The International Rule of Law Movement

A Crisis of Legitimacy and the Way Forward

Edited by
David Marshall

Human Rights Program Series
Harvard Law School

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DISTRIBUTED BY HARVARD UNIVERSITY PRESS

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Printed in the United States of America

ISBN: 978-0-6743657-0-4

Library of Congress Cataloging-in-Publication Data

The international rule of law movement : a crisis of legitimacy and the way forward / Edited by David Marshall.
p. cm. -- (Human rights program series)
Includes bibliographical references.
ISBN 978-0-674-36570-4
1. Rule of law. 2. International law. I. Marshall, David, (lawyer), author editor of compilation.
K3171.I59 2014
340'.11--dc23
2014013831

Printed by Signature Book Printing, http://www.sbpbooks.com

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Foreword

Is international rule of law assistance a waste of time and resources because we do not generally achieve expected results? As institutions that were invited to contribute financially to this volume,[1] we believe it is not. Nonetheless, based on our experience, we support the call to rethink strategy and implementation methods of international rule of law assistance and to identify a new way forward. Most importantly, we believe that the dialogue between conflict-affected societies, international assistance providers, field practitioners, and researchers needs to be strengthened.

The rule of law field is the subject of an intense debate. Our institutions believe that there are two chief reasons for this. First is the seriousness of the matter at hand. As a principle of governance, the rule of law has a direct bearing on how political actors and public employees exercise power and are held accountable. The rule of law therefore involves issues of justice and impunity, often in relation to societies divided by ethnic or sectarian rifts and where these matters are contentious and violently fought over. The second reason for scrutinizing rule of law assistance has to do with volume. There is simply more rule of law assistance now than ever before.[2] There are no exact figures, but a quick scan of AidData and similar databases shows an increase in and diversification of interventions in the last two decades.

Some of the contributions to this volume paint a seemingly bleak picture, concluding that the "field" is performing poorly. Some attribute weak performance to donors' tendency to work with institutions rather than with "ends" or "outcomes": institution-building rather than problem solving. Several authors also suggest interesting approaches that might counterbalance the field's poor track record—for instance, working at the community level and with broader justice issues. We appreciate the expertise and insights brought to bear on the rule of law in these chapters; they give us case studies, which may not be amenable to "scaling up." We might know that assistance of a cer-

tain kind in some countries, or for some sectors, has failed to achieve expected results; but for the field as a whole, more is needed.

While we recognize that these conclusions represent distinct perspectives on unique events, we demur from a wholesale dismissal of rule of law programs, reforms, and similar interventions absent more generalizable studies—by which we mean comprehensive, longitudinal empirical studies that might be dispositive of which factors, levers, and sorts of interventions are most effective in promoting and realizing the rule of law. Such studies no doubt are difficult to design and quite expensive. Yet this sort of empirical data, even with its limitations, may allow for the identification of patterns over time, between countries, and between different challenges. Moreover, it is in all likelihood not a matter of failure or success, since the rule of law is not a binary system that can be started, paused, or stopped. All stakeholders involved in rule of law assistance have to adjust their expectations regarding what is achievable and within what timeframe: the *World Development Report 2011* states that it took the fastest reforming countries in the twentieth century up to forty-one years to make significant progress on institutional transformation in the rule of law sector.[3]

Other chapters in this volume despair less, and suggest a revised form of rule of law assistance—one that is incremental and experimental, that works through trial and error, and that is smaller in scale but broader in terms of values (e.g., by encompassing human rights). This has some appeal, but might not be an easy sell to the constituencies in war-stricken, poor, and transitional countries expecting a quick response and for whom the "rule of law" has symbolic, if not actual, value. People in conflict-affected and fragile states may have different expectations and hopes about the rule of law, and they will have this whether we reconfigure rule of law assistance or not. Thus, the approaches to rule of law that we identify may not be the approaches sought by end users.

We recognize that rule of law assistance is never a mere technical activity but a highly sensitive political process about ideas, attitudes, and human behavior that affects elite privileges. Considering the tall order of changing behavior where such change may entail great personal loss, we should also be aware of political will, or lack thereof, when discussing failure or success. Rule of law interventions are in many ways games played by local rules, and we should not overemphasize the role of externally driven reform. While there is sometimes talk of "windows of opportunity" for external actors, past experience gives reason to be skeptical about what can be achieved by outsiders. Rule of law assistance is no longer the purview of Western donors,

and the moral authority and legitimacy of organizations such as the United Nations is in some parts of the world questioned and contested.

Notwithstanding our different perspectives on the "field," linking practice with research is an important step forward, and we would like to sincerely thank the editor and the contributors to this volume for taking that step.

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Folke Bernadotte Academy

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United States Institute of Peace

Notes

1. The United States Institute of Peace (USIP), Folke Bernadotte Academy (FBA), and Center for International Peace Operations (ZIF) offer specialized training on the rule of law. FBA and USIP work in the field. FBA and ZIF select and recruit civilian experts to be deployed to peace operations and civilian crisis management missions worldwide. While funding this volume, all three organizations also participated in the expert panel and in the review of articles.

2. For UN rule of law commitments in peace operations, see, for example, Richard Zajac Sannerholm, Frida Möller, Kristina Simion, and Hanna Hallonsten, *UN Peace Operations and Rule of Law Assistance in Africa 1989–2010: Data, Patterns and Questions for the Future* (Stockholm: Folke Bernadotte Academy, 2012).

3. World Bank, *World Development Report 2011: Conflict, Security and Development* (Washington, DC: World Bank, 2011), 11.

Acknowledgments

This book brings together the research of individual experts in the area of rule of law whose focus is predominately on postconflict and fragile states. The volume grew out my time as a visiting fellow with the Human Rights Program at Harvard Law School, while on sabbatical leave from the United Nations. During that time, I had a rich discussion with Robert O. Varenik on the meaning, if any, of the latest pronouncement by member states of the United Nations on the centrality of the rule of law to solving most of the world's ills. Their pronouncement came at a time when there is actually evidence to the contrary. We discussed whether anything new could be said about the reasons for the failure of the global rule of law movement that had not been said a decade ago by Thomas Carothers, Erik G. Jensen, Brian Z. Tamanaha, and many others.

That discussion led, in turn, to a workshop on the rule of law, convened in November 2013 by the Human Rights Program. There, scholars presented papers that were eventually transformed into the chapters of this volume. Special thanks are owed to the authors for sacrificing considerable time and energy on this initiative. Deep gratitude also goes to the members of the expert panel, Rachel Kleinfeld, Robert O. Varenik, and William O'Neill, and to commentators Juan Carlos Botero, Erik G. Jensen, and Ahmed Ghanem.

I would particularly like to thank Harvard Law School faculty members Gerald L. Neuman, co-director of the Human Rights Program, and Mindy J. Roseman, academic director of the Human Rights Program, for hosting the review meeting and supporting this initiative. I am also grateful to the Visiting Fellows Program at the Human Rights Program for providing an institutional environment that encourages deeper learning and innovation in addressing global injustice. This publication would not have been possible without the generous support of both my employer, the Office of the High Commissioner for Human Rights, and the United Nations Sabbatical Leave Programme,

which allowed me to explore in greater depth the challenges facing the United Nations in its efforts to bring lasting peace and justice to fragile states.

I am indebted to Naz Modirzadeh for carefully reviewing and providing comments on earlier drafts and for her friendship sealed during a rule of law–related endeavor in Kandahar, Afghanistan, in 2002.

Deep gratitude is also due to the three organizations that funded this initiative: the Center for International Peace Operations, the Folke Bernadotte Academy, and the United States Institute of Peace. The representatives of these organizations—Britta Madsen, Richard Zajac Sannerholm, Jennifer Schmidt, Colette Rausch, and Vivienne O'Connor—also read and provided comments on many of the chapters.

Thanks to Morgan Stoffregen for copyediting the book and to Catlin Rockman for designing it and laying it out. I would also like to recognize Bryan Chadwick for his support and insights.

Finally, I want to thank Giorgia for her extraordinary patience following my return from South Sudan and my immediate subsequent departure to Harvard Law School. The burdens were many. There are currently no plans to leave the New York area—unless for Rome.

David Marshall
March 2014
Cambridge, MA

Introduction

David Marshall

Today, unprecedented international attention is being placed on state-building in postconflict and fragile states, with a primary focus on rule of law reform. Enormous amounts of money[1] and effort have gone into rebuilding and often changing entire justice systems, with modest success. This attention raises profound questions about the objective, approach, methodology, and consequences of these efforts.

The drivers that cause state collapse or dissolution are often multifaceted, with each situation having its own history, contingencies, and specificities. It stands to reason that each may require a unique approach to rebuilding the state and respect for state authority, laws, and institutions. That said, the international community prefers to see commonalities—such states aspire to be nation-states; all nation-states need functioning legal systems predicated on the rule of law; and, due to a rule of law deficit, these countries have "failed." The restoration (or *de novo* construction) of legal systems is the solution.

The encounter between the international rule of law movement and fractured and distant countries that very few outsiders understand has resulted in great disappointment and disillusionment. Persistent state-building failures—such as in Afghanistan, the Democratic Republic of Congo, Haiti, Iraq, and South Sudan—have not deterred the international community. Though the evidence suggests that trying to change such legal systems is an unproductive endeavor, the international community continues to attempt to reengineer institutions, laws, and legal processes, perhaps because there is no accountability for such meager results.

It once seemed incontrovertible that the Western rule of law model was a "good thing." The end of the Cold War provided new opportunities for the

international community to help rebuild shattered states in the developing world. At the time, the rule of law movement was generally considered an adjunct to broader democratization efforts. But it has now taken center stage, accompanied by bold assertions that it will alleviate poverty, secure human rights, and prevent conflict. These goals have proved elusive because the rule of law does not have special abilities to deliver them.

The causes of the movement's failure have remained constant—unrealistic objectives, misplaced doctrinal approaches, insufficient expertise, poor planning and execution, and a lack of deep contextual knowledge. The lessons learned suggest a need to calibrate goals and objectives so that they take account of the negligible impact that international rule of law assistance has had to date. Although the seminal works of Thomas Carothers (1998, 2006), Erik G. Jensen and Thomas C. Heller (2003), and Brian Z. Tamanaha (2011) call for focus and modesty, the international rule of law movement remains undeterred from adopting "comprehensive," whole-system approaches. Indeed, the movement has morphed into an "industry" in that there is considerable business activity around it—though not much of a product.

The past decade has seen an explosion of entities in the rule of law field. They encompass academic institutions, governments, government-funded bodies, journals, nonprofit organizations, private-sector initiatives, and professional associations. At last count, over 1,300 rule of law organizations were listed in the International Bar Association's Rule of Law Directory.[2] The output is enormous—courses and academic programs,[3] research centers, publications, guidance and lessons-learned materials,[4] networks,[5] workshops, training programs, projects, awards,[6] online platforms and forums, blogs, tweet-a-thons,[7] indexes, campaigns, summits, and conferences. In addition to a growth in rule of law entities, there are global rule of law "professionals," mainly Western, ready to deploy "rapidly" to foreign lands to assist in this grand state-building exercise.

A striking development over the past decade has been the increased attention paid by the United Nations (UN) to state-building, particularly rule of law assistance. The UN has since become, probably next to the United States, one of the world's major global actors in rule of law assistance. As described in one of the chapters to this volume, in 2002, a total of eight UN entities provided rule of law expertise. By 2008, the number had grown to forty. Today, UN entities provide rule of law assistance in more than 150 countries; in 70 of these, a minimum of three UN entities provide such expertise.

Though recent international outputs—such as the Global Rule of Law Business Principles and the LexisNexis Rule of Law Business Code—suggest a broadening of the field into commercial interests, the international rule of

law movement has been predominately focused on the reform of criminal justice systems through a state-centric, top-down approach. Perhaps this is because manifestations of dysfunctional justice systems are more easily identified when seen through the lens of crumbling court houses, overcrowded prisons, and limited numbers of police. But deficiencies in the criminal justice system are often a reflection of social and cultural attitudes, political inequalities, distributional disparities, and the power dynamics between elites and the populations they serve. The international rule of law movement has been slow to recognize this.

It is with this critical eye toward the movement's past decade of endeavors that I engaged in discussions with scholars and practitioners while on sabbatical from the United Nations. Those discussions ultimately formed the basis for this volume. The authors all have a mixture of scholarship and practice, rooted in fieldwork. Three major rule of law research entities—the Center for International Peace Operations, the Folke Bernadotte Academy, and the United States Institute of Peace—all of whom are deeply invested in the movement, have provided financial support for this volume and the scholarship therein that is critical of the status quo.

Chapter Review

Authors were asked to address a multitude of conceptual and operational questions. Conceptually: What are the assumptions underlying rule of law? In what way does the technocratic positioning of the rule of law blind us to the problematic aspects of creating law for others? In what ways does rule of law reform work clash with state sovereignty? What does it mean to seek to rebuild a justice system from the ground up? Is rule of law reform antidemocratic? Is the enterprise so flawed that it is impossible, or is it morally and ethically sound but hobbled by poor systems and flawed processes? And operationally: How can identifying goals and being clearer about how we know when they have been achieved help us improve rule of law work? How can we better capture and manage our rule of law knowledge, including an understanding of historic cultural attitudes about the nature of law, the role of law in society, and the way that law should be made and applied? What have been the successes of locally driven, "light footprint" interventions? And how can we best identify and support local priorities, initiatives, and solutions?

This volume reflects a diversity of interpretations of the international rule of law movement. It is intended to raise questions—not to provide definitive answers—regarding the way forward. We hope that it lays a foundation for future debate and, potentially, radical change concerning the way the inter-

national rule of law movement does business. Though most of the chapters speak to one another, some of the contributions reveal competing approaches and, to some extent, generate tension rather than harmony.

Central to that tension is whether the focus should be about renewal and improvement or about recognizing failure and stopping the cycle of "tinkering" with the existing levers of justice reform in postconflict and fragile states. These two approaches promise radically different outcomes. The latter approach essentially promises to destroy entire areas of the "industry," declare them fatally flawed, and reimagine the entire enterprise. The former assumes that the international rule of law industry (either because it is too big to fail or because it is actually a good thing) is here to stay, and that its size, ambition, and scope are not things that can (or should) be questioned. Rather, we must commit ourselves to improving what already exists, whether by incorporating customary systems, increasing funding, or linking the rule of law to the post-2015 development agenda.

A second theme that emerges from these chapters is the extent to which the failure of rule of law is a failure of international organizations as "institutions." Do these organizations possess certain characteristics that make them the appropriate and legitimate purveyors of rule of law theory and vision? Or is it inappropriate and illegitimate for these organizations to represent the global rule of law movement? Should the organizations instead invest in playing more of a convening role, supporting "cultural affinity" initiatives, such as that being undertaken in South Sudan by the Intergovernmental Authority on Development in East Africa?

Moreover, is the rule of law about law and institutions? Is it about binding law? Would rule of law be better if it were grounded in things that states must do as a matter of law (as opposed to, say, having a flourishing defense bar, which is not a legal obligation)? Many in the rule of law field believe that law and institutions are the solution to problems, based on the assumption that the state has a monopoly on law. But customary law and religious, tribal, and community bodies are already providing solutions in much of the world. Does resolving a dispute always have to engage state institutions? If informal processes are providing essential services to communities, albeit with inequalities and unfairness, is this not "good enough," particularly given the deficits in state responses? And would the international rule of law movement not be better if it were run and staffed by anthropologists, sociologists, and linguistic and cultural experts? Is the rule of law about understanding and working with societies, or is it about understanding and building institutions around law and legal practice?

The rule of law is a work in progress everywhere, at home and abroad. An exploration of how the rule of law is working at "home"—particularly an analysis of the easy assumptions that are often made about "model" justice systems in some states, in which laws and institutions can be easily transported and replicated abroad—is a missing piece of this publication. Recent research in one of the most well-resourced and sophisticated legal regimes in the world, the United States, indicates deep and disturbing problems, particularly in the criminal justice system (Stuntz 2011; Bibas 2012). The system's main achievements appear to be the mass incarceration of millions and an emphasis on process and procedure rather than principles of fairness and equality. And despite layers of judicial review and other protections, there is increasing evidence of the wrongful convictions of innocent persons, including those serving death sentences. Though this volume calls for the international rule of law movement to move beyond a myopic focus on criminal justice reform, the research and experiences in this area nevertheless have serious implications that go well beyond the shores of the United States and are worthy of further exploration by the international rule of law movement. If states wish to improve the prospects of the rule of law in the world, they must first fix the rule of law at home.

Most of the contributions to this volume address rule of law reform in the context of postconflict and fragile states because that is where there is considerable international attention. Two of the authors focus on more developed states. The majority of contributors believe that nothing short of a new paradigm is required for the international rule of law movement.

In **Beyond Deficit and Dysfunction: Three Questions toward Just Development in Fragile and Conflict-Affected Settings**, Louis-Alexandre Berg, Deborah Isser, and Doug Porter suggest that donors must reorient the way they understand justice and their role in promoting it. To date, justice reform efforts have been detached from emerging knowledge about the need to embed justice work within a broader understanding of sociopolitical trajectories, and to more deeply engage with the realities found in unstable and crisis-ridden environments. Donor preoccupation with law and order creates blind spots around justice needs and challenges—from land and property ownership to access to basic services—in which grievances and disputes occur that contribute to conflict and fragility. The authors suggest shifting away from emphasizing institutional deficits and dysfunctions and moving toward focusing on issues related to conflict, perceptions of justice, and barriers to development. These are identified in a problem-solving approach through a series of questions: What is the justice problem? How is this problem being governed? And

what is the appropriate role for external assistance in constructively facilitating these contests?

In **Reboot Required: The United Nations' Engagement in Rule of Law Reform in Postconflict and Fragile States**, I call for radical change in the way that the UN engages this field. The UN must reexamine the purpose, approach, methodology, and results of its rule of law assistance, understanding that much good can be done, but on a smaller scale. Though central to the development of the international legal framework and normative human rights and criminal justice principles, on which rule of law work is based, the UN was historically a modest actor when it came to the provision of technical rule of law assistance to its member states. This profoundly changed in 2003, with the Security Council's decision to establish multidimensional peacekeeping missions in postconflict and fragile states. These missions had mandates to "comprehensively" reform justice systems, with a particular focus on police and prisons. The chapter suggests that the premise was based on a flawed understanding of the justice problem, and that, in any event, the UN was ill-suited to play this role because of deficits in its knowledge, capacities, and skills. The chapter recommends that the UN adopt a modest, focused, and incremental approach, moored in international human rights law, in which the organization uses its moral and normative authority and convening power to better identify and support local priorities, initiatives, and solutions.

Haider Ala Hamoudi's chapter, **Decolonizing the Centralist Mind: Legal Pluralism and the Rule of Law**, suggests that the international rule of law movement needs to unshackle itself from the conception of state centrality that has permeated its legal consciousness so it can imagine a different set of solutions for addressing problems related to rule of law. The chapter examines the deficiencies associated with the legal centralist approach in the context of rule of law efforts through an exploration of the "legal order" in the Republic of Iraq. It explores the failure to heed the lessons of legal pluralism, which indicate that, in any social field, there is more than one legal system in operation and that state law by no means reigns supreme. The author rejects the suggestion that law should ultimately derive from, or be delegated by, the state and challenges the notion that the exclusive role of the state is to manage legal disputes. The chapter, while careful not to romanticize religious or tribal "legal order," highlights the important advantages of these processes—they command loyalty, are familiar and accessible to their participants, and are undertaken in a language that is understood. It argues that that the state should be simply one of many players in a multifaceted and multidimensional system.

While calls for the international rule of law movement to consider the local "context" become more ubiquitous, in **Policy of Government and Policy of Culture: Understanding the Rules of Law in the "Context" of South Sudan's Western Equatoria State**, Mareike Schomerus suggests that "context" is in fact a dynamic interplay between changing, symbolic, and imagined realities and histories. The question of how international rule of law assistance might navigate nonstatic belonging, tradition, and rule setting is thus more complex than even a context-sensitive rule of law intervention might envision. Rule of law reform efforts in South Sudan are mainly an international endeavor focusing on the rule of law as "legal certainty," while local requirements, manifest in how the Azande kingdom is imagined, seek flexible interpretation of a broad range of governance and cultural issues. The chapter challenges widely held assumptions that see context-sensitive justice provision as requiring a clear set of rules, institutions, and authorities, with context acknowledged through an extension of those into so-called informal processes. Instead, the chapter suggests, the international rule of law movement needs to adjust its understanding of "context specific" and "culturally sensitive" as meaning to engage in surroundings that are permanently evolving and to reimagine social realities, with notions of democracy, rules of law, and justice profoundly different from those of the international rule of law movement.

Deval Desai's chapter, **In Search of "Hire" Knowledge: Donor Hiring Practices and the Organization of the Rule of Law Reform Field**, highlights a strange dynamic in the world of rule of law reform: money spent on rule of law projects has increased, even as a strong sense of consensus has emerged that the international community does not really know what to do in this "field." He argues that the idea that the field does not really know what it is doing is not only unproblematic for the field's continued existence but has in fact become constitutive of it. People working in rule of law reform are not grouped together, nor do they share a common sense of purpose or an approach to reform. Rather, they are bound together by the very idea they do not know what to do. Desai argues that the rule of law field exists because the field states that it does, through an ongoing restatement of its existence and reinvention of its history. In light of these circumstances, how can the field be "organized"? How is it possible to learn and move forward if we are constantly reinventing the past and restating our existence in the present? The author suggests that we perhaps remain too concerned at the conceptual level with trying—and always failing—to find some clear content that can bind us together as rule of law reformers. Instead, we should turn to practice to see

how we deal with and ignore the indeterminacy of what we do. The chapter looks specifically at the characteristics of rule of law personnel enumerated in the hiring statements of international organizations and donors to see how they engage with what it means to be a rule of law reformer.

In **New Rules for the Rule of Law**, James A. Goldston explores why the rule of law's moment of relevance has arrived and what can be done to give the concept greater meaning in practice. The chapter describes the rule of law's new rhetorical popularity among politically diverse states, which embrace the breadth of its reach and the legitimacy it bestows, including on controversial policies, perhaps because they perceive it as content free. This, the author argues, may explain some states' preference for the rule of law over human rights. The chapter calls for a vision of the rule of law grounded as much in the experiences and struggles of ordinary people as in the adoption of laws and the building of institutions. The rule of law's new ascendancy in official discourse has implications for donors and practitioners, including the implication that rule of law reform, while often presented as a technical challenge, is an inherently political act. Finally, the chapter recommends that advocates seize on a time-bound opportunity—the negotiation of the post-2015 development agenda—to promote the rule of law as a value integral to more inclusive and effective human development.

Other chapters discuss innovations that the international rule of law movement needs to better understand and explore. In **From HiPPOs to "Best Fit" in Justice Reform: Experimentalism in Sierra Leone**, Margaux Hall, Nicholas Menzies, and Michael Woolcock explore the use of experimentation in the World Bank's Justice for the Poor program in Sierra Leone to improve justice and accountability outcomes relating to the delivery of health services. Given the inherent state of uncertainty in complex environments, the authors posit, justice reform efforts could be improved by crafting such responses through a conscious stance of experimentation. Such an approach would design projects that allow data to be collected in real time from an evolving set of activities, using the most encouraging empirical findings to identify locally legitimate, context-specific solutions. Though admittedly radical in the field of justice reform, continually testing and refining operational alternatives based on ongoing data collection is common in the web-based tech world. This approach, the authors suggest, would engage different actors and remedy injustices at different levels.

In **Legal Empowerment and the Land Rush: Three Struggles**, Vivek Maru examines potential innovations relating to grassroots efforts to pursue justice in the context of community rights to land and natural resources. Globally, vast amounts of land are held under customary tenure, with no formal docu-