

ADVANCING THE RULE OF LAW ABROAD

NEXT GENERATION REFORM

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RACHEL KLEINFELD

CARNEGIE ENDOWMENT

FOR INTERNATIONAL PEACE

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Carnegie Endowment for International Peace
1779 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-483-7600, Fax 202-483-1840
www.ceip.org

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Cover design by Jocelyn Soly
Composition by Beth Schlenoff
Printed by United Book Press

Library of Congress Cataloging-in-Publication Data

Kleinfeld, Rachel.

Advancing the rule of law abroad : next generation reform / Rachel Kleinfeld.
p. cm.

ISBN 978-0-87003-348-3 (pbk.)—ISBN 978-0-87003-349-0 (cloth) 1. Law reform. 2. New democracies. 3. Rule of law. 4. Law—American influences. 5. Law—European influences. I. Title.

K559.K59 2012
340'.11—dc23

2012001516

ACKNOWLEDGMENTS

This book owes its existence to Tom Carothers, who well over a decade ago began to support my journey in the rule-of-law field. His insight, wisdom, and willingness to put up with an extremely long writing process have allowed these words to finally see the light of day. I also owe great thanks to the Carnegie Endowment for International Peace, particularly Ilonka Oszvald and Jocelyn Soly, who painstakingly worked through the copyediting and cover design of this book.

The seeds of this writing began a decade ago at Oxford University. I owe immense thanks to the trust of Kalypso Nicolaidis, my adviser who not only oversaw my doctoral thesis in this area, but believed that I still might finish despite my decision to move back to America and start a nonprofit organization a year into the writing. Her patience, good-humor, and intellectual partnership have been a gift.

My thinking in the rule-of-law field has been spurred by many great intellects and practitioners. From my earliest days I have been influenced by my father's fierce intelligence and his life-long service to the law, which provided inspiration—and fodder for decades of dinner-table debates. I also thank both my father and mother for their libertarianism, which allowed me to spend youthful years gallivanting through countries that lacked much rule of law—experiences for which I will thank them for the rest of my life. Two who deserve special mention are Richard Messick of the World Bank and Wade Channell from USAID. Their willingness to read early versions of the manuscript and provide feedback has strength-

ened the work, and I have learned a great deal from their own writings and our manifold conversations over the years.

I have also enjoyed talking through these issues with many members of the Truman National Security Project community, from those working on the ground in Afghanistan and Iraq, to those in the trenches at the U.S. Department of State, Department of Defense, National Security Council, and other government agencies. Since the Truman community always engages in lively debate, I will not name names of those who might disagree with these conclusions—but I deeply appreciate all of their thoughts, grounded insights, and targeted questions. Their work in some of the most dangerous parts of the world—and some of the toughest parts of Washington, D.C.!—inspires and humbles my own efforts.

The research for this book drew on scores of interviews in countries around the world. I thank all those who provided their time to answer my many questions. Their names appear throughout the notes, but some who offered deeper insight (and second and third interviews) demand particular mention, such as Sebastian Pompe in Indonesia, Aurel Ciobanu-Dordea in Romania, and Fatos Bundo in Albania. While in most countries I worked without a translator, in Indonesia, John Riady provided that service—as well as handling all logistics, setting up meetings, and swiftly becoming a fellow thinker and colleague. I've rarely met such a fast learner or such a skilled compatriot at the art of getting things done while stuck in the midst of Jakarta traffic! I am grateful for his help, savvy, and intelligence.

This book owes its existence to experiences I had in rural India, Russia, and Eastern Europe, where the fabric of rule-of-law societies had frayed. These experiences sent me on a nearly twenty-year journey to discover how to improve the security, enhance the development, and increase the empowerment and human rights of people around the world who struggle under societies without liberty under law. It is easy to write about these issues; it is hard to fight them from the ground up. This book is dedicated to all those working for justice and dignity under the rule of law—may their struggle be rewarded, and may the United States stand on their side.

FOREWORD

When one speaks to an audience in a country moving away from authoritarian rule about possible paths ahead, the surest way to elicit wide agreement and interest is to highlight the importance of the rule of law. Whereas references to democracy or market economics will provoke a debate about their value and appropriateness for the society in question, the rule of law commands near-universal respect. Different audience members may understand the term in different ways—some will hear anticorruption, others the need for basic personal security, and still others will interpret it as a broad but powerful quest for justice—but they will not question the importance of the basic enterprise.

In parallel fashion, although Western policymakers and aid practitioners trying to assist postauthoritarian transitions often squabble over models and sequences of political and economic development, they are almost always unanimous in agreeing that rule-of-law development should be a priority. As I wrote in the 1990s, when the international community was starting to support political and economic transitions in every corner of the world, the rule of law has come to be seen as the “elixir of transitions.” That is to say, it is perceived as a necessary foundation for the success of all other elements of the transitional package—political, social, economic, and humanitarian.

The result has been a mushrooming of efforts to foster the rule of law in a remarkably large and diverse group of countries. Throughout the developing and postcommunist worlds, one finds a welter of specific

undertakings advanced under the rubric of rule-of-law development. These include attempts to promote transitional justice, judicial and police reform, legal aid, access to justice, alternative dispute resolution, legal education, and much else.

Unquestionably many of these efforts are valuable and have produced positive effects. But the experience has often been daunting. Russia has attempted myriad rule-of-law reforms for twenty years and absorbed significant amounts of Western assistance in the effort, yet law in Russia remains associated as much with the abuse of power as the regulation of it. El Salvador has been an early and continuing recipient of substantial amounts of rule-of-law assistance from abroad, but is beset today with devastating levels of criminality. Nearly two decades of varied attempts to help Cambodia with transitional justice and basic legal reforms have produced only very modest results.

Why has the rule-of-law endeavor proved so difficult? Despite powerful public support for the idea in countries around the world, reform efforts inevitably confront the fact that the technical elements of strengthening legal systems are only a minor part of undertakings that must confront the enormous challenges of creating meaningful limitations on political power holders, changing how governments relate to citizens, and altering fundamental norms that govern how citizens interact with each other.

Rule-of-law reformers increasingly recognize these realities and have learned many lessons about what works and what doesn't. Aggregating, capturing, and synthesizing this knowledge is a difficult but critical task. This book does just that.

Drawing on deep-reaching comparative research and sharp analytic insights, Rachel Kleinfeld persuasively argues that rule-of-law reform is poised to advance from an initial, somewhat exploratory generation to a more knowing and effective second generation. She builds her case by moving systematically from a reconsideration of competing ideas about the rule of law and a broad look at the overall set of available policy tools to an incisive analysis of which particular configurations of these tools are most likely to be effective in different types of cases. She proceeds from a full awareness of the difficulties that rule-of-law reform often encounters, but maintains a notable conviction that the international community can do better.

RACHEL KLEINFELD

Having addressed rule-of-law issues in a series of works coming out of its Democracy and Rule of Law Program since the 1990s, the Carnegie Endowment for International Peace is pleased to publish this important contribution to a field that remains as crucial and compelling today as when it emerged in the international policy agenda decades ago.

—Thomas Carothers
Vice President for Studies
Carnegie Endowment for International Peace

TABLE OF CONTENTS

ACKNOWLEDGMENTS	vii
FOREWORD	ix
CHAPTER ONE INTRODUCTION	i
CHAPTER TWO GOALS: WHY ARE WE DOING THIS?	37
CHAPTER THREE PAUSING FOR DOUBT: ARE WE REALLY BUILDING THE RULE OF LAW?	59
CHAPTER FOUR WHAT MUST CHANGE? THE FOUR OBJECTS OF REFORM	79
CHAPTER FIVE METHODS OF INTERVENTION FROM OUTSIDE	109
CHAPTER SIX STRATEGY AND IMPLEMENTATION: DEPLOYING TACTICS TOGETHER	147
CHAPTER SEVEN CRAFTING A SECOND-GENERATION REFORM STRATEGY	181
CHAPTER EIGHT CONCLUSION	209
NOTES	223
INDEX	269
ABOUT THE AUTHOR	279
CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE	281

INTRODUCTION

As this century comes to a close, I think historians will say that one of the great advances in our civilization during this last 100 years has been the gift of law to people across the world.

– U.S. Supreme Court Justice Anthony Kennedy¹

These sequestered nooks are the public offices of the legal profession, where writs are issued, judgments signed, declarations filed, and numerous other ingenious machines put in motion for the torture and torment of His Majesty's liege subjects, and the comfort and emolument of the practitioners of the law.

– Charles Dickens, *The Pickwick Papers*

In the winter of 1992, I traveled to St. Petersburg to live with my brother, who was working with the city's first Russian-American theater company. Its office was located just above one of the favorite nightspots of the rising Russian mafia. Every day, we would walk to work past kiosks that had been burned out the night before—a message to shopkeepers to pay their protection money. At night we would try to avoid the burly men who had already kidnapped two of the actors, releasing them late at night, stripped, in a forest. We were among the first Americans living in the city since the Soviet Union's demise, and the *mafiosi* assumed we were

rich. One day, a gangster pulled a few of the troupe aside and offered them a nuclear submarine—for a bargain price. The man was far off the mark about actors' material resources as well as their desire for a weapon of war, so we'll never know if his offer was real. But it was plausible, in those cowboy capitalist days after the fall of the Soviet Union, when anything and everything seemed to be for sale.

When the rule of law breaks down in any country, the effects are felt around the world. A nuclear submarine swimming through international waters might be noticed—but it's plausible that a Russian border guard, having just received more than his yearly wage in a one-off payment, could turn a blind eye to smugglers leaving the country with small arms or even nuclear waste from which a dirty bomb could be built. Jails in Washington, D.C., house Central American gang members whose empires spread from El Salvador to our nation's capital—and whose dominions are fed by cheap guns purchased in our own states.² Street corner stands in Thailand do a bustling business in pirated videos, cutting into Hollywood's bottom line. Corruption infuriates Tunisia's frustrated, unemployed youth, and once the spark catches, the entire Middle East is aflame.

Rule-of-law deficiencies in other countries—whether just across a border or separated by distant seas—have led the United States and a host of other countries and international institutions to try to promote improvements in the rule of law within foreign nations. These efforts are sometimes called “rule-of-law assistance.” But the term is a misnomer, suggesting that aid is the only way to engage other countries in this sphere. Instead, this book will use the term “rule-of-law reform” to encapsulate the full range of methods used—from diplomacy and aid to membership requirements in NATO, the North Atlantic Treaty Organization—to help other countries improve their rule of law.

In 1998, scholar Thomas Carothers published what was then a path-breaking article on *The Rule of Law Revival*, recounting the possibilities, progress, and problems of the burgeoning field. Yet fourteen years later, little has changed. Like the movie *Groundhog Day*, rule-of-law practitioners and scholars keep waking up to the same predicaments, noting them in the same working papers, and then going back to do the same things. Despite its importance, the field of rule-of-law reform has remained

in conceptual infancy, unaware of its own history, and as the saying goes, bound to repeat it.

Yet recently, change has begun poking through like crocuses in springtime. Just as Bill Murray's character finally broke out of his endless loop, rule-of-law practitioners and scholars have begun to make progress in altering the thinking and programs on the rule of law. This book describes this nascent second-generation movement of rule-of-law reform and provides further scholarship to support it. It focuses primarily on U.S. efforts. But work to promote the rule of law abroad is a global activity in which other countries and international bodies engage in a generally similar set of tactics. And many of the broad ways of thinking about rule-of-law challenges and strategies apply equally to a range of countries, aid agencies, and international bodies engaged in rule-of-law promotion, even though they have different histories and administrative arrangements. For that reason, this book offers examples from both U.S. and non-U.S. actors to showcase similar methods in what is a global field with widely shared characteristics. It also draws on examples from outside the United States to illustrate some strategic options that are less prevalent in America and more developed elsewhere. By contrasting what is known now with what has been done in the past, we can make headway on an important area of reform that has bedeviled the international community for years.

Why Are So Many Countries Trying to Spark Rule-of-Law Reform in Other Countries? And Should They Be Trying?

A respected *éminence grise* of the U.S. foreign policy establishment once told me, "No serious security threat can come from a country where you can't drink the water." His advice may have been well taken in the twentieth century, when it could have helped us avoid the war in Vietnam and a host of ill-conceived excursions into Latin America. But in today's globalized world, countries are not the only actors. The Twin Towers were brought down by people organized in places like Sudan,

Pakistan, Yemen, and Afghanistan—all areas where imbibing from a tap is ill-advised. Today's foreign policy leaders simply face a new reality.

For much of the nineteenth and twentieth centuries, a handful of countries controlled most of the space on the map. Through colonial relationships or paternalistic proclamations like the Monroe Doctrine, these “great powers” kept the peace and controlled the borders from yesteryear's Ceylon to Suriname. That world began to fall apart in the 1950s as decolonization got under way. For the next few decades, U.S. and Soviet proxy regimes and the legacy of colonial systems kept the lid on scores of new countries as they emerged headily into independence. Difficulty traveling between Soviet and Western spheres, and the costs of migrating from the Third World to anywhere else, kept most rule-of-law problems local and avoided major spillover.

But cracks began to show almost immediately. Communist movements in Latin America in the 1950s, Middle Eastern terrorism in the 1970s, and the drug trade in the 1980s impelled the United States to begin training police in scores of countries to head off threats before they reached U.S. borders. In the 1970s, publics in Europe and the United States became passionate about human rights and demanded that their governments promote such rights as part of their foreign policies. By the early 1990s, scholars of aid effectiveness started linking a country's ability to enforce contracts to its ability to develop economically—and the basket of issues that would become known as the rule of law quickly became important to the development community as well.

Meanwhile, the Soviet Union fell. The United States pulled back its State Department presence around the world when the Russians reduced their own footprint—and suddenly, dozens of states that had held together thanks to the centripetal forces of that great-power rivalry began to break apart. Organized crime began to rival—and at times fuse with—governments as the drug trade grew, communist states privatized, and the Balkan wars spawned large-scale smuggling operations. Al-Qaeda, nurtured by the Saudis and Americans to fight the Soviets in the 1980s, began to metastasize within a series of states too weak to root it out. Countries such as Yemen emerged from civil wars with weak governments and strong societies, in which the rulers often controlled little beyond the capital city. As had happened during the Middle Ages and the centuries

surrounding the fall of Rome, blank spaces began to appear on the map, where the writ of government failed, and highwaymen ruled once again.

In most countries where the United States and others are working to improve the rule of law, governments are too weak to monopolize violence or are unable to create mechanisms of control for their police and judiciaries. People are preyed upon by criminals and traffic cops. Businesses cannot grow too large for fear of mafia-style shakedowns. Justice is sold to the highest bidder. In other countries, autocrats continue to rule. Individuals need to be protected against an overly strong, encroaching state—the same problem that led Enlightenment liberals and ancient Greeks to promote the idea of the rule of law in the first place. But even in apparently formidable autocracies, internal rot has often taken hold of public services. A shell of order and control held together by force hides a feeble state apparatus eaten away by corruption and ineffectiveness. And, whether the problem is terrorist recruitment, pirated movies, or corruption so serious that it breeds revolution, these rule of law failures often become the policy nightmares that bedevil countries in the developed world. Thus, the United States and other countries have decided that myriad difficulties can be solved only if they help catalyze rule-of-law improvements abroad.

The question that keeps arising is: How? Because the reality is clear: The United States, along with most others working in the field, is not very good at promoting the rule of law abroad. After decades of work and billions of dollars, the track record of successful rule of law promotion efforts is paltry. In his comprehensive study of police reform, David Bayley found that: “As a general proposition, American foreign assistance has not been shown to contribute significantly or consistently to reforming police institutions abroad, still less to the creation and stabilization of democratic governments.”³ A General Accounting Office (GAO)⁴ study of U.S. democracy assistance to Latin America and the Caribbean from 1992 to 2002 found that after over a billion dollars spent, the programs had “a modest impact,” while its study of U.S. rule of law programs in the former Soviet Union for the same period found “limited impact” with the newly independent states scoring “poorly in the development of the rule of law and, as a whole . . . growing worse over time.”⁵ Scholar Stephen Golub notes that “what stands out about rule of law assistance . . . is how difficult

and often disappointing such work is.” Even successfully implemented tactics, such as an improved constitution, are often undermined by later failures in implementation and enforcement.⁶ Moreover, U.S. efforts fail in part for structural, systemic reasons that are difficult to change, such as convoluted systems of funding and accountability that have accreted over time within the diplomacy and aid apparatus, often as a result of congressional rulings. As one piece of legislation has been built atop another, and old programs have been repackaged to fit new needs, the United States has created a series of Rube Goldberg-style contraptions for promoting the rule of law abroad that would cause any strategist to despair.

It is easy to think, after reading such findings, that the United States should get out of the business of trying to affect the rule of law in other countries. But history flies in the face of a passive stance. The United States has been intervening in other countries’ judicial, penal, and police systems for more than a century, since its early incursions into nearby Latin America at the end of the nineteenth century. What the past century has shown is that, whether good at it or not, and regardless of the ideology of any particular administration or Congress, the United States is going to continue trying. No matter the track record, Americans continue to rediscover that solutions to their security problems, hope for human rights improvements, and the bedrock of economic development require rule-of-law improvements in other countries. Meanwhile, nearly every interaction between the United States and another country affects that country’s rule of law—even when it is an unintended consequence.⁷ Decisions on whether to undertake military-to-military training missions, sign a free trade deal, or conclude a treaty all influence a country’s rule of law. When the United States engages in typical diplomatic action, it may choose to shore up dictatorial leaders, and thus unconsciously promote inequality in the law—or it may reward democratic governments and be seen by local reformists as standing by their side. The United States allows corruption in procurement and inadvertently shows that national interest trumps the rule of law, or it cracks down, even at the cost of not getting money out the door as quickly, and sends a very different message. The United States has no choice but to have an impact—it can choose only whether to be conscious and deliberate about the kind of impact it has.

History shows that the United States is going to engage in rule-of-law reform abroad whether it has working institutions skilled at doing it or has to slap something together on the fly with the policy equivalent of duct tape. And since the United States is going to do it, it should make every effort to get better at it. Improving the track record requires the United States to understand its history, think about what it is actually trying to accomplish, and learn from its mistakes in order to strategically engage in a field that matters, in a way that has a chance of success.

What Is the Rule of Law?

What is this miracle cure that seems so important to so many foreign policy goals?⁸ For decades, rule-of-law reform took place without much of a definition at all, based on the idea that “you’ll know it when you see it.” Instead of a definition, governments and donor agencies simply elucidated the institutional characteristics they thought were necessary for a country to have a modern legal order—and then set about helping a country build, or improve, each area.⁹ For example, when seeking to quantify U.S. rule of law activity, the General Accounting Office explained:

Throughout this report, we use the phrase “rule of law” to refer to U.S. assistance efforts to support legal, judicial, and law enforcement reform efforts undertaken by foreign governments. This term encompasses assistance to help reform legal systems (criminal, civil, administrative, and commercial laws and regulations) as well as judicial and law enforcement institutions (ministries of justice, courts, and police, including their organizations, procedures, and personnel).¹⁰

Scholar Stephen Golub provided an excellent taxonomy of this first-generation definitional style:

- A focus on state institutions, particularly judiciaries.
- This institutional focus is largely determined by the legal profession, as represented by a nation’s jurists, top legal officials, and attorneys, and by foreign consultants and donor personnel.

ADVANCING THE RULE OF LAW ABROAD

- As a result, a tendency to define the legal system's problems and cures narrowly, in terms of courts, prosecutors, contracts, law reform, and other institutions and processes in which lawyers play central roles.
- Where civil society engagement occurs, it usually is as a means toward the end of state institutional development: consulting nongovernmental organizations (NGOs) on how to reform the (narrowly defined) legal system, and funding them as vehicles for advocating reform.
- A reliance on foreign expertise, initiative, and models, particularly those originating in industrialized societies.

These features translate into funding a distinct array of activities, including:

- constructing and repairing courthouses;
- purchasing furniture, computers, and other equipment and materials;
- drafting new laws and regulations;
- training judges, lawyers, and other legal personnel;
- establishing management and administration systems for judiciaries;
- supporting judicial and other training/management institutes;
- building up bar associations; and
- conducting international exchanges for judges, court administrators, and lawyers.¹¹

With the addition of access to justice programs and anticorruption initiatives, this definition still rings true. However, it leads to multiple difficulties—not the least of which is the fact that each of these laws and institutions of justice could be reformed, without much rule of law resulting—or rule-of-law improvements could come about despite “outdated” institutions and laws.

Consider, for instance, a 2004 analysis of a rule-of-law reform program run by the European Union's aid agency. The EU's definition of its activities, like American first-generation rule of law assistance, emphasizes creating judiciaries that are “independent, well staffed and well trained, well