(Conference Draft)

"An Interdisciplinary Approach to Rule of Law Studies as a Model for Law & Development Studies"

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2015 Law and Development Conference

New Orleans, USA
March 2015

Introduction

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Assessing the state of scholarship requires a clarification of terminology. In this paper, we assert that a field of Rule of Law is not impossible to ascertain, and we attempt to lay the groundwork for this project. In doing so, we also argue that "Rule of Law," as a field, should be considered distinct from "Law and Development." However, many scholars use the two terms interchangeably, or seem to consider the former simply a new version of the latter.[1] Thus, as we assess the varied critiques lobbed against the notion of rule of law as a field, we draw from post-1980 scholarship addressing both rule of law and law and development.

Rule of Law Agita

The long-standing lament of rule of law — the lack of clarity regarding what rule of law actually is, and what constitutes the field — is at the crux of the Law and Development "crisis" identified by Trubek and Galanter in 1974.[2] Almost four decades later, Brian Tamanaha, who perceives Rule of Law as merely a present-day iteration of Law and Development, similarly asserted that, "[n]o uniquely unifying basis exists upon which to construct a "field"; there is no way to draw conceptual boundaries to delimit it. Law and development work is more aptly described as an agglomeration of projects advanced by motivated actors and supported by external funding."[3] On the other hand, calling it a crisis may be a bit of an overstatement. Other commentators have accepted the conceptual confusion without any existential discomfort.[4] Still, the lack of conceptual clarity is evident to all who practice, write, or think about "rule of law".

[1] Tamanaha, for example, refers to "Rule of Law and Development", which he describes as a present-day version of the "Law and Development" movement from the 50s, 60s, and 70s. Tamanaha, *supra* note [], at 216-217.

[2] Marc Galanter and David M. Trubek, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 Wis. L. Rev. 1062, 1063 (1974).

[3] Tamanaha, *supra* note [], at 220.

[4] Thomas Carothers, for example, notes that although there is consensus that rule of law is a good, "when diverse national and international actors gather and agree that they are all committed to helping build the rule of law in a particular country or context, they usually agree on much less than it initially appears." Thomas

The core issue scholars and practitioners struggle with is the difficulty in clearly isolating the content of the phrase, rule of law. Is rule of law about the creation of functioning legal institutions? Is it instead about achieving certain end goals?[5] Should its focus emphasize poverty reduction and bottom-up techniques?[6] Is rule of law something that varies country to country, or can it be measured across nations with the help of global variables?[7] These questions beg the much bigger question, how do we organize rule of law studies? Without a clear sense of what rule of law is, or at a minimum what the rule of law field asks or attempts to do, how can scholars and practitioners develop the field?

Deval Desai, in an attempt to constitute the field, interrogates the varied attempts to bring meaning to the term "rule of law," and ultimately concludes that the absence of a unifying basis does not present a problem. Instead it is simply a characteristic of a field which "constantly utters itself into being without referring to—and sometimes even acknowledging the absence of—a determinate analytic core."[8] The problem he identifies is one of "negation:" in attempting to overcome the indeterminacy of the core of rule of law, scholars risk negating the field altogether.[9] After overviewing the various attempts at organizing the field, which include analyses of definitions, methods, tools, and context,[10] Desai argues that such attempts, in focusing solely on attempting to create or discover the determinate content of the field, misunderstand the field. That is, rather than attempting to develop the field or bring it into being, he argues that scholars should understand the field as existing independent of their ability to categorize, and that organizing efforts should instead

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Carothers, *Rule of Law Temptations*, 33 The Fletcher Forum of World Affairs 49, 53 (2009). Despite this, he seems quite comfortable with rule of law as a movement. *Id.*

[5] Rachel Kleinfeld, *Competing Definitions of the Rule of Law: Implications for Practitioners*. Kleinfeld argues that dominant theories of rule of law focus too heavily on institutions, when they should instead be focused on the ends rule of law programs seek to achieve.

[6] Stephen Golub, *Beyond Rule of Law Orthodoxy*

[7] Several projects have undertaken the effort to quantify rule of law in a manner that allows it to be measured and compared across nation states. For example, the World Justice Project, the World Bank, and the United Nations produce and track indicators designed to provide a comparative measurement of rule of law across nations. *See* World Justice Project, WJP Rule of Law Index 2014, http://worldjusticeproject.org/rule-of-law-index (last visited Apr. 13, 2015); United Nations Department of Peacekeeping Operations and Office of the United Nations High Commissioner for Human Rights, The United Nations Rule of Law Indicators: Implementation Guide and Practice Tools (2011), *available at* http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf; World Bank Databank, Worldwide Governance Indicators, http://databank.worldbank.org/data/databases/rule-of-law (last visited Apr. 13, 2015).

[8] Desai, p. 49.

[9] Desai, p. 54.

[10] [text note]

look to actors within the field. More specifically, Desai suggests that the hiring documents of four major rule of law programmers—the World Bank, the United Nations Development Programme (UNDP), Australia's Department of Foreign Affairs and Trade (DFAT), and the UK Department for International Development (DFID)—reveal how the field is organized. This performative understanding of the field is beneficial in that it allows for a functional organization of the field. The field is what the actors are doing or are called to do or be. He analogizes it storytelling, where the stories are the work being done.[11]

Although Desai's organizational approach nicely sidesteps the scholarly confusion wrought by the interdisciplinary and numerous ways of conceiving of the field, in privileging the main rule of law actors, it privileges a Western, and overtly legal approach. Equally troublesome is the fact that this approach would make the field highly dependent on the swings of the political pendulum. Although the storytelling Desai advocates would permit the contestation over rule of law definition, and perhaps extricate the field from being mired in dispute, it would also limit understandings of rule of law. Though practitioners are an important part of the rule of law field, the fact that they work for inherently political organizations, organizations with sometimes competing objectives, cannot be ignored.

Such an approach also overinflates the influence of one specific group of actors, while minimizing scholarly contributions. Certainly, while examining hiring documents, one can ascertain what skills, goals, institutions, or tools are prioritized by rule of law actors. However, these pieces of information are insufficient to responsibly constitute the field. What rule of law actors *are* doing may not equal what rule of law actors *should be* doing. The voices of non-practitioners — including scholars and beneficiaries of rule of law programs — are important for adding this element to the discussion. Non-practitioners can provide important feedback in developing the motivations for[12] and understanding the impacts of[13] rule of law programming. Constituting a field without their voices is dangerous. Doing so makes these voices secondary at best, and unheard at worst.

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[11] Desai p. 73

[12] Funding of rule of law projects is often based on political motivations. Desai purposefully does not include the largest funders — organizations within the US government — in his analysis. However, he is still left with two government agencies, DFID and DFAT. The World Bank is also arguably beholden to western donors. That leaves only the UNDP, which does benefit from a reputation of being able to separate itself from donor politics. Yet the UNDP argues that it prioritizes feedback from outsiders.

[13] The large donors in rule of law programming fund projects with time frames, parameters, and indicators. Although evaluations of the project are completed at the end of the project, in at least some cases, these evaluations are done in the form of in-person surveys of beneficiaries on the last day of the project. The growing field of design, monitoring, and evaluation in development projects has improved the state of international project evaluation. Despite this, limiting feedback to the program-driven evaluation weakens the feedback loop. Evaluations are often based on indicators, which do not necessarily capture all of the impacts of

The Definitional Array of Rule of Law

Interestingly, despite all the lamentation over the lack of a core understanding of rule of law, the more widely-accepted definitions cover the same ground. Commentators continue to underscore the differences in definitions, oftentimes comparing thin versus thick,[14] or ends-based versus institution-focused.[15] Still, the difference in definitions seems to be in the degree of expansiveness, rather than true distinctions in conceptualization. Definitions tend to differ in the number and phrasing of generally-agreed upon characteristics of an ideal governance type—ideal, at least, from a western perspective—that must be present in order for rule of law to be present. This not only suggests that there is at least some coherence in rule of law studies, but it also reveals a fundamental flaw in current understandings of rule of law.

Differences among rule of law definitions are often associated with the breadth of the definition. "Thin" definitions tend to focus on procedural components of law-making. Definitions become "thicker" as they increase their focus on the content of the law.[16] Thin definitions are difficult, possibly impossible, to find in the international rule of law world. The thinnest definitions are most often embraced by rule of law donor nations with respect to themselves. For example, the Rule of Law Institute of Australia, which has a purely domestic focus, asserts that, "…most of the content of the rule of law can be summed up in two points: (1) that the people (including, one should add, the government) should be ruled by the law and obey it and (2) that the law should be such that people

a program, or what is important to beneficiaries. Long-term scholarly studies and free form feedback from beneficiaries (for example, in the form of op-eds) provide information that would otherwise be lost.

[14] Brian Tamanaha, *A Concise Guide to the Rule of Law,* St. John's University school of Law, Legal Studies Research Paper Series, 3 (Sept. 2007).

[15] Rachel Kleinfeld Belton, *Competing Definitions of The Rule of Law: Implications for Practitioners*, Carnegie Papers Rule of Law Series No. 55, 6-7 (Jan. 2005); Dr. Vivienne O'Connor, *Practitioner's Guide: Defining the Rule of Law and Related concepts,* International Network to Promote the Rule of Law, p. 5 (Feb. 2015).

[16] Dr. Vivienne O'Connor, Practitioner's Guide: Defining the Rule of Law and Related Concepts 7 (International Network to Promote the Rule of Law 2015) ("When a rule of law definition contains requirements about the content of laws, it is called a "thick" definition of the rule of law. Contrast this with a "thin" definition, which only requires that there is a law (any law), and that everyone is accountable to it."). Tamanaha suggests that more than mere accountabilitiy is required for thin definitions. In his taxonomy, however, "thin" definitions remain largely procedural, requiring "a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms." Tamanaha, *A Concise Guide*, *supra* note [], at 3.

will be able (and one should add, willingly) to be guided by it."[17] In the world of international aid and development, rule of law definitions become increasingly thick.

Even as they are more expansive in content, these internationally-focused definitions continue to limit their emphasis largely to law and justice. The World Justice Project, for example, asserts that the rule of law exists when four universal principles are upheld, and that the presence of these principles is measured by 9 factors and 48 sub-factors.[18] These four principles require accountability under the law for government and private individuals and entities; clear publicized, stable, just, and evenly-applied laws that protect fundamental rights; accessible, fair, and efficient procedures for enacting, administering, and enforcing laws; and the timely and fair administration of justice by an ethical, independent, representative, and well-funded judiciary.[19] The United Nation Secretary General[20] and the United States Department of State[21] emphasize the same characteristics, with slightly different words.

These definitions are highly limited because of how they are sourced. It is possible that these definitions describe the ideal state of "rule of law" in a specific society. However, the trouble with these definitions is that they draw from a limited set of sources and philosophies. They reflect commonly-held understandings of law, politics, and government institutions from a decidedly

[17] Rule of Law Institute of Australia, Principles, www.ruleoflaw.org.au/principles (last visited Apr. 13, 2015).

[18] The World Justice Project, What is the Rule of Law?, http://worldjusticeproject.org/what-rule-law [hereinafter WJP Definition]; *Methodology*, *in* WJP Rule of Law Index 2014 168 (2014), *available at* http://worldjusticeproject.org/sites/default/files/files/tables_methodology.pdf.

[19] WJP Definition, *supra* note []. "

[20] The Secretary-General describes rule of law as, "a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency." Report of the Secretary-General: The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004), *available at* http://www.unrol.org/article.aspx?n=What%20is%20the%20rule%20of%20law?.

[21] Although the term "rule of law" appears in a number of State Department publications, finding a definition is difficult. The agency seems reticent to openly commit to any particular definition. However, a 2009 inter-agency report on security sector reform describes rule of law as, "…a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law." U.S. Agency for International Development, U.S. Department of Defense, and U.S. Department of State, Security Sector Reform (2009), *available at* http://www.state.gov/documents/organization/115810.pdf.

Western and Global North perspective. It is arguable that after an analysis drawing from multiple fields and global perspectives, revised definitions of rule of law will look largely the same.[22] However, without a true interdisciplinary, global, and cross-sectional interrogation of what rule of law entails, these existing definitions are ignoring law's connectedness with all aspects of society, and the differences that exist across societies.

Notably, some actors have at least acknowledged that rule of law is inextricably linked with factors outside of simply law and politics, moving the conversation closer to a more accurate understanding of rule of law. International Development Law Organization (IDLO), for example, asserts that "the rule of law is a culture and daily practice. It is inseparable from equality, from access to justice and education, from access to health and the protection of the most vulnerable. It is crucial for the viability of communities and nations, and for the environment that sustains them."[23] Though IDLO tries to avoid the trap of too narrowly construing rule of law, it continues to emphasize some of the traditional elements of the Law and Development movement, as it is sure to note that rule of law "is an enabler of justice and development."[24] Tamanaha makes a similar claim, coining it the "connectedness of law principle," but sees these linkages as rendering impossible the constitution of a rule of law field.[25] The implication is that because law is related to everything, and all societies are so different, it is impossible to constitute a field that fairly considers all these moving parts.

The notion of connectivity is, at the moment, the fairest assessment of law. It does not attempt to confine law to ill-fitting parameters. However, this understanding of rule of law as interconnected with all aspects of societies is not a call of doom. Instead, it sets the foundation for a robust field of study of rule of law.

Rule of Law as a Neural Net

[22] We are doubtful that this would be the case but cannot say for certain until we have undertaken such an analysis.

[23] International Development Law Organization, Rule of Law, http://www.idlo.int/what-we-do/rule-law (last visited Apr. 13, 2015).

[24] *Id.*

[25] Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development,* 44 Cornell Int'l L. J. 209, 214 (2011).

Tamanaha puts forth his "connectedness of law principle" as an explanation for why law and development programs, and later rule of law programs, fall short.[26] Law and Development, in its various iterations, has focused on causal relationships between, first, law and economic development, and later, between law and culture. However, as Tamanaha notes, law is connected with more than just economics and culture; it is connected to nearly multiple facets of society. We find ourselves in agreement with Tamanaha. Law IS connected to every aspect of society. It does not and cannot exist in a vacuum. However, we part ways with Tamanaha when considering the impact of this connectedness. We find this connectedness principle to be the foundation, rather than the undoing, of rule of law studies. Rule of Law studies, as we have begun to develop them at the University of South Carolina, are cross-disciplinary, requiring bottom-up and top-down research, and are strengthened by repeat connections across departments.

In other words, we conceptualize the field much like the human body's nervous system. The central nervous system, comprising the brain and spinal cord, receives inputs from neurons in the peripheral nervous system and processes the multiple sources of information. The central nervous system can then send out signals back to the peripheral nervous system to instigate involuntary or voluntary responses. The peripheral nerves in a hand, for example, may feel the heat of a flame or the roughness of an un-sanded piece of wood. The central nervous system, upon processing these sensory inputs may cause a reflexive flinching in the former scenario. Responses in the latter scenario are more complex. After receiving various motor, sensory, and proprioceptive inputs, the central nervous system is ready to engage the body in the voluntary response of picking up a piece of sandpaper and sanding the wood. To put an astoundingly complex system in simple terms, the entire system is a collection of signals in the form of electrical impulses, and its effective functioning is dependent on the ability of those signals to be relayed and understood. The brain is ineffective without these inputs from the periphery.

If access to, quality of, or empowerment with respect to education, health care, business, agriculture, law, and, *inter alia*, information technology, are understood to be each of the inputs, our interdisciplinary approach to rule of law becomes clear. Rule of law is best promoted when all of these inputs are valued and supported.

[Insert discussion about our vision for rule of law studies on campus and the collaborative. Includes scholars from numerous fields, with scholarly focuses ranging from institutions and higher level policy actors to underserved, under-heard, rural populations. Also engage with actors from donor and beneficiary governments, representing a variety of different policy objectives.]

Much like Desai's approach, our view on rule of law studies permits continued contestation over the exact meaning of rule of law. We are not convinced that rule of law cannot be defined or that it will always be indeterminate, but we agree that the indeterminacy of the core is not fatal to the field.

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[26] Brian Tamanaha, *The Primacy of Society and the Failures of Law and Development,* 44 Cornell Int'l L. J. 209, 214 (2011).

However, our approach is receptive to the multifarious aspects of society that are connected to each other and to law. Importantly, by opening the field up to types of inputs rather than to specific actors, we open ourselves to non-western, non-legal voices. Conversations about colonialism certainly occur in the fields of law and political science, but other fields more widely embrace such conversation. In addition, scholars are more likely than practitioners to engage in the discussion of the colonial nature of international action. We may never free ourselves from the inherent imperialism, but our entire endeavor seeks to become less colonial.

This approach to rule of law necessarily severs it from law and development. Law and Development has maintained an emphasis on the state, and views national economic development as a key consequence of law and development programs. Although rule of law has multiple connections to various societal forces, economic development is not a key facet of the rule of law field.

Promotion of rule of law can lead to human development in all areas. It can lead to, among other things, educational empowerment, improved health, financial empowerment, and legal empowerment. However, unlike law and development, the success of rule of law is not dependent on resulting economic growth of a nation. Measures of success are complex and not limited to economic growth. For example, improvement in the area of educational empowerment and consequently increased effectiveness in exercising constitutional rights is a moment of success for rule of law studies. That this will eventually lead to all forms of development, including economic, is the goal, but such economic development and growth is not the only goal, nor is it the condition for acknowledging success.

Conclusion

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