THE INSTITUTIONAL APPROACH

Although most legal scholars define the rule of law by its ends, most programs to build the rule of law implicitly define the rule of law by its institutional attributes. Although they cite the rule of law as their ultimate goal, practitioners almost immediately turn to institutions not as means, but as intermediate or measurable ends. Internally, most practitioner organizations rarely use the words *rule of law reform* and instead discuss legal reform, judicial reform, and police (or law enforcement) reform.

Institutional definitions of the rule of law are not new. Their heritage stretches back to ancient Greek discussions of the need for standing laws, impartial courts, and enforcement mechanisms (although the latter were often religious, political, or cultural strictures, not modern law-enforcement bodies). The three primary institutions that modern-day rule-of-law programs focus on were first enumerated by John Locke, who stated that legitimate governments were:

> bound to govern by establish'd *standing Laws*, promulgated and known to the People, and not by Extemporary Decrees, by *indifferent* and upright *Judges*, who are to decide Controversies by those Laws; and to imploy the force of the community at home *only in the execution of such Laws.*[54]

Modern rule-of-law practitioners still define the rule of law as a state that contains these three primary institutions:

- **Laws** themselves, which are publicly known and relatively settled;
- A **judiciary** schooled in legal reasoning, knowledgeable about the law, reasonably efficient, and independent of political manipulation and corruption.
- A **force able to enforce laws**, execute judgments, and maintain public peace and safety: usually police, bailiffs, and other law enforcement bodies.

As practitioners have tried to reform these primary institutions, however, they have found that they rely on the proper functioning of a large and ever-growing array of essential supporting institutions. Laws are supported by institutions ranging from legislatures to land cadastres and notary publics. The judiciary is reliant on magistrates' schools, law schools, bar associations, clerks and administrative workers, and other supporting groups. Police require prisons, intelligence services, bail systems, and cooperative agreements with border guards and other law enforcement bodies, among other institutions. As new supporting institutions are discovered and deemed to be essential, they are added to the list of areas in need of reform.

From Institutions as Means to Institutions as Ends-in-Themselves

When ancient Greeks or Enlightenment philosophers discussed the rule of law, these material rule-of-law institutions were considered means to overarching societal ends, such as order, rights, and justice. Aristotle, for instance, discussed various forms of political arrangements, as well as the institutions of the magistrates and juries, and cultural and personal values, as enforcement mechanisms—all of which were judged on how they would affect the end goals that the rule of law was supposed to accomplish.[55]

Similarly, when the rule of law first came into the development field through the work of Douglass North and his fellow new institutional economists, they meant to underline the

importance of both means and ends. The new institutionalists used the term *institution* in a broad and new way to mean "the humanly devised constraints that shape human interaction."[56] Recognizing the importance of institutions so construed was not meant to imply that aid workers focus on the *material* organization of such legal institutions, such as laws and judiciaries, but that they recognize the importance of political, social, and cultural structures—such as a set of social patterns and interactions that serve to limit the acceptable areas of government control.

Yet when practitioners turned these ideas into practice, they inevitably had to simplify such nuanced theoretical concepts. Because programs to build the rule of law are most easily oriented around reforming concrete problems within material things such as laws or organizations, it was all too easy for means to become conflated with ends and eventually made into ends in themselves. Rather than considering from scratch, each time one enters a new country, how organizations, cultural interactions, and government agencies can be made to function in a system that supports human rights, for example, it is simply easier to write human rights laws, train police in human rights norms, and establish legal clinics that enable the poor to enforce their rights. Such a move is an inevitable part of rule-of-law reform.

This move would not be problematic if it were true that when organizations are made to function properly, or laws are better written, the means become the end. But, in fact, it is the ends to which they will be put that determines what it means for these institutions (as the word is commonly used) to function well. Even an impartial, efficient judiciary, for instance, is not of value in and of itself; if a society never had a dispute to solve, such a judiciary would simply be a ceremonial cost. It is of value because we believe that such a judiciary will enable disputes to be resolved efficiently and without recourse to violence, will create predictability, and will provide like judgments for like cases.[57] It is these ends, among others, that compose the intrinsic goods that the rule of law brings. Moreover, as shown above, even if reformers can make a single institution function well, they will not necessarily achieve any rule-of-law ends because each requires reform across *multiple* institutions.

The problem, therefore, is seeing the creation of such laws, training programs, and clinics as ends in themselves. Yet that step is an easy one to take. In many states, the problems with these institutional attributes are broad and deep. After the fall of the communist regime in Albania, for instance, laws were not published or distributed. Judges without high school degrees had been appointed from the hometown clan of the prime minister; their inability to reason through judicial precedent, their lack of knowledge of the laws, and their frequent corruption rendered fair justice impossible. Moreover, the sudden downfall of the government had been followed by widespread looting, and government arms caches had thus been redistributed to most men in the country. Poorly equipped bailiffs and police were scared to enter heavily armed villages, making the enforcement of civil claims or criminal justice nearly impossible. In rural areas, old forms of tribal justice—made more brutal and arbitrary from their reintroduction by drug and human traffickers with goals other than the rule of law in mind—had taken over in the face of government inability to enforce the laws. Similar problems are repeated in countries worldwide.

The solution, to any well-meaning and time-pressed reformer, seems obvious. Laws should be published and disseminated, judges should be trained, police should be armed and citizens disarmed, court procedures should be made efficient and corruption reduced—the list may be enormous, but it is, at least, self-evident. Improving flawed primary and secondary institutions appears to be a fairly straightforward process of skill building and technical reform.[58] The question then becomes one of sequencing: Where does one start?

The tendency to move directly into institutional reform, without considering the overarching end goals of such reforms, is exacerbated by the practical problems of expertise. Breaking down the rule of law by the institutions that must be improved in order to build it makes practical sense, given how expertise is allocated. Consultants on police reform tend to be retired police officers, police commissioners, and scholars of criminology. Lawyers alone have the expertise for legal reform, and judges, magistrates, and lawyers tend to be involved in most judicial reform projects. Meanwhile, a person who can advise on police reform will probably have little to say about the judiciary and vice versa. Other than political theorists and legal scholars, few presume to be expert in the rule of law, and their ability to transform this theoretical knowledge into pragmatic procedures for addressing the practicalities of institutional reform in developing countries is limited, to say the least. For such mundane reasons, the rule-of-law field tends to be subdivided into different areas of expertise, and bringing these fields together to consider how they can work toward joint ends based on a unified definition and understanding of overarching goals is difficult.[59] It is easy to take the next step and simply focus on making each field function "properly" as an end in itself.

It is quite understandable why practitioners have made this simple move in their need to accomplish a particular goal. Most have ended up betwixt and between: Their formal definitions mix ends and institutions, the distinction is never clarified, and in practice, they tend to focus on institutions as ends in themselves. The reasons are understandable, but explanation is not exculpation. Organizations working to build the rule of law abroad could insist that institutional reform always occurs under a distinct and clear understanding of the end it is intended to serve. Reformers could measure ends, rather than institutional reforms, in judging their success. They rarely do. Instead, reform of institutional attributes is treated as the end goal of rule-of-law reform—a definition that has real, negative impact on the success of rule-of-law reform efforts.

Problems with Institution-Based Definitions

When the rule of law is implicitly defined by its institutions, rather than its ends, the latter tend to be assumed. Rather than considering the desired goals we are trying to achieve through the rule of law, and then determining what institutional, political, and cultural changes best achieve these ends, practitioners are tempted to move directly toward building institutions that look like those reformers know. Practitioners engaged in such institution modeling tend to compare institutions in the country that need to be reformed with their counterparts in developed countries and then provide the resources, skills, and professional socialization to help each local institution approach Western models.[60] However, judiciaries can be impartial, trained, efficient, and able to dispense honest justice whether they are working within an Anglo-Saxon adversarial system, a Continental prosecutorial system, or even are constituted as a group of tribal elders working with known customary law within a village Panchayat in India. A government can be reined in by a constitution, but sometimes, as Montesquieu made clear, custom or a type of "English constitution" works just as well, if not better, than paper laws that are not obeyed. Not only are innumerable institutions to be reformed not necessarily essential to rule-of-law reform, but they can even impede it, by insisting on a model that is either unnecessary or unsuited to the political and cultural landscape.

Defining the rule of law by its institutions also slants practitioners toward overly technocratic models of reform. As discussed in the section on ends, the rule of law is as much a cultural and political model as a technocratic or even legal institution. The Greeks recognized that the rule

of law rested on more than correctly constituted legal institutions, and their enforcement ideas tended to emerge out of religious strictures far more than human institutions.[61] For this reason, Aristotle claimed that "customary laws have more weight… than written laws."[62] And, as Isaiah Berlin observed, "What makes [Great Britain] comparatively free, therefore, is the fact that this theoretically omnipotent entity is restrained by custom and opinion from acting as such. It is clear that what matters is not the form of these restraining powers—whether they are legal, or moral, or constitutional—but their effectiveness."[63] Even the *Economist,* in a recent article on crime in Argentina, discusses the need not only for improved institutions but also for cultural change among the citizenry to curb crime and corruption.[64] Many modern practitioners recognize the cultural dimensions of the rule of law in theory, but their definition of the concept and means of attacking it impede this realization from seriously impacting reform efforts.

An institutional attributes type of definition also fails to ask why institutions are so bad—and whose interests are served through weak rule-of-law institutions. Often, there are quite rational political reasons for appointing ill-trained judges who, as a result, lack independence or for keeping police underequipped with arbitrary career paths so that they are not tempted or able to form a power center separate from their government benefactors. Practitioners are often following an idealized blueprint of their home system that ignores its own difficulties and flaws, such as the intense political involvement in the picking of the U.S. judiciary or the corruption residing in some European judiciaries. Therefore, many reformers ignore the issues of power and politics inherent in all developed rule-of-law systems. The very question "how should this institution be reformed?" ignores larger political changes that may be far more important than institutional tweaking in achieving rule-of-law ends. As in the establishment of the court in the *Eumenides* or the historical case of the Magna Carta, politics and power matter a great deal in establishing the rule of law.[65] Michael Oakeshott correctly noted that the rule of law cannot protect itself against external assault. It must have powerful defenders or interests who gain from supporting it. Reform programs that focus on providing computers to improve court efficiency in the midst of a political autocracy, for example, seem rather like treating heartburn in a patient suffering from cancer.

Another problem that arises from such institutional modeling is that reformers tend to waste time and scarce legal resources within developing countries in efforts to make laws and institutions look like those in their own system. Delegates from the EU speak constantly of bringing the legal systems of Balkan countries "up to European standards" and suggest that they adopt the entirety of European law, regardless of their ability to enforce it, as a first step. Lawyers from the United States hold mock trials to teach adversarial litigation techniques to law students in countries with prosecutorial legal systems. There is a theoretical basis to some of these efforts: The Balkans may eventually need European law, and the adversarial, oral litigation system, for instance, is argued to be more transparent and less confusing, particularly for illiterates, than prosecutorial, written procedures. Even so, fights often break out between reformers from different nations who argue over whether to use German bankruptcy laws or American, or whether the constitution should uphold case law versus code law, when in reality either would be sufficient for achieving the ends that these reforms are supposed to serve. Reform can then become a process of substituting one workable law with another, perhaps slightly "better," that emanates from a different legal system.

Part of the reason for such arguments is that many supposed rule-of-law reforms stretch the concept to encompass not only the minimal ends of the rule of law but also values and institutions that are cutting-edge or not even agreed upon within countries with a developed rule of law. The

poor, for instance, did not get free legal counsel in criminal cases before the 1960s in America, but such counsel is considered essential to declare that a developing country has the rule of law. Human rights laws that far exceed those of Singapore, or even of the United States, are considered essential for legal reform in Europe. These reforms may well be very good things, but they are not necessarily essential for the rule of law, and by stretching the point they can cast doubt on the more core attributes of the concept.

In fact, by claiming that institutional reform is an attempt to bring institutions in line with those in developed countries, reformers open themselves to charges of hypocrisy. Judicial and criminal legal reform in Russia is engaged in overturning a system that is *de rigueur* in Japan, which has a 99 percent conviction rate and allows citizens to be held without reason for 23 days.[66] The highly political process of judicial choice in the United States would never be permitted by reformers elsewhere. Neither would an institutional arrangement such as that in Great Britain that leaves the police answering to three different masters, none of them the public. In fact, since Hayek, there has even been an active debate about whether the United States and Great Britain, by allowing too much administrative discretion or by using the law to advance social goals, are moving away from the impartial rule of law.[67] Many legal professionals in the developing world know that the rule of law is a goal toward which even Western institutions are still evolving. Using Western systems rather than universally accepted ends as models leaves the reforms themselves open to question when flaws in the "model countries"—corruption, the death penalty, prison abuse—come to light.[68]

Most pernicious, depending on how they are implemented, institutional reforms carried out under the banner of rule-of-law reform can actually undermine rule-of-law ends. For instance, in Romania, businessmen have pleaded for an end to legal reform: They can live with bad laws, but the constant "improvement" of key property laws by various bilateral and multilateral aid agencies creates an unpredictable legal environment. An end good of the rule of law—a stable, predictable legal system—has been undermined by the so-called reform process. If legal reforms are forced on other countries through conditionality, as they often are, executives may be forced to pass laws by decree rather than through the legislative process.[69] In many Latin American and Eastern European countries, for instance, strong World Bank and International Monetary Fund conditionality for various commercial legal reforms forced the growing use of executive ordinance in the face of a recalcitrant parliament. The growing habit of the executive to bypass parliament and rule through decree was noted with alarm in the EU progress reports on Romania's rule of law.[70] These apparent reforms threatened the very idea of a government bound to pass laws through a standing legal process, a particularly worrisome occurrence in a new democracy emerging from overly strong executive rule.

These criticisms of an institutional attributes style of definition may appear strong on paper, but in the field, it is easy to shrug off these thoughts as pedantic. When institutions are extremely flawed, fixing some of the problems seems like a move in the right direction, regardless of whether rule-of-law ends have been thought out. Yet the effects of such breezy thinking should be seriously considered. Real, negative outcomes, such as pushing institutional reforms in ways that actually undermine rule-of-law ends, demonstrate the serious repercussions of too-easy thinking.