports democratic reform across the broader Middle East. Elections are vital, but they are only the beginning. Raising up a democracy requires the rule of law, and protection of minorities, and strong, accountable institutions that last longer than a single vote.

Id.

3 *See* Testimony of Howard J. Krongard, Inspector General, U.S. Department of State and Broadcasting Board of Governors, October 18, 2005, *available at* http://oig.state.gov/documents/organization/55371.pdf [hereinafter Krongard Testimony].

the report of the Inspector General notes that there is no commonly agreed upon definition for the rule of law.[4] In fact, a solid definition of the rule of law remains elusive for practitioners and academics alike. As one scholar noted, "Invocations of the Rule of Law are sufficiently meaningful to deserve attention, but today are typically too vague and conclusory to dispel lingering puzzlement."[5]

In spite of the confusion as to its meaning, the use of the phrase "rule of law" has been on the increase in recent years. Professor Brian Tamanaha, a scholar on the subject, has noted that the rule of law stands in the peculiar state of being the preeminent legitimating political ideal in the world today, without agreement on precisely what it means.[6] International actors seeking to implement the rule of law in other countries, however, must have a solid definition and established criteria by which to assess to their progress, or lack thereof, in this endeavor. Such a definition and criteria must be capable of objective analysis and must also be functional in a variety of legal and cultural settings.

This article addresses the various definitions and conceptualizations of the rule of law as articulated by legal scholars and rule of law practitioners. The article goes on to discuss the rule of law as defined by government entities engaged in activities involving the rule of law, thereby demonstrating dissonance in opinion as to what the rule of law actually means. Finally, the article proposes a framework for a single, uniform definition of the rule of law, one which can be used by a variety of governmental actors engaged in rule of law development in a variety of countries with varying legal systems.

> OIG was aware of some 19 entities including U.S. Government agencies, NGO's, and private contractors, as well as foreign countries and multinational organizations, that were contributing in one form or another to rule-of-law activities in Iraq. We set out to create an inventory of such activities, to identify overlaps and duplication, and to find gaps that might exist.

Id.

[4] *Id.*

[5] Richard H. Fallon, Jr., *The "Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 56 (1997).

[6] *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW 5 (2004).

II. Defining the Rule of Law

Before one can effectively implement the rule of law, it is logical to first ascertain what the term means. There is no adequate method of measuring its growth or discerning its presence without defining what it is. However, such a task is deceptively complex. The burgeoning literature on this topic reveals a plurality of competing definitions. As a result, any discussion about the meaning of the phrase reveals the great difficulty that exists in concisely revealing the true nature of this important idea.

Professor John V. Orth, when discussing the origins of the rule of law, noted that "[A]lthough the general idea of a rule-based state is as old as the Romans, the specific phrase 'the Rule of Law' was first popularized only in the last half of the nineteenth century by [an Oxford academic named] A.V. Dicey."[7] Dicey declared that two features characterized the political institutions of England: the supremacy of the central government, and what he called "the Rule of Law."[8] Dicey viewed the rule of law as consisting of three principal ideas: (1) no one can be punished or assessed damages for conduct not definitely forbidden by law; (2) all legal rights and liabilities are determined by the ordinary court system; and (3) all individual rights are derived from the ordinary law of the land rather than a written constitution. In that regard, Dicey considered the English Constitution to be the product of courts rather than the source of the courts' jurisdiction.[9]

Since Dicey's initial discussion of the concept, legal scholars have expounded on the idea and various conceptions or definitions of the rule of law have been formulated. In theoretical terms, scholars maintain a formalist view and a substantive view of the rule of law. The formalist definition is procedural in nature, viewing the rule of law as a situation in which a government acts in accordance with predetermined rules or laws.[10] The focus of the formalist conception of the rule of law is on the form and source of laws and the state's conformance therewith. The

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[7] John V. Orth, *Exporting the Rule of Law*, 24 N.C.J. INT'L L. & COM. REG. 71, 72 (1998).
[8] *See* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 179-201 (7th ed. 1908).
[9] *Id.*
[10] *See* TAMANAHA, *supra* note 6, at 97 ("When rules exist and are honored by the legal system, formal legality operates.").

substance of those laws is of secondary (if any) concern.[11] Therefore, from a purely formalist perspective, it is incorrect to conflate democracy or any substantive human right with the rule of law. The rule of law exists when laws are in place and governments obey them.

Scholars in this school of thought have noted that certain elements must exist within the legal system of any government in order for the rule of law to exist. Laws must be prospective, general, clear, public, and relatively stable. Laws must not require the impossible and there must be consistency between the existing rules and the actual conduct of governmental actors. Likewise, the government must have an independent judiciary, open and fair hearings without bias, and review of legislative and administrative officials and limitations on the discretion of police to insure conformity to the requirements of the rule of law.[12]

The formalist definition of the rule of law meets the most basic understanding of the modern view of the concept: the state is "subject to a cordon of constraints" that is embodied in the law.[13] Although this basic tenet is not argued by those holding more substantive conceptualizations of the rule of law, the purely formalistic view is

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[11] *Id.* at 93 (quoting Joseph Raz, *The Rule of Law and its Virtue*, 93 L.Q. REV. 195, 201 (1977)).

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of more enlightened Western democracies. . . It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.

Id.

[12] *Id.* (discussing the writings of Fuller, Hayek, Raz, and Unger). *See* LON L. FULLER, THE MORALITY OF LAW ch.2 (New Haven: Yale Univ. Press) (2d rev. ed., 1969). *See also* Joseph Raz, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW 212-213 (Oxford: Clarendon Press 1979); *see also* F. HAYEK, 3 LAW, LEGALISM, AND LIBERTY 41-46 (Chicago: Univ. of Chicago Press 1979); s*ee also* ROBERTO M. UNGER, LAW IN MODERN SOCIETY (New York: Free Press 1976).

[13] *See* MARTIN LOUGHLIN, SWORD AND SCALES, AN EXAMINATION OF THE RELATIONSHIP BETWEEN LAW AND POLITICS 3 (2000) ("For implicit in the global success of capitalist liberal democracy is the recognition that politics is subject to a cordon of constraints. To invoke a well-used shorthand, the conduct of politics must be subject to the "rule of law.").

criticized for being morally neutral or so devoid of substance that is always in danger of collapsing into tyranny.[14]

Substantive definitions of the rule of law, on the other hand, begin from the same premise as the formalist view, that the government must abide by its rules, but also incorporate certain substantive requirements such as human rights or democratic principles.[15] Tamanaha notes that the Declaration of the 1990 Conference on Security and Cooperation in Europe, which had representatives from many Western European countries as well as the United States, expressly stated:

> [T]he rule of law does not mean merely a formal legality which assumes regularity and consistency in the achievement and enforcement of democratic order, but justice based upon the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expressions. . . . [D]emocracy is an inherent element in the rule of law.[16]

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[14] *See* TAMANAHA, *supra* note 6, at 96. The author wrote:

> The emptiness of formal legality, to make a broader point, runs contrary to the long tradition of the rule of law, the historical inspiration of which has been the restraint of tyranny by the sovereign. Such restraint went beyond the idea that the government must enact and abide by laws that take on the proper form of rules, to include the understanding that there were certain things the government or sovereign could not do. The limits imposed by law were substantive, based on natural law, shared customs, Christian morality, or the good of the community. Formal legality discards this orientation. Consistent with formal legality, the government can do as it wishes, so long as it is able to pursue those desires in terms consistent with (general, clear, certain, and public) legal rules declared in advance. If the government is moved to do something not legally permitted, it must simply change the law first, making sure to meet the requirements of the legal form.

Id.

[15] *Id.* at 102 ("All substantive versions of the rule of law incorporate the elements of the formal rule of law, then go further, adding on various content specifications. The most common substantive version includes individual rights within the rule of law.").

[16] *Id.* at 111.

From a practice-based perspective, definitions can be divided into "ends based" and "institutional" definitions of the rule of law.[17] Ends-based definitions of the rule of law focus on the desired results of the rule of law and measure success accordingly. Rachel Kleinfeld, co-director of the Truman National Security Project, lists those desired results under the rubrics of Government Bound by Law; Equality Before the Law; Law and Order; Predictable, Efficient Justice; and Lack of State Violation of Human Rights.[18]

The perceived advantage of defining the rule of law by its ends is a greater focus on the attainment of certain societal goals—an emphasis of the ends over the means. However, a focus on the desired ends to the neglect of the institutions can pose practical problems as, for the most part, the ends sought by rule of law reform can only be attained through building effective institutions. Adopting a definition of the rule of law which is too rigorously "ends-based" is akin to planning a journey to Paris without focusing on the plane tickets. If one wants to arrive at the destination, one must first find the proper vehicle to get there.

Further, international actors must be careful when incorporating into their definitions of the rule of law such nebulous concepts as "human rights." There is existing disagreement on which human rights are universal and as to what constitutes a human right.[19] Even if a certain

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[17] *See* RACHEL KLEINFELD, COMPETING DEFINITIONS OF THE RULE OF LAW, *in* PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 33-34 (2006). Kleinfeld stated:

> Thus, there are two very different ways of defining the rule of law that are being discussed in parallel conversations. The first style or definition enumerates the goods that the rule of law brings to society. A society with the rule of law is a society that instantiates these goods or ends, such as law and order, a government bound by law, and human rights. The ends are the reason we value the rule of law and are what most people mentally measure when determining the degree to which a country has the rule of law. Another type of definition describes the institutions a society must have to be considered to possess the rule of law. Such a society would have certain institutional attributes such as an efficient and trained judiciary, a noncorrupt police force, and published, publicly known laws.

Id.

[18] *Id.* at 36-44.

[19] *See* Erik Roxstrom, Mark Gibney, & Terje Einarsen, *The NATO Bombing Case (*Bankovic et al. v. Belgium et al.*) and the Limits of Western Human Rights Protection*, 23 B.U. INT'L L.J. 55 (2005) ("The idea of human rights is extremely abstract and leaves

right is agreed to be a universal human good, it must be remembered that cultural, ethnic, and legal differences in various countries can impact the way in which such a right is accepted and interpreted.[20] Accordingly, attention should be paid to how such terms are used, how they are incorporated into any operational definition of the rule of law, and how such ideas can be practically implemented across a broad range of legal systems. In this regard, it should be emphasized that, based on the nature of the work, the majority of operations involving rule of law development will take place in the Middle East and elsewhere—places that do not necessarily share the same intellectual history or cultural mores as Western countries.

In contrast to the ends-based definition of the rule of law, the institutional approach focuses on the governmental institutions which a society must possess to obtain the rule of law. Generally, these institutions are broadly categorized as law, a judiciary, and a force

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plenty of room for good faith disagreements about what might be considered to be a human right and what a specific human right means in certain contexts.").

[20] *See* Paolo G. Carozza, *Subsidiarity as a Structural Principle of International Human Rights Law*, 97 A.J.I.L. 38 (2003). Carozza states:

> Any statement of a human right when abstractly proposed can be said to be fundamental and universal to the extent that it expresses part of the requirements of justice and human dignity for every human being, that is, to the extent that it expresses in the language of rights some aspect of the common good. In that case, it is "fundamental" in the sense that it is *necessary* to the realization of human dignity and the common good, and it is "universal" because it is necessary to the realization of human dignity and the common good in *every* society. Butt cannot be supposed that the accidents of culture, language, history, institutional and political circumstance, economic organization, and the myriad other differences that separate any one society from another across time and space are irrelevant to putting even fundamental and universal principles into practice. Even if an abstract notion like a "human right" can reasonably be said to be necessary to the realization of the common good in all societies, the specification of that concept of "right" will depend on varying conceptions of who the holders of the right and the correlative duty are, or the conditions under which the right claim is lost or waived, and so on. Thus, even when a right can properly be termed fundamental and universal, it may still, and probably will, differ in its instantiation in positive law in a given context.

Id.

capable of enforcing laws.[21] However, the institutional approach recognizes that there is an archipelago of supporting institutions that are necessary for the proper functioning of the basic three and which must share the focus of development.[22] For instance, Kleinfeld notes:

> Laws are supported by institutions ranging from legislatures to land cadastres and notary publics. The judiciary is reliant on magistrates' schools, law schools, bar associations, clerks and administrative workers, and other supporting groups. Police require prisons, intelligence services, bail systems, and cooperative agreements with border guards and other law enforcement bodies, among other institutions. As new supporting institutions are discovered and deemed to be essential, they are added to the list of areas in need of reform."[23]

The advantage of conceptualizing the rule of law as institutional in nature is the concreteness of the object to be built, measured, or reformed. It is easier to gauge the functioning of a court or a police force than it is to measure the progress of a society in achieving potentially abstract social ends such as equality before the law. Further, achieving such social goals can take far longer than institutional reform. However, the danger of such a view is to lose focus altogether of the desired results the rule of law is supposed to attain—viewing the institutions as their own ends. Such a narrow focus can be counterproductive and can even undermine the rule of law. Though institutions are critical to the successful implementation of the rule of law, in the end it is not institutions that achieve the rule of law, but the use thereof.

III. The United States: Three Definitions

As the Department of State Office of the Inspector General has noted, the United States has yet to adopt a definition of the rule of law.[24]

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[21] *Id.* at 47 (noting that this tripartite formulation dates back to the writing of John Locke).

[22] *Id.* at 48.

[23] *See* RACHEL KLEINFELD BELTON, COMPETING DEFINITIONS OF THE RULE OF LAW: IMPLICATIONS FOR PRACTITIONERS (Carnegie Endowment 2005), *available at* http://www.carnegieendowment.org/files/CP55.Belton.FINAL.pdf.

[24] *See* Krongard Testimony, *supra* note 3. Krongard stated:

However, there are numerous government entities that focus on the work of rule of law and rule of law reform. Each entity defines the rule of law differently, depending on the entity's focus.

The United States Institute of Peace (USIP), a nonpartisan institution funded by Congress, stated in a Special Report on the rule of law in Iraq that the rule of law means not only the provision of effective police, courts, and prisons, but also the concept of addressing human rights violations and crimes committed during and prior to the war.[25] Based upon this view, USIP noted that establishing the rule of law in Iraq required a two-track process: (1) administering justice for past atrocities and ridding the Iraqi government of those implicated in the abuses of the regime, and (2) rebuilding the justice system to establish law and order and protect the rights of all Iraqis.[26]

> While there is no commonly agreed upon definition for the rule of law, we take it to mean a broad spectrum of activities including a constitution, legislation, a court system and courthouses, a judiciary, police, lawyers and legal assistance, due process procedures, prisons, a commercial code, and anticorruption activities.

Id.

[25] *See* UNITED STATES INSTITUTE OF PEACE, SPECIAL REPORT NO. 104, ESTABLISHING THE RULE OF LAW IN IRAQ (Apr. 2003), *available at* http://www.usip.org/pubs/specialreports/sr104.html. The report states:

> For Ashdown, "rule of law" meant the provision of effective police, courts, and prisons. Beyond these immediate core elements, establishing the rule of law in post-conflict societies also involves dealing with human rights violations and crimes committed during and prior to the war. The relatively rapid arrest, trial, and punishment of regime officials and military officers who have committed major abuses are important to achieving a sense of justice. It is also important to remove fear from the society and to deter individuals from seeking revenge. In addition, there is a long-term need for a mechanism or forum that allows people who have suffered to describe their experiences publicly, assign blame, and have their statements recorded as part of the formal history of the conflict.

Id.

[26] *Id.*

A review of the Special Report makes it clear that, for USIP, the rule of law means the existence of functioning institutions, such as a judiciary and a police force that are capable of maintaining law and order.[27] In providing security, stability, and personal safety, the government should also provide assurance that transparent law enforcement and judicial processes provide the same protections and penalties for all citizens.[28] Therefore, the USIP view of the rule of law is one that is mainly institutional in nature. It focuses on criminal law apparatus of the state, but with an additional focus on the safeguarding of human rights and an emphasis on transitional justice.

The United States Army Peacekeeping and Stability Operations Institute (PKSOI), an organization that exists under the rubric of the U.S. Army War College, held a Rule of Law Conference in 2004 in which the rule of law was defined by the following statement:

> The rule of law in the context of peace operations incorporates international and municipal legal obligations and standards applicable to all parties involved in the peace process. As a principle it includes the application of the Charter of the United Nations, international humanitarian law, human rights law, military law, criminal law and procedure, and constitutional law. It also incorporates principles that govern civil and criminal accountability for management and conduct of peace operations (peacekeepers). It also allows for follow up mechanisms to ensure that complaints made against peacekeepers are investigated, and where necessary, appropriate enforcement action is taken. The rule of law includes standards by which national institutions of the host country may be held

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[27] *Id.* (noting as we have learned from previous peace operations, the most important objective in the initial phase of the post-conflict period is to establish the rule of law. In his pre-departure press conference on 17 December 2000, Bernard Kouchner, the senior UN official in Kosovo, said the "lesson of Kosovo" was that "peacekeeping missions need to arrive with a law-and-order kit made up of trained police, judges, and prosecutors and a set of draconian security laws. This is the only way to stop criminal behavior from flourishing in a post-war vacuum of authority" (citation ommitted). Such a judicial package must be supported by effective military forces that can quickly subdue armed opposition, disarm opposing forces, perform basic constabulary tasks, and ensure that civilian law enforcement officers and administrative officials can perform their functions in an atmosphere of relative security.).

[28] *Id.*

> accountable for their failure to comply with universal legal principles and rules. The rule of law is also the framework that governs the relationship between intervening forces and the local community; and the basis upon which the local population may be held accountable for their actions prior to, and following, the intervention.[29]

Therefore, for PKSOI, the rule of law is mainly a substantive concept, focusing on the contents of the legal rules and specifying which substantive elements the target legal system must possess in order for the rule of law to exist. The PKSOI definition also emphasizes the accountability of government actors, but does so by viewing accountability as a substantive requirement rather than by focusing on the institutions that would enforce accountability. It is also worth noting that the PKSOI definition holds the host country accountable for failure to comply with "universal legal principles and rules" while the adherence to domestic legislation finds no mention.

The Inspector General for the United States State Department has expressed another view.

> While there is no commonly agreed upon definition for the rule of law, we take it to mean a broad spectrum of activities including a constitution, legislation, a court system and courthouses, a judiciary, police, lawyers and legal assistance, due process procedures, prisons, a commercial code, and anticorruption activities. To successfully implement an emerging rule of law, these activities must proceed somewhat sequentially and not randomly.[30]

Thus, at least one element of the State Department has espoused a heavily institutional conceptualization of the rule of law, focusing on judicial apparatus with an additional focus on a commercial code and anticorruption activities. However, it should be noted that the definition, as articulated by the Inspector General, almost conflates legal

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[29] *See* UNITED STATES ARMY PEACEKEEPING AND STABILITY OPERATIONS INSTITUTE, RULE OF LAW CONFERENCE REPORT (June 2004), *available at* http://www.carlisle.army.mil/usacs1publications/webruleoflaw.pdf.

[30] *Id.*

reconstruction with rule of law development—focusing on the rebuilding of the legal apparatus without mention of the creation of a government that remains subordinate to a cordon of rules and legal constraints.

IV. A Proposed Operational Definition

The problems with the definitions of the rule of law are manifold. However, a key problem is that they tend to incorporate notions and ideas that, while perhaps desirable, are not necessarily critical to the rule of law. As noted above, sometimes the phrase is used to mean legal reconstruction—an endeavor that often assists in developing the rule of law, but which is conceptually different. The result is a definitional drift that serves to efface the central meaning of the rule of law, lending to it a certain nebulousness, and complicating matters for those seeking to develop it.

An operational definition of the rule of law must be one that is capable of enactment and measurement. Those seeking to effect its implementation must have defined criteria that can be used to assess the progress or regression of the rule of law. However, the operational definition of the rule of law must also be one that is capable of export—not containing unrealistic substantive requirements that do not comport with the target nation's legal system.[31]

The need for an exportable definition of the rule of law requires that those seeking to develop it adopt a more formalist definition. This is because one of the keys to success in implementing any kind of rule of law program is to foster "local ownership" of laws and legal institutions.[32] When laws and institutions are transplanted into (or grafted onto) the legal system of a target nation without proper consideration for the organic legal culture or native laws, legal reforms can lack legitimacy and the rule of law can then be undermined.[33]

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[31] *See* Orth, *supra* note 7, at 82 ("Encouraging the development of local legal culture is more important in the long run than improving foreign observation. Legal culture is not so readily exportable as scientific culture, in which the medium is the universal language of mathematics and experiments are reproducible abroad. Law is inevitably more local.").

[32] *See* WADE CHANNELL, LESSONS NOT LEARNED ABOUT LEGAL REFORM IN PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 137-41 (2006).

[33] *Id.* at 139.

Definitions of the rule of law that rigidly demand substantive requirements cannot be applied to a broad class of countries. Rather, substantive requirements for each country should be determined based upon a detailed study of that country's legal system and an individual analysis that takes into consideration particular legal histories, needs, demands, circumstances. Otherwise, local populations will resist or ignore the legal regime imposed in the name of rule of law reform.[34] Such resistance is inimical to the rule of law.

The International Commission of Jurists posited an interesting formalist definition of the rule of law, which defined it as,

> The principles, institution and procedures, not always identical but broadly similar, which the experience and traditions of lawyers in different countries in the world, often themselves having varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.[35]

This definition is helpful because it allows for flexibility with regard to legal cultures and diverse legal structures. Further, it emphasizes the principal aim of the rule of law, which is to protect the individual from arbitrary government. However, the definition is problematic in that it is too vague and lacks criteria by which the rule of law can be assessed.

To alleviate this deficiency, therefore, international actors seeking to implement the rule of law in failed states should look to the scholarship

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> The "hasty transplant syndrome" is a critical problem in legal reform assistance. It involves using foreign laws as a model for a new country, without sufficient translation and adaptation of the laws into the local legal culture. In some egregious cases, reformers simply translate a law from one language into another, change references to the country through search-and-replace commands, and then have the law passed by a compliant local legislature. The result is generally an ill-fitting law that does not "take" in its new environment as evidenced by inadequate implementation.

Id.

[34] *Id.*

[35] *See* INTERNATIONAL COMMISSION OF JURISTS, THE DYNAMIC ASPECTS OF THE RULE OF LAW IN THE MODERN AGE, REPORT ON THE PROCEEDINGS OF THE SOUTH-EAST AND PACIFIC CONFERENCE OF JURISTS, BAGKOK, THAILAND 17 (Feb. 15-19, 1965).

regarding the formalist view of the rule of law. In that regard, there are nine principal elements that comprise this concept: laws must be prospective, general, clear, public, and relatively stable. Laws must not require the impossible and there must be consistency between the rules of the actual conduct of legal actors. To support and maintain these fundamental elements of the rule of law, the government must have an independent judiciary, open and fair hearings without bias, systematic review of legislative and administrative officials, and limitations on the discretion of state actors.[36] These basic requirements ensure that the government remains subordinate to a system of rules and, importantly, are relatively capable of objective assessment. Thus, a proposed operational definition of the rule of law would entail the concept as articulated by the International Commission of Jurists and incorporate the following criteria:

1. General laws: In order for the rule of law to prevail in any given government, laws should be drafted in such a way that they apply to the population as a whole rather than to a specific person or a particular party.[37] Those seeking to measure the generality of legislation can do so by observation and analysis of the legislation in force. If the legislation is written so as to apply to a broad class of crimes or situations, then it will meet the basic standard of generality. If the legislation is written so as to apply to an individual case, then the legislation fails the test of generality.

2. Clear laws: An equally important feature of a legal system is clarity. Clarity in legislation is capable of measurement by observation and analysis of enacted or proposed laws. If the legislation is sufficiently clear that its plain meaning may be determined by its language, then it meets the basic standard of clarity. If the legislation is so oracular or confusing that it cannot be understood – that the citizenry cannot

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[36] *Id.*

[37] *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS ch. 3 (1764).

> The sovereign, as the representative of society, may only frame laws in general terms which are binding on all members. He may not rule on whether an individual violated the social pact, because that would divide the nation into two parts: one, represented by the sovereign, who asserts the violation of the contract, and the other, represented by the accused, who denies it..).

Id.

understand what rights they are entitled or what conduct is prohibited – then it fails the test of clarity.[38]

3. Public laws: The question of whether or not laws are public can be assessed by looking to see if information regarding proposed or enacted legislation is being disseminated to the general population. If the public is being informed of what laws are being enacted, informed of the substance of those laws, and told how those laws will impact their lives, then laws are sufficiently public. If laws are being enacted in secret or if the public is not informed of what laws are being proposed or enacted, then the laws are not sufficiently public.[39] It is for this reason that commentators since the Enlightenment have endorsed printed publications of laws such as Codes, etc.[40]

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[38] *Id.* ch. 5.

> If interpretation of the laws is an evil, it is obvious that the obscurity which makes interpretation necessary is another. And it is the greatest of evils if the laws be written in a language which is not understood by the people and which makes them dependant upon a few individuals because they cannot judge for themselves what will become of their freedom or their life and limbs, hindered by a language which turns a solemn and public book into what is almost a private and family affair. . . . The more people understand the sacred code of laws and get used to handling it, the fewer will be the crimes, for there is no doubt that ignorance and uncertainty of punishment opens the way to the eloquence of the emotions.).

Id.

[39] *Id.*

> Once consequence of the foregoing thoughts is that, without the written word, a society will never arrive at a fixed form of government, in which power derives from all members and not just from a few, and in which laws are unalterable except by the general will, are not corrupted as they make their way through the throng of private interests.

Id.

[40] *Id.* (noting "Thus we see how useful the printing press is, which makes the general public, and not just a few individuals, the repository of the holy laws. And we see how it drives out the shady propensity to cabal and intrigue, which vanishes when confronted with the enlightenment and knowledge that its followers ostensibly despise but really fear.").

4. Stable laws: The stability of the laws is equally susceptible of objective evaluation. If a society's laws are sufficiently stable that the citizenry can consistently know their rights and limitations, then the rule of law can exist. However, if laws are in such constant tumult that the population cannot reasonably be expected to know what today's legal regime entails, then the basic test of stability fails. This stability must exist not only in legislative enactments of law, but in judicial interpretation.[41] Achievement of such legal stability serves the desired end of predictable, efficient justice.

5. Reasonable laws: Whether or not the law demands the impossible is another aspect which is capable of objective evaluation by analysis of legislative texts. If the law places upon the citizenry obligations or expectations with which they can not reasonably be expected to comply, then the law's demands are unreasonable and there can be no rule of law.[42]

6. Governmental conformity to law: Additionally, there must be consistency between the rules of the actual conduct of legal actors. Such consistency may be evaluated by effective monitoring of judges, prosecutors, and law enforcement agents to ensure that their decisions and conduct are in line with enacted law as well as prescribed rules and regulations. When judges, without a solid legal rationale, rule contrary to legislation, then the rule of law disintegrates into disorganized legal chaos.[43] Likewise, when law enforcement agents disregard legal rules,

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[41] *Id.* ch. 4.

> In this way, citizens can acquire that sense of security which is just, because it is the reason men join together in society, and which is useful, because it allows them to evaluate exactly the drawbacks of wrongdoing. It is also the case that they will acquire a spirit of independence, but not the kind that will lead them to shake off the laws or defy the supreme magistrates, but the kind that will allow them to stand up to those who have dared to sully the name of virtue by describing with that name their weakness in giving in to their self-interested and capricious opinions.

Id.

[42] *See* CHARLES DICKENS, OLIVER TWIST 489 (1838) ("If the law supposes that," said Mr. Bumble, . . the law is a ass—a idiot. If that's the eye of the law, the law is a bachelor; and the worst I wish the law is that his eye may be opened by experience—by experience.").

[43] *See* BECCARIA, *supra* note 37, ch. 4.

standards of behavior, and limits on their authority to act, then the rule of law does not exist.

7. Independent judiciary: In order to maintain and support a legal system that enshrines the rule of law, certain institutional aspects must also exist, principally an independent judiciary. When judges attain full independence from other branches of government, then the judiciary serves as a check against illegal and *ultra vires* conduct by the government. It ensures that no other part of the developing government disregards the law. As Orth noted, "The goal must be the creation of a strong local legal culture that supports and encourages judicial independence. To paraphrase Madison, the judges' ambition must be made to counteract the corrupt, selfish, and short-sighted ambition of other government officials. The successful export of the Rule of Law means the end of the need for threats and blandishments; once fully functional, the Rule of Law is self-perpetuating and self-policing."[44]

8. Open and fair hearings: Just as the judiciary must be independent, it must also have open and fair hearings without that are without bias. This transparency feature of the judiciary serves to ensure that it remains independent and capable of monitoring and assessment. When judicial proceedings are closed behind doors of secrecy, then there is no way for the citizenry (or the international community) to ensure that the law is being upheld or applied fairly.[45] Transparency also serves to

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> When a fixed code of laws, which must be followed to the letter, leaves the judge no role other than that of enquiring into citizens' actions and judging whether they conform or not to the written law, and when the standards of just and unjust, which ought to guide the actions of the ignorant citizen as much as those of the philosopher are not a matter of debate but of fact, then the subjects are not exposed to the petty tyrannies which are the crueler the smaller the distance between him who inflicts and him who suffers.).

Id.

[44] *See* Orth, *supra* note 7, at 82.

[45] *See* BECCARIA, *supra* note 37, ch. 4.

> Verdicts and the proof of guilt should be public, so that opinion, which is perhaps the only cement holding society together, can restrain the use of force and the influence of the passions, as so that the people shall say that they are not slaves but are protected, which is a sentiment to inspire courage and as valuable as a tax to a sovereign who knows his true interests.

remind judges that they are subject to monitoring and assessment.[46] It also grants a certain power to the public, who may observe and analyze the fairness and legitimacy of the proceedings.[47] The transparency or "openness" of the judiciary, like the existence of bias in a court's rulings, is capable of measurement through simple observation of judicial proceedings. Fostering an open and bias-free judiciary also serves the desired end of achieving equality before the law.

9. Limitations on state actors: It is also key that there be defined limitations on the discretion of state actors and review of legislative and administrative officials so that when governmental actors step outside that cordon of legal constraints, their action can be corrected and, if necessary, the offending actor may be disciplined. Without such a mechanism, a legal system would be hard pressed to ensure that the law remains preeminent. The presence or absence of such rules is capable of objective assessment by a simple review of what legal safeguards are in place and how they are enforced. When these limitations are enshrined in a legal system, it serves the desired end of attaining a government which is bound by law.

The advantage of adopting such a modified formalist definition is that it allows for the flexibility to accommodate different legal systems in areas which are culturally, ethnically, and legally diverse. However, while maintaining that legal flexibility, it would incorporate nine formal factors that must exist (and which are capable of objective evaluation) in any system where the rule of law is to prevail. Although it does not contain substantive elements, international actors would still be free to push for the enactment of such measures where appropriate and practical. However, in determining whether or not the rule of law exists in any particular polity, it is best not to confuse the core meaning of the concept with other aspirations.

Id.

[46] *See* Orth, *supra* note 7, at 81 ("Legal officials must be encouraged to make their decision process as transparent as possible. The judges must know someone is watching, but the scrutiny must be principled and fair. Decisions must be examined with respect to consistency with pre-existing law, adequacy of the factual record, and correct application of the law to the facts. The judicial decision-maker must expect criticism for mistakes, but also praise for correct and heroic decisions. Critics must operate within a professional culture that values and supports honest opinions, even (or especially) those with which they disagree.").

[47] *See* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 195-228 (1977) (noting that the public's ability to observe served not only to exercise power over those observed, but those doing the observing).

V. Conclusion

The rule of law is, at its core, a simple concept. As it has ascended in importance, it has, however, become the victim of a certain definitional drift. Redefined multiple times for a multitude of purposes, it is often articulated as a concept which contains elements that have nothing to do with a government's conformance with the law or the ability of the law to serve as a restraint on the actions of the state. However, in spite of the extant definitional fog, international actors seeking to develop the rule of law in failed states must view the concept with clarity and establish a workable definition and normative criteria which can be used to assess progress or regression. In that regard, the definition of the rule of law posited by the International Commission of Jurists, supplemented by the nine criteria derived from formalist scholarship, provides a flexible and measurable definition that is unencumbered by substantive requirements. Such a definition is capable of objective assessment and is flexible enough to be applicable in a variety of differing legal cultures.

The rule of law should not be confused with legal reconstruction or human rights. Its definition should not be warped so that it is conflated with a certain set of familiar substantive requirements, no matter how worthy or needed those substantive requirements might be. This is not to say that such substantive laws should never be introduced into failed or failing states. As it is determined that certain substantive laws and rights are appropriate or desired, international actors or the local populace may strive for their enactment, but to require certain substantive elements for all polities in all circumstances is to lose sight of the world's legal and cultural diversity.

The core concept of the rule of law does not implicate substantive requirements, but refers to that situation in which the state is subject to a cordon of constraint that is embodied in the law—a condition of legal preeminence that serves to curb government action and abuse. International actors seeking to implement the rule of law must understand it as a concept separate from other related concepts and must settle on a workable, exportable definition that contains measurable criteria and focuses on the basic precepts of the idea, unadulterated by substantive elements that may not necessarily apply in all circumstances.

To paraphrase Shakespeare, the rule of law is not the rule of law when it is mingled with regards that stand aloof from the entire point.[48]

[48] WILLIAM SHAKESPEARE, KING LEAR act 1, sc. 1; *see also* Van Horn v. Van Horn, 393 F. Supp. 2d 730 (N.D. Iowa 2005) (noting, "King Lear recounts the events surrounding the aging King Lear's decision to divvy up his kingdom among his three daughters, Cordelia, Regan and Goneril. Looking for his progeny to bask him in love, Lear decides he will bequeath the greatest riches upon whichever daughter makes the most sycophantic incantation of devotion and adoration. When his favorite daughter, Cordelia, fails to be sufficiently obsequious in the eye of the King, he disowns her. The King immediately realizes he has made a mistake of grave proportions as Regan and Goneril proceed to undermine the scant authority the King retained. Unable to deal with the betrayal, King Lear goes insane. Much treachery, stabbing, poisoning, and hanging ensue, and the quartet ends up dead by the closing act." Cordelia's response to Lear's inquiry in the opening scene demonstrates that a concept must be viewed in its purity and cannot be adulterated by other unrelated though desirable elements, lest tragedy befall.).