## EXECUTIVE SUMMARY

Definitions of the rule of law fall into two categories: (1) those that emphasize the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments), and (2) those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies). For practical and historical reasons, legal scholars and philosophers have favored the first type of definition. Practitioners of rule-of-law development programs tend to use the second type of definition. This paper analyzes the challenge of effectively defining the rule of law, through an examination of both types of definitions, the historical background of each, and the implications of each for rule-of-law development efforts.

From this definitional analysis, two main points follow. First, as ends-based definitions make clear, the rule of law is not a single, unified good but is composed of five separate, socially desirable goods, or ends: (1) a government bound by law, (2) equality before the law, (3) law and order, (4) predictable and efficient rulings, and (5) human rights. These ends are distinct, likely to meet different types of support and resistance within countries undergoing reform, and often in tension with one another in practice. Second, a number of the widely acknowledged problems with current rule-of-law reform strategies spring directly from pitfalls inherent in a definition based on institutional attributes. Consciously switching to an ends-based definition would provide conceptual clarity to strengthen rule-of-law reform efforts. By considering the rule of law as a series of separate goods that must advance together, practitioners can improve their measurements of the rule of law within and between various countries, better anticipate likely supporters of and opponents to different reform efforts, and avoid various unintended side effects of reform efforts that now sometimes undermine the rule of law in countries attempting reform.

*The rule of law bakes no bread, it is unable to distribute loaves or fishes (it has none), and it cannot protect itself against external assault, but it remains the most civilized and least burdensome conception of a state yet to be devised.*

—Michael Oakeshott, 1983[1]

*It would not be very difficult to show that the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.*

—Judith Shklar, 1987[2]

Developed countries and international organizations have spent more than a billion dollars over the last twenty years trying to build the rule of law in countries transitioning to democracy or attempting to escape underdevelopment.[3] Like a product sold on late-night television, the rule of law is touted as able to accomplish everything from improving human rights to enabling economic growth to helping to win the war on terror. The rule of law is deemed an essential component of democracy and free markets. The North Atlantic Treaty Organization (NATO) demands that all new members demonstrate their commitment to it, and the European Union (EU) requires its existence before a country can even begin negotiating for accession. Building the rule of law is a strategic objective of the U.S. Agency for International Development (USAID), a growth field for the World Bank, and a rhetorical trope for politicians worldwide.[4] So what is this magical elixir?

Read any set of articles discussing the rule of law, and the concept emerges looking like the proverbial blind man's elephant—a trunk to one person, a tail to another. In fact, the phrase is commonly used today to imply at least five separate meanings or end goals. One frequent usage implies a government that abides by standing laws and respects judicial rule—precisely what the International Bar Association found lacking when it chastised Zimbabwe for destroying the rule of law in that country.[5] By this same standard, neighboring South Africa is praised for its government's willingness to abide by the law. Yet USAID is sponsoring "rule-of-law" building activities there to counter high crime rates—under a definition of the rule of law that means "law and order."[6] An *Asia Times* writer uses the term to mean lack of equality before the law, stating, "If a case arises between two normal people, then the law is somewhat powerful. But if one person is a company official or from the government, then there is no power in the law."[7] The rule of law is also frequently used as

a synonym for enforced human rights. Amnesty International, for example, is not alone in making statements such as, "The only way to make a break from the past, a time when human rights were routinely abused, is to establish the rule of law, with the protection of human rights at its center."[8] Meanwhile, under the aegis of rule-of-law building, the World Bank is providing computers to courts, printing laws, and establishing magistrates' schools to create its technocratic vision of the rule of law as efficient and predictable justice.[9]

Is the rule of law any of these bundles of goods, a set of goods lumped together, or a set of goods that must be related to one another in a particular way? Is it, in other words, a tail or a trunk, a bundle of elephant parts, or the whole elephant? Among those who define the rule of law by its ends—and thus argue about which ends deserve inclusion—this argument has raged since the ancient Greeks. The debate continues today, mainly among legal scholars.[10] Yet among others—particularly within the practitioner, political, and journalistic communities—the very question seems to have gone unnoticed. The five ends are jumbled together willy-nilly, any end may be implied when the phrase *rule of law* is invoked, and differences between ends are often ignored.

This conceptual confusion may have arisen because practitioners working to build the rule of law abroad have developed an entirely different way of looking at the concept, based not on end goals but on institutions to be reformed.[11] Few modern rule-of-law reform practitioners sat down and enjoyed a disquisition on classical rule-of-law conceptions before taking up their jobs; their efforts were developed in the heat of battle, as authoritarianism was pushed back, Communism fell, and countries had immediate needs for functioning economies, governments, and societies. In response to these unprecedented demands, aid agencies and their hastily employed lawyers tried to get a handle on the massive new undertaking by breaking the concept down into the concrete institutions that needed reforming. In Latin America, that meant a focus on "judicial reform," gradually expanding to law and then police reform. In Eastern Europe, legal change alone was thought sufficient in early years; when this approach failed to bear fruit, efforts expanded to reform other rule-of-law institutions. When the U.S. Government Accounting Office (GAO) was asked to evaluate U.S. rule-of-law assistance, for instance, they defined the scope of their work as many practitioners would:

> 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).[12]

In other words, a parallel conversation has emerged in which the rule of law is defined not by the end purposes it is to serve in society but by what I will call its "institutional attributes." Creating the proper institutional attributes—the "necessary" laws, a "well-functioning" judiciary, and a "good" law enforcement apparatus—has become, for many practitioners, the goal of rule-of-law reform efforts.

Thus, there are two very different ways of defining the rule of law that are being discussed in parallel conversations.[13] The first style of 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 the law, and human rights. The ends are the reason why 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.

These two different ways of defining the concept are often conflated and confused. Current definitions of the rule of law used by organizations working to create it abroad tend toward ad hoc laundry lists of institutions to reform, mixed with high-flying rhetoric about the ends that the rule of law is expected to accomplish.[14] It is easy to accuse attempts at closer definition as pedantic, academic exercises. After all, even if current practitioners have not precisely defined their terms, they will know what they want when they see it.

If institutional reform led directly to improvements in rule-of-law ends, that would be true enough. Yet, because achieving such ends requires reform *across* institutions while institutional reforms are generally carried out *within* single institutions, institutional reform can be undertaken with no significant effect on rule-of-law ends. At the same time, definitions based on institutional attributes lead practitioners to measure the wrong things to determine success. Worse, poorly devised reforms of rule-of-law institutions can undermine rule-of-law ends. Therefore, the slant toward definitions based on institutional attributes or which amalgamate ends and institutions has serious repercussions for the success (or lack thereof) of rule-of-law building strategies. Improving our definitions is crucial to advancing our understanding of what it is we are trying to build and our ability to implement reforms. Before we can improve definitions, however, we must first consider each definition in turn.

## ENDS-BASED DEFINITIONS

Already, in discussing the "ends" of the rule of law, I have gotten ahead of the general use of the phrase. In ringing policy pronouncements and membership criteria for exclusive "clubs" such as NATO and the EU, the rule of law itself is the desired end—singular. States can have more or less rule of law, and more is always better. Yet as the elephant metaphor indicates, by the time the field of rule-of-law building had gained steam, the concept was being used to imply at least five different goals: making the state abide by law, ensuring equality before the law, supplying law and order, providing efficient and impartial justice, and upholding human rights.

Because these ends were never clarified or separated, practitioner organizations did not fully appreciate their distinctiveness. In their written definitions, practitioner organizations tend to mention some ends and forget others—often with little consistency in which they include and which they leave out from definition to definition. For instance, in the various USAID definitions cited in this paper, predictability appears in only one, while another leaves out law and order and touts a market-based economy as inherent to the concept.[15]

Clarity on the five end goals is important, however, because they are not the same: One cannot be reduced to another. On a theoretical level, some of these end goals have become generally accepted in Western legal and political philosophy over the last few thousand years. Others remain hotly disputed. Reining in the state by forcing it to govern through a known set of laws has been accepted as a goal of the rule of law since the ancient Greeks.[16] Meanwhile, whether human rights is an end of the rule of law—or whether the phrase merely implies technocratic procedures and institutions—has