IMPLICATIONS OF COMPETING DEFINITIONS

This paper has sought to make two core points: first, that the rule of law is more usefully defined for the international development community by its ends, not by its institutional attributes; and second, that these ends are manifold, separable, often in tension, and affect different segments of the society to be reformed. Taking these two conceptual steps has many repercussions for the rule-of-law reform community, including the following:

1. For any rule-of-law end, all institutions must be reformed.

Fulfilling any rule-of-law end requires work across the three primary rule-of-law institutions. Even the most frequently undertaken reform, achieving predictable and efficient justice, which may appear to involve judicial reform alone, in fact necessitates legal reform to ban activities such as judicial corruption, bribery, and threatening public officials, as well as police reform to ensure that appropriate evidence is collected for use in cases, to avoid investigation delays, and to protect judges from threats that could affect their decisions.

Not only does each of the major rule-of-law ends require reform of and coordination among laws, the judiciary, and the police, it also requires reforms across the spectrum of supporting institutions for all three, such as prison reform (to keep prisoners in jail and prevent them from perpetrating crimes from inside), notary public reform (to reduce corruption and forgery of legal documents used in court), and law school reform (to ensure that lawyers are a professional class trained to argue cases based on law, rather than "fixers" who win by connections and bribes).

On the ground, coordination between some types of legal reform and judicial reform occurs regularly, but coordination between these two reforms and police reform almost never takes place. Moreover, coordination of any of these three areas with the reform of supporting institutions is ad hoc, at best. When reform of any one institution gets too far ahead of the other, achieving rule-of-law ends becomes less likely, because of the interdependence among rule-of-law institutions. For instance, in Panama, a decade-long reform effort moved the police from being one of the least trusted and most corrupt institutions in the country, to being among the most highly regarded. Police reform in Panama was successful, and now people turn to the police for help. However, law and order there has barely improved; the corrupt judiciary tends to release prisoners, particularly drug traffickers and organized criminals. And although the state may abuse the human rights of the citizenry somewhat less (never a huge problem before), individual criminals now do so more.

Obviously, country-specific empirical research is necessary to address the practical implications of this point, such as which areas should be prioritized, or where scarce resources should be allocated. The overarching point, however, should be heeded: Organizations such as USAID that are leaning ever further toward sector-specific reform, where one contractor focuses solely on the judiciary and another on the police, should reconsider their model.

2. Achieving rule-of-law ends requires political and cultural, not only institutional, change.

Reform must occur across all primary institutions to achieve any rule-of-law end, but even such widespread institutional reform will rarely be enough to ensure real change. As alluded to throughout

this paper, many rule-of-law ends are upheld even when institutional arrangements are far from supportive, if countries have social and political cultures that place a premium on the rule of law. The converse is also true: Recalcitrant cultures or balking politicians can undermine even well-organized rule-of-law institutions. Institutional reform can be a lever of change that pushes culture and politics in the right direction, but this outcome is neither assured nor particularly likely to occur unless reformers have their eye on using institutions to leverage wider change in this way.

Alexis de Tocqueville probably saw this issue most clearly. Visiting England just after a trip to Switzerland and following his famous travels in America, he wrote:

> Whoever travels in the United States is involuntarily and instinctively so impressed with the fact that the spirit of liberty and the taste for it have pervaded all the habits of the American people. But if violence were to destroy the Republican institutions in most Swiss Cantons, it would be by no means certain that after a rather short state of transition the people would not grow accustomed to the loss of liberty. In the United States and in England there seems to be more liberty in the customs than in the laws of the people. In Switzerland there seems to be more liberty in the laws than in the customs of the country.[71]

In other words, while customs without material institutions can manage to uphold some rule-of-law ends (here described as the "spirit of liberty"), institutions without customs are weak and easily circumvented by raw power.

Well-planned institutional reforms can certainly affect political culture and change societal expectations. And most practitioners realize the importance of culture, power, and politics. But the institutional attributes style of defining the rule of law minimizes the importance of these levers of change and obstructs clear thinking about how to address them.

As already discussed, looking at distinct ends one by one illuminates the political and cultural cleavages that will affect reform success. By adopting this nuanced view of rule-of-law ends as distinct goals, reformers could better anticipate obstruction and could begin to take power and politics into account on the practical, planning level. Moreover, a clear consideration of ends would remove the ability of some practitioners to deny the fact that their work is inherently about changing the cultural and political values of other countries. The self-deception endemic in the field regarding this issue raised obstacles in project after project.[72]

3. Not all work to reform legal institutions is rule-of-law reform.

Rule-of-law reformers believe, by definition, that they are trying to create the rule of law. Yet the field of rule-of-law reform grew not out of a desire to create the rule of law abroad but out of a need to find solutions to myriad international needs and problems. The United States and Europe hit on the rule of law as one solution to many needs: creating liberal democracies in Latin America and Eastern Europe, providing global security against drug cartels and organized criminals, and helping poor countries develop. Piecing together preexisting programs and creating new ones, the field of rule-of-law reform was born. Yet the field of rule-of-law reform did not replace these primary policy motives—it was a means to these larger ends. When strict rule-of-law procedures would impede the passage of laws or the construction of agencies desired for development, security, and so on, they tended to be ignored. Thus, these public policy goals that motivated the creation of the field sometimes also motivate action outside of it—as is shown by the acceptance of using executive decrees to achieve supposed rule-of-law goals.

One of the key problems with defining the rule of law by institutional reform rather than end goals is that it makes such conceptual conflation easier. Any work to reform laws, any change to police policy, is considered rule-of-law reform. This is not true. For instance, goals such as improving global security through police reform and antiterrorist laws are accomplished by reforming rule-of-law institutions—but they are targeted not at improving the rule of law *within* a particular state, but at achieving security for *other* states. When the EU pushes acceding countries to adopt the entire legal *acquis communitaire*, it is not building the rule of law through all these legal changes; it is simply helping them create a legal system that can mesh with its own, which is often tilted in ways that benefit current members. In the past, such activity was known as "gunboat diplomacy." Simply because it is now undertaken by aid agencies and lawyers instead of generals does not elevate it to a dimension of the rule of law.

Conflating all institutional reform with rule-of-law reform leads to two problems. First, the rule of law winds up being defined so broadly that it takes in all sorts of reforms pursued for other reasons, including the self-interest of the aiding state. Second, reformers can believe that they are working toward the rule of law, when in fact their goals require reforms that are other than, and at times opposed to, the rule of law.

A common example of the first mistake is conflating the desire to build the rule of law to enable a market economy—which is certainly helped by forwarding these five rule-of-law ends—with building a particular type of laissez faire economy, a separate goal from building the rule of law. Law reforms to enable large-scale privatization activity, reduce business regulations, float prices on basic goods, and create certain types of bankruptcy and credit procedures are encouraged, often in the name of legal reform for the rule of law.[73] Because this work is done by those agencies engaged in other rule-of-law reform projects, and because they are using the instruments of rule-of-law reform to press their case, practitioners frequently confuse "building the rule of law" with enacting a particular vision of economic life.[74] These reforms may all be economically useful, but even Hayek (under whose name such reforms are frequently conflated with the rule of law) distinguished between reforms that improved economic efficiency, and the far narrower range of economic activities that the state had to be restricted from to maintain the rule of law. Germany and the United States, for instance, are both viewed as rule-of-law societies, despite the fact that bankruptcy is a more difficult procedure in the former than the latter. Scandinavia can be more socialist, and France can favor greater agricultural tariffs, without either having less rule of law than more open, laissez faire economies.[75] Mis-defining the rule of law in this way breeds cynicism and resistance in states to be reformed. Politicians in states that are being reformed can end up believing, rightly or wrongly, that rule-of-law reform is used as a guise for developed countries to tie the developing state more closely to their own legal and economic system.[76]

Equally important, rule-of-law reformers may not actually want the rule of law, a point obscured by institutionally based definitions that count all reform of rule-of-law institutions as rule-of-law reform. Reformers engaged in the rule-of-law field primarily to improve global security may support some rule-of-law ends but be less excited about others, such as human rights or due process that would bind the executive to act through law. Other reformers may want some of the ends some of the time but not all of the time. Frank Upham describes an early case in the United States in which judges use some tricky legal footwork to abrogate one individual's property rights to allow for large-scale development that would create growth and jobs for many more.[77] The case could easily mirror the development desires that the World Bank, USAID, or EU holds for many countries today.

These development goals lead these organizations, which theoretically favor rule-of-law ends such as binding the executive, to push executives to use unlawful decrees to pass desired reform legislation, rather than upholding rule-of-law procedures as their primary end.

In other words, the rule of law is often desired by rule-of-law reformers not as an end in itself but as a means to other ends. In such cases, the rule of law, the means they are using to try to achieve their other goals, is under some definitions in opposition to them and certainly likely to slow them down. In fact, it is arguable that reformers often do not want the rule of law at all—or at least not the technocratic, proceduralist version they proclaim.[78] The lack of hard evidence that the rule of law, in and of itself, procedures and all, actually does bring improved economic growth in the long run or better international security contributes to the ambivalence over actual end goals within the rule-of-law building field.[79]

4. Rule-of-law ends are in tension—particularly in poor societies or societies with a weak rule of law. Improvements in one end goal can decrease success in others.

If we are going to pursue an ends-based definition, we must acknowledge that it is not easy. A key point that must first be understood is that all good things do not go together: Rule-of-law ends are in tension, particularly in the development stages.

The rule of law is about both limiting the power of the state and empowering it to protect the rights of the citizens against lawbreakers and rebels. Fostering the judicial independence required to bind the government can work against rooting out corruption within the judiciary. A country with scrupulous human rights norms may have difficulty maintaining law and order in the face of a heavily armed citizenry and organized gangs without similar scruples. Conversely, citizens wanting social order may demand the weakening of regulations protecting civil and political rights. In working rule-of-law systems, the five elements of the rule of law support one another. In nascent or poorly functioning systems, the five elements can and do undermine one another. While the ends of rule of law are not opposed in theory, in practice, they often come into conflict.

Poverty is one exacerbating factor. Countries are better able to enforce law and order while respecting human rights if the police are well paid, well trained, and properly equipped, and prisons are well built and undercrowded. When judges are underpaid and underrespected, corruption can take hold, forcing difficult choices between increasing judicial independence and achieving predictable, equitable justice. Poor countries are more at risk for civil wars and rebel movements and therefore are more likely to need to invoke overwhelming executive powers and martial law to create law and order.[80]

In fact, in countries where the rule of law is not well developed, vicious cycles can emerge where the lack of one good leads to the lack of another: Human rights abuse, for instance, breeds a rebel movement that causes the government to attempt to reassert public order by acting further outside the law and further harming human rights. In countries where multiple elements of the rule of law are lacking or out of sync, rebuilding them often requires choices between valuable goods. For example, forcing the government to abide by law may allow the rebel movement to get out of hand, which itself creates law-and-order problems—and can lead those victimized to take the law into their own hands.

Sequencing of reforms is yet another difficulty. Attempts to reform aspects of the rule of law that focus on one end can be undermined by reform efforts concerned with another. For instance, efforts to increase predictability and efficiency in the judiciary through anticorruption drives, skills testing, and other measures can be used by local ministries of justice to increase the grip of the executive over the judiciary. Precisely this fight played out in Albanian reform efforts. Reformers from the World Bank, working with the ministry of justice, wished to institute a skills test for judges to weed out those who had been appointed with no training. They were opposed by reformers from the Council of Europe, who believed that a skills test instituted by the Ministry of Justice set a bad precedent for executive interference in the judiciary. In Albania, a smart solution was found: The test was held but was closely monitored by international reformers, watered down considerably, and few judges were expelled. This outcome both reduced the precedent of executive interference and ended up improving judicial skill levels to some extent, because international reformers spent the weeks before the test providing judges with copies of the laws and helping them study.[81]

Most of the time, states and international organizations working to build the rule of law avoid the implications of this tension, instead taking the approach that "all good things go together" and that a little bit more rule of law is better than none at all.[82] Yet because these goods are often interrelated in tension, progress on one front without progress on the others will lead not to partial progress (all other goods being held equal while one improves) but to an entirely different animal (where the improvement in one good pushes some of the others up and others down).

Far from the current belief among aid practitioners that some reform is better than none, reform may occasionally create worse, less liberal outcomes.[83] For example, improved human rights laws and norms in a society suffering from law-and-order problems can erode cultural support for human rights, if they are seen as getting in the way of the rights of "ordinary" citizens to live free from crime.[84] Greater efficiency without improved laws can lead not to a liberal rule of law but to an autocratic rule *through* law that is not founded on liberal norms, as exemplified by regimes such as the Third Reich. The U.S. Institute of Peace report on the rule of law in Afghanistan, in discussing the lopsided work in law enforcement versus human rights and judicial reform, notes,

> at best, such a [law enforcement] force will be able to provide some public order; at worst, the international community will have enhanced the ability of power-holders to control and abuse the population without creating mechanisms to protect the rights of Afghans. A substantial investment in one area of rule of law will not have a meaningful pay-off in terms of real democratic governance and stability unless other pieces of the puzzle are put in place as well.[85]

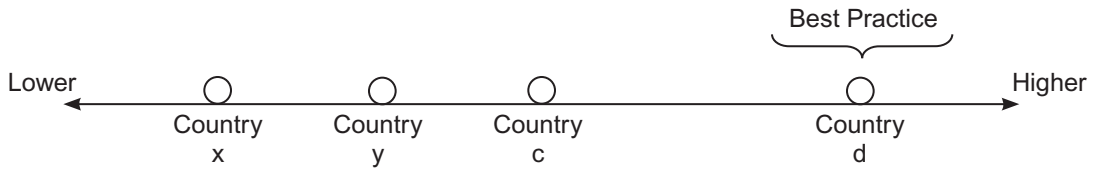
One reform effort can also undermine another. For instance, a subsector of many rule-of-law reform programs is making justice more accessible. Those working for predictable, efficient justice tend to see this end largely in terms of making justice more accessible so that the market economy might function more efficiently.[86] They therefore tend to create small claims courts, which both serve the ends of making justice more affordable and efficient for those with small stakes to settle and move those cases that would have been brought out of the regular courts. Yet other accessibility reforms can undermine this end. Accessibility programs championed to help the poor ensure their human rights or gain real equality before the law often use the regular court system, and if the programs are successful, they can overwhelm courts at all levels with suits that would not have been brought previously, reducing court efficiency.

5. We should measure the ends of the rule of law, not the institutions. Given the tension between goods, we will gain clarity if instead of measuring the rule of law, we measure achievement in each end of the rule of law.

As discussed above, end goals of the rule of law can be achieved even when institutions vary widely. Moreover, whether institutions are properly aligned or not cannot be measured by considering the state of the institution itself; the measurement only makes sense against the end the institution is intended to serve. Any anxious tourist to an exotic locale knows that if one is worried about law and order, it is more telling to measure crime statistics, not to count how many police have graduated from the academy. An investor does not read the constitution of an emerging market economy but asks other businesspeople whether contracts are enforced fairly and predictably. Having the aforementioned institutional attributes may be necessary to these outcomes, but they are not the way in which we determine whether the rule of law is present.

When the United States, the EU, or the World Bank try to measure success in building the rule of law, or the Millennium Challenge Account attempts to measure a country's "the rule of law" as one of its criteria for aid, it tends to be one of a number of goods they are measuring. They generally divide the dimensions of the manifold goods they are looking at along different lines, where the rule of law is a unified good, and is placed under the umbrella of "governance," which includes other measures such as regulatory quality and control of corruption.[87] Their rule-of-law measurement thus looks unitary, like this:

Figure 1. Rule of Law Measurement

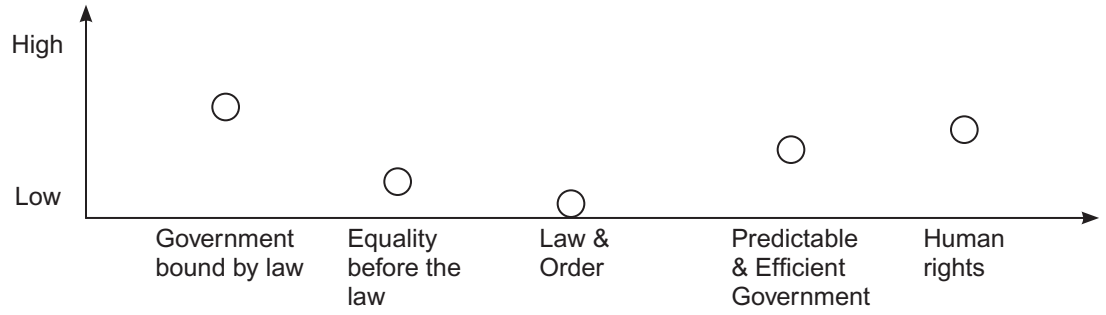


Yet the fact that the rule of law has five distinct ends means that it is not a unitary whole, but a set of five distinct goods that can advance at different rates. If we agree that the five ends described above should be the measurement of rule-of-law achievement, we must then determine how to weigh them against one another. Does improving one end create more rule of law? Or must all five be advanced together, or be related in a particular way? Many U.S. and EU interventions to build the rule of law do not work at pushing all five ends but are geared toward improving some institutional attribute aimed primarily at one of these ends, though often affecting a few of them simultaneously. This interdependence, along with the fact that the five ends are complementary but often in tension, means that progress in one area alone rarely occurs with all other goods being held constant. If one goes up, the others may rise with it, but they may also fall as a result.

For instance, Russia under Putin has had more predictable and efficient justice than it did under Yeltsin (see figures 2 and 3). The reduction in corruption has helped to ensure that the central government can rule, regular businesses can operate, and local government officials do not have impunity before the law. However, Putin accomplished this feat by amassing more power at

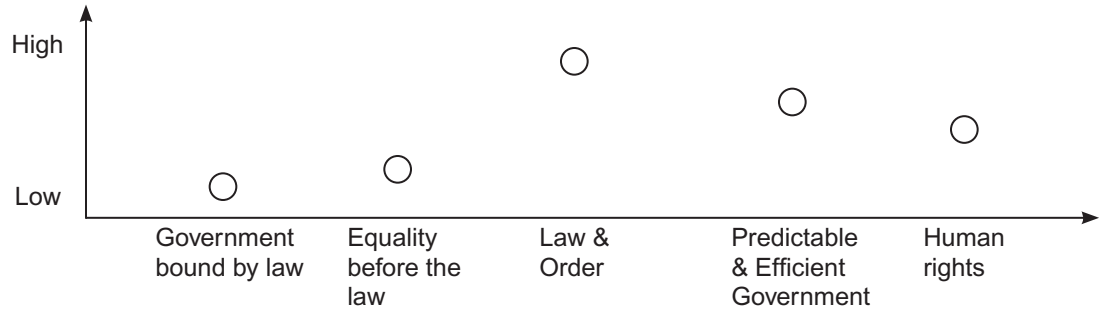
the central level, reestablishing executive control over the Duma and much of the judiciary and reinstating elements of state power such as the reformed KGB.[88] Is this more rule of law, or less? The question, actually, is incoherent, because the rule of law is not a unified good. Instead, it makes more sense to see these five aspects of the rule of law as independent elements—like five dimmer switches that control different lights.

Figure 2. Rule of Law in Russia under Yeltsin



Under Putin, law and order has improved, as has the predictability and stability of legal institutions (figure 3). Yet the executive is less bound to law. Meanwhile, human rights are now more threatened by the state, but less by anarchy, leaving that measure fairly steady.

Figure 3. Rule of Law in Russia under Putin



These five goods can be added together, of course, to get a single rule-of-law "score" for a country; a higher score would mean a greater level of rule of law, but the additive number would be fairly meaningless. If one country has serious law-and-order difficulties and another has an authoritarian government, but their final scores even out, do they have the same rule of law? The answer is not worth giving: They have different types of rule of law, and different societies have different levels of tolerance for different rule of law problems.[89]

Finding the proxies to measure these end goals is a huge undertaking and outside the scope of this paper. Here, it is enough to suggest that we need to be looking for proxies to measure the right things: The ends—not the institutions or an amalgamation of the two—are the proper goals to measure. The actual measurement proxies within efforts such as the World Bank Governance

Indicators are a good first step, but by amalgamating ends and institutions and by making the rule of law unitary, these indicators hardly serve any clarifying purpose.

CONCLUSION

When Dicey described the rule of law a hundred years ago, he wrote that "whenever we talk of Englishmen as loving the government of law, or of the supremacy of law as being a characteristic of the English constitution, [we] are using words which, though they possess a real significance, are nevertheless to most persons who employ them full of vagueness and ambiguity."[90] This pleasant fog had not improved significantly at the time that the field of rule-of-law reform was born.

The new field of rule-of-law reform did not emerge slowly after years of academic discourse. It grew from action—action needed right away—as states tried to keep regions from falling into poverty and anarchy, organizations jockeyed with one another for primacy in a new and growing field, reformers tried to create new polities out of crumbling states, and the United States and Europe fought for influence over the newly unallied states of Eastern Europe through legal systems, as well as through NATO and the EU. Few, except perhaps practitioners on the ground, noticed that they were working for different goals under the rubric of rule-of-law reform—and that they were too busy acting to comment.

After twenty years of such fevered activity toward ambiguous ends, however, it is time to take a step back and reflect.[91] Rule-of-law reformers have been working to improve an ever-growing number of rule-of-law institutions. But the ends these institutions are intended to serve in society have become obscured. Rule-of-law reformers are trying to build a system that is better seen not as a set of institutions but as a set of distinct but interrelated end goals. When the system is properly balanced, these ends are mutually supportive. But when the system is in its infancy or when these goods are improperly aligned, they can undermine each other.

By treating the rule of law as a set of institutions, reformers handicap themselves in bringing about the end goals of the rule of law—all of which require reform across institutions, as well as cultural and political changes that lie outside the concrete institutional realm. By treating the rule of law as a single good rather than as a system of goods in tension, reformers can inadvertently work to bring about a malformed rule of law, such as one in which laws that overly empower the executive are applied and enforced more efficiently.[92]

The difficulties of turning a definition of the rule of law based on ends into a practical method of tackling rule-of-law reforms are real. Acknowledging the need to do so and developing a measurement system that orients reformers toward this realization are first steps.