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Regulatory rule of law

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1. Introduction

For much of the twentieth century, we thought of rule of law as being part of the form and operation of a nation-state, expressed through attributes such as uniform application of law, the state's own submission to law and judicial independence from the executive branch of government. Domestic rule of law has been theorised in different ways within Western democracies (for example, Krygier 2015), but the fall of the Berlin Wall in 1989 triggered a recasting of both the conceptualisation and the practice of rule of law. As the United States and its allies sought to democratise Eastern and Central Europe and the former Soviet Union, and open those markets to capitalism, the so-called 'revival' of rule of law unfolded (Carothers 1998). Rule of law now emerged in a more obviously ideological and instrumental guise—as a policy tool intended to advance political goals worldwide, through multilateral and bilateral interventions in transitional and developing states, official development assistance (ODA), state-building and peacekeeping (for example, Sannerholm et al. 2012).

Twenty-five years later, the conceptual range, regulatory effect and geographic reach of rule of law have grown dramatically (Carothers 1998, 2009). We now acknowledge that its form and function in Asia and in authoritarian regimes are very different to our original Anglo-European definitions (for example, Peerenboom 2004; Mason 2011;

Cheeseman 2015). Following the September 2001 terrorist attacks on the United States, rule of law has been further mobilised to combat security risks and terrorism. Today, we label these policy interventions in various ways, including ‘rule of law promotion’, ‘rule of law assistance’, ‘law and justice reform’, ‘law and development’, ‘governance’, ‘legal and institutional reform’, ‘access to justice’, ‘legal empowerment’, ‘security sector reform’, ‘international peacekeeping’ and ‘international policing’, but, in this chapter, we will collapse these categories and focus on the regulatory character of what I will call ‘rule of law promotion’.

Regulatory scholars have written extensively on the intersection of regulation and law within domestic legal systems (for example, Parker et al. 2004; Freigang 2002). This chapter starts from the premise that rule of law projected transnationally is regulatory: it forms part of multilateral or bilateral policies designed to change the course of events in target states. In this chapter, we look at just two aspects of this phenomenon: 1) how rule of law norms are produced, exchanged and distributed by transnational actors in a global marketplace; and 2) the extent to which transnational rule of law actors are themselves subject to regulation.

2. Regulatory rule of law defined

Rule of law promotion can be viewed as one of many ways in which a transnational legal order (Halliday and Shaffer 2015) is constructed. It involves multiple actors at the international, transnational, national and local levels who interact through processes such as diplomacy, ODA, military interventions and provision of humanitarian aid. Rule of law promotion is transnational because it sits ‘somewhere beyond the reach of the nation-state and below the legal regime of international law and the authority of international organizations’ (Folke Schuppert 2012: 90).

The projects that become the ‘carriers’ of rule of law concepts and practices (for example, Behrends et al. 2014) between these levels of governance range from electoral monitoring and support, through post-conflict legal reconstruction, to setting up institutions for transitional justice. So, when the Australian Federal Police use their International Deployment Group to keep the peace and provide police training in the Solomon Islands,

this is rule of law promotion; so, too, are projects where faith-based non-governmental organisations (NGOs) are subcontracted by multilateral donors to provide legal advocacy for women affected by violence.

Rule of law interventions often follow a crisis—such as the US declaration of the ‘war on terror’ in 2001—or a political watershed, such as the Burmese military junta’s ‘roadmap to democracy’ announced in 2008. These moments create fissures in the borders of otherwise sovereign states that admit external actors, using international financing or mandates under international law to advance rule of law reform prescriptions. They do this through multilateral organisations—for example, the Organisation for Economic Co-operation and Development (OECD) or the United Nations (UN) and its agencies—or through bilateral or regional negotiations, or unilaterally, and often with the help of political allies and globalised epistemic communities such as international NGOs and rule of law practitioners (Simion and Taylor 2015).

The legitimating discourse for rule of law interventions is that the target state ‘lacks’ rule of law (Mattei and Nader 2008), but the driver is undeniably the policy aims of the intervening actors (for example, Lancaster 2006), which may include accession to a multilateral trade agreement (for example, Humphreys 2010), securing a weak neighbour’s porous borders, improving human rights as a means of creating peace and security or creating a more supportive climate for foreign investment.

3. Normative conflict within rule of law promotion

Contemporary rule of law projects are now ambitious in scope; they aim to do much more than improve the legislative framework or strengthen the judiciary in developing economies (for example, Hammegren 2015; van Rooij and Nicholson 2013). The World Bank has been a dominant actor in pursuing multiple, and often conflicting, rule of law objectives (for example, World Bank 2011). Santos (2006) profiles the bank’s own use of competing—and conflicting—ideas of the rule of law in its reform interventions: Dicey’s separation of powers and submission of the state to law; Hayek’s realisation of market transactions with minimal state interference; Weber’s substantive focus on norms and personnel shaping institutions; and Sen’s (1999) emphasis on institutions and their representatives doing distributional equity to citizens.

The malleability of rule of law as a concept lends itself to use by dictators and progressive reformers alike (for example, Tamanaha 2004, 2006). Many thoughtful scholars argue that ‘rule of law’ should deliver a fuller set of substantive and procedural justice norms, such as human rights, access to justice and distributive justice (for example, Armytage 2012; Cane 2010; Mason 2011). Krygier (2010) observes that freighting the idea of rule of law with the obligation to deliver security, human rights, social equity and market efficiency—as well as the institutions to deliver these—has diminished our understanding of the conditions under which the rule of law flourishes and its fundamental purpose, which, he argues, is to curb the exercise of arbitrary power by both state and non-state actors.

The choice of conceptual foundation matters: how you design security sector reform (SSR), for example, depends on what you think its normative goals should be. If you see SSR as a technical program designed to strengthen the criminal justice sector and provide solutions to specialised threats such as narcotics control and counterterrorism, establishing US-style high-security prisons in somewhere like Afghanistan will be a priority. If human security is your concern, you would ask how SSR interventions in that country could reduce the incidence of women and children jailed for crimes of poverty, or how to manage opportunistic ‘forum shopping’ between state justice institutions and those of religious and customary law (for example, Jayasuriya 2012).

4. Rule of law as a transnational marketplace

This apparent goal confusion in rule of law interventions is not accidental. Carothers and Samet-Marram (2015) have reimagined the post-1989 period of global democracy promotion as a ‘global marketplace of political change’. Rule of law promotion is both a symbolic and a material marketplace: rule of law programs and norms are created, commodified and distributed globally through financial transfers totalling billions of dollars. Pinpointing the precise value of rule of law-related expenditure is difficult; it is only a subset of the world’s ODA, defence expenditure on state-building and private philanthropy for development (Development Initiatives 2013; IDLO 2010). Australia, for example, as a medium-sized donor, was, until recently, spending AU\$371 million per annum (or 14.7 per cent of its then bilateral aid

budget) on law and justice assistance (DFAT 2012: 5). How to effectively code and aggregate the many different forms of rule of law financing, even by members of the OECD's Development Assistance Committee (OECD-DAC), are challenging, precisely because the substantive focus of the work is fluid.

Notwithstanding the ideological claims that rule of law promotion will advance 'legal empowerment' and 'justice for the poor' (for example, Golub 2009, 2010; van Rooij and Nicholson 2013), structurally, the money follows the political aims of the funder; it is largely a supply-driven phenomenon. International development aid agreements contemplate 'partnership' and 'local ownership', but the dominant values in those agreements are transparency, efficiency and accountability (OECD 2015). The actual disbursement of funds is mediated by chains of international and local 'designers', 'implementers' and 'evaluators'—a crowd of principals and agents who make up what I have called the 'rule of law bazaar' (Taylor 2010b). Rule of law market actors range from state-owned enterprises through to self-employed individuals. Across the spectrum are international NGOs, state agencies, local NGOs, militaries, churches and corporations. There is considerable blurring of profit and non-profit profiles; NGOs, for example, are often funded by both public agencies and corporations. The process of 'assisting' target states is thus also a process of siphoning some of the development assistance finance back to the global North (for example, Ghani and Lockhart 2008). At the same time, Carothers and Samet-Marram (2015) argue that both the financiers and the implementers of democracy promotion are increasingly non-Western and non-liberal; we can observe a similar trend in rule of law promotion (for example, Taylor 2010a).

Lawyers feature prominently in rule of law's international, transnational and local spaces, even though the work itself is varied and distributed across many different occupational groups. Indeed, rule of law promotion as a practice has something in common with the professional organisation of law in the global North: it declares allegiance to altruistic aims (poverty reduction, human rights, access to justice) (for example, Halliday and Karpick 1997; Halliday et al. 2007) and pursues these in tandem with strategies to secure market share and profitability (Dezalay and Garth 2011).

5. Rule of law as a transnational legal order

Rule of law promotion can be viewed as the formation of a transnational legal order (TLO) of the kind theorised by Halliday and Shaffer (2015). It functions as one of many ‘global scripts’ promoted within and through transnational organisations in the making of ‘soft law’ and regulation internationally (Darian-Smith 2013). Rule of law norms are inscribed in legal technologies such as conventions and treaties, best practices and standards, legislative guides and model laws, international court rulings and the rules of global regulatory bodies.

The paradigm example of a rule of law ‘script’ is the UN promulgation of a definition of rule of law in 2004. This can be understood as an attempt to assert control over rule of law’s ‘regulatory spaces’ (for example, Scott 2001), within and outside the UN system. It also shapes the discursive production and distribution of rule of law, by injecting ‘laws that are publicly promulgated, equally enforced and independently adjudicated’ with ‘international human rights norms and standards’ (UN Secretary-General 2004). This definition, then, becomes a compliance standard for the UN system as a whole, embedded within UN agency programming and within its rule of law assessment tool. The European Union (EU), too, has a new rule of law compliance standard: a ‘pre–Article 7’ warning procedure for assessing where there has been ‘a systematic breakdown in rule of law’ within a member state of the kind that would trigger the suspension of EU voting rights under Article 7 of the Lisbon Treaty (EC 2014).

Both the UN and the EU examples show how rule of law operates as a multinodal form of transnational regulation. There is no single international forum or agency that oversees the production, distribution and enforcement of the rule of law by state and non-state entities. Thus, the UN system, the EU, the World Bank and other international and transnational actors compete for the symbolic and practical ownership of rule of law promotion as a means of creating and entrenching their desired global norms.

6. Rule of law as surveillance and monitoring

Mobilising rule of law promotion as regulation requires some form of enforcement, so rule of law comes packaged with diagnostic, surveillance and evaluative tools with which to measure a state's 'progress' in rule of law adoption. Many of these are modes of regulation that are routine within new public management: outsourcing and public procurement, highly detailed contracts, standardised costing formulas, standardised forms (including spreadsheets, 'log-frame' plans, internal reports and 'communication plans'), audit and monitoring, policy 'toolkits' and public reports (Natsios 2010). Rule of law is also 'performed' through the practices of rule of law agents and their epistemic communities and professional networks, so personnel roles and titles, styles of physically organising the workplace, public announcements of 'results', narratives about 'lessons learned' and formal monitoring and evaluation (for example, Cohen et al. 2011; Cohen and Simion 2013) are also important processes in the production and distribution of rule of law, as they are in ODA in other domains as well.

Can we measure or quantify 'rule of law'? The value and impact of rule of law promotion programs are typically 'measured' by counting their outputs (for example, number of lawyers trained, number of cases filed) or through proxy 'indicators' (for example, Parsons et al. 2010). The short time horizons of most policy interventions mean that longitudinal studies of how rule of law projects affect local actors and institutions over time are uncommon.

The 'indicator culture' that has taken hold within organisations that fund rule of law policy interventions (Davis et al. 2010; Engle Merry et al. 2015) is a strategy of global governance in which social phenomena are presented in a quasi-scientific form, and where different sets of indicators reference and mimic one another to present stylised accounts of the target states. Indicators are also combined with other forms of monitoring. So, embedding indicators in procurement contracts, for example, means that moving the target country up or down an anticorruption or democracy index can become a contractual performance requirement (for example, Taylor 2010b).

Most indicators focus on formal legal systems and the agencies of the state (Taylor 2007), rather than on non-state and religious forms of law (for example, Forsyth 2009). The gap between this metric representation

of rule of law and how citizens experience ‘everyday’ law and legal institutions in that country is generally not explained (cf. Deinla and Taylor 2015). The World Justice Project (WJP) Rule of Law Index[®], for example, uses 47 indicators to evaluate constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice (WJP 2015). The *Regulatory Guillotine*[™] tool identifies and disestablishes duplicative or redundant laws (Jacobs et al. 2014).

Some indicator sets are more nuanced. The self-assessment tool for rule of law in public administration developed by the UN Development Programme (UNDP) and the Folke Bernadotte Academy (FBA) in Sweden (UNDP 2015), for example, is explicit about the political nature of public administration and how local political power determines the type and quality of public sector services. These kinds of approaches are consistent with Braithwaite’s (2011) recommendations about responsive regulation and Kavanagh and Jones’s (2011: 25) proposal for strengthening the United Nations’ own rule of law capacity, both of which emphasise attention to local context.

7. Branding rule of law

As indicators proliferate, they become rule of law ‘products’ in their own right: the purchase and distribution of the regulatory tool itself become a rule of law intervention. Many of these tools are originally developed with public funding; some are fully open access, such as the UN Rule of Law Toolkit (UN 2011) and the UNDP–FBA assessment tool (UNDP 2015); others are presented as the intellectual property of the designing organisation, such as the WJP Rule of Law Index[®] (WJP 2015). What all of these tools have in common, however, is some form of ‘brand architecture’—branding that seeks to build an affiliative bond between the rule of law commodity and its end-users.

Australia’s ‘law and justice’ interventions feature a bouncing red kangaroo. The Australian Government is clear that this logo ‘represents the product we deliver—Australian aid’ (DFAT 2015a). In the United States, the US Agency for International Development (USAID) rolled out its new branding in 2004–05 to strengthen its foreign policy

objectives, and the ‘favourability of the US nearly doubled in Indonesia ... thanks to the massive delivery of—for the first time “well branded”—US foreign assistance’ (USAID 2015).

Other rule of law brands include the World Bank’s ‘Justice for the Poor’ (J4P) and USAID’s ‘Educating and Equipping Tomorrow’s Justice Reformers’ (E2J) and ‘People to People Peacebuilding’ (P2P). The shorthand brands are intended to distinguish projects that might otherwise be confusingly similar. They also seek to direct attention to the funder (rather than their agents, which often have their own brands). In each case, they seek to suggest to end-users that the project/product is more desirable than its unbranded forerunner or competitor.

8. Regulatory rule of law actors

In sociological terms, when rule of law travels abroad as a set of both concepts and practices, it becomes a transnational ‘project’ (Behrends et al. 2014). Its rationalities—embedded in epistemic communities, knowledge and surrounding institutions—are left behind and the model’s concepts and practices must be adapted and reinvented at new sites. That reinvention takes place through the people and organisations that design and deliver rule of law interventions in developing or fragile-country settings, within the constraints of a military operation or a development aid-funded project.

We see this when a state seeks to join a multilateral organisation such as the EU or the World Trade Organization (WTO). International rule of law advisors often substitute for state actors to prepare the state for accession (for example, Morlino and Magen 2009). They mobilise professional capital, occupational prestige and the power of ideas and technical knowledge from abroad (for example, Halliday and Carruthers 2009; Bosch 2016; Simion n.d.). In so doing, they act as the ‘brokers’, ‘translators’, ‘mediators’ and ‘agents’ for the organisations advancing the desired policy intervention (for example, Mosse 2011; Lewis and Mosse 2006; Levitt and Merry 2009). Bill Easterly (2014) terms this process, when performed by economists, ‘the tyranny of experts’. So, this prompts us to ask who are the rule of law practitioners in these new locations, how do they act as regulatory agents of a TLO and how are they themselves regulated?

9. Agents of the rule of law

Development economics is replete with descriptions of the complexities of principal–agent relationships in the design and delivery of aid (for example, Gibson et al. 2005). We lack a full benchmark study of how many organisations and individuals are involved in rule of law promotion work worldwide. Thus, it is risky to profile rule of law practice by sampling public documentation, as Desai (2014) does. What we know from pilot empirical studies is that, despite highly technocratic regimes of oversight and control, rule of law remains a highly relational field (Simion and Taylor 2015).

Many of the rule of law market’s biggest actors—the EU, the UNDP and the Organization for Security and Co-operation in Europe (OSCE)—limit their recruitment to lawyers and members of other branches of the legal profession. Chiefs of parties recruiting for a rule of law mission, particularly in a high-risk location, will prefer colleagues who are known to them or who come with endorsements from trusted third parties. Established missions in places that lack glamour or prestige also relax their standards when it comes to recruitment. This is consistent with what Baylis (2009) describes as the ‘cycling’ effect of cohorts moving from one ‘hot’ development destination to the next, and with international policing studies that show a reluctance to be ‘the last man out’ (Durch 2012).

Professional networks

Rule of law is intensely mobile work, so it is not surprising that digital communities of practice have emerged: key examples are the Rule of Law Community of Practice Network in the UN Department of Peacekeeping Operations (DPKO) and the International Network to Promote the Rule of Law (INPROL), sponsored by the US Institute for Peace (Simion and Taylor 2015: 66). More interactive discussion takes place using social media such as ‘LinkedIn’ and through groups such as the Justice Support Group and the Rule of Law Veterans group (Simion and Taylor 2015: 66). The growth of online forums can be seen as ‘wiki-regulation’ (Grabosky 2012) and the creation of a self-regulatory ‘space’ for debating rule of law ideas, norms and practices, but these are not designed to have strong regulatory traction.

Ethics and accountability

A signature capacity of a profession is its ability to control its membership and to sanction members who violate its behavioural standards (for example, American Bar Association 2015). Rule of law actors in transnational spaces may perceive themselves to be beyond the reach of regulation, either because they see themselves as the ‘source’ of legal norms or because they are physically removed from familiar professional environments. Where this occurs it may have legitimacy costs for the discursive or actual power of rule of law norms; people promoting rule of law should also be subject to the laws of the system they are supporting (Rausch 2006; Roesler 2010). The most egregious examples of violation have been by UN peacekeeping forces and private military contractors (for example, Simm 2013; Durch and Berkman 2006). But anecdotal evidence suggests that we should also examine legal and ethical awareness among practitioners of rule of law.

Where more than one agency or state is involved in a rule of law promotion project, a threshold issue is whose rules apply? Seconded from government agencies are generally bound by domestic legislation and a ‘sending’ organisation’s code of conduct and legal mandate (for example, DFAT 2015b), as well as by those of their ‘receiving’ organisation and sometimes immunity provisions deriving from international conventions (for example, UN 1946) and restrictions stemming from insurance coverage.

In this ‘choice of law’ contest, the first casualty is usually local law (for example, Derks and Price 2010: vi). The paradigm example is consumption of recreational drugs or alcohol in places where this is illegal. This may be ignored or downplayed, in the tacit or overt belief that the local legal system is underdeveloped or unworthy of respect. Or it may be excused on the basis that remote locations allow more latitude for behavioural lapses, and an expectation that monitoring by peers is looser where their professional relationships may be short-lived (Taylor 2009).

Beyond strict legality, rule of law practice is replete with ethical dilemmas. Do you honour ‘local ownership’ and accommodate gender segregation or a degree of ethnic patronage in distributing opportunities, or do you insist that the ‘international’ norms must prevail (for example, Hansen and Wiharta 2007)? There is currently no mechanism in place for resolving those tensions beyond particular projects or for defining

quality standards for rule of law practice. So, regulatory contestation at the project level is normal, as local actors and international actors compete for control over the norms and direction of a rule of law intervention (Bosch 2016).

Rule of law practitioners move fluidly among networked organisations, taking with them their knowledge, contacts, professional practices and their sense of ‘how we do’ rule of law promotion (Alkon 2013; Bosch 2016). This makes it difficult to sustain ‘feedback loops’ for the kind of learning that is necessary for effective interventions. This was termed a ‘problem of knowledge’ (Carothers 2006) and was considered to be a lack of political and commercial incentives for rule of law actors to coordinate their efforts (Channell 2006; Taylor 2009). More accurately, it is a problem of how to effectively share, absorb, reflect on and institutionalise knowledge gained from practice across a multilevel, globally diffuse field.

10. Conclusion

This chapter has argued that rule of law promotion is a transnational regulatory endeavour that can also be seen as an attempt to create a transnational legal order. Rule of law promotion operates discursively as a form of regulation by purporting to identify states that ‘lack’ rule of law. The malleability of the concept of rule of law allows a very wide range of norms to be produced and inscribed in global policy tools and technologies. By so doing, transnational actors are able to pursue a range of policy aims in relation to the target state.

The production and distribution of rule of law are sustained in part through standardisation of norms—one example being rule of law indicators, which focus on formal, abstracted aspects of legal systems rather than the pluralist, context-specific details at the local level. Tools for monitoring and measuring compliance with these standards, then, in turn, become rule of law ‘products’ for the rule of law marketplace.

The translation of rule of law norms from the transnational to the local level is the work of individual and organisational ‘brokers’ and ‘translators’ (Lewis and Mosse 2006; Mosse 2011). They shape regulatory outcomes locally by leveraging their technical knowledge, prestige and professional capital. That process, however, is complicated by the fact that rule of law practitioners and their employer organisations largely float beyond

national regulatory reach. Visible slippage between practitioners' invocation of rule of law norms, and their failure to embody these in practice, is one of the ways in which rule of law's claim to legitimacy may be diminished.

Further reading

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