8-23-2006

The Rule of Law

Miguel Schor
Suffolk University Law School, mschor@suffolk.edu

Miguel Schor
Associate Professor of Law
Suffolk University School of Law
120 Tremont St., Boston, MA 02108
617-305-6244, mschor@suffolk.edu

The Rule of Law[1]

The last two decades witnessed a very important transformation as a number of nations principally in Eastern Europe and Latin America underwent democratization and market reforms. These reforms are being undermined, however, by the difficulties these nations face in implementing the rule of law. The rule of law, therefore, has moved to the center of an intellectual debate concerning how best to engineer the transformations needed for development to occur. As Thomas Carothers (1998, 1) notes, the "concept [of the rule of law] is suddenly everywhere—a venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization." Oddly, it has not been lawyers but principally social scientists who have made the rule of law an important topic in development studies. The economist Hernando de Soto (2000, 1989), for example, has argued persuasively that without a functioning legal system, markets and consequently economic development are impossible. Political scientists Zakaria (2003) and O'Donnell (1994) argue that democracy in the developing world is unlikely to endure without effective rules that cabin political behavior.

The advent of democracies lacking the rule of law not only remade the political map of the world but also transformed research agendas as scholars concerned with third

---

[1] This essay will be published in the ENCYCLOPEDIA OF LAW AND SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES (David Clark ed. 2006).

world development sought to define the rule of law and argued over how best to implement it. Perhaps not surprisingly given the importance and the antiquity of the topic, there is little agreement as to the precise contours of the rule of law (Fletcher 1996, Radin 1989, and Rosenfeld 2001). Yet there is an historical core to the concept that plays an important role in the Western legal tradition. The rule of law means that government can act only through law and that law checks the power of government (Berman 1984, 536-7). The former emphasizes the importance of rules whereas the latter is more normative in focus (Fletcher 1996, 11). Translated into modern terms, the two key components of the rule of law are due process of law and constitutional judicial review.

Due process is the oldest component of the rule of law and provides a procedural check on government. The ideal of due process is that government cannot act against individuals without affording a hearing before a neutral magistrate who applies rules that in principle can be used to dispose of other, similar disputes (Harvey 1961, 494). Due process contributes to the legitimacy and longevity of government for two reasons. First, all societies are honeycombed with disputes and require, therefore, legitimate mechanisms to resolve disagreements. It is no accident that almost every society throughout history has used a third person to settle disputes (Shapiro 1981). Whether we are talking about a village elder or the judge of the modern state, the "basic political legitimacy of courts" stems from this "overwhelming appeal to common sense" (Shapiro, 1). Second, courts facilitate the social trust and consent that governments need to function well. Courts resolve disputes in a very different manner than do other political actors. The legitimacy of elected officials flows ultimately from the ballot box whereas the legitimacy of judges rests on the reasons that they provide for their actions. Elected

officials are accountable to the electorate; judges are answerable for the explanations they give for their decisions (Schedler et al. 1999).

Constitutional judicial review is the newest component of the rule of law and provides a substantive and normative check on government. The new democracies of Eastern Europe and Latin America, having recently escaped from the evils of dictatorship, understandably established or sought to strengthen courts with the power to effectuate constitutional guarantees (Neal and Vallinder 1995, Russell and O'Brien 2001, and Schwartz 2000). The mechanisms used to provide constitutional judicial review are extremely varied as they are the complex result of borrowing and political compromise (Shapiro and Stone 2002, Lijphart 1999). There is a common core to these mechanisms, however, as they rest on an independent constitutional or supreme court with the power to interpret and effectuate written constitutions.

Contemporary understandings of the rule of law that emphasize the importance of due process and constitutional judicial review flow from an account of "best practices" among the world's democracies. This understanding is dangerously incomplete, however, for it fails to take into account the difficulties faced by new democracies in implementing the rule of law. Unearthing what the absence of the rule of law or the un-rule of law looks like is the key to understanding the rule of law. The un-rule of law is not a passing aberration or a pathology but the norm in most of the nations of the world (Méndez et al. 1999). To uncover what the un-rule of law means, this essay will discuss how comparative lawyers, political scientists, and economists analyze how law operates in the developing world.

Ugo Mattei (1997) uses the traditional tool of comparative law—legal taxonomy—to differentiate the legal systems of the West from those of the third world. Mattei argues that the traditional classification of the world's legal systems into families based on history is of little relevance to problems facing developing nations and proposes instead a classification based on the presence or absence of the rule of law. The Western legal tradition is characterized by the rule of professional law in which law is separate from politics and other forms of social control such as politics and religion. As a consequence, law is autonomous from politics. Developing nations, on the other hand, "enjoy" the rule of political law where politics trumps law. The key features of the political rule of law or the un-rule of law are

> weak courts; . . . high level of instability of existing democratic structures, if any; high level of political involvement in the activity of the judiciary; high levels of police coercion; . . . continuous attempts at major legal reform; legal culture heavily influenced by foreign models and usually marginalized by the political power; scarcity of legally trained personnel; and a highly bureaucratized public decision making process (Mattei, 30).

Nations with the un-rule of law, therefore, have highly malleable legal systems as rules are trumped by political exigencies.

The impact of the un-rule of law on politics is also profound. In a constitutional democracy, elected leaders are accountable both vertically to the electorate and horizontally to other political institutions. O'Donnell (1994) argues that democracy in the developing world, on the other hand, is not constitutional but delegative democracy because horizontal accountability is lacking. Delegative democracies "rest on the premise that whoever wins election to the presidency is thereby entitled to govern as he or she sees fit, constrained only by the hard facts of existing power relations and by a constitutionally limited term of office" (O'Donnell, 59). The un-rule of law manifests

itself politically in frequent recourse to the state of siege as presidents deal with crises by suspending the normal workings of the legal system (Loveman 1993). Emergencies are routinely used as an excuse to trump constitutional guarantees.

This concentration of power, however, undermines rather than facilitates development. In a constitutional democracy, policymaking is typically "slow and incremental and sometimes prone to gridlock" (O'Donnell, 62). Mistakes tend to be small and easily reversed. Incremental decision-making is not only less prone to irreversible mistakes but is also more legitimate as it requires the input of a large number of political actors (Lijphart 1999). In delegative democracies, on the other hand, major decisions can and are made without support from other political actors. This sort of decision making is attractive to developing democracies because of the manifold ills that they face. Repeated crises, not long-term reforms, however, are the typical outcome of providing elected leaders with so much power. They pursue short-term policies that reward supporters rather than reforms that provide a long-term pay-off (Geddes 1994). Presidents in delegative democracies, in short, lack incentives to strengthen the myriad institutions needed to effectuate the rule of law (Prillaman 2000 and Ungar 2002).

The impact of the un-rule of law is as profound on economic development as it is on democratic stability. Courts are as marginalized in resolving economic disputes as they are in resolving political disputes. Economic disputes are typically handled by bureaucrats rather than by judges and resolved in a manner to enhance the power of the political leadership rather than according to rules (De Soto 2000, 1989). There are two important consequences to the marginalization of courts. First, markets are inefficient. Businesses swap political support for rules that favor their interests, which in turn reduces

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

Given the enormous political and economic costs imposed by the un-rule of law, the issue of why the rule of law has not been implemented in the third world is an enduring mystery. Nations became democratic and adopted economic liberalization packages almost overnight yet the rule of law has proven difficult to construct. Although this essay does not contend it provides an answer to this problem, it argues that any solution requires that we revisit and reinterpret the core concepts that underpin the notion of the rule of law—due process and constitutional judicial review—to see how they play out in nations undergoing a series of difficult transitions.

The conventional view of due process is that decisions must be made by neutral magistrates who decide cases based on general principles or rules. The conventional view, therefore, emphasizes how decisions are made rather than how they are implemented. The problem with this view is that it ignores that courts are political as well as legal institutions. As political institutions, courts lack the power of the sword or

the purse. The ability of courts to function ultimately hinges on the actions of other actors who are willing to implement those policies (Canon and Johnson 1999).

It is precisely the linkage between law and politics that is lacking in developing nations. Courts have long been marginalized from the process of nation building in the third world because they lacked political power and could be ignored with impunity by elites. Law cannot function unless there is a network of other actors who are willing to use such decisions as a resource in what is ultimately a political struggle as much as it is a legal one (Cannon and Johnson 1999, Epp 1998, and Widner 2001). Radin (1989, 808-809) makes this point when she concludes "Rules are created and continue to exist not only because a legislature says so, but also by virtue of their being embedded in [society]. A judge's decision in response to a rule responds necessarily to the community as a whole and not just what the legislature has said." Due process of law means that judges must fashion socially relevant rules that provide a pay-off to the citizenry.

The ability of judges to play a creative role in constituting the rule of law will in turn be influenced by the legal ideology they labor under. Common law judges have important advantages over civil law ones in that the common law has long acknowledged a creative role for judges whereas the civil law ideal is that judges should be subservient to the other branches in interpreting rules (Merryman 1985). Widner (2001, 24), for example, provides a very fine study of how judges in Africa consciously played a creative role in creating a constituency for the "rule of law in common law Africa." In the developed world, the state makes the law available by publishing decisions and various interest groups then seek out those decisions to use as resources in achieving their aims. This linkage is lacking in the underdeveloped world. The problem was acute in

common law Africa where customary law was an important component of the legal landscape. The solution was to build "legal literacy" by educating the public as to the law and by crafting decisions that would be relevant to those who would otherwise resort to customary law to settle disputes (Widner 2000, 314). Crafting the rule of law is a long-term process that hinges on courts producing outcomes that can be used by consumers and societal attitudes shifting in favor of the law as citizens realize it favors their interests.

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

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

1993, Epstein and Knight 1998, and McCloskey 2000). The price of the power granted the judiciary to review the constitutionality of legislation is that the political branches retain important checks on the judiciary such as the power to name judges, to control judicial jurisdiction, and to enforce judicial decisions. As a consequence of these political checks on judicial power, the judiciary must be strategic in making decisions and take into account the interests of other political actors and the citizenry. Constitutional judicial review was not created in one fell swoop when Marbury v. Madison was decided but was the long-term consequence of a judiciary that was "flexible and non-dogmatic" and responsive to the "drift of public opinion and the distribution of power in the American Republic" (McCloskey 2000, 208).

In short, scholars will be unable to understand the rule of law if they simply view it through the lens of the best practices in well-developed democracies. Conventional accounts of the rule of law focus on the twin requirements that government must act through and under the law. Due process of law and constitutional judicial review obviously must be implemented in recently democratized nations to sustain political and economic development. The problems that these nations face in building the rule of law, however, demonstrate that the rule of law faces in two directions: one legal, the other political. The two key components of the rule of law rest on political processes. Due process of law means that judges must articulate reasons for their decisions so that those decisions can be used by other actors as resources to advance their interests. A society that lacks due process of law is one where the law has no social relevancy because the linkages between law and society are broken. Constitutional judicial review means that the judiciary is somewhat but not too independent so that it can be a countervailing and

accountable force in politics. The rule of law does not rest on negating politics but on crafting the proper linkages between courts and other political actors.

Further Reading

Harold J. Berman. (1984). Law and Revolution: The Formation of the Western Legal Tradition. Cambridge: Harvard University Press.

Bradley C. Canon and Charles A. Johnson. (1999). Judicial Policies: Implementation and Impact. Washington, D.C.: Congressional Quarterly Press.

Thomas Carothers. (1998). "The Rule of Law Revival." Foreign Affairs 77: 95-106.

Charles R. Epp. (1998). The Rights Revolution. Chicago: University of Chicago Press.

Lee Epstein and Jack Knight. (1998). The Choices Justices Make. Washington, D.C.: Congressional Quarterly Press.

Owen M. Fiss. (1993). "The Right Degree of Independence." In Transition to Democracy in Latin America: the Role of the Judiciary, Irwin P. Stotzky, ed., 55-72. Boulder: Westview Press.

George P. Fletcher. (1996). Basic Concepts of Legal Thought. Oxford: Oxford University Press.

Barbara Geddes. (1994). Politician's Dilemma: Building State Capacity in Latin America. Berkeley: University of California Press.

William Burnett Harvey. (1961). The Rule of Law in Historical Perspective." Michigan Law Review 59: 487-500.

Arend Lijphart. (1999). Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries. New Haven: Yale University Press.

Brian Loveman. (1993). The Constitution of Tyranny: Regimes of Exception in Spanish America. Pittsburgh: University of Pittsburgh Press.

Robert G. McCloskey. (2000). The American Supreme Court. Revised by Sanford Levinson. Chicago: University of Chicago Press.

Marbury v. Madison. (1803). 5 U.S. 137.

Ugo Mattei. (1997). "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems." American Journal of Comparative Law 45: 5-43.

Juan E. Méndez, Guillermo O'Donnell, and Paulo Sérgio Pinheiro, eds. (1999). The (Un)rule of Law & the Underprivileged in Latin America. Notre Dame: University of Notre Dame Press, 1999

John Henry Merryman. (1985). The Civil Law Tradition: an Introduction to the Legal Systems of Western Europe and Latin America. Stanford: Stanford University Press.

Guillermo O'Donnell. (1994). "Delegative Democracy." Journal of Democracy 5: 56-69.

William C. Prillaman. (2000). The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law. Westport, CT: Praeger.

Margaret Jane Radin. (1989). "Reconsidering the Rule of Law." Boston University Law Review 69: 781-819.

Michel Rosenfeld. (2001). "The Rule of Law and the Legitimacy of Constitutional Democracy." Southern California Law Review 74: 1307-1350.

Peter H. Russell and David O'Brien, eds. (2001). Judicial Independence in the Age of Democracy: Critical Perspectives from around the World. Charlottesville: University of Virginia Press.

Andreas Schedler, Larry Diamond, and Marc F. Plattner, eds. (1999). The Self-Restraining State: Power and Accountability in New Democracies. Boulder: Lynne Rienner.

Herman Schwartz. (2000). The Struggle for Constitutional Justice in Post-Communist Europe. Chicago: University of Chicago Press.

Martin Shapiro and Alec Stone Sweet. (2002). On Law, Politics, & Judicialization. Oxford: Oxford University Press.

Martin Shapiro. (1981). Courts: a Comparative and Political Analysis. Chicago: University of Chicago Press.

Hernando de Soto. (2000). The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else. New York: Basic Books.

_____. (1989). The Other Path: the Invisible Revolution in the Third World. New York: Harper & Row Publishers.

Neal C. Tate and Torbjorn Vallinder, eds. (1995). The Global Expansion of Judicial Power. New York: New York University Press.

Ruti G. Teitel. (2000). Transitional Justice. Oxford: Oxford University Press.

E.P. Thompson. (1975). Whigs and Hunters: the Origin of the Black Act. New York: Pantheon Books.

Mark Ungar. (2002). Elusive Reform: Democracy and the Rule of Law in Latin America. Boulder: Lynne Rienner.

Jennifer Widner. (2001). Building the Rule of Law: Francis Nyalali and the Road to Judicial Independence in Africa. New York: W.W. Norton & Co.

Fareed Zakaria. (2003). The Future of Freedom: Illiberal Democracy at Home and Abroad. New York: W.W. Norton & Co.