The Rule of Law

A Lexicon for Policy Makers

By Barry Hager

THE MANSFIELD CENTER FOR PACIFIC AFFAIRS
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There is a gap in the literature on the Rule of Law. There are ample writings exhorting adherence to the Rule of Law, and scholarly articles on its historical antecedents, but no concise lexicon detailing the precise elements considered to comprise the Rule of Law. Such a lexicon would be a useful policy tool for policy makers and national leaders, providing a practical checklist of precise policy reforms that must take place if the Rule of Law itself is to be embraced.

The need for such a lexicon is suggested by statements such as these from the best scholarly work on the Rule of Law:

> We have a pretty good idea what we mean by "free markets" and "democratic elections." But legality and the "the Rule of Law" are ideals that present themselves as opaque even to legal philosophers…
>
> In English, we are never quite sure what we mean by the "the Rule of Law." Do we mean rule by laws laid down—whether the legal rules are good or bad? Or do we mean "rule by Law," by the right rules, by the rules that meet the tests of morality and justice?
>
> **GEORGE P. FLETCHER**
> Columbia University School of Law

> The Rule of Law is a much celebrated, historic ideal, the precise meaning of which may be less clear today than ever before. Significantly, however, the meaning of the phrase "the Rule of Law"—which I shall refer to as "the Rule-of-Law ideal"—has always been contested…
>
> In American legal discourse, debates about the historical and conceptual foundations of the Rule-of-Law ideal are seldom engaged directly. Indeed, many invocations of the Rule of Law are smug and hortatory…
>
> [Although the Rule of Law is] a shared concept, many of the operative terms are vague. Understanding the vagueness of particular shared assumptions helps to clarify possible bases for disagreement. And disagreement is common.
>
> **RICHARD H. FALLON, JR.**
> Harvard Law School

> The challenge…is not solely one of extending the Rule of Law into nation states where it has not heretofore flourished. It is also one of avoiding relapses in Great Britain, the United States, and other countries where the Rule of Law has long prevailed. Isolated yet significant departures from the Rule of Law still occur even in these countries…
>
> A major explanation for the uncertain advance of the Rule of Law in the world and for relapses even where it has generally prevailed, is that the requisites of its implementation and the values it serves are not sufficiently well understood. The capacity of any ideal to be realized within a society depends on how faithfully it is conceptualized…
>
> **ROBERT S. SUMMERS**
> Cornell University

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PREFACE

Today's newspapers, magazines, journals, political commentaries and talk shows—and even the lyrics of a contemporary popular song—contain references to the Rule of Law. In the United States, the term was invoked with great passion during last year's impeachment proceedings in the U.S. Congress while in the international arena, financial institutions such as the World Bank and the International Monetary Fund have made the Rule of Law a staple recommendation for the nations to which they provide assistance. And many in the West are vocal in their advocacy of the Rule of Law as necessary for Asian nations to sustain stable, growing economies and create democratic institutions.

Frequent references to the Rule of Law make it appear that there is general agreement about what the Rule of Law is, what precisely it entails, and how it can be adopted in nations that have not heretofore embraced it. Yet, legal practitioners and scholars concede there is a genuine lack of agreement, even in Western societies and free market economies. Many Asian leaders, in particular, voice skepticism that the Rule of Law is relevant to and can succeed in their nations. Support for the Rule of Law in Asia is often superficial, frequently in response to perceived pressure from the West or from multinational institutions. In short, the Rule of Law is the subject of an ongoing and vibrant international debate.

In order to contribute to this debate, the Mansfield Center for Pacific Affairs co-sponsored with the Global Forum of Japan a major conference in Tokyo in May 1999 on "The Rule of Law and Its Acceptance in Asia." With support from the Japan-U.S. Friendship Commission, the conference was designed to facilitate an open and focused dialogue on the precise components of the Rule of Law and what it entails. The daylong meeting provided a forum in which Western leaders and Asian specialists and practitioners were able to move beyond shallow discussions of the Rule of Law as a "buzzword" and delve into the core elements and concepts.

In preparation for the conference, the Mansfield Center worked with Barry M. Hager, an attorney and specialist in international finance, trade and administrative law, to develop a scholarly monograph that traces the historical and legal roots of the Rule of Law concept and provides a lexicon of the specific political and economic norms that comprise adherence to the Rule of Law. Developed with generous support from the Henry Luce Foundation and distributed in draft

form before the conference, Mr. Hager's document,*The Rule of Law: A Lexicon for Policy Makers*, served as a basis for discussion at the conference.

Because the Tokyo conference highlighted the need for continuing the discussion about the Rule of Law, the Mansfield Center is planning a series of Mansfield Dialogues in China in fall 1999. These small group meetings among scholars and policy makers from the United States and China are intended to bridge gaps in understanding about the implications of the Rule of Law for political and economic life in Asia and to further awareness and knowledge among a diverse group of participants. At each of these Dialogues, we plan to distribute a Chinese translation of *The Rule of Law: A Lexicon for Policy Makers*, again intending that this publication be a foundation for debate and discussion.

On behalf of the Mansfield Center for Pacific Affairs, I want to take this opportunity to express our thanks to the organizations and individuals who contributed to the development of this publication. We are grateful to the Henry Luce Foundation for supporting the development and translation of this lexicon and to the Maureen and Mike Mansfield Foundation, which provides funding for the Mansfield Center for Pacific Affairs and has given its support to the Rule of Law conference and this project. Barry Hager, who authored this document, did a masterful job outlining the legal and historical roots of the Rule of Law as well as defining its core components. His sensitive treatment of this complex topic provides a much needed scholarly resource for all who are involved in the debate and discussion about how governments should behave and how individual citizens should participate in their governments. We also wish to thank Liang Zhiping who reviewed the Chinese translation and provided welcome comments and suggestions. Kenneth Mangin and Catherine Bouesnard at Hager Associates provided research support, and Joyce Piquette and Nia Lizanna at the Mansfield Center for Pacific Affairs assisted with production and translation arrangements. Mary-Jane Atwater at the Mansfield Center edited the English version of this publication and managed production of this translation. The cover design is by Supon Design and the translation by Xin Min through Contact International. Finally, I want to take this opportunity to acknowledge my predecessor, Tovah LaDier, who initiated the Rule of Law project at the Mansfield Center.

L. Gordon Flake
Executive Director
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INTRODUCTION

The Rule of Law is invoked so regularly in discussions of reform agendas in Asia and other regions of the world that it seems no explanation of the concept is needed. All agree, it is assumed, on what the Rule of Law means. To the contrary, there is frequent imprecision and occasional real disagreement on the fundamental elements of the Rule of Law among the scholars and lawyers of the West where the Rule of Law concept arose.

At the same time, there is a degree of suspicion or resistance to the Rule of Law concept among Asian leaders. The Western provenance of the concept may be a sufficient basis for its rejection for some, but for many more there is the reaction of skepticism about the supposedly inevitable benefits of the Rule of Law. Put bluntly, if the Rule of Law is a guarantor of good government and the elimination of such banes as corruption and cronyism, why have those outcomes not been routinely achieved in the West? Finally, there is the view that the Rule of Law is but one path to the goals of democracy, free markets and well-governed societies; there may be others, with alternative landscapes more congenial to the Asian experience.

Despite those reasons for resistance or at least skepticism regarding the Rule of Law, one thing appears certain: policy makers in the West will continue to advocate the Rule of Law as a necessary precondition for both the development of mature democracy and the establishment of sound and sustainable economic growth—goals that are themselves generally embraced by Asian leaders as well as by those from other regions. Adherence to the Rule of Law is firmly entrenched in the mix of policy recommendations which are the catechism of the United States government, international financial institutions and European nations, all of whom offer help and advice on achieving democracy and healthy economies.

That said, the combination of Western push and Eastern resistance to the Rule of Law has the potential for abrading East-West relations. One means of reducing that potential irritant is to foster a candid dialogue which has two features:

First, the precise elements of the Rule of Law on which there is general agreement among Western lawyers and scholars need to be spelled out with specificity. The general slogan of the Rule of Law needs to be parsed to determine precisely what is being recommended by its advocates.

Second, those precise elements should be considered by Asian leaders on a case-by-case basis. If objections are raised, not at the level of dismissing the general the Rule of Law banner, but to one or more specific elements of the Rule of Law, then it becomes fair to press for an equally clear statement of the alternatives Asian leaders would offer to replace those elements. Only when we have this kind of discourse can we join the real debate over which policy proposals are best for specific Asian nations at this point in history, as the pursuit of stable democracies and healthy market economies continues.

This lexicon is intended to provide the first of those two predicates for a candid East-West dialogue on the meaning and appropriateness for Asia of the Western notion of the Rule of Law. Here we attempt to set forth the basic elements of the Rule of Law that are commonly agreed upon. Each one is described both in terms of what practices it requires or entails, what good is said to flow from it, and its legal and historical antecedents.

Success for this lexicon would be to have it used in candid debate between the proponents and skeptics of the Rule of Law. The Mansfield Center for Pacific Affairs, from the United States, and the Global Forum of Japan plan one such forum; others no doubt will be held. They will not be the first and should not be the last. Asian leaders and jurists have held important conferences to discuss the meaning and applicability of the Rule of Law in their region since the 1950s. Some of those discussions are rich in thought and have been relied upon in developing this lexicon.

Further discussion, both candid and precise, about the meaning and potential impact of these Rule of Law concepts will serve the cause of democracy in Asia and improved East-West understanding. Whatever components of the Rule of Law are adopted by Asian nations must be based on Asian decisions, not Western prescription; where components are rejected, it remains fair for Western policy makers to ask Asian leaders what alternatives are being chosen that retain the capacity to advance democracy and sound economies.

THE LEGAL HISTORY OF THE RULE OF LAW

The Rule of Law concept has a deep historical lineage, being traced in some scholarly views to the concepts of justice and fairness discussed by Aristotle.[1] But while Greek civilization gave rise to the Western concept of democracy, albeit limited in actual practice in Athens, it was the undemocratic Roman Empire that gave birth to the Western tradition of a well-codified and broadly applied body of law:

> The basic legal institutions of European civilization emerged in a specific cultural environment, that of the early Roman Republic. Roman law grew into a complex procedural system administered by trained jurists in the Roman Empire, the Byzantine Empire, and later European monarchies. Because it never imposed constitutional restraints on the executive, it did not ensure the Rule of Law in the modern sense. Napoleon's famous codes of law and procedure (1804-1811) guaranteed equality before the law and protected private property rights in the tradition of Roman law, but they did not infringe on the prerogatives of the emperor and his spies, censors, and secret police.[2]

The Roman legacy in part was the concept of a codified body of laws widely applied in order to maintain order and sustain a regime. As noted, that legacy did not extend to the idea that the government itself was bound by law. That innovation may be the most important contribution of Western legal thought.

Certainly in the judgment of many, the seminal document in the emergence of the Rule of Law as a fundamental Western legal concept is the Magna Carta, precisely because it embodies that idea:

> Since 1215 in England, and in ensuing centuries in many countries that England has and has not influenced, there has been major progress toward government under the Rule of Law. England's own earliest major advance was King John's acquiescence in the Magna Carta in June of 1215. The final revision of this great charter…was confirmed in 1297

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[1] Aristotle, *Politics* (ca. 325 B.C.) cited in cited in John N. Moore, "The Rule of Law: An Overview," (paper presented at the first U.S./Soviet Conference on 'The Rule of Law' held in Moscow and Leningrad, 19-23 March 1990), 7.

[2] Jeffrey D. Sachs (editor) and Pistor, Katharina, *The Rule of Law and Economic Reform in Russia* The John M. Olin Critical Issues Series, (Westview Press, 1987), 25.

> by King Edward I and placed on the first or "great" roll of English statutes…One of its original clauses captures a major feature of the relatively formal theory of the Rule of Law…:
>
> "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we (*the King*) proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land."[3]

That great document embodied the principle that government itself—in that day, the monarchy—is bound by law, and may not do certain things to ordinary citizens absent a justification grounded either in peer decisions ("lawful judgement of his equals") or established law ("law of the land"). A cornerstone of the Rule of Law is that law rules the government itself. Arbitrary exercise of power not based on law is inherently suspect and worthy of resistance.

While much occurred in the intervening four centuries in the West, the seventeenth and eighteenth centuries were a period of fertile intellectual consideration of the proper forms and bases of government resulting in a flowering both of analysis of government and of popular uprisings that reshaped those governments. The writings and actions of that period are crucial to an understanding of the Western concept of the Rule of Law.

First, the question of the source of legitimacy for governmental action arises. As support for unquestioning adherence to monarchical rule dissolved, scholars debated what exactly it is that provides the basis for governmental authority. John Locke, Jean-Jacques Rousseau and Count Montesquieu provided the most influential contributions. In rough summary, the Englishman Locke's view prevailed: government is based on popular consent, and actions by a government that are not supported by that popular consent (leaving aside the complexities of ascertaining that consent) are not valid, or, as Locke said, are "without authority."[4]

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[3] Robert S. Summers, "A Formal Theory of the Rule of Law," Ratio Juris, vol. 6, no. 2 (July 1993), 127.

[4] Jocke, *Second Treatise of Civil Government* (1690) and Rousseau, *The Social Contract* (1762) cited in John N. Moore, "The Rule of Law: An Overview" (paper presented at the first U.S./Soviet Conference on 'the Rule of Law' held in Moscow and Leningrad, 19-23 March 1990), 8.

Second, the question of the proper structure of government arises. Here the ideas of the French aristocrat Montesquieu were most emulated. His writings ushered in an era of constitution-writing, which assumed that constitutions, as original statements of the will of the people to be governed, were necessary to their government. Moreover, his eloquence on the question of the importance of the separation and balance of powers has never been surpassed, except perhaps by the American James Madison.

In the 1748 *L'Esprit des Lois*, Montesquieu wrote:

> When the legislative and executive powers are united in the same person...there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.
>
> Again, there is no liberty, if the judicial power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with all the violence of an oppressor.[5]

Third, the fundamental notion of the rights of individuals emerged. As an antithesis to arbitrary monarchical, theocratic or military power, the belief took hold that individuals are entitled to certain things which neither governments, nor other individuals, can take from them absent some rational reason that is established by a procedurally sound, and fair, mechanism. This notion of individual rights, now usually referred to as human rights, was most eloquently captured in the American Declaration of Independence's statement that all men are equal and that among their unalienable rights are "life, liberty and the pursuit of happiness."[6]

Just one generation after Montesquieu's writings, the flowering of Western constitutionalism and democratic revolution occurred. In the brief period from 1776 to 1791, most of what is worth repeating on the subject of the basis for democracy in the West was written.

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[5] Montesquier, L'Esprit des Lois, 1748.
[6] Declaration of Independence, 1776.

The American Declaration of Independence on July 4, 1776, endorsed John Locke's view of the basis for the legitimacy of government: "We hold these truths to be self-evident, that all men…are endowed by their Creator with certain unalienable rights…to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."[7]

In 1780, the state of Massachusetts adopted its Constitution, incorporating a provision that is a useful statement both of the concept of the Rule of Law and of the link between separation of powers and the Rule of Law:

> In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.[8]

By 1789, the concepts of government being limited by the consent of the governed, of separation of powers as a potent mechanical device to protect against any violation of popular consent and of the existence of inherent, and inalienable, personal rights had become entrenched. The U.S. Constitution, down to its very structure, reflected the notion that power must be divided among three branches, each with a capacity to check the other against the arbitrary use of power. And both the French Declaration of the Rights of Man and the Citizen of 1789 and the U.S. Bill of Rights in 1791 articulated with precision the concept that individual human rights must be protected from the potential tyranny of the state by mechanisms that prevent the sovereign from the arbitrary use of power.[9]

An interesting point is that the actual term "the Rule of Law" is not widely found in these historical documents, including the U.S. Constitution. As Professor George P. Fletcher has pointed out:

> Unlike typical European constitutions, the basic charter of the United States says nothing about a commitment to the Rule of Law. The closest constitutional analogue is the phrase prohibiting the depri-vation of "life, liberty, or property without due process of law."[10]

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[7] Declaration of Independence, 1776.
[8] Massachusetts Constitution, Article 30, Part the First.
[9] U.S. Bill of Rights; French Declaration of the Rights of Man and the Citizen.
[10] George P. Fletcher, Basic Concepts of Legal Thought (Oxford University Press, 1996), 13.

Indeed, the concept of "due process" has become, in American law, the most vigilant guarantor of the set of procedural rights and remedies available to individual citizens, which we usually mean when we refer to the Rule of Law.

Other linguistic terms arose that more closely track the "the Rule of Law" formulation, notably the *Rechtsstaat* of German law and the *Etat de droit* in French thought. In both cases, the fundamental concept of the Rule of Law, which emerged when the Magna Carta was extracted from the English monarch at Runnymede, is clear: government itself is bound by law.

The modern European *Rechtsstaat*, or 'state based on the Rule of Law,' rested on Roman legal procedures but also grew out of the tradition of checks and balances created by the estates and their representative assemblies in the late medieval period. In the words of Barrington Moore, Jr.:

> The most important aspect was the growth of the notion of the immunity of certain groups and persons from the power of the ruler, along with the conception of the right of resistance to unjust authority. Together with the conception of contract as a mutual engagement freely undertaken by free persons, derived from the feudal relation of vassalage, this complex of ideas and practices constitutes a critical legacy from European medieval society to modern conceptions of a free society. This complex arose only in Western Europe.[11]

Yet as Professor Fletcher has also pointed out, something more is intended by the words used in European legal traditions than simply saying that governments too are bound by the laws that govern individuals:

> There are in fact two versions of the Rule of Law, a modest version of adhering to the rules and a more lofty ideal that incorporates criteria of justice. We shuffle back and forth between them because we are unsure of the import of the term "law" in the expression "the Rule of Law." To explicate a rarely perceived ambiguity in English, we turn to a distinction between two concepts of law that is widely recognized in other languages but ignored in English.

[11] Sachs, op.cit., p. 25.

Continental European languages, for example, use one term for law that expresses the idea of laws enacted—laid down, legislated—by an authoritative body. Thus Germans use the term *Gesetz*, French *loi*, Spanish *ley*…All these languages also contain a second word for law that expresses a higher notion of Law as binding because it is sound in principle. This alternative conception of law is expressed in the Continental European languages as *Recht* in German, *droit* in French, *derecho* in Spanish…the closest translation of these terms in English would be 'Right,' an archaic expression for Law…The connotation of Right (or Law with a capital L) is typically that of good or just law, which is binding on us because it is good or just…

In many modern European languages…the term for Law in this higher sense is used to refer to personal rights in the plural (*Rechte*, *droits*, *prava*, *derechos*). The appeal to human rights, therefore, is an indirect appeal to the same word 'Right' that in European languages signifies Law in a higher sense. When we speak today of protecting human rights, such as the rights to life, liberty, and dignity, we always have in mind rights that appeal to us because they are just as a matter of principle.

Each of those two terms for law generates a distinct conception of the Rule of Law. If someone argues that 'the Rule of Law' simply means that 'the government is bound by rules fixed and announced beforehand,' they would be content with having the rules laid down by an authoritative lawgiver or legislature. This is what the Germans would call a *Gesetzesstaat* or the Communists once labeled 'socialist legality…' The rules are binding whether they are good or bad.

Those who think that the Rule of Law is an ideal for good government stress the dimension of Right in the Rule of Law.

The vision of a state based on ideal law is captured in the German notion of a *Rechtsstaat*. The European notion of "the Rule of Law" is based always on the term for Law in the higher sense. [12]

[12] Fletcher, op.cit., pp. 11-12.

In the American legal tradition, that appeal to Law "in the higher sense" frequently is grounded in the doctrine of constitutionalism. Based on the writings of Montesquieu, the era that saw the beginnings of electoral democracies in Europe and the United States two centuries ago was an era that placed great faith in the power of a written constitution to order society and guarantee liberty. Beyond that, a constitution was seen as a method of actually articulating that higher law which, by the consent of the governed, should rule the affairs of the nation.

Even though the term "the Rule of Law" is not contained in the U.S. Constitution, it could be said that the concept of the Rule of Law was clearly on display in what is perhaps the most important Supreme Court case ever decided—*Marbury v Madison*.

Just 14 years after the writing of the Constitution, Chief Justice John Marshall wrote the opinion that established with finality what was not at all evident based on a plain reading of the Constitution: that the Court (*i.e.*, the judicial branch established in Article 3 of the Constitution) had the power of judicial review; that using that power, the Court, relying on the Constitution, could set aside an act of the legislature (the Congress) as invalid, even though that Act had been passed by proper procedures and on its face was a valid Act of a duly constituted Congress.

The Court's 1803 reasoning is worth recalling, since it bears not only on the manner in which the concept of the Rule of Law became further entrenched in the American legal tradition, but because it also deals with one of the more difficult aspects of the practical application of the Rule of Law concepts: how to resolve disputes where there is a conflict between laws, each of which has a claim to validity:

> Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void….
>
> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.[13]

Thus, even though the term "the Rule of Law" was not widely deployed at the time, it can be said that by the beginning of the nineteenth century, the Rule of Law was firmly entrenched as a guiding legal principle in the democracies of the United States and Europe. Its hallmarks were a faith in constitutionalism as the tangible proof of the consent of the governed, the belief that government itself is limited by law and cannot engage in arbitrary exercises of power, and that individuals are endowed with certain rights that are inalienable, even by action of legitimately constituted governments.

It should go without saying that the political realities of the time did not live up to the lofty concept of the Rule of Law, so stated. Virtually every society in the West, certainly including the United States, engaged in some form of inhumane treatment of segments of its own population. Slavery and serfdom stretched from the United States to the Russian edge of Europe. Women had full political rights in few, if any, of these nations. As the nineteenth century wore on, colonialism and the European attempt to subjugate non-Europeans expanded, rather than contracted. The industrial revolution introduced new forms of economic exploitation which in turn gave rise to political movements that found the contemporary reality of democratic government wholly lacking in a sufficient commitment to human rights or the Rule of Law.

The twentieth century saw Europe itself fall into a period of savage disregard for law and human rights, as the threat of violent conquest by one nation over all the others on the continent was accompanied by an unprecedented assault on the very existence of one ethnic group. The simultaneous conflict in Asia likewise

[13] *Marbury v Madison,* 5 U.S. 137 (1803).

trampled widely on human rights. By the time the Second World War was over, the need seemed urgent to create peacekeeping supranational institutions and to restate the consensual commitment to human rights and the Rule of Law.

The 1948 Universal Declaration of Human Rights did so. Its preamble stated "…it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."[14]

In the past fifty years, the concept of the Rule of Law has become more firmly entrenched and its virtues more broadly defined. The use of the term itself has become nearly ubiquitous in discussions of good government, and the Rule of Law has been advocated as a necessary precondition for two quite separate achievements widely pursued by Western governments: the development of Western-style democracies throughout the world and the equally widespread emergence of free market economies. Both of these rationales for promoting the Rule of Law are discussed in more detail below, but it is useful first, in the context of this quick survey of Western legal history and of the origins of the commitment to the Rule of Law, to briefly review other legal and governmental traditions where the Rule of Law has been greeted more skeptically.

[14] Universal Declaration of Human Rights, Preamble.

NON-WESTERN LEGAL TRADITIONS AND THE RULE OF LAW

The tendency in the West too often is to pay little tribute to the existence of other legal traditions, largely because they do not have the hallmarks of the Rule of Law approach that developed in the West. It becomes an unfair tautology that the absence of a Rule of Law heritage suggests an absence of any legal system at all. That is in fact not true.

Indeed, returning to the legacy of Roman law, it is important to remember that it has always been possible to have a well-elaborated legal system the purpose of which is not to protect the rights of the individual citizen or member of the community, but instead to advance the workings of the state or the interests of the entire community. Generally, this concept of law working for the greater good of the community at large, through the direction of a benevolent leader or administrative regime, can be said to characterize a number of other legal systems, notably including those in Asia.

Two points should be made here about the historical bases for Asian suspicion regarding the Western "Rule of Law" approach to legal systems:

First, the experience of colonialism and the search for trade advantage by Europeans necessarily has colored the Asian view of what Westerners intend in practice by their Rule of Law. Asia never colonized Europe; much of Asia was colonized by Europe. The workings of those colonial systems were keyed to achieving mercantile and trade advantage for the "mother" country. Within that context, it is not surprising that Asians historically did not always see European legal systems as the guarantors of individual rights that they claimed to be within the European and North American contexts. Add to that experience the fact that Asians also colonized each other at various points, using law as a tool for imposing the will of the controlling regime, as in the Roman Imperial experience.

Thus it was observed at one of the earlier conferences on the Rule of Law in Asia that:

> During the course of his long subjugation to foreign rule, the average Korean found that laws were made by the rulers not with the ultimate purpose of protecting the individual or furthering his interests, but to provide the machinery by which the country could continue to be kept

> under subjugation. The result of this attitude towards the law is that the average person, far from considering himself under a duty to obey the law, endeavours as far as possible to evade it.
>
> This attitude towards the law is observable, though perhaps in a far less pronounced form, in several other Asian countries which have been under foreign rule. While the rulers did in many instances make laws in the interests of the people, it would be true to say that the primary object of law-making was the preservation of peace, the protection of the trading interests of the foreign power and the maintenance of the status quo. Of course, the force of this observation would vary depending on how enlightened and how benevolent the foreign ruler was. Many illustrations can be traced of extremely harsh and repressive laws which had been imposed by colonial powers in South-East Asia with a view to protecting their trade monopolies and their trading interests generally, and which were certainly not designed to benefit the local inhabitants.[1]

Second, given the sheer magnitude of the realm, and a myriad of other cultural factors, the legal tradition in China evolved as nearly the polar opposite of the Western individual, rights-based reliance on the Rule of Law. Instead, the need for wise and benevolent leaders using law to impose order and achieve the highest good for the whole society was emphasized:

> Traditionally, East-Asia—particularly China and countries influenced by Chinese political philosophy—is the centre of the antithesis to the Rule of Law conception of the polity. This position is best presented in the works of Confucian scholars written in opposition to the Legalist School in China. Although he spoke before the Legalist School came into existence, the remarks of the third century B.C. Chinese philosopher Hsun Tsu are typical of these views:
>
> There is a ruling man but not a ruling regulation...Law cannot stand alone and regulation cannot be exercised by itself. By getting the (right) man, it lasts; by losing the (right) man, it perishes. Law is the tip of

[1] International Commission of Jurists, "The Dynamic Aspects of the Rule of Law in the Modern Age" (report on the Proceedings of the South-East Asian and Pacific Conference of Jurists, Bangkok, Thailand, 15-19 February 1965), 31

> government, and the great man is the source of governing. Therefore by having the great man (in control) although the law is incomplete, it will be sufficient to cover everything. Without a great man, even if the law is complete, the sequence of its application will be in disorder and will be unable to meet the change of events, and will lead to disorder.[2]

In contemporary discussions of the Rule of Law, this skepticism about the actual capacity of Law to "stand alone" and the concomitant preference for a reliance on the "right" man or "great" man as the correct source of good governance remains a strong theme for many Asian theorists and commentators.[3]

It is a view that deserves careful attention. Indeed, it is clear that no law is entirely self-executing. The "right" or "good" man or woman is required both to know the law and to seek to execute it properly. Venality, selfishness, intemperance or simple stupidity are all frailties within human beings that can result in bad applications of laws, no matter the wisdom or fairness of the laws themselves. In fact, even in the Western system of the Rule of Law, great emphasis is placed on the need for mechanisms to identify the "right" person to place in charge of each component of the legal and political system: the legislative, the executive and perhaps especially, the judiciary.

A hallmark of periodic reform movements in the West has been an emphasis on the concept of merit selection. Whether in filling the ranks of the administrative bureaucracy or selecting judges, a consistent norm within the modern Western legal tradition is that such selection should be based on the merit of the individual, usually as demonstrated by academic achievement and professional experience. Considerations such as wealth, family ties, cronyism or party affiliation (other than for elected officials), at least in theory, are meant to be disfavored.

Yet in the Western legal tradition, it is precisely the Rule of Law that is needed to ensure such merit-based selection. If formal, rules-based selection procedures are not in place, open and known to all, and generally adhered to, then there is little if any means of ensuring the selection of the "right" man, consistent with other democratic principles.

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[2] Ibid., 31-33.

[3] The first in a series of conferences on the Rule of Law, co-sponsored by the Mansfield Center for Pacific Affairs and the Global Forum of Japan, was held in Tokyo, 27-28 May 1999. That discussion, among others, was characterized by intense exchanges on this point. *The proceedings of that conference are in a forthcoming Mansfield Center publication.*

That is, one alternative means of identifying the "right" man is reliance on the monarch/nobility model, which assumes that the "best" people are so, and can be identified as such, by dint of birth. That assumption is not compatible with the egalitarian principles of democracy (nor, one might add, with empirical experience). Another alternative means of stocking the pool of rulers is strictly ideological: adherence to State or Party doctrines and evidence of ideological zeal can be the test for admission to political, administrative or judicial power. Again, such an approach is not easily reconciled with principles of democracy. If the only means of proving oneself to be the "right" person for governance is to adhere to a particular party or ideology, then ideological zeal is sufficient. The rule, not of Law but of the Party or the State or some restricted elite thereof, necessarily comes into play, and that must be considered inconsistent with participatory democracy.

True, popular elections in democracies determine who will be the legislators and key executive branch officials (in some cases, judges too are popularly elected) and of course, elections entail ideological choices. But the major premise of elections is that in a democracy the people generally, not an elite party or select state group, have a right to participate in the selection of the leaders of their government. Moreover, elections are periodic in nature, affording the public a chance to change its collective mind or nullify a prior ideological choice.

Adherence to the Rule of Law ensures that the results of such choices by the electorate are honored. Once an election is held, it is the essence of the Rule of Law concept that the election results must be honored. Losers depart office willingly. In a very important sense, being the "right" man to rule must include, in a democracy, having been chosen to rule by free and fair election of the general public. No matter how "right" one may be, in some technocratic or meritocratic sense of one's ability, the democratic mandate to govern is a necessary element in determining that an individual is the "right" person for governing.

Spotlighting the other alternative means for identifying the "right" man to govern may make the point best: the venerable concept of the enlightened despot assumes that it is possible to have the best governance from a leader who holds power by despotic means, but possesses the requisite wisdom to govern. In theory such a ruler is possible, and there are cases of societies ruled by unelected leaders that are well governed, in certain technocratic senses. Yet, such a basis for exercising governmental power is in direct conflict with the premise at the heart of both the Rule of Law and of democracy: a government is only legitimate when it governs with the consent of the governed.

Another non-Western legal tradition, which is relevant to some Asian reactions to the Rule of Law concept, is the development of Russian law from medieval times through the recent dissolution of the Soviet Union. As contemporary economic reformers have described that legal history:

> The standard definition of Russian autocracy … has two components. The primary meaning relates to foreign affairs, as a ruler who has no foreign overlord enjoys autocratic power, literally 'ruling by oneself.' In the absence of internal checks and balances, the term connotes absolute power as well. By the end of Tatar rule, conventionally dated in 1480, the grand principality of Muscovy had made the transition to this system. Over the centuries, in medieval Muscovy, the Russian Empire, and the Soviet Union, the autocratic government required personal service from most if not all of its subjects, issued a host of arbitrary laws, and remained immune from constitutional restraints on its executive power.
>
> A distinction must be drawn between the Rule of Law and rule *through* law. The vast number and complexity of the laws promulgated by Russian autocrats had nothing to do with the defense of human rights or limits on the power of the tsar. The enormous *Polnoe sobranie zakonov* (Complete Collection of Laws 1649-1913, hereinafter PSZ) and its supple-ment, the *Sobranie uzakonenii I rasporiazhenii pravitel'stva* (Collection of Governmental Statutes and Decrees 1863-1917, hereinafter SURP) together with the various codes of laws issued from 1497 onward, indicated the vigor with which tsarist bureaucrats sought to regiment society by means of statutory compulsion and restriction. The law functioned as an administrative device, not as a set of rules to be obeyed by state officials … For centuries, the Russian state pursued the goal of expanding its dominion over the huge Eurasian plain. To this end, it placed the highest priority on equipping the largest armed force in Europe. Such military strength in turn required the imposition of state service, heavy taxation, state control of key industries, and, above all, the destruction of any countervailing political forces.[4]

Given the influence of Soviet thinking on a number of Asian leaders during the initial post-colonial period of the 1950s through the 1970s, it is not surprising

[4] Sachs, op. cit., pp. 24-25.

that elements of each of these views of legal systems (Confucian and Tsarist/ Soviet, as well as the experience with colonialism) have influenced Asian attitudes toward the Western Rule of Law. Current discussions about progress in Asia toward the Rule of Law reverberate with these themes of the tension between the Rule of Law and the Confucian reliance on enlightened leaders serving the broader social interests. In China, the alleged intent of the State (Party) apparatus and its bureaucrats to achieve rule "by" (or "through") law rather than rule "of" law has made Chinese Rule of Law and legal reform efforts contentious both within China and in the West.[5]

The Chinese legal tradition in particular poses more of a challenge to Western Rule of Law concepts, because it is an alternative, affirmative view of how to achieve a well-ordered society. Again, in the analysis of a prominent group of Asian jurists first looking at the future of the Rule of Law in Asia:

> This line of reasoning [Chinese political philosophy such as that of Hsun Tsu], while it did not deny the need for some law to order society, assumed that the emphasis ought to be placed on creating a special class of virtuous rulers who should be allowed to direct society as they felt best without being hamstrung by an extensive body of rules passed down from ages past. It was very much a philosophy of the rule of men and not of law; its ideals were rendered incarnate in an intellectual elite of benevolent philosophers. The states which attempted to realize these Confucian principles were characterized by:
>
> (A) Relatively few statutes or similar materials; such as there were, were couched in broad general language, which tended to be an injunction to comply with certain ethical principles …
>
> (B) Non-publication of administrative materials circulated internally within the government between officials.
>
> (C) A bureaucracy, assumed to be drawn from the intellectual elite, which occupied one of the highest if not the highest prestige positions within the society.

[5] James V. Feinerman, "The Rule of Law…with Chinese Socialist Characteristics," Current History (September 1997): 278-281.

(D) Unification of the judicial and legislative functions in the hands of the executive.

(E) A general dislike for litigation felt by the people and a corresponding lack of "rights consciousness" fostered by active policies of the government. Use of unofficial means of resolving disputes, such as mediation, was encouraged in place of recourse to courts.

(F) Non-existence of a legal profession. Those who sought to argue principles of law while representing the interests of parties were looked upon as pettifoggers and parasites and as making no useful contribution to society.[6]

With the possible exception of the final point in that list, given the popular disrepute in which lawyers are held even in societies characterized by Western Rule of Law precepts, this list of characteristics of Confucian/Chinese-inspired legal and governmental systems is a remarkably precise counterpoint to the list of necessary core elements of the Rule of Law as it is generally construed in modern Western practice.

The negative view of lawyers in the Confucian tradition is linked to a more profound difference in thinking between the Western Rule of Law approach to a well-ordered society and major Asian philosophical and religious strains. The Rule of Law view stresses individual rights, while other philosophies emphasize communitarian duties or responsibilities. As Professor Fletcher has written:

> In this abstract [Western] world of higher law, conflicting claims are ordered and resolved. The just triumph, and wrongdoers suffer …
>
> As the market reconciles the demands of buyers and sellers, the Right orders and resolves the conflicting claims that drive the legal system … The courts may have to frustrate some claimants, but our commitment to justice convinces us that this frustration is properly borne by the party in the Wrong.
>
> The system that I have outlined, the one that we cultivate in the West, is based on competition, conflict, and resolution by an abstract impersonal

[6] "The Dynamic Aspects of the Rule of Law in the Modern Age," op. cit. pp. 31-32.

> mechanism. Yet there is another way to think about law—one that I associate in general terms with the Japanese word Hō signifying the path, the way we must travel together. The radical for Hō, the three lines on the left, imply an analogy between law and a waterway. As rivers flow in a constrained channel, the society too, as a collective entity, has a path to travel. Failing to join the cooperative venture of following the correct way is properly thought of not as a sin, but as a failed performance.[7]

Likewise, in the Islamic tradition, the focus is on collective welfare, not on individual rights:

> In Islamic doctrine, the individual is considered a limb of a collectivity, which is the *umma*/ community of believers. Furthermore, rights are entitlements and are different from duties. In Islam, Muslims, as believers, have duties/*fara'id* vis-a-vis the community/*umma*, but no individual rights in the sense of entitlements … .
>
> This worldview becomes clear when the individual-istic character in the Western concept of human rights is juxtaposed with the pre-modern Islamic heritage.[8]

As we will discuss later, the Western Rule of Law by no means dismisses these communitarian values that are elevated in various Asian traditions. Rather, it assumes first of all that those communitarian values include respect for individual rights, and second that the best method of maximizing the communal interest is through the protection and vindication of individual substantive and procedural rights.

We turn now to the core concepts and practices that most practitioners and scholars of the Western Rule of Law view as critical in order to have a governmental system that can be said to adhere to the Rule of Law.

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[7] George P. Flatcher, " Hō and Halakha." Article published in S'vara: A Journal of Philosophy and Judaism (Winter 1990).

[8] Bassam Tibi, "Islamic Law/Shari'a, Human Rights, Universal Morality and International Relations," Human Rights Quarterly, vol. 16, no. 2 (May 1994).

THE CORE COMPONENTS OF THE RULE OF LAW

CONSTITUTIONALISM

The existence of a constitution is widely seen as a necessary prerequisite of both democracy and the Rule of Law. One of the rites of passage for nations moving from colonialism to independence, whether in the 1780s or the 1960s, or from absolutist rule to democratic rule, has been the conclusion of a formal written constitution. Such a formal document (or set of documents, in the English case) is seen as necessary for the articulation of the people's will, or the general "consent of the governed," which is, as we have discussed, the basis of any government's claim to validity.

Constitutions then are meant to be the fundamental statement of what a group of people gathered together as citizens of a particular nation view as the basic rules and values which they share and to which they agree to bind themselves. The significance of a constitution is that once it is ratified by a democratic process, which confirms that it is supported by "we the people," in the initial phrase of the U.S. Constitution, it then serves both as an architectural blueprint for the organization of the institutions of that government and as the standard by which any subsequent actions of the government may be checked to ensure their validity. The constitutional standard of validity is inherently that of respect for the consent of the governed.

As expressed by Professor John Norton Moore:

> Constitutions should embody the fundamental compact with the people—such constitutions should serve as the highest form of law to which all other laws and governmental actions must conform. As such, constitutions should embody the *fundamental* precepts of a democratic society rather than serving to incorporate ever-changing laws more appropriately dealt with by statute. Similarly, governmental structures and actions should *seriously* conform with constitutional norms, and constitutions should not be mere ceremonial or aspirational documents.[1]

One of the conceptual difficulties in fulfilling the mandate of constitutionalism as an element in the establishment of the Rule of Law is how to ascertain whether

[1] John N. Moore, "The Rule of Law: An Overview" (paper presented at the first U.S/Soviet Conference on 'the Rule of Law' held in Moscow and Leningrad, 19-23 March 1990).

the constitution as written actually has the support and consent of the governed. Thus one of the subsidiary requirements of a constitution is that it can itself be changed, or amended. Indeed, the revolutionary principle articulated in the U.S. Declaration of Independence remains that "whenever any form of government becomes destructive of these ends [securing the inalienable rights of man], it is the right of the people to alter or abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."[2]

Far short of such a revolutionary moment, changing circumstances or political mores can nevertheless call for a change in a constitution, but such change must itself be according to the rules for amendment prescribed in the document or fall short of the Rule of Law doctrine. Certainly the constitution cannot be changed by the government itself, or by some process that does not credibly attempt to consult with the "governed" to obtain their consent. Hence the amendment process of the U.S. Constitution is an elaborate sequence of consultation with both state governments and the national Congress. (Despite its complexity, it has nonetheless worked over a dozen times to incorporate twenty-six amendments.)

The absence of any credible effort to consult with the governed in the constitution-writing or amendment process is fatal to the goal of constitutionalism, even if the document itself might pass some aesthetic or intellectual test of adequacy as a governing instrument. A case in point from Asian history, according to the scholar Kichisaburo Nakamura, was the promulgation of the Meiji Constitution in 1889. In describing the actions of the Imperial government in secretly promulgating an acceptable formal constitution "before the idea of having a British-type democratic constitution had penetrated too deeply into the minds of the public," he concluded that the constitution so issued, without consultation of the people and even without their awareness of the process, was a "false modern constitution."[3]

As the case of *Marbury v Madison* revealed early in the life of the U.S. republic, the doctrine of constitutionalism has implications in a democracy for the role and power of both the legislature and the judiciary. As Professor Richard Fallon has noted, it is an important point to explain why legislation passed by current

[2] Declaration of Independence, Preamble.
[3] Kichisaburo Nakamura, The Formation of Modern Japan (Honolulu: East West Press Center, 1964) 56-62.

majorities in "politically accountable legislatures" with a "prima facie claim to legitimate lawmaking authority" must nonetheless yield to "a Constitution initially ratified more than two hundred years ago …"[4]

The answer lies in the notion that a nation gathers itself for the task of "higher lawmaking" at certain points in its history, namely when it undertakes to write or amend the constitution.[5] At other times, even though the legislature and the executive have been granted powers to govern consistent with that constitution, they have not been granted powers to act inconsistently with it. In the structure that has emerged in the United States since the *Marbury* case, it is the duty of the judiciary to make the determination of whether either of the other two branches has crossed that crucial boundary.

LAW GOVERNS THE GOVERNMENT

The notion that the constitution controls the actions of the government is extended further by the doctrine of the Rule of Law. In making statutory law, the legislature is bound by constitutional limits. Then the statutes themselves must bind all of the government. As discussed earlier, this idea that the government itself is bound by law is the heart of the Western contribution to the doctrine of the Rule of Law.

It is perhaps here that the contrast between the Western concern for limits on governmental power and the Confucian confidence in the benevolence of enlightened rulers is best highlighted. Repeatedly, in discourses on the Rule of Law, the underlying theme is that we must be wary of government, acting through its human officials, lest arbitrary or unfair treatment of one individual or a class of individuals negates basic human rights or notions of fairness and equal treatment of all citizens. Bound up in that Western concern are preconceptions—vital to the notion of democracy in the West—that individual rights and equitable treatment of all individuals are necessary elements.

It is also here, however, that a shared view of human nature may be perceived. As the French scholar Blandine Kriegel has argued, the proper understanding of the liberal tradition in Western philosophy is that the liberal state should act as a neutral arbiter among individuals who, acting in their own self interest, might so

[4] Richard H. Fallon Jr., " 'The Rule of Law' as a Concept in Constitutional Discourse," Columbia Law Review, vol. 97, no. 1 (January 1997), 11.
[5] Argument by Bruce Ackerman cited in " 'The Rule of Law' as a Concept in Constitutional Discourse," Ibid., 11.

pursue selfish aims as to violate the rights of others.[6] Multiplied throughout society, this becomes what Hobbes called the "war of all against all."[7]

The Confucian confidence in the enlightened ruler, and the more modern Asian corollary of confidence in a well-trained bureaucracy (shared, incidentally, by at least the French, among Westerners) should be viewed as a different answer to the same problem: individuals acting alone may act badly or selfishly, and must be restrained by some authority that can be relied on to pursue the broader public good.

The difference in prescriptions for this problem is that the Western notion of the Rule of Law places a higher value on procedural limits on governmental actors, because they too are human, and less reliance on any assumption that enlightened leaders can be identified and placed in power, whether through hereditary, military, meritocratic or electoral systems.

The concept that the government itself is ruled by law is rich in subsidiary requirements, but they can safely be summarized by the assertion that "the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens."[8]

Among the numerous subsidiary requirements entailed in this concept, the most important may be the notion that individuals must have recourse to some procedural method to challenge the actions of government. This must be true in all spheres: legislative, executive and judicial. Obviously, there is no substantive content to the notion that government is ruled by law if there is no method of testing a specific governmental action to see if it adheres to law. Thus mechanisms are required to effectuate that option for individual citizens:

- If the legislature passes a law, it must be possible for a citizen to challenge the constitutionality of that law;

- If the executive takes an action, it must be possible for a citizen to challenge that action in terms of its legality or constitutionality; and

[6] Blandine Kriegel, *The State and the Rule of Law* (Princeton University Press, 1995), passim.
[7] Fallon, op cit., p. 7; Thomas Hobbes (see J.N. Moore, op.cit.).
[8] Ibid., 8.

- If the judiciary takes an action, it must be possible for a citizen to appeal that action; if appeals are fully exhausted to the highest judicial level, there must be some mechanism for seeking a new law that would override the existing law, as interpreted and enforced by the courts.

While the specifics of those mechanisms can differ from one system to another, in every case, this crucial aspect of the Rule of Law system leads to another core element of the Rule of Law: the requirement of an independent judiciary.

AN INDEPENDENT JUDICIARY

Central to every discussion of the Rule of Law is the insistence on the necessity of an independent judiciary. As Ibrahim Shihata, General Counsel of the World Bank, defines it:

> In modern constitutional law, the "the rule of law" translates into the principles of law-abiding governmental powers, independent courts, transparency of legislation, and judicial review of the constitutionality of laws and other norms of lower order.[9]

An independent judiciary endowed with the power of judicial review of legislative and executive acts is critical to the Rule of Law because the judiciary is the institution that enforces the two key mechanisms that ensure the Rule of Law: separation of powers, and checks and balances among the different powers.

As Professor Moore has argued:

> An independent judiciary is a critical component of the principle of separation of powers … Because of the great importance of judicial review as a central mechanism for constitutional enforcement and for maintenance of the Rule of Law … I believe that it should be considered a fundamental principle in its own right. Indeed, no principle in the American experience has been more important in maintaining the integrity of the major constitutional underpinnings of the Rule of Law than has the principle of independent judicial review.[10]

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[9] Ibrahim F.I. Shihata, "Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank," *Kluwer Law International* (1997), 5.
[10] J. N. Moore, op.cit., p. 8.

If the major tenet of Montesquieu's approach to constitutional-ism is accepted (that powers must be separated so that each acts as a check on the other), then the judiciary is the enforcer of that concept. It is the one branch of government that is not an active initiator of laws or programs. It is the branch that resolves cases or controversies brought before it by adversarial parties. At least in American jurisprudence, a court's first duty is to make certain that it has the jurisdiction to reach the particular case brought before it, and that the case is indeed a live or actual dispute, not a theoretical or hypothetical dispute. If those thresholds are reached, then its duty is to impartially ascertain the applicable law and enforce it on the litigating parties.

If the resolution of the case involves rebuking either the legislature (for passage of an unconstitutional law) or the executive (for improper actions outside the law or misapplication of the law), then that is the court's duty. Moreover, as to the checks and balances mechanism, it is the judiciary which must resolve the disputes that arise between those who perform the other functions of government (legislative and executive) in those cases where the dispute is about the correct division of power between them.

Generally in the literature about separation of powers and the mechanism of checks and balances to limit abuse of power, it is assumed that the American model of three separate and independent branches of government is best suited to this purpose. But it is interesting to note that in other major Western systems, commonly referred to as parliamentary, there is a blending of the legislative and the executive, without apparent harm to democracy or the Rule of Law.

That is, in parliamentary systems the top officials of the executive branch, usually a prime minister and ministers, are members of or direct participants in the debates of the legislature. Through party discipline, the executive branch chooses the initiatives that are undertaken in the parliament and ensures that only those acts the executive agrees to are passed. More important, at any moment when the executive branch loses political control over a majority of the members of the legislature, it is the legislature that then has the power to, in effect, discharge the executive by a vote of "no confidence," which forces formation of a new executive (prime minister and cabinet). Calling or holding an election—direct recourse to the people—decides who should be the executive. The executive, in turn, can effectively discharge the legislature by calling a parliamentary election to ask the people who should continue to serve in the legislative branch.[11] Thus the powers of the two branches are in fact commingled, not separate.

[11] Note that the French Fifth Republic system devised by President Charles de Gaulle is a hybrid of the two types, but in practice its functioning is consistent with these observations about parliamentary regimes.

By contrast, it is consistently true that all the major Western legal systems have an independent judiciary, clearly separated from the other functions of government, and incapable of being discharged by either of the other two branches.[12] It is hard to conceive of an organizational scheme that could be otherwise, yet still achieve the purpose ascribed to the judiciary of ensuring that every actor in the society, including the government and its officials, are subject to the Rule of Law.

Here again the concept of an independent judiciary is rich in subsidiary requirements and characteristics. To achieve real independence for the judiciary, practical mechanisms must be put in place to support it, and societal norms must defend it. Again, as Professor Moore concisely states these practical requirements:

> A genuinely independent judiciary, of course, requires not only a doctrine of judicial review but also scrupulous protection of the independence of the judiciary in form and in fact. Details of appointment, tenure, salary, status, training and removal must all be resolved to preserve and strengthen that independence. Similarly, the selection of the judiciary must not be on a partisan basis and should ensure the selection of the most qualified legal experts. And the legal profession, as well as the government and society as a whole, must internalize the independence of the judiciary and the important reasons for it.[13]

It is generally assumed that among those practical measures, life tenure for judges is the most important, since it is the best mechanism to insulate a judge from external pressures, which might cause a deviation from impartial application of the law, whether the pressures originate from other government officials, the litigants or from external parties with an interest in the court's decisions. But it is common sense to observe that matters of compensation, working conditions and intangibles like the prestige or respect accorded judges are all factors in the equation that determines how truly independent a judiciary is.

The question of societal respect for the judiciary relates to an additional major reason for the importance of judicial independence. For the Rule of Law to

[12] President Franklin D. Roosevelt's failed "court packing" effort is proof that the U.S. Executive cannot, even in effect, discharge the Justices of the Supreme Court by diluting their power.
[13] J.N. Moore, op. cit., p. 10.

prevail in a society, there must be a general public perception that law is fairly applied to all, without political, religious, or ethnic favoritism or corrupt inducements. The goal of equal and fair application of the law is itself one of the core necessary components of the Rule of Law.

LAW MUST BE FAIRLY AND CONSISTENTLY APPLIED

This simplest of axioms about the core requirements of the Rule of Law may be the most complex to achieve. The prevalence of geographic, ethnic and other tribalism in most societies is a breeding ground for favoritism based on regional, religious, racial, ethnic and other distinctions. Even in the supposed melting pot of the United States, a litigant from New York might have some apprehension about facing a court in Alabama, and the element of racial considerations plainly has not been erased from the U.S. judicial system.

Yet the mandate of fairness is critical. Public confidence in the Rule of Law can only be sustained if the perception is wide and deep that there is no favoritism based on such distinctions. On this point, there seems to be no theoretical dispute between Asian and Western views. In the Declaration of Delhi enunciated in 1959 after an International Congress of Jurists, comprising nearly 200 judges and lawyers from 53 nations, it was concluded that a government must not:

> … discriminate in its laws in respect of individuals, classes of persons, or minority groups on the ground of race, religion, sex or other such reasons not affording a proper basis for making a distinction between human beings, classes, or minorities …[14]

Achievement of this lofty goal of equal and fair treatment of all is elusive, but specific mechanisms can be identified that are important in the effort. First, governments must ensure that the apparatus of government itself is inclusive of all groups within the society and is structured in ways that promote equitable treatment of all. This cannot be achieved merely by the pronouncements of a formal constitution. It must be made real by practical, incremental measures that address the workings of all three branches or functions of government: legislative, executive and judicial.

With respect to the legislative function, the right of suffrage is at the core. All citizens, without respect to ethnicity, religion, gender or other characteristics,

[14] Declaration of Delhi, Clause III, (a).

must be allowed to participate in elections and have a reasonable expectation that their votes will be weighed equally with those of other individuals.

The nexus between "free and fair elections" and the "the Rule of Law" is that legislatures are elected to act in a representative capacity, passing laws that are supposed to embody those laws that would be passed by all citizens acting in concert, if it were practical to assemble all citizens on all such legislative questions.

Absent access to the ballot, and a reasonably equitable weighting of the worth of each vote, there is no reason for any citizen deprived of an equally weighted vote to assume that his or her views will in fact be represented in the legislature. Worse, experience suggests that they will not be.

Whether or not there must be a literal standard of "one man, one vote" as enunciated by the U.S. Supreme Court,[15] the require-ments of the Rule of Law are that all citizens (taking into account reasonable voting qualifications such as having reached the age of maturity and not having forfeited citizenship through felonious actions) should have the right to vote and, flowing from that right, the expectation that the legislature and the executive will be proportionately responsive to their views.

As for the executive, one key requirement for the Rule of Law is open access to the positions and appointments of the executive branch. In most governments, whether democratic or not, the executive branch is the locus of the most government jobs, and therefore the focus of those who seek "spoils." In many developing economies, the government is a major employer if not the premier employer. In order to promote respect for the Rule of Law, the public perception must be that those executive positions are acquired based on some system of merit, rather than on ethnic, religious or other discriminatory methods of selection.

In the United States, the history of civil service reform has been that of a battle between reformers who seek to insulate the positions in the vast U.S. executive bureaucracy from political influence and politicians who view the correct definition of democracy as requiring adherence to the will of the people as expressed in the latest election—the view succinctly captured in the famous phrase "to the victors belong the spoils."[16]

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[15] *Baker v Carr*, 369 U.S. 186 (1962).

[16] A view attributed to Andrew Jackson and most 19th century U.S. Presidents, but which spawned the civil service reform movement later in the century.

It is important to note that in other societies, both Western and Asian, the concept of a meritocratic bureaucracy has had a stronger hold than in the United States. In both France and Japan, for example, there is a well-established tradition of strong bureaucracies to which access is determined almost strictly on merit, as defined by performance at elite educational institutions. In turn, there has generally been public support for those bureaucracies, based on the perception that they were able and qualified to do their jobs. That support is consistent with the argument that meritocratic selection is important to ensure popular respect for the Rule of Law. The stresses of recent times, and alleged excesses by the bureaucrats, have reduced public support for the established bureaucracies of both Japan and France in roughly parallel fashion, a trend that deserves attention in the context of support for the Rule of Law.

Finally, the operations of the judicial branch must promote confidence in the Rule of Law. Police, prosecutors and judges must be drawn from all elements of the society, so that adverse results cannot be viewed through the prism of exclusion from the system. In an important counterweight to the concept of judicial independence, judges too must be subjected to some form of outside control to ensure against abuses. In large part, this is typically achieved by an appellate structure. If a court of original jurisdiction makes unreasonable or legally unfounded decisions, appeal to the next level should be available to rectify those mistakes. In complex areas of the law where there is genuine disagreement among different courts on the right outcomes, as frequently occurs among the twelve U.S. federal circuit courts of appeals, then appeal to a supreme tribunal should be available to resolve the question and establish the legal rule that governs that question.

To the extent that the appellate structure is insufficient to guarantee a judiciary that performs well and deserves respect, the other necessary mechanisms include those that insure the selection of judges based on merit (as in the case of the executive) and those that permit judges to be removed for cause—notwithstanding the presumption that judges should be granted life tenure to insulate them from transient political pressures. There are a number of variants in these procedures, but in each case the consistent aim is to ensure that the judiciary remains independent while guarding against any arbitrary exercise of power by the judiciary itself, or by any solitary judge.

An additional mechanism to support the Rule of Law and to ensure public support for the workings of the judiciary is the jury system. It is useful to note the device of the jury system precisely because it displays the differences of views that exist

among Western legal systems. The jury system is seen as crucial to the Anglo-Saxon systems of justice, and was adumbrated by the phrase in the Magna Carta that guaranteed against governmental actions adverse to an individual without the sanction of his peers. Tocqueville, the unparalleled observer and admirer of U.S. society, despite being French, praised the jury system highly, as the quintessence of democracy:

> [the jury system] places the real direction of society in the hands of the governed…and not in that of the government … [It] raises the people itself… to the bench of judges [and] consequently invests the people … with the direction society.[17]

That said, it must be admitted that the jury system is not specifically necessary to the Rule of Law, else the European civil law systems (among others) that do not feature it could not be said to be examples of the Rule of Law. What is worthy of consideration is the question of how mechanisms can be established, with or without the jury system, to ensure that the application of the law by the executive and judicial branches remains consistent with a broad popular view of justice in particular cases.

The assumption behind the jury system is that one cannot be sure whether the "people" would consent to a particular application of the law without consulting a representative segment of the citizenry. Whether that is in fact necessary for the Rule of Law, or what other mechanisms might exist besides the jury system to allow that consultation with the citizenry at large, are important questions to answer.

LAW IS TRANSPARENT AND ACCESSIBLE TO ALL

Transparency

Transparency has two major components. First, laws must be sufficiently understandable and broadly published so that individuals have some fair warning of what conduct might provoke sanctions from the government, and also so that they can insist upon their legal rights in a timely fashion and have them respected by other parties who likewise have reasonable access to the existence and meaning of laws.

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[17] Tocqueville, quoted by California Chief Justice Bird, in Rose Elizabeth Bird, "The Rule of Law as an Enduring Principle" (speech to the Los Angeles World Affairs Council on 3 June 1983), *Beverly Hills Bar Association Journal,* vol. 17, no. 4 (1983), 219-226.

The philosopher Freidrich Hayek framed transparency as requiring "… that government in all its actions [be] bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances."[18] Likewise, in contemporary times, the World Bank has defined the Rule of Law as requiring, *inter alia*, "a set of rules which are known in advance."[19]

The virtues of such transparency would seem apparent: predictability, reliability and a general sense that the application of the law to one's conduct will not be arbitrary or capricious. If you know what the law is, and obey it, you should have no reason to fear that either the government or your fellow citizens will attempt to interfere with or limit your conduct. If you know what the law is, and disobey it, you are forewarned that, if caught, there are specific consequences.

The second element of transparency is procedural. The process by which laws are made ought also to be transparent. If laws are merely announced as fiat or *fait accompli* by government agents, then the sense of a reasonable rationale behind the laws may be undermined. And even if the reasonableness of a law seems clear, a process for promulgating the law that is not open and does not allow for participation and comment in some fashion by those who may be affected by the law will undermine the general public support for the law. Surely, coercion may suffice to force compliance with such edict-laws, but the "consent of the governed" has not really been obtained in that way. Acquiescence, perhaps, but not consent.

These plain concepts require a host of specific mechanisms to achieve. The first component of transparency—that laws be known in advance—actually is rather hard to achieve in practice. Simple laws like those governing traffic can be made known easily by posting signs. And laws that affirm the moral codes long entrenched in most societies, like the prohibition on murder or other bodily harm to another or the prohibition against stealing, are generally presumed to be known and understood by all in a society, absent a mental deficiency. But in a complex, regulated economy like most today, the laws or rules governing conduct in the business sphere—issuance and sale of securities, adherence to

[18] Freidrich Hayek, *The Road To Serfdom,* 1944.
[19] Ibrahim F.I. Shihata, "Role of the Judiciary in the Prevention and Control of Corruption" (paper presented at the Joint Conference on 'The Problem of Corruption: Prevention and Judicial Control' held in Rome, Italy, 1 April 1998).

environmental protection regulations, obedience to antitrust and competition laws—these are in fact difficult to make known in a way that ensures actual knowledge, in advance, by all the individuals who may be engaging in conduct that is regulated by those laws.

The answer to this dilemma is generally to insist that laws be formally published and available to the public in predictable places. Codes that address specific areas of the law should be published and made available on the shelves of libraries and government buildings and on Web sites. These laws should be regularly updated to reflect any changes that have been made by the legislative or executive branches. Assuming such general openness and availability of laws, the legal doctrine that then typically governs individual conduct is the "duty to inquire." It is not sufficient as a defense to say "I didn't know" when some reasonable inquiry could have given you the information needed to know the law in advance. It is this line of reasoning that squares the familiar dictum in U.S. law that "ignorance of the law is no excuse" with the requirement that laws be known in advance in order to be fairly binding upon the individual.

As for the goal of procedural transparency, again there is a range of mechanisms that can be employed to achieve this. Some are well established and uncontroversial; others are comparatively new and continue to be debated. Generally, the goal is for each branch or function of government to be open to public scrutiny as it does its work. The legislature, in particular, should be open to public view during its debates, and any proposed legislation should be announced, published and debated for a sufficient period of time to allow interested and potentially affected citizens to comment. In practice, there are important details to this broad prescription.

While it is true that the formal floor proceedings of the U.S. House of Representatives and Senate have been open to visitors in the galleries throughout the history of the republic, it is only in the last twenty-five years that key committee meetings have been opened to the public's scrutiny, and even more recently that television cameras have made the Congress' deliberations something that a broad range of the public throughout the country could observe. It is of interest to note that some Congressional veterans contend that the increased transparency of the proceedings of the U.S. Congress has led to "pandering" to transient public emotions, a contention that implicitly endorses the notion that an enlightened bureaucracy, either meritocratic or elected, may make better decisions in private than if it is exposed to full public scrutiny of its actions.

In the executive branch, perhaps the most important single mechanism to insure transparency of the law is "notice and comment rulemaking." Such rulemaking provides that whenever the executive branch is considering making a new rule or regulation to implement a statute, it should publish the proposed rule in a predictable and findable place (like the *Federal Register* in the United States), so that interested parties can comment upon it. Then, those comments should be taken into account as the agency promulgates its final rule, which again would have to be published so that the public is on notice as to the contents of the new rule in its final form.

Other mechanisms that have emerged in the past thirty years in the United States, and which are beginning to be tried in other systems, include U.S. statutes such as the Freedom of Information Act, 5 U.S.C. 551, and the Open Meetings Act ("Sunshine Act") 5 U.S.C. 552.[20] These requirements that the actual deliberations of executive branch agencies be open and the executive's records be accessible to the public place affirmative burdens on the government, and some argue that they are excessive. Yet the general thrust of such openness seems required by the Rule of Law: neither the consent of the governed nor sound laws that reflect the rational interests of the public are likely to be achieved through rulemaking that is hidden from the public and does not permit its participation and substantive input.

Courts have a peculiar responsibility to be open in their proceedings for two reasons:

First, the guarantee of procedural fairness and consistent application of the law by courts is best insured if the proceedings are open, are recorded, and are the subject of appeal. The right to appeal would be rendered meaningless if there were no record or basis for establishing what the court did and its legal reasoning.

Second, at least in the common law tradition of England and the United States, if not in the civil law traditions of continental Europe, court decisions become the building blocks of a jurisprudence of precedents. That is, as each court confronts a particular set of facts and tries to apply relevant law, a precedent is set for how to deal with that type of case. As new cases appear, courts are

[20] Both of these statutes are part of the Administrative Procedures Act, 5 U.S.C. Sec. 551-559, 60 Stat. 231 (1946). The APA is the repository of the bulk of the statutory law that governs how the U.S. bureaucracy must conduct its business. As such, the APA is crucial to an understanding of how the "Rule of Law" is implemented by the executive branch and the regulatory bureaucracy of the United States.

inclined to handle them consistently with these past precedents, if the cases appear "on point." Such respect for precedent again contributes to the sense that the law is predictable and not arbitrary. It is only workable if the precedents are capable of being known, either because they were the subject of written opinions or the deliberations of the courts in prior cases were recorded.

Accessibility

The principle of accessibility may be one of the hardest to honor in the search for the Rule of Law. Accessibility can mean simply "capable of being understood." Clearly, some laws fail that test, but it is a standard that legislatures and executives should be able to meet. More importantly, accessibility means a real chance to participate in the law-making and law-adjudicating process and to try to vindicate one's rights, whether personal or economic.

The challenge of accessibility is that it requires both complex procedural protections for individuals and financial resources. The procedural protections take the form of various mechanisms to ensure that individuals have the right to be heard, to "confront their accuser" in the criminal context, or to utilize established procedures of the legislature, the executive branch and the courts to defend or advance one's civil rights and financial interests.

The resources are required because such access to the legal system—in any of its parts—typically requires time and some degree of legal training or specialized knowledge. Not every citizen possesses these, and not every individual has the personal financial resources to hire a specialized lawyer or representative to take on this function. Thus the responsibility falls on the legal and governmental system itself, and on lawyers in the private bar, to provide the expertise, time and work to afford every citizen some reasonable expectation of accessibility to the workings of the law. All of those require financial resources. It is safe to assert that no society has yet committed sufficient financial resources to meet this goal in its fullest sense, even though many do have a range of legal aid, *pro bono* lawyer requirements and public assistance programs intended to honor, at least in part, this aspirational goal of accessibility. It is noteworthy that China's new "Law on Lawyers," which sets forth the conditions for the practice of law in the People's Republic of China (PRC), imposes a *pro bono* requirement on all lawyers to provide legal assistance to indigent and otherwise disadvantaged individuals, thereby endorsing the principle of accessibility.[21]

[21] Law of the People's Republic of China on Lawyers, adopted by the National People's Congress, 15 May 1996, effective 1 January 1997.

APPLICATION OF THE LAW IS EFFICIENT AND TIMELY

The familiar aphorism in American law is that "justice delayed is justice denied." This is most clearly true in the criminal context, where, depending on the rules governing pre-trial detention or release, a criminal defendant stands to be deprived of his or her liberty for prolonged periods even before a determination of guilt or innocence, notwithstanding the concept of the presumption of innocence that prevails in some criminal justice systems.

In civil cases, as well, particularly in modern, fast-paced economic circumstances, slow judicial or executive (regulatory) proceedings may render an economic interest moot or eliminate the opportunity for an economic gain.

Yet the mandate for efficient and timely application of the law is difficult to achieve for at least two broad reasons. First, there is again the question of resources. Courts must be endowed with sufficient personnel and materiel to decide cases expeditiously, and executive branch agencies likewise need resources to decide regulatory questions or handle administrative cases that arise under their jurisdiction. Very few judges in any system would say they have been given enough resources, nor would they likely turn away more. Assuming decent resources, practical management challenges must also be met. Courts must be well administered and there must be systems of accountability to ascertain why matters are not being resolved efficiently when they are not.

Second, some of the other values elevated by the Rule of Law are at times in conflict with the goal of simple efficiency and rapid disposition of cases. Most important may be the checks and balances incorporated throughout the legal system to ensure against arbitrary or hasty decisions. Procedural rights accorded criminal defendants and civil litigants in the course of pre-trial and trials, rights of appeal of judicial decisions, as well as the processes in the executive branch discussed earlier according public notice of and participation in rulemaking—all of these are in pursuit of important Rule of Law values, but they build in time-consuming procedures, which make the final resolution of legal cases more lengthy, not less.

Likewise, at times there is a conflict with the basic concept of judicial independence. Systems that pressure judges to decide cases quickly or that take cases away from judges who ponder cases for a long time run the risk of violating the precepts of judicial independence.

Perhaps the most important point to make in this area is that efficiency and timeliness in the legal system are related to the goals of fairness and equitable treatment. There is the risk of both the reality and the perception of favoritism in the application of the law where the courts are generally not capable of speedy resolution of cases, because there inevitably will be pressures from those with special power in the society—the wealthy or the politically well-connected—to have their matters disposed of more efficiently. The lack of general efficiency becomes a breeding ground for favoritism in the dispensing of efficient justice.

In turn, this creates a link to corruption in governmental processes, notably in the judiciary. As General Counsel Shihata of the World Bank has noted:

> "Within the judiciary, delays, low salaries and the proliferation of detailed and archaic formalities contribute to corruption by inviting kickbacks to be paid to expedite the process. Nepotism, connections, petty bribery and other means of acquiring private influence and advantage through the support administrative system damage public perceptions and do little to advance the confidence of those outside the judiciary."[22]

Corruption, sometimes itself the product of inefficient administration of justice, then becomes the cause of further inefficiencies and costs in the administration of justice. "Widespread and enduring corruption in the system as a whole imposes additional costs on the society and leads to further inefficiencies in the administration of justice. It also frustrates the legitimate expectations and trust of the population in the justice system."[23]

Inefficiency and the invitation to corruption that it entails are not limited to the judiciary. All branches of government, particularly those in the executive branches that deal with economic rights such as licenses, and inspections to meet various legal requirements, whether building and housing codes or restaurant sanitation requirements, are notorious examples of areas of government activity prone to corruption as people seek to get the efficient—and fair—vindication of their legal and economic rights in the face of inefficient bureaucracies.

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[22] Ibrahim F.I. Shihata, "Role of the Judiciary in the Prevention and Control of Corruption" (paper presented at the Joint Conference on 'The Problem of Corruption: Prevention and Judicial Control' held in Rome, Italy, 1 April 1998).
[23] Ibid., 3.

Inefficiency and the potential for corruption in the judiciary are cause for a higher level of concern, however, due to the larger Rule of Law objective that individuals should have particular faith in the impartiality, objectivity and independence of judges and courts. If that faith is brought into question, then the underlying public support for the Rule of Law is instantly and significantly damaged.

PROPERTY AND ECONOMIC RIGHTS ARE PROTECTED, INCLUDING CONTRACTS

Since 1997 and the advent of the economic crisis in Asia, there have been intense discussions about what reforms may be needed to remedy the deficiencies that have been revealed in certain Asian and other emerging economies. The Rule of Law has been regularly and strongly advocated as a core requirement of the needed economic reform. That view has been aggressively advocated by officials of the United States, the International Monetary Fund (IMF) and other international financial institutions.[24]

Despite the new urgency in the tone of this discussion, there has been for the past several decades a running debate about the role of law, and the Rule of Law, in economic development. Already in the early years of the post-colonial, developing nation experience, the conferences sponsored by the International Commission of Jurists and held variously in Athens, Delhi, Rio de Janeiro, Lagos and Bangkok, from 1955 to 1965, regularly concluded that the Rule of Law was an important component not just of political and democratic development, but also of economic development. Generally, these were hortatory findings, however, with limited empirical analysis of the linkage between the two, or itemized statements of the components of the Rule of Law relevant to economic development.[25]

Moreover, those discussions reflected the strong countercurrents to the Western notions of the Rule of Law that flowed at that time, in the context of the split

[24] Charlene Barshefsky, "Trade and American Prosperity in 1999" (testimony of the United States Trade Representative before the Senate Committee on Finance, Washington D.C., 26 January 1999).

[25] The International Congress of Jurists sponsored a series of conferences on the Rule of Law in the 1950s and 1960s. See "The Judiciary and the Legal Profession under the Rule of Law" New Delhi, India, 5-10 January 1959; "Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists" Bangkok, Thailand, 15-19 February 1965; "Executive Action and the Rule of Law," Rio De Janeiro, Brazil, 11-15 December 1962; also including a report on conferences in Athens (June 1955) and in Lagos (April 1960).

between the views of nations that in several cases were just relinquishing colonial power status and those that were just achieving independent nationhood. In those discussions, the point was frequently made that the Rule of Law appertains to political and civil rights, whereas the social and economic welfare of their indigent populations should be the proper focus of government officials in newly independent nations.[26]

Indeed, in the post-colonial context, many held the view that the economic rights protected by the Rule of Law, certainly in the colonial experience, were in conflict with the goals of equitable economic growth. Land reform was a frequently discussed example. Those who viewed redistribution of land resources as a necessary and important step toward providing the means to indigenous people to climb toward prosperity necessarily had a different view of the claims of property titles than those who strictly respected such claims.[27]

During the 1960s and 1970s, the official development agencies of the donor nations, notably including the U.S. Agency for International Development (AID), pursued the notion that there was, nevertheless, a linkage between law and development, putting official development assistance (ODA) money into the support of various law reform, judicial training and related exercises.[28] This effort was substantial enough to have been characterized as the "law-and-development movement," which in turn has spawned an extensive literature among Western academics on the question of whether the efforts to spur economic development through legal reform have actually worked.

Given the failure in a number of developing nations to achieve rapid or sustained economic growth, that literature has tended toward the pessimistic. Yet as one scholar, who surveyed this literature concluded, "law-and-development theory...and law-and-development studies...can be seen as largely a Western academic conversation."[29] He further concluded pragmatically that the frustration with legal reform as a mechanism to produce economic development was

[26] International Commission of Jurists, "The Dynamic Aspects of the Rule of Law in the Modern Age" (Report on the Proceedings of the South-East Asian Pacific Conference of Jurists, Bangkok, Thailand, 15-19 February 1965), 30.
[27] Ibid., 60.
[28] See Jose Alvarez, "Promoting the 'Rule of Law' in Latin America: Problems and Prospects," *George Washington Journal of International Law and Economics,* vol. 25, no. 2 (1991).
[29] Brian Z. Tamanaha, "The Lessons of Law-and-Development Studies," *The American Journal of International Law*; vol. 89 (1995), 485.

premature, since legal reform can produce important, and necessary, preconditions for economic growth, but of course "law simply cannot of itself solve the many problems confronting developing countries."[30]

That measured conclusion is reflected in the work done more recently by the Asian Development Bank (ADB). The ADB conducted a study released in 1997 that analyzed six Asian economies (the PRC, India, Japan, Korea, Malaysia and Taiwan) over the time period 1960–1995. The study examined the causal relationships between legal reform and economic and social development. The study concluded that the link between legal reform and economic development had been validated:

> [the study supports] a basic premise upon which governments have acted in both transition and liberalizing economies in enacting significant law reforms; that law is important to private sector development and, in particular, to the development of financial and capital markets. The study also observed, somewhat more tentatively, increased use of the courts as economic activity increased, increased use of courts to challenge governmental action, and increased frequency with which private parties were successful in their disputes with government: these are signs of the growing importance of legal remedies as economies become more complex and more impersonal, and of the growing use of the legal system to enhance the accountability of government.[31]

Acting on that premise, both the ADB and the World Bank have made support for legal reform and the Rule of Law major components of their programs in many countries, including a number of Asian nations. In 1992, the World Bank made its first loan exclusively dedicated to judicial reform. The Bank has financed court infrastructure and management training, stocking of legal libraries, substantive law reform (particularly in commercial and administrative law) and other legal and judicial reform projects.[32]

A succinct statement of why the Rule of Law is now generally believed to be a necessary, if not always sufficient, condition for economic development is set forth by the Asian Development Bank:

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[30] Ibid., 486.
[31] The Asian Development Bank, "Law and Development at the Asian Development Bank: A Summary of the Law-Related Development Activities of the Asian Development Bank," Asian Development Bank Publication, vol. 54 (1998): 28.
[32] Ibrahim F.I. Shihata, "Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank," *Kluwer Law International* (1997).

> It is now accepted both by aid agencies and developing country members that a market economy requires conditions in which the right to property and the sanctity of contracts are recognized and protected. A legal system can provide such conditions by protecting and regulating exchanges of private property, enforcing contracts and ensuring equal protection to all under the law concerning their rights and property. A legal system also provides predictability, particularly with respect to the outcome of disputes, which reduces risks and thus lowers transaction costs.[33]

That summary encapsulates the specific elements of the Rule of Law that are thought germane to economic development:

- protection of property rights;
- recognition of the right of individuals and corporate entities to freely enter into contracts, and official legal enforcement of private contractual commitments;
- legal rules regarding market transactions;
- equal standing under the law for all individuals, and equal protection of the rights and property of all individuals; and
- fair and efficient, therefore predictable, resolution of economic disputes, generally through the court system.

If the ADB and other advocates of the Rule of Law and its utility in economic development are correct that there is now a consensus on those points, it must not be overlooked that there is a strong ideological undercurrent to such a consensus. In the long period of struggle between Marxist and capitalist views of how economies should be organized, neither the obligation of the state to protect private property rights nor the state's obligation to enforce privately-agreed contracts were points of consensus. The apparent consensus on those points today reflects the acceptance in the vast majority of the nations of the world of the view that economic development is most likely to occur where basic free market principles are respected and allowed to operate, with private

[33] "Law and Development at the Asian Development Bank…" op.cit., vol. 54, (1998): 4-5.

property rights and sanctity of contract being at the core of such free market principles.

It should also be noted that even Western doctrines of the Rule of Law do not require governments to subordinate all broad national or social interests to specific private property interests. Each legal system has its own variant, but most provide mechanisms whereby a substantial public interest can override a private property claim. The concept of *eminent domain* in U.S. law permits a "taking" of private real estate for public purposes, such as highway construction. And contracts can be voided on the grounds of public policy, as for example where they are concords to engage in activity that is criminal or against certain broad public interests, or where they are "contracts of adhesion" arrived at by parties with significantly different levels of bargaining power, introducing the prospect that agreement was coerced, not voluntary.

In those cases, however, the Rule of Law principles of due process and independent judicial resolution of disputes are relied upon to resolve the conflict between private property/contract rights and the interests of the government and society at large. For example, in an *eminent domain* dispute, the private property owner is entitled to a due process determination of whether the state has a valid and compelling interest in the "taking" of his land, and he certainly is entitled to appropriate, market value compensation for the land if taken.

As with the other core components of the Rule of Law, both this requirement that private property and contract rights be respected and the corollary mandates that market transactions be legally protected and enforced and that private economic disputes should be resolved fairly and efficiently are rich with complex subsidiary requirements.

It is interesting to note that in many respects the most important of those subsidiary requirements constitute a command to private sector entities to act in the same open, transparent and fair manner that is imposed upon government by the Rule of Law.

Corporate governance is the prime example. Particularly in the wake of the recent Asian economic crisis, there has been a strong focus on the need for improved corporate governance. What this means in practice is more open disclosure of the precise financial condition of corporate entities, including accurate statements of such facts as the identity of ownership interests, compensation of executives, the existence of hidden liabilities, open discussion

of the workings of the corporate board and other sensitive issues. Overall, it means better adherence to sound accounting standards to determine the actual health of private companies. Whether the U.S. Generally Accepted Accounting Principles (GAAP) system or an alternative is adopted, sound corporate governance requires a high degree of openness and transparency.[34]

Likewise, it is also conventional wisdom that the recent crisis has revealed the need for better prudential regulation of the financial sector. Here too the hallmark of "safety and soundness" regulation in the financial sphere is sufficient disclosure of financial facts to permit both government regulators and private investors to make sound, well-informed decisions about whether financial institutions are being well run and whether investments in them are safe.

Again, a strong focus has been placed, particularly by U.S. Treasury and IMF officials, on the need for greater openness to equity investment from foreign sources. This too can be seen as a requirement that the private sector function in the same fair, non-discriminatory manner as is required of the government under the Rule of Law (and a parallel requirement that no government regulations impede such private behavior). That is, in the context of a global economy where potential investors are not defined on an exclusively national basis, all such investors must be treated fairly and equally regardless of their national provenance.[35]

Indeed, under the concepts of the Rule of Law that are advanced as relevant to economic development, the proper role of government is premised on adherence to certain Rule of Law standards by the private sector. That is, government is to be a consistently fair enforcer of private economic rights and agreements, and a fair, timely and efficient resolver of private economic disputes, *based upon* private economic entities regulating their own conduct according to principles of transparency, disclosure, sound governance and fair, egalitarian treatment of all investors and counterparties in the marketplace.

The overarching assumption in the advocacy of the Rule of Law principles as necessary to economic reform and development is that of the global economy. As the ADB study results noted, law reform is particularly important in the

[34] U.S. Treasury Secretary Lawrence Summers has said that the greatest single contribution of the Western world to economic development has been the (GAAP) system of reliable accounting principles.
[35] This has been a major requirement of IMF "rescue" packages in Thailand, Indonesia and Korea.

development of financial and capital markets. And as the World Bank General Counsel has said, legal mechanisms that ensure transparency, sanctity of contract and fair dispute resolution "give investors and consumers alike a sense of security and a confidence in the system that is badly needed for the commitment of long-term capital."[36]

Those official comments reflect the general view today that the models of economic development that relied on strictly indigenous capital formation and import substitution have not worked and in any event will not work in the future. Capital, which is necessary to create economic activity, will be needed at least in part from foreign sources. In order for such foreign capital to be attracted, particularly in more long-term, equity forms, the Rule of Law principles of openness, transparency, and fair treatment of all economic actors, regardless of nationality, must be observed.

HUMAN AND INTELLECTUAL RIGHTS ARE PROTECTED

As discussed earlier, one of the cornerstones of the development of the legal theory of the Rule of Law is the concept of the existence of individual rights and the corollary principle that governments must respect those rights. Specifically which rights are the entitlement of each individual has been articulated in numerous documents, notably including the United States' Bill of Rights, the French Declaration of the Rights of Man and the Universal Declaration of Human Rights.

It is important to note that a very wide range of "rights" is endorsed in these documents, covering not solely political and civil rights but also economic rights. In the case of the U.S. Bill of Rights, for example, the highest profile rights enumerated may be those of the First Amendment, including freedom of religion, freedom of the press, freedom of speech, and freedom of assembly and petition of the government. Other personal rights include protections against arbitrary action by the government, as in the Fourth Amendment guarantee against "unreasonable searches and seizures" of homes and personal effects and the Fifth and Sixth Amendment guarantees of fair criminal proceedings, including the bar on double jeopardy and compulsory self-incrimination, the right to a speedy and public jury trial, the right to counsel and the general requirement that any deprivation of an individual's liberty and certainly his life can only be imposed after "due process" of law has sanctioned such state punishment of the individual.

[36] Ibrahim, F.I. Shihata, "Complementary Reforms: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank," *Kluwer Law International* (1997): 12

But the U.S. Bill of Rights also encompasses economic and property rights, including the Fifth Amendment guarantee that private property shall not be "taken for public use, without just compensation," the preservation of the right to a jury trial in financially substantial civil suits, and the Third Amendment prohibition on government "quartering" of soldiers in homes, which is a protection against arbitrary imposition of public costs on private citizens.

The Universal Declaration of Human Rights is a much broader statement of rights that reflects the range of abuses of individuals and their rights experienced in the first half of this century, particularly in Europe. The Universal Declaration explicitly encompasses not only the basic human and political rights of the U.S. Bill of Rights but also embraces rights against invidious discrimination based on race, ethnicity or gender. The Universal Declaration also includes fundamental economic rights, including the rights to fair wages and to non-discriminatory treatment in economic relations and the right to a sufficient standard of living.[37]

In the case of all of these rights, the focus of these documents is primarily that of restraining governmental behavior so that governments do not deprive individuals of their rights. What is sometimes overlooked, however, is that these documents, particularly the Universal Declaration, also entail an affirmative mandate to governments to create an enabling environment for the protection of human rights, interceding where necessary to prevent the violation of human rights of one group or individual by the actions of others.

In recent years, the focus of the human rights debates that have prevailed in a range of international fora has been on the performance of various governments in meeting those obligations to respect the human rights of their citizens. A major series of conferences under the auspices of the Conference on Security and Cooperation in Europe (CSCE) has articulated, beginning with the Helsinki Final Act, the responsibilities of governments to honor and protect individual and community-based human rights. While these conferences began as a delayed outgrowth of the Second World War and involved the regularization of the relations between the then-Soviet Union and the nations of Western Europe and the United States, the CSCE set up a framework of attention to and monitoring of human rights abuses, which has been influential globally. In formal legal terms, the CSCE rights framework provides the legal basis for

[37] *See* Universal Declaration of Human Rights.

countries to challenge the human rights performance of other countries notwithstanding the general international norm of non-interference in domestic political matters.[38]

As the public international discussion of the performance of various governments in the human rights arena has grown over the years, it has also become more prominent as part of numerous bilateral and multilateral meetings and negotiations on other topics, and it has become the subject of contention between governments. Examples abound, but certainly include the numerous occasions on which multilateral and bilateral trade agreements and concessions have been conditioned, or have been threatened to be conditioned, on specific governments' conduct in the arena of human rights protections.

This high-profile attention to the human rights records of specific governments has also occasioned criticism, some of it from Asian leaders, of the focus on human rights as being either inconsistent with "Asian values," or, alternatively, as a case of Western cultural imperialism. One thoughtful observer of this debate persuasively argues that the differences between the "Western" and "Asian" view of human rights can easily be exaggerated, in particular because the fault lines of this debate occur within both Western and Asian cultures, not just between the two regions.

Citing survey data identifying the most important "societal values" of East Asians and Americans, Michael Freeman points out that two values in particular are cherished by both East Asians and Americans: freedom of expression and the accountability of public officials. Other values are shared or overlapping. The inclusion on the Asian list of "an orderly society," "respect for authority" and "societal harmony" contrasts with the American citation of personal freedom and individual rights. But as he points out:

> The problem of balancing order and rights has continuously been a central issue of Western political thought since the seventeenth Century. Conservatives tend to place more weight on order and liberals more weight on rights. There are also differences of emphasis among Western societies, some emphasizing rights more than others. [Critics of

[38] For a broad discussion of the CSCE human rights system and its importance to the protection of human rights, see Thomas Buergenthal, "The CSCE Rights System," *George Washington Journal of International Law and Economics,* vol. 25, no. 2 (1991), 333.

> "Western" values concentrate] on the USA without noting that its strong emphasis on individual rights is exceptional among the Western political cultures.[39]

He goes on to point out that Western individualism can be exaggerated, constrained as it is by "such collectivities as family, economic enterprise and nation."[40]

What should be emphasized is that the principles of the Rule of Law provide for mechanisms for that debate—over the proper boundaries of the rights of the individual and the prerogatives of the larger society—to be resolved in a manner that is consistent with the values and beliefs of *each* society. Not even the Magna Carta asserted that no man would be deprived by the government of his liberty or his property; instead, it contemplated such deprivation, while guaranteeing that none would be so deprived without due process of law, including consultation with his peers.

In the criminal context, such procedural rights as public trials, jury trials, the right to confront accusers, the prohibition against self-incrimination (seen, among other things, as an invitation to prosecutorial torture) all go in the direction of insuring that

conviction and punishment for criminal offenses are imposed by the state only in a manner, and following procedures, that are generally agreed upon by the society at large to be fair and just.

In the civil and economic context, the dictates of the Rule of Law likewise insure against arbitrary action by the state against the economic and property rights of the individual. In so doing, these civil and criminal procedural rights and rules become the guarantor of the substantive human rights of individuals. Political rights such as the right of free expression and personal, intellectual rights such as freedom of religion and the right of intellectual inquiry are most likely to be protected where a government hostile to the particular free expression or religious belief of an individual has no mechanism to attack them that is not limited by these procedural restraints.

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[39] Michael Freeman, "Human Rights, Democracy and 'Asian Values'," *The Pacific Review*, vol. 9, no. 3 (1996), 355 #5.
[40] Ibid., 355.

LAW CAN BE CHANGED BY AN ESTABLISHED PROCESS WHICH ITSELF IS TRANSPARENT AND ACCESSIBLE TO ALL

The common notion of rules and laws contains an assumption of inflexibility. Perhaps from childhood, we are taught that rules must be strictly enforced, lest they lose their validity and disciplinary power. And certainly many of the precepts of the Rule of Law already discussed ratify that notion. The reliability, dependability and predictability that is associated with fair, equitable and consistent application of the law by official authorities all connote a certain rigidity in the structure and enforcement of the law.

Yet one of the necessary components of the Rule of Law is a process by which the law itself can be changed, consistent with the values of transparency, accessibility to all and predictability. Change in the law can be required for a number of reasons. Circumstances can change so that a law is rendered meaningless or even counterproductive; social mores can change so that conduct once deserving of sanction or punishment no longer seems offensive; and particularly in the economic realm, technological and other changes can introduce whole new situations simply not contemplated by existing law but which must be addressed.

Also, there is the need for a certain element of flexibility within the framework of existing law, given the infinite number of factual situations and variations in circumstances that can be the subject of a legal dispute, whether in the civil or criminal context. Indeed, it is interesting to note that in the definition of the Rule of Law offered by the World Bank in the context of its work on governance, three of the five elements noted are concerned with this issue of flexibility and change. Those three are: 1) mechanisms must exist "to allow for departure from [the established rules] as needed, according to established procedures"; 2) "conflicts in the application of rules can be resolved through binding decisions of an independent judicial or arbitral body"; and 3) "there are known procedures for amending the rules when they no longer serve their purpose."[41]

Contrary to being inflexible, the Rule of Law carries with it the capacity to promote the orderly evolution of the law. At the constitutional level, as mentioned earlier, the doctrines of constitutionalism set a high bar for any changes in the organic document of the government. That said, it must remain possible for change

[41] Ibrahim, F.I. Shihata, "Complementary Reforms: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank," *Kluver Law International* (1997): 5 f(1).

even in the constitution, and the constitution itself should provide for an orderly mechanism to do so.

Below the level of constitutional change, the mechanisms discussed in earlier chapters address the means by which law can be changed in a manner that remains predictable and consistent with the right of all to access and influence such changes.

Legislatures, which as a matter of vocational definition are engaged in changing law, should employ a range of mechanisms to ensure that their proceedings are open or available to the public, that comments and opinions from the public are received and considered, and that the changes in law that are finally promulgated are duly published and disseminated in a fashion consistent with the goal of widespread public knowledge of the law.

Executive branches likewise should employ such procedural techniques as notice and comment rulemaking to involve all affected members of the public in the contemplation of changes in regulations and interpretations of statutes.

The courts also have built-in mechanisms for change. Appellate review gives guidance to lower courts on evolutionary changes in legal interpretations. Where matters of first impression are decided differently in different jurisdictions, such conflicts between the views in different jurisdictions can percolate up through the appellate system to be resolved at a higher level. And courts are bound by their own rules of procedure, which can themselves be changed as needed, ideally with open consideration of the changes and input from the private bar and others who may be affected.

In sum, adherence to the Rule of Law should not be inconsistent with or restrict the kind of growth and evolution in public affairs that are increasingly necessary given the pace of modern technological and social change. Instead, respect for the Rule of Law is the best guarantor that as such changes in the administration of public affairs inevitably do occur, they remain consistent with the larger values of individual rights, constitutionalism and restraints on arbitrary actions by governments, which are the underlying essence of the Rule of Law.

CONCLUSION

The nine components of the Rule of Law articulated in this lexicon are, as the text indicates, intricately interwoven. One source of confusion and even dissension in the discussion of the Rule of Law has been that the various components of the Rule of Law can be expressed differently, or the boundaries between these various components placed alternatively. Perhaps more dangerous to informed debate, it is frequently just assumed that we all agree on what we are talking about as we invoke the Rule of Law.

The hope is that this delineation of the core elements of the Rule of Law will help to clarify the debate over the Rule of Law and its applicability to the many varying political and economic situations in Asia. The normative values that lie behind this explication of the Rule of Law are consistent with the widely held view among Western nations that the two goals of political democracy and liberal economies are commendable objectives to which nations of all regions should aspire. This view sees adherence to the components of the Rule of Law described here as promoting both those goals, and therefore as worthy of acceptance and endorsement by governments and private sectors throughout the world.

It is our further hope that the text of this lexicon reflects another important perspective. The Rule of Law is not a concept that has been perfected and fully realized in the West and is now ripe for export to other regions. Rather, in the West, as well as elsewhere, it is a goal, an aspiration describing how governments should behave and how individual citizens should participate in their government. Failures and deviations from the aspirational norms of the Rule of Law are frequent and readily observable in the United States, Europe and throughout the West. The suggestion that others should adopt or expand their embrace of the Rule of Law should not be taken as a statement that the work of perfecting the adherence to the Rule of Law is complete in any society; it is not.

Finally, in this discussion of the Rule of Law we have attempted to inject some sensitivity to the history of economic relations between West and East, which may appear at times to be lacking in Western pronouncements about the virtues of the Rule of Law. Western economies in the past have been predatory in relations with the East, and that legacy, while conveniently forgotten by many in the West, understandably causes suspicion in the East when economic prescriptions are offered that arguably are self-interested.[1] It is our conviction that in this case, the advocacy of the Rule of Law is sound advice, no matter the advisor.

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[1] This is particularly true of some sensitive recommendations as that of permitting foreign ownership of land. This has generated a negative reaction in Thailand and other nations where land is seen as uniquely linked to patrimony. Western lack of sensitivity on this point seems particularly inappropriate when one recalls a quite similar negative reaction in the United States to high-profile "petrodollar" purchases of cultural icons such as Rockefeller Center and Pebble Beach.

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