

2007

International Rule of Law Symposium: Introductory Essay

David R. Andrews

Recommended Citation

David R. Andrews, *International Rule of Law Symposium: Introductory Essay*, 25 BERKELEY J. INT'L LAW. 1 (2007).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol25/iss1/1>

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley Journal of International Law by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.

International Rule of Law Symposium: Introductory Essay

By
David R. Andrews*

We live in a world plagued by serious gaps in the rule of law – the legal doctrines and institutions that help ensure basic human security and the just and efficient functioning of society. In a globalized world, we cannot afford to and indeed we may not be able to isolate ourselves from the effects of rule of law deficits abroad. Because so much of the world economy is intertwined – a significant and growing percentage of the GDP of the U.S. is generated overseas – the lack of the rule of law, even in faraway countries, can strip the world’s economies of the predictability and stability they need to thrive. Furthermore, in purely human terms, gaps in the rule of law cause terrible suffering. In a shrinking, globalized world this poses tangible risks to our prosperity and security at home. The need for the rule of law is clear.

There is an emerging consensus among foreign policy and development experts that the rule of law should be a greater priority and play a more important role in our efforts to address today’s global problems – from health pandemics to conflict, poverty to terrorism. Already, the rule of law figures prominently in the international policy scene as a central feature of the World Bank’s investment strategies, the UN’s Peace Building Commission, and President Bush’s “Freedom Agenda.” In its 2005 Summit Resolution, the UN General Assembly declared that “good governance and the rule of law at the national and international levels are essential for sustained economic growth, sustainable development and the eradication of poverty and hunger.”¹ Multinational corporations joining the UN’s Global Compact embrace a rule of law program to advance human rights, uphold labor standards, safeguard the

* In February 2005, Mr. Andrews retired from PepsiCo, Inc. where he served as the Senior Vice President for Government Affairs, General Counsel and Secretary. From 1997 to 2000, he served as the 19th Legal Adviser to the U.S. Department of State. Mr. Andrews expresses his appreciation to Michael Maya, Deputy Director of the ABA’s Rule of Law Initiative and to Elizabeth Andersen, Executive Director of American Society of International Law (ASIL).

1. A/Res/60/1, para 11.

environment, and combat corruption.² The rule of law is a cause whose time has come.

Yet, beneath the grand rhetorical level, there remain important unanswered questions about the rule of law: what exactly it means, why it matters, and what different actors should be doing to advance it. In November 2005, the American Bar Association (“ABA”) convened its first International Rule of Law Symposium to begin answering those questions and to build a broader and more effective network of stakeholders who can work together to strengthen the rule of law throughout the world.

It was my privilege to serve on the Symposium Steering Committee and to moderate a panel at the Symposium. I have long believed that the innumerable constraints imposed on a society governed by the rule of law are ultimately the source of its liberation—liberation that unleashes the creative and entrepreneurial spirit and allows for the orderly pursuit of the common good. Therefore, during most of my professional career, I have been active in a number of non-governmental organizations that in one way or another are committed to promoting the rule of law, such as the Lawyers Committee for Civil Rights Under Law, The Asia Foundation, and the ABA’s Central European and Eurasian Law Initiative (CEELI).

In addition to my focus on the rule of law from the non-governmental angle, my government service has significantly influenced my approach to fostering the rule of law globally. It was at the State Department that I was reminded that while the rule of law is central to both democracy and a market economy, it requires more than technical or mechanical reforms of laws or legal institutions. The financial crisis in Asia in 1997, which was considered a major national security matter, is a clear example of this point. Many, if not most, of the countries known as the Asian “Tigers” were engaged in rule of law reforms of one sort or another. However, ingrown circles of bankers, businessmen and politicians brought the economies of their countries to their knees by subverting the reforms, thereby precipitating a downturn in the world economy. In this instance, as elsewhere in the world, the primary obstacle to reforms and the advancement of the rule of law was not technical or financial, but rather political and human.

Likewise, my subsequent tenure as General Counsel of PepsiCo, which operates in more than 200 countries, only confirmed what I had learned during my government service – that political will and a changed mindset among the governed is at least as important to advancing the rule of law as technical prowess. For example, numerous countries in Asia, the former Soviet Union, Eastern Europe, Latin America, sub-Saharan Africa, and the Middle East

2. See UN Global Compact, The Ten Principles, <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

continue to engage in a variety of law reform initiatives, such as rewriting constitutions, laws and regulations. That is the easy part. Far-reaching institutional reforms and the creation of a “rule of law culture,” especially in countries emerging from an era of repressive rule, is another matter altogether. With few if any exceptions, such change is proving to be a multi-generational undertaking.

While I generally hold to the notion that the rule of law and economic and democratic development are closely if not inextricably linked, we must recognize and puzzle through the exceptions to this rule, namely China and to a lesser degree, Russia. What can we learn from the China experience, where the absence of the rule of law seems not to have stymied economic growth, at least in the short term? Will the absence of the rule of law ultimately undermine the long term sustainability of this economic titan? The existence of these and many other unanswered questions merely points to the fact that the study and promotion of the rule of law must be a multi-disciplinary undertaking, involving social scientists, economists, educators, and others. It cannot be the sole province of lawyers. The organizers of the International Rule of Law Symposium, the ABA, firmly understand this. It was their vision to bring together leaders from a variety of disciplines to discuss ways to better promote the rule of law. When I was asked to serve on the Symposium Steering Committee, I eagerly accepted the challenge of building a broader-based movement to promote the rule of law globally.

As readers of this special edition will see, the International Rule of Law Symposium highlighted the importance of the rule of law in addressing today’s global challenges. The keynote speeches published here reflect a commitment at the highest levels of government, in the U.S. and abroad, to advancing the rule of law. Additional panel discussions summarized by Symposium Rapporteur Professor Katharina Pistor grappled with the subject in greater detail. Symposium panelists and attendees from over forty countries – representing business, advocacy groups, government, non-governmental organizations, academia, etc. – shared their insights about the nexus between the rule of law and poverty, conflict, terrorism, corruption, public health, and economic opportunity.

We heard from The Boeing Corporation’s Thomas Pickering that large multinational corporations consider the rule of law a significant factor in investment decisions. Governance issues present an especially difficult challenge for small and medium-sized companies that lack the clout to bargain for the investment stability they need when dealing with governments. Juan Mendez of the International Center for Transitional Justice underscored the importance of post-conflict accountability and the rule of law to long-term peace building and the dangers of foregoing accountability as a condition of peace. Geeta Gau Gupta of the World Bank described how gaps in the rule of law that particularly affect women have devastating effects on health and economic well-

being. The discussions of the ways in which the rule of law shapes the world in which we live were wide-ranging and rich.

We also heard that efforts to address these problems through rule of law assistance programs can founder if inadequately resourced or poorly designed. In some cases, rule of law assistance efforts have missed the mark because they were not adequately coordinated with other international donors, or failed to take into consideration local conditions, buy-in and political will for reform. Efforts by private actors to promote the rule of law have also faced challenges: in some circumstances, multilateral corporations have felt constrained to press an aggressive rule of law agenda for fear that it might alienate the government in the countries in which they invest. In her article appearing in this special Symposium Edition, Professor Pistor reports on these and other challenges, and the sometimes conflicting views on how best to meet them.

The Symposium did not purport to resolve all of these differences nor to yield an agreed upon blueprint for action. Its chief contribution was to foster a high level conversation among diverse constituencies on the questions I posed at the beginning of this article, and to develop a basis for on-going dialogue and concrete problem solving in this critical field. The Symposium was a clear success, serving as an important starting point, carried forward by this publication. Already, the Symposium has been a springboard for a number of important follow-on initiatives that focus on the role that both lawyers and non-lawyers can play in rule of law promotion efforts worldwide.

Based on the Symposium presentations and discussions, I would like to suggest five ways in which the work begun in that valuable forum might beneficially continue.

First, as nearly every Symposium panelist and speaker remarked, we need clarity around the definition of the rule of law and other complex questions such as whether it varies in different contexts and how it relates to democracy and economic development. To engage in effective development of policy related to the rule of law, we need a clear standard and regular measurement of how different governments measure up. A number of organizations conduct assessments that address elements of the rule of law. The World Bank issues its "Doing Business" reports that gauge the regulatory environment for business; Freedom House measures democratic freedoms in its "Freedom in the World" report; Transparency International's Transparency Index ranks countries according to perceptions of the level of corruption; the ABA issues in-depth qualitative reports on the status of judicial reform, legal education reform, legal profession reform, prosecutorial reform, and various rights protections, and the UN is developing a rule of law assessment tool for post-conflict settings. But no organization yet comprehensively measures and reports on the status of the "rule of law." Development of such a tool would be an invaluable contribution to the field.

Second, as a number of Symposium panelists remarked, there is a critical

need for greater donor coordination in the rule of law field. Too often, reformers in developing countries are bombarded by competing or redundant recommendations from various international advisors, some of whom appear more intent on proselytizing their own native legal code than they are on supporting a suitable and sustainable reform for the country in question. Rule of law promotion would be greatly enhanced by regular donor coordination meetings on a country and international level. A related recommendation is that those active in rule of law promotion efforts must work more closely with donors in disparate fields, such as donors active in promoting public health. While rule of law promotion efforts might, superficially, appear to be peripheral to a public health reform agenda, they are in fact closely connected. For example, in certain African countries, as much as seventy percent of donated pharmaceutical drugs fail to reach patients in need, instead vanishing into the black market. These and other disturbing reports beg the question of whether money spent on a sustained and robust rule of law and anti-corruption initiative might save more lives in the long run, allowing critical aid to flow freely and reliably to intended beneficiaries in a country beset by a significant rule of law deficit.

Third, there is a need for an increase in funding for rule of law promotional activities, and, as former USAID Administrator Andrew Natsios observed during the Symposium, rule of law promotion should be mainstreamed as a part of all development assistance. Currently, only a very small fraction of all U.S. (or worldwide) assistance is devoted to rule of law promotion efforts. As both Joy Ezeilo of the Women's Aid Collective in Nigeria and Samuel P. Fried of the Limited Corporation observed at the Symposium, there is a particular need for assistance to grassroots civil society organizations working on rule of law issues in developing countries. Consideration should be given to establishing a dedicated global rule of law fund to address these needs, as expanding the capacity and reach of indigenous reformers is one of the most effective ways of promoting the rule of law.

Fourth, global efforts to promote the rule of law should include a robust campaign to educate the broad public about this issue and its relevance to pressing global concerns. The rule of law requires broad-based public understanding and buy-in, as well as appropriate laws and effective justice sector institutions. As Senator Hillary Clinton put it at the Symposium, "The rule of law may begin in law books and congressional or legislative debates and courtrooms. It doesn't end there. It finds its most vibrant expression in the actions of citizens—ordinary men and women who draw courage from the law to take a stand for their own rights and for those of others." To borrow from economics, attention must be paid to the "demand side" of the rule of law equation, as well as the "supply side." In this vein, the former Minister of Finance of Afghanistan, Ashraf Ghani, told Symposium attendees how he worked to curb tax evasion by visiting mosques and explaining to the general

public how government revenues would facilitate the provision of the public goods they needed.

Fifth, there is a need for expanded research to capture lessons learned about effective rule of law promotion efforts. Although bilateral and multilateral donors have spent billions on legal reform efforts over the past two decades, relatively little has been devoted to documenting and publishing accounts of which strategies have worked, which have not, and why. This gives rise to what Thomas Carothers of the Carnegie Endowment for International Peace has called “the problem of knowledge” in this field.³ The *Berkeley Journal of International Law* is to be commended for its focus on this issue, and other journals should follow suit, while donors should devote increased resources to research and evaluation in the rule of law field. Regular on-line and in-person fora should be developed through which rule of law stakeholders can meet as they did under the ABA auspices in November 2005 to share their experiences and insights on effective strategies to advance effective rule of law reforms.

These are but five of the many initiatives that could spring from the Symposium discussions begun last November, breathing life into what former Chief Justice of the Philippines Hilario Davide declared the commencement of a “Rule of Law Movement” at the close of the meeting.

I hope that law students, practicing lawyers, and others who read this special Symposium Edition will be inspired to devote some portion, or maybe all, of their professional energies to the advancement of the rule of law worldwide. More immediately, I hope that review of the report and transcripts from the Symposium published here will inspire further thought and study on how to build a more robust rule of law movement. Finally, I commend the ABA and the *Berkeley Journal of International Law* for their leadership in this critically important cause.

3. See, e.g., Thomas Carothers, Promoting the Rule of Law: The Problem of Knowledge, Carnegie Paper No. 34, January 2003; <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1169&proj=zdr1>; see also, Thomas Carothers, ed., *Promoting the Rule of Law: In Search of Knowledge*, Carnegie Endowment for International Peace, 2006.